



White & Case LLP General Trade Report - JETRO

November 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

GENERAL TRADE POLICY

US General Trade Policy Highlights

Senate Finance Committee Reportedly “Very Close” to Finalizing Bill on Trade Promotion Authority, Approval by Congress Increasingly Uncertain

On November 14, 2013, Senate Finance Committee Chairman Max Baucus (D-MT) told reporters that he is “very close” to finalizing a bill that would give President Obama Fast Track Trade Promotion Authority (TPA). Senator Baucus has been working closely with the House Ways and Means Committee Chairman Dave Camp (R-MI) to prepare the draft, and Sen. Baucus has expressed confidence that they will introduce the TPA bill to Congress before the end of the year.

TPA is a fast-track procedure by which Congress can pass the implementing legislation for trade agreements. Although the US constitution affords to Congress the authority to regulate foreign commerce, in practice, the Executive Office of the United States Trade Representative (USTR) negotiates Free Trade Agreements (FTAs). TPA legislation officially delegates Congress’ authority on foreign trade to USTR, and prescribes to USTR Congress’ priorities for FTA negotiations.

Although the previous 2002 TPA law expired in 2007, USTR has continued to negotiate trade agreements, including the (i) Trans-Pacific Partnership (TPP), (ii) Trade in Services Agreement (TISA), and (iv) the Transatlantic Trade and Investment Partnership (TTIP), following the executive-congressional notification and consultation requirements contemplated under the now-expired 2002 TPA law. The Obama Administration, the behest at which USTR operates, is now seeking to renew TPA, which would introduce expedited procedures for congressional consideration of trade agreements. Specifically, lawmakers would be able to vote up or down on but not amend an agreement, and committees of jurisdiction would have a limited window of time to consider the agreement’s implementing language before discharging it to the chamber plenary for the vote.

It is becoming increasingly uncertain, however, that the House of Representatives would pass any bill providing for renewed TPA authority, given that more than 190 Democrat and Republican Representatives have vowed to oppose any such proposal. On November 12, 2013, a group of 23 House Republicans stated in a letter to the President that they would not agree to approve a request for TPA legislation as it would “cede [their] constitutional authority” and allow “the president to send these executive branch-authored bills directly to the floor for a vote under rules forbidding all floor amendments and limiting debate.” Another letter, also dated November 12, from six additional House Republicans pledged their opposition to renewed TPA legislation and urged the Obama Administration to engage in “meaningful dialogues” with the House. 151 House Democrats signed a

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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

similar letter dated November 13, commenting that, "in light of the the broad scope of today's trade agreements, it is even more vital that Congress have a fulsome role in shaping these pacts' terms." Signatory House Democrats committed to oppose TPA "or any other mechanism delegating Congress' constitutional authority over trade policy that continues to exclude [lawmakers] from having a meaningful role in the formative stages of trade agreements and throughout negotiating and approval processes." Ten other House Democrats signed a similar letter to the President on November 8, 2013.

At the other end of the spectrum, private sector representatives continue to push for new TPA legislation. A coalition of trade and business associations (e.g., the American Farm Bureau, the Business Roundtable, the Coalition of Services Industries, and the US Chamber of Commerce, among others) wrote in a September 9, 2013 letter to House and Senate leadership that TPA "is a critical tool for advancing pending and future trade agreements that support US economic growth and jobs and benefit [US] businesses, farmers, and workers." The letter then commented that "TPA helps ensure a meaningful role for Congress at all stages of trade negotiations" and that "[p]assage of TPA also will help reinforce the Congressional-Executive Branch partnership that has long proven critical to negotiating US trade agreements and getting them implemented by Congress."

House Ways and Means Trade Subcommittee Chairman Devin Nunes (R-CA) has commented that President Obama must take a leadership role in pushing for TPA in order to persuade Congress to vote in favor of such legislation. He cautioned that a failure to pass renewed TPA legislation could jeopardize the possibility of Congressional approval of the Trans-Pacific Partnership during the President's second term.

Click [here](#) and [here](#) for the November 12 letters from House Republicans, [here](#) and [here](#) for the November 13 and November 8 letters from House Democrats, respectively, and [here](#) for the letter from private sector representatives.

China Agrees to Reduce ITA Exclusion List; Still Seeks Longer Phase-out Periods

Parties working toward the expansion of the Information Technology Agreement (ITA) held negotiations from October 21-24, 2013. These parties had decided in July 2013 to suspend such negotiations due to China's request for the exclusion of 106 of the 256 products from duty-free treatment under the expanded ITA (*please refer to the W&C WTO Trade Alert dated July 20, 2013*); however, China subsequently held bilateral discussions with the United States during which China agreed to submit a revised sensitivities list, which allowed parties to proceed with this most recent late-October round. China has reportedly removed from its sensitivities list one-third of the high-tech goods for which it had originally sought exclusion from duty-free treatment. However, China is seeking long tariff phase-out periods for approximately half of the sensitive tariff lines appearing on its revised list.

