WHITE & CASE

White & Case LLP
General Trade Report - JETRO

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UNITED STATES

GENERAL TRADE POLICY

US General Trade Policy Highlights

Congressional Anti-Piracy Caucus Places China, India, Russia, and Switzerland on 2014 Intellectual Property Watch List

On June 24, 2014, the Congressional International Creativity and Theft-Prevention Caucus (ICTPC) published its 2014 International Piracy Watch List (IPWL), identifying China, India, Russia, and Switzerland as countries with "continuing problems in the protection of intellectual property." India is the only country newly added to the list for 2014. Italy and the Philippines, which appeared on the 2013 report, were removed in light of domestic reforms undertaken in each country and increased commitment by each country to enforce intellectual property (IP) laws.

The ICTPC is a bipartisan Congressional caucus co-chaired by Democratic and Republican members of the House and the Senate. Known until 2014 as the Congressional International Anti-Piracy Caucus, the ICTPC was founded in 2003 to address allegations of both physical and digital international IP theft. In particular, the ICTPC seeks to identify countries that allegedly "are failing to meet their obligations to protect intellectual property." While the ICTPC includes only four countries on the 2014 IPWL, the ICTPC's 2014 report states that the IPWL "is not intended as a complete list of nations of concern or as a ranking of nations with the greatest problems." Rather, the report aims "to call attention to new developments…in nations with inadequate laws and enforcement."

The 2014 IPWL findings may be summarized as follows:

- **China**: The scale of copyright infringement remains "massive" in China, and specific areas of concern include online piracy affecting journal publishers; legal software use by government agencies and state-owned enterprises; and full implementation of the US-China Film Agreement, which seeks to expand market access for US movies. The ICTPC acknowledges, however, that "signs of real progress and commitment" exist, particularly with respect to enforcement actions.

- **India**: Despite having large copyright-intensive domestic industries (*e.g.*, film and music), India maintains "a seriously flawed environment" for copyright and IP protections, namely through inadequate legal frameworks and enforcement priorities. Issues of particular importance include camcording piracy, unlicensed software use by enterprises, and absence of effective notice-and-takedown procedures for online piracy.

- **Russia**: Inadequate IP protection in Russia results in rampant Internet piracy, websites that

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actively facilitate copyright theft, and "a haven for digital piracy" for "rogue actors." Of particular concern, enforcement actions decreased in 2013, despite new IP commitments made by Russia upon acceding to the World Trade Organization in 2012.

- **Switzerland**: A "deteriorating climate" for copyright protection has developed in Switzerland following a 2010 decision by the Swiss Federal Supreme Court that "rendered it virtually impossible for rights holders to bring actions against large scale peer-to-peer infringers." The ICTPC appreciates, however, the Swiss government's willingness to address US concerns forthrightly.

Click here for a House Judiciary Committee press release regarding the 2014 IPWL and access to the ICTPC report.

Canada Objects to New "Buy American" Provisions in US Legislation

During a June 25, 2014 meeting of the World Trade Organization's (WTO) Committee on Government Procurement, Canada objected to multiple pieces of US legislation containing "Buy American" provisions, which require public infrastructure projects to be built with products made in the United States. Canada argued that such provisions violate Article XXII.6 of the WTO Agreement on Government Procurement (GPA), which provides that "[e]ach Party shall seek to avoid introducing or continuing discriminatory measures that distort open procurement." The European Union, Hong Kong, and Japan expressed similar concerns.

Canada objected to "Buy American" provisions in the following enacted or proposed pieces of US legislation:

- **Water Resources Reform and Development Act**: The *Water Resources Reform and Development Act* (*WRRDA*), a water infrastructure bill signed into law by President Obama on June 10, 2014, requires that "all of the iron and steel products" used in federally subsidized projects authorized by the *WRRDA* be "produced in the United States."

- **GROW America Act**: The *Generating Renewal, Opportunity and Work with Accelerated Mobility, Efficiency and Rebuilding of Infrastructure and Communities Throughout America Act* (*GROW America Act*), an urban transportation bill proposed by the Obama Administration, would increase domestic content requirements for applicable purchases of bus and rail car components from the current level of 60 percent to 100 percent by 2019.

- **State-Level Legislation**: Several states have enacted or are considering legislation with "Buy American" requirements. Minnesota recently passed a capital investment law that requires, "[t]o the extent possible," that certain public facilities be constructed with American-made steel. The Massachusetts legislature is considering a general procurement bill requiring state agencies to "establish a preference for products manufactured in the United States." The New York legislature is considering a bill to make an individual "ineligible to receive any [government] contract or subcontract" if "any iron, steel or manufactured product used in [applicable] projects…was not produced in the United States."

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While the *WRRDA* has been signed into law, whether Congress will consider or pass the *GROW America Act* remains uncertain. Because the principal objective of the *GROW America Act* is to avoid the approaching expiration of funding for US highways, Congress might consider the bill. However, Congress might advance a different transportation reauthorization bill in light of the *GROW America Act*'s increased expenditure levels relative to previous transportation bills.

The US *Trade Agreements Act* (19 U.S.C. § 2511 *et seq*.) provides that the President "may waive, in whole or in part…the application of any law, regulation, procedure, or practice regarding Government procurement" under certain broad conditions. However, this authority is discretionary, and whether the President would exercise this discretion in regards to "Buy American" mandates authorized by the *WRRDA* or the *GROW America Act* is uncertain. The legal and practical effects of state-level "Buy American" requirements also are uncertain. However, major trade agreements currently under negotiation – namely the Trans-Pacific Partnership and the Transatlantic Trade and Investment Partnership – presumably will address state-level government procurement requirements.

Click here for the *Water Resources Reform and Development Act*; here for the *GROW America Act*; here for the Minnesota law; here for the Massachusetts law; here for the New York law; and here for the relevant section of the *Trade Agreements Act*.

