



# White & Case LLP General Trade Report - JETRO

December 2014

## In This Issue

United States..... 1  
General Trade Policy..... 1

Free Trade Agreements... 13  
Multilateral ..... 18

## Table of Contents

<b>UNITED STATES .....</b>	<b>1</b>
<b><i>US General Trade Policy Highlights .....</i></b>	<b>1</b>
US Congressional Trade Leaders Strongly Oppose Recently Approved EU Digital Commerce Resolution .....	1
United States and Singapore Sign Two Customs Agreements Designed to Facilitate Trade and Enforcement .....	2
Senate Finance Committee Member Will Seek to Modify US Trade Remedy Laws in Potential 2015 TPA Legislation .....	2
House Ways and Means Committee Announces New Trade Subcommittee Roster; Rep. Pat Tiberi (R-OH) Named as Subcommittee Chairman .....	3
House Energy and Commerce Committee Member Introduces Legislation to Eliminate Ban on US Crude Oil Exports .....	4
Senate Finance Committee Member Unveils Legislation to Modify US Trade Remedy Laws .....	5
US Trade Association Proposes Unified Trusted Trader Program to Streamline Border Processing .....	6
USTR Concludes Out-of-Cycle Review of India's Intellectual Property Rights Policies; No Further Actions Planned .....	7
Presidential Task Force on Illegal, Unreported, and Unregulated Fishing and Seafood Fraud Issues Recommendations; Seeks Public Comments .....	9
US-China Joint Commission on Commerce and Trade Yields Commitments on Competition Law, Agricultural Market Access, and IPR Protection .....	10
Congressional Trade Leaders Express Concerns Regarding India's Trade and Investment Policies Following Release of ITC Report .....	11
<b><i>Free Trade Agreement Highlights .....</i></b>	<b>13</b>
President Obama to Push Congressional Leaders for TPA and Address Concerns Regarding TPP .....	13
US Trade Representative Michael Froman Expects TPP Negotiations to Be Completed in 2015 .....	14
Informal TPP Negotiating Round in Washington, DC Yields Minimal Results .....	15
Congressional Research Service Report Highlights Potential Trade and Investment Agreements Between United States and Taiwan .....	16
<b>MULTILATERAL .....</b>	<b>18</b>
WTO Update: Renewed Optimism After a Difficult Year .....	18
<b><i>Multilateral Highlights .....</i></b>	<b>22</b>
Ongoing TISA Negotiations Complicate Progress on Doha Services Negotiations .....	22
WTO General Council Adopts TFA Protocol of Amendment, Clarifies Bali Decision on Food Security .....	24
Information Technology Agreement Negotiators Fail to Reach Agreement on Product Scope .....	24

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## UNITED STATES

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### GENERAL TRADE POLICY

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#### *US General Trade Policy Highlights*

### US Congressional Trade Leaders Strongly Oppose Recently Approved EU Digital Commerce Resolution

During the past week, several US lawmakers have claimed that a nonbinding resolution approved by the European Union (EU) Parliament on November 27, 2014 could restrict cross-border data flows by forcing localization of cloud computing services. The resolution, titled *Supporting Consumer Rights in the Digital Single Market*, was introduced on November 24, provoking a series of critical letters from US Congressional trade leaders and several other Members of Congress. Congressional leaders have expressed opposition previously to similar “forced localization” policy proposals (most notably, in the context of the Trans-Pacific Partnership negotiations), by which countries require the use of domestic servers as a condition for permission to provide digital services.

On November 25, Sens. Ron Wyden (D-OR) and Orrin Hatch (R-UT), Chairman and Ranking Member, respectively, of the Senate Finance Committee, and Reps. Dave Camp (R-MI) and Sander Levin (D-MI), Chairman and Ranking Member, respectively, of the House Ways & Means Committee, signed a bipartisan letter opposing the EU resolution. A second bipartisan letter opposing the resolution was signed by 12 members of the House of Representatives, each of whom represent districts that are home to US technology firms.

The two letters expressed concerns over a provision in the EU resolution that US lawmakers considered to be a call for localization of cloud computing services in the EU. The letter signed by House Ways & Means and Senate Finance Committee leaders claimed that the provision “could go as far as to create a ‘walled-off EU cloud.’” In a possible reference to the same provision, the House of Representatives letter claimed that the resolution “would stem cross-border data flows at the expense of millions of people” and stated that its adoption “would deter continued innovation and investment from US based Internet companies.” The provision in question, however, does not explicitly mandate localization of cloud computing services, and the potential implications of implementation of the provision are uncertain.

The letter signed by House Ways & Means and Senate Finance Committee leaders warned that the resolution raises questions about the EU’s commitment to the free flow of data worldwide. Collectively, the concerns raised by the lawmakers might impact the broader US-EU trade relationship, in particular the negotiation of the Transatlantic Trade and Investment Partnership agreement.

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## United States and Singapore Sign Two Customs Agreements Designed to Facilitate Trade and Enforcement

On December 1, 2014, the US Customs and Border Protection (CBP) Commissioner and Singapore's Customs Director-General signed two customs agreements intended to increase cooperation between the two countries in the areas of trade facilitation and enforcement.

One of the agreements signed by the two officials is the US–Singapore Customs Mutual Assistance Agreement (CMAA). The CMAA is a bilateral agreement which provides a legal framework for the two customs administrations to exchange information and evidence to assist one another in the enforcement of customs laws. The information exchanged will support efforts to enforce laws related to duty evasion, trafficking, proliferation, money laundering, and terrorism–related activities.

The second agreement is a Mutual Recognition Arrangement (MRA) between CBP's Customs–Trade Partnership Against Terrorism (C–TPAT) program and Singapore Customs' Secure Trade Partnership program. Both programs are voluntary government–industry initiatives which allow participating companies to certify compliance with certain supply chain security criteria in exchange for benefits, such as expedited trade processing and reduced shipment examination rates. According to CBP, the MRA “will link the two industry partnership programs, so that together they create a unified and sustainable security posture that can assist in securing and facilitating global cargo trade.” CBP has stated that the arrangement will provide companies with tangible and intangible benefits, including (i) fewer exams when shipping cargo, (ii) a faster validation process, (iii) common US–Singaporean standards, (iv) transparency between US and Singaporean customs administrations, (v) business resumption, (vi) expedited processing, and (vii) marketability.

Singapore is the United States' 17<sup>th</sup> largest goods trading partner, engaging in USD 49 billion worth of total goods trade with the United States during 2013, according to the Office of the US Trade Representative. Upon signing the two customs agreements, the United States now has 72 CMAAs with other countries, and 10 MRAs with other countries operating customs programs similar to C–TPAT.

## Senate Finance Committee Member Will Seek to Modify US Trade Remedy Laws in Potential 2015 TPA Legislation

Following his December 2, 2014 speech at the Council on Foreign Relations, Sen. Sherrod Brown (D–OH) announced that he will seek to include provisions modifying US trade remedy laws in potential future Trade Promotion Authority (TPA) legislation. The provisions will be modeled after draft legislation known as the *Leveling the Playing Field Act*, which has not been formally introduced in Congress but was announced by Sen. Brown on October 1, 2014.

While the specifics of Sen. Brown's trade remedy legislation are unknown, an aide to the Senator stated that the bill will clarify the threshold used by the International Trade Commission (ITC) to make injury determinations in trade remedy cases. Sen. Brown has argued that the ITC focuses too narrowly on the profitability of domestic industries when making injury determinations and has urged the ITC to give greater consideration to output, employment, and wage effects in its analysis. The

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WHITE & CASE LLP | 2

bill also will contain language designed to prevent foreign companies “from circumventing dumping or countervailing duties by making one-time sales to the US at artificially high prices,” according to the Senator’s aide.

Sen. Brown also has expressed dissatisfaction with the pace of ITC investigations, noting during his December 2 comments that the ITC can take more than one year to investigate antidumping and countervailing duty charges. Sen. Brown stated that he intends to expedite that process, confirming earlier statements by his aide that the draft trade remedy legislation “would ensure foreign respondents can’t slow down the process” of trade remedy investigations.

