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White & Case LLP
General Trade Report - JETRO

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UNITED STATES

GENERAL TRADE POLICY

ITC Releases Annual Report on Shifts in US Merchandise Trade

Summary

On August 15, 2011 the International Trade Commission (ITC) released its annual "Shifts in US Merchandise Trade" report ("Report"), which analyzes trends in merchandise trade using data for more than 250 major industry groups, as provided by the Department of Commerce (DOC), and analysis, as provided by ITC's Office of Industries, which routinely monitors trade developments in natural resource, agricultural and manufacturing industries. Analysis in trade in services industries is provided in the separate annual ITC report "Recent Trends in Services Trade."

Analysis

The Report is divided into the following parts: (i) an analysis of overall US economic performance and merchandise trade; (ii) an analysis of the shifts in US trade with each of its top trading partners; and (iii) an analysis of shifts in trade for major merchandise sectors and industry/commodity groups.

I. OVERALL US MERCHANDISE TRADE

Part I analyzes overall US economic performance and merchandise trade. The report states that, from 2009 to 2010, US domestic merchandise exports increased by 20 percent to USD 1,122.1 billion and US imports of merchandise increased by 23 percent to USD 1,898.6 billion. As a result, the US trade deficit increased by 23 percent to USD 776.5 billion.

II. BILATERAL TRADE

Part II analyzes shifts in trade between the United States and its five leading trading partners between 2009 and 2010. These trading partners include Canada, China, the European Union (EU), Mexico and Japan. In addition, the ITC analyzes trade shifts between the United States and Brazil, India, Russia and Korea for the same time period in light of their growing importance as trading partners. These shifts are summarized, by trading partner, below:

- **Brazil.** From 2009 to 2010, the United States' merchandise trade surplus with Brazil increased by USD 4.2 billion to USD 6.8 billion. Refined petroleum products, coal, and chemicals contributed the most to the increase in US exports to Brazil. US imports from Brazil also increased, especially imports of crude petroleum, wood pulp and wastepaper, and coffee and tea;

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- **Canada.** From 2009 to 2010, the United States' merchandise trade deficit with Canada increased by USD 16.7 billion to USD 69.6 billion. Transportation equipment and minerals and metals contributed the most to the increase in US exports to Canada. Transportation equipment, minerals and metals, as well as energy-related products and chemicals accounted for almost 75 percent of US imports from Canada;

- **China.** From 2009 to 2010, the United States' merchandise trade deficit with China increased by USD 47.9 billion to USD 278.3 billion. US exports to China consisted largely of agricultural products, primarily soybean meal and cooking oil, as well as transportation equipment, chemicals and related products, and electronic products. US imports from China consisted largely of electronics as well as textiles and apparel;

- **European Union.** From 2009 to 2010, the United States' merchandise trade deficit with the EU increased by USD 21.8 billion to USD 97.6 million. Increased exports of chemicals and related products and of minerals and metals accounted for 55 percent of the total growth in US exports to the EU. US imports from the EU increased in almost all product sectors; however, imports of transportation equipment, chemicals and related products, minerals and metals, energy-related products and electronics accounted for 84 percent of the growth in US imports from the EU;

- **India.** From 2009 to 2010, the United States' merchandise trade deficit with India increase by USD 6.6 million to USD 13.2 billion. US exports to India rose in most major industry sectors, especially chemicals and related products and minerals and metals. US imports from India increased in all major commodity sectors, except energy-related products, which grew by over 400 percent. In addition, US imports from India of gemstones and medicinal chemicals also increased;

- **Japan.** From 2009 to 2010, the United States' merchandise trade deficit with Japan increased by USD 15.3 billion to USD 64.2 billion. The largest absolute increases in US exports to Japan occurred in chemicals and related products, electronic products and energy-related products. The largest growth in US imports from Japan occurred in transportation equipment, electronic products, and machinery;

- **Korea.** From 2009 to 2010, the United States' merchandise trade deficit with Korea decreased by USD 0.6 billion to USD 11.1 billion. US exports to Korea increased the most in the semiconductor manufacturing equipment (SME) industry. The United States increased its importation of computers and semiconductor components, transportation equipment and household appliances from Korea;

- **Mexico.** From 2009 to 2010, the United States' merchandise trade deficit with Mexico increased by USD 26.6 billion to USD 97.2 billion. The two US sectors that registered the largest growth in exports to Mexico in 2010 were energy-related products and transportation equipment. Transportation equipment, electronic products and energy-related products registered the three largest absolute increases in imports from Mexico; and

- **Russia.** From 2009 to 2010, the United States' merchandise trade deficit with Russia increased by USD 7.3 billion to USD 19.5 billion. US exports to Russia increased across all sectors except for agricultural products, which fell by 18 percent. The largest absolute increase in US exports to Russia was in the chemicals and related products sector. The increase in US imports from Russia primarily reflected an increase in the value of imports from the energy-related products sector due to higher global petroleum prices.

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III. TRADE BY SECTOR

Part III provides a general overview of US trade in 10 merchandise sectors. In addition, shifts in 16 specific industry/commodity groups are examined due to their significant absolute or percentage shifts in US trade. The 10 merchandise sectors that are analyzed include agricultural products, chemicals and related products, electronic products, energy-related products, forest products, minerals and metals, miscellaneous manufactures, machinery, transportation equipment, and textiles, apparel and footwear. From 2009 to 2010, the United States had the largest deficit in the energy-related products sector (US deficit increased by USD 51.7 billion to USD 252.7 billion) and the largest surplus in the agricultural products sector (US surplus increased by USD 8.1 billion to USD 23.9 billion).

