



White & Case LLP General Trade Report - JETRO

December 2011

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UNITED STATES

GENERAL TRADE POLICY

USTR Releases 10th Annual Report to Congress on China's WTO Compliance

Summary

On December 12, 2011 the US Trade Representative (USTR) issued its 10th annual "Report to Congress on China's WTO Compliance" ("Report"). The Report was prepared pursuant to Section 421 of the US-China Relations Act of 2000, which requires USTR to report annually to Congress on the extent to which China has complied with the commitments it made in connection to its 2001 accession to the World Trade Organization (WTO). In addition to detailing key areas of concern, the Report also outlines developments and trends related to the US-China bilateral trade relationship.

Analysis

I. TRENDS

According to the Report, China's first 10 years of WTO membership are characterized by two different phases. From 2001-2006, the Report notes that China took "impressive steps to implement a set of sweeping commitments." Such steps included: (i) the elimination of non-tariff barriers; (ii) the reduction of tariffs; and (iii) improvements to the country's legal system. After 2006; however, the Report notes that China's progress towards market liberalization began to slow. In more recent years, the Report states, "China seems to be embracing state capitalism more strongly." According to the Report, this trend continued in 2011: throughout the year, US stakeholders expressed concern regarding the prevalence of interventionist policies and practices, and the large role of state-owned enterprises (SOEs) in China. The Report states that this ongoing trend suggests that China has not fully embraced the key WTO principles of market access, transparency and non-discrimination. In response to these developments, the Report states that the US government will hold China fully accountable for fulfilling and maintaining its WTO commitments.

II. 2011 DEVELOPMENTS

According to the Report, in 2011 the Obama Administration sought to increase the benefits the United States derives from its trade relationship with China through bilateral dialogue and, when necessary, use of the WTO Dispute Settlement Body (DSB). With respect to bilateral dialogue, the Report notes that President Hu Jintao made a State visit to Washington, DC in January 2011, and the US and Chinese governments held their 3rd Strategic and Economic Dialogue (S&ED) in May 2011 and their 22nd Joint Commission on Commerce and Trade (JCCT) in November 2011. In addition, the Report notes that USTR held WTO consultations with China

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twice in 2011 after filing two separate WTO disputes against China, namely: (i) *Measures Concerning Wind Power Equipment* (DS419); and (ii) *Anti-dumping and Countervailing Duty Measures on Broiler Products from the United States* (DS427). According to the Report, the United States is currently involved in three additional WTO disputes that the United States filed against China, including: (i) *Export Restraints on Raw Materials* (DS394); (ii) *Electronic Payment Services* (DS413); and (iii) *Antidumping and Countervailing Duties on Grain-Oriented Steel* (DS414).

III. PRIORITY AREAS

The Report outlines six areas of particular concern to the US government and stakeholders in terms of China's approach to the obligation of WTO membership. We summarize these areas below:

- a. **Intellectual Property Rights (IPR).** According to the Report, "effective enforcement" of China's intellectual property rights laws and regulations remains a key area of concern for US businesses. Key accomplishments with respect to China's IPR enforcement during 2011 included, *inter alia*: (i) following USTR's publication of its first annual "Out-of-Cycle Review of Notorious Markets," the Chinese website Baidu reached a precedent-setting licensing agreement with US and international rights holders; and (ii) at the November 2011 JCCT, Chinese government officials confirmed the establishment of a high-level central government IPR enforcement structure;
- b. **Industrial Policies.** The Report states that in 2011 China continued to use industrial policies that limit the market access of US goods and services. According to the Report, these industrial policies often benefit China's SOEs. The Report cites a number of industrial policies of concern, including, *inter alia*: (i) indigenous innovation; (ii) export restraints; (iii) forced transfer of technology; (iv) investment restrictions; and (v) government procurement. With respect to government procurement, the Report notes that although China submitted a revised offer to join the WTO Government Procurement Agreement (GPA) in December 2011, "China's offer still falls short in many respects. Going forward, China will need to expand the scope of its offer much further to be comparable to other GPA parties";
- c. **Trading Rights and Distribution Services.** According to the Report, many of the United States' concerns regarding trading rights and distribution concerns have been addressed. Nonetheless, the US government is still concerned with the unwarranted restrictions the Chinese government puts on US direct selling services;
- d. **Agriculture.** Although China became the United States' largest agricultural export market in 2010, the Report notes that "China remains among the least transparent and predictable of the world's major markets for agricultural products." According to the Report, the US government is particularly concerned with the sanitary and phyto-sanitary (SPS) measures and regulatory practices the Chinese government imposes on US beef, poultry and pork products;
- e. **Services.** Although the United States enjoys a trade surplus in trade in services with China, the Report cites numerous challenges US services suppliers have encountered in China. More specifically, the Report notes the Chinese government's continued use of "discriminatory regulatory processes, informal bans on entry, overly burdensome licensing and operating requirements and other means to frustrate