Passage of TPA in 2015 is uncertain, however, and whether some or all of Sen. Brown’s proposals would be included in any future TPA legislation also is uncertain. In addition, a bill containing such potentially controversial provisions could jeopardize TPA’s passage. Sen. Orrin Hatch (R-UT), presumed to be the next Senate Finance Committee Chairman in 2015, co-sponsored 2014 TPA legislation known as the *Bipartisan Congressional Trade Priorities Act* (BCTPA), which did not include changes to trade remedy laws similar to those proposed by Sen. Brown. Aides for Sen. Hatch have stated that he prefers to pass TPA legislation with as few changes as possible to the BCTPA, although Sen. Hatch’s position on Sen. Brown’s trade remedy proposals is uncertain. Moreover, it is possible that Sen. Hatch would allow some changes to the BCTPA or similar TPA legislation to secure desired bipartisan support. Sen. Brown has stated that outgoing Senate Finance Committee Chairman Ron Wyden (D-OR) is “open” to including the trade remedy language in future TPA legislation but noted that he has not yet discussed the proposal with Sen. Hatch.

## House Ways and Means Committee Announces New Trade Subcommittee Roster; Rep. Pat Tiberi (R-OH) Named as Subcommittee Chairman

On December 4, 2014, incoming House Ways and Means Committee Chairman Rep. Paul Ryan (R-WI) announced that Rep. Pat Tiberi (R-OH) will Chair the House Ways and Means Subcommittee on Trade in the 114<sup>th</sup> Congress. Rep. Tiberi has expressed openness to cooperating with President Obama to advance trade initiatives, stating in a December 4 press release that “plenty of common ground” exists between Democrats and Republicans on US trade policy.

Although Rep. Tiberi did not serve on the Trade Subcommittee in the 113<sup>th</sup> Congress, he consistently has voted in favor of trade initiatives since taking office in 2001. Rep. Tiberi voted in favor of free trade agreements with Chile (2003), Singapore (2003), Australia (2004), Morocco (2004), Bahrain (2005), Oman (2006), Peru (2007), Panama (2011), Colombia (2011), and South Korea (2011); Trade Promotion Authority (2002); and reauthorization of the Export-Import Bank (2002 and 2012). Despite these positions, Rep. Tiberi is not considered to be vocal on trade issues, and his selection as Chairman of the Trade Subcommittee was unexpected.

Rep. Tiberi will be joined by the following eight returning Republican members who currently serve on the Trade Subcommittee: Reps. Devin Nunes (R-CA), Kevin Brady (R-TX), Dave Reichert (R-WA), Vern Buchanan (R-FL), Adrian Smith (R-NE), Aaron Schock (R-IL), Lynn Jenkins (R-KS),

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and Charles Boustany (R-LA). In addition, Rep. Erik Paulsen (R-MN) will join the Trade Subcommittee, replacing Rep. Peter Roskam (R-IL). Similar to Rep. Tiberi, Rep. Paulsen and all eight Republican members returning to the Trade Subcommittee in 2015 have consistently supported trade initiatives, voting in favor of FTAs with Panama, Colombia, and South Korea in 2011. Incoming Ways and Means Chairman Ryan has a similar record in favor of trade initiatives and expressed support for granting TPA to the Obama Administration during an interview in Washington, DC on December 2.

Democratic appointments to the Trade Subcommittee have not been announced, and whether Democrats will lose seats on the Ways and Means Committee as a result of the 2014 Congressional elections remains unknown. Despite these uncertainties, the new leadership and makeup of both the House Ways and Means Committee and the Trade Subcommittee indicate that both entities likely will remain very supportive of trade initiatives in the 114<sup>th</sup> Congress.

Click [here](#) for the list of Republican House Ways and Means Committee and Subcommittee members in the 114<sup>th</sup> Congress.

## House Energy and Commerce Committee Member Introduces Legislation to Eliminate Ban on US Crude Oil Exports

On December 9, 2014, Rep. Joe Barton (R-TX) introduced H.R. 5814, legislation in the House of Representatives that would repeal a longstanding ban on exports of crude oil from the United States. The introduction of the legislation coincided with a December 11 House Energy and Commerce Committee Hearing on the Energy Policy and Conservation Act (EPCA), which established the ban on crude oil exports in 1975. According to a December 2014 Congressional Budget Office (CBO) report, elimination of the ban likely would lead to a slight decline in global oil and liquid fuel prices.

The US federal government regulates the export of crude oil primarily pursuant to Section 103 of the EPCA, which requires the President to “promulgate a rule prohibiting the export of crude oil and natural gas produced in the United States.” Although the EPCA authorizes the President to exempt certain exports from the ban for national interest purposes, the United States maintains an effective ban on almost all crude oil exports. According to the recent CBO report, only one percent of crude oil produced in the United States in 2013 was exported, almost all of it to Canada.

H.R. 5814 would repeal Section 103 of the EPCA and mandate that “no official of the Federal Government shall impose or enforce any restriction on the export of crude oil,” notwithstanding any other provision of law. The legislation also requires the US Secretary of Energy to provide Congress with recommendations on the appropriate size, composition, and purpose of the Strategic Petroleum Reserve, an emergency supply of US crude oil containing approximately 695.9 million barrels.

While H.R. 5814 will not receive a vote before the end of 2014, the prospects for legislation repealing the ban on crude oil exports are expected to improve in the 114<sup>th</sup> Congress. Sen. Lisa Murkowski (R-AK), who is expected to become Chair of the Senate Energy and Natural Resources Committee in the new Republican-majority Senate, opposes the ban and has signaled a willingness

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to pursue legislation to repeal it. According to Sen. Murkowski, the recent decline in crude oil prices bolsters arguments for repealing the ban. Despite these developments, however, the ban on crude oil exports continues to be strongly supported, and whether repeal efforts will succeed in the 114<sup>th</sup> Congress is uncertain.

Rep. Barton argued during a December 11 House Energy and Commerce Committee hearing that permitting crude oil exports would not increase US gasoline prices, a concern that has been expressed by many lawmakers. The CBO report estimates that US consumers of gasoline and oil products likely would benefit from small price reductions if the ban were to be repealed due to a resulting decline in the world price of crude oil. The CBO report also notes that the United States could choose to permit crude oil exports only to countries with which it has free trade agreements, which would have an even smaller impact on prices than a complete repeal of the ban.

Click [here](#) for a copy of the H.R. 5814 and [here](#) for a copy of the CBO report.

## Senate Finance Committee Member Unveils Legislation to Modify US Trade Remedy Laws

On December 10, 2014, Sen. Sherrod Brown (D–OH) introduced the *Leveling the Playing Field Act* (S. 2994), legislation that would modify US trade remedy laws by amending the Tariff Act of 1930. The modifications proposed by the legislation, which was first announced in October, generally are believed to favor petitioners in US trade remedy cases. Although the legislation will not receive a vote in 2014, Sen. Brown has stated that he will seek to have its provisions included in potential Trade Promotion Authority (TPA) legislation that might receive a vote in the 114<sup>th</sup> Congress. While Congressional passage of TPA is likely in 2015, the inclusion of S. 2994's provisions in such legislation is uncertain. Incoming Senate Finance Committee Chairman Orrin Hatch (R–UT) was a co–sponsor of bipartisan TPA legislation introduced in 2014, and has indicated that he would prefer to pass future TPA legislation with as few changes to that bill as possible.

