



# White & Case LLP General Trade Report - JETRO

January 2015

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## UNITED STATES

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### GENERAL TRADE POLICY

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#### *US General Trade Policy Highlights*

### USTR Releases 2014 Report to Congress on China's WTO Compliance

On December 30, 2014, the Office of the United States Trade Representative (USTR) published its 13<sup>th</sup> statutorily-mandated annual report to Congress on China's compliance with its World Trade Organization (WTO) obligations. The report examines China's practices in nine categories, namely: (i) trading rights; (ii) import regulation; (iii) export regulation; (iv) internal policies affecting trade; (v) investment; (vi) agriculture; (vii) intellectual property rights (IPR); (viii) services; and (ix) legal framework. USTR reported progress in certain policy areas, highlighted a number of new and ongoing concerns, and confirmed that the United States will continue to use WTO dispute settlement where appropriate to address such concerns.

USTR identified the following as priority areas related to China's WTO obligations and trading relationship with the United States:

- **Industrial Policies:** Regarding China's commitment to accede to the WTO's Government Procurement Agreement (GPA), USTR expressed concerns that China's most recent GPA offer remains limited in scope and coverage. USTR also alleged that China continues to provide a range of export subsidies to domestic industries that appear to be prohibited under WTO rules. In addition, the report alleges that China has failed to abide by WTO disciplines when pursuing antidumping (AD) and countervailing duty (CVD) investigations and imposing AD/CVD duties. Chinese policies designed to promote "indigenous innovation" and technology transfers also were highlighted as areas of concern.
- **Services:** The report stated that China has continued to place restrictions on foreign companies that supply electronic payment services to banks and other businesses. USTR noted that the United States prevailed in a 2013 WTO case challenging such restrictions but alleged that China has not taken steps to comply with the WTO's rulings; USTR added that it is considering appropriate next steps at the WTO. USTR also cited China's foreign equity caps in the insurance, cloud computing, and banking industries as ongoing concerns.
- **Agriculture:** USTR reported that in 2014, China's regulatory authorities continued to implement questionable sanitary and phytosanitary (SPS) measures, resulting in unwarranted restrictions on US beef, poultry, and pork exports. USTR also noted that delays in China's approvals of biotechnology products worsened in 2014. Regarding subsidies, USTR stated that China has

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begun new support schemes for hogs and pork and a purchasing reserve system for pork. The report also highlighted concerns that China's notifications to the WTO have not covered all applicable domestic support measures, and USTR questioned the methodologies used by China to calculate support levels.

- **Intellectual Property Rights:** Trade secret theft was listed as a major area of concern, and USTR alleged that violators of China's trade secret law continued to operate with impunity in 2014. Regarding counterfeiting and piracy issues, USTR reported that China has increased enforcement efforts to combat the distribution of counterfeit goods but noted that counterfeiting and software and online piracy remain widespread in China. USTR also stated that China has not fully implemented policies which would permit the submission of supplemental data to support pharmaceutical patent applications, despite having committed to do so in 2013.
- **Transparency:** USTR stated that although China has committed to adopt a single official journal for the publication of all trade-related laws, regulations, and measures, not all federal-government entities publish relevant measures in the journal, and many such entities adopt a narrow interpretation of the types of measures that must be published. USTR also reported that Chinese government agencies have failed to provide a 30-day public comment period for proposed trade-related rules and regulations, despite the publication of binding measures in 2012 that required China's government agencies to provide such comment periods.
- **Legal Framework:** USTR highlighted ongoing issues regarding the implementation of China's *Anti-Monopoly Law* (AML), including uncertainties regarding the law's application to Chinese state-owned enterprises and concerns about the procedural fairness of AML investigations against foreign companies.

Despite the concerns highlighted in the report, USTR acknowledged that China has made significant progress towards compliance with its WTO obligations in many of the priority areas listed above, in particular IPR protection and transparency. Commitments made by China at the recent US-China Joint Commission on Commerce and Trade (JCCT) also were cited as causes for optimism. However, although USTR has committed to apply external pressure and continue using WTO dispute settlement procedures when appropriate, internal forces within China likely will need to provide the impetuses for the types of substantial reforms advocated by USTR and the US government more broadly.

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

## Three Republican Senators Join Senate Finance Committee as 114th Congress Convenes

The first session of the 114<sup>th</sup> Congress convened on January 6, 2015, with three new Republican Senators having joined the Senate Finance Committee (SFC) led by Chairman Orrin Hatch (R-UT). The SFC, which has jurisdiction over trade matters, is expected to consider important trade-related legislation in 2015, including Trade Promotion Authority (TPA), renewal of the Generalized

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System of Preferences (GSP) and the African Growth and Opportunity Act (AGOA), customs reauthorization, and duty suspensions under the Miscellaneous Tariff Bill.

Sens. Dan Coats (R-IN), Dean Heller (R-NV), and Tim Scott (R-SC), each of whom has consistently supported trade-liberalizing initiatives while serving in Congress, have joined the SFC in the 114<sup>th</sup> Congress. The three lawmakers voted in favor of free trade agreements with Colombia, Panama, and South Korea in 2011 and supported the establishment of permanent normal trade relations with Russia and Moldova in 2012. Sens. Coats and Heller voted to grant TPA to President Obama in 2011, while Sen. Scott was a member of the House of Representatives at that time and thus did not have an opportunity to vote on TPA legislation.

With the addition of Sens. Coats, Heller, and Scott, Republicans hold 14 seats on the SFC in the 114<sup>th</sup> Congress, while Democrats hold 12 seats. Previously, in the 113<sup>th</sup> Congress, Democrats held 13 seats on the SFC, while Republicans held 11 seats. This change in composition strongly increases the likelihood that the SFC will advance major trade legislation in 2015. Despite the new majority, however, Republicans on the SFC likely will wish to secure the support of some Democratic members before voting on major trade initiatives.