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efforts of US suppliers of banking, insurance, express delivery, telecommunication legal and other services”; and

- f. **Transparency.** According to the Report, China agreed to implement many of the commitments it made with regard to transparency immediately after it acceded to the WTO. Nonetheless, the Report highlights several areas in which the Chinese government has not yet fulfilled these commitments. More specifically, the Report notes that many of China’s ministries have not been consistent in publishing draft rules and regulations for public comment. In addition, the Chinese government has not fulfilled its WTO commitment to make available, in a consistent manner, all trade-related laws, regulations and other measures in one or more of the WTO languages (English, French and Spanish).

Outlook

According to Assistant USTR (AUSTR) for China Affairs Claire Reade, who testified in front of the Congressional-Executive Commission on China (CECC) on December 13, 2011 regarding China’s WTO compliance, “going forward [USTR Ron] Kirk will continue to vigorously pursue increased benefits for US stakeholders in all of these areas, using bilateral and multilateral engagement, including dispute settlement at the WTO, where appropriate.” Despite the US government’s bilateral and multilateral efforts, experts note that progress on US-China bilateral trade issues is usually incremental in nature. To illustrate this point, experts cite the 2011 JCCT, at which Chinese officials’ most significant commitments included promises to, *inter alia*: (i) continue their software legalization program; (ii) complete the “de-linking” of indigenous innovation and government procurement; and (iii) institutionalize their 2010 Special IPR Campaign through the establishment of a State Council-level IPR enforcement structure. Although these commitments represent important signs of progress with respect to two key issues, namely IPR enforcement and industrial policies, experts note that because neither of them was particularly sweeping in nature, the Report still identifies the same two issues as priority areas of concern for the US government. Indeed, experts note that the six priority areas identified in the 2011 Report are the same six areas USTR has identified as priority areas of concern for at least the past five years in its annual Report to Congress on China’s WTO Compliance. Looking forward, both the US and Chinese governments will undergo political transitions in 2012. Experts opine that neither government is likely to make any significant concessions to the other during this transitional period. As a result, experts expect that the US government’s priority concerns with respect to China’s WTO compliance will likely remain largely the same in 2012.

China and the United States Conclude 22nd Session of JCCT

Summary

The 22nd session of the US-China Joint Commission on Commerce and Trade (JCCT) was convened in Chengdu, China from November 20-21, 2011. The meeting was co-chaired by US Department of Commerce (DOC) Secretary John Bryson and USTR Ron Kirk, together with Chinese Vice Premier Wang Qishan. Talks between US and Chinese officials (“parties”) on a wide range of trade and investment issues resulted in a number of commitments, agreements, and Memoranda of Understanding (MOUs). More specifically, Chinese officials made specific commitments regarding several issues of concern to the US government, including IPR protection and enforcement as well as indigenous innovation, especially in the context of government

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procurement. More modest progress was made on the issues of standards and conformity assessments, in addition to market access in the areas of new energy vehicles (NEV), medical devices and tourism. However, talks on issues relating to China's investment restrictions and barriers against the importation of US agricultural exports resulted in few signs of advancement.

Analysis

The JCCT, established in 1983, is the principal bilateral forum for addressing trade and investment issues and for promoting commercial opportunities between the United States and China. The parties began expanding the mechanism in 1997 and, as of 2011, it includes approximately 15 sub-ministerial and working group-level dialogues that address specific issues on an ongoing basis, including those relating to IPR-related matters, the regulation of medical devices, pharmaceuticals, and high-tech and strategic trade matters.

