



June 2010

Japan External Trade Organization
WTO and Regional Trade Agreements
Monthly Report

IN THIS ISSUE

United States..... 1
Free Trade Agreements 31

Customs43
Multilateral 45

Table of Contents

Summary of Reports	ii
Reports in Detail	1
United States	1
Senate Finance Committee Questions Treasury Secretary on US-China Economic Relationship, Currency Concerns	1
House Ways and Means Committee Hears Testimony on China’s Trade and Industrial Policies; China Announces “Flexibility” in Currency.....	5
Administration Unveils Joint Strategic Plan to Combat Intellectual Property Theft.....	11
Senate Committee Hearings Highlight Legislators’ Continued Focus on China’s Trade and Industrial Policies ...	18
United States Highlights	21
Congress Passes Iran Sanctions Bill, Sends Legislation to President for Signature.....	21
US, Russia Reach Poultry Agreement	23
Legislators Introduce New Bill on China and Government Procurement	24
Senate Commerce Committee Passes Export Promotion Act of 2010	25
USTR Appoints New Chief Counsel for China Enforcement	27
Trade Committee of European Parliament Holds Hearing with US Ambassador to EU	27
Undersecretary of Commerce for International Trade Discusses NEI Features.....	28
CBP Announces Intent to Distribute Assessed AD, CVD Duties in Connection with Byrd Amendment.....	29
Free Trade Agreements	31
TPP Negotiators Convene in San Francisco for Second Round of FTA Talks.....	31
Free Trade Agreements Highlights.....	34
President Obama Signals Intent to Move Forward on Pending KORUS FTA	34
Legislators Call on Administration to Move on US-Colombia FTA	37
Tech, Consumer Electronic Groups Urge USTR to Pursue “Narrower” ACTA.....	39
Senators Urge Administration to Submit “Concrete List of Actions” to Korea, Colombia and Panama in Order to Move Pending FTAs Forward	40
Customs	43
Customs Highlights.....	43
Lawmakers Hold Hearing on Foreign Manufacturers Legal Accountability Act of 2010	43
Multilateral	45
Multilateral Highlights	45
G-20 Toronto Summit Ends with Renewed Calls for Open Markets, Although End-2010 Doha Completion Date Dropped from Declaration	45
United States Blocks Indonesia’s First Panel Request in Flavored Cigarettes Dispute	46
Brazil Suspends Application of Retaliatory Measures against the United States in Cotton Dispute.....	46
APEC Officials Discuss Trade, Bogor Goals at Sapporo Gathering.....	48

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

Summary of Reports

United States

Senate Finance Committee Questions Treasury Secretary on US-China Economic Relationship, Currency Concerns

On June 10, 2010, the Senate Finance Committee held a hearing on the US-China economic relationship. At the hearing, Committee Chairman Max Baucus (D-MT), Ranking Member Charles Grassley (R-IA) and other legislators posed questions to Secretary of Treasury Timothy Geithner on bilateral US-China economic issues, including currency and “indigenous innovation” policies. We review the hearing and the statements made by legislators and officials participating in the proceedings.

House Ways and Means Committee Hears Testimony on China’s Trade and Industrial Policies; China Announces “Flexibility” in Currency

On June 16, 2010, the House Ways and Means Committee heard input from expert panelists concerning China’s current trade and industrial policies. According to Committee Members and hearing witnesses, China’s trade policies limit market access for US goods in China, make US goods less competitive to Chinese goods and affect US labor. Members of the Committee also pressed panelists on issues ranging from Chinese currency exchange practices, intellectual property rights (IPR) in China and China’s “indigenous innovation” policy. We review the testimony provided at the hearing and relevant points as raised by Committee Members and hearing witnesses.

Administration Unveils Joint Strategic Plan to Combat Intellectual Property Theft

On June 22, 2010, the Obama Administration released its “Joint Strategic Plan to Combat Intellectual Property Theft.” US Intellectual Property Enforcement Coordinator Victoria Espinel along with several other Administration officials unveiled the Joint Strategic Plan (“the Plan”) which is aimed at combating intellectual property (IP) theft and improving coordination of IP enforcement. The Plan contains more than thirty recommendations for improvements to the US IP regime. Espinel outlined the Plan at a June 23, 2010 Senate Judiciary Committee hearing. We review the elements of the Plan and the discussion of the Plan at the Senate hearing.

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

Senate Committee Hearings Highlight Legislators' Continued Focus on China's Trade and Industrial Policies

On June 23, 2010, the Senate Finance Committee held a hearing at which Secretary of Commerce Gary Locke and United States Trade Representative (USTR) Ron Kirk gave testimony regarding China's trade and industrial policies. Separately, the Senate Foreign Relations Committee also heard testimony that day from expert panelists on friction in the United States-China relationship. Issues covered at both Committee hearings included China's currency regime, industrial innovation policies, government procurement procedures and intellectual property rights protection. We review the Committee hearings below.

United States Highlights

We would like to alert you to the following United States highlights:

- Congress Passes Iran Sanctions Bill, Sends Legislation to President for Signature
- US, Russia Reach Poultry Agreement
- Legislators Introduce New Bill on China and Government Procurement
- Senate Commerce Committee Passes Export Promotion Act of 2010
- USTR Appoints New Chief Counsel for China Enforcement
- Trade Committee of European Parliament Holds Hearing with US Ambassador to EU
- Undersecretary of Commerce for International Trade Discusses NEI Features
- CBP Announces Intent to Distribute Assessed AD, CVD Duties in Connection with Byrd Amendment

Free Trade Agreements

TPP Negotiators Convene in San Francisco for Second Round of FTA Talks

Officials from countries negotiating the Trans-Pacific Partnership (TPP) Free Trade Agreement (FTA) met the week of June 14, 2010 in San Francisco for the second round of trade agreement negotiations. During this round, negotiators discussed, among other things, the relationship between the TPP FTA and pre-existing FTAs and the process of developing draft FTA texts for negotiators to examine at the next round of TPP FTA negotiations, scheduled for October 2010. We review the second round of TPP FTA negotiations.

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

Free Trade Agreements Highlights

We would like to alert you to the following Free Trade Agreements highlights:

- President Obama Signals Intent to Move Forward on Pending KORUS FTA
- Legislators Call on Administration to Move on US-Colombia FTA
- Tech, Consumer Electronic Groups Urge USTR to Pursue “Narrower” ACTA
- Senators Urge Administration to Submit “Concrete List of Actions” to Korea, Colombia and Panama in Order to Move Pending FTAs Forward

Customs

Customs Highlights

We would like to alert you to the following Customs highlights:

- Lawmakers Hold Hearing on Foreign Manufacturers Legal Accountability Act of 2010

Multilateral

Multilateral Highlights

- G-20 Toronto Summit Ends with Renewed Calls for Open Markets, Although End-2010 Doha Completion Date Dropped from Declaration
- United States Blocks Indonesia’s First Panel Request in Flavored Cigarettes Dispute
- Brazil Suspends Application of Retaliatory Measures against the United States in Cotton Dispute
- APEC Officials Discuss Trade, Bogor Goals at Sapporo Gathering

Reports in Detail

United States

Senate Finance Committee Questions Treasury Secretary on US-China Economic Relationship, Currency Concerns

Summary

On June 10, 2010, the Senate Finance Committee held a hearing on the US-China economic relationship. At the hearing, Committee Chairman Max Baucus (D-MT), Ranking Member Charles Grassley (R-IA) and other legislators posed questions to Secretary of Treasury Timothy Geithner on bilateral US-China economic issues, including currency and “indigenous innovation” policies. We review the hearing and the statements made by legislators and officials participating in the proceedings.

Analysis

I. Background

The Senate Finance Committee’s hearing took place during a period of increased focus on the US-China economic relationship. China’s “indigenous innovation” policies and the intellectual property-related concerns that such policies have elicited among US businesses have spurred legislators to call on the Obama Administration to address such concerns. In addition, legislators such as Sen. Charles Schumer (D-NY) have also turned their attention to China’s currency and the alleged manipulation of the RMB, especially in light of the Treasury Department’s delay of its issuance of the April 2010 semiannual report to Congress on currency manipulation and promises by Administration officials that the United States and China will broach the currency issue by the time the June 26, 2010 G-20 meeting occurs in Canada.

II. Senate Finance Committee Hearing

Upon calling the hearing to order, **Chairman Baucus** opined that there should be four ways to define the US approach to US-China economic relations: (i) the United States must formulate a comprehensive and coordinated strategy to better manage the bilateral economic relationship that does not “take a back seat” to the bilateral strategic relationship; (ii) the United States must approach China’s economic policies “as a global concern, not just an American concern,” and must effectively address “China’s currency misalignment, ineffective protection and enforcement of intellectual property rights, and industrial policies,

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

such as indigenous innovation, [that] hurt businesses around the world, not just US businesses;" (iii) the United States must look at and use tools offered by the international institutes, such as the International Monetary Fund and the World Trade Organization, to provide effective recourse on any contentious issues in the US-China relationship; and (iv) the United States must be willing to take strong unilateral action. On this last point, Chairman Baucus opined that "the Treasury Department must negotiate effective solutions to address China's currency manipulation . . . the Commerce Department must apply a rigorous analysis when investigating anti-dumping and countervailing duty petitions regarding Chinese imports . . . [and] the Office of the United States Trade Representative [USTR] must take all necessary steps to improve China's protection and enforcement of US intellectual property rights and to suspend China's discriminatory indigenous innovation policy."

Ranking Member Grassley noted his "serious concerns about the direction that China's government is taking with respects to its economic and trade policies," and he asked that Secretary Geithner provide the Committee with the Administration's "next steps" in the bilateral relationship. Ranking Member Grassley also opined that "instead of doing everything it can to comply with the letter and spirit of WTO obligations, the Chinese appear to be looking for ways to evade those rules and to find loopholes and gaps in the rules that it can exploit" in regards to its indigenous innovation policy. He also noted that the Administration had cited the meeting of the G-20, as well as the US-China Strategic and Economic Dialogue (S&ED) as reasons to delay issuance of April 2010 exchange rate report, and he asked whether there had been any developments since the S&ED and what Secretary Geithner expected from the G-20.

Secretary Geithner stated that there were three main challenges in the US-China economic relationship: (i) promoting a "level playing field for American workers and businesses" and pursuing the full remedies available under US law and in the World Trade Organization (WTO) to address unfair trade practices by China; (ii) promoting more balanced economic growth; and (iii) addressing China's exchange rate policy that may be "unfair and hurts the interests of American producers." Some of the policy solutions that Secretary Geithner suggested in his testimony included stronger protections for intellectual property, less discrimination against US businesses in China, stronger growth in China that relies less on exports so China is importing more from the United States as they grow, and reforms to China's exchange rate mechanism. On the delay in the issuance of the April 2010 currency report, he noted that the Administration "wants to make sure that we are using every effective means to encourage [China] to move [on the currency matter], including taking advantage of the fact that the leaders of the G-20 meet in Canada."

Sen. Jim Bunning (R-KY) noted that “the 1988 omnibus trade law requires the Secretary of the Treasury to submit a report on exchange rate policy to Congress twice a year, [that] the report must be completed by October 15th each year and updated every six months [and that] it is now June 10th, nearly two months after the deadline you missed,” asking Secretary Geithner what made him “think that the deadline in this statute is optional?” Secretary Geithner responded that previous Administrations have also delayed issuance of the report “for a broad range of factors.” He added that the Administration will re-evaluate whether to release the currency report following the upcoming G-20 meeting in Toronto.

Sen. John Kerry (D-MA) asked Secretary Geithner what assurances China had provided to the United States that it is willing to address US complaints on various matters, to which Secretary Geithner responded that “for the first time now, you're seeing domestic demand in China, not exports - domestic demand growing much faster than GDP, growing much faster than the overall economy [and] you're seeing consumption rise substantially as a share of growth,” adding that it was the United States' responsibility to reinforce these changes.

Sen. Schumer opined that “China's mercantilist policies continue to undermine the health of US industry,” adding that he and several of his colleagues “despite the Administration asking us not to do it, are going to move forward with our bipartisan legislation to provide specific consequences for countries that fail to adopt appropriate policies to eliminate China currency.”

Sen. Debbie Stabenow (D-MI) added that although she supports the President's National Export Initiative (NEI) and its goal of doubling exports in the next five years, the United States must “have fair trade, we have to have a level playing field if we're going to make sure that the Chinese who want to buy our products are able to do that and we are able to sell to them.”

Sen. Olympia Snowe (R-ME) asked if there had been any positive and encouraging developments as a result of the May 2010 S&ED meetings, to which Secretary Geithner responded that “China committed to resume the process of exchange rate reform, to allow its currency to begin to reflect market forces, although . . . they haven't decided when they're going to do that, how quickly.” He added that at the S&ED, China also committed “to change and modify aspects of this indigenous innovation policy to remove some of the most discriminatory aspects of it and to a process of negotiation to try to resolve our remaining concerns,” and agreed to a range of specific commitments to increase opportunities for US investors in China in a range of sectors. He also noted that China has given commitments to submit a revised offer by July to join the WTO on Government Procurement, which he opined was “the best way to limit China's use of government procurement preferences to promote its industrial policies.”

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

III. Upcoming Hearings

On June 16, 2010, the House Ways and Means Committee will hold a hearing regarding China's trade and industrial policies. At the hearing, the Committee plans to discuss issues such as indigenous innovation, intellectual property rights, product standards, export restrictions, and subsidies.