Sen. Hatch has stated that some of the SFC's top priorities in 2015 will be the passage of TPA legislation and the renewal of GSP and AGOA. Sen. John Thune (R-SD), a SFC member and Chairman of the Republican Conference, has stated that TPA likely will be one of the first pieces of legislation to be addressed by the SFC in 2015.

## US Senators Introduce Legislation to Expedite Permitting Process for Liquefied Natural Gas Exports

On January 6, 2015, Sens. John Barrasso (R-WY) and Martin Heinrich (D-NM) introduced the *LNG Permitting Certainty and Transparency Act* (S.33), legislation intended to expedite the permitting process for exports of liquefied natural gas (LNG), including exports to countries that do not have free trade agreements (FTAs) with the United States. Similar to previous legislative initiatives in the 113<sup>th</sup> Congress, S.33 would establish deadlines for the US Department of Energy (DOE) to issue final decisions on LNG export applications, among other requirements. The Senate Energy and Natural Resources Committee **are** expected to hold a hearing on S.33 in late January 2015.

Section 3 of the Natural Gas Act (15 U.S.C. § 717b) requires DOE approval for all exports of LNG, including exports to countries that have FTAs with the United States. However, exports to non-FTA countries are subject to a discretionary "public interest" test, and DOE may refuse to grant permission to export if it determines that the exports at issue "will not be consistent with the public interest."

In addition to acquiring export licensing approval from DOE, companies seeking to export LNG also must complete an environmental impact assessment and secure a construction permit from the Federal Energy Regulatory Commission (FERC), as required by the National Environmental Policy Act (42 U.S.C. § 4321 et seq.). For LNG terminals located offshore beyond state waters, the agency responsible for approving construction permits is the Maritime Administration (MARAD), pursuant to

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the Deepwater Ports Act (33 U.S.C. § 1501 et seq.).

S.33 (i) directs the DOE to issue a decision on an application for authorization to export LNG within 45 days of the conclusion of a FERC or MARAD review; (ii) requires an applicant, in the case of any authorization to export LNG, to disclose publicly the specific destination(s) of any such authorized LNG exports; and (iii) assigns jurisdictional authority, for purposes of civil actions arising in relation to LNG licensing, to regional federal courts and requires those courts to expedite any civil actions regarding LNG licensing. S.33 was co-sponsored by a bipartisan group of Senators, including Sens. Michael Bennet (D-CO), Cory Gardner (R-CO), Heidi Heitkamp (D-ND), John Hoeven (R-ND), Tim Kaine (D-VA), and Shelley Moore-Capito (R-WV). Legislation similar to S.33 was introduced in 2014 as the *Domestic Prosperity and Global Freedom Act* (H.R.6) and passed the House of Representatives by a vote of 266-150, with 220 Republicans and 46 Democrats voting affirmatively. The Senate, then under Democratic majority control, did not consider the legislation, however.

Prospects for S.33 or similar legislation are improved in the 114<sup>th</sup> Congress, in which the Republican Party has assumed majority control of the Senate. Senate Republicans, including Senate Energy and Natural Resources Committee Chairman Lisa Murkowski (R-AK), strongly support liberalization of LNG exports, and while many Democrats remain opposed, bipartisan support for such policies has grown in recent years. Rising tensions with Russia over recent events in the Crimea region of Ukraine also might induce support for the legislation, which proponents have argued will increase the energy security of US allies who otherwise might purchase energy from Russia.

In addition to these factors, Secretary of Energy Ernest Moniz expressed willingness in November 2014 to cooperate with lawmakers on legislation that would expedite the permitting process for LNG exports. Specifically, Moniz requested that the 45-day window for permitting decisions only begin upon conclusion of FERC's environmental impact review, rather than on the date that applications are filed with FERC, as required by previous legislative proposals. S.33 reflects that change, although Sec. Moniz has not commented publicly on the bill.

Despite these improved prospects, Congressional approval of S.33 will face obstacles, including opposition from Senate Democrats. Key Senate Democrats who supported liberalization of LNG exports in the 113<sup>th</sup> Congress – namely Sens. Mark Begich (D-AK), Mary Landrieu (D-LA), and Mark Udall (D-CO) – lost re-election campaigns in 2014, thus limiting potential sources of Democratic support for LNG export liberalization in the 114<sup>th</sup> Congress. As a result, prospects for the liberalization of LNG exports, while improved, remain uncertain.

Click [here](#) for a copy of S.33.

## United States to Lift Restrictions on Mexican Trucks After Three-Year Pilot Program

On January 9, 2015, the US Department of Transportation (DOT) announced that Mexican motor carriers soon will be permitted to apply for authorization to conduct cross-border, long-haul trucking operations within the United States, potentially resolving a longstanding trade dispute between the

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United States and Mexico. According to the DOT and US Trade Representative (USTR) Michael Froman, the policy change should avert the imposition of more than USD 2 billion per year in retaliatory tariffs against US exports. The United States has been under pressure to lift its restrictions on Mexican motor carriers since 2001, when a North American Free Trade Agreement (NAFTA) dispute settlement panel ruled that US policies were inconsistent with NAFTA's cross-border trucking provisions.

The DOT announcement coincided with the conclusion of the Cross-Border Long-Haul Trucking Pilot Program, which was designed to evaluate the safety record of Mexican motor carriers. Under the Pilot Program, a limited number of Mexican trucks were granted increased access to US roads from 2011 to 2014. In a report to Congress released on January 9, 2015, DOT concluded that the Mexican motor carriers who participated in the Pilot Program operated at a level of safety comparable to that of US and Canadian motor carriers, and DOT subsequently announced that it would begin accepting applications from Mexican companies interested in conducting long-haul operations.

