



# White & Case LLP General Trade Report - JETRO

November 2014

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## UNITED STATES

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### GENERAL TRADE POLICY

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## Implications of the 2014 Congressional Elections for US Trade Policy

### Summary

The November 4, 2014 mid-term elections in the United States increased Congressional support for trade liberalization at a critical time for US trade policy. A new Republican majority in the Senate and an enlarged Republican majority in the House of Representatives likely will offer a more straightforward legislative path to the enactment of Trade Promotion Authority (TPA) in 2015, which in turn could spur the conclusion and Congressional approval of the Trans-Pacific Partnership<sup>1</sup> (TPP) agreement. Significant obstacles to completing TPP exist, but enactment of TPA would ease Congressional consideration of the agreement and might aid in securing key concessions from negotiating partners. On the other hand, passage of TPA likely would not have a substantial, direct impact on the Transatlantic Trade and Investment Partnership<sup>2</sup> (TTIP) because TTIP negotiations remain in their early stages and are encumbered by multiple contentious issues.

Republican gains in Congress do not, however, guarantee TPA's ratification. President Obama's recently announced plan to pursue Executive action on immigration has the potential to create partisan gridlock, diminishing prospects for TPA legislation for the immediate future. In addition, President Obama still must court Congressional Democrats to secure bipartisan support for the legislation and to temper Democrats' TPA-related demands. An absence of Democratic support for TPA or a final TPA bill that contains currency or other divisive issues could jeopardize TPA's passage, potentially delaying the completion and Congressional consideration of a TPP agreement. Even if the partisan gridlock ensuing from the President's Executive action is short-lived, these issues still present major obstacles to ratifying TPA. As a result, although advancement of the US trade agenda remains likely in 2015, Congressional passage of TPA early in the year appears increasingly unlikely.

Less prominent trade issues, such as renewal of the Generalized System of Preferences (GSP) and the Miscellaneous Tariff Bill (MTB), also might be affected by Republican gains in Congress, TPA's passage, and the overall comity between the Executive and Legislative branches in 2015.

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<sup>1</sup> The Trans-Pacific Partnership is a proposed regional free trade agreement between the United States, Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.

<sup>2</sup> The Transatlantic Trade and Investment Partnership is a proposed regional free trade agreement between the United States and the European Union.

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## Background

TPA commits Congress to use expedited (*i.e.*, “fast track”) procedures to consider legislation to implement certain trade agreements that the President negotiates during a specified period of time. In so doing, TPA enables the President and foreign governments to negotiate trade agreements with the assurance that Congress, rather than amending any negotiated agreement, will wholly accept or wholly reject any such agreement via a timely “up or down” vote. Absent this assurance, foreign governments might have reduced incentives to negotiate trade agreements with the United States due to concerns that Congress might reject or revise individual clauses of such agreements. In exchange for this assurance, and as outlined in legislation to implement TPA, the President must adhere to certain negotiating objectives and certain procedures to notify and consult with Congress regarding the progress of any negotiations.

TPA was first enacted in 1975 and renewed in 1979, 1984, 1988, and 2002. Congress has used TPA to enact the Tokyo Round Agreements Act of 1979, the Uruguay Round Agreements Act of 1994, and 14 bilateral or regional trade agreements. The most recent iteration of TPA was enacted in December 2002 and expired in July 2007. With the exception of President Obama, every president since Franklin D. Roosevelt in the 1930s has possessed TPA or a special trade negotiating authority similar to TPA.

## Analysis

### I. EFFECTS OF THE 2014 ELECTIONS ON THE COMPOSITION OF CONGRESS

#### Senate

The 2014 Congressional elections transferred majority control of the US Senate to the Republican Party, which will hold at least 53 Senate seats in the 114th Congress (beginning January 3, 2015). Sen. Mitch McConnell (R-KY), formerly the Senate Minority Leader, will become Senate Majority Leader. Sen. Harry Reid (D-NV), who has served as Senate Majority Leader since 2007, will become the Senate Minority leader.

Chairmanship of the Senate Finance Committee likely will transition to its current Ranking Member, Sen. Orrin Hatch (R-UT). Current Finance Chairman Ron Wyden (D-OR) will likely become Ranking Member. The new Finance roster is expected to contain 13 Republicans and 11 Democrats, a reversal of the current ratio. One subtraction from the Democratic membership will be Sen. John D. Rockefeller IV (D-WV), who will retire at the end of 2014. Assuming that another subtraction is required, Sen. Mark Warner (D-VA), the most junior Finance Democrat, likely will be removed.

#### House of Representatives

The Republican Party will extend its majority control in the US House of Representatives to hold 244 seats in the 114th Congress. Rep. John Boehner (R-OH) won re-election and will continue as Speaker of the House, while Rep. Nancy Pelosi (D-CA) will continue in her role as House Minority Leader.

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Leadership of the House Ways & Means Committee will change due to the retirement of Chairman David Camp (R-MI) at the end of 2014. Rep. Paul Ryan (R-WI) will become Chairman, while Rep. Sander Levin (D-MI) will remain Ranking Member. Republicans currently hold 23 seats on the Ways & Means Committee, compared to the Democrats' 16. How this ratio will change to reflect the larger Republican majority remains uncertain.

## II. CONGRESSIONAL ATTITUDES TOWARD TRADE

The 114th Congress likely will be more supportive of major trade legislation than the present Congress. The change will be most pronounced in the Senate, where Republicans will gain control of the chamber and will replace several Democrats who opposed TPA, trade agreements, and other trade initiatives. In the House, the effect of the enlarged Republican majority on support for trade legislation will be less pronounced.

### Senate

A majority-Republican Senate in the 114th Congress likely will be more amenable to advancing trade legislation than the existing majority-Democratic Senate in the 113th Congress. Regarding leadership, Sen. McConnell is a strong proponent of TPA, TPP, and TTIP. For example, in 2011, he sponsored an amendment to the *Trade Adjustment Assistance Extension Act* (H.R. 2832) that would have granted TPA to President Obama, and in 2014 he supported the *Bipartisan Congressional Trade Priorities Act (BCTPA)* (S. 1900), TPA legislation introduced by Sens. Max Baucus (D-MT) and Hatch. In contrast, Majority Leader Reid, in apparent response to trade skeptics and labor groups in the Democratic Party's base, opposed both initiatives. Reid also refused to permit the *BCTPA*, supported by the White House and Republican leadership, to receive a floor vote in the Senate. The change in Senate leadership to Republican control thus increases the probability that TPA legislation and other trade initiatives will receive a floor vote during the 114th Congress.

The change in Finance Committee leadership also improves prospects for passage of major trade legislation in the Senate. Likely Finance Chairman Hatch co-sponsored the *BCTPA* in 2014 and TPA legislation in 2011 and has described TPA as a top priority for the 114th Congress. In contrast, Chairman Wyden, who will likely become the Committee's Ranking Member in 2015, voted against TPA in 2011 and delayed action on the *BCTPA* in 2014. All 11 of the Democratic senators expected to remain on the Finance Committee in 2015 voted against TPA in 2011. However, several Senate aides speculate that, of those 11 senators, only Sens. Sherrod Brown (D-OH) and Robert Casey (D-PA) would oppose TPA legislation in the 114th Congress. Sens. Benjamin Cardin (D-MD) and Debbie Stabenow (D-MI) also might oppose TPA, however, depending on the details of the legislation.

In the full Senate, the replacement of at least eight incumbent Democrats with Republicans very likely will shift the Senate towards greater support for TPA legislation and any future free trade agreements (FTAs) considered under TPA. The most recent Senate vote to grant TPA to the President, held in 2011, was split along party lines, with 43 out of 47 Republicans supporting and 50 out of 51 Democrats opposing. As the table below shows, multiple Democrats being replaced by Republicans voted against the 2011 TPA amendment, whereas no retiring Republican voted against the amendment.