Outlook

Overall, the Report finds that the uptick in the world economy from 2009 to 2010, both in the United States and in other countries, was responsible for the increase in both US exports and imports of merchandise. In terms of bilateral and multilateral trade, the Report finds that there was a significant increase in the trade deficits between the United States and its five leading trading partners—the EU, Canada, China, Mexico, and Japan. According to the Report "[t]he increase in these deficits in 2010 reflects the extent to which the improving [US] domestic economy bolstered purchases of goods produced in these economies—especially China."

In terms of US merchandise trade, the report states that the following factors contributed to the growth in US merchandise exports: (i) an increased foreign demand due to rising incomes in many US major trading partners; and (ii) the depreciation of the value of the US dollar against the currencies of major foreign trading partners. This growth in exports was led by energy –related products, which grew by 43 percent. From 2009 to 2010, US imports of merchandise increased the most in energy-related products as well as transportation equipment and minerals and metals. The Report contends that higher prices for crude petroleum and nonferrous metals significantly contributed to the overall increase in the value of US exports and imports of merchandise from 2009 to 2010.

US General Trade Policy Highlights

Senator Introduces Legislation to Establish Asia-South Pacific Trade Preference Program

On July 28, 2011 Sen. Dianne Feinstein (D-CA) introduced the Asia-South Pacific Trade Preferences Act (S. 1443). Sen. Feinstein explained that the bill would "provide duty free and quota free benefits for garments and other products similar to those afforded to beneficiary countries under the Africa Growth and Opportunity Act [(AGOA)]." After it was read twice, S. 1443 was referred to the Senate Finance Committee.

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S. 1443 lists 13 countries in the Asia-South Pacific region as eligible for the trade preferences under the program.[1] As with AGOA, eligible countries may only benefit from the trade preferences if the President authorizes that they have established, or are making continual progress toward: (i) establishing a market-based economy; (ii) instituting rule of law; (iii) eliminating barriers to US trade and investment; (iv) implementing economic policies to reduce poverty, increase health care coverage, expand educational opportunities and physical infrastructure, and promote the development of private enterprise and capital markets; and (v) protecting worker rights.

Beneficiary countries would receive the trade preferences outlined in the bill, subject to annual renewal yearly for up to 10 years. Chief among these preferences is that which allows certain imports from beneficiary countries to receive duty free and quota free (DFQF) treatment upon entry into the United States. However, products that the International Trade Commission (ITC) has labeled import-sensitive may not receive DFQF treatment. Products that are not considered import-sensitive must also meet the rules of origin, which, in general, dictate that direct costs or value of the materials produced in one or more beneficiary countries plus the direct costs of processing operations performed in one or more beneficiary countries must be at least 35 percent of the total appraised value of such an article in order to qualify for DFQF treatment.

S. 1443 also includes specific provisions that ensure DFQF treatment for textiles and apparel products from beneficiary countries. Notably, S. 1443 provides a third-party fabric provision similar to that included in AGOA, which would allow textiles and apparel articles wholly assembled in one or more beneficiary country, regardless of the country of origin of the yarn or fabric used to make such articles, to qualify for DFQF treatment until December 31, 2019.

Sen. Feinstein posits that, even though a number of the possible beneficiary countries, including Nepal, Cambodia, and Bangladesh, have active garment industries, their textile and apparel exports ~~a~~account for only 4 percent of the US textile and apparel imports." By opening the US market to their exports, she argues that these countries will be less dependent on foreign aid, and more capable of achieving sustained growth and higher standards of living.

Experts note that, although S. 1443 does not currently have any co-sponsors and reaction to the content of the bill has been muted by the debt ceiling debates, it will likely be challenged by US textile and apparel companies that make similar products. In addition, interest groups seeking to protect the trade preferences the United States has already pledged to other countries or groups of countries, particularly textiles and apparel producers in AGOA, are likely to argue that such countries will lose their competitive advantage and, in turn, development potential if S. 1443 becomes law. Also, S. 1443 will, in time, serve as an important indicator of lawmakers' policy positions in regard to DFQF in the broader context of multilateral trade liberalization. US negotiators that were participating in the World Trade Organization (WTO) Doha Development Agenda (DDA) agreed in 2005 to provide DFQF to 97 percent of exports from least developed countries (LDCs), but this pledge has not yet been fulfilled. Key amongst those products not included in this 97 percent are textiles and apparel products. Consequently, debate and a subsequent vote on Sen. Feinstein's bill will be instrumental in determining the likelihood of the United States ever providing DFQF to 100 percent of LDC exports. Nonetheless, experts note

[1] These countries include Afghanistan, Bangladesh, Bhutan, Cambodia, Kiribati, Lao People's Democratic Republic, Maldives, Nepal, Samoa, Solomon Islands, Timor-Leste (East Timor), Tuvalu, and Vanuatu.

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that debate over S. 1443 will most likely be delayed until the Generalized System of Preferences (GSP) and the Andean Trade Promotion and Drug Eradication Act (ATPDEA) have been renewed, and may even be delayed until the ITC releases its report on the economic effects of a DFQF, which is expected in February 2012.

CRS Releases Report on China-US Trade Issues; Outlines Key Bilateral Challenges

On August 4, 2011, the US Congressional Research Service (CRS) issued an updated version of the ~~"~~China-US Trade Issues" report. Since 2006, CRS has issued revised editions of the report several times each year in order to keep policymakers up-to-date on bilateral trade issues between the United States and China. The August 4 edition serves as an update to the last version of the report, which was published on January 7, 2011.

Like previous versions, the report is divided into three sections, which provide:

- **An overview of US trade with China.** The report cites a 14.6 percent increase in US exports to China during the first five months of 2011, but estimates that, if bilateral trade continues on its current trajectory, the 2011 year-end US trade deficit with China will reach approximately USD USD 313 billion;

- **An overview of US-China bilateral investment.** The report states that in March 2011, China's holdings of US securities were valued at USD 1,145 billion. In addition to Chinese investment in the United States, the report also notes that China's foreign direct investment (FDI) in the United States increased to a cumulative value of USD 49,403 million at the end of 2009; and

- **An overview of major US-China trade issues.** According to the report, the major US-China trade issues include: (i) China's currency policy; (ii) China's obligations in the World Trade Organization (WTO); (iii) China's alleged violation of US intellectual property rights (IPR); (iv) China's indigenous innovation and government procurement policies; and (v) US and China trade remedy laws.

