



White & Case LLP General Trade Report - JETRO

October 2010

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UNITED STATES

GENERAL TRADE POLICY

Anti-Counterfeiting Trade Agreement Nears Finalization; Four Key Issues Remain Outstanding

Summary

On October 6, 2010, participating countries¹ in the Anti-Counterfeiting Trade Agreement (ACTA) negotiations publicly released the nearly finalized text of the Agreement upon the conclusion of the eleventh and final round of negotiations held from September 23 to October 1, 2010 in Tokyo. Four key, unresolved areas remain pertaining to the internet and copyrights, border measures, and civil and criminal enforcement. Participating countries have stated that they are close to reaching a final agreement and are working to resolve outstanding issues via email correspondence to finalize the agreement in the coming weeks. No further formal negotiating rounds are expected to be scheduled.

Analysis

The draft ACTA text contains five chapters, including: (i) Initial Provisions and Definitions; (ii) Legal Framework for Enforcement of Intellectual Property Rights; (iii) Enforcement Practices; (iv) International Cooperation; and (v) Institutional Arrangements. Of these five chapters, negotiating partners have yet to resolve issues related to provisions in four sections of Chapter Two.

We provide a summary of the outstanding issues in each section below.

- (i) **Internet Section:** The European Union (EU) opposes the use of “*widespread distribution*” in the second paragraph of this section. The language in the text states that each country’s enforcement procedures will apply to “*the unlawful use of means of widespread distribution for infringing purposes.*” The European Union argues, however, that using the terms “widespread distribution” could be misleading and subject to broad interpretations among ACTA partners. Certain participating countries also seek to clarify whether the enforcement procedures on “widespread distribution” of material refers to civil or criminal enforcement.

The United States is pushing for the ACTA’s scope to only cover “copyrights or related rights” while the European Union has requested that the language in this section cover “at least” trademarks. The European Union argues that the internet can be used to infringe both trademarks and copyrights. The issue facing the United States is that using trademarks in the internet section would likely contradict the *US Digital Millennium Copyright Act (DMCA)* and create a situation in which the United States would need

¹ ACTA’s negotiation partners include the United States; Australia; Canada; the European Union represented by the European Commission, the EU Presidency (Belgium) and the EU Member States; Japan; Korea; Mexico; Morocco; New Zealand; Singapore; and Switzerland.

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to develop a law similar to the DMCA to regulate trademark infringement. Internet businesses have also expressed concern that a broad ACTA scope including trademarks may restrict the online trade of goods and services.

- (ii) **Civil Enforcement Section:** While patents now appear to have a limited scope in the Agreement, the United States is further pushing for the removal of patents in the civil enforcement section. The United States has added a footnote in the draft text requesting that *“for the purpose of this Agreement, parties agree that patents do not fall within the scope of this Section.”* The view of the United States is that the inclusion of patents in this section will likely contradict certain US patent law provisions as they relate to damages and injunctions.
- (iii) **Border Measures Section:** The European Union opposes the use of *“unreasonably”* in the first paragraph of this section. The language in the section stipulates that *“...for effective border enforcement of IPRs, a party should do so in a manner that does not discriminate unreasonably between IPRs and that avoids the creation of barriers to legitimate trade.”* The problem for the European Union is that the term *“unreasonably”* is open to interpretation and this could ultimately result in ACTA participating countries discriminating against EU geographic indications (GIs) in favour of trademarks. The European Union has indicated that it will not likely support the Agreement if the text does not enforce the protection of its traditional food names (*Please see October 7, 2010, W&C Trade Alert for more details*). The European Union has requested that customs agents of the negotiating parties treat the enforcement of recognized GIs with the same level of enforcement as is done with the enforcement of counterfeit and pirated goods. Although the new text does not mention a specific requirement for GIs, media observers opine that the ambiguity of the section on border seizures indirectly provides for GI enforcement. For instance, participating countries were unable to agree on the procedures for the import and export of shipments. The text stipulates that, *“where appropriate,”* right holders may request that their competent authorities suspend or seize goods suspected of IPR infringement. Certain negotiating partners view the use of *“where appropriate”* as subjective and some have requested the exclusion of this requirement from the text.
- (iv) **Criminal Enforcement Section:** The United States, backed by the Motion Picture Association of America (MPAA), wants to enforce criminal charges on all unauthorized video recording in cinemas. As of yet, the text stipulates that *“each party ‘may’ provide criminal procedures and penalties in appropriate cases for the unauthorized copying of cinematographic works from a performance in a motion picture exhibition facility generally open to the public.”* Certain participating countries, however, do not believe that unauthorized video recording is worthy of a criminal penalty.

Outlook

ACTA parties announced on October 8, 2010 that they expect to resolve their differences via email in the next few weeks. With no further negotiating sessions scheduled, the Agreement is close to a final draft. Media sources indicate that negotiating parties will likely accept the Agreement once it is finalized unless participants, such as the United States or the European Union, back out from the Agreement altogether. The United States and the European Union have already indicated that they will not accept an Agreement that requires changes to

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their domestic laws. The United States, in particular, expects ACTA to remain an executive agreement, which will not have to be submitted to Congress. Depending on the outcome of the informal negotiations for the final ACTA text, the United States will likely make significant concessions in order to ensure a final agreement before the mid-term congressional elections in November 2010. Once the ACTA text is finalized, countries will have a period of up to two years to complete the necessary domestic procedures and legal scrubbing that are required to sign the Agreement. Analysts predict that, of all the ACTA countries, Singapore will most likely be among the first to sign the Agreement as Singapore's ratification process from past treaties has proven less convoluted than that of other ACTA countries. Such agreements usually only require Cabinet-level approval after they have undergone the legal scrubbing process.