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State	Defeated/Retired Incumbent	2011 TPA Vote	2011 Korea FTA Vote	2011 Panama FTA Vote	2011 Colombia FTA Vote	New Member
AK	Mark Begich (D)	Nay	Yea	Nay	Nay	Dan Sullivan (R)
AR	Mark Pryor (D)	Yea	Yea	Yea	Yea	Tom Cotton (R)
CO	Mark Udall (D)	Nay	Yea	Yea	Yea	Cory Gardner (R)
GA	Saxby Chambliss (R)	Yea	Yea	Yea	Yea	David Perdue (R)
IA	Tom Harkin (D)	Nay	Nay	Nay	Nay	Jodi Ernst (R)
LA	Mary Landrieu (D) <sup>3</sup>	Nay	Yea	Yea	Yea	Bill Cassidy (R)
MI	Carl Levin (D)	Nay	Yea	Yea	Nay	Gary Peters (D)
MT	Max Baucus (D) <sup>4</sup>	Nay	Yea	Yea	Yea	Steve Daines (R)
NC	Kay Hagan (D)	Nay	Nay	Nay	Nay	Thom Tillis (R)
NE	Mike Johanns (R)	Yea	Yea	Yea	Yea	Ben Sasse (R)
OK	Tom Coburn (R)	Yea	Did not vote	Did not vote	Did not vote	James Lankford (R)
SD	Tim Johnson (D)	Nay	Yea	Yea	Yea	Mike Rounds (R)
WV	Jay Rockefeller (D)	Nay	Nay	Nay	Nay	Shelley Moore-Capito (R)

The table also indicates that the replacement of incumbent Democrats with Republicans bodes well for potential passage of TPP and TTIP, as several outgoing Democratic senators opposed one or more FTAs in 2011 that robust Republican majorities supported. Senators-elect Cory Gardner (R-CO), James Lankford (R-OK), and Shelley Moore-Capito (R-WV) voted for all three FTAs in question – the US-Korea FTA, the US-Panama FTA, and the US-Colombia FTA – while serving in the House of Representatives in 2011. So too did Rep. Bill Cassidy (R-LA), who is predicted to defeat Sen. Mary Landrieu (D-LA) in a December 6 runoff election. Moreover, nearly all year 2011 Senate votes against those trade agreements were cast by Democrats, as shown in the table below:

Legislation	Total Senate "Nay" Votes	Total Senate Democratic "Nay" Votes
<i>United States-Korea Free Trade Agreement Implementation Act (H.R. 3080)</i>	15	14
<i>United States-Panama Trade Promotion Agreement Implementation Act (H.R. 3079)</i>	22	21
<i>United States-Columbia Trade Promotion Implementation Act (H.R. 3078)</i>	33	30

## House of Representatives

<sup>3</sup> Sen. Landrieu faces a December 6 runoff election with polls indicating a likely Republican victory.

<sup>4</sup> Sen. Baucus retired on February 6, 2014. The remainder of his term was served by Sen. John Walsh (D-MT).

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The extension of the Republican majority likely will have only a minor positive impact on the already strong probability that the House would support major trade legislation in the 114th Congress, including TPA and, should agreements be completed, legislation to implement TPP and TTIP. House Speaker Boehner expressed support for TPA in early 2014, calling on President Obama to help generate Democratic support for TPA legislation. In addition, incoming Ways and Means Chairman Paul Ryan has consistently supported trade initiatives and advocated for the *BCTPA*. As a whole, the House remains amenable to passage of major trade initiatives, with the US trade agreements with Korea, Panama, and Colombia passing the Republican-majority House in 2012 by margins of 95 votes or more.

### III. PROSPECTS FOR COMPLETION AND PASSAGE OF TRADE POLICIES

#### TPA

Republican control of the Senate increases the likelihood, but does not guarantee, that Congress will pass TPA. The existing Senate Democratic leadership opposes granting TPA to President Obama. Majority Leader Reid, a longstanding critic of trade agreements, has stated that his Senate colleagues would be “well-advised” not to “push” for TPA. Majority Whip Richard Durbin (D-IL), who describes himself as “critical and skeptical” of TPA, has claimed that a consensus exists among Senate Democrats that the Senate should not consider TPA legislation during 2014. In contrast, the existing Senate Republican leadership supports granting TPA to President Obama. Shortly after the conclusion of the November 4 elections, Sen. McConnell made clear that the 114th Congress’ Republican-majority Senate would work with President Obama to pass TPA as a means to advance TPP and TTIP.

It is expected, therefore, that the existing Democratic-majority Senate will not vote on TPA, and that the pending Republican-majority Senate likely will approve TPA legislation sometime in 2015. Sen. Hatch, presumed Finance Chairman in the 114th Congress, previously co-sponsored the *BCTPA*, TPA legislation intended to apply to TPP and TTIP. Introduced on January 9, 2014 in the Senate (S.1900) by former Finance Chairman Baucus and Ranking Member Hatch, and in the House of Representatives (H.R.3830) by Ways and Means Chairman Camp, the *BCTPA* would apply to trade agreements entered into before July 1, 2018 (or July 1, 2021 if the President requests an extension and Congress does not vote against such an extension).

While the Republican-majority Senate is supportive of TPA legislation, the substance of that legislation remains uncertain. Aides for Sen. Hatch reportedly have stated that he prefers to pass TPA legislation with as few changes as possible to the *BCTPA*. However, Congressional trade leaders disagree regarding the contents and details of that legislation, and Sen. Hatch will remain the only *BCTPA* author in the 114th Congress. Ways & Means Ranking Member Levin, a longtime critic of trade agreements, declined to co-sponsor the legislation and likely will oppose TPA legislation in the 114th Congress. Sen. Wyden, who replaced Sen. Baucus as Finance Chairman in February 2014, intends to seek “smart track” changes to the *BCTPA*. While the specific content and parameters of such changes remain uncertain, they likely would relate to consultation and transparency requirements. Sen. Wyden has emphasized that (i) the Obama Administration should provide Congress and the public with increased information regarding ongoing negotiations, perhaps through the appointment of a transparency officer within the Office of the United States Trade

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Representative (USTR); and (ii) Congress should be granted more time to deliberate, as well as access to “procedures” to “right the ship if trade negotiators get off course.”

Because the Finance Chairmanship will transfer from Sen. Wyden to Sen. Hatch in 2015, the degree to which Sen. Wyden’s proposals will be incorporated into any final TPA legislation is uncertain. However, Sen. Wyden, as well as several other Finance Democrats, likely will condition support for TPA legislation on the inclusion of at least some of the proposals crafted during his Chairmanship. Furthermore, other Democratic members of the Finance or Ways and Means Committees might demand the inclusion of controversial provisions, beyond those already included in the *BCTPA*, regarding labor, the environment, and currency manipulation. In particular, several Democrats have demanded that TPA legislation include a provision requiring that covered trade agreements include enforceable currency rules. Exclusion of such a provision could result in inadequate Democratic support for TPA and TPP, while inclusion of such a provision could weaken Republican support for TPA and potentially impede the successful conclusion of TPP negotiations. Sen. Hatch likely will wish to advance TPA legislation that, similar to the *BCTPA*, enjoys bipartisan support among the Finance Committee leadership and lacks the most controversial provisions. However, Sen. Hatch might need to modify the *BCTPA* or similar legislation to secure Democratic support. If final TPA legislation contains controversial labor, environment, currency, or transparency provisions demanded by several Senate Democrats, the bill’s passage could be jeopardized.

TPA also might face problems without bipartisan support. With public skepticism regarding the benefits of trade well documented by public opinion polls, Republicans might be hesitant to take sole responsibility for the passage of trade initiatives prior to the 2016 elections. Doing so could expose Republican candidates to potential criticisms during the 2016 Congressional and Presidential campaigns; thus, some degree of Democratic support for TPA is likely necessary to advance the legislation next year.