US restrictions on Mexican motor carriers have been a longstanding source of trade tensions between the two countries. Under the terms of NAFTA, the United States and Mexico agreed to permit unrestricted cross-border delivery trucking, provided that participating trucks and drivers satisfy applicable safety regulations. In 1995, however, then-President Bill Clinton suspended implementation of the trucking agreement, citing safety concerns and under significant pressure from labor unions. In 2007, then-President George Bush launched a pilot program to permit a limited number of Mexican trucks increased access to the United States. In 2009, however, a bipartisan majority in Congress, citing safety concerns and under continued pressure from labor unions, voted to eliminate funding for the program.

Mexico subsequently began to impose retaliatory tariffs on US agricultural, personal care, and manufactured products. Retaliatory measures had been authorized by a NAFTA arbitration panel in 2001, after it was determined by the dispute settlement panel that the US trucking policies were inconsistent with US obligations under the Investment and Trade in Services chapters of NAFTA. According to the DOT, the retaliatory tariffs amounted to USD 2.4 billion annually. Following the DOT's January 9 announcement, USTR Froman stated that "the successful conclusion of the Pilot Program provides the basis for the permanent resolution to this dispute" and that the United States would "work with Mexico to ensure that the threat of retaliatory duties will now be brought to a swift conclusion." Mexico committed in 2011 to fully terminate the retaliatory tariffs within 10 business days of receiving notification from the United States of the successful completion of the Pilot Program.

In its January 9 announcement, DOT stated that in order to receive long-haul operating authority, companies from Mexico will be required to pass a Pre-Authorization Safety Audit, which will evaluate safety procedures related to drug-testing, hours-of-service monitoring, and other practices. All drivers will be required to possess a valid US or Mexican driver's license and meet English language proficiency requirements established by the DOT. Once a motor carrier has been approved, the DOT will require that its vehicles undergo a North American Standard Level 1 inspection every 90 days for at least four years.

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Click [here](#) for the DOT announcement.

## Congressional Research Service Issues Report on GSP Reauthorization

The Congressional Research Service (CRS) recently issued a report analyzing the effectiveness of the US Generalized System of Preferences (GSP) program and the legislative debate regarding GSP reauthorization. In the report, CRS notes that broad support for GSP exists in Congress and cites evidence to suggest that GSP has promoted US economic objectives. The report also highlights concerns expressed by US policymakers regarding GSP and presents Congress with several alternatives to full reauthorization of GSP for all beneficiary countries.

The report notes that substantial growth in US imports from GSP countries over the past 15 years might indicate that GSP has facilitated export-driven growth in developing countries, in accordance with GSP's statutory objectives. The report also suggests that while the impact of GSP on the US economy is small, many US firms benefit from the lower cost of goods and raw materials imported under the GSP program.

The report highlights concerns regarding GSP in its current form, including indications that some Members of Congress would like large emerging economies to graduate from GSP and to establish more reciprocal trading arrangements with the United States. The report also states that while multiple "import sensitive" products are excluded from GSP eligibility, certain imports under GSP sometimes can adversely affect US manufacturers.

The report presents Congress with the following options with respect to treatment of the GSP program, in addition to reauthorization of GSP in its current form:

- **Negotiate Free Trade Agreements (FTAs) with GSP Countries:** As some US policymakers have suggested, the United States could pursue multilateral negotiations, FTAs, or other forms of agreements with certain GSP beneficiaries. Such agreements could provide reciprocal benefits and improved market access for the United States.
- **Authorize GSP Only for Least-Developed Countries (LDCs):** Congress could modify GSP so that its benefits primarily apply to least-developed beneficiaries, as has been suggested by some Members of Congress. An "LDC-only" extension of GSP might apply to the following countries in the short-term: Afghanistan, Bhutan, Cambodia, Central African Republic, Democratic Republic of the Congo, Haiti, Kiribati, Nepal, Samoa, Timor-Leste, Tuvalu, Vanuatu, and Yemen. Under such a proposal, countries designated as African Growth and Opportunity Act (AGOA) beneficiaries would continue to receive GSP benefits until September 30, 2015, in accordance with existing law.
- **Expand GSP Application:** Congress could (i) expand the list of tariff lines that are permitted duty-free access under GSP, (ii) allow "import sensitive" products to receive preferential treatment, (iii) improve rule of origin requirements to provide greater predictability, (iv) eliminate competitive need limitations (CNLs) or raise CNL thresholds, or (v) revise country eligibility requirements.

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- **Restrict GSP Application:** Congress could (i) reconsider criteria for graduation of countries or individual industry sectors from GSP; (ii) modify rules of origin requirements for qualifying products; (iii) lower the threshold at which the President may (or must) withdraw, suspend, or limit the application of duty-free treatment of certain products; (iv) require more active monitoring of the economic progress and/or GSP compliance of beneficiary countries; or (v) add additional eligibility criteria, such as movement towards more reciprocal tariff treatment.
- **Suspend GSP:** Congress could choose to permanently suspend GSP, in which case no legislative action would be required.

Each of these options has been presented in previous CRS reports on GSP, and although US lawmakers have the ability to pursue such options, Congress likely will reauthorize GSP at some future date without significantly changing the program. Many Members of Congress support GSP in its present form and regard the program as a tool to promote US foreign policy objectives and provide foreign assistance to developing countries. In addition, several US industry groups, including the influential US Chamber of Commerce, are strong and longstanding GSP supporters.

Senate Finance Committee Chairman Orrin Hatch (R-UT) has listed GSP reauthorization as a top legislative priority for 2015. While the exact legislative path for potential GSP reauthorization remains uncertain, the increased likelihood that the 114<sup>th</sup> Congress will advance major trade initiatives improves prospects for GSP. As a result, GSP reauthorization in its present form or with minor modifications appears likely during the 114<sup>th</sup> Congress. House Republicans reportedly wish to reauthorize GSP through an “omnibus package” of trade legislation that incorporates Trade Promotion Authority (TPA) and other trade initiatives; such a package would provide a viable legislative vehicle for GSP reauthorization in 2015.