S. 2994 proposes amendments to the Tariff Act that would affect the following aspects of antidumping (AD) and countervailing duty (CVD) investigations:

- **Adverse Facts Available:** Section 2 of the proposed legislation states that in certain instances, if the administering authority uses an adverse inference in selecting among facts otherwise available, it is not required to demonstrate that the countervailable subsidy rate or dumping margin used reflects the “commercial reality” of the interested party. Section 2 also clarifies that when using an adverse inference, the administering authority is not required to make adjustments to a countervailable subsidy rate or weighted average dumping margin based on assumptions about information that an interested party would have provided if it had complied with the request for information.
- **Determination of Material Injury:** Section 3 of the proposed legislation seeks to clarify the threshold used by the administering authority to make injury determinations in trade remedy cases. Section 3 specifies that “the fact that the performance of an affected industry has improved during the period of the investigation shall not preclude a finding of material injury or

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threat of material injury.” Section 3 clarifies that in an investigation initiated by petition, the administering authority may consider the effect of economic recessions on a domestic firm’s performance, in the event that a recession began during the 3–year period prior to the petition being filed. The proposed legislation states that under such circumstances, the administering authority may extend its normal period of investigation to ensure that the period begins at least 365 days before the beginning of the recession. Some observers, however, including former US International Trade Commission Commissioner Daniel Pearson, have stated that the administering authority already makes such considerations under current law and presently has the authority to adjust the period of investigation under special circumstances.

- **Number of Voluntary Respondents:** Section 6 of the proposed legislation specifies a list of factors that may be used by the administering authority to determine whether undertaking an individual examination of a respondent would be “unduly burdensome,” including the complexity of the information presented in questionnaires and other aspects of a given proceeding.
- **Calculation of Normal Value:** Section 7 of the proposed legislation specifies that the administering authority may disregard price or cost values for inputs submitted by firms under investigation that are located in non–market economy countries, if it has reason to believe or suspect that the subject merchandise is being subsidized or dumped, without investigating and determining that subsidization or dumping has occurred. Non–market economy countries are those that the administering authority determines do not operate according to market principles regarding cost or pricing structures, such that sales of merchandise in such countries do not reflect the fair value of the merchandise.

The proposed legislation also would authorize the administering authority to impose the highest possible AD/CVD duty rate against firms that file false certifications with US Customs and Border Protection in an attempt to evade existing trade remedy duties. Whether any of the measures contained within S. 2994 will be incorporated into future trade legislation is unclear; however, Sen. Brown may condition his support for potential TPA legislation on inclusion of the measures.

A copy of S. 2994 is available upon request.

## US Trade Association Proposes Unified Trusted Trader Program to Streamline Border Processing

On December 10, 2014, the American Association of Exporters and Importers (AAEI) announced that it had presented US federal officials with a proposal for a new trusted trader program, which would encompass all 47 US federal agencies with jurisdiction over imports. The proposal was unveiled at a meeting of the Border Interagency Executive Council (BIEC), a group of representatives from several government agencies tasked, pursuant to Executive Order 13659, with streamlining US import and export processes.

The proposed program would be modeled after the Customs–Trade Partnership Against Terrorism (C–TPAT). Administered by US Customs and Border Protection (CBP), C–TPAT is a voluntary government–industry initiative which allows participating companies to certify compliance with

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certain supply chain security criteria in exchange for benefits, such as expedited trade processing and reduced shipment examination rates. The program has become a model for several other initiatives operated by different federal agencies, such as the Food and Drug Administration's Secure Supply Chain Pilot Program and the Consumer Product Safety Commission's Importer Self-Assessment Product Safety program.

Under the AAEL's proposal, these existing initiatives (with the possible exception of C-TPAT) would be merged into a single trusted trader program. Qualifying importers would then apply for designation as Certified Compliant Commercial Entities (3CEs), a status that would be recognized by all 47 trade-regulating agencies. Before receiving the designation, importers would be subject to a risk assessment process that would incorporate the various risk models used by each trade-regulating agency. This process would generally consider (i) the type of importer and its experience importing, (ii) the types of products being imported, (iii) the source country/country of export, and (iv) the importer's compliance record.

The AAEL proposal specifies that importers possessing 3CE status would receive benefits at the pre-shipment, release, and post-entry phases of the import process. These benefits would include a single portal for electronic filing and a single, coordinated multi-agency release process for cargo. Other benefits would include faster cargo processing and clearance, reduced audits, and mitigated penalties. Similar to C-TPAT, the 3CE program would recognize three different tiers of certification, with Tier 3 importers receiving the highest level of benefits. CBP's Centers for Excellence and Expertise would be responsible for managing 3CE accounts under the proposal.

The BIEC and CBP have not commented on the AAEL proposal. However, the BIEC likely will produce recommendations calling for the harmonization of agency risk-management processes, pursuant to its instructions under Executive Order 13659. Issued on February 19, 2014, the Executive Order instructed the BIEC to develop common risk management principles and methods and identify opportunities to eliminate redundant capabilities among trade-regulating agencies.

A copy of the AAEL proposal is available upon request.

## **USTR Concludes Out-of-Cycle Review of India's Intellectual Property Rights Policies; No Further Actions Planned**

On December 12, 2014, the Office of the US Trade Representative (USTR) announced the conclusion of an Out-of-Cycle Review (OCR) of India's intellectual property policies. USTR stated that India has made "useful commitments" to improve its intellectual property rights (IPR) regime and did not disclose any plans to take further action against India as a result of the OCR. The nature and scope of the commitments referenced by USTR are unknown, however, and multiple sources have speculated that India's intellectual property policies are unlikely to undergo significant change as a result of the OCR.

Initiated on October 14, the OCR was intended to supplement the 2014 edition of USTR's Special 301 Report examining international IPR practices, in which India was listed on the IPR "Priority Watch List". In the report, published in April 2014, USTR identified India as one of ten countries in

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WHITE & CASE LLP | 7

which “particular problems exist... with respect to IPR protection, enforcement, or market access.” The report highlighted multiple IPR issues of concern regarding India, including copyrights, counterfeiting, data protection, localization trends, patents, trade secrets, and trademarks, and announced plans to conduct the OCR in the fall of 2014. Following the initiation of the OCR in October, the Indian government informed US officials that it would not cooperate with the review, opining that USTR’s actions were unilateral and that US–Indian IPR issues should be addressed exclusively through the high–level US–India IPR working group established during Indian Prime Minister Narendra Modi’s September 30 meeting with President Obama.

Despite these initial objections, USTR’s December 12 statement reported that in recent months, “there have been multiple engagements with Government of India officials at the staff and senior levels on the broad range of issues of concern.” These engagements included, according to USTR, commitments to institutionalize high–level engagement on IPR issues, to pursue a specific work program, and to deepen bilateral cooperation and information exchange on IPR–related issues under the US–India Trade Policy Forum (TPF). The TPF, which was held on November 25 in New Delhi, India, was followed by a joint statement in which USTR Michael Froman and Indian Minister of Commerce and Industry Nirmala Sitharaman announced an agreement on a 2015 work plan to address intellectual property issues. As a result of these developments, USTR likely will not pursue further actions to investigate India’s intellectual property policies at this time.

The details of the 2015 work plan have not been released, however, leading some sources to speculate about the nature of potential concessions that the Government of India might have made. Following the USTR announcement, Secretary–General D.G. Shah of the Indian Pharmaceutical Alliance stated that India “seems to have conceded something that led to the conclusion of the OCR. Either the USTR is misleading its constituency, or we do not know what is promised by the Commerce Minister.” However, other sources have downplayed the likelihood that India has agreed to significant concessions as a result of the OCR. Following the USTR announcement, one member of a six–member panel tasked with drafting India’s National Intellectual Property Rights Policy stated that the “fundamental principles” of India’s IP policies would not change. Referring to the World Trade Organization’s Agreement on Trade–Related Aspects of Intellectual Property Rights (TRIPS), the panel member stated that India would not enact IPR policies that go beyond its TRIPS obligations. “Everything India does is TRIPS compliant,” stated the panel member. “If any country ever asks us, by way of bilateral agreements, to do something that is TRIPS–plus, we have refused.”

The USTR announcement was criticized by incoming Senate Finance Committee Chairman Orrin Hatch (R–UT), who previously had called on the Obama Administration “to use the OCR to develop a meaningful and effective action plan with definitive timetables” to address India’s alleged intellectual property shortcomings. Sen. Hatch criticized the alleged “lack of concrete action” resulting from the OCR and renewed his call for an IPR work plan containing specified timetables for India’s implementation of IPR policy reforms.