Republican leadership thus must craft a TPA bill that gains some Democratic support but avoids the most controversial provisions demanded by many Congressional Democrats. As such, TPA legislation likely will include a balance of labor, environment, and currency provisions that is sufficient to acquire bipartisan support but insufficient to discourage free trade Republicans or US trading partners. Achieving this balance will require significant work by the Obama administration to secure Democratic votes for TPA and ensure that no provisions in the law will jeopardize TPP, TTIP, or other future FTAs.

Non-trade factors also might weigh heavily on TPA in 2015. Most notably, President Obama’s recently announced plan to legalize certain undocumented immigrants without Congressional approval may diminish Congressional Republicans’ willingness to work with him on trade or grant him the appearance of new powers under TPA, at least in the short term. Congressional Republicans generally opposed the President’s plan, and stated prior to its official announcement that any unilateral efforts by President Obama would cause them to reconsider their willingness to cooperate with the President on TPA, TPP, or TTIP.

The extent to which President Obama’s Executive action will diminish prospects for TPA in the new Congress is uncertain. Incoming Ways & Means Chairman Ryan has described the Executive action as a “stunning act of polarization” that would result in “gridlock” and “an even more adversarial

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relationship" between President Obama and the new Congress. Sen. McConnell has suggested that Congress will act to curtail the immigration plan but has not stated how potential cooperation in other areas, such as trade policy, might be affected. US Trade Representative Michael Froman has discounted the notion that the immigration dispute will imperil Congressional passage of trade initiatives in 2015.

Although Congress is now controlled by the more trade-friendly Republican Party, potential partisan gridlock resulting from the President's Executive action on immigration throws the immediate future of US trade policy, and TPA in particular, into doubt. Early 2015 action on TPA now appears unlikely, unless tempers on Capitol Hill – and among the conservative grassroots – cool dramatically over the Christmas and New Year's holidays. Moreover, even if this gridlock is broken or short-lived, irreconcilable differences over the substance of TPA legislation or an inability to attract significant bipartisan support present major obstacles to ratifying TPA. Passage of TPA and advancement of the US trade agenda remains likely in 2015 but will be affected as much by the administration's intentions and actions as by the new makeup of Congress.

## FTAs

The Republican takeover of the Senate increases prospects for completion and passage of TPP and TTIP. These improved prospects stem from the likelihood that the soon-to-be Republican-majority Senate, in contrast with the existing Democrat-majority Senate, will vote to reauthorize TPA sometime in 2015.

Passage of TPA appears to be critical to TPP's success for several reasons. First, Congressional Republicans have insisted repeatedly that TPA must precede the finalization of ongoing TPP negotiations. In a July 2014 letter to USTR Michael Froman signed by all 23 Republican members of the House Ways & Means Committee, the Representatives stated that they would not support a TPP agreement if it were completed before the enactment of TPA. Failure to adhere to Republican demands on this issue would inject new, and needless, uncertainty into the process. Second, several TPP members have used the United States' lack of TPA as a reason to withhold their most ambitious market access concessions and agree to some of TPP's more politically-sensitive elements. Without TPA's procedural limits on Congressional consideration, they argue, the United States cannot offer concrete assurances that the agreement that they sign will be the one actually approved and implemented. Thus, the conclusion of an ambitious, high-standard TPP likely requires TPA. Finally, and likely because of the first two reasons, the Obama administration also wishes to secure TPA before finalizing the TPP agreement.

Passage of TPA is less significant to the outcome of TTIP. TTIP negotiators are far from achieving consensus on issues considered central to the agreement, including regulatory harmonization and market access for goods and services. The proposed inclusion of an investor-state dispute settlement mechanism also has engendered strong opposition from EU member states. Moreover, European negotiators have not expressed concerns about undertaking TTIP negotiations without TPA's assurances – likely due to the talks' early stages and their familiarity with the US political process. Thus, passage of TPA likely would not affect the TTIP, at least in the short term.

## Other Trade Initiatives

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Prospects for passage of additional trade initiatives, most notably GSP, also will be improved in the 114th Congress. In 2013, attempts to advance GSP legislation in the Senate failed when Sen. Tom Coburn (R-OK) placed a hold on the bill (S.1331), citing disapproval of the funding mechanism used to offset the program's tariff reductions. However, Sen. Coburn retired at the end of 2014. The most likely path to renewal of GSP is to attach renewal legislation to a Continuing Resolution expected to pass in December 2014. Nonetheless, improved prospects for TPA in the 114th Congress also bode well for GSP's potential renewal as part of a larger package of trade legislation. In particular, GSP might be attached to a TPA proposal to gain bipartisan support. Such a package also might include customs reauthorization legislation and a new MTB. Whether such a package will be proposed remains uncertain, but, regardless, the increased likelihood of a TPA proposal in the 114th Congress improves prospects for GSP, MTB, and customs legislation.

### Outlook

While the Republican takeover of the Senate increases the likelihood that Congress will pass major trade legislation, any effects that the Republican takeover might have on ongoing TPP and TTIP negotiations should not be overstated. First, each trade agreement – and TTIP in particular – remains incomplete. TPP parties have failed to make progress in several key sectors, and TTIP parties have refrained from advancing negotiations regarding multiple politically contentious issues. Some analysts argue that it will be months, if not years, before TPP or TTIP parties reach an agreement. Most recently, the Prime Minister of New Zealand stated that failure to conclude TPP by summer 2015 could lead to the agreement being put “on ice” until 2016 or later.

Second, whether the President's Executive actions on immigration will result in diminished prospects for bi-partisan Congressional-Executive initiatives in 2015 is uncertain. The US business community likely will pressure Republicans to cooperate with the President on trade initiatives, despite his actions on immigration. However, certain Republican constituencies likely will oppose such cooperation. As a result, some Republican Senators and House Members – in particular those who might be considering running in the 2016 Presidential election – might be reluctant to grant President Obama the appearance of new powers under TPA.

Third, even if TPA legislation does materialize in 2015, leadership from President Obama will be required to pass the bill into law, as well as to complete TPP and TTIP. The Obama Administration has not publicly promoted TPA, TPP, and TTIP to Congressional Democrats, whose constituents largely oppose the agreements. While a Republican Senate and House offer a more straightforward legislative path to granting TPA, Presidential leadership is essential to secure the bipartisan consensus required by Republicans. The President must court at least some Democratic votes in Congress, and these can be won only through active involvement. Similarly, President Obama must attempt to persuade the public of the benefits and importance of the pending trade agreements and stand firm against opposition from labor and industry groups that have inhibited progress in the negotiations. Such Presidential actions and positions are far from certain.

Fourth, ideological divisions within the Republican Party might impact a potential vote on trade initiatives. However, these disagreements should not be oversold. Some critics suggest that certain conservative Republicans might oppose granting additional authority, including TPA, to President Obama. However, such alleged ideological divisions do not appear to have impeded previous trade

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initiatives during President Obama's term. For example, Sen. Susan Collins (R-ME) and then-Sen. Olympia Snowe (R-ME), considered two of the most moderate Senate Republicans in recent years, were the only Senate Republicans to oppose 2011 trade agreements with Korea and Colombia and two of only four Senate Republicans to oppose TPA in 2011. In the House, less than 4 percent of voting Republicans opposed implementation of the Panama or Columbia agreements, while less than 10 percent opposed a 2011 trade agreement with Korea. Thus, trade policy divisions within the Republican Party alone should not derail TPA or the US trade agenda.