USTR Reviewing GSP Eligibility for Myanmar

According to a June 2014 press release issued by the US Embassy in Rangoon (Yangon), the United States Trade Representative (USTR) "is reviewing Burma's eligibility for participation in the Generalized System of Preferences program." The US Generalized System of Preferences (GSP) – a preferential trading scheme under which the United States provides temporary, non-reciprocal, non-discriminatory, and duty-free access to certain products imported from designated beneficiary developing countries – expired on July 31, 2013. As such, should USTR determine to extend GSP eligibility to Myanmar, any duty benefits that Myanmar might receive under the program would become effective only upon reauthorization of GSP by Congress. While most analysts believe that Congress will reauthorize GSP, it remains uncertain when, and whether, Congress will do so.

USTR's ongoing review of GSP eligibility for Myanmar follows a series of recent reforms of US economic policy towards Myanmar. In 2014, the US Export-Import Bank began to finance loans for US exports to Myanmar, and the US Department of Commerce opened the first-ever Foreign Commercial Service office in Yangon to assist American companies doing business in the country. In 2013, the United States began to allow the importation of most products from Myanmar, authorized US citizens to conduct most financial transactions with major Myanmar financial institutions, and signed a Trade and Investment Framework Agreement (TIFA) with Myanmar to promote dialogue and cooperation on trade and investment. In 2012, the United States permitted the first new investment in Myanmar in nearly 15 years and eased its ban on the importation of products from Myanmar and the exportation of financial services to the country.

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European Union Seeks Automatic Licensing Approval for US Energy Exports

According to a Council of the European Union document leaked July 8, 2014 by environmental groups, the European Union is seeking "to include a legally binding commitment" in the prospective Transatlantic Trade and Investment Partnership (TTIP) agreement that "guarantee[s] the free export of crude oil and gas resources by transforming any mandatory and nonautomatic export licensing procedures into a process by which licenses for exports to the EU are granted automatically and expeditiously." The document, dated May 27, 2014, states further that "[s]uch a specific commitment would, in the EU's view, not require that the U.S. amend its existing legislation on oil and gas."

According to the document, the EU seeks a "clear signal" from the United States that the TTIP will include an ambitious chapter on raw materials and investment that "could serve as a platform" for either party's future energy negotiations with other countries. The document notes, however, that "a clear agreement to discuss a comprehensive chapter on energy and raw materials is still lacking." In particular, the document laments that the United States had been "hesitant to discuss a solution for US export restrictions on natural gas and crude oil in the TTIP through binding legal commitments."

The document states that a demonstration by the United States of its commitment to include such export guarantees would (i) encourage investment in upstream and downstream energy sectors, (ii) build support for stronger EU energy security and more integrated energy policies, and (iii) signal to other countries that the United States and the European Union are committed to "open markets and good governance" for energy and raw materials.

The leaking of the document coincides with ongoing US debates regarding energy export policies. For example, the Department of Energy recently began to amend the processes by which it reviews licenses to export liquefied natural gas (LNG), and the House of Representatives passed legislation on June 25 to expedite LNG export licensing procedures. Regarding oil, Department of Commerce Secretary Penny Pritzker stated on July 3 that the Obama Administration is considering loosening its interpretation of a longstanding ban on exports of crude oil, and the DOC recently approved exports by two companies of a form of ultra-light crude oil (*i.e.*, condensate).

An unofficial copy of the leaked EU document can be provided upon request.

Sixth US-China Strategic and Economic Dialogue Produces Bilateral Investment Treaty Timeline

On July 10, 2014, the sixth joint meeting of the US-China Strategic and Economic Dialogue (S&ED) concluded in Beijing. US Treasury Secretary Jacob Lew and Chinese Vice Premier Wang Yang led the S&ED, which broadly emphasized the importance of the following: (i) strengthening economic policy cooperation; (ii) promoting open trade and investment; (iii) enhancing global cooperation and international rules; and (iv) fostering financial stability and reform. Regarding specific commitments, the S&ED resulted, most notably, in the establishment of a timeline for the negotiation of a US-Chinese bilateral investment treaty (BIT).

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The establishment of a BIT timeline builds upon commitments made during the fifth S&ED in 2013 to pursue a BIT that will cover all phases of investment and all economic sectors, except where predetermined exceptions are provided on a negative list basis. The countries committed to agree on a core BIT text by the end of 2014 and to begin discussions on their respective negative list offers in early 2015. Industry representatives thus far have expressed skepticism, however, that China will provide a narrow list, particularly regarding services.

China also made commitments in the following areas:

- **Competition law**: China acknowledged that competition laws should be fair, non-discriminatory, objective, and transparent and "promote consumer welfare and economic efficiency," rather than "individual competitors or industries." This statement disappointed US business groups, which hoped that China would commit not to use competition policy for industrial policy goals.

- **Exchange rate**: China committed to reduce foreign exchange intervention and to continue movement toward a market-determined exchange rate. According to the Treasury Department, a market-determined exchange rate "is critical to shifting the Chinese economy away from exports and towards growth that relies on Chinese consumption demand, which will create increasing opportunities for [US exports]."

- **Trade secrets**: China committed "to vigorously investigate and prosecute trade secret theft cases, to publish civil and criminal judgments, and to protect trade secrets submitted in regulatory, administrative, and other proceedings."

- **Regulatory transparency**: China committed to legal reviews of regulatory documents, the implementation of laws to ensure administrative licensing fairness, the protection of confidential business information, and the provision of English translations of Chinese departmental rules.

- **Services**: China committed to accelerate revisions of its foreign investment catalogue to promote liberalization in such services sectors as construction, design, and engineering.

- **State-owned enterprises**: China committed to deepening reforms to state-owned enterprises (SOEs), improving SOE corporate governance structures, increasing market-based recruitment of SOE personnel, and increasing the dividends that SOEs pay to the government.

China also committed to the following: (i) accelerate market-based energy price reforms and eliminate preferential input pricing for SOEs; (ii) prevent excess steel production; (iii) assist the United States to restart plurilateral Information Technology Agreement discussions at the World Trade Organization (WTO); (iv) ensure that government export financing adheres to global guidelines; (v) expand opportunities for US financial services investors and providers; (vi) accelerate the establishment of a financial deposit insurance program and the improvement of financial institution resolution mechanisms; (vii) continue market-based interest rate reforms; (viii) strengthen financial regulatory cooperation; and (ix) enhance cooperative intellectual property protections.