General Trade Policy Highlights

USTR Seeks Public Comment on List of IP Violators

On October 1, 2010, the United State Trade Representative (USTR) announced in a Federal Register notice (75 FR 60854-60855) that it is seeking public comment for its 2011 "Notorious Markets" list, which is a list of physical and online marketplaces that have been the subject of intellectual property rights (IPR) enforcement action and/or where further investigation for possible IPR infringements is deemed merited by USTR. Although the Notorious Markets list has, in the past, been published as part of the annual Special 301 report, USTR will publish the 2011 list separately from the 2011 Special 301 report in order to draw greater attention to the list and "guide trade enforcement actions."

According to the notice, the Notorious Markets list details IPR violation-related information reviewed by USTR during the Special 301 process and "serves to highlight the problem of marketplaces that deal in infringing goods and help sustain global piracy and counterfeiting." US trading partners listed in the 2010 Notorious Markets list include Argentina, Brazil, China, Colombia, Ecuador, India, Indonesia, Korea, Mexico, Paraguay, Philippines, Russia, and Thailand. The annual Special 301 report analyzes how effectively US trading partners protect IPRs and will continue to have priority and non-priority watch lists of countries (rather than marketplaces as in the Notorious Markets list) where IPR violations occur and USTR deems IPR legislation/enforcement to be either insufficient or ineffectual.

The deadline for interested parties to submit written comments regarding the Notorious Markets list is November 5, 2010. Accepted comments will identify the market, the rightful principal owners or operators of the intellectual property, the infringing products sold, criminal or civil enforcement activity executed against the IPR violation and any positive progress made. The USTR has stated that it will publish the Notorious Markets lists at the "earliest practicable date" after receiving comments (the 2010 Special 301 report was released in April).

United States and its Negotiating Partners Conclude Eleventh Round of ACTA Negotiations; Reach Tentative Agreement

From September 23 to October 1, 2010, the United States and several of its trading partners, including Australia, Canada, the European Union represented by the European Commission, the EU Presidency (Belgium) and the

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EU Member States, Japan, Korea, Mexico, Morocco, New Zealand, Singapore, and Switzerland, held the eleventh and final round of Anti-Counterfeiting Trade Agreement (ACTA) negotiations in Tokyo, Japan. ACTA is a comprehensive international framework that aims to combat the infringement of intellectual property rights (IPRs), particularly counterfeiting and piracy, which participating countries have blamed for losses in trade revenue.

A joint statement made by participating countries reveals that a tentative agreement has been reached on ACTA although initial plans had been to completely finalize the text of the agreement by September 2010. According to the joint statement, the participants have “constructively resolved nearly all substantive issues and produced a consolidated and largely finalized text of the proposed agreement, which will be submitted *ad referendum* to their respective authorities.” They have further agreed to work quickly to resolve outstanding issues with a view to finalize the text of the agreement as quickly as possible. In a separate press release dated October 2, 2010, United States Trade Representative (USTR) Ron Kirk added that “ACTA negotiating partners have agreed to publicly release the text shortly.”

During this latest round of negotiations in Tokyo, the European Union and the United States deliberated on the issue of treatment of IPRs. While the United States proposed that ACTA be limited to trademark infringement and copyright piracy, the European Union pushed for a broader list of IPRs (such as patents) in certain sections of the agreement. Critics of the negotiations argue that such a move could likely encourage the seizure of legitimate generic drugs in transit to developing countries. Additionally, the United States indicated that it was opposed to the inclusion of patents in parts of the agreement, particularly those concerning criminal enforcement as patent infringement does not fall under US criminal law.

The United States and the European Union failed to resolve whether the ACTA should cover geographical indicators (GIs) to the same extent as copyrights and trademark infringement. The European Union seeks broad protection for its traditional food names, such as Parmesan cheese, as well as fashion and automotive labels. It has demanded that customs agents treat the enforcement of recognized GIs, in the same as they do the enforcement of counterfeit and pirated goods. The European Union has argued that, under the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), countries are allowed to protect GIs through either a trademark or standalone system, provided that it does not infringe upon a right holder's trademark. The United States is opposed to including GIs in the ACTA for fear that US products recognized as a GI in other countries could be seized at the border for infringement. It has further reservations that US companies may be subject to civil and criminal penalties for alleged infringement of GIs recognized in the EU or in other ACTA signatory countries. In an effort to reach a compromise, sources indicate that the United States will likely consider optional language in the ACTA text, which may allow countries the flexibility of including IPR beyond trademark infringement and copyright piracy.

Countries are yet to finalize a firm agreement on key issues but sources indicate that the United States will likely make significant concessions in order to ensure a final agreement before the mid-term congressional elections in November 2010. Participating countries further seek the participation in the ACTA of large trading nations such as Brazil, China, and India.

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USTR Initiates Section 301 Investigation on China's Green Technology Practices

On October 15, 2010, the Office of the US Trade Representative (USTR) announced that it had initiated an investigation under Section 301 of the Trade Act of 1974 into the Government of China's support of its domestic clean energy sector. USTR initiated the investigation in response to a petition filed by the United Steelworkers (USW) on September 9, 2010 requesting that the Obama Administration initiate dispute settlement proceedings at the WTO to pressure the Chinese government to desist from providing this "unfair" support to its clean energy sector.

The USW petition alleged that China was violating World Trade Organization (WTO) rules by providing direct and indirect subsidies, such as low-interest loans and land grants, to its clean energy sector. The petition also alleged that China was violating WTO rules by requiring foreign clean energy companies to license their technology to Chinese partners as a condition to enter the Chinese market. Other alleged WTO violations included in the USW petition related to performance standards and preferential practices employed by the Chinese government as well as China's export restrictions on "rare earth" elements used to produce wind turbines, solar panels and fluorescent light bulbs. The USW petition contended that China's support of its clean energy sector was unfairly contributing to Chinese companies expanding their market share for clean energy equipment to the detriment of American workers in those sectors, many of whom are USW members.