Potential impediments to GSP reauthorization in its current form do exist, however. For example, Members of Congress disagree regarding the potential graduation of large emerging economies from the program, and such disagreements could delay or prevent consensus on reauthorization. In addition, the US legislative agenda might become dominated by issues deemed to be of greater prominence, allowing little time for Congressional consideration of legislation to reauthorize GSP. As a result, GSP reauthorization during the 114<sup>th</sup> Congress, while likely, remains uncertain.

A copy of the CRS report is available upon request.

## US Lawmakers Seek to Expand Ability of Customs and Border Protection to Share Information Regarding Counterfeit Shipment Investigations

On January 9, 2015, Reps. Zoe Lofgren (D-CA) and Ted Poe (R-TX) introduced the *Foreign Counterfeit Prevention Act* (H.R. 236) in the House of Representatives. The legislation seeks to expand the types of information that US Customs and Border Protection (CBP) officials are permitted to share with copyright and trademark holders while investigating imports of suspected counterfeit merchandise. The House Judiciary Subcommittee on Crime, Terrorism, Homeland Security, and Investigations held a hearing on similar legislation introduced by Reps. Lofgren and

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Poe in 2012 but did not advance that legislation to the House floor to receive a vote.

H.R. 236 seeks to correct an alleged “enforcement deficiency,” as described in a statement by Rep. Poe, resulting from a 2008 CBP directive that instructed field staff to redact all identifying markings and codes before sending digital images of suspected counterfeit merchandise to rights holders for authentication. Rep. Poe has argued that the ability to share identifying markings, such as bar codes, would enhance and expedite CBP’s ability to authenticate or seize, as appropriate, suspected counterfeit merchandise. Some industry groups in the United States have argued that the current practice of redacting identifying markings has made it difficult for CBP to authenticate certain suspected counterfeit goods, such as semiconductors.

H.R. 236 seeks to amend the *Trade Secrets Act* (18 U.S.C. § 1905) to clarify that CBP employees and officials are permitted, upon the detention of merchandise presented to CBP, to provide the owner of a copyright or registered mark with (i) any information appearing on the merchandise, including its retail packaging; (ii) a sample of the merchandise and its retail packaging; or (iii) digital images of the merchandise and its retail packaging.

H.R. 236 also includes provisions pertaining specifically to imports deemed to be of “critical merchandise,” including (i) aircraft engines, appliances, propellers, and spare parts; (ii) motor vehicle equipment; (iii) semiconductors; and (iv) other items that could pose a threat to health, safety, or national security. The legislation would amend section 42 of the *Trademark Act* (15 U.S.C. § 1124) to specify that, in the event that “critical merchandise” is suspected of bearing a counterfeit mark, CBP must provide the owner of the trademark with non-redacted images of the merchandise, packaging and labels, and may also provide non-redacted samples of the merchandise.

Critics of the proposed measures, such as Rep. Bobby Scott (D-VA), have expressed concerns that the legislation would allow the release of tracking and distribution codes that identify proprietary and confidential supply chain information, and that lawful importers would not have protection or recourse from the release of such information. Other observers have expressed concerns that the legislation would inhibit parallel or “grey market” trading, in which goods are sold lawfully through distribution channels that are not authorized by the original manufacturer.

H.R. 236 has been referred to the House Judiciary Committee but has not been scheduled for a hearing. Previous unsuccessful attempts by Rep. Poe to advance similar legislation in the 112<sup>th</sup> and 113<sup>th</sup> Congress suggest that passage of H.R. 236 remains unlikely. However, the number of annual counterfeit goods seizures reported by CBP has risen substantially over the past decade, a trend which might increase support for future legislation to facilitate further information sharing between CBP and copyright and trademark holders.

Click [here](#) for a copy of H.R.236.

## USTR Says Further Progress Needed on Worker Rights Before Reinstatement of GSP Benefits for Bangladesh

On January 16, 2015, the Office of the US Trade Representative (USTR) announced that Bangladesh will need to make further progress in addressing worker rights and safety issues before

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reinstatement of the country's trade benefits under the Generalized System of Preferences (GSP) can be considered. President Obama suspended Bangladesh's trade benefits under the GSP in June 2013 due to Bangladesh's alleged failure to meet statutory eligibility requirements related to worker rights.

The announcement followed the conclusion of a USTR-led interagency review of the Bangladeshi government's progress in implementing the 2013 GSP Action Plan, in which the United States listed a number of "significant actions" that would provide a basis for reinstating Bangladesh's GSP benefits. The GSP Action Plan encouraged specific steps by the government of Bangladesh to address alleged worker rights and safety issues in the following areas: (i) government inspections for labor, fire, and building standards; (ii) the ready-made garments (RMG) and knitwear sector; (iii) Export Processing Zones (EPZ); and (iv) the shrimp processing sector.

In its January 16 announcement, USTR stated that while Bangladesh has made progress over the past year to address fire and building safety issues in the RMG and knitwear sector, further progress will be needed to "fairly and systematically address reports of unfair labor practices and to advance and implement needed legal reforms." In particular, USTR cited concerns over "continuing reports of harassment and violence against union activists seeking to establish new unions or to exercise their legal rights." In addition, USTR stated that the Bangladeshi government has made minimal progress in advancing the labor law reforms called for in the GSP Action Plan, which include changes designed to ensure that workers in EPZs receive the same rights and protections as non-EPZ workers.

According to USTR, the total value of US imports from Bangladesh under GSP totaled USD 34.7 million in 2012, and the top imports from Bangladesh under the GSP included tobacco, sports equipment, porcelain china, and plastic products. Although legal authorization for duty-free treatment expired in July 2013 for all GSP countries, the USTR announcement stated that the Obama Administration supports reauthorization of the GSP program "at the earliest opportunity."

