

# US & Multilateral Trade and Policy Developments

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**Japan External Trade Organization**

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## US General Trade Policy Highlights

### US Trade Representative to Initiate Negotiations with European Union for Covered Agreement on Insurance

On November 20, 2015, the Office of the US Trade Representative (USTR) and the US Department of the Treasury (“Treasury”) notified Congress of their intent to initiate negotiations to enter into a covered agreement on insurance with the European Union.<sup>1</sup> USTR’s stated objective for the negotiations is to obtain treatment of the US insurance regulatory system as “equivalent” under EU law, in exchange for affording nationally uniform treatment to EU-based re-insurers operating in the United States. The negotiations will take place separately from the Transatlantic Trade and Investment Partnership (TTIP) negotiations, and will be conducted under an authority granted to USTR and Treasury by Title V of the *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010* (P.L. 111-203 or “the Dodd-Frank Act”).

In the United States, state-level insurance regulators have general authority over the business of insurance, and as a result, prudential regulations governing the activities of insurance companies vary from state to state. Some observers, including foreign-based insurers operating in the United States, have raised concerns that the resulting lack of uniform regulatory treatment across the 50 states increases compliance costs and inhibits market entry. Foreign-based re-insurers also have criticized measures maintained by some US states that subject foreign-based re-insurers to additional collateral requirements, placing them at a competitive disadvantage to US-based re-insurers.

The US Congress sought to address these issues in Title V of the Dodd-Frank Act. Title V authorized USTR and Treasury to jointly negotiate and enter into covered agreements, which are defined in the legislation as “written bilateral or multilateral agreement[s] regarding prudential measures with respect to the business of insurance or reinsurance[.]” In addition, Title V authorized Treasury to preempt state-level prudential measures that (i) are inconsistent with a covered agreement; and (ii) “result in less favorable treatment of a non-United States insurer domiciled in a foreign jurisdiction that is subject to a covered agreement than a United States insurer domiciled, licensed, or otherwise admitted in that State[.]” Thus, through covered agreements, Treasury can override state prudential measures in order to provide national treatment to foreign-based insurers with respect to such measures.

The recent initiation of negotiations with the European Union represents the first time that USTR and Treasury have pursued a covered agreement. The primary US objective in the negotiations is to obtain recognition of the US insurance regulatory system as an “equivalent” system under the European Union’s Solvency II Directive (“Solvency II”) – an EU-wide regulatory harmonization program scheduled to take effect on January 1, 2016. Absent an equivalency determination, individual EU member states may subject US-based insurers to additional requirements under Solvency II (e.g., collateral requirements), placing US firms at a competitive disadvantage. In exchange, the European Union will seek commitments from the United States to provide nationally uniform treatment to EU-based insurers operating in the United States, and to eliminate, through Treasury’s preemption authority, state-level collateral requirements that allegedly discriminate against foreign re-insurers.

Pursuant to the Dodd-Frank Act, congressional approval is not required for a covered agreement to enter into force. However, USTR and Treasury are required to jointly consult with Congress at several stages: (i) before initiating the negotiations; (ii) during the negotiations; and (iii) before entering into the covered agreement. A covered agreement can enter into force 90 calendar days after USTR and Treasury jointly submit a copy of the final legal text of the agreement to the appropriate congressional committees. House Foreign Affairs Committee Chairman Edward Royce (R-CA) has expressed support for the covered agreement negotiations with the European Union, and has suggested that a successful agreement with the European Union could lay the groundwork for negotiations with other key insurance jurisdictions such as Switzerland, Bermuda and Japan.

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<sup>1</sup> Click [here](#) for a copy of the congressional notification letter provided by USTR and Treasury.

## Free Trade Agreement Highlights

### US Trade Representative Identifies Nineteen Products That Could Lose GSP Eligibility in 2016

On November 13, 2015, the Office of the US Trade Representative (USTR) published a list of 19 products that, based on January—September 2015 trade data, could exceed competitive need limitations (CNLs) for the 2015 calendar year and thereby become ineligible for duty-free treatment under the Generalized System of Preferences (GSP) in 2016.<sup>2</sup> This information may aid interested parties in deciding whether to submit a petition to waive the CNLs for individual beneficiary developing countries (BDCs) with respect to specific GSP-eligible products.

The GSP statute provides that a BDC is to lose its GSP eligibility with respect to a product if a CNL is exceeded and no waiver is granted. CNLs are exceeded when US imports of a GSP-eligible product from a BDC during a calendar year (i) account for 50 percent or more of the value of total US imports of that product; or (ii) exceed a specified dollar value (USD 170 million in 2015). Products originating from a BDC are considered to be “sufficiently competitive” when US imports of the product exceed one of these CNLs. By statute, GSP treatment for a product exceeding either CNL will terminate on July 1 of the subsequent calendar year.