Despite the House and Senate coming under Republican control, potential partisan gridlock ensuing from the President's Executive action on immigration makes passage of TPA in early 2015 unlikely. Furthermore, resolution of this gridlock would not guarantee swift passage of TPA, due to differences over the substance of TPA legislation and minimal bipartisan support. If such problems can be avoided and if Congress can move beyond immigration, then implementation of TPA would reinvigorate TPP, while TTIP would remain largely unaffected due to the negotiations being in their early stages. A potential best-case scenario would include TPA passage in early 2015, followed by conclusion of TPP negotiations in summer 2015 and Congressional consideration of TPP implementing legislation in autumn 2015. However, the President's actions on immigration now make this optimistic scenario increasingly unlikely. A potential worst-case scenario would include failure by Congress to enact TPA in 2015, possibly preventing TPP's conclusion or implementation during President Obama's second term.

## ***US General Trade Policy Highlights***

### **United States and China Agree to Accelerate Negotiations on Bilateral Investment Treaty**

The United States and China are continuing progress towards a bilateral investment treaty (BIT) following the establishment of a negotiation timeline earlier this year. The timeline, which was agreed upon at the Sixth US-China Strategic and Economic Dialogue on July 10, 2014, included commitments to agree on a core BIT text by the end of 2014 and to begin discussions on negative list offers in early 2015.

Following the establishment of the negotiation timeline, China's Vice Minister of Finance Zhu Guangyao reported in an October 9, 2014 speech that the United States and China had made "big progress" towards reconciling each country's model text for investment treaties. Subsequently, during a November 5, 2014 speech on US-China relations in Washington, DC, US Secretary of State John Kerry reaffirmed the United States' commitment to the BIT, stating that "we're focused on enhancing trade and investment between our countries, including through the ongoing negotiations of a high-standard bilateral investment treaty."

Further indications that the BIT negotiations would proceed according to the established timeline came on November 12, 2014, during a joint press conference between President Obama and Chinese President Xi Jinping in Beijing. "We agreed to accelerate the negotiations of the BIT," President Jinping said, "and we'll make efforts to reach agreement on the core issues and the major

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articles of the treaty text, and to initiate the negative list of negotiations in 2015.” President Obama concurred that the two leaders had “agreed to work actively” to complete the agreement.

Some US business groups, including the US Chamber of Commerce, have raised concerns about the model text used by the United States as a starting point for BIT negotiations. Specifically, the Chamber has called for new rules that would restrict China’s ability to reward foreign investors who utilize domestic content by providing them with preferential subsidies. The Chamber also has requested the inclusion of measures governing the behavior of state-owned enterprises, similar to those measures proposed by the United States in the Trans-Pacific Partnership negotiations, as well as the inclusion of investor-state dispute settlement mechanisms. It is unknown how many of these proposals will be adopted by US negotiators, or whether their potential inclusion will complicate efforts to finalize the core BIT text by the end of 2014.

After the two countries agree on the provisions of a treaty, negotiators will begin to narrow the list of sectors that each country has requested to exclude from the agreement, also known as a negative list. Chinese Vice Minister of Finance Zhu Guangyao has stated that significantly reducing China’s negative list will be challenging, a factor which could further complicate negotiations in 2015.

[Click here](#) for a copy of the remarks made on November 12, 2014 by President Obama and President Xi Jinping.

## **Government Accountability Office Proposes Enhanced Monitoring of FTA Partners’ Labor and Environmental Commitments**

On November 13, 2014, the US Government Accountability Office (GAO) published two reports recommending increased oversight of partner countries’ compliance with labor and environmental commitments under free trade agreements (FTAs) with the United States. Both reports concluded that while several countries have made progress towards compliance, resource limitations and insufficient US oversight have enabled the persistence of conditions that violate FTA labor and environmental obligations.

The first GAO report assessed compliance with FTA environmental commitments and found that several partner countries had enacted new environmental laws and established or strengthened environmental institutions since signing FTAs with the United States. However, limited technical capacity and resources reportedly have posed challenges for governments in several of the countries, preventing them from enforcing compliance with FTA commitments. According to the report, resource constraints in Chile, El Salvador, and Guatemala have prevented public officials in those countries from enforcing environmental laws and conducting investigations, including those related to water quality and the protection of endangered species. The report states that similar constraints in Peru have impeded the Peruvian government’s ability to prevent deforestation resulting from illegal logging and mining on protected lands.

The second GAO report assessed the enforcement of labor standards and found that several partner countries had taken steps to implement FTA labor provisions since entering into trade agreements

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with the United States. However, the report alleges that gaps in labor protections persist in Colombia, El Salvador, Guatemala, Oman, and Peru. The report states that court decisions, fines, and penalties related to labor violations remain poorly enforced in Colombia, El Salvador, and Peru, as do collective bargaining laws in Guatemala.

The reports recommend that the Office of the US Trade Representative (USTR) coordinate enhanced monitoring and enforcement activities with the Department of Labor and the Department of State and provide planning assistance to specific partner countries where appropriate. House Ways & Means Committee Ranking Member Sander Levin (D-MI) and House Committee on Education and the Workforce Ranking Member George Miller (D-CA) echoed the recommendations in a press release, requesting that the Obama Administration to adopt “a more systematic and coordinated approach to enforcement” of labor and environmental provisions with FTA partner countries.

[Click here](#) for a copy of the GAO report on environmental commitments and [here](#) for a copy of the GAO report on labor commitments.

## **Government Accountability Office Says US Customs and Border Protection Should Improve Enforcement of ITC Exclusion Orders**

On November 19, 2014, the US Government Accountability Office (GAO) recommended that the US Customs and Border Protection (CBP) take steps to improve its enforcement of exclusion orders issued by the International Trade Commission (ITC). ITC issues exclusion orders upon final determination of a violation of Section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337), which prohibits the importation and sale of articles that infringe a valid and enforceable US patent, copyright, trademark, or mask work. The report was requested by Sens. Ron Wyden (D-WA) and Orrin Hatch (R-UT), Chairman and Ranking Member, respectively, of the Senate Finance Committee.

Exclusion orders direct CBP to prevent infringing imports from entering US commerce. Upon receipt by CBP of an exclusion order, an internal electronic alert is issued to all CBP officials describing the protected intellectual property right and the names of the importers associated with the infringing products. CBP then engages in risk-based targeting of shipments, conducts physical inspections, and seizes, destroys, or denies entry to excluded merchandise.

The GAO report found management weaknesses and inefficiencies in this enforcement process. First, the report concluded that CBP does not regularly review exclusion orders and ensure that corresponding electronic alerts are issued. An audit revealed that CBP had failed to issue electronic alerts for approximately one fourth of exclusion orders in effect at the time of GAO’s data request. Second, GAO found that CBP lacks an established timeframe for issuing the electronic alerts, and in some cases alerts were not issued for as long as three months after an exclusion order took effect. Third, the report concluded that CBP lacked a process for identifying exclusion orders that were candidates for ITC rescission and submitting rescission requests, resulting in a larger number of orders to be enforced.

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The GAO report recommended that CBP conduct regular reviews of exclusion orders, establish timeframes for issuing electronic alerts, and establish a process for identifying orders that might be candidates for ITC rescission. According to GAO, 94 exclusion orders were in effect as of April 30, 2014, 60 percent of which involved integrated circuits, computer components, consumer electronics, and chemical compounds.

## US Export-Import Bank Signs Memorandum of Understanding with India to Finance Up To USD 1 Billion in Clean Energy Exports

On November 18, 2014, the Export-Import Bank of the United States (Ex-Im Bank) signed a Memorandum of Understanding with India's Renewable Energy Development Agency (IREDA) to finance up to USD 1 billion for clean energy exports from the United States.

According to a statement issued by IREDA, the Memorandum of Understanding will cover a loan facility that entails up to USD 1 billion in medium- and long-term guaranteed and/or direct dollar loans. This assistance provided by the Ex-Im Bank will finance exports of US technologies, products, and services utilized by the IREDA in its commercial development activities. IREDA has identified solar, wind, hydroelectric, and waste conversion projects as priority areas of investment under the new agreement. The Ex-Im Bank has authorized USD 353.4 million for US renewable energy exports to India since 2009, and India currently ranks as the second-largest destination for US exports supported by Ex-Im Bank financing.

