WHITE & CASE

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General Trade Report - JETRO

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UNITED STATES

GENERAL TRADE POLICY

China and the United States Convene 21st Session of JCCT

Summary

From December 14-15, 2010, high-level government officials from China and the United States (the "Parties") convened in Washington, DC for the 21st session of the Joint Commission on Commerce and Trade (JCCT). The Parties discussed a wide range of trade and investment issues, signed seven agreements to promote bilateral cooperation and mutual investments, and agreed to deepen cooperation in the areas of legislation, environmental protection, intellectual property rights (IPR), health care, telecommunication, and the collection and dissemination of trade statistics. The next JCCT is scheduled to meet in China in 2011.

Analysis

The JCCT, established in 1983, is an annual high-level government-to-government mechanism aimed at improving commercial ties and resolving trade disputes between China and the US. The parties expanded the mechanism in 1997 to include sub-ministerial and working group-level dialogues that continue throughout the year to address specific issues, including IPR-related matters, the regulation of medical devices, pharmaceuticals, and high-tech and strategic trade matters. The last JCCT was held in China in October 2009.

From December 14-15, 2010, Chinese Vice Premier Wang Qishan, US Secretary of Commerce Gary Locke, and US Trade Representative (USTR) Ron Kirk co-chaired the 21st session of the JCCT in Washington, DC. The Chinese delegation was comprised of senior officials from 26 ministries and agencies, including the Ministry of Commerce, the Ministry of Agriculture, the National Development and Reform Commission (NDRC), the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ), and the Ministry of Industry and Information Technology (MIIT), among others. The US delegation was comprised of the US Ambassador to China, US Trade and Development Agency Director and officials from the Treasury and State Departments.

During this JCCT meeting, the Parties discussed a wide range of trade and investment issues, including IPR, indigenous innovation, government procurement, emerging technologies, express delivery, agriculture, pharmaceuticals, standards and testing, telecommunication-related goods, travel and tourism, export controls, China's current status as a non-market economy country, and signed a number of agreements to increase dialogue and strengthen cooperation aimed at addressing the issues identified above.

It is important to note that other than the signed agreements and memoranda of understanding (MOUs) agreed upon during the JCCT, most commitments reached during the session were only verbal agreements.

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Consequently, according to USTR officials, the lack of signed commitments from either party on a variety of panel-discussion topics means that some of the verbal commitments will not be realized. For this reason, throughout the duration of the talks, the US delegation urged representatives from the private sector to continue applying pressure on both governments to follow through on verbal commitments made.

We summarize below the main points discussed and verbal agreements reached during the JCCT meeting:

IPR

- **Software Legalization.** China committed to establishing software asset management systems for government agencies to implement software legalization more effectively. To further promote software legalization within the Chinese government, China has also announced the allocation of resources in future budgets for purchasing, upgrading and/or replacing agencies' software. China furthered its commitment to software legalization beyond the government by announcing the participation of 30 state-owned enterprises (SOEs), in collaboration with the Chinese government, in a licensed software pilot project. The United States and China committed to continuing discussions on verification of compliance with software legalization commitments made at the JCCT;

- **Internet Intermediary Liability.** China announced that its Judiciary would study several options for ensuring that those who facilitate online IPR infringement would be equally as liable as those who directly engage in the infringement itself. Although no firm commitment was made on this issue, China announced that its Judiciary is already involved in drafting relevant legal interpretations in order to better combat online copyright infringement;

- **Library IPR Protection.** China and the United States announced they will continue to cooperate on library IPR protection, including exchanging views and sharing information with IP rights holders about efforts to protect IPR. China's National Copyright Administration agreed to take swift action with respect to library IPR-related complaints lodged by US academic journals but, according to Chinese officials, said action will be based on ongoing investigations into the merits of these complaints;

- **Patents and Standards.** China and the United States discussed and made progress on the role of standards organizations in making decisions on standards-related patent issues. The two countries agreed to continue discussions on this topic although no firm commitment was made; and

- **Liability of Landlords.** China agreed to take ~~a~~appropriate" legal measures to clarify responsibilities of market managers in protecting trademark rights in local markets.

Also, the United States agreed to accelerate approval on the patent application filed by a Chinese technology company, IWNCOMM, and launch training programs for Chinese trademark examiners as early as possible. The parties also discussed complex patent issues related to standards and agreed to finalize language on software verification by mid-January 2011.

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Indigenous Innovation

- **IP Origin.** China made a commitment to not discriminate against foreign-invested enterprises (FIEs) in government procurement based on the origin of the IP. The United States also agreed not to adopt or maintain any measures that discriminate against products or services based on the origin of IP innovation;

- **MIIT Equipment Catalogue.** China's MIIT committed to revise the *Catalogue Guiding Indigenous Innovation in Major Technology Equipment* in order to avoid being used for import substitution, the provision of export subsidies and/or the discrimination of foreign suppliers; and

- **Future Technologies.** China agreed to allow operators to freely choose standards or technologies in 3G or any future technology.

Government Procurement

- **WTO GPA.** China agreed to present a second revised offer to the World Trade Organization (WTO) Government Procurement Committee in 2011;

- **Government Procurement Preferences.** China agreed to further revise the *Implementing Regulations on Government Procurement Law* to provide equal treatment to FIEs; and

- **Definition of "Domestic Products".** China and the United States agreed to continue cooperation on defining ~~-~~domestic products" in a manner in which procuring entities maximize efficiency and cost savings.

Emerging Technologies

- **Smart Grid.** China agreed to develop the smart grid standards in an open, transparent, and fair manner, with reference to international standards, and consistent with its WTO commitments. China welcomed the opportunity to cooperate with the US National Institute of Standards and Technology in developing smart grid standards; and

- **Wind Power Equipment.** China confirmed that foreign companies with overseas experience and technical documentation on existing overseas wind power projects are qualified to supply equipment for large wind power projects in China. Previously, only companies with experience *in China* were eligible to supply equipment, which largely excluded US firms.

Express Delivery

- **Fake Express Delivery Services (EDS).** China and the United States will continue cooperation in investigating and shutting down fake express delivery services websites in China; and

- **EDS Supervision.** China and the United States agreed to enhance cooperative efforts to supervise EDSs.

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Agriculture

- **Beef.** China confirmed its lifting of a ban on imports from the US of bones and boneless beef products culled from cattle under 30 months age. The parties agreed to resume talks on beef market access issues in early January 2011;

- **Avian Influenza.** China confirmed its lifting of Avian Influenza-related bans on poultry products from Idaho and Kentucky. The two countries agreed to continue technical discussions in accordance with science-based international standards on the remaining bans on poultry products from four other US states;

- **Cooked Poultry.** The United States committed to addressing issues related to the importation of cooked poultry from China;

- **Pears.** The United States agreed to complete a risk assessment on the importation of Asian pears from China in the first half of 2011 and issue draft regulations on the importation of Asian pears in a timely manner; and

- **Wood Handicrafts.** The United States agreed to publish regulations on the importation of wood handicrafts and limit the applicable scope of these regulations to those products with potential risks.

Pharmaceuticals

- **Regulatory Data Protection.** China agreed to provide efficient protection to undisclosed pharmaceutical data which are required for marketing approval. The two countries further agreed to hold a seminar on pharmaceutical data protection; and

- **Anti-Counterfeiting Collaboration.** China and the United States agreed to cooperate closely to prevent counterfeit and substandard drugs. China announced the establishment of a complaint center through which pharmaceutical counterfeiting-related complaints can be channeled.

Standards and Testing

- **Compulsory Certification.** China confirmed its proactive efforts in streamlining China‘s Compulsory Certification (CCC) process and its willingness to make technical exchanges with the United States in this regard; and

- **Quarantine and Inspection.** China and the United States agreed to establish a quarantine expert team to solve problems in quarantine and inspection of miniature gardens from China.

Telecommunication Goods

- **Streamlined Application Process.** China confirmed that it will establish a streamlined, ~~-o~~ne-stop-shop” application procedure and lower charges for two certification processes for mobile devices and agreed to initiate information exchanges related to the bilateral APECTEL Mutual Recognition Agreement.

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China's Market Economy Status (MES)

- **Recognition.** The United States agreed to take China's MES concerns into serious consideration, and increase communication with China to accelerate the process for recognizing China' MES.

Export Control

- **Regime Reform.** The United States agreed to take into account China's comments on its reform of its export control regime and, also, Chinese enterprises' applications for the importation of civil high-tech items.

China and the United States concluded seven non-verbal, signed agreements and MOUs covering agricultural cooperation, statistics, soybean inspection and quarantine, smart grids, real-time water quality monitoring systems, and the promotion of investment in the United States. In addition, the parties agreed to engage in various activities, including legal exchange, electronic scrap recycling, IPR information exchange, the improvement of drug safety and quality, medical device classification, promotion of green information and communication technologies, and cooperation in the sharing of trade statistics.