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

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## FREE TRADE AGREEMENTS

### *Free Trade Agreement Highlights*

## Results of EU Investor-State Dispute Settlement Public Consultation Might Complicate TTIP Negotiations

On January 13, 2015, the European Commission released the results of a four-month public consultation regarding the proposed inclusion of an Investor-State Dispute Settlement (ISDS) mechanism in the Transatlantic Trade and Investment Partnership (TTIP) agreement. As was expected, the public consultation revealed widespread opposition to the inclusion of an ISDS mechanism in TTIP from European citizens and interest groups, a result which might further complicate the TTIP negotiations. In response to the consultations, EU Trade Commissioner Cecilia Malmstrom signaled that the EU will seek to revise, rather than eliminate, the ISDS component of TTIP. Substantial weakening of ISDS provisions might not be acceptable to US negotiators, however, who have called for strong investor protections in TTIP.

Negotiations on the investment provisions of TTIP have been suspended since January of 2014, when then-EU Trade Commissioner Karel De Gucht announced that the EU would hold public consultations on its draft proposal on investor protections. The public consultations were held from March 27 to July 13, 2014, and comments were received from individual citizens, business organizations, trade unions, consumer groups, academics, law firms, and other interested organizations. According to an EU Commission report released on January 13, 2015, the majority of respondents oppose the inclusion of ISDS in TTIP, with trade unions, governmental organizations, and non-governmental organizations among the groups most opposed to the mechanism. Most prominent among the concerns expressed by such groups were fears that an ISDS mechanism would preclude or limit the EU's ability to regulate in the public interest.

Following the release of the report, EU Trade Commissioner Cecilia Malmstrom acknowledged that "the consultation clearly shows that there is a huge skepticism against the ISDS instrument" but also noted that "EU member states have approved a TTIP negotiation mandate that requires ISDS to be included." Commissioner Malmstrom also indicated that certain areas of the ISDS proposal will be reformed based on the results of the consultation. The European Commission now will organize consultation meetings with EU governments, the European Parliament, and other stakeholders to consider revisions to its draft investment provisions based on the comments submitted.

Commissioner Malmstrom also stated that the EU's revised ISDS proposal for TTIP may differ from the ISDS language included in the EU-Canada Comprehensive Economic and Trade Agreement (CETA). This statement, which suggests that the EU might insist on a lower level of investor protections in TTIP than were agreed to in the CETA, likely will concern US negotiators. United States Trade Representative Michael Froman has called for a high standard of investment protections in TTIP, and the US-EU working group that recommended the initiation of TTIP

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negotiations called for the agreement's investment chapter to reflect "the highest standards of protection that both sides have negotiated to date."

How quickly the European Commission will revise its ISDS proposal remains unclear. However, any efforts to weaken substantially the ISDS mechanism will further complicate the TTIP negotiations, which already are encumbered by several other contentious issues. ISDS is not expected to be discussed during the upcoming round of TTIP negotiations in Brussels on February 2 to 6, during which negotiators are expected to focus on market access and regulatory issues.

## **USTR Says Progress Made on Agriculture and Automobiles in Bilateral TPP Negotiations with Japan**

From January 13 to 16, 2015, the United States and Japan held bilateral Trans-Pacific Partnership (TPP) negotiations in Tokyo to address outstanding issues regarding trade in agricultural products and automobiles. Upon conclusion of the negotiations, US and Japanese officials reported incremental progress in both areas and claimed to have committed to a heightened level of seriousness in the bilateral discussions. Despite this progress, however, Congressional approval of Trade Promotion Authority (TPA) likely will be required before all of the outstanding issues between the United States and Japan can be resolved.

Acting Deputy US Trade Representative (USTR) Wendy Cutler represented the United States in the bilateral negotiations and stated on January 16 that while resolution of the outstanding issues remains difficult, the two countries were able to narrow gaps related to non-tariff measures and dispute settlement in the automotive sector, as well as agricultural market access. Acting Deputy USTR Cutler also stated that the discussions included an update on recent topical developments in Washington, DC, in particular the Obama Administration's efforts to secure Congressional approval of TPA.

Japanese TPP Ambassador Hiroshi Oe represented Japan in the agricultural market access negotiations and stated on January 16 that the number of outstanding agricultural market access issues between the United States and Japan had decreased. Ambassador Oe added that the negotiators had "discussed what needs to be done to reach a final agreement" on agricultural market access. In the automobile negotiations, Japan was represented by TPP Ambassador Takeo Mori, who stated that "mid-level" issues on automobiles had been resolved but added that larger outstanding issues would need to be addressed at the ministerial level. Both the US and Japanese negotiators declined to provide further specifics regarding which issues had been addressed or the extent of the progress made during the negotiations.

Following the meetings, US and Japanese officials commended one another for approaching the bilateral negotiations with renewed seriousness, and Japanese officials noted the time-sensitive nature of the discussions given the 2016 US Presidential elections. On January 16, Japanese Minister of State for Economic and Fiscal Policy Akira Amari stated that the US is now "more serious than ever" in its efforts to conclude the negotiations, and Acting Deputy USTR Cutler stated that Japanese negotiators demonstrated a similar level of commitment during the bilateral discussions.

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The comments followed reports that USTR Michael Froman recently has told Members of Congress that the TPP negotiations could be concluded within two months. This highly ambitious timeframe appears unrealistic, however, as Congressional approval of TPA likely is necessary before Japan will offer the level of concessions on automobiles and agriculture being sought by US negotiators. While multiple predictions have been made regarding the potential introduction and debate of TPA legislation in Congress, senior Congressional aides recently have stated that such legislation will not be introduced until at least March, due in part to crowded floor and committee agendas during the month of February. Congress also will need time to debate TPA legislation once introduced; the duration of such debates will depend upon the substance of the legislation and whether or not controversial provisions are included. This timetable suggests that conclusion of the TPP negotiations in early 2015 is unlikely. In addition, White House officials recently confirmed that the Obama Administration wishes to secure TPA prior to the conclusion of the TPP negotiations; because Republican lawmakers also have demanded this sequencing, conclusion of TPP prior to passage of TPA is unlikely.