Outlook

The "China currency" debate has made its way to the legislative agenda again, likely for several different reasons, including the April 2010 delay of the currency report by Treasury, the conclusion to the second annual S&ED meeting in May 2010, and the upcoming G-20 meeting in Canada where Administration officials have promised that they will discuss at length with China its currency. The Senate Finance Committee hearing served as a pulpit where legislators voiced their concerns with several of China's economic policies and aired their frustrations with the Administration's "quiet and behind-closed-doors" approach to the US-China bilateral economic relationship. Indeed, Sen. Schumer used the hearing as an opportunity to warn Secretary Geithner and the Administration that he and his Senate colleagues would advance legislation unilaterally attacking Chinese imports unless China appreciates the RMB by the end of the June 26-27 G-20 Summit in Toronto.

Although most observers believe that Sen. Schumer's threat to push for his legislation - the Currency Exchange Rate Oversight Reform Act of 2010 (S. 3134) - after the G-20 meeting is a political ploy, they also note that Sen. Schumer's threat this time around is different from threats he raised earlier this year to push the legislation forward for several different reasons, including the economic situation in Greece and its effects on the Euro (in April 2010, many observers expected China to appreciate the RMB before the G-20 Summit but the economic situation in Greece and the global currency instability it has created has complicated and likely delayed such an appreciation), and recent figures that show that China has a trade surplus and that the US trade deficit has increased. There are some unsubstantiated reports that China's revaluation/appreciation of the RMB is unlikely to occur during the second quarter of 2010 (i.e., by the end of June) and will likely take place during the third quarter, especially in light of the Euro's collapse and continuing problems in Europe. This delay complicates matters, as Sen. Schumer has publicly stated (as we noted above) that if China does not appreciate its currency by the end of the G-20 meetings at the end of June, he will press for Senate consideration of his bill. As one observer noted, "the combination of these three developments, a struggling US economy, and the November midterm elections is definitely going to push China's currency back to the forefront of the 2010 international trade stage and . . . create the perfect political storm" for Sen. Schumer to push his legislation forward. Although many observers still do not expect S. 3134 or other similar bills to fully pass the Senate and the House of Representatives,

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

the confluence of recent factors as described above could mean that Sen. Schumer and other legislators will increase their calls for the Administration to address their concerns and will aggressively push for passage of legislation punishing China for its currency practices.

According to some observers, at this stage, what may happen is that after the G-20 meeting ends, China and other G-20 members may jointly announce that the present instability in global markets necessitates a delay in any currency moves. Sens. Schumer and Graham and other legislators will likely balk at this additional delay and may increase the volume of their complaints and push for a floor vote on their legislation. However, Treasury and other Administration officials will no doubt be working behind closed doors to assuage their concerns, and will attempt to establish a new “deadline” for China’s currency appreciation, likely by the time the October Treasury report on currency manipulation is supposed to be delivered to Congress, or by the time the November elections occur. In the meantime, however, Sen. Schumer and others will continue to press on the issue because of its political value and high profile. However, any news from the G-20 that China will revalue its currency in the coming months and/or quiet Administration efforts in this regard would likely diminish support for S. 3134 or other similar bills as legislators wait to see what happens under any revised deadlines.

House Ways and Means Committee Hears Testimony on China’s Trade and Industrial Policies; China Announces “Flexibility” in Currency

Summary

On June 16, 2010, the House Ways and Means Committee heard input from expert panelists concerning China’s current trade and industrial policies. According to Committee Members and hearing witnesses, China’s trade policies limit market access for US goods in China, make US goods less competitive to Chinese goods and affect US labor. Members of the Committee also pressed panelists on issues ranging from Chinese currency exchange practices, intellectual property rights (IPR) in China and China’s “indigenous innovation” policy. We review the testimony provided at the hearing and relevant points as raised by Committee Members and hearing witnesses.

Separately, on June 19, 2010, China announced that that it would allow greater flexibility in the value of the RMB, which some observers interpret as a sign that China will allow its currency to appreciate gradually against the US dollar. We review China’s announcement and reaction to the announcement.

Analysis

I. Ways and Means Committee Hearing on China

According to the Ways and Means Committee, “there are growing concerns that the Government of the People’s Republic of China is intervening more aggressively in its economy, in ways that distort trade flows and disadvantage US businesses and workers.” The June 16 hearing examined overall trends in China’s trade and industrial policies, including China’s indigenous innovation initiative; failure to enforce IPR; product standards; export restrictions and selective tax rebates; and subsidies and other measures. At the hearing, business leaders on the panel warned Committee Members that punitive blanket legislation would likely do more harm than good to American business interests in both the United States and China and would hurt the bilateral relationship between the two countries. Lobbying China across many fronts and finding specific solutions to specific problems, according to panel members, would be more effective than unilateral sanctions, trade penalties or taking China before the World Trade Organization (WTO). We include below a summary of some of the witnesses’ testimony delivered at the hearing:

Ian Bremmer, President of The Eurasia Group, in reference to IPR violations in China, stated that “many western corporations increasingly loathe bringing technology there (China) because it has been borrowed in the past” and he cited a recent statement made by Microsoft that China is no longer the future of Microsoft. He also made reference to China’s indigenous innovation policies, opining that they “allow the Chinese to maintain a greater share of the profits for what they do produce” and that these policies are used to “maintain the strong level of economic growth needed for the political survival of the regime.”

Christian Murck, President of the American Chamber of Commerce, People’s Republic of China, testified that “there is concern in the American business community that China will resort to [...] discriminatory measures favoring domestic enterprises over foreign companies and the state-owned sector over the private sector, potentially resulting in narrowing market access” for US firms. He stated that China’s indigenous innovation policies are of particular concern for US Chamber of Commerce members as the nationality of intellectual property is a criterion for government procurement and China is still not a member of the WTO’s Agreement on Government Procurement. His closing remarks emphasized that it is important for the United States to focus on market access for US firms in China and on the protection of IPR.

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

Charles Freeman from the Center for Strategic and International Studies stated that local governments in China are more likely to side with local violators of IPR. He also stated that “when rights holders do prevail, they are usually awarded minimal damages [which] fail to deter future theft.” According to Freeman, in China “the rewards for piracy far outweigh the risks.” With respect to indigenous innovation policies, Freeman cited China’s willingness to join the WTO’s Agreement on Government Procurement “as soon as possible” but noted that this has not yet occurred.

John Frisbie, President of the US-China Business Council, noted that “member companies (of the US-China Business Council) [...] have serious concerns about policy trends in China that unfairly favor domestic companies.” He expressed that the United States needs to pursue bilateral dialogue with China in order to improve US advocacy efforts to influence Chinese trade and industrial policies. He also stated that “US companies want to see problems addressed with specific solutions” as opposed to punitive legislation that would harm the relationship between the United States and China.

Dean Garfield, President and CEO of the Information Technology Industry Council, stated that US companies are “increasingly being asked to navigate [...] punitive rules that both unfairly tip the scales in favor of domestic industry and seek to divest foreign companies of [...] intellectual property.” According to Garfield, the Chinese indigenous innovation policies that were revised in November 2009 “force foreign companies to disclose their intellectual property to Chinese firms.” He also noted that China’s system of standards limit market access by forcing foreign firms to “create bifurcated product lines [...] or simply turn their back on the (Chinese) market.” He expressed that a “sustained, firm and sensible engagement” is the way to “effect positive change” with China.

Leo Gerard, International President of United Steelworkers, cited government support for Chinese companies such as “cheap, below-market funding” and subsidies in the form of direct and subsidized production inputs as explanations for China’s production overcapacity. Low cost technology as a result of piracy and forced technology transfers, according to Gerard, also contribute to this overcapacity. He testified that “China’s manipulation of its currency, its theft of intellectual property and [...] protectionist and predatory practices must be addressed” and stated that “a comprehensive strategy to deal” with these issues should be developed.

Robert Holleyman, II, President and CEO of Business Software Alliance, testified that difficulties of US software firms in China stem from “massive illegal use of software and indigenous innovation policies that limit [...] access to a broad swath of the Chinese market.” He underlined the importance of replacing the United States’ “one-off, issue-by-issue approach” to changing China’s trade and industrial policies with a comprehensive, results-based approach.

The reaction of Committee Members to the testimony was varied. **Ways and Means Committee Chairman Sander Levin (D-MI)** put forth that the United States has been very patient with China with respect to its “inflexible currency practices” and he sees the upcoming G-20 summit in Toronto as a juncture at which China should revisit and modify some of these practices. He hinted that if China does not act accordingly on these policies shortly after the G-20 meeting, Congress will move to apply unilateral pressure on China. According to Chairman Levin, “China persists in pursuing discriminatory trade and investment policies that benefit China at the expense of its developed and developing country trading partners [and] seven years of patience from the United States and the international community has run out.”

Ranking Member of the Committee Dave Camp (R-MI) opined that China is acting “in poor faith” and is actively pursuing protectionist policies that will lead to the breakdown of the US-China relationship. Rep. Camp criticized China’s efforts to enforce IPR and stated that the United States will “need to do everything possible to address this [IP] theft”, which suggests that he believes that the back and forth of bilateral dialogue and consultation might yield few results with respect to resolving the US-China trade disputes at hand.

Ways and Means Subcommittee on Trade Ranking Member Kevin Brady (R-TX) questioned the effectiveness of unilateral trade penalties against China and was skeptical that such penalties might help US workers. Moreover, he submitted that any US legislation penalizing China for some of its trade policies might not be consistent with the United States’ obligations at the WTO.

Rep. Rick Larsen (D-WA) stated that, while it is important for China to revise its currency exchange rate, this issue should not consume near-term US policy toward China. According to Rep. Larsen, indigenous innovation, IPR and other trade liberalization issues are of equal importance and can be best resolved through sustained and committed dialogue with China.

II. **China’s Announcement on Currency**

Separately, on June 19, 2010, China announced that it will “increase the renminbi’s exchange-rate flexibility” following recent improvements in China’s economy. According to the People’s Bank of China, “the recovery and upturn of the Chinese economy has become more solid with the enhanced economic stability [and] it is desirable to proceed further with reform of the renminbi exchange-rate regime and increase the renminbi exchange-rate flexibility.” The announcement did not include a timeframe for the change in the exchange rate, but Chinese officials did rule out a one-off revaluation and noted that there is no basis for “large-scale appreciation.” Chinese officials have noted that the RMB would move in

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

relation to an unspecified basket of currencies, a move that some experts opine would prevent rapid fluctuations in China's currency. According to Li Daokui, an adviser on the People's Bank of China's policy board, "China has ended its crisis-mode exchange-rate policy as the economy recovers strongly and inflationary pressure continues to build [and] the yuan's future trend depends on the euro's movement, and the trends of other major currencies."

US reaction to China's announcement was positive but cautious. **President Obama** praised China's announcement and noted that "China's decision to increase the flexibility of its exchange rate is a constructive step that can help safeguard the recovery and contribute to a more balanced global economy." **Secretary of Treasury Timothy Geithner** lauded China's announcement and stated that "vigorous implementation would make a positive contribution to strong and balanced global growth." **Ways and Means Chairman Levin** stated that the announcement was "a positive first step, but it remains to be seen whether this move will be more symbolic than significant," adding that he has "seen actions like this before and it is clear that China did not allow enough appreciation the last time it adopted a policy like this one, from 2005-2008 . . . if China takes that same approach again, the United States will still need to take action." **Sen. Schumer** adopted a similar attitude, noting that legislators may be forced to take unilateral action against China if China does not hold true to its announcement. **Senate Finance Committee Chairman Max Baucus (D-MT)** stated that China's announcement is "a welcome first step to help keep American businesses competitive and create more American jobs, however China's currency appreciation must be meaningful to ensure American ranchers, farmers and small businesses are competing on a level playing field in the global economy," adding that in the coming weeks and months, he will be working closely with the Obama Administration and other Members of Congress "to ensure we keep China accountable and keep American businesses competitive." **Senate Finance Committee Ranking Member Charles Grassley (R-IA)** noted that "China's announcement is long overdue [and] Congress and the Administration need to keep the pressure on until China takes concrete actions to appreciate its currency exchange rate in a meaningful way."

Outlook

Observers noted that several Members of the Ways and Means Committee that had previously recommended US bilateral and multilateral cooperation with China, such as Chairman Levin, adopted a harsher tone towards China at the June 16 hearing. Chairman Levin and other legislators were especially critical of China's policies concerning currency and IPR, and provided warnings that Members of Congress could soon turn to legislation directed at China's policies. This could include the Currency Exchange Rate and Reform Act of 2010 (S. 3134), a bill that sponsor Sen. Charles Schumer (D-NY)

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

would like Congress to move on over the next several weeks. As legislators noted, the end-June G-20 meetings in Canada and subsequent follow-up action will serve as an indicator on whether Congress will move forward on S. 3134 and other China-related bills.