In addition to updating US-China trade statistics, the August 4 CRS report is also revised to reflect emerging trends in US-China trade. For example, the report highlights the increased proportion of US imports from China that are comprised of more technologically advanced products. Also, the report no longer lists ~~"~~Health and Safety Concerns Over Certain Imports from China" as a major US-China trade issue. Furthermore, the report provides an overview of the recent debate regarding Chinese FDI in the United States. In particular, it includes a discussion of the potential advantages and disadvantages of, as well examples of successful and unsuccessful attempts at, Chinese FDI in the United States. Finally, the report provides coverage of legislation introduced in the 112th Congress aimed at influencing US-China trade. Such legislation includes, *inter alia*, the Foreign-Held Debt Transparency and Threat Assessment Act (S. 1028), the Currency Reform for Fair Trade Act (S. 328 and HR 639), and the Fix United States Government Contracting Deficit with China Act (HR 375).

The report concludes that the key challenges for the United States are ~~"~~to convince China (i) that it has a stake in maintaining the [rules-based] international trading system, which is largely responsible for its economic rise, and to take a more active leadership role in maintaining that system; and (ii) that further economic and trade reforms are the surest way for China to expand and modernize its economy." Despite the clarity of these goals, the report

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reveals a divergence of opinions on the most effective way to accomplish them. While some policymakers believe that a policy of engagement, through fora such as the Joint Commission on Commerce and Trade (JCCT), the Strategic and Economic Dialogue (S&ED) and the WTO Dispute Settlement Body (DSB) is key to cooperation, others, particularly many Democrats and some Republicans in the US Congress, promote a more assertive policy that makes use of US trade remedy laws to address China's allegedly unfair trading practices and economic policies.

We attach the August 4, 2011 edition of the CRS report "China-US Trade Issues" for your reference. Please let us know if you have any questions.

DOC Initiates Anti-Circumvention Investigation of Drill Pipe from China

On August 12, 2011, the US Department of Commerce (DOC) published a notice in the Federal Register (FR), initiating an anti-circumvention inquiry in accordance with Section 781(b) of the Tariff Act of 1930, as amended ("the Act"). The investigation will seek to determine whether certain imports of drill pipe from China are circumventing certain duty orders. The allegedly circumvented duty orders include "Drill Pipe from the People's Republic of China: Antidumping Duty Order" (A-570-965) and the "Drill Pipe from the People's Republic of China: Countervailing Duty Order" (C-570-966), which are collectively referred to in the August 12 FR notice as "Drill Pipe Orders". According to the Act, DOC should issue its determination within 300 days from the date of the initiation of the inquiry.

On June 14, 2011 VAM Drilling USA, Texas Steel Conversion Inc. and Rotary Drilling Tools ("petitioners") submitted a request for DOC to initiate an anti-circumvention inquiry of the Hilong Group of Companies Co. Ltd. ("Hilong" or "respondent") to determine whether pipe and tool joints produced in China, friction welded together in the United Arab Emirates ("UAE"), and exported to the United States as UAE-origin drill pipes are circumventing the Drill Pipe Orders. According to the petitioners, the Drill Pipe Orders cover the drill pipe assembled in the UAE because it is the same class or kind as the drill pipe produced in the PRC. The drill pipe assembled in the UAE contains the same components as the tool joints and pipe produced in China with the only difference being that the friction welding of the pipe to the tool joint occurs in the UAE instead of China.

The Act provides that DOC may find circumvention of an antidumping (AD) or countervailing duty (CVD) order when merchandise of the same class or kind is completed or assembled in a foreign country other than the country to which the order applies. If DOC determines that circumvention is occurring, U.S. imports of Hilong's drill pipes will be subject to the relevant AD/CVD orders. To make its determination, DOC also must consider whether: (i) the process of assembly of completion in the other foreign country is minor or insignificant; (ii) the value of the merchandise produced in the foreign country to which the antidumping duty order applies is a significant portion of the total value of the merchandise exported to the United States; and (iii) action is appropriate to prevent evasion of such an order or finding.

Experts note that DOC's initiation of this anti-circumvention investigation comes amidst a bipartisan Congressional call for greater enforcement of AD/CVD orders. According to Sen. Ron Wyden (D-OR), who introduced the Enforcing Orders and Reducing Circumvention and Evasion (ENFORCE) Act of 2011 (S. 1133) in

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May 2011, ~~d~~developing countries like China have been known to mislabel shipments and reroute good through third-party countries in an effort to fool customs officials and circumvent US laws." Most recently, Senate Finance Committee Chairman Sen. Max Baucus (D-MT) and ranking member Sen. Orrin Hatch (R-UT) agreed at a July 2011 Senate Finance Committee hearing to move legislation that tackles the issue of circumvention before the end of 2011.

Vice President Biden Addresses Key Issues in US-China Bilateral Trade Relationship

On August 21, 2011, Vice President (VP) Biden delivered a speech on US-China relations at Sichuan University in Chengdu (China), emphasizing the importance of the US-China bilateral trade relationship. He addressed a number of bilateral trade issues, including those on which the United States and China are currently making progress, as well as those for which progress has been elusive.

In his speech, VP Biden described a rising China as a positive development and stressed similarity in objectives and responsibilities between the two countries. In terms of bilateral trade, VP Biden stated that China's continued economic growth is in America's self-interest, as a more prosperous China ~~w~~will mean demand for American-made goods and services and more jobs [in the United States]." VP Biden welcomed healthy economic competition from China, but also stressed that competition needs to take place on a level playing field with clear rules that treat all countries fairly and equally.