Click [here](#) for a copy of the USTR press release.

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## Presidential Task Force on Illegal, Unreported, and Unregulated Fishing and Seafood Fraud Issues Recommendations; Seeks Public Comments

On December 18, 2014, the Presidential Task Force on Illegal, Unreported, and Unregulated (IUU) Fishing and Seafood Fraud published in the *Federal Register* a series of recommendations intended to combat IUU fishing and seafood fraud, including as such fishing and fraud relates to shrimp (79 Fed. Reg. 75536). Established on June 17, 2014 and co-chaired by the Department of Commerce and the Department of State, the Task Force recommended to the President a comprehensive framework to combat IUU fishing and seafood fraud. The recommendations are available for public comment no later than January 20, 2015.

The Task Force made 15 recommendations within the following four general themes:

- **International:** Work with international governments and regional fisheries management organizations to combat IUU fishing and seafood fraud;
- **Enforcement:** Strengthen enforcement tools to combat IUU fishing and seafood fraud;
- **Partnership:** Create and expand partnerships with US state and local governments, industry, and non-governmental organizations to identify and eliminate seafood fraud and IUU seafood in US commerce; and
- **Traceability:** Create a risk-based traceability program to track seafood from harvest to entry into US commerce to prevent entry of illegal products into the supply chain and better inform retailers and consumers.

The following four recommendations are of particular interest:

- **Free Trade Agreements:** Direct the United States Trade Representative (USTR) to use existing and future free trade agreements to combat IUU fishing and seafood fraud, including through enhanced cooperation with trading partners and commitments to enforce environmental and labor laws;
- **Subsidies:** Direct USTR and the Secretaries of Commerce and State to pursue international commitments to eliminate fisheries subsidies that contribute to excess fishing capacity, overfishing, and IUU fishing by 2020;
- **Tariffs:** Direct USTR and the Secretaries of Commerce and Homeland Security to work with the International Trade Commission to adjust US tariff codes to enhance identification in trade of species subject to IUU fishing or seafood fraud accordingly; and
- **Traceability:** Direct the Task Force to establish a risk-based traceability program to track seafood from point of harvest to entry into US commerce.

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WHITE & CASE LLP | 9

According to the notice published in the *Federal Register*, IUU fishing is “[o]ne of the biggest global threats to the sustainable management of the world’s fisheries,” and global losses attributable to IUU fishing are estimated to be between USD 10 to 23 billion annually. Whether the President will instruct executive agencies, as applicable, to adopt the recommendations is uncertain. Regardless, going forward, the newly created Task Force will report annually to the President on “key issues related to IUU fishing and seafood fraud, and progress on development and implementation of a comprehensive and risk-based traceability program.”

Click [here](#) to view a copy of the Federal Register Notice.

## US–China Joint Commission on Commerce and Trade Yields Commitments on Competition Law, Agricultural Market Access, and IPR Protection

From December 16 to 18, 2014, a high-level US delegation including US Trade Representative (USTR) Michael Froman and Secretary of Commerce Penny Pritzker met with Chinese government officials during the 25<sup>th</sup> session of the US–China Joint Commission on Commerce and Trade (JCCT) in Chicago, Illinois. According to USTR Froman, US negotiators secured commitments from China on a number of priority issues, including intellectual property rights protection, competition law enforcement, and agricultural market access.

The US–China Bilateral Investment Treaty (BIT) currently under negotiation also was discussed at the JCCT, but no significant breakthroughs were reported, despite a commitment made by both countries in July to agree on a core BIT text by the end of 2014.

Following the conclusion of the JCCT meeting on December 18, the Department of Commerce (DOC) reported outcomes in the following areas:

- **Trade Secret Protection:** China acknowledged that it would conduct a legislative study of a revised law on trade secrets and confirmed that government officials who illegally disclose companies’ trade secrets “are to be subject to administrative or legal liability.” Chinese officials made a similar pledge to refine and enforce trade secret law during the 24<sup>th</sup> meeting of the JCCT in 2013, but sources allege that minimal progress has been made in this area. According to the US–China Economic and Security Review Commission’s (USCC) 2014 Annual Report to Congress, alleged cyber-espionage in China “continued unabated in 2014” and included state-sponsored attempts to obtain company data, despite US efforts to combat such practices.
- **Agricultural Biotechnology:** China announced that it would issue import approvals for one genetically modified corn variety and two genetically modified soybean varieties commonly grown by US farmers. In addition, the United States and China agreed to establish a “Strategic Agricultural Innovation Dialogue” at the Vice-Ministerial level to address issues related to trade in biotechnology products.
- **Medical Devices and Pharmaceuticals Market Access:** China committed to study and implement institutional reforms that would expedite its review and approval process for

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pharmaceuticals and medical devices, with the goal of reducing the overall time-to-market for such products.

- **Competition Law:** Responding to US concerns regarding alleged discriminatory treatment of foreign companies under China's anti-monopoly law (AML), China clarified that in enforcing the AML, all business operators should be treated equally. China committed to publish in a timely manner the final versions of administrative decisions that impose liabilities on a party under the AML, including the reasons and evidence according to which decisions are based, and agreed to refrain from publishing information containing trade secrets. China also affirmed that it would permit interested parties to have legal counsel present during meetings with its three Antimonopoly Enforcement Agencies.
- **Geographical Indications (GIs):** China and the United States expressed agreement on fundamental principles related to GIs and acknowledged that the relationship between trademarks and GIs is to be handled in accordance with the WTO's Trade Related Aspects of Intellectual Property Rights Agreement.
- **Online Infringement:** China committed to strengthen enforcement against unlawful trademark counterfeiting and copyright piracy activities in the online environment. Specifically, China agreed to classify products having significant public health and safety impacts as priorities and to carry out enforcement-related actions "in a practical and timely fashion."
- **Government Procurement:** China confirmed that it would publish for public comment the draft Interim Administrative Measures for the Government Procurement of Domestic Goods.

Whether such commitments will result in concrete policy and enforcement actions is uncertain. The USCC's 2014 Annual Report expressed skepticism regarding China's adherence to previous commitments made during the JCCT and identified instances in which US federal agencies have claimed that China has been slow to implement policy changes agreed to during JCCT meetings. The USCC report recommended that the Government Accountability Office (GAO) be directed to assess whether China has implemented commitments made under the JCCT.

Click [here](#) for a copy of the DOC Fact Sheet.

## Congressional Trade Leaders Express Concerns Regarding India's Trade and Investment Policies Following Release of ITC Report

On December 22, 2014, the US International Trade Commission (ITC) released the findings of ITC Investigation No. 332-543, titled "*Trade, Investment, and Industrial Policies in India: Effects on the U.S. Economy*." The investigation was requested in August 2013 by then-Senate Finance Committee Chairman Max Baucus (D-MT) and Ranking Member Orrin Hatch (R-UT), as well as House Ways and Means Committee Chairman Dave Camp (R-MI) and Ranking Member Sander Levin (D-MI). Following the release of the ITC's findings, which included allegations that US companies face significant barriers to trade and investment in India, Congressional trade leaders

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WHITE & CASE LLP | 11

reiterated concerns regarding India's trade and investment policies and urged the Indian government to enact reforms.

The ITC report alleged that “a wide range of restrictive Indian policies... have adversely affected U.S. companies doing business in India” and stated that such policies have inhibited bilateral economic activity between the two countries. In particular, the report alleged that the main Indian policy barriers affecting US companies include (i) tariffs and customs procedures, (ii) foreign direct investment restrictions, (iii) local-content restrictions, (iv) treatment of intellectual property, (v) taxes and financial regulations, (vi) regulatory uncertainty, and (vii) other nontariff measures. US firms in the agriculture, financial services, and pharmaceutical sectors have been the most severely impacted by such policies, according to the ITC.