Under Section 301, "the United States may investigate and sanction foreign countries that maintain acts, policies and practices that violate, or deny US rights or benefits under, trade agreements, or are unjustifiable, unreasonable or discriminatory and burden or restrict US commerce." A US business can file a petition with USTR requesting an investigation of a particular practice of a foreign country and whether that country is violating its WTO commitments. USTR must determine whether to initiate a formal Section 301 investigation within 45 days of receipt of the petition. Upon initiation of an investigation, USTR must request consultations with the foreign government. The primary aim of the consultations is to encourage the foreign government to remove the offending practice. In most cases, negotiations are sufficient to convince the allegedly offending country to comply with its international obligations. When negotiations fail, USTR may take action, including raising US import duties on a foreign country's products to respond to the trade damage. However, where, such as in the present case, a Section 301 investigation involves an alleged violation of a bilateral, regional or multilateral trade agreement of which both the United States and the nation/customs union at issue is a part (such as the WTO agreement), USTR must, by law, follow that agreement's dispute settlement provisions. Given that the USW's petition alleges Chinese violations of WTO rules, any subsequent investigation must therefore result in WTO dispute settlement proceedings.

Although Section 301 provides US unions and businesses a formal mechanism through which they can petition the US government for action before the WTO, it has been used infrequently since the organization's inception in 1995. Some Section 301 petitions have been brought to USTR in recent years, including one concerning China's alleged currency manipulation, but these petitions have either been rejected by USTR (as in the case with China's currency practices) or have been settled bilaterally. Indeed, no sanctions have been applied as a result of Section 301 investigations initiated since 1996, and none has resulted in a formal WTO dispute settlement

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case. In this way, Section 301 has been a rather weak, albeit public and available, tool for US businesses or unions to petition the US government to bring a case to the WTO.

While USTR's initiation decision today represents a change from its past Section 301 decisions, the shift is not surprising because all previous 301 decisions occurred under different Presidents. The USW petition was the first opportunity for the Obama administration to act under Section 301. The timing of USTR's decision, however, indicates that it may be about more than the USW petition itself. Today, the Department of the Treasury was scheduled to release its Semi-Annual Report on International Economic and Exchange Rate Policies but it has announced that the release of the report will be delayed. As the Section 301 decision was not expected until October 24, 2010, that USTR announced the initiation of the investigation early is likely linked to the Treasury Department's decision to delay the release of its report. If, in fact, USTR announced the Section 301 initiation in order to shield the Obama Administration from criticism stemming from the Treasury Department's delay, it is a clear demonstration of the balancing act the Obama Administration must play between placating its domestic support, including organized labor, and avoiding a major conflict with China, one of the United States' largest trading partners. The delay of the Treasury Department report does, however, allow the Obama Administration to maintain pressure on China to increase flexibility of the RMB in the weeks remaining before the November 2010 G-20 Summit in Seoul, Korea.

House Refers to Committee Bill to Close Perceived Loopholes in US Government Procurement

On September 29, 2010, Rep. Phil Hare (D-IL) and Rep. Mike Michaud (D-ME) introduced the Jobs through Procurement Act (HR 6262), which seeks to enforce current domestic sourcing requirements for US government procurement. HR 6262 also seeks to ensure that the US government does not procure goods produced in sweatshops. The bill has since been referred to the House Committee on Armed Services and the House Committee on Oversight and Government Reform but it remains unclear if and when these committees will mark up this bill and report it to the House plenary for consideration.

HR 6262, in its present form, requires government contracts, be they for defense or general procurement of goods and services, to contain a clause ensuring compliance on the part of the contractor or subcontractor with the Berry Amendment (provision in US code affording preference in defense procurement for domestically produced, manufactured or home-grown goods) and the Buy American Act (provision in US code affording preference in general government procurement for US-made goods). HR 6262 also provides for US government workers involved in defense or general government procurement to receive training in compliance with the Berry Amendment and the Buy American Act.

HR 6262's prohibition on procurement of sweatshop goods includes language which amends the Federal Property and Administrative Services Act of 1949. This amendment includes updated definitions of "Core Labor Standards" used to determine whether an operation can be classified as a "sweatshop." The bill's sweatshop procurement prohibition provision also details the steps US government agency heads must follow to ensure their respective agencies are not procuring sweatshop goods and, in the case in which sweatshops goods are being procured, steps to be taken to investigate the infraction and terminate the contract.

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HR 6262's all Democrat co-sponsorship includes Rep. Bob Filner (D-CA), Rep. Raul Grijalva (D-AZ), Rep. Alcee Hastings (D-FL), Rep. Marcy Kaptur (D-OH), Rep. Gwen Moore (D-WI), all of whom consistently vote against trade liberalization. HR 6262 also has the support of certain organized labor associations such as the Service Employees International Union (SEIU), American Federation of Government Employees and Change to Win as well as other organization involved in labor rights, including the US Presbyterian Church, the International Labor Rights Forum, and SweatFree Communities. Given the busy congressional schedule and the bill's limited sponsorship, the introduction of HR 6262 by Reps. Hare and Michaud likely has political, rather than substantive, motivations. According to recent election polling data, both Congressmen face tough re-election prospects in the upcoming midterm elections. Congressional observers opine that, if HR 6262 is eventually reported to the House floor, the bill's mark-up would likely result in substantial changes to the controversial provisions detailed above. However, due to significant time constraints, there is little chance that the bill would be considered in the 2010 lame duck session.