In order to provide advance notice of products that may exceed the 2015 CNLs, USTR has published the list below, which includes any GSP-eligible products for which US imports from a BDC in January—September 2015 (i) exceeded USD 110 million; or (ii) accounted for more than 42 percent of total US imports of that product. Regardless of whether a product is included on the list below, however, USTR will base all determinations and decisions regarding CNLs on full calendar-year 2015 import data.

HTS Number	Description	BDC Country	Interim 2015 Imports from BDC (USD)	Interim 2015 Imports from All Sources (USD)	BDC Share of Interim Imports
04100000	Edible products of animal origin, nesi	Indonesia	7,456,334	15,086,396	49.40%
08041060	Dates, fresh or dried, whole, without pits, packed in units weighing over 4.6 kg	Tunisia	15,101,393	26,462,270	57.10%
11029025	Rice flour	Thailand	6,836,994	14,932,679	45.80%
15091040	Virgin olive oil and its fractions, whether or not refined, not chemically modified, weighing with the immediate container 18 kg or over	Tunisia	105,325,711	232,758,325	45.30%
21022060	Single-cell micro-organisms, dead, excluding yeasts, (but not including vaccines of heading 3002)	Brazil	21,209,713	40,450,631	52.40%
22029090	Nonalcoholic beverages, nesi, not including fruit or vegetable juices of heading 2009	Thailand	123,496,884	443,240,608	27.90%
28042900	Rare gases, other than	Ukraine	50,872,243	111,869,546	45.50%

<sup>2</sup> Click [here](#) for a copy of USTR’s November 13th announcement.

HTS Number	Description	BDC Country	Interim 2015 Imports from BDC (USD)	Interim 2015 Imports from All Sources (USD)	BDC Share of Interim Imports
	argon				
29349947	Nonaromatic drugs of other heterocyclic compounds, nesoi	India	30,403,289	70,488,742	43.10%
39173100	Flexible plastic tubes, pipes and hoses, having a minimum burst pressure of 27.6 Mpa	Brazil	45,096,454	106,573,822	42.30%
42029204	Insulated beverage bag w/outer surface textiles, interior only flexible plastic container storing/dispensing beverage thru flexible tubing	Philippines	13,567,869	26,797,130	50.60%
44091005	Coniferous wood continuously shaped along any of its ends, w[h]ether or not also continuously shaped along any edges or faces	Brazil	15,463,929	31,009,602	49.90%
69111037	Porcelain or china (o/than bone china) household table & kitchenware in sets in which aggregate val. of arts./US note 6(b) o/\$56 n/o \$200	Indonesia	25,941,635	57,801,883	44.90%
73072150	Stainless steel, not cast, flanges for tubes/pipes, not forged or forged and machined, tooled and otherwise processed after forging	India	42,148,784	99,277,164	42.50%
73079150	Iron or steel (o/than stainless), not cast, flanges for tubes/pipes, not forged or forged and machined, tooled & processed after forging	India	86,587,858	198,072,275	43.70%
73259100	Iron or steel, cast grinding balls and similar articles for mills	India	11,975,113	19,487,598	61.40%
85258030	Television cameras, nesi	Thailand	110,916,842	1,498,021,821	7.40%
85441900	Insulated (including enameled or anodized) winding wire, other than of copper	Venezuela	12,388,124	27,375,163	45.30%
87085095	Parts & accessories of motor vehicle of 8701, nesoi, 8702 and 8704-8705, half-shafts	India	13,839,721	24,715,065	56.00%

HTS Number	Description	BDC Country	Interim 2015 Imports from BDC (USD)	Interim 2015 Imports from All Sources (USD)	BDC Share of Interim Imports
90015000	Spectacle lenses of materials other than glass, unmounted	Thailand	113,411,856	506,732,697	22.40%

Any interested party may submit a petition seeking a waiver of the 2015 CNLs for individual BDCs with respect to specific GSP-eligible products. General guidelines for submitting CNL waiver petitions can be found in USTR's August 19, 2015 *Federal Register* notice ([80 Fed. Reg. 50376](#)) and at [15 C.F.R. § 2007](#). **USTR has extended the deadline for submitting CNL waiver petitions until 5 p.m. EST on Friday, December 4, 2015.**

USTR may also provide waivers from the 50 percent CNL if total imports of the relevant article from all countries during the calendar year did not exceed the applicable *de minimis* amount for that year (USD 22.5 million for 2015). Such waivers cannot be requested by petition, but public comments are accepted following publication of a *Federal Register* notice, usually in March, announcing the products that fall under this category. Granting such waivers is a discretionary decision made by USTR.