It is uncertain how soon China will fully move forward on its announcement to provide greater flexibility to its currency, especially in light of the current state of the global economy and the problems that the EU is facing with the euro. Prior to the crisis in Greece, observers expected China to make a slight revaluation of its currency immediately following the G-20 meeting. This would have sated legislators that have lost patience with China and its currency and enabled the Administration to declare a success on the currency matter. China, however, has not provided any further details on how and when it will appreciate its currency. According to our sources, closed-door meetings between US and Chinese officials and the International Monetary Fund (IMF) indicate that a revaluation of the currency during the third quarter could happen, although no other details have been released at this stage, consequently making it difficult to determine if reports of a third quarter revaluation are accurate. Nonetheless, for some observers, China's June 19 statement, while positive in that it indicated China's willingness to address US currency concerns, likely serves as a way for China to deflect pressure from the United States, US legislators and other trading partners ahead of the G-20 meeting. Indeed, China's currency announcement may have been timed for maximum political effectiveness: China may have been seeking to remove some of the pressure it has received of late as well as provide itself some space and additional time to allow its currency to appreciate without providing specifics of how and when.

Even with China's currency statement, however, US legislators will not drop the issue easily. The legislators' cautious statements on China's announcement indicate that the currency issue very much remains on legislators' radars. This means that if China does not address its currency as promised following the G-20 meeting, legislators may increase their calls for unilateral action against China's policies. Depending on when China addresses its currency, and by how much it allows its currency to appreciate, the combination of China's lack of action on currency, the continued delay by Treasury of its April 2010 currency report, the upcoming elections, and the increased focus by legislators on China could mean that, for the next several months, Sen. Schumer and others will continue to increase their calls for Congressional action on China. Chinese officials, meanwhile, will likely continue to rebuff threats of unilateral action by Congress and will argue that the best way to move forward with resolving the disputes over currency exchange rate, IPR and other matters without damaging the strong bilateral relationship is through dialogue and consultation between the United States and China.

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

Administration Unveils Joint Strategic Plan to Combat Intellectual Property Theft

Summary

On June 22, 2010, the Obama Administration released its “Joint Strategic Plan to Combat Intellectual Property Theft.” US Intellectual Property Enforcement Coordinator Victoria Espinel along with several other Administration officials unveiled the Joint Strategic Plan (“the Plan”) which is aimed at combating intellectual property (IP) theft and improving coordination of IP enforcement. The Plan contains more than thirty recommendations for improvements to the US IP regime. Espinel outlined the Plan at a June 23, 2010 Senate Judiciary Committee hearing. We review the elements of the Plan and the discussion of the Plan at the Senate hearing.

Analysis

I. Joint Strategic Plan to Combat Intellectual Property Theft

The Prioritizing Resources and Organization for Intellectual Property Act of 2008 (Pub. L. 110-403, “PRO-IP Act”) directs the Intellectual Property Enforcement Coordinator (IPEC) to coordinate the development of a Joint Strategic Plan against counterfeiting and infringement. The Office of the IPEC worked with Federal agencies and departments and with input from the public to put together the Plan. The recommendations included in the Plan were divided among the following six broad “actions” that “the Federal government will take to enhance the protection of US intellectual property rights:”

1. “Lead by example” and ensure that the Federal government does not purchase or use infringing products;
2. Support transparency in the development of enforcement policy, information sharing and reporting of law enforcement activities domestically and abroad;
3. Improve coordination and increase the efficiency and effectiveness of law enforcement efforts at the Federal, state and local level, of personnel stationed overseas;
4. Work with US trading partners and with international organizations to better enforce US intellectual property rights in the global economy;
5. Secure supply chains to stem the flow of infringing products at US borders and through enhanced cooperation with the private sector; and

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

6. Improve data and information collection from intellectual property-related activity and assess domestic and foreign laws and enforcement activities to maintain “an open, fair and balanced environment for American intellectual property rightholders.”

The Plan contains 33 “enforcement strategy action items.” We review several of these action items below:

Increased Coordination and Cooperation. Under the Plan, the government will enhance IPR-related coordination among government agencies, between federal, state and local governments, and with US trading partners.

Working Group to Prevent US Government Purchase of Counterfeit Products. Under the Plan, the government will establish a government-wide working group tasked with studying how to reduce the risk of the procurement of counterfeit parts by the US government. The working group will submit to the President, within 180 days after its first meeting, a memorandum outlining its findings and issues requiring further analysis.

Use of Legal Software by Federal Contractors. The government will review its practices and policies to promote the use of only legal software by contractors

Enhanced Transparency. The government will enhance public engagement through online outreach, stakeholder outreach, congressional consultations and soliciting feedback through advisory committees, official comment mechanisms such as Federal Register notices (FRN), notices of proposed rulemaking (NPRM) and notices of inquiry (NOI), on improvements to the US IP regime.

Special 301 Actions. The Plan states that the Office of the United States Trade Representative (USTR) will continue to publish its annual Special 301 report on intellectual property violators, and will continue to include in the report the Notorious Markets list, a compilation of examples of Internet and physical markets that have been the subject of enforcement action or that may merit further investigation for possible intellectual property infringements. USTR, in coordination with IPEC, will initiate an interagency process to assess opportunities to further publicize and potentially expand on the list in an effort to increase public awareness and guide related trade enforcement actions. USTR, in coordination with the IPEC, will also initiate an interagency process to increase the effectiveness of, and strengthen implementation of, Special 301 action plans that focus on selected trading partners “for which targeted efforts could produce desired results.”

Section 337 Actions. Under Section 337 of the Tariff Act of 1930 (19 USC § 1337), the International Trade Commission (ITC) is responsible for investigating allegations regarding unfair practices in import

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

trade, including those related to intellectual property infringements. Once the ITC makes a determination of infringement, it issues a Section 337 exclusion order and Customs and Border Protection (CBP) bars the importation of infringing goods. Under the Plan, the government will seek changes to provide CBP with the authority to share enforcement data with complainant rightholders, including denials of entry, seizures pursuant to seizure and forfeiture orders and determinations pursuant to an ITC exclusion order. The ITC and CBP will also explore procedures to facilitate and encourage communications between CBP and the ITC with respect to the scope of an exclusion order.

Shared Database. Under the Plan, the government will have a database that: (i) is shared by Federal law enforcement agencies; (ii) contains information about intellectual property cases; and (iii) can provide case-specific information about pending investigations, including the name and contact information for the lead investigative agent.

Counterfeit Pharmaceutical Interagency Committee. The Plan mandates the IPEC to establish an interagency committee on the counterfeiting of pharmaceutical drugs and medical products made up of Federal agencies, including the Office of National Drug Control Policy, the National Institutes of Health (NIH), the Department of Commerce (DOC), the Department of States (DOS) and the US Agency of International Development (USAID), and USTR, among others. Among other issues, the committee will examine problems associated with unlicensed Internet pharmacies, health and safety risks in the United States associated with the distribution of counterfeits and the proliferation of the distribution of counterfeit pharmaceuticals in Africa.

International Organizations. The IPEC will work with relevant Federal agencies and the IPR Center to raise awareness of intellectual property enforcement and to increase international collaborative efforts through international organizations, such as the World Intellectual Property Organization (WIPO), the World Trade Organization (WTO), the World Customs Organization (WCO), the World Health Organization (WHO), the Group of Twenty Finance Ministers and Central Bank Governors (G-20), the International Criminal Police Organization (INTERPOL), the Asia-Pacific Economic Cooperation (APEC) Forum, and the Organization for Economic Co-operation and Development (OECD).

FDA Notification Requirement for Counterfeit Pharmaceuticals/Other Medical Products. Under the Plan, manufacturers and importers will be required to notify the Food and Drug Administration (FDA) in the event of a known counterfeit of any pharmaceutical and other medical product. The required notification will also specify any known potential adverse health consequences of the counterfeit product. Drug manufacturers will also be required to provide the FDA with a list and complete description of any

legitimate drug products that are currently being distributed in the stream of US commerce on a twice annual basis.

Electronic Track and Trace for Pharmaceuticals and Medical Products. The Plan states that “the Food, Drug and Cosmetic Act should be modified to require that manufacturers, wholesalers and dispensers implement a track-and-trace system, which allows for authentication of the product and creation of an electronic pedigree for medical products using unique identifiers for products.”

Increased Enforcement. The IPEC will work with relevant Federal agencies to establish increased enforcement cooperation, coordination and information sharing consistent with current agreements, procedures, notices, alerts, guidance, memoranda of understanding and established partnerships for daily operations at US borders.

Penalty Relief for Voluntary Disclosure. Under the Plan, the government will take action to allow importers and others involved in the importation of infringing goods to receive relief from civil enforcement action as appropriate when they voluntarily disclose an IPR violation to CBP prior to the beginning of an investigation. If a valid disclosure is made, the infringing goods in the disclosing party’s possession or control would be destroyed under CBP’s supervision and the disclosing party would bear the costs of destruction.

Penalties for Exporters of Infringing Goods. The Plan states that the government will seek legislative amendments to specify authority for CBP to create and implement a mechanism to evaluate and issue administrative penalties for intellectual property-related export violations.

Bonding Requirements for Circumvention Devices. The Plan notes that “one of the tools available for rightholders to assist CBP in enforcing against counterfeit and pirated goods is for rightholders to obtain a sample of the suspected product to determine if it is infringing.” In those instances, CBP requires that rightholders post a bond to cover the potential loss or damage to the sample if the products are ultimately found to be non-infringing. Under the Plan, contingent on CBP obtaining the authority to provide rightholders samples of circumvention devices and in order to further streamline bonding requirements, CBP will extend the new bond practice to cover samples of circumvention devices.

Review of Existing Intellectual Property Laws. The IPEC will initiate and coordinate a process, working with Federal agencies, to review existing laws “to ensure that they are effectively reaching the appropriate range of infringing conduct, including any problems or gaps in scope due to changes in technologies used by infringers.” Under the Plan, Federal agencies will also review existing civil and criminal penalties to ensure that they are providing an effective deterrent to infringement (including, as to

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

criminal penalties, reviewing the United States Sentencing Guidelines), as well as review enforcement of existing laws to determine if legislative changes are needed to enhance enforcement efforts. The initial review process will conclude within 120 days from the date of the submission of this Joint Strategic Plan to Congress, and the Administration, coordinated through the IPEC, will recommend to Congress any proposed legislative changes resulting from this review process.

Supporting US Businesses in Overseas Markets. In coordination with the IPEC, DOC and other relevant agencies will conduct a comprehensive review of existing US government efforts to educate, guide and provide resources to those US businesses that are: (i) acquiring intellectual property rights in foreign markets; (ii) contemplating exporting intellectual property-based products or choosing markets for export; (iii) actively entering foreign markets or facing difficulties entering foreign markets; and (iv) encountering difficulties enforcing their intellectual property rights in foreign markets. According to the Plan, “the goal of the review is to increase the scope and effectiveness of existing efforts through improved coordination of our diplomatic, cooperative, programmatic and other bilateral mechanisms [and] this effort will focus in particular, but not exclusively, on the Chinese market.”

II. Reactions to Joint Strategic Plan

Reactions to the issuance of the Plan were positive. Administration officials such as **Vice President Joe Biden** and **USTR Ron Kirk** lauded the Plan and opined that it would help improve the US IP regime as well as address IP-related concerns with US trading partners and other entities. **President and CEO of the US Chamber of Commerce’s Global Intellectual Property Center David Hirschmann** stated that “if fully implemented by the Administration and Congress, the first ever National IP Enforcement Strategy could dramatically improve our nation’s ability to combat counterfeiting and piracy.” He noted that the Plan will “defend America’s intellectual property by cracking down on the counterfeiting and piracy that are killing jobs, harming consumers, and stunting our economic recovery.”

American Apparel and Footwear Association (AAFA) President and CEO Kevin Burke applauded the Plan and opined that it “reflects a comprehensive approach that pulls all IP stakeholders together [and] brings about meaningful improvements to intellectual property protections.” **National Association of Manufacturers (NAM) President John Engler** noted that the Plan “highlights the need to ensure that global supply chains are secured and protected and that IP can continue to be a driver of the US economy through innovation and the creation of manufacturing jobs,” adding that one of NAM’s top priorities is to “combat the growing threat of product counterfeiting and piracy around the world, especially in China.”

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

The International Intellectual Property Alliance (IIPA) lauded the Plan's focus on the impact of global copyright piracy. **Pharmaceutical Research and Manufacturers of America (PhRMA) President and CEO Billy Tauzin** highlighted the Plan's establishment of a Counterfeit Pharmaceutical Interagency Committee, its focus on robust enforcement of IP rights worldwide, and its goal of enhancing US advocacy on IP issues in multiple international forums. **The Computer and Communications Industry Association**, while generally supportive of the Plan, warned that "if properly pursued, such a plan could be valuable, but if not implemented properly it could be a drag on innovation."

III. **Senate Judiciary Committee Hearing on Joint Strategic Plan**

On June 23, 2010, the Senate Judiciary Committee held a hearing on the Plan. **Espinel** testified at the hearing and presented the Plan to **Committee Chairman Patrick Leahy (D-VT)** and other Committee Members. During her testimony, Espinel outlined the Plan and highlighted that the IPEC will be reviewing existing IP laws to identify any gaps that require legislative changes. She noted that the Plan calls on the private sector to work together to find "practical and efficient" solutions to IP-related problems. On Internet piracy, she urged the Federal government to find "alternative" ways to reduce online piracy, including pursuing foreign-based Web sites and services that infringe on IP through enforcement of IP laws and diplomatic measures. Espinel stated that the IPEC will be "targeting counterfeiters and pirates, not those engaged in legal and legitimate activities [and] increased coordination, cooperation and prioritization must accompany this first step [although] legislative action may be required in order to fulfill our goals."