A number of US and Chinese government officials attended the 2011 JCCT. In addition to USTR Kirk and DOC Secretary Bryson, the US delegation included Department of Agriculture (USDA) Secretary Tom Vilsack, US Ambassador to China Gary Locke, Trade and Development Agency (USTDA) Director Leocadia Zak, and representatives from the Departments of State (DOS), Treasury, and several other government agencies. In addition to Minister Wang, the Chinese delegation also included, among others, Minister of Agriculture Han Changfu, Vice Minister and Senior International Trade Representative of the Ministry of Commerce (MOFCOM) Gao Hucheng, Vice Minister of Foreign Affairs Cui Tiankai, Vice Minister of Finance Zhu Guangyao, and Director of the National Energy Administration (NEA) Liu Tienan.

From November 20-21, 2011, the parties discussed a wide range of trade and investment issues of concern to both the Chinese and US governments. For the US government, these concerns relate to the following issues, *inter alia*: investment, IPR protection and enforcement, indigenous innovation (particularly as it pertains to government procurement), strategic emerging industries, the energy industry, administrative licensing, standards and conformity assessments, agriculture, health care goods and services, telecommunication goods and services, and travel and tourism. For the Chinese government, these concerns relate to the following issues, *inter alia*: US export controls, China's non-market economy (NME) status, US application of trade remedies, and restrictions on Chinese investment in the United States in sensitive sectors.

At the November 21 JCCT Signing Ceremony, several agreements were signed by US and Chinese officials, as well as between several US and Chinese businesses. The private sector agreements signed aim to promote US-China business in the renewable energy and transportation industries. The agreements US and Chinese officials signed aim to promote bilateral cooperation in, among others, the areas of IPR, trade statistics, energy and high technology.

Aside from these signed agreements, much of the progress made at the JCCT came in the form of verbal commitments. These commitments were outlined by both the Chinese and US governments at a press conference following the JCCT. Because these were verbal and not signed agreements, experts note that both the US and Chinese governments will have to work through the JCCT in 2012 to ensure commitments of the 2011 JCCT are fully implemented.

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I. SPECIFIC OUTCOMES

According to the US-China JCCT Fact Sheet, published by USTR, the US government secured several key commitments from the Chinese government during the 2011 JCCT. Although the Chinese government has not yet published a fact sheet on the outcomes of the JCCT, experts note that the Chinese government gained more modest concessions related to its key issues of concern at the JCCT.

We summarize below the commitments made at the JCCT, as reported by the USTR's US-China JCCT Fact Sheet:

IPR

- **New State Council-level IPR Leadership Structure.** On November 9, 2011, China's State Council Standing Committee announced the establishment of a national IPR Office, seated in the MOFCOM, as a new "leading group" to coordinate interagency efforts to tackle IPR infringement and counterfeiting issues in China (*please refer to the W&C Trade Alert dated November 21, 2011*). China's State Council confirmed at the JCCT plenary that Vice Premier Wang Qishan will head the new leading group and that the group would make permanent the leadership structure established under the 2010 Special IPR Campaign;
- **Software Legalization.** Vice Premier Wang stated that he will directly oversee the continuation of the software legalization for government agencies program. To date, all central government agencies have completed the inspection and correction of work related to software legalization. Vice Premier Wang specifically committed to ensuring that all 31 provincial level government agencies will complete their respective legalization efforts by the mid-2012, and that all Chinese local and municipal level agencies will complete similar work by late 2012;

Also, within the JCCT IPR Working Group, the Parties made commitments to work together on the issues of online counterfeiting, online and library copyright protection, broadcast tariff rates, bad faith trademark filings and patent quality. In addition, Chinese and US government officials tasked the JCCT IPR Working Group with the study of investment, tax and other regulations relating to IPR provisions in order to determine whether government benefits and incentives are linked to similar IPR development requirements.

Indigenous Innovation

- **Government Procurement.** Chinese officials announced that the State Council has finalized a measure requiring provincial governments, municipalities and autonomous regions to eliminate any catalogues or other measures linking innovation policies to government procurement preferences by December 1, 2011.