## United States and China Conclude 26th Session of Joint Commission on Commerce and Trade

From November 21-23, 2015, a US delegation including US Trade Representative (USTR) Michael Froman and Secretary of Commerce Penny Pritzker met with Chinese government officials in Guangzhou, China for the 26<sup>th</sup> session of the US-China Joint Commission on Commerce and Trade (JCCT). The JCCT yielded minimal commitments on priority issues identified by US business groups ahead of the meeting, which included (i) strengthening intellectual property rights protection; (ii) addressing Chinese cybersecurity measures that allegedly discriminate against US firms; (iii) improving regulatory transparency; and (iv) making progress towards the US-China Bilateral Investment Treaty (BIT). The lack of significant progress at the JCCT might reflect, *inter alia*, the declining leverage of the Obama administration as President Obama enters his final year in office, and a desire on the part of Chinese officials to delay any significant concessions until the next US administration.

The main outcomes from the 26<sup>th</sup> JCCT can be summarized as follows:

- Chinese information and communications technology (ICT) policy.** China confirmed that a revised draft of its *Guidelines on Promoting the Application of Secure and Controllable Information Technology in the Banking Industry* (2014-2015) will be released for a 30-day public comment period and implemented after revision. China suspended the implementation of these guidelines in April 2015 in response to opposition from the United States, among other countries (*please refer to the W&C US Trade Alert dated April 22, 2015.*) China also committed to notify a similar measure affecting the insurance industry, titled *Insurance System Informatization Regulatory Requirements (Draft)*, to the WTO Committee on Technical Barriers to Trade. The measure is currently in draft form, and China has provided a 30-day public comment period on the initial draft, according to the US Department of Commerce. Both sides also made a general commitment that ICT information security measures “are not to unnecessarily limit or prevent commercial sales opportunities for foreign suppliers of ICT products, services, or technologies and will not impose nationality-based conditions and restrictions on the purchase, sale and use of ICT by commercial enterprises unnecessarily.”
- Steel and aluminum overcapacity.** The United States and China agreed to hold discussions in 2016 concerning “capacity, production, and trade in the steel sector[.]” The United States has indicated that it will seek, as part of those discussions, updates on China’s progress with regard to its 2014 Strategic and Economic Dialogue (S&ED) commitment to establish mechanisms that prevent the expansion of its crude steelmaking capacity. The United States and China also agreed to “intensify” their discussions regarding overcapacity in the aluminum sector in 2016. This outcome may have been the result of demands from US aluminum producers, who in November 2015

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established a new industry association that has urged USTR to address Chinese trade practices in the aluminum sector, including alleged subsidies such as interest-free loans.

- **Agricultural biotechnology.** According to US Secretary of Agriculture Tom Vilsack, China “indicated...that it would move quickly” to review eleven agricultural biotechnology traits that are currently awaiting import approvals from China’s Ministry of Agriculture (MOA). Secretary Vilsack emphasized that the United States is hoping to see progress on this issue within the next 30 to 60 days. 42 US Senators expressed concerns about the growing queue of traits awaiting approval by MOA in a September 23 letter to President Obama (*please refer to the W&C US Trade Alert dated September 30.*) China also agreed to continue an existing dialogue on market access for US beef, which presently cannot be exported to China due to import restrictions related to bovine spongiform encephalopathy (BSE).
- **Government support.** The United States noted that it has recently provided comments to China’s Ministry of Commerce (MOFCOM) concerning the WTO-consistency of Chinese support policies related to farm machinery and “International Well Known Brands.” China confirmed at the JCCT that it would address these matters in accordance with its *Circular on Strengthening Trade Policy Compliance*. China also confirmed that (i) its Semiconductor Industry Development Plan policies are equally applicable to, and available for, foreign-invested enterprises; and (ii) its National Semiconductor Investment Fund will be managed in a manner “consistent with market-based concepts.”
- **Medical devices.** China confirmed that, under its medical device regulatory framework, it will give imported medical devices the same treatment as those manufactured domestically with respect to market access. China also committed to (i) complete drafting in 2016 of a second series of clinical trial exemption catalogues for medical devices; and (ii) appoint dedicated personnel to facilitate the medical device evaluation and approval process.

Notably, the statements released by the United States and China following the JCCT did not address the US-China BIT negotiations. USTR Froman stated after the JCCT that the parties have made progress recently on a number of issues related to the core text, but noted that more work was needed “on the text, negative list, and additional issues.” In light of these issues, completion of the BIT during President Obama’s term remains unlikely (*please refer to the W&C US Trade Alert dated September 30, 2015*).

Click [here](#) for a copy of China’s statement on the 26<sup>th</sup> JCCT, and [here](#) for a copy of the US fact sheet.