Specifically, China's revised list identifies approximately 140 sensitive tariff lines out of the total of 250 items under negotiation. China is seeking exclusions for approximately half of these sensitive items, while seeking long tariff phase-out periods for the remaining half. As other ITA members

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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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generally agreed, the phase-out periods will be three years for non-sensitive items; five years for sensitive items; and more than five years for exceptional cases. A trade diplomat involved in the negotiations asserted that the items shifted to the phase-out list include certain medical devices, semiconductor manufacturing equipment and printers, all of which the Washington-based Information Technology Industry Council (ITI) has identified as essential for inclusion in the expanded ITA. Notably, China proposes a tariff phase-out period of longer than five years for approximately 30 products. An official involved in the negotiations noted that the phase-out list is “good,” given that “some of the items are quite critical” for some ITA members. However, several products on the phase-out list are consumer goods that have a short life cycle, such that phase-out periods of greater than five years for such products would be of little use. These concerns constitute major reasons for which the ITA negotiations will likely proceed slower than previously expected.

The United States appears to have informally linked China's engagement in the ITA talks to its participation in the Trade in Services Agreement (TISA). China recently declared its interest in joining TISA (*please refer to the W&C China Trade Alert dated October 2, 2013*), but the United States expressed several reservations and concerns that China's participation in the TISA negotiations may reduce the Agreement's level of ambition and hamper its negotiations, citing China's original low-ambition market access offer in the ITA expansion negotiations. Skepticism toward China's inclusion in TISA is strong and wide-spread among US service suppliers, who inform United States Trade Representative (USTR) TISA negotiators' positions.

According to sources, 27 World Trade Organization (WTO) members generally agree that there will be three tariff elimination "baskets" under the expanded ITA, but parties have yet to agree on which products fall into which baskets. It remains unclear whether the parties will be able to reach an agreement before the 9th WTO Ministerial Conference in December 2013, at the conclusion of which parties are aiming to conclude an ITA expansion deal, according to WTO Director-General Roberto Azevedo.

DOC Expands US Manufacturing Council Membership to US Subsidiaries of Foreign Companies

DOC Secretary Pritzker announced on November 1, 2013 at the SelectUSA 2013 Investment Summit in Washington, DC the expanded eligibility rules to allow representatives of US subsidiaries of foreign companies to join the US Manufacturing Council. DOC has updated the Council charter to reflect the change, which now mandates a membership representing a balanced cross-section of the US manufacturing industry according to sector, geographic location, demographics, and company size. DOC will issue a Federal Register notice shortly seeking applications to fill 5 Council vacancies.

President George W. Bush established the Manufacturing Council on April 7, 2004, as recommended by a January 2004 DOC report calling for improvements to the US Government's focus on manufacturing competitiveness. According to the Council's charter, the Council's 25 private sector members appointed by the DOC Secretary advise the DOC Secretary as the “premier national advisory committee on manufacturing” on challenges facing US manufacturers, and make recommendations to help US manufacturers maintain global competitiveness. The Council's latest

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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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contributions to US trade policy include a May 23, 2012 letter to past DOC Secretary Bryson, urging such provisions in TPP as the “yarn forward” rule of origin (ROO), disciplines on state-owned enterprises (SOEs), and unfettered cross-border data flows.

According to Secretary Pritzker, “adding representatives from foreign companies that are already doing business in the [United States] will add perspectives to the Council on policies to attract and retain foreign direct investment in the [US] manufacturing sector.” A DOC and President’s Council of Economic Advisers joint report released on October 31, 2013 finds that foreign direct investment comprised 9.6 percent of US private investment and employed 5.6 million US workers in 2011. Organization for International Investment (OFII) President and CEO Nancy McLernon on November 1, 2013 further hailed the move as long overdue; an October 29, 2013 OFII report detailed US economic growth and job creation as a result of foreign investment in the United States.

The next Council meeting will take place on November 13, 2013 in Houston. During the meeting, the Council will discuss current workforce development efforts by the federal government, the importance of alternative energy technologies for manufacturers, the effects of current tax policies on manufacturers, and the importance of continued research and development for the manufacturing industry.

Click [here](#) for the DOC press release, [here](#) for a list of the Council’s current members, and [here](#) for the DOC-President’s Council joint report, and [here](#) for the OFII report.

DOE Grants License for Additional LNG Exports to Non-FTA Partners

The Department of Energy (DOE) conditionally authorized on November 15, 2013 the exportation of 1.8 billions of cubic feet per day (bcf/d) of liquefied natural gas (LNG) on the part of Freeport LNG Expansion, LP and FLNG Liquefaction, LLC (“Freeport”) to countries with which the United States has not entered a free trade agreement (FTA). This represents an increase of 0.4 bcf/d since DOE first authorized Freeport to export to these countries in May 2013.

Section 3 of the Natural Gas Act (15 U.S.C. § 717b) requires DOE approval for all exports of LNG, 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.”

For purposes of Freeport’s recent authorization to export an additional 0.4 bcf/d, DOE reports to have examined “economic, energy security, and environmental impacts [...] as well as public comments for and against [Freeport’s] application.” DOE subsequently “determined that [the] additional [export] volume [...] from the [Freeport] terminal [...] for a period of 20 years was not inconsistent with the public interest.”

Senate Energy and Natural Resources Committee Chairman Ron Wyden (D-OR) issued a press statement following DOE’s November 15 decision, lauding the “deliberative manner” in which DOE is considering the LNG export applications “on a case-by-case basis.” However, having argued in the past that increasing US LNG exports could potentially harm US energy security, growth and

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employment, Sen. Wyden also urged DOE to reevaluate its decision making process should LNG prices become unstable. In contrast, Ranking Member of the Senate Energy and Natural Resources Committee Lisa Murkowski (R-AK) urged DOE "to continue to process export applications in a timely fashion," noting that "exports of [US] natural gas are [...] boosting the US economy, creating jobs, and lowering [US] deficits."