Chairman Leahy indicated that he is working on legislation aimed at targeting foreign Web sites and others that "steal United States intellectual property." He did not offer other details on his planned legislation, noting only that it will "target those who profit directly from taking American property and American jobs along with it." Chairman Leahy also indicated that he may add language to the Fiscal Year 2011 State Department and foreign operations spending bill calling on the State Department to post intellectual property experts in the embassies of countries that are major sources of piracy such as China.

Sen. Tom Coburn (R-OK) questioned Espinel about whether China was cooperating with the United States on the IP front, adding that "the answer is, we do not have the cooperation of the Chinese government . . . they're stealing our intellectual property . . . they're stealing our future today."

Sen. Sheldon Whitehouse (D-RI) noted that legitimate businesses can sometimes enable piracy, and used as examples search engines used to find Web sites where illegal content can be downloaded and legitimate payment services such as Visa and MasterCard that are used to pay for illegal content.

Outlook

The Plan represents the Administration's full-scale effort to strengthen the US IP regime and address US businesses' concerns on intellectual property theft, domestically and abroad. Observers opine that the Plan was, for the most part, well-received because it addresses many of the IP-related issues that US companies have raised repeatedly over the past several years and because it contains a broad array of recommended actions and initiatives, many of them led by the IPEC, a relatively new office. President Obama named Victoria Espinel the new US IPEC (a position created by Congress in 2008 as part of Pub. L. 110-403) on September 25, 2009, noting that the IPEC is meant to "augment American efforts to prevent the exploitation of pirated or counterfeited movies, music and software, as well as other intellectual property." The IPEC, part of the Office of Management and Budget, is mandated to strengthen US enforcement efforts to stop the sale of pirated or counterfeited movies, music, drugs and software, and the Plan is the first such strategic and comprehensive action plan to be issued from that office.

Although the Plan has been warmly received, some observers question when and how the IPEC and other government agencies will undertake some of the initiatives and recommendations included in the Plan. Although some recommendations contain definitive deadlines for completion, the majority of the action items indicate that the government will "explore" or "work towards" achieving changes to the US IP regime without providing concrete timelines for review and completion of such initiatives. Observers point specifically to Espinel's comments that her office will be reviewing existing IP laws to identify any required legislative changes, opining that such a review and any ensuing work with Members of Congress are unlikely to happen in the short-term and will likely require a large block of time devoted to changes in IP laws and regulations, time that legislators may not have between now and the end of the year, given the busy legislative agenda, the upcoming summer recess, the November elections, and the lame-duck session to follow the elections. Nonetheless, for many US businesses and business groups, the introduction of the Plan is a positive move because it places IP and IP-related concerns on the Administration's agenda and on its radar.

Some legislators have certainly taken notice of the recent focus on IP, especially in light of China's "indigenous innovation" policies and concerns that US businesses have raised on these policies and their effect on US IP rightsholders. Indeed, the Senate Judiciary Committee hearing where Espinel presented the Plan to legislators included Sen. Coburn's (strongly critical) views on China and its relationship with US intellectual property. Legislators' current focus on China's trade and economic policies (and how they affect the US economy) could serve to boost the Plan and garner it some political capital and support,

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

especially since the Plan devotes a large section to enhancing cooperation between the US government and foreign trading partners, including China, and because the Plan includes how the United States plans to enhance its monitoring and enforcement of IP laws and regulations. Consequently, some legislators may see the Plan as another tool to address US-led IP-related concerns in China.

Senate Committee Hearings Highlight Legislators' Continued Focus on China's Trade and Industrial Policies

Summary

On June 23, 2010, the Senate Finance Committee held a hearing at which Secretary of Commerce Gary Locke and United States Trade Representative (USTR) Ron Kirk gave testimony regarding China's trade and industrial policies. Separately, the Senate Foreign Relations Committee also heard testimony that day from expert panelists on friction in the United States-China relationship. Issues covered at both Committee hearings included China's currency regime, industrial innovation policies, government procurement procedures and intellectual property rights protection. We review the Committee hearings below.

Analysis

I. Senate Finance Committee Hearing

In opening the hearing, **Chairman of the Senate Finance Committee Max Baucus (D-MT)** urged Secretary Locke and USTR Kirk to develop and implement a comprehensive, coordinated strategy" to ensure that China "eliminates unscientific barriers to US agriculture exports, enforces and protects American intellectual property rights and suspends its practices favoring [...] indigenous innovation." He also pressed the Department of Commerce to determine whether China's currency practices are tantamount to a countervailable subsidy to Chinese exports under US law. Chairman Baucus had previously laid out a strategy to approach United States-China trade and economic disputes in which he proposed resorting to the tools offered by International Monetary Fund (IMF) and the World Trade Organization (WTO) in order to address US concerns with China. He also opined that, if necessary, the United States should take strong unilateral action to resolve outstanding economic and trade issues with China.

In his opening statement, **Ranking Member of the Senate Finance Committee Charles Grassley (R-IA)** openly referred to China's currency practices as "currency manipulation." He opined that "China's

most recent move to reinstate a slow, crawling exchange rate peg does not solve the problem,” and he also cited “China’s failure to effectively protect intellectual property rights.”

Secretary of Commerce Gary Locke’s testimony broached China’s indigenous innovation policies, its currency practices and its intellectual property protection and enforcement. He posited that China’s “industrial policies [...] limit foreign market access with the goal of developing an indigenous capacity to innovate” and that “these policies compel foreign companies to transfer technology [...] to the detriment of US and foreign companies.” With respect to whether China’s currency practices are tantamount to a countervailable duty, Secretary Locke stated that he “wanted to make sure [Department of Commerce’s] decision to investigate is warranted by the facts and the law.” Secretary Locke, referring to China’s protection of IPR, stated that “penalties for IPR infringement generally are not severe enough to deter potential violators.” With respect to future action that could be taken by the United States in response to China’s trade and industrial policies, he stated that “when cooperation and dialogue are not enough, we are committed to utilizing all the tools we have available in order to make the progress we need.”

USTR Ron Kirk highlighted that the “top priority concerns with China include addressing indigenous innovation and other discriminatory industrial policies [...], improving enforcement of IPR, ending non science-based regulations that block US agricultural exports and obtaining increased services market access.” He added that these issues will top the Joint Commission on Commerce and Trade’s (JCCT) agenda in Autumn 2010.

II. Senate Foreign Relations Committee Hearing

The Senate Foreign Relations Committee heard testimony from **Dr. Laura Tyson, Professor of Global Management at the University of California, Berkeley**, and the **Honorable Carla Hills, Chair and CEO of Hills & Company International Consultants**, who broached issues such as China’s currency practices, its indigenous innovation policies and its protection of intellectual property rights.

Dr. Tyson supports “reforming the exchange rate regime in a way that allows the RMB to appreciate gradually” as this would boost the purchasing power of Chinese consumers, encourage Chinese producers to shift production away from exports toward domestic markets and “temper the impacts of [...] inflation.” She added that she does “not endorse the view [...] that China should make an immediate large upward adjustment in the RMB-dollar exchange rate” as this might jeopardize the stability of China’s “still embryonic financial system.” According to Dr. Tyson, countervailing duties imposed on Chinese goods “in an effort to offset the so-called RMB currency subsidy would raise the prices of these products

for US consumers and drive their production not back into the US but to other emerging market countries.”

With respect to China’s indigenous innovation and government procurement policies, Dr. Tyson noted that “China’s trade and industrial policies are [...] impeding access of foreign producers to China’s market” and that these policies “effectively deny access to [...] products if the technology does not originate in China – even if the products are entirely produced in China with 100 percent local content.” She added that most US products sold in China contain technology developed in the United States or elsewhere, and these companies are “reluctant to develop technologies in China as a result of inadequate intellectual property protection.”

Dr. Tyson warned the Committee against the imposition of trade sanctions on China, opining that were the United States to do so, it would be “highly likely that China would retaliate.” This retaliation could include China “lodging a WTO complaint, imposing tit-for-tat trade sanctions on US exports to China or reducing demand for US government securities.”

The Honorable Carla Hills, in reference to China’s currency regime, opined that “monitoring this issue at future G-20 meetings will be helpful in that it will maximize pressure on China [...] in international fora and minimize bilateral contention.” She added that US businesses in China are concerned about indigenous innovation policies in government procurement, noting that China becoming a signatory to the Government Procurement Agreement of the WTO “would protect [US] entrepreneurs against some of the discrimination [...] they encounter today in penetrating the Chinese market.” She also cited US business concerns regarding intellectual property rights protection in China and stated that “enforcement is a major problem at the central, provincial and local levels.”

Outlook

The two most recent legislative Committee hearings come amidst high US unemployment fueled by poor job creation and lackluster economic growth. This has caused increased pressure on lawmakers to address China’s economic, trade and industrial policies that are seen by many as detrimental to US firms. China’s currency and its IPR regime are two main issues that legislators have turned their attention to in recent months, and the two recent hearings, along with hearings that the House Ways and Means and Senate Finance Committees have held in previous weeks indicate that the renewed legislative focus on China and its policies is unlikely to die down in the short term, especially with November elections coming up.

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

In an effort to avoid the currency issue from monopolizing the docket at the recent G-20 talks in Toronto, Canada, China recently announced that it would allow more flexibility in the RMB-USD exchange rate. Many US lawmakers, however, see China's move toward greater RMB flexibility as "too little" and doubt China's true intention to maintain this flexibility over the long-term. Sen. Charles Schumer (D-NY), despite pressure from the White House not to do so, has promised to make a serious push for his Currency Exchange Rate and Reform Act of 2010 (S. 3134) over the coming weeks, a bill that would treat the undervaluation of the RMB as a countervailable duty. The Obama Administration, meanwhile, is concerned that legislation for unilateral retaliation against China, such as S. 3134, will represent a large setback for US-China relations. Nonetheless, Sen. Schumer and others are likely to maintain their vocal criticism of China's currency practices in the short-term, at least until the November elections.

Indigenous innovation policies in government procurement in China are also on the radar of US lawmakers. Sen. Debbie Stabenow (D-MI) plans to introduce a bill in the Senate that would prevent the US government from procuring Chinese goods until China signs the Government Procurement Agreement of the WTO, and she is confident that the bill has enough support to pass although the Senate's July recess and elections in November could delay introduction and consideration of such a bill. Although not as "high-profile" as China's currency, China's indigenous innovation policies and its IPR regime will also likely remain focal China-related items for legislators, and Sen. Stabenow's bill could attract more legislative attention and increase the dialogue and criticism from Members of Congress on and of a number of China's policies.

United States Highlights

Congress Passes Iran Sanctions Bill, Sends Legislation to President for Signature

On June 24, 2010, Congress passed the conference report of the Comprehensive Iran Sanctions, Accountability and Divestment Act of 2009 (H.R. 2194). On June 21, 2010, Senate Banking Committee Chairman Chris Dodd (D-CT) and House Foreign Affairs Committee Chairman Howard Berman (D-CA), Conference Co-chairs for the bill to strengthen Iran sanctions, announced they had reached an agreement on a draft joint text for H.R. 2194. The House of Representatives then approved the final Iran sanctions bill by a vote of 408 to eight, and the Senate approved the bill by a vote of 99 to 0. The bill was last sent to President Obama for his signature, and observers expect him to sign the bill shortly.

Among other things, the final version of H.R. 2194:

- establishes three new sanctions (in addition to the six sanctions that already exist under current law): (i) a prohibition on access to foreign exchange in the United States; (ii) a prohibition on access to the US banking system, and (iii) a prohibition on property transactions in the United States - H.R. 2194 would require the President to impose at least three of the possible now-nine sanctions on an entity in violation of current sanctions law, in addition to other mandatory sanctions;
- imposes sanctions on foreign companies – including insurance, financing and shipping companies – that assist Iran in importing refined petroleum or maintaining or expanding Iran’s domestic refining capacity;
- imposes sanctions on parent companies if their subsidiaries engage in a sanctionable activity in Iran’s energy sector;
- constrains US banks from engaging in financial transactions with foreign banks doing business with Iran’s Islamic Revolutionary Guard Corps, sanctioned Iranian banks or facilitating Iran’s illicit nuclear program or its support for terrorism;
- eliminates a loophole in US law that excludes from sanctions the provision of goods, services or technology to Iran’s oil and natural gas sectors;
- requires a certification from a company seeking contracts with the United States that it is not engaged in sanctionable activities in Iran’s energy sector;
- bans US government procurement contracts for any foreign company that exports to Iran technology used to restrict the free flow of information or to disrupt, monitor or otherwise restrict freedom of speech;
- bars the President from issuing licenses for the export of nuclear goods, services or technology to any country with which the United States has a nuclear cooperation agreement that helps Iran develop or acquire a nuclear weapons capability;
- enables US states and local governments to divest their portfolios of foreign companies involved in Iran’s energy sector;
- imposes financial penalties and travel restrictions on Iran’s human rights abusers;
- codifies certain aspects of the US trade embargo against Iran; and
- requires the Director of National Intelligence to report on countries which allow their territory to be used to send illicit goods to Iran and provides for remedies to address such concerns.