## US Department of Agriculture Releases Final Rule Implementing Catfish Inspection Program

On November 25, 2015, the US Department of Agriculture, Food Safety Inspection Service (FSIS) released a final rule establishing an inspection program for fish classified under the order Siluriformes, including catfish. The rule was developed in order to implement provisions of (i) the 2008 US Farm Bill, which subjected domestic and imported catfish to inspection requirements contained in the Federal Meat Inspection Act (FMIA); and (ii) the 2014 US Farm Bill, which expanded this requirement to cover “all fish of the order Siluriformes”. Notably, the rule sets forth procedures that foreign countries must follow to maintain their eligibility to export Siluriformes fish to the United States under the new system – including by having their seafood inspection systems recognized by FSIS as “equivalent” to the US system.

The key components of the final rule may be summarized as follows:

- **Effective date and transitional period.** The effective date of the rule (*i.e.*, the date on which Siluriformes fish will come under FSIS jurisdiction) will occur in March 2016, 90 days after the rule is published in the *Federal Register*. FSIS will then phase in the rule over an 18-month “transitional period,” which will begin on the effective date. Foreign countries that export Siluriformes fish to the United States and wish to continue doing so during the transitional period are required to submit to FSIS, prior to the effective date: (i) lists of establishments that

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currently export and will continue to export Siluriformes fish to the United States; and (ii) documentation of laws or other legal measures in place that provide authority to regulate the growing and processing of fish for human food and to assure compliance with the US Food and Drug Administration's (FDA) regulatory requirements for Fish and Fishery Products (21 C.F.R. § 123). This initial documentation will only be recognized during the transitional period, and will not be used to evaluate the equivalency of the country's inspection system (see below).

- **Equivalency.** Foreign countries that wish to continue exporting Siluriformes fish to the United States after the transitional period must submit to FSIS, prior to the expiration of the transitional period, adequate documentation showing the equivalence of their Siluriformes inspection systems with that of the United States. For FSIS to determine that a foreign country's system is equivalent, it must find that "the system of fish inspection maintained by [the foreign country], with respect to establishments preparing products in such country for export to the United States, insures compliance of the establishments and their products with requirements equivalent to the inspection and other requirements of the FMIA and the regulations that implement it in the United States." To satisfy this requirement, foreign countries must provide documentation demonstrating equivalence in four areas: (i) program administration; (ii) legal authority and requirements governing inspections; (iii) document evaluation and system review; and (iv) maintenance of standards. Once FSIS has determined that a foreign country maintains an equivalent system, only fish establishments that have been certified by that foreign country as complying with the equivalent requirements will be eligible to export Siluriformes fish to the United States.
- **Interim exports.** If FSIS has not reached an equivalency determination with respect to a foreign country by the end of the transitional period, FSIS will allow exports from that country to continue after the transitional period. Such exports can continue until such time that FSIS makes a negative equivalency determination (alternatively, if FSIS makes a positive equivalency determination, such exports can continue.) To be eligible for these interim exports, however, foreign countries must submit their equivalency documentation prior to the expiration of the transitional period.
- **Inspections and Labeling Requirements.** Beginning on the effective date, imported Siluriformes fish will be reinspected and subjected to species and residue testing by FSIS on at least a quarterly basis. At the end of the transitional period, all imported Siluriformes fish shipments will be reinspected in a manner similar to imported meat and poultry products from equivalent countries. Imported Siluriformes fish also will be subjected to the FMIA requirements concerning marking and labeling of immediate and outside containers (9 C.F.R. § 327.14-15).
- **Scope.** The rule applies to all 36 families of Siluriformes, including pangasius – a variety raised principally in Southeast Asia and in particular, Vietnam. Pangasius is a low-cost variety that competes directly with US catfish due to its similar taste and texture. Some observers have suggested that the US catfish industry and allied members of Congress have proposed and supported the FSIS catfish inspection program in an effort to limit imports of pangasius from Vietnam, as well as other competing varieties.

The inspection program will likely continue to be a source of trade friction with Vietnam and other Siluriformes-exporting countries, which have alleged that the program could violate the United States' obligations under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement"). Such criticisms have focused on Articles 2.2 and 5.1 of the SPS Agreement, which require Members to ensure that SPS measures (i) are "applied only to the extent necessary" to protect health; and (ii) are based on a risk assessment that is appropriate to the circumstances. Vietnamese Trade Minister Vu Huy Hoang referenced these concerns in an October 2013 letter to US Secretary of State John Kerry, which noted "the very small number of reported illness attributed to catfish of any kind" and argued that "[i]t cannot be seriously maintained that the [FSIS] program responds to a food safety risk." The final rule briefly addresses WTO-consistency, but does not respond to these concerns in detail.

Click [here](#) for a copy of the final rule released by FSIS.

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