Click [here](#) for DOE's November 15 Freeport authorization, [here](#) for a copy of Sen. Wyden's statement, and [here](#) for a copy of Sen. Murkowski's statement.

US Ambassador to the WTO Laments Failure to Secure Bali Trade Deal

In a November 26 statement to the WTO General Council, US Ambassador to the WTO Michael Punke lamented the failure of WTO Members to resolve outstanding disagreements on key negotiating issues, and expressed "sadness" that the Membership had lost a "once-in-a-generation opportunity" to conclude the WTO's first multilateral trade deal. Ambassador Punke thanked WTO Director-General Roberto Azevêdo for his efforts to facilitate a deal for the upcoming Ninth Ministerial Conference in Bali, scheduled 3-6 December 2013, and remarked that "a small handful of Members can keep the majority from achieving success."

Over the last eight weeks, WTO Members have been engaged in the so-called "Geneva Process," involving intense negotiations on the Bali package of draft agreements covering trade facilitation, agriculture and development. Despite Members having reached agreement with respect to the texts on agriculture and development, trade facilitation negotiations collapsed during meetings held from November 23-24, with 50 brackets reportedly still outstanding in the current text.

The United States and other developed countries viewed trade facilitation as the key element of the Bali package. However, divergent positions on both political and technical issues prevented negotiators in Geneva from reaching consensus and finalizing the text. The definition of goods moved via "fixed infrastructure" proved to be particularly contentious. The European Union has long-supported a definition which would prevent Russia from turning off pipeline transport of oil and gas, but this position proved controversial. The principle of freedom of transit also divided Members, as language Cuba proposed sought to force the United States to lift its Cuban trade embargo, and another proposal by Turkey sought to prevent the European Union from limiting the number of Turkish trucks that can enter EU territory.

In addition to these differing positions, press reports indicate that other Members, particularly India, as well as Argentina, Brazil and certain African countries, deliberately provoked further confrontation and stalemate in order to thwart an agreement on trade facilitation in retaliation for what those countries consider to be unsatisfactory texts on agriculture and development. For example, Argentina had sought a binding obligation to reduce agricultural export subsidies, but only a broad political commitment was secured in the final text. India had also indicated to the press that it could no longer accept the draft agreement on stockholding programs for food security purposes, and sources report that India took a difficult position during the trade facilitation talks in order to prevent the conclusion of the entire package, thereby avoiding commitments on stockholding programs

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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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without having to formally reject that agreement.

Although separate from the Bali package, participating Members have also suspended negotiations to expand the 1996 WTO Information Technology Agreement (ITA) due to intense disagreement with China, which is demanding many product exclusions from the agreement and long periods for tariff phase-outs. Sources close to the negotiations have commented that, until China revises its position, negotiations will be on hold. Nonetheless, informal discussions between US and Chinese trade ministers during the WTO Bali Ministerial could allow them to narrow several gaps at the political-level.

At the WTO General Council meeting on Tuesday November 26, Director General Azevêdo appealed to Members to "continue seeking convergence wherever [it] is possible" in the run-up to the Bali Ministerial, despite the fact that Members will not have an opportunity to revise the draft texts before then, and further negotiation or decision-making is highly unlikely to occur amongst ministers in Bali. D-G Azevêdo stated that failure in Bali will have "grave consequences" for the multilateral trading system, and commented that Members had failed not only the WTO, but their domestic constituencies, the business community, and the poor worldwide.

Click [here](#) for WTO Ambassador Michael Punke's statement, and [here](#) for D-G Azevêdo's statement.

United States Continues Challenging Argentine Import Regime before WTO

The United States presented before a World Trade Organization (WTO) dispute settlement panel on November 14, 2013 its second written submission concerning Argentina — Measures Affecting the Importation of Goods (DS438/444/445) (*please refer to W&C Latin America Trade Alert dated December 12, 2012*). This second communication details the United States' legal basis for challenging Argentina's allegedly import-restrictive regime as inconsistent with WTO rules. We detail below the most relevant considerations included in the US submission.

- **Advance Sworn Import Statement (*Declaración Jurada Anticipada de Importación (DJAI)*).** Since February 2012, Argentina has required importers to submit a DJAI prior to the importation of any good into Argentina. Importers must submit an affidavit, which the Argentine Federal Revenue Administration (*Administración Federal de Ingresos Públicos (AFIP)*) processes, and subsequently transmits to several participating Argentine government entities. The United States alleges that the DJAI requirement is a discretionary, non-automatic import licensing procedure, and that the Argentine Government, particularly the Secretary for Domestic Trade (*Secretaría de Comercio Interior (SCI)*), has too much discretion in regard to withholding DJAI approvals. In this regard, the United States argues that Argentina violates Articles X:3(a) and XI:1 of the General Agreement on Trade and Tariffs of 1994 (GATT 1994) and Articles 1; 3 and 5 of the Import Licensing Agreement (ILA).
- **Restrictive Trade-Related Requirements ("RTRRs").** Under this claim, the United States challenges Argentina's decision to require importers to: (i) export a certain dollar value of goods; (ii) reduce the volume or value of imports; (iii) incorporate local content into products; (iv) make

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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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or increase investments in Argentina; and/or (v) refrain from repatriating profits, as a prior condition to gain permission to import goods. In this regard, the United States argues that Argentine RTRRs violate Articles X:1 and XI:1 of GATT 1994.