Further bilateral meetings between the United States and Japan are expected to be held on the sidelines of a January 26 to February 1 informal negotiating round in New York City, which will include a meeting of the TPP's chief negotiators. During the informal round, working groups on financial services, intellectual property (IP), investment, legal issues, rules of origin, and state-owned enterprises are expected to meet. Outside of the US-Japanese bilateral negotiations, any progress made by the IP working group during the New York City round will be particularly significant to the potential timing of a completed TPP agreement, as the IP chapter has been identified as one of the most controversial chapters and has several key outstanding issues.

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## MULTILATERAL

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### MULTILATERAL

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#### *Multilateral Highlights*

### WTO Appellate Body Rules Against Argentine Import Measures

On January 15, 2015, the World Trade Organization (WTO) released the Appellate Body report for *Argentina – Measures Affecting the Importation of Goods* (DS438/DS444/DS445), which was brought by the European Union, the United States, and Japan. The Appellate Body report upheld the main findings of the panel report, which concluded that most of the Argentine measures at issue were impermissible restrictions on importation under WTO rules. In affirming all of the relevant panel findings, the Appellate Body’s ruling also clarified the scope and application of Article XI:1 of the General Agreement on Trade and Tariffs (GATT), which prohibits quantitative restrictions on imports and exports.

The Appellate Body and panel reports made the following rulings on the challenged Argentine measures:

- **Advance Sworn Import Statement (*Declaración Jurada Anticipada de Importación – DJAI*):** The Appellate Body report upheld the panel report, which concluded that Argentina’s DJAI procedure, regardless of whether it constitutes an import license regime, is an import restriction inconsistent with GATT Article XI:1. Since February 2012, Argentina has required importers to submit a DJAI prior to the importation of goods into Argentina. Importers must submit an affidavit, which the Argentine Federal Revenue Administration (*Administración Federal de Ingresos Públicos*) processes and transmits to several participating Argentine government entities.
- **Trade-Related Requirement Measures (“TRRMs”):** The Appellate Body report upheld the panel report, which concluded that the TRRMs constitute an import restriction inconsistent with Article XI:1 of the GATT. The Appellate Body report also upheld the panel report’s conclusion that TRRMs related to “local content requirements” violated the “National Treatment” principle of GATT Article III:4, because they modify the conditions of competition in the Argentine market such that imported goods are granted less favorable treatment than like domestic products. (Article III:4 was not, however, a focus of the Appellate Body’s report.) The TRMMs at issue were Argentinian requirements that importers, as a condition for permission to import goods, must: (i) export a specified dollar value of goods, (ii) reduce the volume or value of imports, (iii) incorporate local content into products, (iv) make or increase investments in Argentina, and/or (v) refrain from repatriating profits.

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In affirming the Panel's findings, the Appellate Body also clarified the scope and application of GATT Article XI. In particular, the Appellate Body reaffirmed and expanded upon its views in DS394 (*China – Raw Materials*) and emphasized that Article XI:1 prohibits only “quantitative restrictions” on imports and exports, rather than any measure that might impose a condition on importation or exportation:

*“The use of the word “quantitative” in the title of Article XI of the GATT 1994 informs the interpretation of the words “restriction” and “prohibition” in Article XI:1, suggesting that the coverage of Article XI includes those prohibitions and restrictions that limit the quantity or amount of a product being imported or exported. This provision, however, does not cover simply any restriction or prohibition [emphasis in original]. Rather, Article XI:1 refers to prohibitions or restrictions “on the importation ... or on the exportation or sale for export”. Thus, in our view, not every condition or burden placed on importation or exportation will be inconsistent with Article XI, but only those that are limiting, that is, those that limit the importation or exportation of products. Moreover, this limitation need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context.”*

Based on this standard, the Appellate Body ruled that GATT Article XI:1 permits certain “measures through which a prohibition or restriction is produced or becomes operative,” such as licenses. The Appellate Body stated of these measures that, “[i]f an import formality or requirement does not itself limit the importation of products independently of the limiting effects of another restriction, then such import formality or requirement cannot be said to produce the limiting effect and, thus, it will not amount to a ‘restriction’ captured by the prohibition in Article XI:1.” Thus, for example, “import licensing procedures may result in some burden without themselves having trade-restrictive effects on imports” and thus violating Article XI:1.

Prior to the Appellate Body's statements in this dispute, the scope of GATT Article XI had only been elaborated in several, often conflicting, panel reports. The Appellate Body's views thus should help to inform WTO Members of their obligations under Article XI and their use of measures, such as licenses, which impose conditions on imports and/or exports but do not necessarily limit imports and/or exports. According to the Appellate Body's standard, these measures will be permitted under Article XI, as long as they do not independently limit import or export quantities.

The Appellate Body report recommends that the Dispute Settlement Body (DSB) request Argentina to bring its measures into conformity with the GATT. The report likely will be adopted by the DSB at its next meeting, which is scheduled for January 26, 2015.

Click [here](#) for a copy of the Appellate Body report.

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## WTO Members Begin Work on Bali Work Programme to Conclude Doha Round Negotiations

During the week of January 19, 2015, WTO Members began working on the “Bali Work Programme” to conclude the Doha Round negotiations. WTO Director-General Roberto Azevêdo chaired an open-ended meeting of the WTO’s Heads of Delegation on January 21 to establish the process for these discussions, and he also will chair meetings on individual negotiating issues beginning the week of January 26 with Agriculture, Non-Agricultural Market Access (NAMA), and Services.