In addition to making broad commitments regarding economic policy cooperation and the promotion of open trade and investment, the United States made commitments in the following areas:

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- **Export controls**: The United States committed to provide China with "fair treatment" regarding the US export control reform process and to "encourage and facilitate" exports to China of high-technology items for civilian end-uses and end-users.

- **Natural gas exports**: The United States committed to inform China regarding the processes – and ongoing reforms to processes – governing exports of liquefied natural gas.

- **Chemicals imports**: The United States committed to review its authority "to exclude from consideration the import of bulk chemicals" from firms not registered with China Food and Drug Administration.

- **Foreign investment**: The United States committed to ensure that the Committee on Foreign Investment in the United States "applies the same rules and standards to each transaction that it reviews, without regard to the investor's country of origin," and maintain an open investment environment for Chinese investors, including Chinese SOEs.

Click here for a Treasury Department fact sheet on the sixth S&ED.

DC Circuit Requires Committee on Foreign Investment in the United States to Provide Due Process Protections to Investors

On July 15, 2014, the US Court of Appeals for the District of Columbia (DC Circuit) ruled that if the President, pursuant to his powers under the Exon-Florio Amendment to the Defense Production Act of 1950 (DPA), deprives a foreign acquirer or investor in the United States of its constitutionally protected property interests, the foreign acquirer or investor must be accorded certain due process protections. The case at issue, *Ralls Corp. v. CFIUS et al*, is the first-ever challenge to the review process conducted by the Committee on Foreign Investment in the United States (CFIUS), an inter-agency committee within the US federal government that reviews foreign acquisitions and investments in the United States for potential threats to US national security.

In March 2012, Ralls Corp., a US corporation owned by Chinese nationals, purchased four wind farm project companies in Oregon without filing for CFIUS review prior to closing. After the acquisition was concluded, CFIUS determined that Ralls's acquisition threatened US national security and issued temporary mitigation orders restricting Ralls's access to and preventing further construction at the wind farm sites. The matter was subsequently submitted to the President of the United States who also concluded that the transaction posed a threat to national security due to the proximity of the wind farm sites to a US Navy weapons training facility. The President thereafter issued a permanent order that prohibited the transaction and required Ralls to divest itself of the project companies.

On September 12, 2012, Ralls filed an unprecedented lawsuit in the US District Court for the District of Columbia (District Court) against CFIUS and later President Obama, alleging, *inter alia*, that the CFIUS and Presidential orders violated the due process clause of the Fifth Amendment to the United States Constitution because neither CFIUS nor the President provided Ralls the opportunity to

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review and rebut the evidence upon which they relied. The District Court dismissed Ralls's claims on the grounds that the DPA barred judicial review of the President's order, that Ralls possessed no constitutionally protected interests, and that the President possessed "absolute, unreviewable discretion to prohibit a covered transaction."

On appeal before the DC Circuit, Ralls challenged the District Court's decisions regarding whether Ralls was accorded due process and whether the court may review a Presidential decision under the CFIUS regime. The DC Circuit reversed the District Court's decision, finding that the court has the authority to adjudicate due process claims regarding the CFIUS review process, that "the Presidential Order deprived Ralls of significant property interests," and that the lack of due process afforded to Ralls "constitutes a clear constitutional violation." More broadly, the DC Circuit stated that according due process in a CFIUS review context requires: (i) provision of notice of the President's intended action, (ii) access to certain unclassified evidence upon which the President relied to take action, and (iii) a meaningful opportunity to rebut that evidence.

The DC Circuit's ruling constitutes an important albeit narrow victory for foreign investors who have sought greater transparency in the CFIUS review process. While the ruling grants certain due process protections to investors, the CFIUS legal regime remains intact and the due process to be accorded will still need to be balanced against other interests. For example, in remanding the matter to the District Court with instructions to provide Ralls the requisite process described in its decision, including access to the unclassified evidence on which the President relied, the DC Circuit cites the possibility of the District Court having to resolve an executive privilege claim that, if successful, may limit or preclude the sharing of such unclassified evidence. In addition, the US Department of Justice may appeal the ruling to the Supreme Court or request that the ruling, which was decided by a three-judge panel, be reviewed *en banc* by the full DC Circuit.

Investors therefore would be prudent to interpret the DC Circuit's ruling cautiously and continue to carefully consider engaging and filing for review with CFIUS to obtain clearance and safe harbor from further review and to avoid the risk of a costly divestment process after closing.

Click here for the DC Circuit's decision.

Congress and the Obama Administration Consider Potential Reforms to the African Growth and Opportunities Act

The Obama Administration and the US Congress are considering reforms to the African Growth and Opportunities Act (AGOA), a preferential trading scheme under which the United States provides temporary, non-reciprocal, non-discriminatory, and duty-free access to certain products imported from designated African countries. AGOA, which was signed into law in May 2000, enjoys bipartisan and bicameral support in Congress. However, the Obama Administration and several members of Congress are interested in revising the law, which expires in September 2015.

During a July 29, 2014, speech in Washington, DC, US Trade Representative (USTR) Michael Froman stated that the Obama Administration is undergoing "a comprehensive review of AGOA" and seeking "to update and extend" the program. Also on July 29, the House Ways and Means Trade

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Subcommittee held a hearing regarding potential AGOA reforms. Subcommittee Chairman Devin Nunes (R-CA), who is "studying potential changes to the program to improve its effectiveness and utilization," committed to "bipartisan, timely, and seamless renewal." On July 30, the Senate Finance Committee also held a hearing regarding potential AGOA reforms. Committee Chairman Ron Wyden (D-OR) stated that an improved AGOA should promote "a broader range of African exports," and Ranking Member Orrin Hatch (R-UT) expressed strong support for the program.

The following potential AGOA reforms were discussed at one or more of these forums:

- **Eligibility criteria**: USTR Froman proposed "updating" AGOA eligibility criteria to combat "unwarranted sanitary and phytosanitary barriers" and to incorporate changes to "internationally recognized labor rights." He also proposed a "more flexible" and a "tailored and nimble" approach to eligibility reviews to permit partial withdrawal of benefits (ineligibility currently withdraws all benefits). Sen. Wyden inquired whether AGOA eligibility criteria might be used to "battle human rights infringements," while Sen. Hatch questioned whether countries "failing to live up to their economic commitments should remain eligible for the full range of AGOA benefits." Sen. Johnny Isakson (R-GA) questioned whether AGOA eligibility should include a "tiered structure."