Although local sources do not envisage major changes in Argentine economic policies, the deteriorating domestic economic climate is forcing the adoption of corrective measures to increase foreign direct investment (FDI) inflows and reverse rising capital outflows that erode Argentina's Central Bank foreign currency reserves. In this sense, Argentina recently signed an agreement with five foreign companies, compensating them for losses caused by Argentina's 2001 decision to freeze utility rates during the 2001-2002 financial crisis. In addition, on November 27, 2013, the Spanish oil company REPSOL preliminarily accepted an Argentine offer to compensate it for the May 2012 expropriation of the energy company Yacimientos Petrolíferos Fiscales (YPF).

Also, according to local press sources, Argentine Minister of Economy and Public Finances Axel Kicillof is considering the introduction of greater flexibility in the process for the importation of certain manufactured goods, such as capital goods and inputs not produced in Argentina. These sources note that Argentine authorities could consider expediting the issuance of DJAs for certain products in order to uphold certain domestic industries.

Click [here](#) for a copy of US submission.

P5+1 Reaches Compromise with Iran in Exchange for Sanctions Relief

On November 24, 2013, the United States, United Kingdom, Germany, France, Russia and China ("P5+1"), reached a deal with Iran that would decelerate Iran's nuclear development program in exchange for some relief of the economic sanctions P5+1 countries have imposed on Iran. Following negotiations facilitated by the European Union in Geneva, Iran has agreed to, *inter alia*, halt any uranium enrichment above 5 percent and neutralize any of its stockpiles that are near 20 percent, beyond which level approaches bomb-grade fuel. In return, the United States will provide Iran approximately USD 7 billion in relief, an amount the Obama Administration press release deems "a fraction" compared to Iran's approximately USD 100 billion in foreign exchange holdings, of which it has little to no access due to current sanctions.

Specifically, the P5+1 has made commitments to Iran with respect to:

- **Purchases of Iranian oil.** The P5+1 agreed to allow purchases of Iranian oil to remain at their significantly reduced current levels, which are 60 percent less than two years ago. Iran can access up to USD 4.2 billion from these sales, although the Obama Administration expects that USD 15 billion of its revenues during this six-month period will go into restricted overseas accounts. This commitment applies only to the six economies currently importing Iranian crude oil, and will not open up oil imports for other countries;
- **Non-US Insurance/Reinsurance Services.** The P5+1 agreed to suspend secondary sanctions on the provision of insurance/reinsurance services for Iranian oil tankers for the shipment of oil as permitted in the deal;

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- **Transactions Related to Gold and Precious Metals, Automotive Goods and Petrochemical Exports.** The P5+1 agreed to suspend certain secondary sanctions on gold and precious metals, Iran's automotive sector, and Iran's petrochemical exports, potentially providing Iran up to USD 1.5 billion in revenue. Note that purchases by Iran of gold and precious metals may not be made using oil revenues restrained in accounts overseas;
- **New Nuclear-Related Sanctions.** The P5+1 agreed not to impose new nuclear-related sanctions to the extent possible within the P5+1 members' respective political systems;
- **Transfers of Iranian Government Education Funds.** The P5+1 agreed to allow international transfers of up to USD 400 million in governmental tuition assistance from restricted Iranian funds to recognized educational institutions in third countries; and
- **Aircraft Repairs and Inspections.** The P5+1 agreed to license exports for certain safety-related repairs and inspections inside Iran for certain Iranian airlines, including Iran Air.
- **Facilitation of Humanitarian Transactions.** The P5+1 committed to facilitate humanitarian transactions, which are provided for under existing laws but are currently difficult to process due to perceived sanctions restrictions.

It is important to note that these commitments will not take effect until Iran engages in the steps described above with respect to its nuclear program. Such measures will need to be verified by the International Atomic Energy Agency (IAEA) prior to any relief promised to Iran under this deal. Accordingly, it will likely take a number of weeks before the reduction in sanctions takes effect, if at all.

Equally important is what is not included in the P5+1-Iran deal. A majority of present economic-related sanctions architecture remains intact; the Obama Administration reports that such US sanctions as those imposed on shipping and shipbuilding, technical services to Iran's energy sector, and petroleum product exports to Iran remain in effect. On finance-related sanctions, the Obama Administration will maintain sanctions against the Central Bank of Iran, in addition to other sanctions contemplated under the Comprehensive Iran Sanctions, Accountability, and Divestment Act (CISADA), essentially maintaining a blockade against Iranian access to the US financial system.

Despite the initial breakthrough, the US law enforcement agencies continue to warn of "serious consequences" for US companies that violate US sanctions and export control laws, as reflected in comments given by Department of Commerce Under Secretary for Industry and Security Eric Hirschhorn. On November 26, 2013, the US Department of Commerce's Bureau of Industry and Security (BIS) announced that Houston-based Weatherford International has agreed to pay USD 50 million in civil penalties following allegations that Weatherford exported oil- and gas-related equipment to Iran in violation of the Export Administration Regulations (EAR) and the Iranian Transactions and Sanctions Regulations (ITSR). In a related action, the Department of Justice (DOJ) also announced it has imposed a USD 48 million penalty on Weatherford International pursuant to a deferred prosecution agreement.