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

In addition, the bill allows the President to waive certain sanctions on a case-by-case basis in the case of companies where the President certifies to Congress that the country where the company is located is cooperating with US-led multilateral efforts to isolate Iran. The President must explain what actions the particular government is taking to cooperate with multilateral efforts and why the waiver is “vital to the national security interests of the United States.” The Administration had been working with legislators over the past several months to include such waiver authority in the final bill. Several Republican legislators, however, complained that the final version of H.R. 2194 contained too much Presidential waiver authority. House Foreign Affairs Committee Ranking Member Ileana Ros-Lehtinen (R-FL), a vocal opponent of the inclusion of such Presidential waiver authority in the final bill, argued that the new legislation would work only decisively if the President refrains from taking advantage of the long list of waivers. Ranking Member of the House Foreign Affairs’ Subcommittee on Terrorism, Nonproliferation and Trade Ed Royce (R-CA) criticized H.R. 2194 as a “muddle” of provisions “weakened by delays and the possibility of waiver after waver.”

Sanctions under H.R. 2194 would end once the President certifies that Iran no longer satisfies the requirements for designation as a state-sponsor of terrorism, and has ended efforts to develop or acquire nuclear, biological, and chemical weapons and ballistic missiles and ballistic-missile launch technology.

Reaction to passage of the bill was mostly positive. Sen. John McCain (R-AZ) stated that “because of this legislation, we will be posing a choice to companies around the world: Do you want to do business with Iran or do you want to business with the United States?” Sen. Joseph Lieberman (I-CT) opined that “the measures imposed by this legislation—together with sanctions adopted at the UN and, even more importantly, by like-minded nations around the world—offer our last, best hope of peacefully preventing Iran from acquiring a nuclear weapons capability.” Ranking Member of the Senate Banking Committee Richard Shelby (R-AL) noted that “the legislation is a vast improvement over prior law, and ensures that the President must make a determination to impose sanctions or provide Congress with a timely and written rationale for any delays or waivers.” The National Foreign Trade Council (NFTC) and USA*Engage, however, expressed concern that H.R. 2194 could have unintended consequences for legitimate global trade, opining that “unilateral sanctions fail to produce their intended effects upon sovereign states, and the scope of these sanctions is worrisome.”

US, Russia Reach Poultry Agreement

On June 24, 2010, the United States and Russia reached an agreement wherein Russia will lift a ban on US poultry products that has been in place since January 1, 2010. The agreement was reached following

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

talks between President Obama and Russian President Dmitry Medvedev on a range of economic and trade issues in advance of the upcoming G-20 and G-8 conferences in Canada.

Russian officials cited sanitary concerns in implementing the ban, specifically pointing to the effects of treating US poultry with chlorinated water. Under the agreement, the United States will publish information on the Department of Agriculture Web site about which disinfectants and or pathogen reductions treatments are known to be approved by Russia for use on processing poultry and on food generally. The United States will also provide information to Russia on the solutions companies use on poultry shipped to Russia and will give Russia an updated list of poultry processing facilities authorized to ship to Russia. Once the agreement is signed, US poultry producers would be able to resume shipments of poultry to Russia.

United States Trade Representative (USTR) Ron Kirk lauded the agreement and noted that “in 2009, US poultry exports to Russia were valued at USD 767 million [and] today’s agreement will not only benefit our farmers and ranchers, but it will help support agriculture jobs here at home.” Secretary of Agriculture Tom Vilsack stated that “Russia has long been the largest export market for US poultry and regaining access to that market has been a top priority for the Obama Administration.”

Legislators Introduce New Bill on China and Government Procurement

On June 17, 2010, Senators Debbie Stabenow (D-MI), Russ Feingold (D-WI), Sherrod Brown (D-OH), Robert Casey (D-PA), and Lindsey Graham (R-SC) introduced The China Fair Trade Act of 2010 (S. 3505), a bill that aims to prohibit purchases by the US government of Chinese goods and services until China becomes party to the World Trade Organization’s (WTO) Agreement on Government Procurement (GPA). In recent months, China has moved forward with indigenous innovation policies that US firms have decried as giving preference to Chinese firms over foreign firms with respect to Chinese government procurement, and legislators hope that once China signs onto the GPA, such preferences will disappear. The bill was last referred to the Senate Finance Committee on June 17, 2010.

According to the Senators, the US government purchases Chinese tires, ammunition, office equipment, and US mint coins from China. The bill would “plug the holes in Buy American laws that allow the US government to purchase Chinese goods.” S. 3505, according to its sponsors, would also pressure China to become a full signatory to the GPA at which time US firms would have access to the Chinese government procurement market. Meanwhile, Chinese officials present at the May 2010 US-China

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

Strategic and Economic Dialogue (S&ED) summit in Beijing have stated that China would present a new offer to join the GPA before or during July 2010.

Other provisions of the bill would mandate the Secretary of Commerce to submit to Congress a report on the productive capacity of the major industrial sectors in China. The bill also mandates the Secretary of Energy, in consultation with other appropriate agencies, to report to Congress regarding China's policies with respect to, and the subsidies provided by China for, the development and exportation of renewable energy products and technologies. The report must include an analysis of the impact of the policies and subsidies on US manufacturers of renewable energy products and technologies.

The introduction of S. 3505 shows that Congress' spotlight on China's trade and industrial policies has yet to diminish. In the past month, legislators have turned their attention to China's currency, indigenous innovation policies, intellectual property rights regime and other trade-related matters, and have brought up these issues in other bills or during Congressional hearings. It is uncertain if the Senate Finance Committee will set aside time to review and mark-up the bill, especially in light of the upcoming G-20 meetings in Canada where Administration officials have promised to discuss these matters with China. In addition, China has assured US officials that it intends to submit a revised offer to join the GPA before or by the end of July 2010. Until that time, S. 3505 is unlikely to move forward, although the Senators introducing the bill may push for action on their legislation if China does not submit a revised GPA offer as promised, especially because forward movement on such a bill could provide these legislators with additional campaign support for the upcoming November elections.

Senate Commerce Committee Passes Export Promotion Act of 2010

On June 9, 2010, the Senate Committee on Commerce, Science, and Transportation reported the Export Promotion Act of 2010 (S. 3084), as amended, by unanimous voice vote. The bill is meant to "increase the competitiveness of United States businesses, particularly small and medium-sized manufacturing firms ("SMEs"), in interstate and global commerce, foster job creation in the United States, and assist United States businesses in developing or expanding commercial activities in interstate and global commerce." Sen. Amy Klobuchar (D-MN) introduced the measure in March 2010. Among other things, the bill would:

Expand the scope of programs run by the National Institute of Standards and Technology (NIST), including increasing the scope of the Hollings Manufacturing Extension Partnership program, a national network with specialists who help manufacturers compete against lost cost competition;

Increase the number of export promotion employees at the Department of Commerce (DOC) whose primary responsibilities involve promoting or facilitating participation by US businesses in the global marketplace and facilitating the entry into, or expansion of, such participation;

Require the Secretary of Commerce to ensure that global marketplace promotional activities include promoting and facilitating participation by small- and medium-sized manufacturing businesses and authorize USD 30 million for this mandate;

“Improve access to global markets for rural businesses” by authorizing USD five million per year from 2011 through 2015 for DOC's program to improve access to the global marketplace for goods and services provided by rural businesses;

Provide USD 15 million for the Market Development Cooperator Program of the International Trade Administration to establish public-private partnerships and to underwrite a portion of the start-up costs for new projects carried out under that program to strengthen the competitiveness and market share of United States industry; and

Express the sense of the Senate on the need to fund training for state international trade agencies to assist the United States Foreign Commercial Service.

Committee Chairman John Rockefeller (D-WV) described the bill as a serious attempt to reinvigorate US exporters, noting that “in these tough economic times, small businesses need to look wherever they can for new business. During Committee consideration of the bill, Committee members also passed an amendment by Sen. Mike Johanns (R-NE) that highlights the need for passage of the pending Free Trade Agreements (FTAs) with Colombia, Panama, and South Korea and that would require DOC to provide Congress with a report, within 90 days of enactment of the law, detailing the trade barriers US exports face in Colombia, Panama, and South Korea.

The Export Promotion Act of 2010 matches some of the initiatives and goals of the President's National Export Initiative (NEI), including its goal of increasing US exports abroad and its focus on SMEs. It is unclear if the Senate will take up and consider the full bill next, or if other Committees will want to review the bill. Observers do not expect there to be major opposition to such a bill, especially since the bill's provisions tackle US competitiveness and provide legislators with an opportunity to demonstrate their focus on the US economy during an election year. Nonetheless, observers are uncertain if the Senate can add the bill to an already packed and crowded legislative agenda, and consider it in the short-term.

USTR Appoints New Chief Counsel for China Enforcement

According to several reports, United States Trade Representative (USTR) Ron Kirk has appointed Eric Garfinkel to become Chief Counsel for China Enforcement at the Office of the USTR. Garfinkel, who currently serves in the Office of the General Counsel at USTR, would replace Claire Reade who has now become Assistant USTR for China Affairs. Prior to joining USTR, Garfinkel cofounded a toy company. He was nominated by President George H. W. Bush as the Assistant Secretary of Commerce for the Import Administration and served in that position until 1991. Prior to that he was Vice President and General Counsel of the Overseas Private Investment Corporation (OPIC) and a partner at a law firm in Washington, D.C.

Trade Committee of European Parliament Holds Hearing with US Ambassador to EU

On June 1, 2010, the International Trade (INTA) Committee of the European Parliament (EP) held a meeting with US Ambassador to the European Union William E. Kennard, who commented on the priorities and prospects for EU – US trade relations. In his opening statement, the Ambassador first of all highlighted that US President Barak Obama and his Administration remain committed to trade liberalization but currently need to “make the case domestically.” In addition, he noted that the EU and the US will in the future prioritize addressing non-tariff barriers (NTBs) through forums such as the Transatlantic Economic Council (TEC), which he described as a “very useful vehicle.” Kennard here agreed with the criticism from various Members of Parliament (MEPs) that the TEC has thus far delivered few results, but was optimistic that recent discussions between EU Trade Commissioner Karel De Gucht and US Deputy National Security Adviser for International Economic Affairs Michael Froman had provided a “new sense of urgency” (*Please also see W&C May 2010 EU Report*). In addition, Kennard stressed that the TEC will be “one amongst various instruments” that the EU and the US will use to address NTBs.

In the debate that followed the opening statement, various MEPs also questioned Kennard on the US approach towards the ongoing negotiations under the World Trade Organization (WTO) Doha Round. In response, the Ambassador noted that the US remains committed to obtaining “an ambitious and balanced agreement” but believes that the July 2008 package which is currently on the table does not contain sufficient commitments from advanced developing countries such as China and India on agriculture. Kennard added that the US therefore wants to use the July 2008 package as “a starting point to move forward,” and called on the EU to support the negotiation of a more comprehensive agreement.

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

At present, the EU and the US remain each other's main trading partners in a highly interdependent relationship that accounts for more than 50 percent of the global GDP. Recent EU statistics indicate that in 2009, EU goods exports to and imports from the US amounted to, respectively, € 204.4 billion and € 159.8 billion, and continued to consist to a large extent of manufactured goods such as machinery, chemicals, and transport. In the same year, EU exports to and imports of private commercial services totaled, respectively, € 119.4 billion and € 127.0 billion, and focused on sectors such as financial, insurance, transportation, and royalties and license fees services. In 2008, EU and US foreign direct investment (FDI) in each other's markets amounted to, respectively, € 121.4 billion and € 50.5 billion, and focused to a large extent on non-bank holding companies, finance and insurance, and manufacturing sectors.

Undersecretary of Commerce for International Trade Discusses NEI Features

On June 2, 2010, the Washington International Trade Association (WITA) held a briefing with Undersecretary of Commerce for International Trade Francisco Sanchez on the Obama Administration's National Export Initiative (NEI). Undersecretary Sanchez outlined NEI implementation, US industries "poised for export promotion" and emerging markets targeted for commercial engagement with the United States.

According to Undersecretary Sanchez, under the NEI, the Department of Commerce (DOC) is currently developing "specific commercial engagement strategies for emerging markets," including Brazil, India, China, Vietnam, and South Africa. DOC is currently assessing and matching sectors that do best in these particular markets, although Undersecretary Sanchez opined that the sectors that show the most potential for US export growth in these countries include alternative and clean energy, smart grids, environmental services, and green technology.

At the briefing, Undersecretary Sanchez also highlighted other facets of the NEI, including:

- **DOC-led Trade Missions.** On June 3, 2010, DOC led a trade mission to Saudi Arabia and Qatar that is focused on public health; eleven US companies are currently on that trip and with the help of DOC, will seek export opportunities for US medical technology and medical devices, as well as explore water and waste management business in Saudi Arabia and Qatar. Mission participants will be introduced to distributors, public and private buying agents, and other potential business partners. DOC is planning other similar trips for other US companies to other US trading partners on order to market US products and exports.

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

- **Public-Private Export Initiatives.** According to Undersecretary Sanchez, DOC is working with UPS, FedEx, and the US Postal Service and “targeting their exporting clients to find new market opportunities . . . by the end of this summer, we will train the entire international sales forces of these three companies on the services ITA can provide to their exporting clients.”
- **Enhanced Customer Service.** Undersecretary Sanchez noted that DOC is also developing customer service management systems to enhance exporting experiences for US companies; emphasis would be given to companies that already export and are ready for new markets. He did not provide any further details on this initiative.
- **Credit for Small Businesses.** According to Undersecretary Sanchez, “the President has charged the Export Promotion Cabinet to work with the Small Business Administration and the Export-Import Bank and the resources of the Department of Commerce to make credit and resources more readily available.”
- **Increased NEI Budget.** According to Undersecretary Sanchez, President Obama is requesting a USD 78.5 million increase in the DOC’s budget, specifically for the NEI.