Outlook

In 2010, the US-China bilateral trade relationship has been affected by such irritants as the US House of Representatives passing a bill to address China's alleged currency misalignment, the United Steelworkers filing a Section 301 case against China before the WTO, purported IPR violations and resulting 337 investigations being initiated before the US International Trade Commision (USITC), China allegedly placing restrictions on the export of rare-earth minerals, US firms alleging the Chinese government's policies for government procurement effectively dictate a preference for domestic suppliers, and several trade remedy cases filed in the United States. The 21st JCCT offered a good opportunity for officials from both sides to communicate their respective concerns with respect to the bilateral trade and investment relationship and to strengthen cooperation to address these concerns. Sources note, however, that the recently concluded JCCT's true degree of success is, as of yet, unknown due to the fact that previous talks have produced similar verbal and non-verbal agreements only to have parties fail to follow through on a number of the agreements reached. However, US trade policy is driven by the executive branch of government and, given the number of trade irritants at play in the current US-China trade relationship, as well as the view taken by the Obama Administration that these differences should be addressed through bilateral consultation and dialogue (not unilateral action such as legislation) and/or multilateral agreement, experts opine that the Obama Administration is eager to see some follow-through on the commitments made at the JCCT.

DOC Publishes Two Federal Register Notices on NME Separate Rate Analysis and AD Respondent Selection

Summary

On December 16, 2010, the US Department of Commerce (DOC) published in the Federal Register two notices requesting comments on the following: (i) The *de facto* criteria examined to establish a separate rate in

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antidumping proceedings involving non-market economy countries; and (ii) The proposed methodology for respondent selection in antidumping proceedings.

Analysis

I. *DE FACTO* CRITERIA FOR SEPARATE RATE ANALYSIS IN NON-MARKET ECONOMY ANTI-DUMPING PROCEEDINGS

DOC has the rebuttable presumption in antidumping proceeding involving a non-market economy (NME) that export activities of all companies within the NME are subject to government control and, therefore, should be assessed a single antidumping rate, *i.e.*, the NME-Entity rate. DOC applies the NME-Entity rate to all exporters of the NME unless an exporter can demonstrate that it is sufficiently autonomous from the NME government to merit a separate rate, *i.e.*, a dumping margin separate from the margin assigned to the NME-Entity. An exporter can prove this autonomy by demonstrating the absence of governmental control, in principle (*i.e.*, *de jure*) or in practice (*i.e.*, *de facto*), over its export activities. DOC's current practice in its separate rate analysis is to focus primarily on direct government involvement in a company's export activities and, therefore, may not sufficiently account for how the government's role in the NME may affect the exporter's behavior with respect to export activities and setting prices.

In the Federal Register notice, DOC emphasizes that it is not revisiting the *de jure* criteria currently examined for purposes of establishing a company's separate rate. DOC is, however, considering modifying its current policy and practice with respect to the extent to which it might incorporate additional *de facto* criteria into its analysis and invites the public to comment on amending these criteria.

At present, DOC typically considers four factors in determining whether a respondent is subject to a *de facto* control of its exports: (i) whether the export prices are set by or are subject the approval of a governmental agency; (ii) whether the respondent has authority to negotiate and sign contracts and other agreements; (iii) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (iv) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.[1] As part of its *de facto* separate rate analysis, DOC asks applicants questions related to: (i) ownership and whether any individual owners hold office at any level of the NME government; (ii) export sales negotiations and prices; (iii) selection of company management and whether any managers held government positions; (iv) disposition of profits; and (v) affiliations with any companies involved in the production or sale in the home market, third-country markets or the United States of merchandise which would fall under the description of merchandise covered by the scope of the proceeding.

DOC asks that comments include a description of the criteria parties propose the DOC examine, specific questions DOC might ask a separate rate applicant and the type of documentation DOC would expect to review at verification, including procedures followed. In order to ensure their due consideration, comments must be received no later than January 31, 2011.

[1] A separate-rate analysis is not necessary to determine whether an exporter is independent from NME government controlled if the exporter of NME-produced merchandise is wholly foreign-owned or located in a market economy country.

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II. PROPOSED METHODOLOGY FOR RESPONDENT SELECTION IN ANTIDUMPING PROCEEDINGS

In cases in which the number of producers/exporters (company) involved in an AD investigation or review is large enough such that it would be impossible for DOC to examine each company individually, DOC may limit its examination to: (i) a sample of exporters, producers or types of products that is statistically valid based on the information available; or (ii) exporters and producers accounting for the largest volume of subject merchandise from the exporting country that can reasonably be examined. DOC almost always uses option (ii). Consequently, companies under investigation or review with relatively smaller import volumes have rarely been selected by DOC for individual examination.

DOC proposes sampling companies with varying import volumes and, in order to ensure that samples are statistically valid, as required by law, DOC further proposes employing a sampling technique that: (i) is random in order to ensure that every company has an equal chance of being selected; (ii) is stratified in order to ensure the participation in the investigation or review of companies of different import volumes; and (iii) uses probability-proportional-to-size (PPS) samples in order to ensure that the probability of a company being selected as a respondent is proportional to its share of imports.

When to Sample

In the FR notice, DOC specifies that it will forego sampling if: (i) due to resource constraints, DOC is unable to examine at least three companies; (ii) the largest companies by import volume account for at least 75 percent of total imports; or (iii) the characteristics of the underlying population make it highly likely that results obtained from the largest possible sample, given resource constraints, would not represent the population. In the case of (iii), DOC proposes soliciting public comment on significant variation in company characteristics that would have a substantial effect on the variation in dumping margins of the companies of the underlying population. If DOC receives any comment, there would be a rebuttal period before DOC announces its decision on the respondent selection method. If DOC does not find that selecting respondents through sampling is appropriate for that particular segment of the proceedings based on information and comments on record, DOC will choose as respondents those companies accounting for the largest import volume that can be reasonably examined.

Definition of Population

At present, DOC generally selects companies for individual examination based on import volumes reported by Customs and Border Protection (CBP). DOC also assesses an AD rate to other companies not selected for individual examination. DOC does not currently require any evidence of shipment from a non-selected company before making its respondent-selection decision. In the sampling context, however, the evidence of shipments will be required in order to define the population and, should the company be selected, assess a specific AD margin for the company. DOC will, therefore, use CBP data as evidence of shipment and, furthermore, proposes to define the relevant population from which to sample as: (i) all companies subject to investigation with shipments of subject merchandise; and (ii) all companies named in a review with shipments of subject merchandise. The relevant population in a NME case should not include companies that are a part of the NME entity. As DOC may not be able to determine a company's eligibility for a separate rate before respondent selection, DOC proposes excluding companies that have not submitted separate rate applications from the relevant population.

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Sampling Technique

Further to DOC's notice, the first step in using stratified PPS samples is to sort all companies in the relevant population from largest to smallest, based on import volumes. Second, companies are segregated into a number of strata equal to the sample size, with each stratum accounting for approximately the same share of import volume. Third, one respondent from each stratum is selected using PPS. If a single company accounts for more than 33 percent or more of imports, that company would be assigned its own stratum and the remaining companies would be divided into two strata accounting for an equal share of the remaining imports. Then, one respondent would be selected from each of these strata. If two companies each account for more than 33 percent or more of imports, each of the two companies would be assigned its own stratum and one respondent would be randomly selected from the remaining companies.

Calculating and Assigning Rates

After examination of selected respondents by the sampling method, DOC will need to assign a rate to all non-selected companies. To do so, DOC proposes calculating a "sample rate" (an average of all selected respondent rates, weighted by the import share of their corresponding strata). In a market economy case, all companies in the relevant population who were not selected for individual examination would receive the sample rate. In NME cases, consistent with the definition of "relevant population", only companies in the relevant population that qualify for separate rates would receive the sample rate and those that do not qualify for separate rates would receive the NME country-wide rate.

In addition to comments on the methodology described above, DOC requests comments on how it should address the case in which a selected respondent needs to be replaced, due to withdrawal or disqualification for any reason and how should it treat voluntary respondents in the sampling context. Also, DOC requests comments on how it should treat adverse-facts-available, *de minimis* and zero antidumping duty rates in its calculation of the sample rate. To receive their due consideration, all comments must be received by January 31, 2011.

USTR Issues Annual Report on China's WTO Compliance

Summary

On December 23, 2010, the Office of the United States Trade Representative (USTR) released its annual "Report to Congress on China's WTO Compliance." This is the ninth report prepared pursuant to Section 421 of the US-China Relations Act of 2000 (P.L. 106-286), 22 U.S.C. § 6951, which requires USTR to report annually to Congress on compliance by China with commitments made in connection with its accession to the World Trade Organization (WTO), including both multilateral commitments and any bilateral commitments made to the United States. The focus of the report's analysis continues to be on trade concerns raised by US stakeholders that, in the view of the US Government, merit attention within the WTO context. We review below the 2010 report.

The 2010 "Report to Congress on China's WTO Compliance" is available at:
http://www.ustr.gov/webfm_send/2460

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Analysis

I. TRENDS

According to the report, China's progress toward economic reform since its accession to the WTO in 2001 has been ~~-im~~pressive." A ~~-tr~~oubling" trend toward state intervention in recent years, however, has presented new challenges to the United States and China's other trading partners with respect to China fully assuming its WTO commitments and embracing the open, market-oriented and rules-based global trading system.