In regard to US economic and trade policy toward China, VP Biden mentioned the President's Export Control Reform Initiative, noting that the US government has ~~m~~made thousands of new items available for export to China, for exclusive civilian use, that were not available before." He then suggested that the US government could potentially ~~m~~make it easier for Chinese business people to obtain visas to travel to the United States." VP Biden also sought to dispel concerns regarding the recent debt ceiling debate, stating that ~~T~~the United States has never defaulted – and never will default."

VP Biden's speech also broached the following trade issues, which the United States, through such bilateral fora as the US-China Strategic and Economic Dialogue (S&ED) and the US-China Joint Commission on Commerce and Trade (JCCT) has encouraged China to address: (i) VP Biden welcomed the Chinese State Council's recent campaign to enforce intellectual property rights (IPR), but he also cited the International Trade Commission's (ITC) estimate that US companies lose USD 48 billion and tens of thousands of jobs per year due to pirated goods and services, noting that the Chinese government's efforts to fight IPR violations ~~m~~must be strengthened and extended;" (ii) VP Biden briefly mentioned China's alleged currency manipulation, stating that Chinese government officials have informed him that the current ~~fi~~five-year [Chinese government] plan will require [China] to take a number of steps, including continuing [its] effort to move toward a more flexible exchange rate. It's in China's interest, but it's also overwhelmingly in the interest of the United States;" and (iv) VP Biden noted that the United States is ~~t~~troubled" over current restrictions the Chinese government has placed on American investors interested in wholly owning subsidiaries of their own companies in several sectors of the Chinese economy, namely services.

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Experts note that VP Biden's speech comes at an important time, as Congress will soon reconvene from its August recess and a number of lawmakers have recently expressed interest in addressing China's allegedly unfair trade practices in the near-term. More specifically, many Democratic and some Republican lawmakers are interested in passing legislation to address China's alleged currency manipulation, arguing that it would spur US employment and protect US competitiveness. This more confrontational solution to China's allegedly unfair trade practices runs counter to the Obama Administration's US-China trade policy, as characterized in Vice President Biden's speech, which favors engagement though dialogue and cooperation as a primary means of resolving bilateral trade issues. Although momentum is building in Congress to address US-China bilateral trade issues, US trade policy is still consumed by the apparent stand-off between the Obama Administration and congressional Republicans in regard to the pending free trade agreements (FTAs) with Korea, Colombia and Panama and renewal of the Trade Adjustment Assistance (TAA) program. Consequently, Congress will not likely consider legislation to address China's currency policy before it considers the FTAs and TAA renewal although it cannot be ruled out that such currency legislation could be considered as an amendment to TAA renewal, as was suggested by Sen. Sherrod Brown (D-OH) in August 2011.

Senate Finance Ranking Member Requests Update on Re-Organization of Trade-Related Agencies and Departments

On August 24, 2011, Senate Finance Committee Ranking Member Orrin Hatch (R-UT) sent a letter to President Obama, requesting a status update on the Obama Administration's proposed consolidation and re-organization of the US government's trade-related agencies and departments. Sen. Hatch's letter emphasizes that increasing US competitiveness will not occur as a result of creating new job- or competitiveness-related bureaucracies but, rather, opening foreign markets to US exports.

The Obama Administration released a memorandum to the heads of executive departments and agencies of the federal government on March 11, 2011, proposing preliminary steps to consolidate and reorganize the executive branch of the federal government to address: (i) areas of overlap and duplication; (ii) unmet needs; and (iii) possible cost savings. According to the memorandum, the primary focus of this consolidation and reorganization effort will be on the departments and agencies related to trade, exports and ~~o~~verall competitiveness" although the memorandum did not provide a definitive list of the departments and agencies that are potentially subject to this consolidation and reorganization.

In the letter, Sen. Hatch asserts that ~~t~~he solution to [the United States'] trade competitiveness does not lie in creating a new ‗Department of Jobs' or a new ‗Department of Competitiveness' [but] through the negotiation and implementation of strong international trade agreements [such as those] already negotiated with Colombia, Panama and South Korea." In this regard, the letter notes that Congress cannot consider these Agreements, under Trade Promotion Authority (TPA) procedural rules, until the President submits them, which he has not done.

In his letter, Sen. Hatch also expressed particular concern regarding draft Obama Administration proposals to merge the US Trade Representative (USTR) into another agency or department, *e.g.*, the Department of Commerce (DOC) or the Import-Export Bank, as part of the consolidation and re-organization effort, noting that ~~[~~USTR is a] small but highly effective agency [that is] one of the few bright spots in an otherwise bloated

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bureaucracy." Sen. Hatch's comments on USTR are consistent with those of other Republican and Democratic lawmakers, including Senate Finance Committee Chairman Max Baucus (D-MT), who posited at a March 2011 hearing attended by USTR Ron Kirk that such a merger could hamstring the USTR under layers of bureaucracy.

President Obama's March 11 memorandum directed US Government Chief Performance Officer (CPO) Jeffrey Zients to submit to the President within 90 days recommendations on the consolidation and re-organization, a deadline which expired in mid-June 2011. However, statements from the Office of Management and Budget, which falls under the Executive Office of the President, suggest that the Obama Administration will not make these recommendations public until President Obama decides on a path forward with respect to the recommendations. As a result, experts note that lawmakers and industry representatives are expressing increased concern with respect to the details of this possible consolidation and re-organization. In particular, these lawmakers and industry representatives are concerned that trade-related agencies and/or departments with separate and distinct mandates could be merged, which may cause inefficiency. For example, experts note that DOC's focus on enforcement of US trade law might not necessarily combine well that of the USTR, which focuses on negotiating and maintaining trade liberalizing agreements. While it remains unclear how ambitious and encompassing CPO Zients' recommendations to President Obama are, it is likely that the Obama Administration will follow through on some of these recommendations given the current drive across the federal government to cut spending or, at least, provide the appearance of streamlining government to reduce the US budget deficit and spur US job creation.