Following the publication of the ITC's findings, Congressional trade leaders issued a joint statement on December 22 expressing concerns over the alleged “systemic and continuing market access barriers” identified by the investigation. The statement, which urged the Indian government to address the areas of US concern, was signed by Senate Finance Committee Chairman Ron Wyden (D-OR), Ranking Member Orrin Hatch (R-UT), House Ways & Means Committee Chairman Dave Camp (R-MI), and Ranking Member Sander Levin (D-MI). The lawmakers also noted that a second ITC investigation of India's trade and investment practices has been requested to be delivered to Congress by September 24, 2015. The second ITC investigation, which was requested in light of recent national elections in India and the formation of the new Bharatiya Janata Party-led government, will seek to determine whether India has made any significant changes to the trade and investment policies identified by the first investigation.

US scrutiny of India's trade policies has intensified over the past year and will continue during 2015 despite a recent increase in bilateral engagement between the two countries. Although the Office of the US Trade Representative (USTR) has cited India's recent agreement to an intellectual property work plan for 2015 as a sign of progress, Sen. Hatch, who will serve as Chairman of the Senate Finance Committee in the 114<sup>th</sup> Congress, has criticized the work plan as insufficient. According to USTR, the work plan schedules a series of technical meetings between the United States and India to discuss intellectual property rights issues but does not establish deadlines for India to adopt specific policy changes. Such commitments are unlikely to satisfy US lawmakers who have alleged that India has shown disregard for the protection of US intellectual property rights.

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

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WHITE & CASE LLP | 12

## FREE TRADE AGREEMENTS

### *Free Trade Agreement Highlights*

## President Obama to Push Congressional Leaders for TPA and Address Concerns Regarding TPP

Following a December 3, 2014 speech at the Business Roundtable in Washington, DC, President Obama announced that he will work with Congressional leaders to promote the passage of legislation granting Trade Promotion Authority (TPA). The announcement follows significant discussion regarding the implications of the 2014 Congressional elections for US trade policy, including likely effects on potential passage of TPA. President Obama also acknowledged that some Congressional Democrats remain skeptical of the Trans-Pacific Partnership (TPP) agreement and stated that he intends to address those concerns to facilitate the agreement's eventual passage.

President Obama stated that he will speak with incoming Senate Majority Leader Mitch McConnell (R-KY) and Minority Leader Harry Reid (D-NV), as well as House Speaker John Boehner (R-OH) and Minority Leader Nancy Pelosi (D-CA), to make a "strong case" for TPA. President Obama did not provide details regarding the timing of potential TPA legislation but implied that Congressional action on tax reform likely would precede potential trade legislation in 2015.

Describing the President's remarks as "long overdue," likely incoming Senate Finance Committee Chairman Orrin Hatch (R-UT) signaled during a December 3 speech at the National Foreign Trade Council that he would seek to advance TPA legislation quickly in the 114<sup>th</sup> Congress. After stating that TPA would be crucial to successfully concluding pending trade agreements, Sen. Hatch said that he will seek bipartisan consensus on TPA but will not "wait around forever for everyone to be satisfied" before moving forward with the legislation. However, Sen. Hatch cautiously noted that successful passage of TPA "is not guaranteed." During the past week, other Republican leaders, including Sen. McConnell and incoming House Ways & Means Chairman Paul Ryan (R-WI), have expressed willingness to cooperate with President Obama to pass TPA in 2015.

Regarding TPP, President Obama acknowledged that some Congressional Democrats remain skeptical of the agreement due to constituent concerns regarding the impacts of trade agreements on US wages and employment. President Obama argued that the alleged connection between trade and wage stagnation is based upon a "half-truth," and stated that he intends to "dispel some of the myths" that have made advancement of trade initiatives politically challenging. Touting the labor, environmental, and intellectual property standards being negotiated for inclusion in TPP, President Obama argued that the agreement would benefit US workers and would not create new incentives for companies to offshore their operations, an issue of concern among Democratic lawmakers. President Obama stated that while he believes Democratic lawmakers have "legitimate complaints" regarding such issues, such lawmakers are "barking up the wrong tree when it comes to opposing TPP, and I'm going to have to make that argument."

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WHITE & CASE LLP | 13

## US Trade Representative Michael Froman Expects TPP Negotiations to Be Completed in 2015

In a December 3, 2014 meeting with members of the New Democrat Coalition in Washington, DC, US Trade Representative (USTR) Michael Froman reported that he expects negotiations on the Trans-Pacific Partnership (TPP) agreement to be completed by the end of 2015. The statement follows a November 10, 2014 report in which TPP Ministers stated that the conclusion of the negotiations was “coming into focus”. USTR Froman also stated that passage of legislation granting Trade Promotion Authority (TPA) must precede Congressional consideration of a final TPP agreement and implied that such consideration should occur before the end of 2015 to avoid conflict with the 2016 Presidential election.

USTR Froman also delivered an update on the status of agricultural market access negotiations with Japan. While the United States and Japan have come closer to agreement on market access for beef and dairy products, USTR Froman stated that discussions regarding rice only recently began. US rice producers reportedly have sought an increase in Japan’s tariff-rate quota, which is set at 682,000 metric tons for milled rice, and increased access to Japanese end users. According to the US producers, Japan limits direct exports of US rice to Japanese end users and requires that a large share of US rice exports be sold to a Japanese government agency and stored for eventual sale by the government to commercial users. US rice producers reportedly have asked US negotiators to seek an increase in the quantity of rice that can be sold directly by US exporters to Japanese end users. USTR Froman acknowledged that this aspect of the negotiations will be challenging. While market access issues are scheduled to be discussed at the December 7 – 12 informal TPP negotiating round in Washington, DC, sources consider it unlikely that any major concessions will be made prior to Japan’s upcoming national elections on December 14.

Regarding the intellectual property chapter of TPP, USTR Froman stated that a mechanism allowing low-income countries to phase-in the agreement’s intellectual property rights (IPR) protection standards for pharmaceuticals is still being debated. While TPP parties have agreed that the IPR protection standards for pharmaceuticals initially will apply only to high-income countries, disagreement exists regarding whether an income-based threshold or a time-based phase-in period should be used to determine when low-income countries will be required to enforce the new standards. Intellectual property is not expected to be discussed at the working-group level during the upcoming TPP negotiating round in Washington, DC, although informal discussions on the subject might occur.

Following the meeting with USTR Froman, New Democrat Coalition Chairman Rep. Ron Kind (D-WI) stated that Congress should move quickly to enact TPA so that Congressional consideration of a completed TPP agreement could take place prior to the 2016 Presidential election. However, Rep. Kind also asserted that a TPA proposal excluding renewal of Trade Adjustment Assistance (TAA) would “collapse pretty quickly,” indicating that some Democratic members likely will condition their support for TPA on the inclusion of TAA renewal. Whether these or other conditions might delay bipartisan consensus on TPA legislation remains uncertain; should they do so, however, completion and Congressional consideration of a TPP agreement in 2015 might be jeopardized.

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WHITE & CASE LLP | 14

## Informal TPP Negotiating Round in Washington, DC Yields Minimal Results

From December 7 – 12, 2014, chief negotiators and working groups for the TransPacific Partnership (TPP) agreement held an informal round of negotiations in Washington, DC. Minimal progress was made during the round, and although US Trade Representative (USTR) Michael Froman recently stated that he expects the agreement to be concluded in 2015, a number of controversial issues remain unresolved.

During the December round, TPP working groups covering state-owned enterprises (SOEs), market access, rules of origin, the environment, and legal issues reportedly held meetings. Chief negotiators for each of the twelve participating countries also held meetings. The parties aimed to make progress on several “non-sensitive” aspects of the agreement, postponing more controversial issues for future rounds. Following the conclusion of the December round, a USTR spokesman stated that progress was made on SOEs, the environment, textiles, and technical barriers to trade but declined to provide further details regarding specific issues. The spokesman stated, however, that the remaining list of unresolved issues is becoming “smaller and smaller.”

Such remaining issues include a multi-party disagreement regarding the enforcement of intellectual property (IP) standards and bilateral market access negotiations between the United States and Japan. An IP working group, which is seeking to resolve the controversial IP chapter of TPP, did not meet during the December round, although sources have said that IP issues were discussed in other formats during the round. Several observers also speculated that Japan’s recent elections, which were held on December 14, made it unlikely that major concessions would occur regarding market access or other key issues during the round.