United States and Turkey Announce New Initiatives to Strengthen Bilateral Commercial Relations

On October 19, 2010, the United States and Turkey concluded the first meeting of the US-Turkey Framework for Strategic Economic and Commercial Cooperation (FSECC) at which the two countries negotiated several new trade and investment agreements and initiatives designed to strengthen bilateral economic relations. The agreements include the establishment of a new joint US-Turkey Business Council, the finalizing of text related to a Memorandum of Intent (MOI) regarding foreign direct investment promotion programs and a decision to begin negotiations for a MOI regarding small- and medium-sized enterprise collaboration. Other initiatives span a number of sectors and activities, and allow for enhanced economic and commercial cooperation between the two countries in the coming months.

The FSECC began with a meeting in Turkey between President Obama and Turkish President Gul in April 2009 in which each recognized the mutual benefits of pursuing greater bilateral economic ties. Formally launched in April 2009, it provides for senior-level engagement between the two governments with a goal of increasing economic and commercial cooperation across a broad range of areas.

In a joint statement released in Washington, DC at the close of the first meeting, United States Trade Representative Ron Kirk, United States Department of Commerce Secretary Gary Locke, Turkish Prime Minister Ali Babacan and Turkish Minister of State for Foreign Trade Zafer Çağlayan underscored the importance of enhanced economic and commercial ties between the two countries: "The United States and Turkey each have a strong incentive to pursue an intensified bilateral economic relationship. Turkey is a fast-rising economic actor in its region and in the world and many of its firms would like to explore new opportunities in the US market. American companies, in turn, see vast commercial potential in a rapidly developing Turkey of 73 million people with onward connections to markets in Europe, the Middle East, Central Asia and beyond."

A fact sheet released at the close of the meeting details the agreements and initiatives addressed in the FSECC's first meeting. In addition to the agreements indicated above, the initiatives include the following:

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- Holding a Good Manufacturing Practices workshop on pharmaceutical regulations and inspections organized by the US Department of Commerce;
- Producing a Waste-to-Energy feasibility study based on a US Trade and Development Agency (USTDA) grant awarded to the municipal waste management company for the Istanbul Metropolitan Municipality on a proposed 70 megawatt solid waste waste-to-energy facility;
- Establishing a Working Group on Intellectual Property Rights;
- Facilitating trade missions, including a renewable energies trade mission to Turkey and reverse trade missions to the United States for delegates from the Turkish Ministry of Transportation and Communications;
- Holding a training session on export promotion by the US Commercial Service office in Ankara;
- Advancing in the Near Zero Zone Project in which the US Department of Energy is developing an interagency initiative for Turkey to maximize energy efficiency; and
- Facilitating a Eurasian oil and gas supplier trade mission to Kazakhstan and Turkey during which US companies will have customized appointments with prospective partners, distributors and/or end-users.

The agreements and initiatives announced at the close of the meeting were put together over the last year and required the on-going cooperation of a number of US and Turkish government departments and officials as well as of representatives from the private sector. Officials anticipate that the FSECC, through these initial activities, will help to bring about a new phase in economic relations between the two countries. In its joint statement, the Ministers addressed the future activities and goals of the FSECC: "We instructed the Framework component mechanisms, the Trade and Investment Council, the Economic Partnership Commission and the Energy Working Group, to explore new and creative ways to spur new economic cooperation over the coming months and to report back to us by the time of the next Framework meeting. Our political commitment to strengthen our economic relations will establish a firmer footing on which new business partnerships can be established in the future."

The next meeting of the FSECC is expected to take place in Turkey in 2011 although a specific date has not yet been set.

USITC Requests Comments on Possible Modifications to GSP

On October 27, 2010, the United States International Trade Commission (USITC) announced that it is seeking input for an investigation into possible modifications to the US Generalized System of Preferences (GSP). The US Trade Representative (USTR) requested the investigation on October 21, 2010 in order to obtain information concerning the likely impact on US industries, imports, and consumers of the removal, for certain beneficiary countries, of the duty-free status for imports classified under the HTS subheadings 9404.30.80 (certain sleeping bags from all GSP-eligible countries), and 3919.10.20 and 3919.90.50 (certain types of self-adhesive plates, sheets, film, foil, tape, strip and other flat shapes of plastics, in rolls from Indonesia). The USITC will hold a public hearing regarding the investigation on December 1, 2010, and asks that requests to appear at the hearing

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be filed by November 15, 2010. In addition, interested parties can submit written comments by December 8, 2010. The USITC will submit its report on the investigation to USTR by February 7, 2011.

FREE TRADE AGREEMENTS

Officials Meet for Informal Talks on KORUS FTA; Outlook for Passage in 2010 Remains Unlikely

Summary

The Office of the US Trade Representative (USTR) announced on September 27, 2010 that US officials met informally with Korean representatives on the sidelines of the Asia-Pacific Economic Cooperation (APEC) Forum in Japan to discuss the pending Korea-US Free Trade Agreement (KORUS FTA) and remaining contentious issues. The United States is under pressure to finalize the KORUS FTA, particularly as the European Union and Korea recently announced the formal signing of the EU-Korea FTA on October 6, 2010. Some US government officials fear that the EU will gain a significant competitive advantage over US businesses in the Korean market should the EU and Korea implement their bilateral agreement before the KORUS FTA. Ratification of the KORUS FTA has experienced several delays largely due to US concerns over sensitive market access issues related to autos and beef. Reportedly, USTR is aiming to finalize consultations with concerned domestic industries so that concrete discussions can begin with Korea to resolve the outstanding issues in time for the President's visit to Korea in November 2010 for the next G-20 summit. Neither side, however, has set a firm date for the resumption of formal discussions.