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FREE TRADE AGREEMENTS

Free Trade Agreement Highlights

House Lawmaker Introduces Agriculture Trade Facilitation Act to Provide US Trade Negotiators Guidance on SPS Issues

On July 29, 2011 Rep. Devin Nunes (R-CA) introduced the Agricultural Trade Facilitation Act (HR 2707). The bill puts forth general objectives for US trade agreement negotiators to pursue in regard to sanitary and phytosanitary (SPS) measures. According to Rep. Nunes, "[t]he United States needs] to make certain that non-tariff barriers, such as scientifically dubious sanitary and phytosanitary standards, [do not] block wholesome American products from competing in the global marketplace."

HR 2707's SPS objectives emphasize the importance of harmonized, transparent and science-based SPS measures in trade agreements. More specifically, the SPS objectives aim for US trading partners to, *inter alia*: (i) develop international standards relating to the application of SPS measures; (ii) publish their proposed SPS measures (including a scientific justification) and allow interested parties to comment; (iii) make risk assessments (as well as the scientific evidence used for the assessment) available; (iv) use validated test methods on imported agricultural products; and (v) harmonize export certification requirements.

The World Trade Organization (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures ("WTO Agreement") recognizes the rights of each country to implement their own SPS measures, but requires that they be science-based, be applied only to the extent necessary to protect human, animal or plant health, and not be arbitrary or used to unjustifiably discriminate domestically or against trading partners. Despite the requirements laid out in the WTO Agreement, HR 2707 notes that there are currently 37 active WTO Dispute Settlement Body (DSB) cases concerning the application of SPS measures. In addition, Rep. Nunes mentions in HR 2707's accompanying press release that "SPS measures are increasingly being used as protectionist tools, nullifying the impact of tariff reductions and blocking market access to [US] farmers." As a result, HR 2707 urges US negotiators to go beyond the requirements put forth in the WTO Agreement by requiring potential trade partners to agree to high-standard SPS standards.

The United States is currently only negotiating one trade agreement, the Trans-Pacific Partnership (TPP). Experts note that, although HR 2707 does not currently have any co-sponsors, there are a number of influential lawmakers from agriculture-based districts similar to that of Rep. Nunes who are likely to support the inclusion of stronger SPS guidelines in TPP, particularly in light of Japan's possible accession to the Agreement. Although the US Trade Representative (USTR) tabled an initial SPS proposal during the sixth round of TPP talks in May 2011, experts note that it may introduce some revisions to that proposal. In this regard, at a July 12, 2011 event hosted by the American Soybean Association, USTR Chief Agricultural Negotiator Islam Siddiqui stated that he wants TPP to be "WTO-plus" concerning to SPS issues. As such, experts note that regardless of whether HR

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2707 advances in Congress, USTR is likely to hear if not heed lawmakers' calls to push for high-standard SPS measures in the context of TPP.

Senate Lawmakers Reach Apparent Deal on Post-August Recess FTA-TAA Passage; Unclear Details Stoke Skepticism

On August 3, 2011, Senate Majority Leader Harry Reid (D-NV) and Senate Minority Leader Mitch McConnell (R-KY) issued a joint statement, announcing a tentative deal on a path forward for passage of the three pending free trade agreements (FTAs) with Korea, Colombia and Panama and a bipartisan, compromise version of the Trade Adjustment Assistance (TAA) Program. Sens. Reid and McConnell opined that the deal reached could achieve passage of the FTAs and TAA by September 2011 although, due to scare details, experts express skepticism.

According to sources, the deal reportedly entails a so-called "ping pong", whereby: (i) the House first passes a bill for the renewal of the Generalized System of Preferences (GSP) and sends this bill to the Senate; (ii) the Senate amends the GSP renewal bill with TAA renewal language, passes it and sends this GSP-TAA package bill back to the House for a vote; (iii) provided the Obama Administration is assured that TAA will be passed as part of the GSP bill, it submits the FTAs' implementing bills to Congress; (iv) the House holds votes on the FTAs, TAA, GSP and likely the Andean Trade Promotion and Drug Eradication Act (ATPDEA); and (v) upon passing these measures, the House sends them back to the Senate for a procedural vote.

When the Obama Administration submitted the draft implementing language for the three FTAs for Congressional mock mark-ups on June 28, a bipartisan compromise version of TAA was included in the US-Korea FTA implementing legislation. Soon after, however, partisan divide emerged over whether TAA should be included in FTA implementing legislation, which led to a Republican boycott of the original FTAs' mock markup session in the Senate Finance Committee. The Republicans, who enjoy majority control of the House, oppose the inclusion of TAA language in FTA implementing legislation such that, at a rescheduled mock markup session on July 7, the House Ways and Means Committee passed the three draft FTA implementing bills stripped of TAA. In contrast, the majority-Democrat Senate Finance Committee conserved TAA in the US-Korea FTA and passed the three draft FTA implementing bills in mock markup. As the mock markup procedure is the last opportunity for Congress to provide the President with input in regard to what should and should not be included in an FTA's final implementing legislation in order to ensure passage of the same, that the House Ways and Means stripped the US-Korea FTA implementing bill of TAA language in the mock markup session and the Senate Finance Committee did the opposite left the Obama Administration without a clear path forward on the FTAs and TAA.