The report notes that, within the first four years after acceding to the WTO, China implemented a set of ~~-s~~weeping" commitments, including the reduction of tariffs, the elimination of certain non-tariff barriers and many improvements to intellectual property protections and transparency. According to the report, since 2006, China's progress toward market liberalization has slowed. In this regard, the report points to policies and practices at several levels of government in China which are allegedly inconsistent with the WTO principles of market access, non-discrimination and transparency, and reduced trade-distorting government policies.

In 2010, according to the report, ~~-w~~eak" rule of law, the presence of ~~-in~~terventionist" government policies and practices, and the continued preeminence of state-owned enterprises in China's economy remain worrisome to US stakeholders. The report cites so-called ~~-in~~digenous innovation" policies, deficient IPR enforcement, China's ~~-s~~low" movement toward the WTO Government Procurment Agreement, market access barriers and discrimination against foreign enterprises as current concerns.

II. 2010 DEVELOPMENTS

According to the report, the Obama Administration has worked in 2010 to strengthen trade and economic ties with China, ~~-w~~hile also taking steps to enforce China's adherence to its international trade obligations." The report characterizes the Obama Administration's approach to this end as an ~~-o~~utcome-oriented dialogue at all levels of engagement."

On the multilateral front, the United States filed three new cases before the WTO and is continuing to pursue a case filed in 2009. The first case challenges China's use of its trade remedy laws in ways that were allegedly WTO-inconsistent. The second case challenges China's creation of an exclusive supplier of electronic payment services in China, which barred US suppliers from the market. The third case challenged China's support of its domestic wind turbine systems through the use of import substitution subsidies. The United States also successfully defended its use of trade remedies in two WTO cases brought before dispute panels by China although China has since appealed both cases.

On the bilateral front, the United States and China were able to make progress on the following trade-related differences at the 21st Session of the Joint Commission on Commerce and Trade (JCCT), held in Washington, DC from December 14-15, 2010:

A. China agreed to take a series of steps to improve the enforcement of IPR;

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B. China agreed not to maintain any measures that provide government procurement preferences for goods and services based on where the IP was created or is owned;

C. China agreed to submit a revised offer of coverage for accession to the WTO Government Procurement Agreement;

D. China agreed not to use the Major Industrial Equipment Catalogue to discriminate against foreign suppliers;

E. China committed to openness, transparency and non-discrimination in the development of standards for its smart grid market; and

F. China committed to no longer require foreign enterprises to have prior experience in China before participating in large-scale wind power projects.

III. PRIORITY AREAS

The USTR report highlighted six priority areas for action:

- **IPR.** The USTR reports claims that copyright protection on the internet is difficient in China, particularly in light of China having acceded to the World Intellectual Property Organization (WIPO). Also, the report posits that China's criminal penalties for IPR infringement are insufficient and thus do not deter IPR violators;

- **Industrial Policies.** The USTR report claims that certain Chinese industrial policies aim to help less competitive firms succeed. Industrial policies cited include those which link Chinese government procurement to the origin or ownership of the IP and those which establish standards with which foreign suppliers must comply in order to enter the Chinese market. The report also pointed to China's industrial catalogue as supporting import substitution, China's alleged discrimination against potential foreign participants in Chinese wind energy projects and China's export restrictions on raw materials, including rare earths;

- **Trading Rights and Distribution Services.** The USTR report puts forth that China has made progress toward fully liberalizing trading rights (the right to import and export) and distribution services (wholesale, retail, direct selling and franchising), particularly since the 2008 JCCT. As a result, many US firms have since been able to import and export goods into and out of China without a Chinese intermediary and, also, have been able to create their own distribution networks in China. The USTR report does claim, however, that several challenges remain, including: (i) China's continued restriction on the importation and distribution of copyright-intensive products such as books, newspapers, journals, movies and music; and (ii) burdensome restrictions on the business operations of foreign direct sellers;

- **Agriculture.** The USTR report claims that the Chinese agricultural market is not sufficiently transparent and predictable due to selective intervention on the part of China's regulatory authorities. According to the report, Chinese customs and quarantine agencies are capricious in halting or delaying shipments of agricultural products into China. Also, the report alleges that Chinese Sanitary and Phytosantary (SPS) standards

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bedevil" traders of agricultural commodities. The report cites as particularly problematic the practices of China's regulatory authorities with respect to the importation of US poultry, pork and beef products;

- **Services.** The USTR report alleges that China's regulatory process is opaque and overly burdensome with respect to the licensing and operating requirements of foreign suppliers. The report cites the banking, insurance, express delivery, telecommunications, construction and legal services sectors as being particularly affected by China's regulatory process; and

- **Transparency.** The USTR report points to two shortcomings in China's transparency commitments: (i) delays in China adopting a single official journal for publishing all trade-related measures; and (ii) the partial use of notice-and-comment procedures for for new or revised trade-related measures prior to implementation. The report claims that, while China has established a single journal and a notice-and-comment procedure, the single journal does not publish notices from all government ministries nor does the government use the notice-and-comment procedure for all new or revised trade-related measures. Therefore, according to USTR, China's fulfillment of its transparency obligations is incomplete.

Outlook

USTR's 2010 Report on China's WTO Compliance is similar to past annual reports. In the 2010 report, China's IPR enforcement and industrial policies remain as the top areas of concern for US stakeholders. Furthermore, past similarities between the USTR Report on China's WTO Compliance and the USTR National Trade Estimate Report, an annual survey of foreign barriers to US exports released roughly three months later, suggest that the concerns cited in the 2010 Report on China's WTO Compliance are likely to appear in the the 2011 National Trade Estimate Report, which is published as a companion piece to the President's Trade Policy Agenda. The featuring of IPR and industrial policies in both reports would augur USTR continuing to focus on these areas in 2011 and beyond. With respect to approach, USTR will continue engaging China on the bilateral and multilateral fronts and, given recent WTO dispute panel decisions favorable to the United States, it is possible that USTR may now intensify its engagement with China in multilateral fora, including the WTO. However, progress made at the 21st Session of the JCCT on IPR and industrial policies as well as other trade-related contentious issues have likely lended impetus to the Obama Administration's US-China bilateral agenda as well.

General Trade Policy Highlights

ITC Releases Report on Chinese Intellectual Property Rights Protection and Indigenous Innovation

The United States International Trade Commission (ITC) published on December 13, 2010 the first of two reports, requested by Chairman of the Senate Committee on Finance Sen. Max Baucus (D-MT) and Ranking Member Sen. Charles Grassley (R-IA), addressing alleged intellectual property infringement and indigenous innovation policies in China.

The first report, China: Intellectual Property Infringement, Indigenous Innovation policies, and Frameworks for Measuring the Effects on the US Economy," details the types of intellectual property rights (IPR) infringement in

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which China is allegedly engaged such as copyright piracy, trademark counterfeiting, patent infringement and trade secret misappropriation. The report also details China's indigenous innovation policies which, according to the ITC, support the development, commercialization and purchase of Chinese products and technologies over those of the United States and create barriers to US foreign direct investment (FDI) in and exports to China.

The ITC report's principle findings can be summarized as follows:

- **IPR enforcement.** Local Chinese officials protect IPR infringing industries; there is inadequate coordination among Chinese government agencies charged with IPR protection; insufficient resources are allotted for IPR enforcement and training; and civil and criminal penalties are small such that they do not serve as a deterrent for IPR infringement.

- **Victims of IP infringement.** Weak IPR enforcement in China results in the widespread infringement of US firms' copyrights, trademarks, patents and trade secrets; and these firms, particularly small businesses, are unable to protect their IP in China due to lack of resources and/or expertise.

- **Importance of IPR to the United States.** Innovation drives the US economy by creating better products, streamlining processes and providing higher returns on investment.

- **Indigenous innovation.** Indigenous innovation policies reduce business opportunities for US firms in China. These policies are embedded in Chinese government procurement, technical standards, anti-monopoly and tax regulations, such that it is often difficult for a US firm to identify and abide by them in order to compete on equal terms in China.

The report also proposes an analytical framework for quantifying the effect on the US economy of alleged IPR infringement in and indigenous innovation policies of China. This quantification will be included in the second ITC report, which is due to be published on May 2, 2011.

Following the release of the first ITC report, Sen. Baucus stated that ~~"~~China continually fails to protect and enforce American IPRs and discriminates against American businesses [and] it is time for China to get serious about protecting American innovation." Sen. Grassley seconded Sen. Baucus' remarks, stating that ~~"~~China needs to work harder to enforce its IP protection laws and it needs to stop its policies that treat American companies unfairly." Prior to making their remarks, the Sens. Baucus and Grassley, along with 30 other Senators, wrote a letter to Chinese Vice Premier Wang Qishan, urging him to cooperate with the United States on addressing IPR infringement and indigenous innovation policies in the context of the US-China Joint Committee on Commerce and Trade (JCCT), which was held from December 14-15, 2010 in Washington, DC.