The IREDA statement also indicates that the facility will finance such US exports "in addition to financing of 30 percent of domestic component." While vague, this wording appears to confirm earlier indications that the financing would entail a 30 percent Indian local content requirement for end-use products or energy projects that utilize the US goods exported with Ex-Im Bank assistance.

The US-India deal comes at a time of increasing uncertainty regarding the Bank's future. In September 2014, Congress authorized a short term extension of the Ex-Im Bank's charter through June 30, 2015 after a contentious debate regarding the economic merits of its direct loan, loan guarantee, and working capital finance programs. Although a significant number of Republicans opposed the Bank's extension, the extension was passed after being embedded in major government funding legislation. Most Republicans and Democrats supported the funding legislation to avoid a partial government shutdown prior to Congressional elections on November 4, 2014. In 2015, however, proposals to extend the Bank's charter might occur as standalone legislation. Given this possibility, and the recent Republican gains in the House and Senate following the 2014 mid-term elections, the likelihood that the Ex-Im Bank's charter will be extended beyond June 30, 2015 is increasingly uncertain.

[Click here](#) for a copy of the IREDA statement on the Memorandum of Understanding.

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## US-China Economic and Security Review Commission Says Congress Should Explore Sanctions Against Alleged Beneficiaries of Trade Secret Theft

On November 20, 2014, the US-China Economic and Security Review Commission (USCC) recommended that Congress explore the legality of potential sanctions against entities that allegedly benefit from the cyber-theft of US trade secrets. The recommendation was issued in the USCC's 2014 Annual Report, which alleged that cyber-espionage by Chinese entities remained "unabated" in 2014 despite recent US efforts to "expose and stigmatize" such activities.

China's alleged state-sponsorship of trade secret theft has recently gained increased attention in the United States following the US Justice Department's May 2014 indictment of five Chinese military officers suspected of cyber-espionage against US companies. The indictment alleged that the five officers had remotely targeted US-based companies in the steel, solar, and energy sectors with the intention of obtaining trade secrets for distribution to competing firms in China, including state-owned enterprises. According to the USCC report, the Chinese military unit in which the five defendants worked has allegedly compromised the networks of 141 organizations since 2006, 81 percent of which were located in the United States.

The USCC report stated that China's economic incentives for continuing to engage in the alleged cyber theft are "immense, and unlikely to be altered by small-scale US actions." As a result of this assessment, the report recommended that Congress request input from the Office of the US Trade Representative, Department of Commerce, and International Trade Commission concerning "the extent to which existing authorities would allow for sanctions to be imposed against entities that benefit from trade secrets or other information obtained through cyber intrusions or other illegal means and were provided by a national government, foreign intelligence service, or other entity utilizing such means." The report also recommended that Congress provide a proposal to address the issue, should it be determined that such authority does not already exist.

Several high-ranking US officials have recently called upon China to address mounting concerns over its alleged cyber-security practices. While touting the proposed US-China bilateral investment treaty during a November 5 speech in Washington, DC, US Secretary of State John Kerry called for China to put an end to the alleged practices, stating that the two countries cannot "agree to disagree" on the issue of cyber-security. Subsequently, following a November 12 meeting in Beijing with Chinese President Xi Jinping, President Obama reported that he had stressed the importance of protecting trade secrets against cyber threats in discussions with the Chinese leader.

[Click here](#) for the USCC's 2014 Annual Report to Congress.

## No Consensus on GSP Renewal Strategy Despite Lame-Duck Push by US Industry and GSP Countries

Over the past several weeks, coalitions representing US businesses and developing countries have each called upon Congress to enact legislation renewing the Generalized System of Preferences

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(GSP) by the end of 2014. The most recent such effort occurred on November 20, when ambassadors from 16 GSP-eligible countries sent a letter to Congressional leaders urging the renewal of GSP during the present “lame-duck” session of Congress. A similar letter calling for the retroactive renewal of GSP during the 113th Congress was sent to Congressional leaders on November 17, with signatories including the US Chamber of Commerce and more than 600 other US industry associations and companies.

Despite minimal opposition to GSP renewal among Members of Congress, House Ways & Means and Senate Finance Committee members differ on how best to advance such a proposal before the end of the year. Given the crowded legislative agenda and difficulty of obtaining floor time for bills during the remaining weeks of the 113th Congress, stand-alone legislation is considered to be an unlikely vehicle for renewal of GSP, and Congressional trade staff are reportedly considering other alternatives.

Such alternatives include the potential attachment of GSP renewal to a larger package of legislation more likely to be considered by Congress before the end of the year. It has been reported that staff members on the Senate Finance Committee favor the attachment of GSP renewal to the “tax extenders” bill – a potential package of legislation which would renew several tax credits set to expire at the end of 2014. However, Republican staff members on the House Ways & Means Committee reportedly prefer that GSP renewal be included in an omnibus package with other trade legislation, including trade promotion authority.

With the passage of omnibus trade legislation in 2014 now considered to be unlikely, however, the latter approach no longer appears to be a viable legislative vehicle for GSP renewal in the 113th Congress. In addition, the proposed tax extension legislation has proven controversial, with Republicans and Democrats disagreeing over which provisions should be extended and whether such extensions should be made permanent. Sources have also speculated that proponents of the tax extension legislation will be reluctant to include GSP due to concerns that a multitude of additional provisions or amendments may narrow the bill’s coalition of supporters.

It is also possible that GSP renewal may be attached to a government spending bill known as a Continuing Resolution, which is expected to be passed before December 11 when current legislation funding the federal government is set to expire. To date, however, sources have not reported that Congressional trade staff are considering this approach, leaving the potential renewal of GSP in 2014 uncertain.

## State “Buy American” Laws Continue to Draw Objections From Canada, European Union

Over the past several weeks, Canada and the European Union (EU) have reaffirmed publicly their opposition to “Buy American” laws, objecting in particular to multiple pieces of legislation recently proposed in US state legislatures. The laws, which establish US content requirements for state public works projects and other government purchases, have been introduced in an estimated 24 US states over the past two years, although not all of those 24 states have enacted the introduced measures.

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Earlier this year, Canada and the EU voiced objections to proposed state and federal “Buy American” requirements during a June 25, 2014 meeting of the World Trade Organization’s (WTO) Committee on Government Procurement. These concerns were recently reiterated in a November 17 EU Commission Annual Report on Potentially Trade-Restrictive Measures, which alleged that the United States “has been the most active country to embrace procurement-related trade restrictions, especially at state level,” over the past year. The report specifically expressed concerns regarding state procurement legislation recently introduced in New Jersey, New York, Massachusetts, and Minnesota, in addition to claiming that “the situation has also deteriorated at the US federal level.”

Subsequently, on November 20, Canadian Trade Policy Counsellor Vasken Khabayan stated that Canada is now closely monitoring US state legislatures due to the recent proliferation of proposed “Buy American” legislation at the state level. Speaking at a National Foreign Trade Council event in Washington, DC, Counsellor Khabayan reported that Canadian manufacturers have grown increasingly concerned about potential exclusion from consideration for state contracts if such laws are adopted.

Earlier this year, the Office of the US Trade Representative resisted Canadian appeals to address state-level procurement policies in the Trans-Pacific Partnership Agreement, stating in a July 30 press release that “nothing in TPP will in any way impact how state and local governments implement their own procurement policies” and that “no state, local, county, or municipal government is covered by TPP”. Similarly, when discussing the Transatlantic Trade and Investment Partnership (TTIP) before the European Union’s International Trade Committee on September 4, US Ambassador to Brussels Anthony Gardner stated that the United States could not grant EU companies access to state-level procurement as a part of TTIP without the states’ consent. Ambassador Gardner told the Committee that the United States would explore states’ willingness to liberalize their procurement policies but also suggested that EU negotiators engage state officials directly to address the matter.