While the announcement of an apparent deal on a path forward for FTA-TAA passage has been lauded by congressional Republicans, including Senate Finance Committee Ranking Member Orrin Hatch (R-UT), House Ways and Means Chairman Dave Camp (R-TX) and House Speaker John Boehner (R-OH), as well as by USTR Ron Kirk, who operates at the behest of the Obama Administration, and the US Chamber of Commerce President and CEO Thomas Donahue, experts note that very few details have been revealed about the eventual form this deal will assume and that many things can occur between now and early September 2011 to derail the deal, particularly in light of a grim outlook for the US economy and, more importantly, US unemployment in the context of the recently commenced campaign season for the looming 2012 presidential election. Experts also posit that, even if congressional leadership follows through with the "ping pong" approach in September 2011 to achieve

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submission of the three pending FTAs on the part of the Obama Administration, procedural unknowns remain: (i) whether amendments to TAA will be pursued and allowed; (ii) if so, whether lawmakers will offer amendments that will cause further delay such as language to address China's alleged currency manipulation or a renewal of Trade Promotion Authority (TPA); and (iii) whether debate will be limited on TAA. Given these sizeable unknowns, it is unclear whether this reported deal reached will remain intact until lawmakers return from August recess.

USTR Requests Establishment of Arbitral Panel to Address Guatemala's Alleged Labor Violations Under CAFTA-DR

On August 9, 2011, US Trade Representative (USTR) Ron Kirk announced that the US government requested the establishment of an arbitral panel to address Guatemala's alleged labor violations under the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR). Although the United States has been engaging Guatemala over these alleged violations since 2010, USTR Kirk explained in his August 9 statement that the Obama Administration's decision to take the next step in the dispute settlement process is based on its belief that the Guatemalan Government has yet to take any ~~c~~oncrete action" to protect workers' rights.

In April 2008 the AFL-CIO and six Guatemalan labor organizations filed a submission under the CAFTA-DR dispute settlement procedures, claiming that the Guatemalan Government had violated its commitments under Chapter 16 (~~t~~he Labor Chapter") of the free trade agreement (FTA). After the submission, the US government, including USTR and the Departments of Labor and State, examined Guatemala's current labor situation with respect to its labor commitments under CAFTA-DR. The study concluded that Guatemala appeared to be failing to meet its obligation to enforce labor laws, including those that ensure the right of association, the right of workers to organize and bargain collectively, and the right to acceptable working conditions. In an attempt to formally address these concerns, the US government followed the process prescribed in Article 16.6 of CAFTA-DR's Labor Chapter and requested consultations with the Guatemalan government. After the United States and Guatemala failed to reach a solution over the issue at their consultations in December 2010, the United States requested a meeting of the Free Trade Commission (FTC), a ministerial-level body that supervises implementation of the FTA. In regard to the June 7, 2011 FTC meeting, USTR stated, ~~[i]~~ntense work ensued to reach agreement on an adequate enforcement plan, but those efforts [did not succeed]."

Now that the US government has requested the formation of an arbitral panel, it will need to follow the guidelines laid out in Chapter 20 (~~t~~he Dispute Settlement Chapter") of CAFTA-DR. The Dispute Settlement Chapter states that the panel will consist of two panelists and a chairman. After it is formed, the panel has 120 days to issue a preliminary report regarding the dispute. If the panel finds that Guatemala has, indeed, failed to effectively enforce its labor laws, the United States and Guatemala shall reach an agreement on how to resolve the dispute. If they are unable to reach an agreement or, after reaching an agreement, the United States finds that Guatemala has failed to observe the terms of the agreement, the panel may, at the request of the complaining party, impose an annual monetary assessment of up to USD 15 million, which would be paid into a fund established by the FTC and expended at the FTC's discretion for appropriate labor initiatives.

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In his remarks regarding this latest step in the labor rights enforcement case against Guatemala, USTR Kirk stated "[w]ith this case, we are sending a strong message that the Obama Administration will act firmly to ensure effective enforcement of labor laws by our trading partners." When the dispute over Guatemala's alleged labor violations first began in 2008, it represented the first labor case the United States had ever brought against a trade agreement partner. Since then, the US government has also accepted petitions alleging that Peru and Bahrain violated labor commitments agreed to under their respective FTAs with the United States. In addition to these efforts at enforcement, the Obama Administration is also pursuing its goal of a "21st Century" FTA policy through a focus on the inclusion of more stringent labor provisions in future FTAs. More specifically, the Obama Administration has required Colombia to bolster its protection of organized labor before submitting the US-Colombia FTA's implementing bill to Congress, and has made labor protection a central theme in the US negotiation position in the context of the Trans-Pacific Partnership (TPP).

Senate Lawmakers Send Letter Urging Stringent SOE and SSE Provisions in TPP

On August 8, 2011, Sens. Jon Kyl (R-AZ) and Sherrod Brown (D-OH) sent a letter to President Obama, urging him to address the "market-distorting" influence of state-owned and state-supported enterprises (SOEs and SSEs, respectively) in the context of the Trans-Pacific Partnership (TPP)[2] negotiations. The letter puts forth that SOEs and SSEs threaten the principles of open investment and free and fair trade upon which US firms compete to drive innovation and economic growth.

According to Sens. Kyl and Brown, SOEs and SSEs are subsidized and/or otherwise advantaged by their home governments, and "introduce anti-competitive behavior and other distortions that inhibit efficient and fair market development". The letter posits that existing domestic and international laws inadequately prevent SOEs and SSEs from employing unfair trade practices when engaging in commercial activities in US and global markets. In order to overcome this inadequacy, the letter urges the Obama Administration to push for "new and binding commitments that effectively address potential market-distorting actions [of SOEs/SSEs]."