- **Product coverage**: USTR Froman proposed "expanding AGOA's coverage," albeit with consideration given to "domestic sensitivities." Sen. Wyden too suggested "expanding the array of products AGOA covers." According to USTR Froman, AGOA excludes 316 tariff lines.

- **Rules of origin**: USTR Froman proposed "simplifying" rules of origin to facilitate African production and exports. Specifically, he proposed eliminating existing limits on (i) cumulation of labor costs across all AGOA countries and (ii) use of US inputs to meet requisite value content rules. Sen. Wyden suggested that producers be permitted "to draw from a bigger variety of sources in the manufacturing process."

- **Extension period**: USTR Froman proposed "renewing AGOA and its third country fabric provisions for a sufficient period of time to encourage meaningful investment and sourcing." However, Sen. Hatch questioned the appropriateness of a long extension absent "a broader discussion of the role of our trade preference programs more generally." Specifically, Sen. Hatch expressed an interest in extending "AGOA-type benefits to all lesser-developed countries."

- **Graduation**: Sen. Wyden questioned whether South Africa should "graduate from the program, given the size of its economy." Sen. Hatch expressed an interest in pursuing bilateral trade agreements with African countries, while USTR Froman similarly promoted trade relationships that go "beyond one-way preferences" to include "reciprocal trade agreements."

In addition to addressing potential AGOA reforms, USTR Froman's speech and the Congressional hearings addressed African regional integration, capacity building, integration of Africa into global supply chains, and supply-side barriers to US-Africa trade. The speech and hearings precede the August 4-6 inaugural US-Africa Leaders Summit, during which President Obama will host heads of state from fifty African countries in Washington, DC. The Summit will focus on US-Africa trade,

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investment, and development and security partnerships. The US Department of Commerce anticipates that USD 900 million worth of business contracts will be announced during the Summit.

These developments comprise a broad effort by the United States to increase US-Africa trade and investment, particularly in light of China's rapid ascent to become Africa's chief investor and trading partner. According to USTR, since AGOA was signed into law in 2000, non-oil non-mineral exports to the United States have nearly quadrupled, and total exports from sub-Saharan Africa to the United States have tripled. However, exports to the United States under AGOA remain concentrated in the following sectors: crude and refined petroleum, automobiles and parts, and textiles and apparel.

Click here for USTR Froman's speech, here for the Senate Finance Committee hearing, here for the House Ways and Means Trade Subcommittee hearing, and here for information about the US-Africa Leaders Summit.

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FREE TRADE AGREEMENTS

Free Trade Agreement Highlights

July 3-12 TPP Negotiations Begin with Rules of Origin Discussions

On July 3, 2014, an informal round of TPP negotiations was launched in Ottawa, Canada. TPP ministers are not scheduled to attend the negotiations, which will continue until July 12, 2014. According to the Canadian government, principal topics for discussion include the following:

- **Rules of origin** (July 3-7);
- **Investment** (July 6-8);
- **Intellectual property** (July 7-10); and
- **State-owned enterprises** (July 9-12).

Other negotiating groups attending the Ottawa negotiations – but for whom the Canadian government did not release a schedule – include those discussing market access for goods, non-conforming measures for services and investment, and legal and institutional issues.

Sources report that the Ottawa negotiations most likely will avoid controversial issues and focus instead on technical matters and detailed textual edits. For example, the agenda excludes environmental negotiations, and intellectual property discussions likely will not address protections for pharmaceutical products. In regards to new concessions, the Ottawa negotiations are not expected to yield major progress, due in large part to the fact that the United States is unlikely to make significant offers ahead of its November 4 Congressional elections and, correspondingly, other countries are unlikely to extend meaningful offers until after this date. Furthermore, Japan's continuing refusal to compromise with respect to market access for agricultural products has frustrated negotiations overall.

While expectations for the Ottawa negotiations are low, parties continue to express a strong commitment to the prompt completion of TPP. For example, according to Chilean President Michelle Bachelet, who met last week with President Obama, the United States privately aspires to conclude a draft TPP agreement in time for an Asia-Pacific Economic Cooperation (APEC) summit on November 10-11. Japanese Ambassador to the United States Kenichiro Sasae similarly stated on June 30 that TPP parties should aim to conclude negotiations prior to the November APEC summit. While it is highly unlikely that Parties will resolve differences and conclude negotiations in the immediate future, finalization of the text shortly before or during the November 10-11 APEC summit is potentially achievable. Because the United States' Congressional elections will occur on November 4, after that date the United States no longer will have an immediate electoral incentive to

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avoid making TPP offers that might be domestically unpopular. Both the United States and other countries, therefore, are likely to extend meaningful offers after November 4.

TPP Parties Negotiating Exceptions for Services and State-Owned Enterprises

Several parties participating in Trans-Pacific Partnership (TPP) negotiations are seeking country-specific exceptions to services obligations and disciplines on state-owned enterprises (SOEs). The exceptions, known as "non-conforming measures" (NCMs), are being proposed pursuant to a "negative list" approach, by which parties specify services or SOEs for exclusion from relevant TPP commitments. All non-specified services or SOEs would be subject to all relevant commitments.

Parties are reportedly seeking NCMs for services or SOEs as follows:

- **Services**: Malaysia and Vietnam seek NCMs regarding audiovisual services, financial services, and data mobility and storage. In addition, Japan, Malaysia, and Vietnam have proposed extending NCMs to all services developed in the future. This proposal would limit TPP obligations and benefits to currently existing services, thereby requiring additional negotiations to extend TPP obligations and benefits to services developed after parties ratify the agreement. The United States and US industry groups oppose this proposal, arguing that it undermines TPP's ambitious objectives and overall negative list approach.