Analysis

On September 23, 2010, Assistant USTR for Japan, Korea and APEC Affairs Wendy Cutler and Deputy Minister for Trade at Korea's Ministry of Foreign Affairs and Trade (MOFAT) Choi Seok-young held an informal meeting on the margins of the APEC meetings held in Sendai, Japan from September 15-26, 2010. During the meeting, the United States and Korea exchanged views on the outstanding issues and on the timing and venue for the next Ministerial-level meeting on the FTA, but agreed to decide the precise timing and venue of the meeting during future bilateral consultations.

The White House held a high-level, inter-agency meeting on September 17 to take stock of efforts to move forward on the KORUS FTA. US officials examined whether to seek further concessions from Korea beyond the pending market access issues concerning US beef and autos to appease Congressional Democrats with whom the FTA is unpopular. Certain pro-KORUS FTA lobbyists, however, view that further concessions are a misguided approach that would not likely convince more members of Congress to vote in favor of passing the FTA's implementing legislation. Moreover, these lobbyists believe that Korea would likely resist such demands. Korea has long stated publicly that the re-opening of the FTA text is non-negotiable. USTR has also conducted consultations on related issues, including demands from textile producers to reopen the Agreement's textile provisions. In August, however, USTR Ron Kirk confirmed to US stakeholders in Maine that it was too late to

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reopen the Agreement to consider other concerns besides autos and beef. USTR has instead asked industry representatives what improvements could be made that would not involve reopening the text. USTR has noted, however, that it will continue to pursue changes to auto and beef provisions. In particular, USTR is considering whether to press Korea to accept limits on the amount of duty drawback Korea provides to its domestic automakers for imported auto parts incorporated into final vehicles exported to the United States.

I. US STAKEHOLDER VIEWS ON AUTOMOBILES AND BEEF

According to media sources, opposition to the KORUS FTA from the automobile industry has been mixed. Chrysler Corporation and Ford Motor Company have expressed opposition to the Agreement, while General Motors Corporation has remained neutral, given its ownership of the Korean vehicle maker Daewoo. US automobile producers such as Ford and Chrysler question whether Korea would deliver on its commitments under the Agreement. Ford, for example, opposes the Agreement due to fears that Korea's non-tariff barriers (NTB), such as Korean safety and health regulations, would limit US automobiles from entering the Korean market. To resolve this particular issue, the Korea Economic Institute's Director of Congressional Affairs, Troy Stangarone, suggested that Korea recognize US safety and environmental standards in the FTA. He noted that a similar approach was adopted in the EU-Korea FTA, but that the EU agreement did not cover every standard.

On beef, Deputy Undersecretary for the US Department of Agriculture's (USDA) Farm and Foreign Agricultural Services Darci Vetter stated that the Obama administration wants to achieve full market access to the Korean market for US beef from cattle of all ages, as initially negotiated on April 18, 2008, as a way of resolving outstanding beef issues surrounding the Agreement. The United States and Korea had initially negotiated an agreement, which allowed US beef exports of all ages provided that the appropriate specified risk materials (SRMs) were removed. This reflected the guidelines of the World Animal Health Organization (OIE) for beef from countries such as the United States, which is considered to have a controlled risk for bovine spongiform encephalopathy (BSE) or "mad cow disease." The initial agreement allowed Korea to close its market to the United States in cases where the OIE changed the US risk status for BSE. However, criticism from Korean stakeholders forced the two countries to renegotiate the agreement in June 2008. Both sides agreed to sanction an industry-to-industry arrangement, limiting US exports of beef from cattle 30 months and younger. Korea then resumed imports of US beef. With the completion of the FTA, the United States also expects Korea to remove a 40 percent tariff on beef. According to the National Cattlemen's Beef Association, the United States seeks to renegotiate the FTA to reflect the original agreement the two sides negotiated in 2008 and expects to discuss this issue with Korea in the coming weeks.

II. KOREAN STAKEHOLDER VIEWS

Opposition toward the FTA in Korea has largely focused on the import of US beef. Media sources indicate that President Lee Myung-bak's approval rating in 2008 fell below 30 percent due to his administration's handling of public opposition toward the FTA. According to a Ministry of Knowledge and Economy (MKE) official, Korea sees clear gains in liberalizing the automotive industry as it already has subsidiary companies such as Daewoo operating in the United States. On the contrary, the Korean agricultural sector has raised concerns regarding US imports of beef and other agricultural goods noting that US agricultural goods are cheaper and more competitive than Korean agricultural goods. Representatives of the Korean agricultural sector are concerned that US imports

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could crowd-out Korea's agricultural products and hurt the domestic industry. Foreign Minister Yu Myung-hwan announced before the National Assembly in November 2009 that the government would not alter the text of the FTA agreement, but would likely agree instead to minor adjustments through possible side agreements to overcome contentious issues. Some Korean groups have criticized the government's disposition to make minor changes or enter into side agreements as a reversal of the government's original stance to make no changes to the content of the FTA text. These critics add that it remains highly probable that, in the end, Korea will boost the economic interests of the United States in making changes to the auto and beef provisions of the Agreement.

Outlook

According to the MKE, Korea is ready to finalize the KORUS FTA "as soon as possible," and the Agreement's ratification is now dependant on US Congress passage of implementing legislation and President Obama signing the legislation into law. Korea has finished its review process and expects to have only one plenary session before the current Agreement is ratified by the National Assembly. In August 2010, Korean Ambassador to the United States, Han Duk-soo, traveled to numerous US states to highlight the benefits of the KORUS FTA in an effort to boost US support for the Agreement. He cited numerous benefits for the United States, including tariff elimination on coniferous softwood, civilian aircraft, engines and parts, and increased market access for US agricultural products, such as corn, soybeans, wheat and potatoes, into the Korean market.