Environmental negotiations also failed to progress significantly during the December round due to continued disagreements in a number of areas. First, negotiators disagree on which multilateral environmental agreements (MEAs) should be referenced in the TPP environmental chapter and the extent to which TPP signatories should be obligated to adhere to the terms of those agreements. Some TPP countries reportedly prefer that only three MEAs be referenced in the agreement: the Convention on International Trade in Endangered Species of Wild Flora and Fauna, the International Convention for the Prevention of Pollution from Ships, and the Montreal Protocol on Ozone Depleting Substances. The United States, however, reportedly seeks a broader commitment that would reference four additional MEAs. US negotiators also prefer the implementation of a dispute settlement mechanism that would address non-compliance with the MEAs referenced in TPP, while some countries continue to oppose the use of such a mechanism.

TPP countries have scheduled another informal negotiating round from January 26 to February 2, to be followed by a ministerial meeting in February or March. The recent victory of Japanese Prime Minister Shinzo Abe’s party in the December 14 elections might affect the outcome of those negotiations. Some observers have stated that the victory, which Prime Minister Abe described as a “public mandate” for his agenda, might increase the likelihood of concessions on automobile and agricultural market access negotiations with the United States. These observers also have noted, however, that such concessions might not occur until the US Congress grants Trade Promotion

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Authority to the Obama Administration, ensuring that the final TPP agreement, if reached, will be considered by Congress without amendments.

## Congressional Research Service Report Highlights Potential Trade and Investment Agreements Between United States and Taiwan

On November 26, 2014, the Congressional Research Service (CRS) issued a report analyzing political and economic ties between the United States and Taiwan, highlighting several potential trade and investment initiatives between the two countries. The report follows a September 23, 2014 letter sent by 29 US Representatives to Secretary of State John Kerry, which called for increased engagement between the United States and Taiwan. The CRS report describes the following initiatives as salient issues for US–Taiwan policy:

- **Bilateral Investment Agreement (BIA):** The report states that a potential BIA with Taiwan could improve each country's investment climate by introducing a dispute settlement mechanism, increasing transparency, and lowering investment barriers. Taiwan allegedly bans or limits foreign investment in several sectors, including agriculture, chemical manufacturing, and transportation, and allegedly restricts foreign direct investment in telecommunications, high-speed rail, and piped natural gas. According to the report, Taiwanese officials have prioritized signing a BIA with the United States as a precursor to completing a broader trade agreement. House Foreign Affairs Committee Chairman Ed Royce (R–CA) and Senate Foreign Relations Committee Chairman Robert Menendez (D–NJ) have expressed support for a BIA with Taiwan, as have several other Members of Congress.
- **Free Trade Agreement (FTA):** The report notes that Taiwan was the United States' 12<sup>th</sup> largest trading partner and the 7<sup>th</sup> largest export market for US agricultural products in 2013. Agricultural issues figure prominently in US–Taiwan trade negotiations, according to the report, with Taiwan's alleged restrictions on US beef imports serving as a major impediment to the successful negotiation of a US–Taiwan Trade and Investment Framework Agreement (TIFA). According to the CRS report, the alleged restrictions led to the suspension of TIFA talks from July 2007 to March 2013, and although Taiwan has since eased the restrictions, Members of Congress have called for the United States to initiate a WTO dispute against similar alleged Taiwanese restrictions on US pork. Although progress reportedly was made on intellectual property and investment issues during an April 2014 TIFA negotiating round, the dispute over US pork remains unresolved, along with other sanitary and phytosanitary issues.
- **Trans–Pacific Partnership (TPP):** Taiwan has expressed interest in joining TPP, although the report notes that the country faces challenges in joining multilateral trade negotiations. Although Taiwan will not be one of the initial signatories to TPP, the country likely will attempt to join TPP as part of a second group of signatories after the initial agreement is completed. Sen. Menendez has expressed support for Taiwan's accession to TPP, while the Obama Administration has urged Taiwan to unilaterally liberalize certain trade and investment policies before joining TPP at a later date.

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## MULTILATERAL

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### MULTILATERAL

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## WTO Update: Renewed Optimism After a Difficult Year

### Summary

The World Trade Organization (WTO) ended 2014 on a high note. The new Trade Facilitation Agreement (TFA) finally was adopted and sent for ratification after a four-month long impasse, during which India's demand for parallel action on food security had paralyzed the WTO and brought the Doha Round close to collapse. In addition, intensive bilateral work between the United States and China produced a breakthrough on the negotiation of an expansion of the WTO's Information Technology Agreement, and reportedly also on China's accession to the WTO's Government Procurement Agreement (GPA). Towards the end of the year, progress also was made on negotiating an Environmental Goods Agreement (EGA) within the framework of the WTO.

WTO Members now face the very challenging task of reaching agreement by July 2015 on a "clearly defined work programme" to conclude all of the remaining parts of the Doha Round, known as the Bali Work Programme. This will require WTO Members to reach agreement on key political parameters, in particular the level of ambition to aim for in the core market access subjects of Agriculture, Non-Agricultural Market Access, and Services, and the development flexibilities that will be offered to the major emerging market economies. The Doha Round needs to be concluded if the WTO is to remain relevant in a world that soon could see several large, new trade agreements in place – particularly the Trans-Pacific Partnership (TPP), the Trade in Services Agreement (TISA) and the US-EU Transatlantic Trade and Investment Partnership (TTIP). A reasonable target for concluding the Doha Round would be the end of 2016. The price for finishing it promptly, however, might involve settling for a relatively low level of ambition. That would be a disappointing outcome, but many WTO Members view it as a price worth paying to allow the WTO to turn the page on Doha.

### Background

In 2015, governments will mark the 20<sup>th</sup> anniversary of the creation of the WTO. There will be much to celebrate. The new disciplines created in the Uruguay Round generally have been effective, and WTO rules are crucial for managing key trade relationships, especially among the world's major economies. However, the WTO clearly has fallen short of expectations in the negotiation of new trade agreements. The TFA is the only concrete outcome after 14 years of negotiating the Doha Round. WTO Members have the daunting task of making multilateral trade negotiations work effectively in the 21st century, but that cannot be done until the Doha Round is complete. Finishing Doha will be the priority for the next eighteen months.

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## Analysis

### I. THE 2014 HARVEST

The biggest prize of 2014 is the new TFA. Over 50 developing countries already have annexed their Category A notifications to the TFA (notifications of parts of the TFA that the countries will implement as soon as the TFA enters into force) so that they are in a position to ratify the agreement relatively soon. The industrialized countries, however, must implement the whole TFA as soon as it enters into force. The numbers already are close to the requirement of ratification by two-thirds of the membership (107 out of 160) that is needed for the TFA to enter into force, so there should not be a problem in making the TFA a covered agreement of the WTO in 2015.

Also significant is the expanded Information Technology Agreement (ITA).<sup>1</sup> Progress on expanding the ITA had stalled throughout most of 2014 until the November APEC Leaders' Summit in Beijing, when China signaled its willingness to accept a large increase in product coverage. This breakthrough generated optimism that in their final meeting of the year, parties would reach agreement to expand the coverage of the ITA from 120 products to approximately 200. This agreement failed to materialize, however, when objections to the exclusion of a small number of additional products that are important to Korea, among others, proved insurmountable. Negotiations on product coverage therefore will continue in 2015. In addition, there will be other important issues for parties to the ITA to address in 2015. Once parties reach agreement on the expanded ITA product scope, difficult negotiations on the phase-out period for tariffs will follow. The ITA expansion currently being negotiated will follow the same rules regarding the phase-out of tariffs as the current ITA. Under such rules, phase-outs that do not occur immediately are allowed to occur over a period of either three or five years, or, regarding particularly sensitive products, over an exceptional timeframe of seven years. While this phase of the negotiations likely will be challenging, prospects for an overall agreement in 2015 appear positive. The current parties likely will account for approximately 90 percent of world trade in the products being proposed for inclusion, which the parties feel is necessary for the ITA to enter into force. Further consideration will have to be given to the treatment of potential "free-riders," however, such as Argentina, Brazil, India, Indonesia, and South Africa, who are not participating in the negotiations.