CBP Announces Intent to Distribute Assessed AD, CVD Duties in Connection with Byrd Amendment

In a June 1, 2010 Federal Register (FR) notice, US Customs and Border Protection (CBP) announced its intention to distribute assessed antidumping or countervailing duties for fiscal year 2010 in connection with the Continued Dumping and Subsidy Offset Act (CDSOA, also known as the “Byrd Amendment”) (75 FR 30530). The FR notice sets forth the case name and number of each order or finding for which funds may become available for distribution, together with the list of affected domestic producers who are potentially eligible to receive a distribution. The FR notice also provides the instructions for affected domestic producers to file certifications to claim a distribution. Certifications to obtain funds under a particular order or finding must be received by August 2, 2010.

The Byrd Amendment instructed CBP to distribute duties collected in antidumping and countervailing duty cases to affected domestic producers that petitioned for such distributions. Before the Byrd Amendment was enacted in October 2000, such duties went to the general fund of the Treasury. In January 2003, a World Trade Organization (WTO) dispute settlement panel (DS234) ruled that the Byrd Amendment constituted a “non-permissible specific action against dumping or a subsidy” contrary to global trade rules. In February 2006 the US Congress approved legislation repealing the Byrd amendment; the legislation,

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

however, added transitional provisions that allowed US Customs authorities to continue collecting duties for distribution under the Byrd Amendment until October 1, 2007. On October 1, 2007, the Byrd Amendment was officially phased out, but, as noted, the repeal delayed implementation of the phase out, permitting payouts to continue on duties collected on imports before October 1, 2007.

Free Trade Agreements

TPP Negotiators Convene in San Francisco for Second Round of FTA Talks

Summary

Officials from countries negotiating the Trans-Pacific Partnership (TPP) Free Trade Agreement (FTA) met the week of June 14, 2010 in San Francisco for the second round of trade agreement negotiations. During this round, negotiators discussed, among other things, the relationship between the TPP FTA and pre-existing FTAs and the process of developing draft FTA texts for negotiators to examine at the next round of TPP FTA negotiations, scheduled for October 2010. We review the second round of TPP FTA negotiations.

Analysis

I. Second Round Negotiations

Present at the second round of negotiations were officials from the United States, Australia, Brunei Darussalam, Chile, New Zealand, Peru, Singapore, and Vietnam. Assistant United States Trade Representative (AUSTR) for Southeast Asia and the Pacific Barbara Weisel led the US delegation at the talks.

During the week-long negotiations, TPP FTA working groups met to continue discussions and begin negotiations on various chapters of the agreement including: Technical Barriers to Trade; Market Access; Legal and Institutional; Cross-Border Services; Competition; Investment; Environment; Labor; Sanitary and Phytosanitary Measures; Textiles; Capacity Building; Intellectual Property Rights; E-Commerce; Government Procurement; and Financial Services.

During a plenary session, negotiators launched discussions on a framework for market access negotiations, and discussed the relationship between the TPP agreement and pre-existing FTAs. Negotiators also discussed horizontal issues such as small business priorities, regulatory coherence, competitiveness, supply chains, development, and regional integration. Negotiators discussed how much progress they need to make in the second round to begin drafting texts for a third round of TPP talks in October in Brunei. According to reports, negotiating countries have not yet formulated draft texts but are working towards providing first drafts by the October TPP round.

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

The United States also led a discussion on the consultations that USTR will have to undergo with the US Congress when additional countries join the TPP. According to several reports, however, the United States and other TPP negotiators have not yet decided on a formal process for when new countries want to join the TPP FTA negotiations. Observers note that several countries have indicated their interest in joining the negotiations, including Malaysia and Canada, but that TPP negotiators are still exploring how to include such interested parties in the talks.

According to several reports, at the second round of negotiations, TPP negotiators were unable to reach consensus on two fundamental issues: (i) how the TPP FTA will relate to existing FTAs among current TPP participants; and (ii) how TPP countries will conduct market access negotiations. On existing FTAs, USTR officials reportedly stated that the TPP negotiations should not “reopen” market access schedules in existing FTAs it has with TPP countries such as Australia, Singapore, Chile, and Peru. Observers believe that adopting this position would enable US negotiators to maintain and preserve any special treatment of sensitive products that it negotiated in the existing FTAs. Observers note, however, that some countries may be pushing for existing FTAs to be “reopened” which would then enable market access schedules to be renegotiated altogether. On market access, US negotiators are reportedly suggesting that TPP members that do not already have FTAs in place negotiate bilaterally with one another, a contrast from the position being pushed by negotiators from Australia, New Zealand and Singapore who reportedly prefer “plurilateral market access negotiations between all TPP members that would result in a single, unified market access schedule.” Observers note that TPP negotiators will likely hold an informal meeting on market access negotiations before the October negotiating round.

II. Public Stakeholder Participation

USTR also invited various US interest groups to travel to San Francisco and participate in the second round of negotiations. According to USTR, more than 25 organizations traveled to San Francisco for the negotiations. Although these groups did not participate directly in the FTA negotiations, USTR noted that its staff briefed participating stakeholders daily on the negotiations. USTR also provided these groups with the opportunity to give on-site presentations to trade negotiators from the eight participating TPP economies on various issues of interest, ranging from agriculture trade to labor and environment to intellectual property.

According to USTR, interest groups that traveled to San Francisco included:

- The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO);
- The American Farm Bureau Federation;
- The American Sugar Alliance;
- The California Farm Bureau Federation;
- The California Public Health Association-North;
- The Center for Policy Analysis on Trade and Health;
- Citizens Trade Campaign;
- FedEx Express;
- Friends of the Earth;
- Intel;
- The International Forum on Globalization;
- Land O' Lakes;
- The National Center for APEC;
- The National Farmers Union;
- The National Milk Producers Federation;
- The National Pork Producers Council;
- Oceana;
- The Oregon Fair Trade Campaign;
- People for the Ethical Treatment of Animals;
- Public Citizen;
- Sierra Club;
- The US Chamber of Commerce; and
- Yale Law Offices.

Outlook

Similar to the first round of FTA talks, observers did not expect TPP negotiators to make substantive moves on the FTA during the second round of negotiations, and as evident by reports from San Francisco, the second round of negotiations concluded without any major developments or achievements. Negotiators, however, have placed the contentious issues of existing FTAs and market access negotiations on the negotiating table, a positive sign for some observers who opine that these fundamental issues will need to be resolved in order for the talks to proceed smoothly in the future. Although negotiators did not agree to one approach to existing FTAs among TPP members or on how market access negotiations will proceed, the negotiators' focus on these two key points likely shows their understanding of the magnitude of these issues and they are likely attempting to resolve these approaches sooner rather than later, a view corroborated by news of an additional informal market access meeting prior to the October meeting. Negotiators, however, are unlikely to easily resolve these two matters in the short-term given the differences in approach and stances among TPP negotiators.

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

As noted, negotiating members did not appear to agree on how to accept new TPP negotiating members. At such an early stage in the negotiations, observers did not expect TPP countries to quickly agree to a strategy on new TPP participants. Nonetheless, with countries like Malaysia and Canada openly noting their willingness to join the FTA talks, and with calls from some US business groups to include these countries in the negotiations and wrap up the talks by the 2011 US-hosted Asia-Pacific Economic Cooperation (APEC) meeting, US and other negotiators likely understand that they will have to broach this issue sooner rather than later, and come to an agreement on how to best incorporate new TPP members. An agreement on such an approach is unlikely to happen until after TPP members agree on the relationship between the TPP FTA and existing FTAs among TPP members, and until they decide how market access negotiations will proceed.

Between now and October 2010, negotiators will likely meet on an informal basis to continue discussions on the pending issues in preparation for the third round and for the distribution of first draft texts. Observers will be looking to this third round for some substantial moves forward on the TPP FTA, especially if draft negotiating texts are distributed among TPP negotiators. At that stage, there may also be some better indications on how TPP countries will approach the fundamental contentious issues that they broached during this second round of negotiations. Nonetheless, most observers are adopting a cautious “wait-and-see” approach between now and then to see if the United States and its TPP negotiating partners are willing to make concessions, negotiate on base approaches to the negotiations that are acceptable to all the TPP countries and reach a common understanding on these fundamental issues that would enable forward movement in the talks.

Free Trade Agreements Highlights

President Obama Signals Intent to Move Forward on Pending KORUS FTA

On June 26, 2010, President Obama signaled his intent to move forward on the pending US-Korea (KORUS) Free Trade Agreement (FTA). President Obama delivered his remarks on the pending agreement following a meeting with Korean President Lee Myung-Bak on the sidelines of the G-8 and G-20 meetings taking place June 27-28, 2010 in Canada. According to reports, the two leaders discussed at length commercial and trade ties between the United States and Korea. At a press conference following the talks, President Obama stated that “it is time that our United States Trade Representative work very closely with his counterpart from the ROK to make sure that we set a path, a road, so that I can present this FTA to Congress.” According to President Obama, his Administration will work between now

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

and November 2010 (when President Obama is scheduled to visit Korea) to ensure that all the elements of the KORUS FTA are "lined up properly." President Obama also stated that "in the few months that follow [the November visit to Korea]" he intends to present the KORUS FTA to Congress for its consideration. President Lee welcomed President Obama's remarks on the KORUS FTA and noted that the Korean government "will work towards that date and that objective in the weeks and months ahead."

At a press briefing following President Obama's remarks, Administration officials provided further insight to the President's "initiative" to move forward on the KORUS FTA. According to Administration officials, President Obama has informed President Lee of his intention to ask United States Trade Representative (USTR) Ron Kirk to initiate new discussions with his Korean counterpart to resolve the outstanding issues in the KORUS FTA in time for the President's visit to South Korea in November 2010 for the next G-20 summit. Administration officials noted that the President's announcement on the KORUS FTA is a part of his National Export Initiative (NEI). According to officials, the outstanding issues that US and Korean negotiators will have to address include non-tariff measures related to autos and beef. When asked if US officials would attempt to re-open KORUS FTA negotiations, Administration officials responded that "in terms of the modalities, the focus at this point is going to be on the substance of the outstanding items [and US negotiators will] work with the Koreans to explore various modalities." USTR Kirk welcomed President Obama's remarks on the KORUS FTA, noting that "during the past year, USTR has conducted extensive discussions with a wide range of stakeholders and with Congressional leaders to gain a detailed understanding of their concerns about" the KORUS FTA" and he added that he looks forward to "finalizing ways to address these concerns, level the playing field for US workers and producers in the key sectors of autos and beef, and deliver to Americans the jobs and economic opportunity this agreement can bring."

Congressional reactions to the President's KORUS remarks were positive. Senate Finance Committee Chairman Max Baucus (D-MT) opined that "the President's announcement of a concrete plan to move the Korea agreement forward is great news for America's economy," noting that he will work with both the Administration and Korea to craft a plan to fully open Korea's market to US beef. House Ways and Means Committee Chairman Sander Levin (D-MI) opined that "the long standing problem with the US-South Korea FTA as negotiated by the Bush Administration is that it does not effectively address the regulatory and tax barriers that have led to one way trade and hurt our industrial sector as well as kept out our beef," and he added that "Congress expects to be consulted actively in these negotiations, and the date targeted by the President can be met only if the outstanding issues are fully addressed with enforceable commitments." House Ways and Means Committee Ranking Member Dave Camp (R-MI)

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

and Trade Subcommittee Ranking Member Kevin Brady (R-TX) welcomed the President's remarks and expressed hope that the process will provide the United States an opportunity to address market access for US autos and beef, urging "all parties to come to the table in good faith so that we may reach agreement and open a significant new market in the Asia Pacific for American products and services." Leaders of the New Democrat Coalition, led by Reps. Joseph Crowley (D-NY), Adam Smith (D-WA) and Jim Moran (D-VA) expressed their commitment to working with the Administration to complete the KORUS initiative by November.

Reactions from business groups were also positive. The Business Roundtable praised the President's decision to move forward on the KORUS FTA and noted that it stands "ready to work with the President and leaders on both sides of the aisle to conclude these negotiations." The US Chamber of Commerce supported the President's "efforts to expand trade for the sake of creating jobs and keeping this economic recovery on track." The Emergency Committee for American Trade (ECAT) lauded the President's remarks because "the Korea FTA represents a major growth opportunity for all major sectors of the US economy and its approval and implementation will help jumpstart the US economy and help sustain and generate American jobs." The National Foreign Trade Council, the Information Technology Industry Council, the National Association Of Manufacturers, and the National Pork Producers Council also welcomed the President's KORUS remarks.

Although the President's remarks on the KORUS FTA indicate that the agreement (stalled since 2007) is back on the Administration's radar, President Obama's vague statements and broad timeframe do not provide observers with much detail on how US and Korean negotiators will resolve the outstanding issues in the agreement by November and when exactly the Administration will submit the FTA to Congress (i.e., for some observers, "several months after November" could mean by end-December 2010 or early 2011). US officials have continuously insisted that they will not renegotiate the KORUS FTA and Korean officials have echoed this view. Nonetheless, US officials have also not commented on how the two sides will resolve the outstanding issues without reopening the FTA. As noted, non-tariff barriers in the Korean auto market and limited entry of US beef to the Korean market are the two main contentious issues that Administration officials and US legislators have stated must be resolved for the agreement to move forward. Some observers opine that US and Korean negotiators could work on resolving these issues through side letters or side agreements to the KORUS FTA, or through memoranda of understanding (MOUs), although US officials have refused to comment on the instruments available to them in addressing these pending issues. In addition, although some observers are enthusiastic that the Administration has provided a timeline to address the KORUS FTA, others note that the timeline is simply

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

one that provides a deadline for “talks between the two countries to resolve pending issues.” These observers question what may happen if negotiators are unable to resolve the pending issues by November 2010 and are concerned that US negotiators, at that point, could simply state that the issues cannot be resolved at that time thus requiring more negotiations or a re-opening the agreement. Consequently, for some observers, President Obama’s “concrete” plan of action on the KORUS FTA does not provide enough detail or substance for moving the stalled agreement forward by November.