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Strategic Emerging Industries and New Energy Vehicles

- **Foreign Companies Eligible for Preferential Policies.** Chinese officials confirmed that China will invest RMB 10 trillion (USD 1.6 trillion) in strategic emerging industries¹ over the next five years. Furthermore, Chinese officials stated that they will provide a "fair and level playing field" for all companies in these industries; and
- **New Energy Vehicles (NEVs).** Chinese officials confirmed that: (i) the Chinese government does not and will not maintain measures that mandate the transfer of technology; (ii) in China's NEV industry, "mastery of core technology" does not require technology transfer; (iii) the Chinese government does not and will not impose any requirements for foreign-invested companies to establish domestic brands in China in order to sell NEVs; and (iv) foreign-invested companies will be eligible for subsidies and preferential programs on an equal basis with their Chinese counterparts and these programs will be implemented in compliance with WTO rules.

Energy Industry and Smart Grid Technologies

- **Smart Grid Technologies.** Chinese officials stated that the Standardization Administration of China and the China National Energy Administration follow the principles of "openness and transparency" in the development of standards. Chinese officials confirmed that foreign entities are welcome to participate in China's smart grid standards technical committees. They also welcomed "continued bilateral cooperation" on the issue of smart grid standards.

Standards and Conformity Assessment

- **China Compulsory Certification (CCC).** China agreed to conduct technical exchanges with their US counterparts concerning the China Compulsory Certification (CCC) mark, which is China's principal regime for testing, and certifying the quality, safety, and efficacy of products sold in China. Chinese officials also stated that China welcomes competent foreign participation in its CCC technical experts group.

Agriculture

- **Avian Influenza.** According to US-China Business Council (USCBC), China confirmed its lifting of Avian Influenza-related bans on poultry products from Arkansas. The two countries agreed to continue technical discussions toward compliance with science-based international standards on the remaining bans on poultry products from four other US states;

¹ The seven strategic emerging industries include: (i) energy conservation and environmental protection; (ii) new energy; (iii) new-generation information technology; (iv) biology; (v) high-end equipment manufacturing; (vi) new materials; and (vii) new energy-powered automobile manufacturing. Of the seven industries, innovative sectors are energy efficiency and environmental conservation, next-generation information technology, biotechnology, and new energy vehicles (NEVs).

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- **Market Access Barriers.** According to USCBC, the parties committed to continue ongoing discussion and exchanges in regard to other agricultural products facing market access barriers, including beef and pears; and
- **Five-Year Strategic Plan.** USDA, China's Ministry of Agriculture (MOA) and General Administration of Quality Supervision, Inspection and Quarantine announced that they are finalizing the framework of a five-year strategic plan focused on food security, food safety and sustainable agriculture, though they did not announce a timeframe for the release of this plan.

Medical Devices

- **Down Classification.** China's State Food and Drug Administration (SFDA) stated that it has studied lowering the risk classification of x-ray and in-vitro diagnostic (IVD) equipment in accordance with international norms. SFDA committed to issuing a list of x-ray equipment to be placed in a lower category by June 2012 and to also issue a draft catalogue of IVD equipment for public comment by June 2012; and
- **Safety Standards.** SFDA stated that it is conducting in-depth research and drafting transition procedures to facilitate the move to the 3rd edition of IEC 60601-1 safety standards for medical devices, which will be part of SFDA's 2012 work plan.

Pharmaceuticals

- **Regulatory Data Protection.** Chinese and US government officials agreed to conduct more in-depth research and exchanges on how China can establish and implement effective regulatory data protection through the revision of relevant legislative instruments; and
- **Anti-Counterfeiting Collaboration.** Chinese officials announced the establishment of a new Complaint Center for Counterfeit Drugs in order to crack down on the distribution and sale of counterfeit drugs. The Center will facilitate the exchange of information regarding counterfeit drugs in China between the US government, the US pharmaceutical industry and SFDA.

Telecommunications

- **Streamlined Application Process.** As a follow-up to its commitment from the 21st JCCT session in 2010 (*please refer to the W&C Trade Report dated December 21, 2010*), USCBC reports that Chinese officials agreed to publish new procedures for applying for network access licenses and radio type approvals via a so-called "one-stop shop" mechanism by the end of 2011; and
- **Telecommunications Services Catalogue.** Chinese officials also announced plans to publish a draft of its value-added telecommunications services catalogue for public comment.

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Tourism

- **Three Additional Provinces.** The parties agreed to expand the US-China Tourism MOU to include three additional provinces (Henan, Jiangxi and Guizhou), bringing the total number of provinces where Chinese citizens can buy US leisure travel packages to 27.