While the Obama Administration has some executive discretion to implement sanctions relief,

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removing sanctions that Congress passed into law is a different endeavor altogether, namely the Iran Threat Reduction Act of 2011 (HR 1905) and the Iran, North Korea, and Syria Nonproliferation Reform and Modernization Act of 2011 (HR 2105). Congressional reactions so far to the Obama Administrations' Iran efforts are at best cautious in tone, but largely negative, suggesting that Congress' near-term repeal of current sanctions is unlikely. House Foreign Affairs Committee Chairman Rep. Ed Royce (R-CA), also the author of the Nuclear Iran Prevention Act (HR 850), warned in a November 23, 2013 statement of "serious concerns that this agreement does not meet the standards necessary to protect the United States and [its] allies."

The Obama Administration is now urging Congress not to pass additional sanctions on Iran. One option under consideration is a new round of Congress-driven sanctions that would take effect after six months, if Iran reneges on its commitments. This approach has received preliminary support from Sens. Charles Schumer (D-NY) and Mark Kirk (R-IL) and Senate Foreign Relations Committee Chairman Robert Menendez (D-NJ). However, Iranian Foreign Minister Javad Zarif asserted on November 24, 2013 that, "[i]f there are new sanctions, then there is no deal. It is very clear. End of the deal. Because of the inability of one party to maintain their side of the bargain."

Click [here](#) for a copy of the Obama Administration press release, [here](#) for the agreement, [here](#) for the CISADA text, [here](#) for the BIS announcement, [here](#) for HR 1905, and [here](#) for HR 2105.

ITA Expansion Parties Again Suspend Negotiations; Chinese Offer at Center of Disagreement

On November 21, 2013, parties negotiating the expansion of the 1996 Information Technology Agreement (ITA) suspended the negotiations for the second time in 2013. The United States and other negotiating member countries identified China's refusal to accept tariff cuts on information technology products as a principal cause behind this suspension. In contrast, Chinese Commerce Minister Gao Hucheng noted that US negotiators need to consider China's most recent offer in the context of ITA expansion parties' disparate levels of development and competitiveness. Minister Gao Hucheng called for further discussions to find a proper solution allowing relevant parties to reach an agreement on the ITA expansion as soon as possible.

The ITA expansion parties first suspended these negotiations in July 2013 after China requested the exclusion of 106 of the 256 products from duty-free treatment under the expanded ITA (*please refer to the W&C WTO Trade Alert dated July 20, 2013*). In October 2013, the ITA expansion negotiations resumed after China signaled willingness to revise its sensitivities list (*please refer to the W&C China Trade Alert dated November 5, 2013*). However, this most recent revised sensitivities list, which China submitted in mid-November 2013, appears to have been only a slight departure from its July offer discussed during the October negotiations. The revised list has met criticism from a number of participating parties, including the United States, the European Union and Japan.

According to its November offer, China refuses to accept tariff cuts on roughly one-fourth of the 250 products that other participants in the ITA expansion talks have proposed for duty elimination. Moreover, China proposes phasing out duties on another 80 products over a period of

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slincicome@whitecase.com

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

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five years or more.¹ Reportedly, China also insisted that it will not accept tariff cuts on a class of advanced semiconductors known as multi-component semiconductors (MCOs), which continues to be one of many sticking points with the United States.

China's Deputy International Trade Representative at the Vice-Ministerial-level Yu Jianhua indicated that China had shown "maximum flexibility," having revised its list twice. He further noted that other countries' requests for tariff cuts would leave Chinese companies in a weak position, such that China cannot accept all such requests. Meanwhile, US Information Technology Industry (ITI) Council Senior Vice President for Global Policy John Neuffer indicated that, as the biggest information technology exporter in the world, China naturally wants to see tariffs on relevant products eliminated by other countries. Likewise, he asserted that China also wants to use tariffs to protect its information technology industries from competing imported products.

It now appears unlikely that ITA expansion members will reach any agreement before or during the early-December 2013 World Trade Organization (WTO) Ministerial Conference. While US and Chinese trade ministers could meet on the sidelines of the WTO Ministerial at the political-level to close several gaps and re-direct their respective ITA expansion negotiators, ITA expansion parties will unlikely turn to resolving disagreements at the technical-level until early 2014.

¹ According to some participating countries, the long phase-out period should be reserved only for an extremely limited number of import-sensitive goods.

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FREE TRADE AGREEMENTS

Free Trade Agreement Highlights

TISA Participants Hold 4th Negotiating Round

From November 4-8, 2013, participating countries held the 4th round of negotiations toward the Trade In Services Agreement (TISA). A USTR press release highlights that TISA party negotiators (i) are expecting to table market access offers before December 2013; and (ii) have agreed to remove all brackets concerning the so-called “negative list approach.” Negotiators typically use brackets to establish the figurative outer boundaries based on parties’ proposals for provisions upon which they have yet to agree.