- **State-owned enterprises**: Several parties, including the United States, support NCMs regarding SOEs. However, the United States seeks to limit the breadth and scope of such NCMs and has proposed disciplines to reduce the possibility of SOEs to compete with private entities. At the same time, all parties wish to avoid creating rules that would circumscribe the activities of SOEs potentially established in the future. As such, SOE disciplines ultimately agreed upon by the parties might be minimal. For example, whereas several parties have proposed expanding disciplines to sub-federal-level SOEs, the United States supports limiting disciplines to federal-level SOEs. The United States is likely to seek NCMs for the following SOEs: Amtrak (passenger railroad service), Commodity Credit Corporation (farming support entity), Export-Import Bank (export credit entity), Fannie Mae (mortgage support entity), Freddie Mac (mortgage support entity), and Tennessee Valley Authority (utilities entity).

Discussions regarding NCMs are poised to advance now that TPP parties have developed a clearer understanding of the agreement's potential obligations and disciplines. The informal round of negotiations that occurred July 3–12 in Ottawa, Canada reportedly included significant discussions regarding NCMs. Specific proposals, however, are still under negotiation.

Senate Subcommittee on International Trade Assesses Impacts of US-Korea Free Trade Agreement

On July 29, 2014, the US Senate Finance Subcommittee on International Trade, Customs and Global Competitiveness (Trade Subcommittee) held a hearing to assess the impacts of the US-Korea Free Trade Agreement (KORUS), which came into force on March 15, 2012. Both the Senate

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and the House of Representatives overwhelmingly supported KORUS at the time of its passage (by votes of 83–15 and 278–151, respectively), but certain aspects and effects of the agreement are controversial. The Trade Subcommittee thus deemed the two-year anniversary of KORUS enactment to be an appropriate opportunity to evaluate the agreement.

The hearing highlighted the following issues:

- **Autos**: Chairwoman Debbie Stabenow (D-MI) stated that "agreeing to phase-out tariffs on US-made automobiles hasn't been enough" and suggested that Korea, as a result of non-tariff barriers (NTBs), "remains one of the most closed auto markets in the world." Sen. Sherrod Brown (D-OH) similarly argued that Korea's NTBs, in addition to "currency intervention," disadvantage the US auto sector. He criticized Korea's "aggressive" fuel efficiency and CO2 standards, "stringent" fuel economy audit proposals, and indefinite recall proposals for defective cars. A Ford Motor Company representative stated that KORUS has not resolved concerns regarding NTBs, currency, and "shifting" safety and environmental regulations. Several individuals lamented the United States' auto deficit with Korea. According to Sen. Brown, US auto exports to Korea totaled 27,553 in 2013, while US auto imports from Korea totaled 752,675 autos.

- **Dairy**: A US dairy industry representative stated that KORUS has benefitted the US dairy industry significantly, particularly regarding market access for cheese, skim milk powder, and whey. However, the representative stated that as a "direct result" of geographical indication (GI) requirements in the EU-Korea Free Trade Agreement, Korea has restricted access to certain US cheeses, mainly asiago, feta, fontina, and gorgonzola.

- **Telecommunications**: A representative of Qualcomm Incorporated, a semiconductor company that collaborates with LG Electronics and Samsung to sell wireless telecommunications devices and services, applauded KORUS for adopting technology neutrality principles, liberalizing services sectors, and strengthening competition law, intellectual property rights, investment protections, and regulatory transparency.

- **Rice**: A US rice industry representative criticized KORUS for not eliminating Korea's rice tariffs.

Senators and witnesses also discussed "lessons" that US trade negotiators might derive from KORUS when negotiating future FTAs, particularly the Trans-Pacific Partnership (TPP). Both Chairwoman Stabenow and Sen. Brown suggested that TPP and future FTAs should address NTBs and currency manipulation. Sen. Rob Portman (R-OH) expressed a general interest in addressing NTBs and currency issues, opined that FTAs with product exclusions similar to the KORUS rice exemption should not be negotiated, and stated that Korea's inclusion in TPP should be conditioned upon "full implementation of the KORUS issues." Ford's representative suggested that future FTAs should address NTBs, currency manipulation, dispute settlement procedures, and enforcement mechanisms. The dairy industry representative counseled US negotiators to address GI issues, seek clarifications regarding market access rights, and better utilize embassy staff to investigate market access concerns. Qualcomm's representative stated that KORUS is an "updated model" for future FTAs and proves that robust agreements benefit all participating countries. The rice industry representative argued that KORUS illustrates that modern FTAs should not include product

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exclusions and opined that Korea's inclusion in TPP should be conditioned upon removal of rice tariffs.

Click here for a video recording of the hearing and testimonies of the witnesses.

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MULTILATERAL

MULTILATERAL

Multilateral Highlights

WTO Appellate Body Rejects Panel Findings in US-China Dispute Over Countervailing Duties and "Non-Market Economies" But Declines to Resolve the Dispute

On July 7, 2014, the WTO issued the Appellate Body Report in *United States – Countervailing and Anti-Dumping Measures on Certain Products From China* (DS449). The Appellate Body upheld China's appeal and rejected the Panel's finding that the United States' law permitting countervailing duties on imports from "non-market economy" countries ("CVD/NME Law") did not violate Article X of the General Agreement on Tariffs and Trade (GATT). However, the Appellate Body did not "complete the analysis" and formally rule that the CVD/NME Law violated GATT Article X because the record lacked sufficient facts. As such, the long-simmering dispute between the two countries remains unresolved.

Congress passed the CVD/NME Law (Public Law 112-99) on March 13, 2012 as an amendment to the *United States Tariff Act of 1930*, in response to the US Court of Appeals for the Federal Circuit (CAFC) ruling in *GPX International Tire Corp. v. US* (Fed. Cir. Dec. 19, 2011) that CVDs could not be imposed on imports from countries designated as NMEs under the US anti-dumping (AD) law. The CAFC ruled that US CVD law does not apply to NME merchandise because "government payments cannot be characterized as 'subsidies' in a [NME] context." The CAFC's ruling was broader than the lower US Court of International Trade ruling in the same case, which found that the US Department of Commerce (DOC) methodology for concurrently applying countervailing duties and anti-dumping duties on NME imports was unlawful because it did not preclude "double remedies" on those imports. Congress effectively overruled both decisions with the CVD/NME Law, which (i) allowed DOC to assess CVDs on imports from NMEs retroactively to 2006 (*i.e.*, when DOC first began CVD investigations of Chinese imports), but (ii) only prospectively (*i.e*., after the date of the law) required DOC to investigate the existence of double remedies and make adjustments where concurrent ADs and CVDs were applied. Although a Chinese exporter challenged the CVD/NME Law on constitutional grounds, the Federal Circuit rejected those claims on March 18, 2014.