Obama Administration Takes Steps to Modify Export Controls Regulations

On December 10, 2010 the US Department of State released two Notices in the Federal Register seeking public comments on recent proposed amendments to the US Munitions List (USML). The amendments came as part of the Obama Administration's bid to reform US export controls, a central pillar of the Administration's broader

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National Export Initiative, which aims to double US exports by 2015. A major component of the proposed reform is a comprehensive review of the USML, administered by the US State Department, and the Commerce Control List (CCL), administered by the Department of Commerce, in order to eventually consolidate the two into a single list.

The first notice seeks public comments on the State Department's review of Category VII (tanks and other military vehicles) of the USML. Category VII is the first of the USML categories to undergo this process, the purpose of which is to classify the items into one of three tiers, based on the sensitivity of the individual items, and to apply export restrictions accordingly. In August, the White House announced that the results of its task force's initial review of Category VII of the USML demonstrated that the USML is overbroad. The task force found that none of the items in the category should be placed in Tier 3, 18% should be placed in Tier 2, and only 8% should be placed in the lowest tier. The remaining items in Category VII, the task force concluded, should either be decontrolled or transferred to the CCL.

The second notice seeks public comments in order to identify those articles that do not fit into any of the proposed three tiers of the revised USML. The notice also requests comments on transforming the USML from a list based on design intent into a positive list that describes the precise attributes of items subject to export restrictions.

In his meeting with the Export Council on December 9, 2010, President Obama noted that the export initiatives, and the changes to the USML in particular, are an effort to ensure that American firms ~~s~~stay competitive as [the US] better protect[s] [its] national security interests."

USTR Announces Request for WTO Dispute Settlement Consultations with China over Wind Power Equipment Subsidies

On December 22, 2010, the US Trade Representative (USTR) announced that the United States has requested consultations with China under the World Trade Organization (WTO) dispute settlement mechanism in regard to alleged subsidies that the Chinese government provides to wind power equipment manufacturers as part of China's Special Fund for Wind Power Manufacturing program. According to USTR, these subsidies are prohibited under Article 3.1(b) of the WTO's Agreement on Subsidies and Countervailing Measures (SCM Agreement) because they are contingent upon the use of Chinese-made parts and components.

USTR's announcement resulted from the September 9, 2010 petition filed by the United Steelworkers (USW) union under Section 301 of the Trade Act of 1974. (*Please refer to US Trade Alert of October 15, 2010.*) The USW petition alleged that China was violating WTO rules by (i) providing direct and indirect subsidies, such as low-interest loans and land grants, to its clean energy sector; (ii) requiring foreign clean energy companies to license their technology to Chinese partners as a condition to enter the Chinese market; (iii) employing performance standards and preferential practices; and (iv) restricting exports of ~~r~~rare earth" elements used to produce wind turbines, solar panels and fluorescent light bulbs. The USW petition contended that China's support of its clean energy sector was unfairly contributing to Chinese companies expanding their domestic and global market share for clean energy equipment to the detriment of American workers in those sectors, many of whom are USW members.

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The requested WTO dispute settlement consultations address only one of the allegations contained in the original USW Section 301 petition. According to USTR, the United States has been able to make progress on the other areas of concern through its bilateral engagement of China such as the Joint Commission on Commerce and Trade (JCCT) held from December 14-15, 2010 in Washington, DC. For example, at the JCCT, China agreed to eliminate the requirement that foreign enterprises have prior experience supplying equipment to large-scale wind power projects in China.

In his remarks at the announcement of the request for WTO consultations with China, USTR Kirk stated that ―import substitution subsidies are particularly harmful and inherently trade distorting, which is why they are expressly prohibited under WTO rules." He cited these subsidies as inhibiting US exports to China and stated that the removal of ―barriers to our exports is a core element of the [President Obama's] trade strategy."

According to USTR, the WTO consultations request will also include transparency-related claims, such as China's alleged failure to notify the challenged subsidies as required by the SCM Agreement, and to make the measure enacting the challenged subsidies available in at least one of the official languages of the WTO.

Pursuant to WTO dispute settlement procedures, the United States and China will have a 60-day period to reach a mutually-agreed solution to the US allegations. If the two parties are unable to arrive at such an agreement during that period, the United States may request that the WTO form a dispute settlement panel to adjudicate the dispute. China may block the first US request, but the WTO's Dispute Settlement Body must establish a panel upon a second US request to do so. This panel would take into consideration arguments presented by both parties, draft a panel report, circulate the report to the concerned parties then to all WTO members for comments and, finally, adopt the report itself, thus ruling in favor or against the US allegations. With no appeal, the entire dispute settlement process will last approximately one year, although this timeframe can be extended in exceptional circumstances.

Senate and House Pass Reduced Version of Omnibus Trade Bill; GSP and MTB Not Included

On December 22, 2010, shortly before the 111th Congress adjourned, the US House of Representatives and the Senate passed a reduced version of the Omnibus Trade Bill (HR 6517), which included a six-week extension of the Andean Trade Preferences Act (ATPA) and the Trade Adjustment Assistance (TAA) program, but did not contain language for renewal of the Generalized System of Preferences (GSP) or language on the Miscellaneous Tariff Bill (MTB).

The House passed on December 15, 2010 a more robust version of HR 6517, which would have extended ATPA, TAA, GSP, and MTB. After passage in the House, however, the bill was sent to the Senate where it stalled due to differences between Democrats and Republicans concerning Labor Department regulations requiring that TAA be administered by unionized workers (a regulation known as ―merit staffing"). The bill also stalled due to the firm objection of Sen. Jeff Sessions (R-AL) regarding the inclusion in GSP of certain types of low-end sleeping bags from Bangladesh. Before the 111th Congress adjourned, Senate Finance Committee chairman Max Baucus (D-MT) and Senate Republican Whip John Kyl (R-AZ) had been working toward a compromise deal to extend GSP,

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ATPA and TAA and, while Senate Republicans eventually accepted the suspension of ~~"m~~erit staffing" and a short extension of TAA and ATPA, GSP and MTB were not included in the final legislation.

Sen. Sessions effectively excluded GSP from HR 6517 arguing that, were preferential tariff treatment afforded to non-down-filled sleeping bags under GSP, American jobs would be lost, namely those of employees of Exxel Outdoors, a US company with an Alabama factory that produces similar sleeping bags. Sources note, however, that key Senate Republican—including Minority Leader Sen. Mitch McConnell (R-KY) and Sen. Jim Bunning (R-KY)—have stated on several occasions that non-down-filled sleeping bags from Bangladesh should not be removed from the GSP program.

According to sources, expected Chairman of the House Ways and Means Committee Rep. Dave Camp (R-MI), Sen. Baucus and USTR, at the behest of the Obama Administration, have all expressed disappointment at the failure of the Senate to include language in HR 6517 to renew all US preference programs, including GSP. After adjournment, USTR Ron Kirk stated that the Obama Administration would work to achieve a "~~f~~ull, long-term extension" of US preferences programs, a position seconded by Sen. Baucus and Rep. Camp.

Experts note that, as in the past when Congress has failed to renew US preferences before adjourning, it is likely that GSP will be renewed early in the 112th Congress with tariff benefits applying retroactively due to strong bipartisan support for the program. The prospects for swift passage of the MTB in the 112th Congress, commencing on January 5, 2011, however, remain unclear due to lingering concerns over MTB's tariff suspensions qualifying as earmarks, a practice that many within the Republican Party have purportedly renounced.

USTR Requests Advice from USITC on CNL Waivers

On December 20, 2010, US Trade Representative (USTR) Ron Kirk sent a letter to US International Trade Commission (USITC) Chairman Deanna Okun, requesting that the USITC provide advice on whether any industry in the United States is likely to be adversely affected by a waiver of the competitive needs limitation (CNL) for four products that are eligible for duty-free treatment under the Generalized System of Preferences (GSP) program. USTR Kirk also requested in the letter that USITC provide advice as to the probable effect on US imports and US consumers.

In connection with the 2010 GSP Annual Review, USTR announced in a July 15, 2010 Federal Register (FR) notice that the deadline for filing petitions to request CNL waivers was November 16, 2010 (75 FR 41274). In response to the July 15, 2010 FR notice, the GSP Subcommittee of the Trade Policy Staff Committee (TPSC) accepted for review petitions on the following four products: (i) lysine and its esters from Brazil; (ii) pneumatic tires from Sri Lanka; (iii) certain rubber gloves from Thailand; and (iv) calcium silicon ferroalloys from Argentina. Acceptance of a petition for review, however, does not indicate that the waiver has been granted but, rather, that that USTR has found the petitions eligible for review.

If the import levels of a product afforded duty-free treatment under GSP from a beneficiary country exceed a certain threshold (CNL) over one calendar year, US law obliges the President to terminate the GSP benefits for that product from that beneficiary country. The President can, however, waive the CNLs for certain products if he

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takes into account input from the USITC as to whether the waiver will adversely affect any domestic US industry, determines that the waiver is in the economic interests of the United States and publishes the determination in the FR.