Transportation

- **Specialty Automotive Products** MOFCOM and DOC agreed to discuss the market potential within the United States and China for specialty automotive products relating to safety and environmental protection.

Export Control

- **Regime Reform** The US government is currently in the process of reforming the US export controls system to improve national security and increase commercial opportunities for US firms, but experts note that the benefits are likely to be limited for China due to ongoing security concerns. However, according to USCBC, DOC and MOFCOM signed an agreement at the JCCT to facilitate high-tech trade through export control process improvements such as shortening the review period for certifying end-users in China and promoting the Validated End-User program.

Outlook

Experts note that the 22nd session of the JCCT comes in the context of both increased tension within and attention to the US-China bilateral trading relationship. The November 20-21 meeting comes on the heels of the East Asia Summit in Bali, Indonesia and the Asia Pacific Economic Cooperation (APEC) Leaders Summit in Honolulu, Hawaii, where the United States and China, among other countries, made commitments regarding several issues, including trade in environmental goods and services and innovation policies. In addition, experts note that tensions within the bilateral trading relationship have recently increased due to the October 11, 2011 US Senate passage of the "Currency Exchange Rate Oversight Reform Act of 2011" (S 1619), which aims to address China's alleged currency manipulation, and the November 8, 2011 DOC initiation of an antidumping and countervailing duty investigation into imports of solar cells from China.

In this context, experts note that the commitments made at the 2011 JCCT were modest, but not unexpectedly so. According to USTR Kirk, US and Chinese government officials participating in the 2011 JCCT "reached agreement on a number of important outcomes, though [US government officials] hoped to accomplish even more." More specifically, US government officials welcomed commitments made by the Chinese government on the issues of IPR and indigenous innovation, but expressed disappointment at the lack of progress in the areas of agriculture and investment. Experts note that although Chinese government officials did not secure significant commitments from the US government on their issues of key concern during the session, they often achieve progress on other issues of concern through the numerous JCCT dialogues and working groups held throughout the year. According to Vice Premier Wang, this type of continued cooperation is crucial because, "[a]s major world economies, China and the United States would make a positive contribution to the world through their own steady development".

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Experts further note that the true success of the 2011 JCCT will be determined by whether or not the verbal commitments made at the meeting are fully implemented over the longer term. In this regard, experts opine that upcoming political transitions in both China and the United States will serve as a hinderance. While the 2012 US Presidential campaign has only recently gotten underway, experts note that current Vice President Xi Jinping will likely become China's new President in 2012. As both countries prepare for their respective political transitions, experts note that the US and Chinese governments are likely to avoid any actions that could be interpreted by their citizens as a concession to the other country.

Treasury Declines to Label China a Currency Manipulator but Expresses Concern over Japanese FX Interventions

Summary

On December 27, 2011, the US Department of the Treasury ("Treasury") submitted to Congress its semi-annual report on international economic and exchange rate policies ("Treasury report" or "report"). The Treasury report found none of the United States' major trading partners, including China, to be manipulating its currency for the purpose of preventing effective balance of payments adjustment or gaining unfair competitive advantage in international trade from the January through mid-December 2011. The report did, however, reprove Japan for intervening in the foreign currency markets to stem the appreciation of the yen.

Analysis

I. THE REPORT'S FINDINGS

Under the 1988 Omnibus Trade and Competitiveness Act, Treasury is required to submit a report to Congress that determines "whether countries manipulate the rate of exchange between their currency and the US dollar (USD) for purposes of preventing effective balance of payments adjustment or gaining unfair competitive advantage in international trade." The release of the report was due October 15th, as required by law, but sources opine that the delayed release allowed the United States to secure commitments from China in bilateral and multilateral negotiations, such as the November 2011 Joint Commission on Commerce and Trade (JCCT).