23 WTO economies currently participate in the negotiations (*i.e.*, Australia, Canada, Chile, Taiwan, Colombia, Costa Rica, the European Union, Hong Kong, Iceland, Israel, Japan, Liechtenstein, Mexico, New Zealand, Norway, Pakistan, Panama, Paraguay, Peru, Korea, Switzerland, Turkey, and the United States). Following the 3rd round, China and Uruguay formally expressed their interest in joining the TISA negotiations. However, current TISA parties have not agreed upon an accession clause for interested parties, though it is likely similar to that of the Trans-Pacific Partnership (TPP), which requires consent of all existing parties.

TISA participants are reportedly pursuing services trade liberalization along a negative-positive list hybrid approach, whereby national treatment non-discrimination disciplines will apply to all services areas except those which members enumerate (*i.e.*, negative list), and market access commitments will apply only to services areas which members enumerate (*i.e.*, positive list). US TISA negotiators generally consider a pure negative list approach to be more ambitious as it would likely cover a greater number of services, including those in the future. Nonetheless, the US negotiators felt resistance from EU negotiators who believed that a positive list approach more faithfully reflected the structure of the General Agreement on Trade in Services (GATS), such that the two economies agreed on this middle-ground hybrid approach.

US business groups remain cautiously optimistic in regard to China’s expression of interest toward joining the TISA negotiations. At a USTR hearing on November 8, 2013, the US Chamber of Commerce noted that China should first demonstrate full compliance with a WTO ruling on electronic payment services in favor of US providers as a step toward building confidence in China’s intentions. Similarly, several US services providers assert that the establishment of the Shanghai Pilot Free Trade Zone (SFTZ) in September 2013 that aims to serve as a testing ground for economic reforms has not yielded significant outcomes yet for services liberalization.

Click [here](#) for the USTR press release, and [here](#) for the US Chamber of Commerce’s oral statement.

Wikileaks Releases Leaked TPP IPR Chapter

Wikileaks published on November 13, 2013 bracketed negotiating text of the Trans-Pacific

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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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Partnership's (TPP) IPR chapter. The text is dated August 30, 2013, such that it is likely the TPP IPR text as it was following the 19th round of negotiations in Bandar Seri Begawan, which concluded on August 27, 2013. However, no TPP member country has confirmed the legitimacy of the text.

Negotiators use brackets to establish the figurative outer boundaries based on parties' proposals for provisions upon which they have yet to agree. The leaked text includes sections on: (i) cooperation; (ii) trademarks; (iii) geographical indications; (iv) patents, undisclosed test or other data, and traditional knowledge; (v) industrial designs; (vi) copyright and related rights; (vii) enforcement; and (viii) internet service providers. The brackets in this leaked TPP IPR text include annotations specifying which parties support which language, thus revealing the coalitions of TPP member countries that have coalesced around subject areas contemplated under the TPP IPR chapter. The leaked text contains 941 instances of bracketing, suggesting that significant work remained for parties as of early-September 2013.

The United States historically negotiates free trade agreements (FTAs) building on the text of the previous comprehensive FTA; in this instance, US negotiators sought to build on rights and obligations contemplated under the US-Korea FTA (KORUS) IPR chapter. As pharmaceutical issues appear to be those where US negotiators have faced the greatest resistance on IPR, we discuss below several key negotiating areas under the text, and how they compare to the corresponding rights and obligations contemplated under KORUS in regard to pharmaceutical products:

- **Data Exclusivity.** US negotiators propose five years of data exclusivity (*i.e.*, the exclusive right of a brand-name drug maker to test data submitted for a drug's marketing approval); however, US negotiators had not proposed a data exclusivity term for biologic drugs (*i.e.*, drugs created by biological processes rather than chemical synthesis) by the August 30 date when the TPP members consolidated the leaked text, instead leaving a placeholder for this future text on biologics. US brand-name makers of biologic drugs are seeking a 12-year term of data exclusivity, which would be consistent with that contemplated under the 2010 Affordable Care Act (ACA). KORUS contains non-biologic pharmaceutical data exclusivity language similar to that which US negotiators propose for TPP;
- **Patent Term Extensions.** US negotiators propose that TPP members grant rights holders extensions to patent terms in cases in which there are administrative delays in the patent application and drug marketing approval processes. KORUS also includes language allowing for patent term extensions in cases of "unreasonable delays;" and
- **Patent Linkage.** US negotiators propose requiring the marketing approval entity of a TPP party to notify a patent holder of the identity of a third party seeking marketing approval for the same drug in order to prevent the third party from marketing such drug during the term of the valid patent. KORUS contains patent linkage language, although the leaked TPP text appears to provide for greater remedies for rights holders in this regard.

USTR reportedly supports inclusion in TPP of these three protections for pharmaceutical rights holders if such rights holders (*e.g.*, brand-name drug makers) seek marketing approval in a TPP country for a drug within a certain period of another TPP party's authority authorizing its marketing in

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its own territory, *i.e.*, the US proposal for a so-called “access window.” As of August 30, USTR had not yet defined a length of time for this access window proposal, likely because this and other US pharmaceutical-related IPR proposals have met significant resistance from other TPP members on grounds stemming from concerns over access to medicines and health care, including one that sought patentability of certain surgical procedures.

Beyond pharmaceutical issues, US and other TPP member country negotiators’ positions as encapsulated in the consolidated, leaked text have drawn criticism from civil society groups across a wide range of issues. Notably, internet user groups allege that US negotiators aim to bolster piracy provisions in a manner that would limit internet freedom, curtail access to online educational content, and effectively obligate internet service providers (ISPs) to enforce TPP’s online piracy rules. These concerns, in addition to those voiced by groups concerned with access to medicines, are likely to grow as this still-bracketed but possibly outdated text spreads, thus making politically more difficult the task of closing the remaining gaps between TPP members’ bracketed positions.