GSP was not renewed in the lame-duck session of the 111th Congress before it adjourned on December 22, 2010 and will expire on December 31, 2010. If and when GSP is reauthorized, a schedule for the submission of public comments and for a public hearing on the accepted petitions will be announced in the FR. Experts note that, in past cases in which GSP has not been renewed before Congress has adjourned, it is usually renewed shortly after the next Congress convenes with tariff benefits applying retroactively. The 112th Congress convenes on January 5, 2011.

DOC Proposes to Change AD Review Calculation Methodology and End "Zeroing" Practice in AD Proceedings

On December 28, 2010, the US Department of Commerce (DOC) proposed a revision to its antidumping (AD) duty regulations that, if implemented, would (i) change the fundamental AD calculation methodology used in AD administrative review proceedings; (ii) end DOC's practice of disregarding negative dumping margins, or "zeroing," in the calculation of overall weighted-average dumping margins for AD administrative review proceedings; and (iii) end the use of zeroing in AD investigations in which a transaction-to-transaction dumping margin calculation methodology is applied. DOC's proposed rule change is an initial effort to fulfill previous commitments made to the EU, Japan, and Mexico who have complained to the WTO that DOC's continued use of zeroing in AD proceedings is a violation of WTO obligations.

DOC's proposed rule change involves a significant adjustment to the calculation of AD duty margins and importer-specific assessment rates in AD review proceedings. DOC's normal practice in AD reviews has been to derive dumping margins by comparing monthly weighted-average normal values to transaction-specific net export prices. DOC then weight-averages the resulting transaction-specific dumping margins to derive a respondent's overall AD duty deposit rate and, also, the final AD duty assessment rates assigned to individual importers.

Under its standard AD review calculation methodology, DOC disregards any negative dumping margins found (*i.e.*, transactions with an export price exceeding normal value) and does not offset an exporter's dumped transactions with non-dumped sales. DOC is now proposing to (i) change its normal practice in AD reviews and derive AD margins by comparing monthly weighted-average normal values to monthly weighted-average export prices; and (ii) end its zeroing practice under this new AD review calculation methodology. The new proposed rule does not provide details regarding the exact methodology that DOC will use. Under the proposed change to its regulations, DOC also has reserved the right in AD reviews to revert back to a transaction-specific AD calculation methodology under special circumstances and on a case-by-case basis. It is not clear from the DOC's initial proposal if zeroing would be applied in such cases.

DOC's proposed changes to its regulations and AD duty calculation methodologies announced on December 28 constitute an initial effort to resolve pending WTO disputes related to DOC's continued application of zeroing in certain AD investigations and all AD administrative reviews. DOC has requested public comments on the proposed change to its regulations, with comments due no later than January 27, 2011. After reviewing and

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considering public comments, DOC will issue a final rule. Although DOC has not set a timetable for issuing a final rule, once implemented, DOC's revised regulations will apply to the specific and pending WTO disputes identified in DOC's proposed rule change, and to on-going AD administrative review proceedings in which preliminary results are issued more than sixty days after the date on which the final rule is published.

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FREE TRADE AGREEMENTS

US and Korea Reach Agreement on KORUS; Congressional Process Uncertain

Summary

On December 3, 2010, United States Trade Representative (USTR) Ron Kirk and Korean Trade Minister Kim Jong-hoon, reached an agreement on automobile tariffs within the context of the US-Korea Free Trade Agreement (KORUS FTA) negotiations. Experts opine that the December 3, 2010 agreement effectively removes the major substantive obstacle that prevented finalization of the KORUS during the G-20 Summit in Seoul (November 2010) and made elusive sufficient support in Congress. Differences surrounding Korean market access for US beef do, however, linger as do procedural uncertainties for KORUS' consideration in Congress.

Analysis

IV. BACKGROUND

KORUS negotiations began on February 2, 2006 and were concluded on April 1, 2007. The legal scrubbing of the final text was done expeditiously in order to allow President Bush and Korean President Roh Moo-hyun to sign the agreement on June 30, 2007, 1 day prior to the expiration of Trade Promotion Authority (on July 1, 2007), which requires US Congress to vote up or down on an FTA's implementing legislation without being able to add amendments to the same.

By the end of 2008, several US businesses and industry groups had made public their concerns with the 2007 Agreement in regard to provisions ranging from labor and environment to technical barriers to trade (TBTs) in Korea. Korean market access for US beef and automobiles was, however, the issue that ultimately proved insurmountable (until the December 3, 2010 meeting between USTR Kirk and Minister Kim Jong-hoon). US automakers, aligned with the United Autoworkers (UAW), cited barriers in the Korean automobile market and mobilized against allowing KORUS to pass in Congress without modifying automobile-related provisions contained therein. The US beef industry also objected to the prohibition in Korea on imports of beef from the United States older than 30 months. Both the US automobile industry and the US beef industry insisted that the United States and Korea re-visit the Agreement and make the requested modifications to the automotive- and beef-related provisions but Korea maintained a firm position that it would not re-open the Agreement.

In his presidential campaign, Senator Obama claimed opposition to KORUS, citing deficiencies with respect to protection for the automobile, rice and beef sectors. Senator Obama also cited Korea's supposed weak labor and environmental standards. Experts note that, once elected, President Obama began to express tentative support for KORUS around mid-2009 but remained firm in his commitment to obtain a better deal for US automakers and beef producers.

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On the sidelines of the G-20 Summit held in Toronto from June 26-27, 2010, President Obama and Korean President Lee Myung-bak set the G-20 Summit held in Seoul, Korea between November 11-12, 2010 as a deadline to reach a compromise on automobiles and beef. President Obama and President Lee Myung-bak were unable to achieve this compromise by this self-imposed deadline but did announce, however, that an agreement was likely to be reached in the following weeks.

On November 23, 2010, North Korea attacked the South Korean island of Yeonpyeong with artillery fire. Shortly thereafter, the United States and Korea announced joint military manoeuvers in the waters west of the Korean Penninsula. Experts opine that, while a direct link cannot be established, the December 3, 2010 compromise resulting from the meeting between USTR Kirk and Minister Kim Jong-hoon is, at least, partly attributable to the US expression of unconditional support for Korea against North Korean aggression.

V. 2010 SUPPLEMENTAL AGREEMENT

United States Trade Representative (USTR) Ron Kirk and Korean Trade Minister Kim Jong-hoon, reached a tentative agreement on December 3, 2010 on automobile tariffs and other market access issues within the context of the US-Korea Free Trade Agreement (KORUS) negotiations. These amendments modify the 2007 agreement and cover automobile tariffs, phase-out periods, safeguard provisions, environmental standards and tax treatment as well as the phase-out in Korea of tariffs on US pork and patent linkage for generic drugs.

A majority of the 2010 supplemental agreement addressed automobile market access issues. The auto provisions may be summarized as follows:

- The United States will maintain the 2.5 percent tariff currently imposed on Korean-built automobiles until KORUS' fifth year. The original 2007 agreement provided for immediate elimination of the 2.5 percent tariff;

- Korea will immediately reduce the tariff currently imposed on US-built automobiles to 4 percent and eliminate this tariff in the Agreement's fifth year. The original 2007 agreement provided for immediate elimination of this tariff;

- Korea will immediately reduce its tariff imposed on electric cars from 8 percent to 4 percent and both the United States and Korea will completely phase out electric car tariffs by KORUS' fifth year. The original 2007 agreement provided for this tariff to be eliminated by KORUS' tenth year;

- The United States will maintain the 25 percent tariff currently imposed on Korean trucks until KORUS' eighth year and will phase this tariff out completely by the Agreement's tenth year. The original 2007 agreement provided for this tariff to be linearly phased out over 10 years;

- The 2010 supplemental agreement includes automotive safeguard provisions whereby the period during which the automotive safeguard may be invoked and applied will extend 10 years beyond the full elimination of tariffs for each Korean automotive product. The United States is also not required to offer Korea tariff reductions or other compensation for up to two years after the particular safeguard is applied, a departure from what is normally offered by a country resorting to a safeguard to provide relief for a domestic industry. The 2007 agreement contained no such safeguard measures;

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- The 2007 KORUS agreement provided for a ~~-s~~nap back" of US tariffs on Korean passenger cars to pre-agreement levels were Korea to violate the Agreement in a way that materially affected US automobile business in Korea. Under the 2010 supplemental agreement, Korea's obligations to ensure non-violation of KORUS in this area are increased;

- Under the 2010 supplemental agreement, each US automaker will be allowed to export 25,000 automobiles to Korea that meet US federal safety standards. The original 2007 agreement provided for each US automaker to be allowed to export 6,500 automobiles to Korea that meet US federal safety standards;

- Under the 2010 supplemental agreement, all US automobiles will be considered compliant with Korean ultra low emissions vehicle (ULEV) environmental standard if they achieve 119 percent of the targets in these regulations. The original 2007 agreement did not confer this automatic compliance to US-built automobiles;

- Under the 2010 supplemental agreement, Korea will provide for additional transparency in the area of taxes levied on US-built automobiles according to engine size; and

- Under the 2010 supplemental agreement, Korea will allow a 12-month period between when an automotive regulation is issued in Korea and when automobile companies must comply with it. Also, the 2010 supplemental agreement requires Korea to establish a review system to ensure that existing automotive regulations fulfill their purpose without unnecessary burden to automakers.