The current Treasury report found none of the United States' major trading partners, including China, to be manipulating its currency for the above cited purposes during the period of analysis. The report did identify factors suggesting that the real renminbi (RMB) exchange rate is "persistently misaligned" and that the RMB is, therefore, "substantially undervalued." The report cites several factors in support of the Treasury's finding on the RMB, including: (i) China's sustained accumulation of foreign reserves; (ii) the largely unchanged level of China's real effective exchange rate "despite rapid productivity growth in the traded goods sector;" and (iii) the persistence of China's current account surplus. That the Treasury report stopped short of labeling China a "currency manipulator" allows the Obama Administration to avoid taking the steps prescribed in Section 3004 of the 1988 Omnibus Trade and Competitiveness Act, *i.e.*, the Treasury Secretary initiating negotiations with China, within the context of the International Monetary Fund or bilaterally, to ensure that China regularly and promptly adjusts the USD-RMB exchange rate to permit effective balance of payments adjustments and to eliminate any unfair advantage.

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The report notes that, from the June 2010 G-20 Summit in Toronto, where Chinese President Hu Jintao committed to allowing greater flexibility of the RMB against other major currencies, through mid-December 2011, the RMB appreciated, in nominal terms, by 7.1 percent against the USD. The report emphasizes, however, that the appreciation of the RMB against the US dollar, in real terms over the same period, approximates 12 percent due to inflationary pressure within China, although it also posits that uncertainty surrounding the state of the global economy has reduced market expectations of further near-term RMB appreciation with respect to the USD.

The report urges Chinese authorities to take needed policy steps toward greater exchange rate flexibility, and notes that a meaningful appreciation of the RMB is in China's interest. Treasury asserts that moving away from export-led growth and toward a greater reliance on domestic consumption is key to China's sustainable growth over the medium- to long-run, and that allowing for a more rapid appreciation of the RMB would move China closer to achieving this policy goal. While the report notes that further work is necessary, it welcomes several policies² China has undertaken to increase domestic consumption, including: (i) allowing household incomes to rise at a pace faster than GDP growth; (ii) increasing the minimum wage; (iii) ensuring that wages reflect productivity gains; (iv) increasing the share of the services sector in the Chinese economy; (v) allowing for greater foreign competition in the Chinese services sector; (vi) promoting more market-based interest rates; (vii) expanding the social safety net; (viii) continuing price reform in the resources sector; and (ix) increasing dividend payments by state-owned enterprises. Despite these policy initiatives, the Treasury report insists that "exchange rate adjustment is an inherent part of rebalancing toward domestic demand growth."

In regard to Japan, Treasury's report notes that Japanese authorities intervened twice in 2011 (in August and October, respectively) to curtail yen appreciation, in response to reported "speculative and disorderly exchange rate movements" during these two months. Despite these interventions, however, the report notes that the yen experienced a nominal appreciation of 4.1 percent against the USD from January through mid-December 2011 and a 2.8 percent real appreciation January through November 2011. The report further urges Japanese officials to "take fundamental and thoroughgoing steps to increase the dynamism of the domestic economy" in lieu of intervening in the foreign currency market.

II. REACTION TO THE REPORT

Reaction to the report has largely been muted, which is likely due to the report having been released between Christmas Day and New Years Day when lawmakers, and most private sector coalitions and companies' government affairs offices are on vacation. What little reaction has been given has largely been negative, with some lawmakers and industry groups expressing disappointment at Treasury's decision not to take a more firm position toward China:

- **US-China Business Council (USCBC)** issued a statement supporting "the Obama Administration's efforts to have the exchange rate better reflect market influences;"

² Contemplated in China's 12th Five-Year Plan, adopted on March 14, 2011, and in the Joint Fact Sheet of the May 2011 US-China Strategic and Economic Dialogue (S&ED)

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- **Alliance for American Manufacturing (AAM) Director Scott Paul** expressed disappointment at Treasury's findings and noted that China's currency is "still enormously undervalued." According to Paul, China's alleged currency manipulation has "contributed to the loss of hundreds of thousands of American manufacturing jobs" and, as a result, the AAM calls on the House to "pass currency legislation as soon as it returns in January."
- **Rep. Mike Michaud (D-ME)** issued a statement expressing disappointment with the Obama Administration's failure to label China a currency manipulator. He noted that the report "refuse[s] to state the obvious;"
- **Sen. Olympia Snowe (R-ME)** issued a statement expressing disappointment with Treasury's finding on the RMB. She noted that the report failed to state what US workers already know, and urged House leadership to pass in 2012 legislation to address China's currency practices;