Although TPP members have likely progressed in several IPR-related areas since August 30, the high number of brackets in the leaked text suggests that negotiators will unlikely conclude negotiations on this chapter –and others– before 2014. However, the upcoming November 19-24, 2013 TPP Chief Negotiators meeting in Salt Lake City and December 7-9, 2013 TPP Ministers Meeting in Singapore may provide political direction toward resolving these outstanding issues. It remains possible that the United States will lower the ambition of its IPR proposals to allow for broader support for its positions.

In regard to damage control in the wake of the Wikileaks release of the unfinished TPP IPR text, several US business groups are reportedly circulating a memorandum to lawmakers to allay concerns the leaked text may cause; in addition to monitoring the progress of TPP negotiations, lawmakers are engaged in ongoing discussions toward crafting a Trade Promotion Authority (TPA) bill that would encapsulate Congress’ desired negotiating outcomes and trade policy priorities, including in regard to IPR. The memo notes that (i) the leaked text is outdated, (ii) a high percentage of the text remains in brackets and thus does not reflect what the final text will be, (iii) USTR does not support any IPR proposal that would change US IP law, and (iv) the “bogus” IPR-related claims asserted by anti-TPP civil society groups are now “verifiably false.”

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

United States and European Union Hold 2nd Round of TTIP Negotiations

US and EU trade officials concluded the second round of negotiations toward the Transatlantic Trade and Investment Partnership (TTIP) on November 15, 2013 in Brussels. In a brief Office of the United States Trade Representative (USTR) press release, USTR Froman described the 2nd round as “very successful and productive,” and noted that the parties discussed “areas of potential convergence [...], including with respect to services, investment, and regulatory issues.”

As compared to the USTR press statement, a European Commission (EC) press release provided

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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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greater information on areas addressed during the 2nd round, including investment rules, trade in services, energy and raw materials, and several regulatory issues (e.g., regulatory coherence, technical barriers to trade and sectoral approaches). The EC press statement noted that,

- **in regard to investment**, the parties (i) discussed both liberalization- and protection-related issues, and (ii) confirmed their “regulatory freedom to legislate in the public interest;”
- **in regard to services**, the parties (i) discussed issues relating to telecommunications, e-commerce, financial services, and cross-border trade in services, (ii) began explaining their respective market access interests in certain sectors, and (iii) agreed to soon engage on financial services regulatory cooperation;
- **in regard to regulatory issues**, the parties discussed (i) possible horizontal rules in addition to specific commitments on regulatory compatibility in such sectors as medical devices, cosmetics, pharmaceuticals, chemicals, pesticides, information and communication technologies (ICT) and automobiles, and (ii) regulatory coherence and crafting a technical barriers to trade (TBTs) chapter that exceeds World Trade Organization (WTO) commitments; and
- **in regard to energy and raw materials**, parties affirmed their vision for a “predictable market for energy and raw materials as crucial for ensuring reliable supplies,” but stopped short of pointing to any specific restraint on the supply of energy and raw materials.

The EC press release also noted that, in lieu of face-to-face meetings, the parties held videoconferences to discuss such areas as plant health and hygiene measures, intellectual property rights (IPR), competition policy and small- and medium-sized enterprises (SMEs). The parties will similarly hold videoconferences over the coming weeks on tariffs, and labor and environmental issues.

In addition to the progress made as explained in the USTR and EC press statements, US and EU trade officials reportedly agreed on the principle of establishing a bilateral entity to progressively eliminate or reduce the parties’ respective regulatory barriers. However, US Chief Negotiator Dan Mullaney has noted that the name, composition and final mandate of this entity will depend on the TTIP negotiations’ outcomes in such areas as TBTs, sanitary and phytosanitary (SPS) measures, regulatory coherence, and sector-specific industry regulations; he has thus not yet accepted the name recently proposed by the EU Trade Commissioner, *i.e.*, “Regulatory Cooperation Council.”

Also, US negotiators are reportedly more willing to engage their EU counterparts on financial services regulations, which appears to depart from prior resistance on the part of the Obama Administration to the inclusion of such area in the TTIP negotiations. A meeting will take place on November 27, 2013 to discuss financial services regulations.

The USTR press release states that US and EU negotiators will aim to make additional progress before the third round, scheduled for December 16-20, 2013 in Washington, DC.

Click [here](#) for the USTR press release, and [here](#) for the EC press release.

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United States and CARICOM Countries Inaugurate Trade and Investment Council

US and Caribbean Community (CARICOM) trade officials inaugurated on November 15, 2013 in Washington the US-CARICOM Council on Trade and Investment (“Council”). Convened in the context of the US-CARICOM Trade and Investment Framework Agreement (TIFA), the inaugural meeting of the Council featured discussions on (i) cooperation in multilateral fora, (ii) intellectual property rights (IPR) protection, (iii) e-commerce infrastructure development, (iv) barriers to bilateral trade, and (v) regulatory cooperation. Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Kitts and Nevis, Saint Lucia, St. Vincent and Grenadines, Suriname, and Trinidad and Tobago constitute CARICOM.