Despite these recent objections from Canada and the EU, the United States generally maintains non-discriminatory government procurement practices towards countries covered by relevant World Trade Organization (WTO) agreements and certain free trade agreements (FTAs) to which the United States is a party. Although the 1933 *Buy American Act* (41 USC §§ 8301–8305) restricts the acquisition and use by the US government of construction materials and end products not “mined,” “produced,” or “manufactured” in the United States, the President is authorized to waive these requirements to comply with international trade agreements. For example, as a signatory to the Agreement on Government Procurement (GPA), a plurilateral WTO agreement covering 43 WTO Members, the United States is required to provide “treatment no less favourable” to domestic and international providers of most goods and services (so-called “national treatment”). To comply with this obligation, as well as similar obligations contained in certain bilateral FTAs, the President traditionally waives relevant *Buy American Act* requirements for relevant trading partners, pursuant to authority granted to the President by the 1979 *Trade Agreements Act* (19 USC §§ 2501–2582).

However, projects financed by the US Department of Transportation (DOT) and managed predominantly by states, localities, and other non-federal government entities, by virtue of being sub-federal projects, are not subject to the *Buy American Act*. Rather, a collection of distinct legislative provisions impose domestic content requirements on applicable sub-federal DOT projects. This

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distinction is important because whereas the President is authorized to waive (and regularly does waive) *Buy American Act* requirements to comply with US commitments made pursuant to the GPA and other FTAs, the legislative provisions applicable to sub-federal DOT projects provide no such authorization. As such, domestic content requirements in sub-federal projects, such as those which have recently drawn objections from Canada and the EU, have the potential to complicate ongoing Trans-Pacific Partnership and Transatlantic Trade and Investment Partnership negotiations.

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## FREE TRADE AGREEMENTS

### *Free Trade Agreement Highlights*

#### **House Trade Leadership Presses USTR to Protect Cross-Border Data Flows in TPP**

On October 31, 2014, key members of the US House of Representatives sent a letter to US Trade Representative (USTR) Michael Froman, requesting that US trade negotiators include “strong, binding obligations” to protect cross-border data flows in the Trans-Pacific Partnership (TPP) agreement. The bipartisan House letter was signed by Reps. Dave Camp (R-MI) and Sander Levin (D-MI), Chairman and Ranking Member, respectively, of the House Ways & Means Committee, and Reps. Devin Nunes (R-CA) and Charles Rangel (D-NY), Chairman and Ranking Member, respectively, of the House Ways & Means Subcommittee on Trade.

In their letter, the Representatives state that any TPP agreement presented to Congress “must include provisions that specifically keep borders open to the free flow of data.” Such provisions, the Representatives stated, would “prohibit countries from requiring the use of local data servers or other computing infrastructure as a condition for providing digital services, and ensure non-discriminatory treatment of digital products and services.” The Representatives also encouraged USTR Froman to “resist efforts by other countries to include overly broad exceptions that would unnecessarily undermine these provisions and provide lower levels of protection for digital products and services than other areas of trade.”

While the position of US negotiators, lawmakers, and global companies is generally supportive of a liberalized cross-border data regime, several TPP parties have sought exceptions from proposed provisions designed to protect cross-border data flows. For example, on October 25, 2014, it was reported that Vietnam would seek a temporary exception from provisions prohibiting “forced localization,” or the requirement that domestically located servers be used to provide digital services, and other exceptions from the proposed e-commerce obligations. Other TPP parties, including Australia and New Zealand, have objected to the forced localization provisions, citing privacy and security concerns.

The House letter follows a previous set of Congressional letters sent by bipartisan groups of lawmakers in both the House and Senate to USTR Froman on October 24, 2014. Signatories included Sens. Ron Wyden (D-OR) and Orrin Hatch (R-UT), Chairman and Ranking Member, respectively, of the Senate Finance Committee, and Sens. John Rockefeller (D-WV) and John Thune (R-SD), Chairman and Ranking Member, respectively, of the Senate Commerce Committee. The Congressional letters also follow a September 11, 2014 report by the US International Trade Commission (ITC) regarding the effects of foreign trade barriers on international digital trade by US firms.

[Click here for the House of Representatives letter sent on October 31, 2014.](#)

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## USTR Reaffirms US Support for Investor-State Dispute Settlement in TTIP

On October 31, 2014, US Trade Representative (USTR) Michael Froman reaffirmed US support for the inclusion of an Investor-State Dispute Settlement (ISDS) mechanism in the Transatlantic Trade and Investment Partnership (TTIP). Speaking at an event in Washington, DC, USTR Froman expressed openness to changes that would improve prior investment arbitration provisions but stated that an acceptable TTIP agreement without a high standard of investment protections would be “hard to imagine.”

USTR Froman’s addressed recent objections to ISDS raised among EU countries and emphasized that “none of us, neither the United States nor the European Union, want to do anything that is going to constrain our government’s ability to regulate in the public interest.” USTR Froman added that ISDS “fundamentally gives our investors abroad the same rights we give to foreign and direct investors in the United States: the right not to be subject to discriminatory or arbitrary treatment.”

The statements come as negotiations regarding the inclusion of ISDS in TTIP remain suspended, allowing EU trade officials to review public comments collected during consultations held earlier in the year. Common objections to ISDS have included concerns that international tribunals and arbitrations could undermine regulations designed to protect the public and potentially impinge upon the jurisdiction of EU member state courts.

Although USTR Froman’s statements described the appointment of a new European Commission as an opportunity to secure a “fresh start” to the ISDS negotiations, European Commission President Jean-Claude Juncker has commented publically on the possible exclusion of ISDS from TTIP. In an October 22 speech to the European Parliament, then-incoming president Juncker stated that the Commission “will not accept that the jurisdiction of courts in the EU member states be limited by special regimes for investor-to-state disputes,” adding that EU negotiators would be under “no obligation” to include the ISDS provision in a final TTIP agreement. EU Trade Commissioner Cecilia Malmstrom also has commented publically regarding possible exclusion of ISDS from TTIP.

## President Obama and European Leaders Reaffirm Commitment to TTIP

On November 16, 2014, President Obama and leaders of the European Union released a joint statement reaffirming their commitment to the Transatlantic Trade and Investment Partnership (TTIP) agreement. The statement, which was issued after President Obama met with the leaders alongside the G20 summit in Brisbane, endorsed “comprehensive and ambitious negotiations” between the two economies in order to produce a high-standard TTIP agreement.

In what appeared to be a response to growing skepticism concerning TTIP, the leaders also emphasized that commitments to the agreement remain as strong as they were at the outset of the negotiations in June of 2013. Since that time, however, negotiators have failed to make progress in several areas considered central to TTIP, leading to concerns among supporters that the final agreement, if reached, might be less ambitious than originally planned.

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For example, on November 13, Sen. Rob Portman (R-OH) cautioned TTIP negotiators against excluding highly contested provisions from the scope of the agreement. In an apparent reference to the controversial financial services and investor protection measures being considered in the TTIP negotiations, Sen. Portman stated that “the greatest trading partners in the world shouldn’t be talking about taking things off the table... Let’s negotiate an ambitious agreement.”

EU leaders, however, have expressed openness to scaling back or eliminating portions of the agreement that have received significant public criticism, namely the provisions relating to investor-state dispute settlement (ISDS). Last month, EU Commission President Jean-Claude Juncker suggested that EU negotiators were under “no obligation” to include an ISDS mechanism in the TTIP agreement, a prospect that US Trade Representative (USTR) Michael Froman has rejected. Earlier this year, EU negotiators also proposed to exclude financial services from market access discussions, following disagreements with the United States over regulatory harmonization in the financial sector.