Outlook

The latest Treasury report carefully addressed the concerns of both: (i) those who posit that China continues to adversely affect US industries and workers by unfairly manipulating the RMB; and (ii) those who advocate a more moderate engagement with China on currency. Experts note that, on the one hand, Treasury seems to partially agree with the first group, *i.e.*, (i), comprised largely of US organized labor, a handful of US companies and many Democratic lawmakers, who believe that the RMB remains undervalued. On the other hand, Treasury seems to appease the second group, *i.e.*, (ii), comprised largely of US industry groups, by stopping short of labeling China a currency manipulator, which would require the Treasury Secretary to initiate expedited bilateral or multilateral negotiations with China on its currency valuation. Experts also note that Treasury's inclusion in the report of language broaching Chinese government plans to move toward greater reliance on domestic consumption (as opposed to export-led growth) is effectively a nod to (ii) as it suggests that pressure for China to change its currency policies will come from within China as a response to a recognition of China's own macroeconomic circumstances and not as a response to unilateral US pressure. That Treasury stops short of labeling China a currency manipulator helps the Obama Administration avoid stoking unnecessary bilateral tensions, particularly in light of the more constructive tone of recent bilateral consultations between US and Chinese officials at the November 2011 JCCT. Treasury's decision also falls in line with the Obama Administration's preference for bilateral and multilateral dialogue and consultation in addressing China's trade policies, rather than direct and unilateral confrontation.

The full Treasury report can be viewed [here](#).

US General Trade Policy Highlights

USTR Releases Special 301 Out-of-Cycle Review of Notorious Markets

On December 20, 2011 the US Trade Representative ("USTR") released the "Special 301 Out-of-Cycle Review of Notorious Markets" ("December Review"). According to USTR Ron Kirk, "the notorious markets highlighted in

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[the] review negatively impact legitimate [US] businesses and industries of all sizes that rely on intellectual property to protect their goods and services.”

Pursuant to Section 182 of the Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988 and the Uruguay Round Agreements Act (enacted in 1994), USTR publishes a “Special 301 Report” (“Report”) in April of every year. The Report reviews the state of intellectual property rights (IPR) protection and enforcement in a number of countries other than the United States. USTR began to publish a Notorious Market List within the Report in 2006. In 2010, USTR announced that it would begin publishing this list in a separate document known as the “Special 301 Out-of-Cycle Review of Notorious Markets.” The December Review is the second of such Reviews; the first one was published in February 2011. According to USTR, the December Review “does not purport to reflect findings of legal violations, but rather is a summary of information that serves to highlight the problem of marketplaces that deal in infringing goods and which help sustain global piracy and counterfeiting.” USTR published a Federal Register (FR) notice on September 22, 2011, requesting submissions from the public identifying potential internet and physical notorious markets that exist outside the United States for inclusion in the December Review.

The December Review identifies 33 notorious markets. The markets are identified as either physical or internet markets. In addition, there are 9 different subcategories of internet markets, including: (i) Pay-per-download; (ii) Linking; (iii) Business-to-business and Business-to-consumer; (iv) BitTorrent Indexing; (v) BitTorrent Trackers; (vi) Social Media Sites; (vii) Cyberlockers; (viii) Blogs, Online Forums, and Newsgroups; and (ix) Unlicensed programming retransmission. Although the December Review identifies the 33 markets as being based in 23 different countries, USTR notes that a significant number of the markets are located in China and Eastern Europe.

Three markets have been removed from the December Review that were previously listed in the February Review. According to USTR, after being listed in the February Review, the markets themselves and/or local government officials took steps to curtail the availability of pirated counterfeit goods in the respective markets. The markets removed from the December Review include: (i) the Chinese website “Baidu”; (ii) the Hong Kong physical market “Ladies Market”; and (iii) the Russian physical market “Saveloviskiy Market.”

Experts note that USTR’s publication of the Special 301 Out-of-Cycle Review of Notorious Markets acts as a complement to Special 301 Report. While the Report provides an overview of IPR protection based on country, the Review highlights specific internet and physical markets whose IPR infringement practices are of particular concern to the US government and US businesses. Although USTR has thus far only published two of these Reviews, experts note the removal of three markets from the December Review can be interpreted as a preliminary sign of the Review’s effectiveness.