On May 28, 2013, Vice President Joe Biden and Haitian President and CARICOM Heads of Government Conference Chairman Michel Martelly signed in Port of Spain the US-CARICOM TIFA to replace the June 1991 Agreement and an earlier Trade and Investment Council created thereof. The current TIFA directs the Council to address such issues as (i) trade and investment facilitation, (ii) multilateral cooperation, (iii) IPR, (iv) labor rights enforcement, (v) environmental protection, and (vi) other trade barrier-related items, such that the November inaugural meeting on the Council appears to be consistent with its mandate.

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

In 2012, the value of CARICOM imports into the United States reached more than USD 11 billion, principally in mineral fuel, chemicals, and iron and steel. Likewise, the value of US imports into CARICOM over the same period reached nearly USD 12 billion, principally in mineral fuel, machinery, and cereals.

Click [here](#) for a copy of a related USTR 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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CUSTOMS

Customs Highlights

CBP Advisory Committee on Commercial Operations Provides Updates on Major US Customs Programs

Members of the Advisory Committee on Commercial Operations (COAC) of the Customs and Border Protection (CBP) met in Washington, DC on November 15, 2013 for its last public meeting of 2013. During this meeting, the COAC discussed such issues as global supply chain security, trade facilitation, and CBP modernization and automation with the aim of leveraging public-private partnerships to modernize US trade processes.

Broadly, CBP Acting Commissioner Thomas Winkowski opined that 2013 has been a productive year for customs-related regulatory reform, with the trade community having provided positive feedback through CBP's Trade Efficiency and Export Surveys on recent CBP rulemaking and operations. On Trade Efficiency, more than 81 percent of the respondents were satisfied with CBP's trade facilitation efforts; however, where shipment examinations did occur, the average cost was upwards of USD 1,800 and averaged one to four days. On Exports, the COAC found that 77 percent of respondents turned down business due to the potential risk of violating US export control laws and regulations.

Additionally, COAC members discussed the following topics during the meeting:

- **Automated Commercial Environment (ACE).** ACE is CBP's commercial trade processing system designed to automate border processing; ACE will eventually replace the current Automated Commercial System (ACS). In this regard, COAC reviewed and discussed forthcoming recommendations addressing the ACE Development and Deployment Schedule. According to CBP's November 24, 2013 "ACEopedia" report, CBP anticipates an initial deployment of the re-engineered Automated Export System (AES) in mid-2014. The AES establishes electronic means to file export manifest and commodity as well as export control and licensing transaction information directly with CBP. By May 1, 2015, CBP will implement in ACE electronic export and import cargo manifest functionality relating to all modes of transportation, thereby allowing CBP to require that the international carrier community transmit manifest data through ACE;
- **Customs-Trade Partnership against Terrorism (C-TPAT).** C-TPAT is a voluntary program offered to businesses by CBP to help enhance supply chain security, and focuses on improving the supply chain security with respect to terrorism. Commissioner Winkowski announced that CBP would publish a Federal Register notice before 2014, asking importers to participate in a trusted trader pilot, which will unify CBP's C-TPAT and the Importer Self-Assessment (ISA) programs into one process. Likewise, ISA is a voluntary program that confers CBP recognition to importers who can demonstrate a readiness to assume the responsibilities for self-

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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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assessment in exchange for less CBP oversight. CBP will limit the first phase to nine volunteers, and evaluate the program after six months on its effectiveness and cost savings, and review the lessons learned from the same;

- **Role of the Broker Initiative.** This initiative seeks to transform the relationship between the customs broker and CBP by modernizing the broker's role to support CBP's trade facilitation efforts. COAC passed four recommendations in this regard on means to establish the factual identity of the importer of record. According to COAC, CBP is still in need of one key element of the trade transformation initiative, *i.e.*, an overhaul of the regulations contained in 19 CFR Part 111 and 141, which specify rules on customs brokers and entry of merchandise, respectively;
- **Centers of Excellence and Expertise (CEEs).** The CEEs are online "one-stop-shops" that provide centralized processing for importers that volunteer to participate. CBP has a total of ten CEEs, covering such commodity areas as Agriculture and Prepared Products; Apparel; Footwear and Textiles; Consumer Products; and Mass Merchandising. COAC member, Target Corp., shared that it has "seen a tangible, dramatic reduction in the cycle times associated with post entry work" as a result of the CEEs; and
- **One US Government at the Border Initiative.** This initiative furthers CBP's efforts to coordinate with federal agencies, the trade community, and foreign governments to better define risks through increased automation and information sharing, and interagency partnership programs. In practice, the initiative aims to reduce redundant information collection while targeting high-risk trade. To streamline government processes, COAC reviewed and discussed updates from, *inter alia*, the Food and Drug Administration (FDA) and the Environmental Protection Agency (EPA) Working Groups.

COAC is a 20-member council that advises the Secretaries of the Department of the Treasury and the Department of Homeland Security on the commercial operations of CBP and related Department of Homeland Security (DHS) functions. COAC will meet next on February 20, 2014 in Washington, DC.

Click [here](#) for the public summary of the COAC meeting, [here](#) for the Trade Efficiency Survey results, and [here](#) for the Export Survey results. More information is available [here](#) on ACE, [here](#) on ACEopedia, [here](#) on C-TPAT, [here](#) on Role of the Broker, [here](#) on CEEs, and [here](#) on One US Government at the Border.

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