Experts note that the likely target of the Senators' letter is Vietnam, which joined the TPP as a full negotiating member in November 2010. The United States and other TPP member negotiators reportedly found it difficult to broach the issues surrounding SOEs and SSEs with their Vietnamese counterparts at the seventh round of TPP negotiations in June 2011 in Vietnam. Such difficulty is reported to have occurred in light of a lack of consensus within the Vietnamese leadership as to how to undertake reforms in this discipline. However, in preparation for the September 2011 TPP negotiations, which will be held in the United States, the US Trade Representative (USTR), which operates at the behest of the Obama Administration, has circulated for US government inter-agency consideration a draft negotiating text that outlines a means of achieving "competitive neutrality" between SOEs/SSEs and private firms. The Administration, relevant congressional committees and industry representatives typically vet such draft texts before they are tabled at an official negotiating round. Sens. Kyl and Brown both have seats on trade-related committees (Sen. Kyl is a member of the Senate Finance Committee and Sen. Brown is a members of the Senate Banking, Housing & Urban Affairs Subcommittee on Security and

[2] TPP Members: United States, Singapore, Brunei, Australia, New Zealand, Vietnam, Malaysia, Chile, Peru

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International Trade and Finance), which makes it likely that the letter's call for more stringent TPP provisions will bear a certain measure of weight in this vetting process.

USTR Publishes Details on Interagency Committee on Trade in Timber Products from Peru

On August 10, 2011 Assistant US Trade Representative (AUSTR) Mark Linscott released a document titled "Interagency Committee on Trade in Timber Products from Peru: Organization, Function and Internal Procedures" ("Document"). The Document provides details on the Interagency Committee on Trade in Timber Products from Peru ("Interagency Committee") under the US-Peru Trade Promotion Agreement (TPA).

The Interagency Committee was authorized under Section 501 of the US-Peru TPA Implementation Act (Public Law No. 110-138) ("Implementation Act") in order to oversee the implementation of the Annex on Forest Sector Governance (Annex 18.3.4) ("Forestry Annex") of the US-Peru TPA, and President Obama officially established the Interagency Committee with a Presidential Memorandum on May 1, 2009. The Document states that the members of the Interagency Committee have decided to publish details on the Interagency Committee "[i]n the interest of transparency and open government."

According to the Document, the members of the Interagency Committee consist of one representative from the US Departments of Agriculture, Justice, Interior, and States. In addition, representatives from the US Department of Homeland Security and the US Agency for International Development serve as observers. A representative from the USTR serves as the Chair of the Interagency Committee. The Document details the internal procedures the members of the Interagency Committee follow, including how meetings are called, voting procedures and quorum requirements.

In regards to its function, the Document states that the Interagency Committee is charged with overseeing the audit and verification processes outlined in Section 501 of the Implementation Act. Under the US-Peru TPA, the Peruvian Government agreed to conduct verifications and audits when requested by the US Government. The Document states that the audit focuses on the conduct of particular timber producers or exporters in Peru to determine whether those producers or exporters are complying with applicable laws, regulations, and other measures of Peru governing the harvest of, and trade in, timber products. Similarly, the verification focuses on particular shipments of timber products from Peru to the United States to determine whether the export or producer of the products has complied with laws, regulations, and other measures of Peru governing the harvest of, and trade in, those products. The Interagency Committee is responsible for requesting audits and verifications, and, upon receiving requests, deciding the appropriate action, if any, that should be taken on the particular shipment(s) in question.

Experts note that the Obama Administration has been actively involved in the enforcement of the US-Peru TPA's environmental provisions. After Peru missed its August 2010 deadline under US-Peru TPA to come into full compliance with key reforms outlined in the Forestry Annex, the United States broached the issue at several US-Peru bilateral fora, including the Environmental Cooperation Commission. The Peruvian Congress subsequently passed the required reforms in its Forestry and Wildlife Law in June 2011. USTR, which works at the behest of the President, also asked the Organization of American States (OAS) on April 27, 2011 to host the offices of the

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US-Peru TPA's Environmental Matters Secretariat within the OAS. Experts further note that this focus on the US-Peru TPA's environmental provisions should be viewed in the greater context of the Obama Administration's FTA policy, which has placed greater importance on the enforcement or inclusion in trade agreements of so called "non-trade issues," *e.g.*, environmental and labor protection standards. In this regard, the Obama Administration is also currently working to enforce labor protection provisions included in the Dominican Republic-Central American Free Trade Agreement (CAFTA-DR) and to include both labor and environmental protection provisions in the Trans-Pacific Partnership (TPP).

South Korea's Ruling Party to Synchronize KORUS Vote with US Congress' Expected Consideration of FTAs

On August 23, 2011 Deputy Floor Leader for South Korea's ruling Grand National Party (GNP) Lee Myung-gyu communicated to lawmakers that the Korea-United States Free Trade Agreement (KORUS) will be submitted for a vote in the Korean National Assembly in October 2011. Nonetheless, Lee Myung-gyu's staff noted that GNP will likely delay the October vote if the US Congress does not make progress on passing the free trade agreement (FTA) in September. These statements contradict a July 2011 statement by Director-General of International Affairs for the GNP Walter Paik that the National Assembly would pass the FTA before the end of its August 31, 2011 special session, regardless of action taken by the US Congress. In order to pass the FTA in October, GNP must work with the Korean Democratic Party, which demands that more changes be made to KORUS before being submitted for a vote. Additionally, GNP must push for the FTA ratification motion in the Foreign Affairs, Trade and Unification Committee by early September.

A number of events have delayed a US Congressional vote on KORUS, including: (i) March 2011 warnings from Republican lawmakers that they would not consider KORUS unless President Obama submitted the other two pending FTAs with Panama and Colombia, along with KORUS, to Congress for consideration; (ii) the Obama Administration's April 2011 decision to require Colombia to complete a "labor action plan" before submitting the US-Colombia FTA to Congress for passage; and (iii) the Obama Administration's May 2011 announcement that it would condition its submission to Congress of the FTAs' implementing legislation on Congress passing legislation to renew a bolstered version of Trade Adjustment Assistance (TAA), and Republican lawmakers' subsequent refusal to consider renewal of a bolstered TAA as part of the FTAs' implementing legislation, due to concerns over the program's cost.