Ford Motor Company, Chrysler and the United Autoworkers (organized labor) opposed the 2007 agreement's autos provisions and demanded, among other things, a 10-year phase-out period of the US 2.5 percent tariff. Until the December 3, 2010 tentative agreement on the elimination of the tariff in the Agreement's fifth year, neither the United States nor Korea had been willing to compromise on these issues.

Sources note that the compromise on automobile tariffs was reached due to that US negotiators ceded some ground on Korean market access for US pork. The 2010 supplemental agreement pushes back the effective date of the Korean 0 percent tariff rate for US pork from January 1, 2014 to January 1, 2016. Despite this change, American pork producers have expressed support for the deal.

Sources also note that the United States made concessions on pharmaceutical patent protection, doubling to 36 months the amount of time Korea will have to establish a system of patent linkage, which will investigate whether a patent claim exists when a Korean Company applies for marketing approval of a generic drug. Despite this concession, the Pharmaceutical Research and Manufacturers of America (PhRMA) issued a statement following the December 3, 2010 compromise in support of KORUS and made no mention of this concession on pharmaceutical patents in said statement.

Neither USTR Kirk nor Minister Jong-hoon commented on any progress made on Korean market access for US beef, which has been the other major sticking point for US KORUS negotiators. Experts note that the United States has not renounced its objectives on beef although it is unclear at this time whether this issue will be resolved before the United States and Korea to submit KORUS' implementing legislation to their respective legislatures. Although Senate Finance Committee Chair Max Baucus (D-MT), a strong advocate for US ranchers

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and cattlemen, is reportedly angry that the December 3, 2010 meeting did not produce any arrangement for US beef exports to Korea, the National Cattleman's Beef Association has urged Congress to ratify KORUS.

VI. REACTION

Positive reaction to the revised KORUS agreement can be summarized as follows:

- Current Chairman of the House Ways and Means Committee Rep. Sander Levin (D-MI) stated that he supports KORUS and that ~~it~~ is important for American manufacturing and American job";
- Expected Chairman of the Committee for the 112th Congress Rep. Dave Camp stated that KORUS is a ~~b~~big win for American employers and workers";
- Rep. Steny Hoyer (D-MD) stated that KORUS is an important ~~s~~step forward to expand the reach of American exports";
- Rep. Kevin Brady (R-TX) stated that he ~~l~~looks forward to working […] to move the agreement forward as part of a robust trade agend";
- Minority Leader Sen. Mitch McConnel (R-KY) has stated that the compromise reached on KORUS ~~is~~ a positive development";
- Ford Motor Company CEO Alan Mulally has lauded the Obama Administration for having ~~v~~igorously advocated the importance of two-way trade" and further states that Ford ~~a~~pplauds the outline of the revised" KORUS;
- The United Autoworkers (UAW) released a statement in which it expressed its support for KORUS and posits that the Agreement ~~w~~ill protect current American auto jobs";
- The United States Chamber of Commerce President and CEO issued a statement urging Congress to swiftly pass the implementing legislation for KORUS, noting that the Agreement ~~w~~ill create thousands of new jobs, advance our national goal of doubling exports in five years, and demonstrates that America is once again ready to lead on trade";
- Chairman of the Coalition of Service Industries Bill Topeta stated that KORUS ~~w~~ill boost exports, deepen our commercial ties with [Korea] and generate American jobs";
- National Cattleman's Beef Association Chief Economist Gregg Doud deemed the compromise reached on KORUS as ~~e~~ncouraging" and urged timely consideration by Congress;
- USA Poultry and Egg Export Council stated that it expect its exports to Korea to increase in the coming years as a result of KORUS; and

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- President of the American Farm Bureau Federation Bob Stallman ―urges President Obama to send the implementing language to Capitol Hill as soon as possible."

The 2010 supplemental agreement also drew negative reaction from certain lawmakers and advocacy groups:

- Chairman of the Senate Finance Committee Sen. Max Baucus (D-MT) is reportedly unhappy with KORUS' provisions on beef but experts opine that he is under pressure from USTR, operating at the behest of the Obama Administration, not to obstruct passage of the Agreement;

- Sen. Sherrod Brown (D-OH) issued a statement in which she condemns KORUS as a ―NAFTA-style free trade agreement" that will ―balloon [the US trade deficit] and lead to massive job losses";

- The AFL-CIO issued a statement in which it expressed opposition to KORUS, alleging inadequate workers' rights and currency manipulation;

- The American Manufacturing Trade Action Coalition (AMTAC) has issued a statement expressing strong opposition to the revised KORUS agreement. AMTAC claims that issues such as non-reciprocal tariff phase-outs, rule of origin loopholes and customs enforcement language were not addressed; and

- Public Citizen issued a statement expressing strong opposition to KORUS, claiming that the majority of Americans are opposed to ―more-of-the-same job-offshoring [trade] agreements."

The influential United Steelworkers Union (USW) – typically critical of all US trade agreements – has thus far refused to take a position on the revised KORUS agreement. Observers opine that the USW's silence could be due to the overt support by its sister union, the UAW.

Outlook

Despite the conclusion of the KORUS negotiations and initial indications of strong congressional support, several questions remain regarding how the Agreement will be implemented in the United States. Most importantly, questions remain about whether the 2007 agreement and the 2010 supplemental agreement will be governed by the now-expired Trade Promotion Authority (TPA). Under TPA (19 U.S.C. § 2191-2194 and 3803-3805), all trade agreements ―entered into" by the President before July 1, 2007 will be subject to TPA's strict procedural timelines and limitations. In particular, both the House and Senate (and their committees) must approve or reject the agreement, without amendment, in no more than 90 legislative days from the bill's submission to Congress by the White House.

As noted above, the original KORUS agreement was signed on June 30, 2007, and thus unquestionably would have been subject to TPA had it been submitted in its original (2007) form. The 2010 supplemental agreement, however, calls this approach into question. The White House and USTR hold that KORUS' implementing legislation will be considered in Congress per TPA's procedural rules, but many legal experts posit that the 2010 supplemental agreement makes substantive line-item changes to the specific text of the unimplemented 2007 KORUS (*e.g.*, to the passenger car and truck tariff lines) such that TPA might not apply. Under this view, two problems arise: (i) the 2010 agreement modified the 2007 agreement such that it was ―entered into" in 2010 (after

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TPA's expiry), and thus TPA does not apply to any part of the KORUS; or (ii) the 2010 agreement is independent of the 2007 agreement and thus it alone is not subject to TPA.

Congressional experts advise that the correct interpretation of TPA's rules and the ultimate procedural status of any KORUS implementing legislaiton will be made by the Speaker of the House and the House parliamentarian in 2011 when the implementing legislation is formally submitted to Congress. If either of the agreements is found not to be covered by TPA, then the 1974 law in force on trade agreements, 19 U.S.C. § 2112, would apply, and Congress would not be subject to any of the strict procedural limitations under TPA. Thus, it is possible, although far from certain, that one or more of the agreements would be vulnerable to attempts by KORUS opponents in Congress to derail the agreement through amendment or other procedrural hurdle.

Experts also note the possibility that the Obama Administration could submit all three pending FTAs (US-Panama FTA, US-Colombia FTA and KORUS) to Congress at one time as a package deal. Expected Chairman of the House Ways and Means Committee Rep. Dave Camp (R-MI) and Expected Chairman of the House Ways and Means Subcommittee on Trade Rep. Kevin Brady (R-TX) have expressed urgency in moving all three FTAs in Congress in the near-term, particularly in light of the agreement reached on automobile tariffs in the context of KORUS, the Tax Information Exchage Agreement (TIEA) signed with Panana in the context of the US-Panama FTA and increasingly better labor standards in Colombia in the context of the US-Colombia FTA. Congressional sources note, however, that organized labor in the United States has made it known to the Obama Administration as well as to Democratic lawmakers that, while it may eventually embrace KORUS and is largely indifferent toward the US-Panama FTA, it will fight to defeat the US-Colombia FTA. For this reason, experts speculate that the White House might enter into consulatations with lawmakers from both the Republican and the Democratic parties to determine whether to submit the implementing legislation for all three FTAs as one, indivisible package thus advancing the Obama Admininstration's goal of doubling exports in five years and thwarting efforts of anti-FTA lawmakers to attack any one of the FTAs without attacking all three.

As is evident from the significant unknowns detailed above, major questions remain on the future of the KORUS in Congress. While congressional vote counters have made unofficial estimates that KORUS would enjoy sufficient votes to pass in the 112th Congress to commence on January 5, 2011, the parliamentary quandary surrounding TPA must be resolved in order for KORUS to advance further toward congressional approval and the Obama Administration, in consultations with lawmakers, must decide whether to submit to Congress the three-FTA package deal or whether to pursue each FTA separately. Initial predictions are that such procedural hurdles will not prove insurmountable for the KORUS FTA, and that it will be implemented in 2011. However, these issues will become much clearer in 2011 after the new House Republican leadership is installed.