On the US side, analysts note that the United States has yet to provide a formal proposal on the handling of autos and beef, and that Korea has expressed an unwillingness to accept the informal ideas that USTR has presented on autos and Korean environmental standards. Additionally, the entirety of the US House of Representatives is subject to the outcome of the coming November 2010 elections and certain House Democrats have indicated that they do not wish to discuss the FTA prior to the elections as they are concerned that supporting the Agreement, while the US unemployment rate hovers close to 9.7 percent, could jeopardize their respective campaigns. For this reason, some in the Obama administration have proposed postponing negotiations on any contentious issues until after the elections. Such a delay, however, would make it unlikely that the United States and Korea could reach an agreement on these issues before the G20 summit in mid-November 2010, a deadline President Obama set in June (*please refer to the June 29, 2010 US Trade Alert*).

TPP Partners Hold Third Round of Negotiations in Brunei

Summary

The third round of formal negotiations for the Trans-Pacific Partnership Free Trade Agreement (TPP) took place in Brunei from October 4-6, 2010. Twenty-four negotiating groups discussed proposals for cooperation, and preparation of the consolidated text on issues such as trade in goods, services, agriculture, sanitary and phytosanitary standards (SPS), investment, intellectual property rights (IPR), government procurement, labor, and environment, among others. During the round, all TPP negotiating partner countries – Australia, Brunei, Chile, New Zealand, Peru, Singapore, the United States, and Vietnam (as an "associate member") – unanimously voted for Malaysia's inclusion in the negotiations. To further enrich negotiations, participating countries also invited key stakeholders to the seminars and workshops held on the margins of the negotiations. The fourth round of negotiations is tentatively scheduled to take place in New Zealand in December 2010.

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Analysis

According to a USTR press release, the TPP negotiating partners discussed and made progress on a wide range of issues, including industrial goods, agriculture, textiles, SPS standards, services, investment, financial services, IPR, and environment. They further deliberated on crosscutting issues, including promoting competitiveness, supply chain development, and FTA facilitation for small- and medium-sized enterprises. The negotiating parties also agreed to include Malaysia in the TPP negotiations, making Malaysia the first country to become a new negotiating party since the TPP partners launched negotiations in March 2009. The TPP partners made the decision to include Malaysia after they had firmly established that Malaysia had satisfactorily met the necessary standards required to join the negotiations. (*Please refer to the October 9, 2010 Trade Alert for more details*).

The TPP partners welcomed stakeholders to meet with negotiators on the sidelines of the negotiations. Government officials, business representatives and non-government organizations (NGOs) participated in public seminars to build capacity on SPS standards (particularly the electronic certification system, risk analysis, cargo management, and standards for halal produce); labor; and environment issues. According to a USTR press release, in the labor seminar, TPP delegations discussed their respective approaches for incorporating labor provisions into the trade agreement texts. Assistant USTR Lewis Karesh presented on the US approach, focusing on labor provisions in US trade agreements, the importance of respecting fundamental labor rights, and ways to ensure the effective enforcement of labor law. Other TPP delegations also gave presentations, including Brunei's Commissioner of Labor Hajah Rosliah Hasbollah, who discussed the administration and enforcement of labor law in Brunei. Labor remains a contentious issue for most TPP partners. The United States is seeking regulatory coherence in this area, whereby labor policy among the TPP countries becomes more consistent and compatible. However, this goal could likely prove difficult to achieve due to the varying levels of development and differing industrial relations in each TPP participating country.

During the intercessional meeting held in Lima in August 2010, the negotiating partners discussed ways to determine the market access structure for the goods and services schedules under the agreement. However, they were unable to reach a consensus on what kind of scheduling approach the final TPP FTA should reflect, including whether the TPP agreement will maintain market access (tariff) and services schedules in existing bilateral FTAs, or whether the TPP agreement will subsume and/or reopen the existing bilateral agreements for additional negotiations (*Please refer to the September 2010 Monthly Trade Report for more details*). On September 23, 2010, negotiating partners reached a procedural understanding on how to move forward with market access negotiations on goods. They agreed to an initial agreement that provides a hybrid approach to market access architecture, which allows each TPP partner to present market access offers on a bilateral or multilateral basis. The United States still plans to keep existing free trade agreements (FTAs) with TPP partners in place. It further plans to make new bilateral market access offers to the countries with which it does not already have an FTA such as Brunei, New Zealand, and Vietnam. These plans remain an issue for countries, such as Australia and New Zealand, which prefer a single negotiated TPP agreement. In the latest round, negotiating teams agreed to exchange ideas in all outstanding areas and to undertake further work in the coming weeks.

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Outlook

The Philippines, Thailand, and Japan have all expressed interest in joining the negotiations. The Philippines views the TPP as crucial for strengthening bilateral trade relations with the United States. However, joining the TPP will require the Philippine government to strengthen or amend its laws on human rights, child labor, environmental protection and IPR protection, not to mention constitutional limits on foreign ownership in utilities, transportation, media, and education. The Philippine Department of Trade and Industry (DTI) predicts that strengthening these laws will require a five to eight year process. On the other hand, Thailand, according to media sources, is carefully observing the TPP negotiations, to see what direction the negotiations would take before taking a position to join the Agreement. As for Japan, Japanese Prime Ministers Naoto Kan indicated in a speech made on October 1, 2010, that the government views the TPP as a means of revitalizing the Japanese economy. However, Japan is concerned about opening up its agriculture sector, due to strong lobbying from the Japanese Ministry of Agriculture, Forestry and Fisheries (MAFF). Analysts opine that if Japan joins the TPP FTA, other countries, such as Canada, Korea and Mexico, would likely follow, as it would be an opportunity for these countries to discuss and resolve their current issues with TPP countries.