The Chinese Government also filed a formal WTO challenge to the CVD/NME Law in November 2012, on the basis that the law violates the publication and administration obligations of GATT Article X, as well as the WTO *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") because the law does not require DOC to investigate and avoid double remedies. A WTO Panel on March 27, 2014 ruled in favor of China on the application of double remedies in the investigations and reviews at issue in the case. However, the Panel rejected China's claims that the CVD/NME law itself violated GATT Article X, although one Panelist dissented specifically with respect to the Panel's findings on GATT Article X:2. China subsequently appealed the Panel's

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finding on GATT Article X:2 to the Appellate Body on April 8, 2014, and the United States concurrently filed an appeal challenging the Panel's Preliminary Ruling regarding the scope of China's Panel Request.

GATT Article X:2 prohibits the enforcement of measures of general application before their official publication and is intended to protect traders' expectations with respect to trade measures, in particular those that increase duties or charges or impose new or more burdensome requirements, restrictions or prohibitions. In order to determine whether a challenged measure effects such an increase or imposes a new more burdensome requirement, a panel must identify a baseline of comparison as part of its analysis under GATT Article X:2. In DS449, the Panel compared Section 1 of the 2012 CVD/NME Law, which expressly permitted DOC to collect CVDs retroactively on imports from NMEs, against DOC's prior practice of retroactively applying CVDs to imports from NMEs between 2006 and 2012. As a result, the Panel found that the CVD/NME Law did not impermissibly apply retroactively because it maintained duties that already were applied pursuant to DOC's established and uniform practice prior to the CVD/NME Law's implementation.

The Appellate Body disagreed with the Panel, concluding that determining whether a measure violates Article X:2 can only be done in relation to another measure. The Appellate Body found that a published measure of general application, rather than an "established and uniform practice," constituted the baseline of comparison for purposes of Article X:2. The Appellate Body reasoned that although traders develop their expectations also with regard to publicly known practices of agencies charged with administering such measures, the practice of those agencies alone could not be used as the baseline of comparison, without regard to the measure itself. The Appellate Body thus concluded that the comparison under GATT Article X:2 should always be made between the new measure at issue and the prior published measure that it replaces or modifies, rather than the practice of the relevant administrative agency.

Despite siding with China on the interpretation of GATT Article X:2, the Appellate Body declined to complete the analysis and rule that Section 1 of the CVD/NME Law is inconsistent with this provision. The Appellate Body found that the parties disagreed as to whether Section 1 clarified or changed what was already required under the law that the CVD/NME Law amended, and that the record facts were insufficient for the Appellate Body to make a definitive conclusion as to whether the GPX law violated Article X:2.

The Appellate Body's decision is arguably a hollow victory for China. Although it prevailed on the legal merits, China still has not secured a formal Appellate Body ruling that the CVD/NME Law violates WTO rules. As such, the United States will face no pressure from the WTO to amend the law or rescind the many CVD decisions covered by Section 1 (*i.e.*, the DOC investigations and reviews conducted between 2006 and 2012). In order to secure such a ruling, China must start the WTO dispute settlement process – including panel and, if necessary, appellate proceedings – all over again. The Chinese government has thus far provided no indication as to whether it will expend the time and resources to again challenge the CVD/NME Law. However, the Ministry of Commerce has urged the United States to respect the Appellate Body's ruling and "rectify its abuse of trade remedy measures as soon as possible." An official from the Trade Remedy and Investigation Bureau at the Ministry of Commerce has also indicated that trade friction between China and the

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United States is likely to increase. Given that the status quo supports the United States' position on the controversial CVD/NME issue, a formal US response to such statements is unlikely.

Click here for the Appellate Body report.

WTO Panel Issues Mixed Result in US-India Dispute Challenging US Countervailing Duties Law and Measures on Carbon Steel

On July 14, 2014, a WTO Panel issued its ruling in *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India* (DS436). The ruling was mixed, upholding several of India's claims, but rejecting key systemic challenges to the United States' countervailing duty (CVD) law.

India launched the WTO dispute on April 12, 2012, arguing that the US Department of Commerce (DOC) determinations in an original CVD investigation, administrative reviews, and a first sunset review of hot-rolled carbon steel flat imports from India were inconsistent with the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). India made both "as such" challenges to certain provisions of the United States Tariff Act of 1930 and its implementing regulations and "as applied" challenges to DOC's determinations in the specific CVD cases at issue.

Under the SCM Agreement, a "subsidy" is a financial contribution by a government or public body (or a private enterprise entrusted or directed by a government or public body) that confers a benefit on the recipient. A subsidy is countervailable where it is specific to certain enterprises or regions, or is prohibited.

The Panel's findings may be summarized as follows:

- **Public Body**: The Panel rejected India's "as applied" claim that DOC incorrectly focused only on government ownership in its public body analysis, finding that DOC also considered the degree of government control over the entities at issue. As part of its reasoning, the Panel stated that "government involvement in the appointment of an entity's directors… is extremely relevant to the issue of whether that entity is meaningfully controlled by the government." The Panel also rejected India's claim that a public body was not "directly" involved in a transfer of funds (a type of financial contribution) if it only made the decision as to whether a loan would be issued, and the loan was otherwise administered by a different entity.

- ***De Facto* Specificity**: The Panel upheld India's claim that DOC failed to examine all mandatory economic factors as part of its specificity in fact (*de facto*) analysis, as is required by Article 2.1(c) of the SCM Agreement. This includes a country's level of economic diversification and the duration of the program under investigation. However, the Panel rejected India's claim under Article 2.4 that the analysis was not based on positive evidence. The Panel also rejected India's interpretation of Article 2.1(c) that (i) a subsidy is only *de facto* specific if it discriminates in favor of "certain enterprises" against a broader category of similarly situated entities; and (ii) where

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inherent characteristics in a subsidized good limit the subsidy's use to a certain industry, then *de facto* specificity will only exist if the subsidy is limited to a sub-set of that industry.