Another potential hurdle for the agreement lies on the multilateral front. Some legal experts have begun to question whether Korea's concession to the United States on automobile emissions standards (deeming all US-built automobiles as compliant with Korean ULEV environmental standard if they achieve 119 percent of the targets in these regulations) is consistent with Korea's commitments under the WTO's Agreement on Technical Barriers to Trade (TBT). Sources note that the European Union, in response to the ULEV concession made by Korea to the United States, is now seeking similar treatment on standards in the context of the EU-Korea FTA on most favored nation (MFN) basis. It is unclear whether the Europeans' claim will be mirrored by other WTO Members that assert MFN rights through the TBT agreement, instead of an existing or pending FTA with Korea.

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Free Trade Agreement Highlights

Progress Made on Market Access and Cross-Cutting Issues at Fourth Round of TPP Negotiations; IPR and Investment Provisions Problematic

On December 10, 2010 the nine members[2] of the Trans-Pacific Partnership (TPP) concluded the fourth round of negotiations in Auckland, New Zealand. The members made progress on various aspects of the agreement, including technical market access-related details and a framework for horizontal, cross-cutting issues. Members were unable, however, to overcome differences with respect to investment provisions and intellectual property rights (IPR).

The 24 negotiating groups continued work on legal texts outlining the rights and obligations of all members in various areas, including IPR, investment, financial services, technical barriers to trade (TBTs), telecommunications, e-commerce, labor, agriculture, government procurement and environmental. The negotiators also completed the technical details related to initial market access offers, which are expected to be exchanged among member countries in January 2011. TPP members also made progress on cross-cutting issues, such as regulatory coherence, supply chain efficiency, access for small- and medium-sized firms and development.

A point of contention arose, however, over language pertaining to investment provisions. Labor unions and advocacy groups from both Australia and New Zealand signaled their strong opposition to the inclusion of an investor-state mechanism in the Agreement whereby foreign investors would be allowed to challenge a sovereign government in response to that government taking regulatory action unfavorable to the foreign investor. Negotiators from Australia and New Zealand argued that an investor-state mechanism would restrict the ability of a TPP member to regulate in such areas as environment, labor, access to medicines and food labeling. These negotiators also argued that the investor-state mechanism lacks transparency and accountability and that that the appeals processes in the arbitration tribunals charged with adjudicating in dispute settlements are deficient. The United States, which has pushed for and achieved the inclusion of the investor-state mechanism in previous FTAs, supports the inclusion of the mechanism in the TPP, arguing that US foreign direct investment (FDI) in other TPP member countries will be greater if US investors are able to engage directly with the foreign government in dispute settlement proceedings.

IPR proved to be another contentious issue at the TPP negotiations. New Zealand argued that the IPR-related provisions in the TPP should follow the World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) while the United States argued that TRIPS does not satisfactorily offer protection of IPR, particularly with respect to copyright and trademark issues. Like investment, the US position on IPR also is typical of its FTA negotiations.

[2] United States, Singapore, Chile, Brunei, Peru, Australia, New Zealand, Malaysia and Vietnam

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Present at the negotiations were over 100 stakeholders ranging from business groups and non-government organizations (NGOs) to members of academia. Stakeholders were allowed to express to the negotiators their respective positions on issues discussed among the members and to receive post-session briefs on any progress made. They were not, however, allowed to directly engage in the negotiations.

The fourth round of negotiations ended with the establishment of an agenda to be completed in advance of the fifth round of negotiations, which will take place in February 2011 in Santiago, Chile. The TPP member countries have set a goal of concluding the agreement by November 2011 when the United States will host the Asia-Pacific Economic Cooperation (APEC) forum in Hawaii. Experts question, however, whether the TPP negotiators can meet the November 2011 deadline due to the difficulty of reconciling differences among nine member states, the uncertainty surrounding the possible future accession of Japan (and other interested countries) and the lengthy process of arriving at a final compromise on market access schedules once they are presented in January 2011.

Arriving at an agreement on final market access schedules, according to analysts, could prove difficult due to the fact that the United States continues to push for a ~~h~~hybrid" approach whereby already existing bilateral market access schedules (as part of current FTAs in effect) would remain in place and a separate, overarching market access schedule would take effect for countries between which no bilateral market access schedule exists. The US ~~h~~hybrid" approach proposal is not, however, supported by Australia, which has expressed a strong interest in re-opening the US-Australia FTA in order to gain better access to the US dairy market. New Zealand also opposes the ~~h~~hybrid" approach. While all TPP members have conveyed a positive disposition to conclude the TPP by the November 2011 deadline, experts note that, for this to be accomplished, no unexpected delays can occur over the remaining rounds, and new member accessions must pose little resistance to negotiations in course.

TPP Members Announce Schedule of Remaining Negotiation Rounds

The nine members of the Trans-Pacific Partnership (TPP)[3] have announced the dates and locations of the remaining negotiation rounds:

- February 14, 2011 – Chile;
- March 28, 2011 – Singapore;
- June 20, 2011 – Vietnam;
- September 6, 2011 – United States; and
- October 24, 2011 – Peru.

Although the TPP members have limited the remaining rounds to 2011, experts opine that for the Agreement to be concluded by the target November 2011 deadline (at the APEC Summit in Hawaii), no unexpected delays can occur over the remaining rounds, and new member accessions must pose little resistance to negotiations already

[3] United States, Singapore, Chile, Brunei, Peru, Australia, New Zealand, Malaysia and Vietnam

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in course. Should disagreements arise, particularly with respect to the nature, scope and ambition of market access schedules (to be exchanged in January 2011), negotiations would likely be extended into 2012 or beyond.

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Multilateral

WTO Panel Upholds US Application of Special Safeguard Measures in Chinese Tires Case

Summary

A WTO Panel has upheld the US application of a special safeguard measure on tires from China. The United States International Trade Commission (USITC) invoked China-specific rules in September 2009 to impose a safeguard measure in the form of significant additional duties on tires. The WTO Panel ruled in favour of the United States on all issues. This is the first WTO Panel to rule on the WTO-consistency of a safeguard measure under the so-called "Transitional Product-Specific Safeguard Mechanism", which is set out in China's WTO Protocol of Accession. China has announced its intention to appeal.

Analysis

Background

The China-specific safeguard procedure was negotiated by the Clinton Administration in late 1999 and subsequently incorporated into China's WTO Protocol. It provides importing countries with the ability to impose safeguard measures on imports from China alone, using rules that are less stringent than the general multilateral disciplines set out in the WTO Agreement on Safeguards. China has been bitterly critical of a regime that allows trade-restrictive measures to be imposed relatively easily against its imports alone. China, however, accepted this system as a price for its admission into the WTO. The mechanism remains in force for 12 years following China's accession in 2001, and so it will expire in 2013.

The safeguard measure imposed by the United States on tires from China – following authorization by President Obama – consisted of additional duties for a three year period in the amount of 35 per cent *ad valorem* duties in the first year, 30 per cent in the second year and 25 per cent in the third year. An anomaly in the present case was that while the mechanism is intended to protect "domestic producers" from "market disruption", the safeguard measure was sought not by US tire producers but by the United Steelworkers. Indeed, China argued before the Panel that the US industry had "voluntarily reduced its investment in the United States and had invested in manufacturing tyres in China instead" and that Chinese imports were merely filling the consequent "supply gap" caused by US producers.

Thus, as the Panel noted:

In such circumstances, the argument went, this case involved the invocation of a mechanism designed to protect a domestic industry that did not want that protection and by its own actions had precipitated the events that were now being invoked to justify the application of the transitional product-specific safeguard mechanism of China's Protocol of Accession. Arguably, it explained too why the investigation had been initiated by a labour union, a body that was concerned with job losses resulting from this transfer of manufacturing capacity to China, and not

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by the domestic producers themselves. Thus, the Panel was aware that this aspect of the case raised the question of the suitability or relevance of safeguard mechanisms in the context of "outsourcing" and "globalization", matters of considerable systemic interest to WTO Members.

Yet the Panel did not accept China's "supply gap" argument for a number of reasons, including the fact that the USITC itself was divided on this issue. The Panel expressed reservations about having to "make a choice between the views of the majority and the dissenting commissioners."

For China, the combination of the relatively low standard for the successful invocation of the safeguard provision of the Protocol, and the burden of proof it bore as the complaining party, made it difficult to challenge the USITC determination, and US safeguard measure will stand. This is the first time in the history of WTO dispute settlement that a safeguard measure has been upheld in its entirety, although the earlier cases were under the WTO Agreement on Safeguards rather than China's Protocol of Accession.

Imports of Tires from China Were "Increasing Rapidly"

The China safeguard mechanism can be triggered by an importing WTO Member where imports from China cause "market disruption to the domestic producers of like or directly competitive products[.]" The Protocol adds that market disruption will exist "whenever imports of an article […] are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury […] to the domestic industry."