Even if the two sides were able to resolve the pending issues in the FTA, other hurdles still remain, which for some observers could push introduction of the FTA to Congress to 2011 at the earliest. The November elections and the proceeding lame-duck session in Congress may prove an inopportune time for the Administration to bring the KORUS FTA to Congress. As one report notes, “even in a lame-duck session, more than half the House Democratic Caucus are on board with legislation from Rep. Michael Michaud (D-ME) to retool the [KORUS] agreement before it is brought to a vote, which could take years.” Several of the co-sponsors of that bill – the Trade Reform, Accountability, Development, and Employment Act of 2009 (“TRADE Act of 2009,” H.R. 3012) – are either running for the Senate, retiring, or in danger of losing their seats to Republicans. Consequently, some observers opine that 2011 may be a better time for the President to submit the KORUS FTA to Congress given the (possible) changes in the make-up of House Democrats that support a renegotiation of the FTA. In addition to politics, other factors that could affect and push KORUS FTA consideration to 2011 include an already-packed Congressional agenda that may afford little time this year for legislators to consider the KORUS FTA, the run-up to the November elections which may provide little time for Members of Congress to turn their attention to the KORUS FTA and provide their views on the agreement (as the Administration has indicated that it plans to consult with Congress throughout its work on the KORUS FTA), and domestic matters (such as financial regulatory overhaul and the US response to the oil spill) that, to date, have commanded center stage for legislators and Administration officials and that could overshadow trade-related initiatives, including work on the KORUS FTA.

Legislators Call on Administration to Move on US-Colombia FTA

In a June 2, 2010 letter to President Obama, 39 Members of the House of the Representatives urged the Administration to move forward on the pending US-Colombia Free Trade Agreement (FTA) before August 2010, linking passage of the FTA to President Obama’s National Export Initiative (NEI) and its goal of doubling US exports over the next five years. The legislators argue that although most Colombian goods currently enter the United States duty-free, “US products pay full duty into the Colombian market.” The legislators state that the FTA would finally permit duty-free access for US exports of goods and services,

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

and they note that “virtually every economic study has come to the conclusion that the United States will benefit economically from the Agreement.” The legislators state that the longer the United States waits on the FTA, the more the US economy stands to lose, noting that “US companies have been forced to pay an estimated USD 2.7 billion in unnecessary duties on exports of American made products to Colombia because of the delay in implementing the Agreement [and] these duties put American workers at a competitive disadvantage.” The legislators also note that as Colombia moves forward with other trade agreements, the United States will see the US-Colombia FTA’s benefits to US exporters diminished, citing Colombian free trade negotiations with Canada and the European Union.

The legislators also linked passage of the FTA to US national security. The letter states that “Colombia has been a valuable ally to the United States, and we believe strengthening our economic ties with Colombia will help ensure the country continues on the path of reform, stability and friendship in an increasingly volatile region.” The legislators highlighted Colombia’s role as a US partner in combating drug trafficking and fighting terrorism, opining that “in a region that has seen a disturbing increase in hostility to US interests and values, Colombia has consistently proven itself to be an important friend, a reliable partner and a bulwark for democracy.”

Finally, the legislators note in their letter that in August 2010, Colombian President Alvaro Uribe will end his second term and turn over office to a newly elected President. The legislators “believe the passage of the Agreement before August would be a fitting way to recognize [Us-Colombia] partnership and our commitment to common goals of democracy, sustainable development, and security.” The legislators urge the Administration to resolve any outstanding obstacles to the US-Colombia FTA, submit the agreement to Congress, and support its prompt approval. The legislators also opine that “the implementing legislation will have strong, bipartisan support in Congress.”

The June 2, 2010 letter is the latest call for action from legislators attempting to propel forward movement on the pending US FTAs with Colombia, Panama and Korea. In a June 1, 2010 letter to President Obama, a group of Republican Senators, led by Sen. Orrin Hatch (R-UT), asked the Administration to provide the Governments of Korea, Colombia, and Panama “a well-defined and finite list of those outstanding issues they need to accomplish” in order for the United States to take action on the three pending FTAs that it has with these countries. The letter noted that despite the President’s recent statements supporting completion of the pending FTAs with Korea, Colombia and Panama, “there has been little substantial progress in the enactment of these critical accords.” The Senators “respectfully ask [the] Administration [to] provide, on an expedited basis, to Korea, Colombia and Panama, a well-defined and finite list of those outstanding issues they need to accomplish [as well as] propose a specific timeline

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

for the enactment of these FTAs.” Prior to that, in a May 10, 2010 letter to President Obama, Senate Foreign Relations Committee Chairman John Kerry (D-MA) and Ranking Member Dick Lugar (R-IN) expressed their support for the timely resolution of outstanding issues related to the US-Korea (KORUS) FTA) and for its submission to Congress as soon as possible, opining that “such action would send a powerful signal in support of opening new markets during South Korea’s chairmanship of the G-20.” The Senators opined that the KORUS FTA merits prompt consideration for several reasons, including the inclusion in the KORUS FTA of the “highest standards to date on labor and environmental concerns,” the loss of access for US exporters to Korea’s vast markets as it considers and moves on trade agreements with other countries, and Korea’s role as an ally for the United States.

Although the Administration continues to assert that it remains committed to successful passage of the pending FTAs, it is unlikely that the latest June 2 letter (or any of the other legislative letters) will spur the Administration to move on the pending FTAs in the short-term. Administration officials still have not provided details as to when and how they plan on presenting the agreements to Congress for consideration. To further complicate the matter, the Congressional schedule makes it difficult for the Administration to determine a good time to submit the FTAs, given the upcoming July 4 recess, the November elections, the lame-duck session, and the limited legislative schedules between each of these periods. In addition, it remains unclear whether Congressional consideration of the US-Colombia FTA would still fall under Trade Promotion Authority (TPA), given Congress’ actions to strip the FTA of TPA-mandated timelines in 2008; this “gray area” could serve to further delay Congressional consideration of the FTA as legislators and the Administration attempt to figure out how to address a US trade agreement that was completed under the previous Administration under TPA but whose TPA-status has been removed by Congress. Consequently, it is unlikely that the US-Colombia FTA (or any of the other FTAs, for that matter) will see any movement in the short-term, even in light of increased and renewed calls from legislators for Administration movement on the pending agreements.

Tech, Consumer Electronic Groups Urge USTR to Pursue “Narrower” ACTA

In a June 2, 2010 letter to United States Trade Representative (USTR) Ron Kirk, a coalition of technology and consumer electronic industry groups made up of the Computer & Communications Industry Association (CCIA), the Consumer Electronics Association (CEA) and TechAmerica stated they could not support the current draft of the Anti-Counterfeiting Trade Agreement (ACTA) because it could make it

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

easier for foreign companies to impose civil and criminal penalties on US firms for activities that are legal in the United States. USTR released a draft of the ACTA in April 2010.

According to the letter, CCIA, CEA and TechAmerica “are united in our belief that opening up new markets will create new economic opportunities for the businesses we represent and the millions that they employ” and they “support multilateral efforts to combat counterfeiting,” although they note that they are concerned with several aspects of the ACTA. The groups believe that “the fundamental flaw in the approach taken by ACTA – to export and expand the strong penalties found in our copyright law without symmetrically exporting the exceptions that many technology companies rely upon – will exacerbate the trend of foreign states imposing significant civil and potentially even criminal liability on US companies for user activities, or activities permitted under US law.” The groups believe that this approach would affect the international competitiveness of their member companies. According to the three groups, their members would support an international anti-counterfeiting agreement that focused on trademark counterfeiting “without becoming enmeshed in secondary liability and other highly contentious issues surrounding digital copyright enforcement.” The groups urge USTR to pursue a narrower ACTA “focused on preventing the proliferation of counterfeited trademarked goods – in particular those that endanger public health or safety.” The groups also called for a meeting with USTR to discuss the ACTA proposal further.

The full text of the letter can be found at:
http://www.ce.org/Press/CurrentNews/press_release_detail.asp?id=11913.

Senators Urge Administration to Submit “Concrete List of Actions” to Korea, Colombia and Panama in Order to Move Pending FTAs Forward

In a June 1, 2010 letter to President Obama, a group of Republican Senators, led by Sen. Orrin Hatch (R-UT), asked the Administration to provide the Governments of Korea, Colombia, and Panama “a well-defined and finite list of those outstanding issues they need to accomplish” in order for the United States to take action on the three pending Free Trade Agreements (FTAs) that it has with these countries. Signatories to the letter included Sens. Hatch, Kit Bond (R-MS), Pat Roberts (R-KS), Robert Bennett (R-UT), Mike Crapo (R-ID), Mike Enzi (R-WY), Scott Brown (R-MA), James Inhofe (R-OK), Jon Kyl (R-AZ), Sam Brownback (R-KS), Jim Bunning (R-KY), Tom Coburn (R-OK), George LeMieux (R-FL), Roger Wicker (R-MI), John Cornyn (R-TX), and John Ensign (R-NV). Upon releasing the letter, Sen. Hatch

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

stated that “every day that we fail to act on these trade agreements, American businesses, farmers and workers are losing out to our international competitors . . . if the President is serious about doubling our nation’s exports over the next five years and confronting our near ten percent unemployment rate then he needs to stop listening to big labor and take action on these trade accords.”

The letter notes that despite the President’s recent statements supporting completion of the pending FTAs with Korea, Colombia and Panama, “there has been little substantial progress in the enactment of these critical accords.” The Senators noted that “Colombia’s Trade Minister has not yet received a ‘concrete list’ of actions which Colombia must take before your Administration supports Congressional action on these agreements,” alluding to statements made by Administration officials – including United States Trade Representative (USTR) Ron Kirk – that they would shortly develop a list of actions that Colombia must take (on issues such as violence against labor leaders) in order to garner support from the Administration and Congress for the US-Colombia FTA. The Senators “respectfully ask [the] Administration [to] provide, on an expedited basis, to Korea, Colombia and Panama, a well-defined and finite list of those outstanding issues they need to accomplish [as well as] propose a specific timeline for the enactment of these FTAs.”

According to the Senators, “the immediate consideration of these FTAs has never been so important.” The Senators cite EU trade agreements with Central American countries (including Panama) and Korea, and opine that “the impact of [US] inaction [on these trade agreements] is already being felt.” The Senators believe that Congressional ratification of the Korea, Colombia and Panama FTAs “would be the catalyst for significant economic growth and job creation in the United States,” noting that the US International Trade Commission (ITC) has predicted that the US-Korea (KORUS) FTA will facilitate the growth of the US economy by up to USD 11.9 billion, helping US exports of goods to Korea to grow to USD 10.9 billion. The Senators cited similar economic benefits from the Colombia and Panama FTAs.

For its part, the Administration continues to assert that it remains committed to successful passage of the pending FTAs, although Administration officials still have not provided details as to when and how they plan on presenting the agreements to Congress for consideration. Department of Commerce Undersecretary for International Trade Francisco Sanchez, for example, recently commented on the pending agreements, noting that he would “personally work to resolve outstanding issues holding up approval” of the pending agreements. According to Undersecretary Sanchez, however, “the difficulties in resolving the issues with each [agreement] and a crowded [legislative] agenda make it impossible to say when the trade pacts will be ready to send to Congress.” Citing Congress’ attention to mainly domestic issues (such as health care and financial reform), Undersecretary Sanchez stated that he wished he

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

could tell the trade community that consideration and passage of the FTAs will “get done in the next month or two, but I just can’t say when it’s going to happen.”

It is unlikely that the Senators’ letter will spur the Administration to move on the pending FTAs in the short-term. As Undersecretary Sanchez noted in his comments, the Administration does not have any idea when it will present the FTAs to Congress given the “complexities of the issues” surrounding each agreement. He also noted that the Congressional schedule makes it difficult for the Administration to determine a good time to submit the FTAs, a valid point given the current legislative focus on domestic issues, the upcoming summer recess for Congress, the run-up to the November elections, and the lame-duck session to follow. Nonetheless, the Senators’ call for lists of concrete actions that Korea, Colombia and Panama should take in order to achieve support for their FTAs is a direct reminder from legislators that Administration officials like USTR Kirk have made promises over the past several months that they would work with these government to address pending issues that have prevented forward movement on the FTAs. The Administration appears not to have engaged these governments as it promised (as evident in remarks by Colombian officials that they have yet to receive “benchmarks and a concrete list of actions” to address issues as related to the FTA). Although the Senators’ letter may do little to encourage immediate action on these agreements, it does remind the Administration, other legislators and the trade community that these agreements are still awaiting action and that until such action occurs, the United States may lose out on the economic opportunities afforded to it by these pending FTAs.