With negotiations on these issues currently stalled, newly appointed EU Trade Commissioner Cecilia Malmstrom is scheduled to meet with USTR Froman in Brussels on November 21 to assess the current state of the TTIP negotiations and evaluate potential next steps. Commissioner Malmstrom then will appear before the European Parliament’s International Trade Committee during a December 3-4 hearing, where she is expected to detail her plans to further advance the negotiations.

[Click here](#) for a copy of the joint statement from the United States and European Union.

## Trans-Pacific Partnership Update: Obama Administration Continues Push for “Historic” Agreement as Leaders Say Conclusion “Coming Into Focus”

While attending the G20 Summit in Brisbane, Australia from November 15-16, President Obama continued to advocate for the Trans-Pacific Partnership (TPP) agreement, describing the potential deal as a “historic achievement.” The remarks followed a series of meetings between TPP leaders and Ministers on the sidelines of the November 5-11 APEC meetings in Beijing, China, during which incremental progress occurred but no major breakthroughs or timetables were announced.

Following the Beijing Ministerial, TPP Ministers reported on November 10 that negotiators continue to seek solutions in several of the more contentious areas of the agreement. Potential chapters relating to intellectual property rights (IPRs), state-owned enterprises (SOEs), environmental standards, and investment were identified as among the most challenging and sensitive. Outstanding issues in these areas include the following:

- **State-Owned Enterprises:** While negotiators have achieved general consensus on a definition of SOEs and general related provisions, determining which exceptions will be allowed continues to be contentious. In particular, Vietnam reportedly has sought multiple exceptions to the provisions, which would exempt a large percentage of the country’s SOEs from the TPP rules.
- **Intellectual Property:** The United States reportedly continues to seek a “data exclusivity” period

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of twelve years for biologic drugs, a proposal consistent with US law. Australian officials oppose that proposal, support a maximum data exclusivity period of five years, and have stated that there is “no clear landing zone” for the two countries to reach agreement on the issue. US negotiators also are seeking to establish criminal and civil responses to trade secret theft in TPP. Sources have stated that the IPRs chapter has the largest number of unresolved issues.

- **Investment:** The inclusion of an investor-state dispute settlement (ISDS) mechanism continues to be divisive. Although Australia has retreated from its initial blanket opposition to ISDS, no progress has been reported on the potential exclusion of tobacco-related cases from the jurisdiction of the TPP ISDS mechanism. The exclusion has been discussed informally by US negotiators as a means of mitigating objections to ISDS but has received strong opposition from US and Canadian business groups and several US lawmakers. Chile also reportedly has objected to provisions that would restrict the ability of governments to limit capital outflows.
- **Environmental Standards:** The November 10 Ministers’ report seems to endorse the establishment of enforceable environmental obligations under TPP. Although supported by the United States, several TPP countries have opposed aspects of this proposal.

In addition to these issues, differences between the United States and Japan over market access for automobiles and agricultural products continue to impede the conclusion of the negotiations. Speaking at an event in Washington, DC on November 17, US Trade Representative (USTR) Michael Froman stated that while “significant progress” had been made in these areas, unresolved issues remain. Despite these unresolved matters, USTR Froman described the Beijing Ministerial as “very productive,” and TPP Ministers have stated that the end of the negotiations is “coming into focus.” USTR Froman stated that TPP negotiators are “laying out a series of engagements over the next couple of months at the chief negotiator level to make progress on the remaining outstanding issues.”

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## MULTILATERAL

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### MULTILATERAL

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#### *Multilateral Highlights*

### United States and China Reach Understanding on Expanded Information Technology Agreement Product Scope

On November 11, 2014, President Obama announced that the United States and China had reached an understanding on a bilateral agreement to expand the scope of goods covered by the Information Technology Agreement (ITA). The announcement, made during a plenary session at the Asia-Pacific Economic Cooperation (APEC) meeting in Beijing, is considered to be a significant breakthrough that will lead to the resumption of the ITA expansion discussions.

According to a fact sheet released by the White House, the agreement will result in tariff reductions on a range of products, including MRI machines, GPS devices, video game consoles, solid-state drives, and printer ink cartridges. China also agreed to reduce tariffs on multi-component semiconductors, a concession that it previously had resisted.

Tariffs on many of the products to be covered under the expanded agreement will be phased out gradually over a period of several years. Based on the White House announcement, the United States and China do not appear to have reached an agreement on the length of these tariff phase-out periods for specific products. However, in another concession, China reportedly has agreed to a tariff phase-out framework established by the original 1996 ITA agreement. Under the framework, the maximum time frame for phasing out tariffs on certain products is five years, rather than the ten-year time frame originally demanded by Chinese negotiators. Tariffs on other products can either be phased out over three years or eliminated immediately upon implementation of the ITA. US Trade Representative (USTR) Michael Froman has stated that the length of tariff phase-outs will be among the items discussed when ITA discussions resume.

Further discussions among the ITA participants are targeted to begin this December in Geneva, according to the White House. Officials have been cautiously optimistic in assessing the potential impact of the understanding between the United States and China on those discussions. Responding to news of the understanding, USTR Froman stated that “while we don’t take anything for granted, we are hopeful that we’ll be able to work quickly to bring ITA to a successful conclusion.” World Trade Organization (WTO) Director-General Roberto Azevêdo called the understanding “a significant step forward in the negotiations” to expand the ITA.

If achieved, a final consensus to widen the product scope of the ITA would be the first such expansion since the agreement went into force in 1997. The ITA currently has 52 participants, which, according to the WTO, represent approximately 97 percent of world trade in information technology products.

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[Click here](#) for a copy of the White House fact sheet released on November 11, 2014.

## Information Technology Agreement Update: United States-China Understanding on Expanded Product Scope Narrows List of Excluded Products, May Benefit Other Negotiations

This report follows the announcement that the United States and China recently reached a bilateral understanding to expand the product scope of the Information Technology Agreement (ITA). The following information concerns the scale and potential impact of the understanding on future ITA negotiations and other pending trade agreements:

- **Number of product categories covered:** Eighteen months ago, China brought the ITA negotiations to a halt by objecting to lower or eliminate its tariffs on more than 100 of the 250 categories of high tech products that other ITA participants wished to see liberalized in a revised ITA. In Beijing this week, China reached a bilateral agreement with the United States to limit the list of excluded products to fewer than 15 of the original 250.
- **Products to be excluded:** Some ITA participants likely will be disappointed concerning the product categories that will remain excluded from the expanded scope. For example, flat-screen televisions and monitors that are of major export interest to Japan and Korea will remain excluded. However, neither country is likely to impede finalization of the agreement over this issue.
- **Impact on US-China Relations:** Finalization of the ITA could facilitate the conclusion of the Bilateral Investment Treaty that the United States currently is negotiating with China, and it could help persuade the United States to lift its opposition to allowing China to participate in the negotiations on the Trade in Services Agreement.

**Response from WTO Director-General:** WTO Director-General Roberto Azevêdo expressed hope that the understanding “will create renewed momentum, enabling negotiations to be concluded as quickly as possible.”

## United States and India Resolve Trade Facilitation Agreement Impasse

On November 13, 2014, the United States and India reached an interim agreement on India’s food stockholding program, breaking an impasse that has obstructed implementation of the World Trade Organization’s (WTO) Trade Facilitation Agreement (TFA) since July 2014.

Under the bilateral agreement, India has agreed to withdraw its opposition to the TFA and to move forward with full implementation, according to a statement from US Trade Representative (USTR) Michael Froman. The agreement also contains an arrangement known as a “peace clause,” under which WTO Members will agree not to challenge India’s food stockholding programs under WTO dispute settlement procedures until a permanent solution to the issue has been adopted. India previously insisted on a permanent peace clause that would protect its food stockpiling program

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beyond the 2017 deadline agreed to in Bali.