A positive start has been made on the negotiation of a new EGA among 13 countries plus the EU.<sup>2</sup> The initial aim is to eliminate tariffs, with a possible future expansion of the agreement to cover non-tariff barriers. It is hoped that a list of covered products can be agreed on by mid-2015, building on the list of 54 environmental products that APEC members already have agreed to liberalize. As in the case of the ITA, the objective is to reach a critical mass agreement with benefits that could be applied on a most favoured nation basis to all WTO Members.

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<sup>1</sup> The core group of participating countries includes Albania, Australia, Bahrain, Canada, China, Colombia, Costa Rica, Croatia, El Salvador, the EU, Guatemala, Hong Kong, Iceland, Israel, Japan, Malaysia, Montenegro, New Zealand, Norway, the Philippines, Singapore, South Korea, Switzerland, Taiwan, Thailand, Turkey, and the United States.

<sup>2</sup> Australia, Canada, China, Costa Rica, the EU, Hong Kong, Japan, New Zealand, Norway, Singapore, South Korea, Switzerland, Taiwan, and the United States.

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WHITE & CASE LLP | 19

The GPA also is progressing. The revised and expanded GPA entered into force in April, and New Zealand and Montenegro completed their accession to the GPA in October, bringing the number of signatories to 45. China has promised to table its revised offer to join the GPA before the end of 2014, and it is hoped that this revised offer will represent a significant improvement over China's previous offers and open the way for China's rapid accession. Should that occur, attention will turn to other large economies on the GPA waiting list. Australia is poised to begin its accession process, and Russia and Saudi Arabia have an obligation, pursuant to their WTO accession protocols, to negotiate for accession.

In sum, like-minded countries are finding ways to move ahead within the WTO to create new market access opportunities in specific areas without waiting for the resumption of negotiations on the Doha Round. Negotiations on the plurilateral TISA are another example of this progress. Although they are not occurring within the WTO framework, TISA participants are open to bringing the negotiations into the WTO under the rubric of the Doha Round if there is sufficient interest among other WTO Members in contributing to the result.

## II. COMPLETING DOHA

WTO Ministers agreed in Bali to prepare a "clearly defined work programme" to complete the Doha Round. The original deadline was the end of 2014, but due to this year's delay in finalizing the TFA, the target now has been set at the end of July 2015. That target appears very challenging given that no real progress on the Round has been made since 2008, but governments cannot afford to continue to drag out these negotiations without running the risk of driving the WTO into obscurity.

WTO Director-General Azevêdo summarized the challenge at the final General Council meeting of 2014, urging delegations to take an approach on the substance that is reasonable and pragmatic: "If we overreach then we will get bogged down once again – and I think that is the worst-case scenario for everyone." Such statements suggest that the level of ambition will be the key to success. The individual Negotiating Groups will begin work early in 2015, but Director-General Azevêdo will take overall control of the negotiations on the Work Programme through the Trade Negotiations Committee (TNC) that he chairs, starting with a TNC meeting on January 21, 2015. Such control will allow him to introduce the important dimension of trade-offs between the different areas of the negotiations that will have to be made to balance the different priorities of Members.

The Work Programme needs to contain the key political instructions on "what" and "how" results are to be achieved on each of the Doha negotiating topics, which will allow the technical-level negotiators to resume work on the legal texts. The most recent inspiration is to be found in the draft negotiating texts that were tabled in an attempt to conclude the Round in 2008, but that attempt failed, and views differ sharply among Members now regarding the relevancy of those texts as a realistic starting point for trying to agree on the new Work Programme.

This is especially true in the core market access issues of Agriculture and Non-Agricultural Market Access (NAMA). Even the basics of the negotiations on those two issues are now questioned by some Members. In particular, the use of the Swiss formula to cut tariffs has been questioned, as well as the flexibilities that will be available to developing countries, especially the large emerging economies, to protect their farmers and manufacturing industries. The United States, for example,

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WHITE & CASE LLP | 20

considers that a fresh start needs to be made without reference to the 2008 draft texts, while the EU has insisted on parallelism between the three pillars of domestic support, market access, and export competition in Agriculture, as well as a balance with NAMA. Others have questioned the value of using the Swiss formula to cut tariffs since doing so does not facilitate trade-offs across negotiating groups. In Agriculture, Members now have the added complication of incorporating India's demand for a permanent solution to allow developing countries to use subsidies for the purposes of food security.

On Services, negotiations in the Doha Round effectively have stopped as the separate TISA negotiations proceed outside the WTO. If those negotiations are successful, they could provide a platform for quick progress on Services in the broader Doha context, but relying on this possibility could be risky. At a minimum, progress on Services for the Work Programme in July should include an agreement to table revised market access offers. The existing offers are nine years old and no longer reflect current priorities or patterns of trade, for example, electronic commerce and digital trade.

The level of ambition that Members aim for on market access is tied to the flexibilities that will be provided for developing countries. The higher the level of ambition, the more flexibility will be expected by developing countries to protect their domestic industries and farmers. However, developed countries are not prepared to offer the same flexibility to large emerging market economies as to other developing countries. Rather, developed countries want large emerging market economies to graduate from full developing country status and accept a high degree of reciprocity in the negotiations if there is to be a deal. Emerging economies, however, have not accepted that principle. This will be a challenging exercise in settling on the Work Programme.

Other topics in the Doha Round – for example, proposed revisions to rules regarding trade remedy practices, industrial and fishery subsidies, and intellectual property – will progress only if compromises can be found on market access issues. Given the differences in the positions of the major players, the vexing question of developing country flexibilities, and the limited time remaining to reach a deal on the Work Programme, a low level of ambition on market access might be the only realistic prospect. Expectations of results in the Rules areas will need to be downgraded accordingly.

### Outlook

It will be disappointing to Members if the Work Programme in July offers only a low level of ambition with very little real liberalization of trade, but not as damaging to the credibility of the WTO as failing to grasp this opportunity to conclude the Doha Round. Real liberalization could still come from supplementary critical-mass agreements in areas such as the ITA or the EGA, or through importing the results of the TISA. Such a package would fall well short of the expectations set when the Doha Round was launched, but the reality is that time has run out. If there is no prospect of agreement on Doha by July 2015, many of the major countries likely will turn their backs on Doha, instead concentrating on their regional and plurilateral negotiations, which appear far more promising.

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WHITE & CASE LLP | 21

## *Multilateral Highlights*

### **Ongoing TISA Negotiations Complicate Progress on Doha Services Negotiations**

In December, negotiations on trade in services took place on two levels in Geneva, Switzerland. First, the 23 countries negotiating outside of the WTO for a plurilateral Trade in Services Agreement (TISA) held their latest round of discussions from December 1 to 5 and will meet again from February 9 to 13. Second, inside the WTO, the Special Session of the Council for Trade in Services, which carries out the negotiations on services in the Doha Round, met on December 17. The goal of the meeting was to begin the task of reaching agreement on the services component of a “clearly defined work programme” (also known as the Bali Work Programme) designed to conclude all of the remaining parts of the Doha Round. The work programme is to be agreed upon by July 2015. These two negotiations, while legally separate, clearly impinge on each other, and there is a danger that while TISA progresses, it will undermine the policy commitment and investment of resources that will be necessary to produce results in the Doha Round.

In this first meeting of the Special Session since the post-Bali resumption of work in the Doha Round, delegations gave only general indications of their positions. The discussion centered on the appropriate level of ambition to be set in the work programme, with some delegations emphasizing the need for a level of ambition equal to that in Agriculture and Non-Agricultural Market Access (NAMA). Other delegations maintained, however, progress in Agriculture must occur before negotiations on services can advance. (Reference also was made in the previous week’s meeting of the General Council to the “sequencing” decision at the Hong Kong Ministerial Conference of 2006, which effectively put agriculture and NAMA before services.) This is likely to be a continuing controversy in the coming months. There has been a clear lack of leadership in these negotiations, since most of the countries which demanded the liberalization of services in the Doha Round have been and continue to be preoccupied with the TISA negotiations. Indeed, the TISA process was born out of the frustration of these countries with the lack of progress on services in the Doha Round. The United States, the European Union, Australia and other countries interested in services liberalization have not been pressing for movement in the Doha Round.