TPP countries have set a tentative target date for completion of the TPP negotiations to coincide with the Asia-Pacific Economic Cooperation (APEC) forum in Hawaii, which takes place in November 2010. However, observers are doubtful that TPP partners will be able to resolve their outstanding issues by then.

Free Trade Agreements Highlights

Malaysia Becomes Ninth TPP Negotiating Partner to Enter TPP Negotiations

Negotiating partners² of the Trans-Pacific Partnership (TPP) unanimously voted in favor of Malaysia's inclusion in the TPP negotiations, during the third round of the TPP negotiations held from October 4-6, 2010, in Brunei. The decision comes after TPP partners informally agreed to include Malaysia as the ninth negotiating party during an intercessional meeting held in Lima, Peru from August 20-21, 2010.

On October 5, 2010, United States Trade Representative (USTR) Ron Kirk notified the US Congress in two formal letters sent to House Speaker Nancy Pelosi (D-CA) and Senate President Pro Tempore Daniel Inouye (D-HI) that Malaysia would be joining the TPP negotiations. Media sources had expected that Malaysia's inclusion would be delayed until the fourth round of negotiations scheduled for December 2010, as the now expired 2002 US Trade Promotion Authority Act., stipulated that the USTR notify Congress 90 days in advance of entering into new trade negotiations. The Act, which expired on July 1, 2007, covers implementing bills with respect to trade agreements entered into before July 1, 2007. In the case of Malaysia's inclusion in the TPP Agreement, however, Congress agreed that USTR did not need to wait three months after notifying Congress in light of the fact that Congress had already received advanced notification in March 2006 under the Bush administration that the United States intended to enter into bilateral FTA negotiations with Malaysia.

² TPP negotiating partners include the United States, Australia, Brunei, Chile, New Zealand, Peru, Singapore, the United States, and Vietnam (as an "associate member").

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In the lead up to the third round of negotiations, Malaysia's Trade Minister Mustapa Mohamed announced that Malaysia hoped to join the TPP talks "as soon as possible." He further pointed to the advantages of joining the TPP negotiations in the early drafting stages of the Agreement. For instance, certain potential parties have expressed concern about joining the Agreement at a later stage, as this could place them at a disadvantage if they decide to join the Agreement moving forward.

Through the TPP Agreement, Malaysia stands to gain preferential access to US markets and to the markets of TPP negotiating partners, and vice versa. For instance, Malaysia primarily expects to benefit from tariff reductions for its exports of footwear, textile and apparel products, cocoa products, petroleum oils, metal products, and clocks and watches. However, analysts opine that the TPP negotiations will likely pose certain challenges for Malaysia in areas such as financial services liberalization, as certain TPP partners will remain aggressive on services in general. Additionally, although Malaysia is striving to balance the interests of employers and employees, and is currently conducting a review of its labor legislation to make it more competitive, during the negotiations, it may face issues regarding labor rights. Malaysia's inadequate protection of intellectual property rights (IPR), sanitary and phytosanitary (SPS) standards in the fisheries and seafood sectors, and excise duties in the automobile sector may also pose a problem during the negotiations.

Another contentious issue is likely to be government procurement, as Malaysia may resist requests to liberalize the so-called "Bumiputera-policies" requiring companies tendering for government projects to be Malay-owned. Malaysia will further need to convince its people of the benefits of the TPP Agreement. Currently, the perception is that the agreement will likely hurt the domestic market for labor and crowd-out Malaysian goods and services.

Malaysia's official entry as a full participant in the TPP Agreement negotiations coincides with an official announcement by the European Union and Malaysia to launch a bilateral Malaysia-EU free trade agreement ("MEUFTA"). The Malaysian government expects both agreements to attract trade, investment, capital skills, and know-how from advanced economies.

The next informal meeting of the TPP negotiating partners is expected to take place on the margins of the APEC Ministerial Meeting, scheduled to take place in Yokohama, Japan from November 7-8, 2010.

USTR Requests Comments on Proposed Trans-Pacific Partnership FTA with the Inclusion of Malaysia

In an October 20, 2010 Federal Register (FR) notice, the US International Trade Commission (USITC) announced its intent to seek public comment on the probable economic effects of a US free trade agreement with members of the Trans-Pacific Partnership (TPP), given the recent inclusion of Malaysia in the ongoing negotiations (75 Fed. Reg. 64778). The notice comes in response to a request made by the Office of the US Trade Representative (USTR) in an October 5, 2010 letter addressed to the Chairman of the USITC Deanna Tanner Okun, requesting investigation into the: "*US-Trans-Pacific Partnership Free Trade Agreement Including Malaysia: Advice on the Probable Economic Effect of Providing Duty-Free Treatment for Imports.*"

In January 26, 2009, USTR had made a similar request for the USITC to provide comments on the probable economic effects of providing duty-free treatment for imports of products from the seven TPP partners, which

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include Australia, Brunei, Chile, New Zealand, Peru, Singapore and Vietnam. (*Please see W&C Trade Alert of January 28, 2009 for more details.*) In response, the USITC issued a report to USTR on June 2, 2010, containing advice and assessment in investigation Nos. TA-131-034 and TA-2104-026 on: “*US-Trans-Pacific Partnership Free Trade Agreement: Advice on the Probable Economic Effect of Providing Duty-Free Treatment for Imports.*” The USTR now requests that the USITC provide advice concerning the probable economic effects of a US free trade agreement with those countries plus Malaysia, to determine whether Malaysia’s inclusion will produce any changes to the USITC’s June 2010 advice. The USITC will provide its report to the USTR by January 7, 2011.