The full text of the Senators’ letter can be found at:

http://hatch.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=f4daeaf4-1b78-be3e-e085-be7a1a3193f1&Month=6&Year=2010.

Customs

Customs Highlights

Lawmakers Hold Hearing on Foreign Manufacturers Legal Accountability Act of 2010

On June 16, 2010, the House Energy and Commerce Committee's Subcommittee on Commerce, Trade and Consumer Protection heard testimony on the Foreign Manufacturers Legal Accountability Act of 2010 (H.R. 4678). Rep. Betty Sutton (D-OH) introduced the bill in February 2010; the bill would direct the Food and Drug Administration (FDA), the Consumer Product Safety Commission (CPSC) and the Environmental Protection Agency (EPA) to require foreign manufacturers and producers of certain products covered in the bill to retain a registered agent in the United States authorized to accept service of process from a US court for all civil and regulatory proceedings that concern the foreign manufacturer or producer. The imported products covered in this bill include drugs, medical devices, cosmetics, biological products, (new) chemical substances, pesticides, and consumer products.

Under the bill, a foreign manufacturer or producer that registers an agent in the United States consents to US jurisdiction in civil or regulatory proceedings concerning US consumers. The registered agent must be maintained in a US state where the foreign manufacturer or producer imports, distributes or sells its product in any substantial measure. The bill only applies to foreign manufacturers or producers that produce the covered products in excess of a minimum value or quantity to be determined by the head of the applicable agency (*i.e.*, FDA, CPSC or EPA).

Testimony given on the bill was mixed:

- Marianne Rowden, President and CEO of the American Association of Exporters and Importers, expressed concern about the effect the bill would have on US exporters. Anticipating that US trading partners would enact similar measures, Rowden opined that "it will be difficult and expensive for American small and medium size businesses to maintain registered agents in all the foreign markets to which they export."
- Ami Gadhia, Policy Counsel for Consumer Union, was supportive of the bill and expressed that, along with the FDA, CPSC and the EPA, the National Highway Traffic Safety Administration (NHTSA) should also "be included in the scope of this legislation" as tires manufactured in China were recalled in 2007 "because they posed significant hazards to consumers." According to Gadhia, the bill

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

ensures “that consumers harmed by unsafe products can obtain redress no matter where the product is manufactured.”

The Committee did not hear testimony from any person in representation of a foreign firm, association or government concerning how this bill could affect US imports.

Other groups not present at the hearing have also presented their views on the bill. According to the American Association for Justice (AAJ), holding foreign manufacturers or producers accountable for defective products sold in the United States is costly as it requires tracking down the companies’ foreign addresses, serving legal notice to the companies in their country and translating documents (if necessary); this cost is avoided if legal notice is served to the foreign companies’ registered agents in the United States, as required under the bill. The AAJ has called for a quick passage of the bill. Meanwhile, in a letter to House Ways and Means Committee Chairman Sander Levin (D-MI) and Ranking Member Dave Camp (R-MI), President of the National Customs Brokers and Forwarders Association of America (NCBFAA) Jeffrey Coppersmith urged the Committee to evaluate the impact on trade were the bill to become law. According to Coppersmith, US exporters’ exposure to foreign legal systems would offer “an even greater disincentive [to trade]” were the US’ trading partners to implement their own “registered agent” provision.

On June 30, 2010, the Subcommittee on Horticulture and Organic Agriculture approved by voice vote H.R. 4678. It is unclear when the bill will move to the House floor for a vote, given the number of Committees that must still review the bill and mark it up and in light of the House’s upcoming summer recess.

Multilateral

Multilateral Highlights

G-20 Toronto Summit Ends with Renewed Calls for Open Markets, Although End-2010 Doha Completion Date Dropped from Declaration

Leaders from the Group of 20 (G-20) countries met in Toronto, Canada June 26-27, 2010 to discuss the global trade environment and country's protectionist measures, among other things. At the conclusion of the meetings, the G-20 released the "G-20 Toronto Summit Declaration," which highlighted the discussions that the leaders held and their views on the current global economic environment.

According to the declaration, G-20 leaders have agreed on the next steps they should take to "ensure a full return to growth with quality jobs, to reform and strengthen financial systems, and to create strong, sustainable and balanced global growth." The declaration notes that although economic "growth is returning, the recovery is uneven and fragile, unemployment in many countries remains at unacceptable levels, and the social impact of the crisis is still widely felt."

The declaration's section on "Fighting Protectionism and Promoting Trade and Investment" notes that "while the global economic crisis led to the sharpest decline of trade in more than seventy years, G-20 countries chose to keep markets open to the opportunities that trade and investment offer." The G-20 countries renewed their commitment to refrain from raising barriers or imposing new barriers to investment or trade in goods and services, imposing new export restrictions or implementing World Trade Organization (WTO)-inconsistent measures to stimulate exports until 2013, and also committed to rectify such measures as they arise. The G-20 countries also asked the OECD, the ILO, World Bank, and the WTO to report on the benefits of trade liberalization for employment and growth at the Seoul Summit. The G-20 leaders also reiterated their support for bringing the WTO Doha Development Round to a balanced and ambitious conclusion as soon as possible. On "Other Issues," the declaration calls for the "phase out over the medium term of inefficient fossil fuel subsidies that encourage wasteful consumption, taking into account vulnerable groups and their development needs." The G-20 leaders also said they would review progress toward that goal at future summits.

Observers note that G-20 leaders did not include in their declaration an end-2010 deadline for completion of the troubled Doha Round. According to some observers, dropping the date to conclude Doha Round is a notable change from previous G-20 declarations, although the move likely reflects the realities of the

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

stalled multilateral round and the scheduling issues that have arisen, including the upcoming November elections that would have likely delayed the Doha talks. In place of providing an end-date for the Doha Round, G-20 leaders pledged to push forward on bilateral and regional trade talks until the Doha agreement could be done.

United States Blocks Indonesia's First Panel Request in Flavored Cigarettes Dispute

On June 22, 2010, the United States blocked a request from Indonesia for the establishment of a World Trade Organization (WTO) dispute panel to rule whether a new US law banning the sale of flavored cigarettes complies with US WTO obligations. The US Family Smoking Prevention and Tobacco Control Act (which went into effect in September 2009) prohibits the production or sale in the United States of all cigarettes with a "characterizing flavor" other than menthol or tobacco. According to Indonesia, the ban affects clove-flavored cigarettes, of which Indonesia is a major producer, and illegally discriminates against imported cigarettes because the ban is not being applied to menthol cigarettes, which are produced mainly in the United States.

Indonesia had requested consultations with the United States on the matter in April 2010. Those consultations did not result in an agreement between the two countries on how to resolve the matter, consequently leading to Indonesia's first request for a panel at the June 22 meeting of the Dispute Settlement Body (DSB). Under WTO rules, Indonesia can renew its request for a panel at the next DSB meeting, scheduled for July 20, 2010. If Indonesia makes a second panel request, the DSB will automatically establish a panel.

Brazil Suspends Application of Retaliatory Measures against the United States in Cotton Dispute

On June 18, 2010, the Brazilian Foreign Trade Chamber (CAMEX) published in the Official Gazette Resolution no. 43, which suspends the entry into force of retaliatory measures that would have been imposed against imports originating from the United States in the *US – Subsidies on Upland Cotton* (DS267) World Trade Organization (WTO) dispute. On March 8, 2010, CAMEX had published in the Official Gazette Resolution n. 15, which provided for a list of 102 products that could have potentially faced higher import tariffs when imported into Brazil from the United States. According to a statement from the United States Trade Representative (USTR), CAMEX Resolution 43 prevents the imposition of

USD 560 million in countermeasures against US exports that were scheduled to go into effect on June 21, 2010.

The Brazilian Ministry of Development, Industry and Foreign Trade (MDIFT) outlined in a press statement that the suspension of the adoption of retaliatory measures against the United States is the result of successful negotiations between Brazilian and US officials and the conclusion of the “Framework Agreement between Brazil and the United States for a Mutually Agreed Settlement for the Cotton Dispute.” The Framework Agreement will provide specific interim steps and a process for continued discussions between the United States and Brazil on the programs at issue as the USTR works with the US Congress toward a new Farm Bill in 2012. According to the Brazilian MDIFT, the Framework includes the following main elements:

- **Domestic Support Programs:** (i) as a basis for discussion, the United States will establish an annual limit on trade-distorting cotton subsidies, which should be significantly lower than the average applied during the 1999-2005 period (period which was subject to the WTO Dispute Settlement Body (DSB) analysis); (ii) Brazil and the United States will meet quarterly to discuss the contents of the 2012 Farm Bill as it relates to trade-distorting cotton subsidies and the operation of the Export Credit Guarantee Program (GSM-102).
- **Export Credit Guarantee Program (GSM-102):** (i) in addition to regular quarterly consultations with Brazil, the United States will conduct twice a year an operational review of the Program, focusing on risk premium and maturity; (ii) the first review will take place before the announcement of the Program’s conditions for the first half of the next US fiscal year (which begins in October 2010); (iii) the United States will modify the GSM-102 program with the objective of reducing the average loan maturity date for no longer than 16 months until the completion of the transition period that ends in 2012; (iv) every time the guarantees exceed USD 1.3 billion (which represents 48 percent of the biannual budget for the Program), the United States will increase the value of the charged risk premium by at least 11 percent; (v) in some circumstances, when the usage of the Program exceeds USD 1.5 billion, the minimum increase in the risk premium charged will be 15 percent.
- The terms of the Framework Agreement do not affect the rights that both parties obtained in the WTO cotton dispute. The Agreement also does not constitute a pre-judgment of the terms that may constitute a negotiated and mutually satisfactory solution for the dispute.
- Brazil maintains its right to apply countermeasures at any future stage and both parties can denounce the Framework Agreement at any time.

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

- Brazil is committed to the non-application of countermeasures authorized by the WTO while the Framework Agreement is in force.

In a press statement, MDIFT outlined that the Framework Agreement is a positive step towards resolving the US-Brazil cotton dispute. MDIFT officials are hopeful that the negotiation, consultation and reforms under the Framework Agreement will lead to the full implementation of the WTO ruling, which is Brazil's main objective. USTR Ron Kirk has stated that he is pleased that Brazil and the United States have been able to negotiate a Framework Agreement that will avoid the imposition of countermeasures harmful to US trade, including goods and intellectual property rights. USTR Kirk stated, "while respecting the role of the United States Congress in developing the next Farm Bill, the Framework would now allow us to continue to work toward a final resolution of the cotton dispute."

APEC Officials Discuss Trade, Bogor Goals at Sapporo Gathering

On June 5-6, 2010, officials from the countries that make up the Asia-Pacific Economic Cooperation (APEC) met in Sapporo, Japan to discuss economic and trade issues, among other things. During the APEC gatherings, officials also gathered for the 2010 APEC Ministers Responsible for Trade meeting. Deputy United States Trade Representative (DUSTR) Demetrios Marantis headed the US delegation to the meeting on behalf of USTR Ron Kirk who was unable to attend the APEC meetings due to sustained injuries in a car accident in Dallas, Texas the week before. Also attending the APEC meeting was DUSTR Michael Punke.

At the APEC gathering, DUSTR Marantis and other trade officials discussed trade and investment matters, including reducing technical and standards-based barriers to trade, and promoting trade in environmental goods and services. Officials also discussed how to make APEC more responsive to the needs of businesses and workers, as well as how APEC can serve to create jobs within APEC economies, open markets, and promote the needs of small- and medium-sized businesses. APEC members also discussed and agreed to pursue jointly supply-chain connectivity, authorized customs-related economic operator programs and trade recovery, improvement of transparency to facilitate trade, and capacity-building. DUSTR Punke, meanwhile, discussed the future of the World Trade Organization (WTO) Doha Round and reiterated the US commitment to a "balanced and ambitious conclusion to the Round," stressing that APEC economies must ensure meaningful market access contributions commensurate with WTO Members' roles in the global economy."

At the end of the two-day meetings, trade ministers concluded that APEC members have made significant progress toward reaching the "Bogor" goals of achieving free and open trade and investment among

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

developed countries in 2010, an assessment based primarily on how much each country had reduced its tariffs over the past year. The Bogor Goals, set at the 1994 APEC summit in Indonesia, called for the 13 developed APEC members to achieve “free and open trade and investment” in the region by the end of 2010. According to Japanese officials, the APEC region’s average tariff rate fell from 10.3 percent to 6.6 percent between 1996 and 2008. APEC ministers reached a “common understanding” regarding their progress in achieving Bogor goals, and senior officials will now prepare a “strong and credible” report to present to trade ministers at the next APEC meeting in November 2010. According to some observers, following the presentation of such a report, APEC’s trade focus may shift to developing a Free Trade Area of the Asia-Pacific (FTAAP), although it should be noted that trade ministers agreed to explore “possible pathways” toward the FTAAP and have not made any other concrete promises or provided any timelines on achieving such an agreement.

During the APEC meetings, DUSTR Marantis also held several bilateral meetings with other trade officials to discuss, among other things, market access for US beef and rice in Taiwan, access for US pharmaceutical sales in Indonesia, protection of intellectual property in Thailand, and cooperation from Malaysia on a plurilateral initiative to lower tariffs on climate-friendly technologies. DUSTR Punke also held a bilateral meeting with Russian Minister of Economic Development Elvira Nabiullina to discuss the US concern over Russia's restrictions on imports of American poultry, as well as Russia's effort to accede to membership in the WTO.