The TISA negotiations, on the other hand, are advancing, albeit slowly. Of the 21 participants that tabled initial offers of market access commitments in late 2013, only one, Panama, has submitted a revised offer. However, issues of substance are being addressed, and the basic framework of the Agreement is largely agreed. During the December meetings, a disagreement reportedly occurred between the United States and most of its partners regarding a US proposal that has given rise to disagreements in previous meetings. The proposal, which has become known as “MFN Forward,” would require TISA participants to extend to all other participants any future liberalization that they may negotiate in bilateral or regional agreements with third countries. For example, if the EU were to negotiate with any third country or regional group an agreement under Article V of the General Agreement on Trade in Services (GATS), and if that agreement went further in liberalization than TISA, then this additional liberalization would have to be extended to all TISA participants. Insofar as their TISA partners were concerned, therefore, TISA participants in effect would be renouncing the right to further preferential liberalization under Article V. This would be a significant departure

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WHITE & CASE LLP | 22

from the basic architecture of the GATS, and it is thus perhaps unsurprising that, apart from some support from Canada, the United States is almost isolated in pressing for it.

The EU and others have been anxious to retain as much as possible of the GATS structure, to facilitate the eventual integration of TISA into the WTO, and they fear that such a provision would complicate this integration and raise the bar against potential future participants in TISA, such as China, India and Brazil. TISA participants also might wish to retain their own freedom to negotiate bilateral liberalization with key partners, who may or may not be TISA participants.

Disagreement on this point is one of the factors delaying the negotiations on market access, because participants wish to be clear on the basic structure of the Agreement before submitting revised offers. However, negotiators also must address a long list of sectoral and regulatory issues. The negotiators have been discussing, on the basis of written proposals, possible disciplines in a very wide range of services and rules. Most notably, these include: (i) financial services; (ii) domestic regulation & transparency; (iii) maritime transport; (iv) road freight transport; (v) professional services; (vi) information and communication technology; (vii) electronic commerce; (viii) mode 4 (i.e., presence of natural persons); (ix) energy services; (x) air transport; (xi) competitive delivery services; (xii) government procurement; (xiii) cross-border data flow, local content, and local presence; (xiv) state-owned enterprises; (xv) environmental services; (xvi) health-related services; and (xvii) subsidies. The level of ambition in TISA thus is much higher than could be envisaged in the Doha Round.

It is not to be expected that new disciplines will be agreed, or even that substantive negotiations will occur, in all of these areas, but the sheer volume of work facing the negotiators suggests that the slow arrival of revised market access offers is not yet a pressing problem. The MFN Forward proposal therefore is only one of the outstanding issues to be resolved.

A proposal by the EU to add to the Agreement an Annex on Government Procurement has been less controversial. The proposal would require TISA participants to grant national treatment, in terms of access to government procurement contracts, to foreign suppliers with a juridical presence in the country. Most TISA participants already do this. However, it would have to be determined how such an obligation in TISA would relate to the existing obligations of participants under the WTO's Government Procurement Agreement (GPA), and to those TISA participants who do not belong to the GPA.

While the TISA negotiations continue, they will complicate progress on services in the Doha Round. Nevertheless, WTO Members are committed to producing a detailed work programme based on the three pillars of Agriculture, NAMA and Services, and they must produce enough substance in services to sustain the aim of overall agreement in the Doha Round. At a minimum, it would seem essential to agree in July on a date for submission of revised offers of commitments; the existing offers are nine years old and even then were judged to fall far short of the level required to secure agreement.

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## WTO General Council Adopts TFA Protocol of Amendment, Clarifies Bali Decision on Food Security

On November 27, 2014, the World Trade Organization's (WTO) General Council adopted a Protocol of Amendment to enable ratification of the Trade Facilitation Agreement (TFA) and its incorporation into WTO law as an Annex 1A Agreement. The General Council also adopted a clarification of the Bali decision on food security, which now states that WTO Members will refrain from initiating disputes against public food stockholding programs until a permanent solution to the issue is reached. In addition, the General Council decided that the deadline for agreeing on the work program mandated in the Bali Declaration will be July 2015.

WTO Members are now invited to ratify the TFA through their national legislative processes. There is no established deadline for this action, but it is expected that key Members such as the United States and the European Union will encourage other Member countries to complete the ratification process quickly.

The WTO will now return its focus to negotiating the Bali Work Program, with Members seeking to reach agreement by July 2015 on the key political parameters for completing each of the Doha Round topics. In the case of market access topics, Members will seek to reach agreement on the modalities for cutting tariffs and subsidies. In other areas, such as the Rules negotiations, Members likely will seek to reach agreement on the level of ambition that can be achieved. One potential topic of discussion in this area will be the Anti-Dumping Agreement. Members are expected to evaluate whether significant support exists for negotiating changes to the Anti-Dumping Agreement and, if so, what changes to target, while some Members might support dropping the Agreement altogether. In advance of these discussions, it is expected that WTO Members will begin to review their negotiating objectives in each area to ensure that their interests will be taken into account when defining the Bali Work Program.

Click [here](#) for a copy of the TFA Protocol of Amendment, [here](#) for the Decision on Public Stockholding for Food Security Purposes, and [here](#) for the Decision on the Bali Work Program.

## Information Technology Agreement Negotiators Fail to Reach Agreement on Product Scope

Negotiators in Geneva, Switzerland nearly reached an agreement last week that would have expanded the product coverage of the WTO's Information Technology Agreement (ITA) from 120 to approximately 200 products. The negotiators failed to close several remaining gaps, however, and therefore will resume negotiations early in 2015.

On November 11, 2014, it was announced that China had agreed to accept a large increase in the ITA's product coverage following negotiations with the United States. Despite this breakthrough, the continued exclusion of certain products – in particular, flat-screen display monitors – had disappointed other parties, especially Japan, Korea and Taiwan. The objections of these countries to the exclusion of flat-screen display monitors proved to be an obstacle in last week's negotiations, although parties eventually agreed that flat-screen display monitors would not be included in the ITA

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product scope. China also continued to resist the inclusion of several other products, including accumulator batteries, which were not among the products for which China and the United States had reached a bilateral agreement. Due to the significance of the ITA, China will remain under pressure from other parties to compromise so that the agreement's successful conclusion is not jeopardized. In the immediate future, however, how such a compromise will be achieved is unclear.

Once parties reach agreement on the expanded ITA product scope, difficult negotiations on the phase-out period for tariffs will follow. The ITA expansion currently being negotiated will follow the same rules regarding the phase-out of tariffs as the current ITA. Under such rules, phase-outs that do not occur immediately are allowed to occur over a period of either three or five years, or, regarding particularly sensitive products, over an exceptional timeframe of seven years. Reaching an agreement on tariff phase-out periods for each party could prove more challenging than reaching an agreement on product coverage because China, in particular, is expecting considerable latitude on phase-out periods in exchange for accepting a large increase in product coverage.

Parties also will need to consider further the treatment of potential "free-riders," such as Argentina, Brazil, India, Indonesia, and South Africa, who are not participating in the negotiations. According to WTO Director-General Roberto Azevêdo, current parties account for approximately 90 percent of world trade in the products being proposed for inclusion, which is the "critical mass" that parties have indicated is necessary for them to be prepared to apply the expanded ITA on a Most Favored Nation basis to all other WTO Members. Parties might feel reluctant to do so, however, in the absence of concessions from other large emerging market economies. Those concessions might be sought by placing the expanded ITA within the broader context of the Doha negotiations on Non-Agricultural Market Access before the expanded ITA is brought to a conclusion.

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