Parties interested in appearing at the public hearing must provide written notification of their intent to testify, as well as their testimony, by November 10, 2010. The interagency Trade Policy Staff Committee (TPSC) will convene a public hearing in November 17, 2010. Written comments on the proposed FTA are due by November 18, 2010. All pre-hearing briefs and statements must be filed by November 12, 2010, while all post-hearing briefs and statements must be filed by November 26, 2010. Notices of intent to testify, testimony and/or written comments should be submitted electronically at <http://www.regulations.gov>. Comments and testimony may address the reduction or elimination of tariffs or non-tariff barriers on any articles provided for in the Harmonized Tariff Schedule of the United States (HTSUS) that are products of the participating Trans-Pacific countries, any concession that should be sought by the United States, or any other matter relevant to the proposed agreement. USTR requested that the USITC base its advice on the HTS in effect during 2010 and on trade data for 2008. The TPSC in particular seeks comments and testimony on:

- General and commodity-specific negotiating objectives for the proposed plurilateral agreement;
- Economic costs and benefits to US producers and consumers of removal of tariffs and non-tariff barriers on articles traded with the seven Trans-Pacific countries plus Malaysia;
- Treatment of specific goods (described by HTSUS numbers) under the proposed agreement;
- In the case of articles for which immediate elimination of tariffs is not appropriate, a recommended staging schedule for such elimination;
- Adequacy of existing customs measures to ensure that imported goods originate from the seven Trans-Pacific countries, and appropriate rules of origin for goods entering the United States under the proposed agreement;
- Effects on industries and on consumers in the United States producing like or directly competitive products
- Changes to the advice provided in the USITC June 2010 report as a result of Malaysia’s inclusion in the TPP

USTR and Korean Trade Minister to Discuss Final Steps for Implementing KORUS FTA

On October 26, 2010, the United States Trade Representative (USTR) Ron Kirk and Korean Trade Minister Kim Jong-hoon held a meeting in San Francisco to resolve the pending beef and automotive vehicle issues under the

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Korea-United States Free Trade Agreement (KORUS FTA). This meeting comes a few weeks before the Group of 20 (G-20) Summit deadline that President Obama and Korean President Lee Myung-bak set for resolving all differences related to the Agreement.

According to media sources, Korea is still reluctant to make any additional changes to the Agreement, despite calls from the United States to implement changes in the beef and auto vehicle provisions. On the contrary, US stakeholders in the automotive vehicle and agriculture industry continue to seek further changes to the Agreement, including a broader inclusion of beef products into the Agreement and the elimination of all tariffs for vehicles including pick-up trucks. As the US and Korean stakeholders could not come to an agreement on the outstanding issues concerning market access for beef and automobiles at the October 26, 2010 meeting, USTR Ron Kirk and Korean Trade Minister Kim Jong-hoon agreed on October 27, 2010 to meet again before the G-20 Summit in Seoul, Korea, which is scheduled to be held from November 10-12, 2010.

In June 2010, President Obama ordered USTR to resolve any outstanding issues, particularly those pertaining to market access for US beef and automobiles, before the November 2010 G-20 Summit. President Obama, who will be attending the Summit, is currently under pressure to resolve these pending issues as a test of his international leadership on trade in the face of domestic opposition (e.g., US automakers Ford and Chrysler are opposed to the Agreement in its current form due to concerns about access to the Korean automobile market, although General Motors has not taken a position for or against the Agreement).

According to most polls, the Republicans are expected to reassume control of the House of Representatives in the November 2, 2010 US midterm legislative elections and the Democrats are expected to retain only a slight majority in the Senate. Rep. Dave Camp (R-MI) is expected to become the next Chairman of the House Committee on Ways and Means, a committee through which all revenue-related trade bills must pass, and has stated on several occasions that passage of the stalled KORUS FTA (as well as the US-Panama and US-Colombia FTAs) will be a priority under his chairmanship. While the high unemployment rate in the United States makes it difficult for candidates from either party to campaign on a pro-free trade agenda, US trade policy originates and is guided by the Executive Branch and, as the Obama Administration has publically expressed its support for the KORUS FTA, the Agreement will likely be introduced to Congress and passed by the same in 2011 given that the outstanding issues on market access for US beef and automobiles are resolved.

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MULTILATERAL

Multilateral Highlights

United States and European Union join Japan in WTO Complaint Against Canada Over Alleged Solar Power Subsidies

On September 30, 2010, the United States and the European Union filed complaints before the World Trade Organization (WTO) against Canada over Ontario's Feed-In Tariff (FITs) program, which incentivizes electric grid utilities to buy and distribute energy derived from renewable sources. Japan had filed a similar complaint before the WTO on September 13, 2010 (*please refer to the September 21, 2010 WTO Alert*).

The United States, the European Union and Japan hold that stringent local content requirements set by the provincial government of Ontario in its FIT program favor local manufacturers of renewable energy equipment and thus violate WTO rules. The United States, European Union and Japan are dominant players in the renewable energy industry and the prospect of losing revenue, placing their domestic renewable energy industries at a competitive disadvantage and setting adverse precedents in this increasingly competitive and growing market pushed them to join Japan in its WTO filing.

In its complaint, the United States was particularly direct in its concern with protecting its growing industry and trade relationship with its largest trading partner. It noted that the United States "is a major innovator of renewable energy and related technologies and is a primary source of Canadian imports of products used in the production of renewable energy, including solar and wind energy." In response to the US and EU complaints, Canadian Energy Minister Brad Duguid and Trade Minister Peter Van Loan reiterated their position that Canada's measures are consistent with WTO obligations.

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