The deadline that Members have established to reach agreement on the Work Programme has been extended from the end of 2014 to July 2015, but meeting this deadline will be challenging. Some senior negotiators believe that aiming to agree to the Work Programme by the end of the year, when the WTO will hold its 10<sup>th</sup> Ministerial Conference in Kenya, may be more realistic. Director-General Azevêdo is aiming for “a detailed, precise, modalities-like, Work Programme that is as specific as possible and covers all areas of the negotiations.” If such an outcome can be achieved, it will provide the key political parameters for technical-level negotiations to proceed and be concluded quickly.

For the WTO’s major players, the target to conclude the Doha Round is no later than the end of 2016 if the WTO is to remain relevant. Results should be known by that time on the Trade in Services Agreement (TISA), the Trans-Pacific Partnership (TPP) and, possibly, the Transatlantic Trade and Investment Partnership (TTIP); such agreements will eclipse the WTO if the WTO is not able to deliver a result by then. China’s status as a non-market economy also is due to be reviewed at the end of 2016, which will be a major issue for China, the United States and, potentially, finalizing the Doha Round. Furthermore, the date has political resonance, since concluding Doha would be an achievement marking the end of President Obama’s term in office.

Negotiations on the Work Programme did not progress last year due to the difficulties that were encountered in finalizing the Trade Facilitation Agreement (TFA). With the TFA now concluded, Director-General Azevêdo has increased his direct involvement in the other Doha issues. He has begun to chair open-ended, Ambassador-level meetings on the overall shape of the Work Programme and on the specifics of the core market access issues of Agriculture, NAMA and Services. Director-General Azevêdo’s consultations will be backed up by work in the individual Negotiating Groups, but these likely will focus more on technical matters. Some of the experienced Ambassadors who are chairing the Negotiating Groups are expected to leave Geneva this year, which could further lessen the profile of these Groups in concluding the negotiations.

Reaching agreement on market access “modalities” to cut tariffs in Agriculture and NAMA and trade-distorting agricultural subsidies initially will be the main objective. Liberalization of trade in Services also is a key negotiating objective for many delegations, but in the case of Services, the modalities are not complicated, since Members already have agreed to use a bilateral request-and-offer approach. Negotiations on Services in the context of Doha are unlikely to become active until there is greater clarity concerning the outcome of the TISA negotiations, which likely will set the level of ambition for the WTO to achieve.

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Negotiations on Agriculture and NAMA became deadlocked in 2008, when the last attempt was made to conclude the Round, and no progress has been made since then. The 2008 draft texts were well-advanced in certain respects but were never agreed to, and the positions of the delegations were still far apart on key issues, especially on NAMA and on the issue of development flexibilities for advanced developing countries.

Developing countries, including some of the large emerging market economies such as India and Indonesia, prefer for the 2008 texts to be the starting point for renewed negotiations and hope to preserve the development flexibilities in those texts. The United States, the European Union, other developed countries, and some developing countries reject the 2008 texts as the starting point and instead are proposing new and simpler modalities that would allow greater differentiation to be made in the flexibilities available to different categories of developing countries. One proposal, for example, apparently favored by the European Union and the United States, is to replace the Swiss formula for cutting tariffs with an across-the-board base cut (as was used in the Uruguay Round) coupled with bilateral request-and-offer negotiations. This would allow the European Union and the United States to seek more reciprocal liberalization from Brazil, China, India and other advanced developing countries than from lower-income developing countries, and to pursue zero-for-zero tariff cuts in certain key NAMA sectors such as chemicals.

The status of the 2008 texts as the starting point for negotiating modalities for Agriculture and NAMA will be one of the first issues that Director-General Azevêdo will need to tackle in his consultations this week. Reportedly, low-income developing countries are moving to accept that their development flexibilities can be preserved without using the 2008 texts as a starting point. However, India likely will take a much harder line, as it demonstrated at last week's Heads of Delegation meeting when it stated that any attempt by the United States and the European Union to differentiate developing countries is a "gateway" issue that will prevent forward movement on the Work Programme.

Director-General Azevêdo has made it clear that the Work Programme eventually must cover all of the other Doha Round topics, but initially, less attention likely will be paid to them. It appears to be generally accepted that results on those other topics will depend upon the level of ambition that can be achieved in Agriculture and NAMA, and if that level turns out to be low, then there may be minimal, or even no, results elsewhere. Some delegations have had important offensive interests in those topics, particularly in the area of Rules, where the Friends of Antidumping Negotiations (FANS) led by Japan might be reluctant in the short-term to reduce their ambition to tighten the rules on antidumping measures.

Progress is being made separately among groups of Members to negotiate sectoral trade liberalization through the Environmental Goods Agreement and the Information Technology Agreement, but such efforts need to mature further before they can feed back into the Work Programme, where they likely would be picked up under NAMA.

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## WTO Trade Ministers Meet in Davos to Discuss Bali Work Programme

On January 24, 2015, trade ministers from 21 WTO Members met in Davos, Switzerland to support the conclusion of the Bali Work Programme by the July 2015 deadline. With the aim of concluding the Doha Round by the end of the year at the WTO's next Ministerial Conference in Kenya, many of the Ministers agreed on the need for a "re-calibration" of the level of ambition downwards, with the emphasis on a "credible" outcome based on what is "do-able" in order to produce a result during such a limited timeframe.

In the past, the WTO has encountered difficulties in transferring the results of such meetings among small groups of Members back to Geneva for negotiations among the full membership. Reportedly, WTO Director-General Roberto Azevêdo and the ministers from the United States and the European Union felt that the meeting had been successful in creating realistic expectations for the negotiations. However, there was some disagreement among those participating in Davos, and the ministers did not enter into detail on any of the core negotiating issues. If the WTO is to meet the July deadline for agreement on the Work Programme, it will be crucial that the next several weeks of intensive negotiations in Geneva under Director-General Azevêdo's chairmanship on the core market access topics of Agriculture, Non-Agricultural Market Access (NAMA) and Services produce solid progress.