A fact sheet on the agreement released by USTR states that the new US-India agreement also contains plans for an “intensified program of work and negotiations” to arrive at a permanent solution to the food security issue. While the measures set forth in the new agreement will need to be approved by the full WTO membership, they are not expected to be controversial. Negotiations on the TFA were concluded in December 2013 as part of the wider Bali package, but due to disagreements with India regarding food security, WTO members failed to meet the July 31, 2014 deadline to adopt the TFA Protocol of Amendment.

On November 13, 2014, India’s Commerce and Industry Minister Nirmala Sitharaman stated that the new agreement “will end the impasse at the WTO and also open the way for implementation of the TFA.” WTO Director-General Roberto Azevêdo applauded the breakthrough, calling it “a significant step in efforts to get the Bali package and the multilateral trading system back on track.” Azevêdo is expected to discuss the development at the G20 Leaders meeting in Brisbane, Australia this weekend.

[Click here](#) for a copy of the USTR Fact Sheet on the US-India Agreement.

## WTO Members Expected to Adopt Trade Facilitation Agreement Protocol of Amendment at December Meeting

This report follows the announcement that the United States and India recently reached a bilateral agreement on India’s food stockholding program, breaking an impasse that has obstructed implementation of the World Trade Organization’s (WTO) Trade Facilitation Agreement (TFA) since July 2014.

While the US-India agreement will need to be examined and approved by all other WTO Members, the terms of the agreement almost certainly will be accepted. Sources indicate that WTO Director-General Roberto Azevêdo expects the WTO General Council to take the following decisions during its upcoming meetings on December 10 and 11, 2014:

- **Adopt the Protocol of Amendment:** Adopting the Protocol of Amendment will enable ratification of the TFA and its incorporation into WTO law as an Annex 1A Agreement. No further work is required on the text of the TFA and the draft Protocol, which already have been approved. However, whether the deadline for ratification of the Protocol will need to be extended beyond July 2015, due to the delay caused by the impasse over food stockholding, remains uncertain. This detail, although minor, will impact the amount of time that Members have to amend their domestic legislation, where necessary, to conform to the TFA and to submit their ratification of the Protocol.
- **Clarify the Bali language on food security and the “peace clause”:** Although the result of the US-India agreement has been well received, the agreement’s specific language regarding food security and the “peace clause” requires clarification before the General Council. Several Members have expressed frustration at India’s refusal to compromise for nearly six months. These Members argue that the impasse consumed valuable time which could have

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been used to implement the Bali package and negotiate the Bali work program. Members likely will need to launch an accelerated work program to find a permanent solution for food security that will replace the “peace clause.”

- **Extend the deadline to agree on the Bali work program:** The Bali work program deadline likely will be extended until the end of March 2015, or possibly the end of July 2015. Ministers in Bali had asked for the work program to be ready by the end of 2014, which no longer is possible. Director-General Azevêdo reportedly wants the work program to contain key political decisions that will allow the Doha negotiations to be concluded at the technical level. In the case of core market access negotiations, the program will include decisions on detailed modalities to cut import restrictions and agricultural subsidies. In the case of other elements of the Doha Round, the program will include political decisions to determine what level of ambition is realistic if Members are to complete the negotiations quickly, with a possible target time frame of mid-2016.

## New Trade Facilitation Agreement and Food Security Texts to be Distributed at November 24 WTO Heads of Delegation Meeting

As a result of the recent bilateral agreement between the United States and India on food security, efforts to secure formal approval for implementation of the Trade Facilitation Agreement (TFA) have intensified over the past several days. On November 20, World Trade Organization (WTO) Director-General Azevêdo began consulting intensively on new texts for the TFA and food security, with the intention of reaching agreement on the texts from the full WTO Membership at a special General Council meeting on November 26. The texts were drafted by the United States and India following their bilateral agreement last week and will be circulated to the full WTO membership on November 24 at a special Heads of Delegation meeting called by Director-General Azevêdo.

Consultations on the draft texts will continue over the weekend. India, as party to each text, appears to have removed itself as a potential obstacle to reaching agreement. However, the agreement of other Members is uncertain, as sources have indicated that several low-income developing countries are dissatisfied with certain revisions made to the text of the TFA.

The revised text of the Protocol of Amendment, on which Director-General Azevêdo is now consulting, is a simplified legal document inviting Members to ratify the TFA. The target date for ratification likely will be rescheduled from July 2015 to the end of 2015 as a result of the delay caused by the recent food security dispute. The simplification, however, involves two issues, which primarily are of interest to low-income developing countries, that have been deleted from the draft Protocol proposed last July.

The first issue is the deletion of a reference to Paragraph 47 of the Doha Declaration, which would make implementation of the TFA provisional until agreement is reached on the entire Doha package. Absent that language, implementation of the TFA will be definitive once it has been ratified by two-thirds of the WTO membership. Low-income developing countries prefer the inclusion of the Paragraph 47 reference, which may provide them with negotiating leverage on issues in other parts

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of the Doha Round, such as duty-free and quota-free market access.

The second issue is the deletion of language guaranteeing that sufficient financial and technical assistance would be made available to low-income developing countries for the purposes of TFA implementation. The United States and other donor countries have expressed reservations concerning this language, citing an inability to guarantee such foreign aid. However, Director-General Azevêdo recently reached an agreement with the World Bank to ensure that adequate funding is made available for TFA implementation, which might ease the concerns of low-income developing countries.

The proposed revisions to the Bali text on food security involve clarifications that (i) the “peace clause” sought by India will continue indefinitely until a permanent solution is found to amend the Agreement on Agriculture, and (ii) end-2015 will be set as the target date to reach agreement on a permanent solution. Although this target date may not be realistic, it has been sufficient to elicit India’s acceptance of the new text.

## **Environmental Goods Agreement Negotiations Off to Strong Start as US Pushes for Expanded Product List**

On November 20, 2014, Assistant US Trade Representative for Environmental and Natural Resources (AUSTR) Jennifer Prescott reported that negotiations on the World Trade Organization’s (WTO) Environmental Goods Agreement (EGA) are off to a strong start and stated that negotiators should be “erring on the side of liberalization” when considering additions to the EGA product list.

The EGA aims to eliminate tariffs on environmental technologies, such as solar panels, wind turbines, and water treatment filters. The United States joined thirteen other WTO Member nations as a party to the EGA negotiations in March of 2014. According to the Office of the US Trade Representative (USTR), the fourteen WTO Members participating in the EGA account for 86 percent of global trade in environmental goods, which totaled an estimated USD 1 trillion in 2013.

In a March 21 letter to Congress, USTR Michael Froman stated that the new agreement likely would be applied on a Most Favored Nation basis, under which tariff concessions agreed to by participants would have to be accorded to all WTO Members equally, including non-participants (“free-riders”). To minimize the free-rider problem, however, the agreement would enter into force only if it accounted for a “critical mass” of trade in covered products, which in the past has been understood to mean that an agreement should cover approximately 90 percent of trade.

In order to determine the scope of the EGA, negotiators are attempting to build upon the Asia-Pacific Economic Cooperation (APEC) Members’ List of 54 Environmental Goods. In September 2012, APEC Members agreed to reduce applied tariff rates on the 54 goods to 5 percent or lower by 2015. US business groups supporting the EGA have called the APEC list “far too limited,” however, and a joint statement from the fourteen EGA participating countries committed negotiators to exploration of a “broad range of additional products.”

EGA participants are scheduled to meet for another round of negotiations in Geneva from December 1-5, where products for water treatment, wastewater management, soil and water remediation, and

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noise/vibration suppression will be considered for inclusion. While no deadline for finalizing the deal has been established, sources suggest that negotiators could agree on a final list of products by mid-2015, making an agreement possible by the end of 2015. AUSTR Prescott stated at a November 20 event in Washington, DC that while the EGA negotiations have focused exclusively on tariff elimination thus far, efforts to reduce non-tariff barriers could constitute a second phase of negotiations.

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