- **Benefit**: The Panel rejected India's "as such" and "as applied" claims that US regulations for selecting a benchmark to determine whether a benefit has been conferred violated Articles 1.1(b) and 14(d) of the SCM Agreement. The Panel found that DOC was not required to determine the adequacy of remuneration to the government provider of a good before calculating benefit from the perspective of the recipient. The Panel also ruled that DOC may use out-of-country delivered price benchmarks from Australia and Brazil, even though prices in India were set at the ex-mine level, and that DOC had not nullified India's comparative advantage.

- **Facts Available**: The Panel rejected India's "as such" claim that US law violates Article 12.7 of the SCM Agreement because it does not require the use of "facts available" that constitute the "best information" and enables the use of "facts available" in a punitive manner. However, the Panel delivered a mixed result with respect to India's "as applied" claims regarding DOC's application of "facts available" in 407 separate instances: the Panel found that India failed to establish a *prima facie* case in over 300 of the challenged instances but upheld India's claim in others on the basis that DOC's application of facts available was devoid of any factual foundation.

- **Injury**: The Panel upheld India's "as such" and "as applied" claims relating to cumulation in injury determinations, including in the original investigation. The Panel determined that "cross-cumulation" – where investigating authorities cumulatively assess the effects of imports subject to simultaneous CVD investigations *and* imports subject only to parallel, simultaneous AD investigations – was not permitted under Article 15.3 of the SCM Agreement. However, the Panel found that India had failed to make a *prima facie* case in its parallel claim regarding sunset reviews and in its claim that DOC's analysis had not included an evaluation of all mandatory economic factors listed in Article 15.4.

- **Establishment of Subsidy Programs**: The Panel upheld India's claims that DOC failed to determine on the basis of accurate information the existence of a "Captive Mining of Iron Ore Programme," and lacked a sufficient evidentiary basis to find that India had provided a financial contribution through a captive coal mining lease, in violation of Articles 12.5 and 1.1(a)(1)(iii) of the SCM Agreement, respectively. In this context, the Panel also upheld India's claim that DOC improperly rejected certain domestic price information when assessing benefit, in violation of Article 14(d). However, the Panel ultimately found that the government grant of mining rights could amount to the provision of goods under Article 1.1(a)(1)(iii).

- **New Subsidy Programs**: The Panel rejected India's claims under Articles 11, 13, 21 and 22 of the SCM Agreement that DOC was not entitled to examine new subsidy programs in administrative reviews, reasoning that "new subsidy allegations are clearly relevant to the investigating authority's consideration of the need for continued imposition of the duty."

- **Public Notice**: The Panel upheld in part and rejected in part India's challenge to DOC's compliance with the public notice obligations of Article 22.5 of the SCM Agreement. The Panel also exercised judicial economy with respect to certain aspects of India's challenge.

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In light of the mixed nature of the Panel's findings, it is likely that at least one of the parties will appeal the Panel Report to the Appellate Body. Although United States Trade Representative (USTR) Michael Froman applauded the Panel's findings as "a significant victory," his agency stated in a press release that, with respect to those findings against US measures, USTR will "evaluate all options to ensure that U.S. remedies against unfair subsidies remain strong and effective." The Indian Ministry of Commerce and Industry in an official statement welcomed the Panel's findings, particularly on cross-cumulation, and commented that it would undertake an evaluation of all other Indian imports that had been subjected to such an analysis in other DOC investigations. However, the Ministry statement also acknowledged the claims rejected by the Panel, and stated that the decision to appeal is "currently under active consideration."

Both parties now have 60 days to appeal the Panel Report.

Click here for the WTO Panel Report, here for the USTR press release, and here for the Indian Ministry of Commerce and Industry statement.

WTO Panel Upholds Chinese Claims Against Seventeen US Countervailing Duty Investigations Between 2007 and 2012

On July 14, 2014, the World Trade Organization (WTO) issued the Panel Report in *United States – Countervailing Duty Measures on Certain Products from China* (DS437), which upheld several Chinese challenges to 17 countervailing duty (CVD) investigations initiated by the US Department of Commerce (DOC) between 2007 and 2012.[1] The Panel affirmed China's challenges to DOC determinations on (i) "public body"; (ii) export restraints; (iii) regional subsidies; and (iv) specificity in fact (*de facto*). The Panel rejected China's challenges to DOC determinations on (i) out-of-country price benchmarks; (ii) "facts available"; and (iii) initiation.

On May 25, 2012, China requested consultations with the United States, arguing that DOC determinations in several CVD investigations of Chinese imports violated the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). Most of China's claims were "as applied" challenges to DOC's determinations in the specific cases at issue. However, China also made an

[1] The DOC investigations at issue are: *Lightweight Thermal Paper From the People's Republic of China* (C-570-921); *Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China* (C-570-931); *Certain Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China* (C-570-936); *Citric Acid and Certain Citrate Salts From the People's Republic of China* (C-570-938); *Certain Tow Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China* (C-570-940); *Certain Kitchen Appliance Shelving and Racks from the People's Republic of China* (C-570-942); *Certain Oil Country Tubular Goods from the People's Republic of China* (C-570-944); *Pre-Stressed Concrete Steel Wire Strand from the People's Republic of China* (C-570-946); *Certain Magnesia Carbon Bricks From the People's Republic of China* (C-570-955); *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China* (C-570-957); *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China* (C-570-959); *Drill Pipe From the People's Republic of China* (C-570-966); *Aluminum Extrusions From the People's Republic of China* (C-570-968); *High Pressure Steel Cylinders From the People's Republic of China* (C-570-978); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China* (C-570-980); *Utility Scale Wind Towers From the People's Republic of China* (C-570-982); and *Drawn Stainless Steel Sinks From the People's Republic of China* (C-570-984). In its request to establish a panel, China advanced – but later elected not to pursue – claims regarding five additional CVD investigations initiated by DOC.