Director-General Azevêdo opened the Davos meeting by saying that Members needed to work for a credible outcome based on what is achievable without unduly lowering the level of ambition, and that the Work Programme must contain detailed modalities for cutting market access barriers in Agriculture, NAMA and Services. If that can be done, Director-General Azevêdo stated, Members "will be well positioned to conclude the Round in a short period of time." Director-General Azevêdo added that along with the Work Programme, this year Members must produce the two-thirds majority of ratifications necessary for the Trade Facilitation Agreement (TFA) to enter into force, a permanent solution to the problem of food security in developing countries, and results from the sectoral market access negotiations on the Environmental Goods Agreement and the expansion of the Information Technology Agreement.

By stating openly the need to re-calibrate downwards the level of ambition, Director-General Azevêdo is signalling that one of the negotiating rules that he will want Members to accept is that if there is insufficient support for, or strong opposition to, results on particular items of the Doha agenda, then the proponents of those items must accept that they will have to be dropped. Otherwise, the negotiations quickly will become bogged down again. This is the approach that Director-General Azevêdo used to advance the negotiations on the TFA. This approach may be dissatisfactory to some Members, however, who are seeking results in areas such as the Rules and Environment negotiations but who can claim only minority support for their proposals in those areas. In Davos, for example, Japan and Norway spoke of the importance that they attached to results from the negotiations on anti-dumping measures, Mexico stressed the liberalization of labor-intensive services, and New Zealand advocated for results on fishery subsidies; each of these positions, however, is likely to come under pressure to be minimized or dropped in the context of a low-ambition result on Agriculture and NAMA.

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Disagreement in Geneva among Members regarding what exactly is meant by a low-ambition result is likely to occur. Already in Davos, Canada's minister cautioned that if the level of ambition is too low, then the major Members will turn to other trade negotiations to seek meaningful results. Brazil insisted that the aim in Agriculture should continue to be high ambition, and China and South Africa stated that the development dimension of the final result should not be weakened. For the United States, the European Union, and some other Members, however, the critical political point now is to conclude the Doha Round at whatever level of ambition is possible in order to preserve the relevance of the multilateral trading system and the WTO.

## Consultations on Bali Work Programme Begin with Focus on Agriculture, Non-Agricultural Market Access, and Services

During the week of January 26, 2015, WTO Director-General Roberto Azevêdo began consultations with selected Members on the Bali Work Programme. The goal of the consultations was to establish agreed-upon negotiating modalities which will be needed to determine how the remaining aspects of the Doha Round are to be concluded. Director-General Azevêdo focused on the key market access subjects of Agriculture, Non-Agricultural Market Access (NAMA), and Services, and invited Members to state what they could offer as contributions to a negotiated outcome on each of these issues while also disclosing any "red lines" that they would be unable to cross.

Discouragingly, the consultations revealed a deep North-South divide over the issue of development flexibilities. In addition, many of the Members repeated their longstanding positions, which demonstrates the difficulty that Director-General Azevêdo will encounter in his attempts to break the deadlock on market access that has prevailed since 2008. Director-General Azevêdo is insisting, for the time being, that progress has to come "bottom-up" as a result of Members showing flexibility, without any input from himself or the Chairs of the individual Negotiating Groups through proposed compromise texts.

The industrialized countries expressed serious reservations about using the 2008 texts on Agriculture and NAMA as the starting point for the negotiating modalities, and the United States rejected those texts outright. Along with the fact that the texts were never agreed to and contained differences in negotiating positions that were considered unresolvable in 2008, the United States and others stated that the texts no longer reflect the reality of national policies or current competitive conditions on world markets. In the case of Agriculture, for example, the United States claims that China and India now have levels of domestic support that are among the highest in the world, yet these would be practically untouched by the 2008 modalities because of the extensive development flexibilities they contain. Also, according to expert analysis, the new US Farm Bill has increased the United States' level of trade-distorting agricultural support, making it no longer possible for the United States to accept the level of cuts that it would face under the 2008 modalities.

Many developing countries, on the other hand, continued to press for negotiations to start on the basis of the 2008 texts. Developing countries have a key interest in those texts due to the extensive development flexibilities that they offer. Industrialized countries are prepared to offer the flexibilities to low-income developing countries, but not to the emerging market economies such as China and

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India. However, India has stated that any attempt to differentiate developing countries in this way is a “gateway” issue that will prevent forward movement on the Work Programme.

Sharp differences also surfaced in the NAMA consultations over the use in the 2008 modalities of the Swiss formula to reduce tariffs. The Swiss formula is supported by most developing countries, but is opposed by industrialized countries who seek a different tariff-cutting modality that allows for deeper tariff cuts by advanced developing countries. Industrialized countries have not tabled their proposal formally, but it is understood to involve the Uruguay Round formula of an across-the-board baseline cut by all Members other than the least-developed countries, supplemented by bilateral request-and-offer negotiations where greater liberalization and zero-for-zero sectoral tariff cuts would be sought from China and other advanced developing countries.

The consultations on Services made no progress. Most developing countries are unwilling to discuss their potential offers on Services until they have a clearer sense of what the level of ambition on Agriculture and NAMA is likely to be. In addition, many Members are waiting for the results of the separate Trade in Services Agreement negotiations to be known before being willing to engage on Services in the WTO.

Director-General Azevêdo will hold further rounds of consultations in this format on a regular basis, focusing on Agriculture and NAMA and hoping for progress there before moving on to other Doha Round subjects such as Rules and Environment.

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