The Panel found that there were absolute increases of tires from China into the United States in each year of the period of investigation (2004-2008). However, China argued that "the use of the present continuous tense in the phrases 'are being imported'…and 'are increasing' requires the investigating authority to focus on the *most* recent past, in this case 2008 [original emphasis]." The Panel rejected this argument, reasoning that "there is nothing in the use of the present continuous tense in […] the Protocol that would require an investigating authority to focus on the movements in imports during the *most* recent past, or during the period immediately preceding the authority's decision [original emphasis]."

The Panel also observed that there was no definition in the Protocol for imports that are "increasing rapidly [...] relatively" and therefore "any reasonable form of a relative assessment is acceptable." The Panel stated that "the interpretation of this factor is not necessarily limited to a consideration of the market share of Chinese imports, *i.e.*, imports from China as a percentage of total consumption." It saw "no reason why imports relative to domestic production cannot also be considered." The Panel added that in the present case, the USITC considered both imports relative to market share and imports relative to domestic production.

After considering other arguments raised by China, the Panel concluded that "the USITC did not fail to evaluate properly whether imports from China met the specific threshold under […] the Protocol of 'increasing rapidly.'"

US Causation Standard Upheld: "Imports Need Not Be the Sole Cause of the Market Disruption"

China argued that a statutory provision implementing the China safeguard mechanism into US law was WTO-inconsistent "as such." As noted above, the Protocol provides that the imports from China must be "a significant cause" of material injury. The US statute defined "significant cause" as "a cause which contributes significantly to

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the material injury of the domestic industry, but need not be equal to or greater than any other cause." China argued that the US law "lowers the […] causation standard" of the Protocol, in part by redefining "significant cause" to mean "contributes significantly."

The Panel rejected this argument. It began by noting that "[t]he WTO Agreement does not prescribe any particular manner in which a Member's WTO obligations and commitments must be transposed into its domestic law." It reasoned that "there is nothing to prevent a Member from including in its domestic law definitions of terms used in the WTO Agreement. Although a Member's decision to define WTO terms runs the risk that the resultant definition may not be WTO-consistent, WTO-inconsistency must not be presumed."

Turning to the causation standard, the Panel stated that under the Protocol, "rapidly increasing imports need only be 'a' significant cause of market disruption. In other words, the imports need not be the *sole* cause of the market disruption [original emphasis]." It found that "Members must be entitled to interpret the term 'cause' in a way that allows for the possibility that the causal factor is one of several causal factors that together produce or bring market disruption." It added that "it seems reasonable that Members might refer to multiple causes each 'contributing' to the result." It therefore concluded that the "contributes significantly" standard in the US statute did not require the United States to establish causation in a manner inconsistent with the Protocol.

Material Injury: "Supply Gap" Argument Rejected

China argued that the USITC did not establish that rapidly increasing imports from China were a "significant cause" of the material injury. The Panel began its analysis of this issue by noting that the Protocol "does not require the importing Member to apply any particular methodology for establishing market disruption, including causation." The authority had to address the listed objective factors, such as the volume of imports and the effect on prices. The Panel cautioned that a finding of causation under the Protocol "should only be made if it is properly established that rapidly increasing imports have injurious effects that cannot be explained by the existence of other causal factors."

China raised a series of arguments based on the USITC's treatment of the evidence, none of which was successful. For example, China argued that the USITC failed to establish a correlation between the rapidly increasing imports and the material injury sustained by the domestic industry. The Panel disagreed, reasoning that the Protocol did not require a showing of such a correlation. In any event, according to the Panel, "correlation between imports and injury factors is not an exact science, especially as there may be other causes of injury at work. As a result, it would be unrealistic to expect, or require, a somewhat precise correlation between the degree of change in imports and the degree of change in the injury factors." It concluded that "the USITC was entitled to support its determination of 'significant cause' with a finding of overall coincidence between an upward trend in subject imports from China and downward trends in the relevant injury factors."

China also argued that "the US tyre manufacturing industry had voluntarily reduced its investment in the United States and had invested in manufacturing tyres in China instead" and that "the reduction in domestic manufacturing of tyres and the increase in imports from China were the consequences of deliberate economic decision-making by the US tyre industry." The Panel rejected this "supply gap" argument for a number of reasons, including the USITC findings on underselling by Chinese imports, and the fact that countries other than China did not fill the gap. It also noted that the USITC itself had split on this issue, and that "it would be

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inappropriate for the Panel simply to make a choice between the views of the majority and the dissenting commissioners."

A number of other claims made by China, including consequential violations of the GATT, were also rejected by the Panel. The decision of the Panel in *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China* (DS399) was released on December 13, 2010.

Multiilateral Highlights

Doha Round Negotiators Prepare For Last-Chance Effort in 2011

On January 6, 2011, negotiators in the WTO's Doha Round will begin a work program of unprecedented intensity designed to achieve a final Doha Round agreement by the end of the year. The Doha Round commenced in November 2001 but has, in effect, been stalled since July 2008. The new sense of urgency to complete the Round derives from the impetus provided by leaders at the G20 Seoul Summit in Seoul who sent a strong signal of intent to conclude the Round as early as possible, but without a specific commitment to do so in 2011. The Summit Document states that:

> Bearing in mind that 2011 is a critical window of opportunity, albeit narrow …. we now need to complete the end game. We direct our negotiators to engage in across-the-board negotiations to promptly bring the Doha Development Round to a successful, ambitious, comprehensive, and balanced conclusion ….. Once such an outcome is reached, we commit to seek ratification, where necessary, in our respective systems.

The window of opportunity is narrow, since it is generally accepted that progress would be impossible during 2012, a US Presidential election year when key elections will also take place in France and India. The commitment to seek ratification has special relevance for the United States; President Obama said in Seoul that he was prepared to take political risks to secure Congressional approval of an acceptable agreement, and that the United States was prepared to contribute to the improvement of existing offers that will be necessary to achieve this.

The WTO's Trade Negotiations Committee has accordingly agreed an extremely demanding timetable, proposed by the Director-General, Pascal Lamy, for intensified negotiations in the first half of next year, with a view to the completion of agreements on all aspects of the Round by the middle of the year. Following verification of the texts and the resulting schedules of commitments, the final Doha Round package could be signed at the Ministerial Conference scheduled for December 15-17, 2011. Meetings of the Negotiating Groups on Rules, Trade Facilitation, Trade and Environment, TRIPS and Development will begin in the week beginning January 10, 2011. From January 17, 2011, they will be joined by Agriculture, Non-Agricultural Market Access (NAMA), Services and Dispute Settlement. This intensive negotiation across the board will continue ~~as~~ long as it takes to build the basis for revised texts," but it is intended that final texts and schedules of commitments on tariffs and services should be agreed by mid-year. The remainder of the year would be fully taken up with legal polishing and verification of schedules.

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It is clear that if the G20 governments really intend to finish the negotiations quickly, it can be done. It is also clear, however, that the package of projected results which is now on the table, essentially unchanged since July 2008, will not suffice. US WTO Ambassador Michael Punke has reiterated on several occasions that the United States will not support a deal that does not deliver genuinely improved market access, particularly in China, Brazil, India and other emerging economies, and that tariff reductions that would flow from the Round's current draft text fall well short of what is needed in order to secure support for a final Doha agreement in Congress. For their part Brazil, India, China and other developing countries maintain that it is unreasonable to demand more from them while the United States refuses to improve its own offers, notably on the reduction of its agricultural subsidy programs. This has been the position since 2008. However, understanding of their respective positions and possible flexibilities has been greatly improved in recent months by small-group meetings of Geneva Ambassadors on all the key issues in the Round, and this too has contributed to the sense that there is an opportunity to finish the Round, perhaps the last, and that it must be taken.

Geneva negotiators are therefore hoping for an early sign that positions have changed; without this the credibility of the objectives agreed for 2011 will quickly fade. The real decisions will as always be made in capitals, where key participants face great difficulty in mustering political support for the Round. This is particularly true for the United States, where it will not be easy to secure Congressional approval for cuts in farm support programs, despite the new Republican majority in the House of Representatives. However, many analysts are optimistic that the United States will present an ambitious offer on farm supports in mid-January, citing President Obama's strong statement of support, record profits of and exports by US farmers, the current US fiscal crisis, and the growing impetus among many lawmakers to cut government spending. They also note that current food prices make the United States' actual trade-distorting subsidy levels far lower than the $14.5 billion ceiling in its 2008 offer. On the other hand, some in Washington remain pessimistic about the chances for an ambitious US offer, citing the logistical difficulty of securing congressional approval of an ambitious offer by early January 2011, President Obama's past unwillingness to expend significant political capital on trade-related issues, the Administration's gearing-up for the 2012 re-election campaign, and the view that Republicans, despite greater representation in the 112th Congress, are equally as generous as Democrats with respect to funding farm support programs. Most experts agree, however, that any ambitious offer on agricultural subsidy cuts would need to be part of a larger fiscal responsibility package, not tied to Doha alone.

Although the intentions and efforts of G-20 and APEC leaders, including President Obama, are not a guarantee that Doha will be concluded, they are at the very least a recognition on the part of key WTO members that 2011 is the best opportunity since talks collapsed in 2008 to bring the Round to a close. It remains unclear, however, whether this intent will translate into concrete action in January.

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