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"as such" challenge to DOC's "rebuttable presumption" that majority state-owned enterprises are public bodies, as discussed below.

Under the SCM Agreement, a "subsidy" is a financial contribution by a government or public body (or a private enterprise entrusted or directed by a government or public body) that confers a benefit on the recipient. A subsidy is countervailable where it is specific to certain enterprises or regions, or is prohibited.

The Panel's findings in favor of China may be summarized as follows:

- **Public Body**: The Panel found that DOC's "rebuttable presumption" that majority state-owned enterprises are public bodies (i) constitutes a measure that can be challenged "as such" and (ii) is inconsistent "as such" with Article 1.1 of the SCM Agreement. The Panel also found that DOC violated Article 1.1(a)(1) by applying that rebuttable presumption in 12 investigations. The Panel relied on the Appellate Body's finding in *US – Anti-Dumping and Countervailing Duties (China)* (DS379) that government ownership alone is insufficient to deem an entity a public body, and that a public body instead is an entity that possesses, exercises, or is vested with "governmental authority" (*i.e.*, the power to control or regulate other parties). However, the Panel in DS437 deemphasized "governmental authority" and instead emphasized a government's "meaningful control" of an entity as evidence that the entity possesses such authority. The Panel thus interpreted DS379 in a way that could expand the types of entities deemed "public bodies." According to the Panel, while majority government ownership alone is insufficient for a public body determination, meaningful control, which can be demonstrated in many ways, is sufficient.

- **Export Restraints**: The Panel found that DOC violated Article 11.3 of the SCM Agreement by initiating two investigations without "sufficient" evidence that an export restraint produces a "financial contribution" that results in a subsidy. The Panel ruled that an export restraint alone does not constitute a subsidy because an export restraint might not constitute "a financial contribution in the form of a government-entrusted or government-directed provision of goods." However, the Panel cautioned that its finding was based on the particular facts of the dispute.

- **Regional Specificity**: The Panel found that DOC violated Article 2.2 of the SCM Agreement in six investigations by finding the existence of a regionally-specific subsidy without establishing that the subsidy was "limited to certain enterprises located within a designated geographical region."

- ***De Facto* Specificity**: The Panel found that DOC violated Article 2.1(c) of the SCM Agreement by failing in 12 investigations to take account of the "extent of diversification of economic activities" in China and the "length of time during which the subsidy programme has been in operation." The Panel ruled that Article 2.1(c) requires an investigating authority to take such factors into account. However, the Panel stated that this "need not be done explicitly."

The Panel's findings in favor of the United States may be summarized as follows:

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- **Price Benchmark**: The Panel found that DOC was permitted under Articles 1.1(b) and 14(d) of the SCM Agreement to reject private prices in China when determining whether Chinese state-owned enterprises (SOEs) provided inputs "for less than adequate remuneration" (and thus conferred a benefit on consumers of those inputs). The Panel ruled that "predominant" SOE involvement in a domestic market might permit an authority to conclude that a "market distortion" exists and thus use out-of-country price benchmarks to determine benefit under Article 14(d).

- **Facts Available**: The Panel found that DOC's determinations in 13 investigations "on the basis of the facts available" were not in violation of Article 12.7 of the SCM Agreement.

- **Initiation**: The Panel found that DOC, consistent with Article 11 of the SCM Agreement, initiated four investigations with "sufficient" evidence of a financial contribution and 14 investigations with "sufficient" evidence of specificity.

If the Panel report is not appealed, US compliance would require DOC to revise several determinations in the investigations at issue. However, the United States is widely expected to appeal various aspects of the report to the Appellate Body, and China might do the same. US Trade Representative Michael Froman stated that "the Administration is carefully evaluating its options." A Chinese Ministry of Commerce official stated that China is "assessing the Panel Report and will carry on its follow-up work pursuant to the WTO dispute settlement proceeding."

Click here for the Panel Report.

US Ambassador to the WTO Michael Punke Highlights Trade Facilitation, Post-Bali Work Program, Enforcement, and Plurilateral Negotiations

On July 16, 2014, Deputy United States Trade Representative (USTR) and US Ambassador to the World Trade Organization (WTO) Michael Punke testified before the House Ways & Means Subcommittee on Trade. During his testimony regarding the current US trade agenda at the WTO, Ambassador Punke highlighted the following topics:

- **Trade Facilitation Agreement**: The United States is committed to ensuring implementation of the Trade Facilitation Agreement (TFA) negotiated at Bali in 2013. Despite confronting opposition efforts by "a small minority" (*i.e.*, India and several African countries), the United States "is insisting that TFA implementation takes place in strict accordance with the procedures and timelines agreed by all ministers."

- **Post-Bali Work Program**: The WTO seeks to develop a Post-Bali Work Program by the end of 2014. However, while the United States supports a "definitive conclusion" to the Doha Round, "[a] final Doha agreement, if there is to be one, must address key US priorities not addressed in the Bali Package, including in agriculture, industrial market access, and services." Ambassador Punke emphasized that "[t]here would be no Doha result without balance across all of these areas, as well as a balance of commitments across all of the major trading countries."

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- **Enforcement**: The United States continues to address foreign market barriers by "direct engagement" with trading partners, followed, when necessary, by WTO dispute settlement. Since 2009, the United States has brought 18 WTO complaints.

- **Plurilateral Negotiations**: The United States is actively pursuing sectoral plurilateral negotiations – namely the Trade in Services Agreement (TISA), an expanded Information Technology Agreement (ITA), and the Environmental Goods Agreement (EGA) – with "a long-term vision of spurring the next generation of Geneva agreements." Once concluded, these negotiations "will become platforms for other WTO Members to join."

In response to a question from Rep. Dave Reichert (R-WA), Ambassador Punke stated that the United States has not sought to convince currently non-participating parties to join plurilateral negotiations, but rather has waited for such parties to express an active interest in joining the negotiations. Such an approach, according to Ambassador Punke, ensures that negotiating groups are limited to parties that share high standards and similar objectives.

Click here for Ambassador Punke's testimony.

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