Although Congress left for its August recess without a clear path forward, a number of potential vehicles for the passage of the FTAs and TAA have emerged since the June 28, 2011 mock mark-ups were held. The most popular of these vehicles entails a so-called "ping pong," whereby: (i) the House first passes a bill for the renewal of the Generalized System of Preferences (GSP) and sends this bill to the Senate; (ii) the Senate amends the GSP renewal bill with TAA renewal language, passes it and sends this GSP-TAA package bill back to the House for a vote; (iii) provided the Obama Administration is assured that TAA will be passed as part of the GSP bill, it submits the FTAs' implementing bills to Congress; (iv) the House holds votes on the FTAs, TAA, GSP and likely the Andean Trade Promotion and Drug Eradication Act (ATPDEA); and (v) upon passing these measures, the House sends them back to the Senate for a procedural vote.

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When Congress returns on September 6, 2011 it will need to address additional issues that threaten to delay or prevent the passage of KORUS, including: (i) Sen. Mitch McConnell's (R-KY) insistence that Congress consider a renewal of Trade Promotional Authority (TPA) as part of the FTA-TAA package; and (ii) Sen. Sherrod Brown (D-OH) and Rep. Nancy Pelosi's (D-CA) suggestion that the Currency Reform for Fair Trade Act be considered in conjunction with or before the passage of the FTA-TAA package. In addition to these issues, experts note that there are very few Congressional days left in 2011 and a myriad of other issues that need to be addressed; *i.e.* US debt reduction measures.

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MULTILATERAL

Multilateral Highlights

United States Avoids Providing Specific Details on Implementation of Adverse Rulings Concerning the Zeroing Methodology

On August 23, 2011, the US Delegation to the World Trade Organization (WTO) submitted three status reports to the Chairperson of the Dispute Settlement Body (DSB), providing an update on the steps the United States is taking to come into compliance with adverse DSB rulings with respect to its zeroing methodology. These rulings stem from three DSB cases[3] brought against the United States by Japan and the European Communities (EC).

Concerning steps taken in regard to each of these three cases, the status reports cite the December 28, 2010 notice published in the Federal Register by the Department of Commerce (DOC), proposing a change in the methodology for calculating weighted average dumping margins and assessment rates in certain anti-dumping proceedings, including administrative and/or new shipper reviews. According to this notice, DOC proposes to compare monthly weighted average export prices with monthly weighted average normal values, and to grant an offset for comparisons that show an export price that exceeds normal value in the calculation of the weighted average margin of dumping and assessment rate. However, the three zeroing-related status reports stop short of providing any details on the content of DOC's final rule or when this final rule will be adopted. Instead, the status reports simply state that ~~"~~[t]he United States is continuing its ongoing work on the December [28, 2010] proposal and will continue to consult with interested parties."

Zeroing refers to the practice whereby an investigating authority sets to zero so-called ~~"~~negative dumping margins," *i.e.*, when the export price of the product is higher than the price in the exporting country, thus potentially inflating the overall average dumping margin, and leading to the imposition or maintenance of anti-dumping duties which may not otherwise apply. Under its current standard AD review calculation methodology, DOC disregards any negative dumping margins found and does not offset an exporter's dumped transactions with non-dumped sales.

The US delegation also submitted similar status reports in regard to non-zeroing-related DSB cases, including: (i) EC's challenge of Section 110(f) of the US Copyright Act for alleged US violations of the Trade-Related Aspects of the Intellectual Property Rights Agreement (TRIPS); (ii) Japan's challenge of certain DOC and International Trade Commission (ITC) AD preliminary and final determinations for alleged AD-related violations of the General Agreement on Tariffs and Trade (GATT) and the WTO Anti-Dumping Agreement (ADA); and (iii) EC's challenge of Section 211 of the US Omnibus Appropriations Act of 1998 for alleged violations of the TRIPS Agreement.

[3] The three zeroing-related DSB cases for which the US Delegation submitted status reports are: (i) United States – Laws, Regulations And Methodology For Calculating Dumping Margins (DS294), brought by the European Communities (EC); (ii) United States – Measures Relating To Zeroing And Sunset Reviews (DS322), brought by Japan; and (iii) United States – Continued Existence And Application Of Zeroing Methodology (DS350), brought by EC.

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USTR Kirk Announces Nominees for WTO Appellate Body

On August 31, 2011 US Trade Representative (USTR) Ron Kirk nominated two trade lawyers, Thomas Graham and John Greenwald, to serve on the World Trade Organization's (WTO) Appellate Body (AB). One of the USTR's nominated candidates is expected to be chosen by the WTO to fill a seat on AB that will become vacant in December 2011. According to the USTR, ~~the~~ breadth of [the nominated individuals'] backgrounds demonstrates their expertise in law, international trade, and subject matters that often come before the WTO Appellate Body."

AB is composed of seven members, each of whom is appointed to serve a four-year term. Each member may be reappointed to serve a second four-year term. The terms of the members are staggered in order for the seats not to be open at the same time. Currently, there is one member of AB from the United States--Jennifer Hillman. Her term will expire in December 2011. Another AB seat, currently held by Lilia Bautista from the Philippines, will also expire in December 2011. While the United States is expected to fill one of these two open seats, other countries have submitted nominations to fill the other open seat. Both India and Pakistan have nominated their former WTO Ambassadors to join the AB membership. All nominations by Members of the WTO for open seats on the AB were due on August 31, 2011.

According to USTR, there are a number of steps that will need to be followed before the two new members of AB can start their terms. These steps include: (i) the names of the nominees will be circulated to WTO Members; (ii) nominees will be interviewed in September and/or October 2011 by the selection committee established by WTO Members; (iii) the selection committee will make a recommendation to WTO Members no later than November 10, 2011; (iv) WTO Members will make the decision to appoint two new AB members; and (v) the two new members will begin their AB terms on December 11, 2011.

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