Chairman Brady Provides Outlook on US Trade Agenda

On December 13, 2011 the Washington International Trade Association (WITA) hosted House Ways and Means Trade Subcommittee Chairman Kevin Brady (R-TX) for a discussion on the US trade agenda. Although Chairman Brady outlined a number of trade issues that he will attempt to address within the House Ways and Means Subcommittee on Trade during 2012, he placed particular emphasis on the need to complete the Trans-Pacific

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Partnership (TPP) Agreement, manage the US-China bilateral trade relationship, and extend Permanent Normal Trade Relations (PNTR) to Russia.

With respect to the TPP, Chairman Brady urged the Obama Administration to seek a mid-2012 conclusion to the Agreement. He also welcomed the interests of Japan, Canada and Mexico in joining the Agreement, but warned that countries interested in joining TPP should be required to meet the high standards of the Agreement without slowing down the negotiation of the same. In particular, Chairman Brady stated that Japan must resolve certain US-Japan bilateral trade issues before it accedes to the Agreement. More specifically, he cited the need for Japan to grant increased market access to US beef products, medical devices and insurance services. Chairman Brady also provided comments on a number of the Agreement's texts. With regard to the labor chapter, Chairman Brady noted that text should not include provisions that go beyond those included in the "May 10 Agreement."³ He further noted that, should USTR decide to include provisions that go beyond the "May 10 Agreement," the Obama Administration would lose key Republican support for TPP. In addition, he called for the inclusion of Investor-State Dispute Settlement provisions in the TPP that apply equally to all countries party to the TPP. Finally, Chairman Brady expressed his support for legislation extending Trade Promotional Authority (TPA) in 2012 that will pave the way for the implementation of TPP, as well as the pursuit of a broader trade agenda.

Chairman Brady also noted his support for Russia's accession to the WTO. Although Russia was formally invited to join the WTO on December 16, 2011, sources note that the country will not likely complete its accession until mid-2012. According to Chairman Brady, Russia's accession will improve the US-Russia bilateral trade relationship as it will subject Russia to a rules-based trading system. The US Congress must pass and the President must enact legislation establishing Permanent Normal Trade Relations (PNTR), *i.e.*, most favored nation (MFN) status, with Russia before its accession to the WTO is complete in order to prevent Russia from denying MFN market access to US firms which they would otherwise enjoy as a result of Russia being within the WTO. In order to grant Russia PNTR, Chairman Brady noted that Congress will need to waive the Jackson-Vanick Amendment (under Title IV of the Trade Act of 1974), which prevents the United States from establishing PNTR unless the relevant country fulfills "freedom of emigration" conditions under the Amendment. In its attempt to revoke the Jackson-Vanick Amendment and grant Russia PNTR, Chairman Brady noted that members of Congress will likely want to address certain issues regarding US-Russia relations, including: (i) international security, especially with respect to Iran; (ii) Russia's protection of human rights; (iii) market access for US agricultural products; and (iv) Russia's ability to protect IPR. He expressed concern regarding Congress' ability to grant Russia PNTR with his statement "I've counted a lot of votes in my time. This will be a very heavy lift." Even so, he stated his intention to hold a hearing on the issue in the near term so that Congress can schedule a vote within the first half of 2012.

According to Chairman Brady, the US-China trade relationship will continue to be a prominent item on the US trade agenda. He was careful to note that, going forward, management of the US-China relationship should not

³ The May 10 Agreement, a compromise deal reached by then President Bush with House Democrats to break a partisan stalemate on the US-Peru and US-Panama Free Trade Agreements (FTAs) and allow for their consideration in Congress, provided for the inclusion in pending and future FTAs of core international labor and environmental protection standards and loosened intellectual property rights (IPR) provisions.

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center on China's alleged currency manipulation. According to Chairman Brady, indigenous innovation, IPR enforcement, and export restraints on raw materials are all issues that are just as important as China's alleged currency manipulation. He further noted that the US-China bilateral trade relationship would benefit from a bilateral investment treaty (BIT). Nonetheless, Chairman Brady also acknowledged that because the Obama Administration's review of the model BIT has not yet been completed, it is unlikely that any progress on a US-China BIT can be made in the near term.

In addition to these three priority issues, Chairman Brady also commented on a number of additional trade issues, including:

- **African Growth and Opportunity Act (AGOA).** Chairman Brady stated his support for the extension of AGOA's third country fabric provision;
- **Miscellaneous Tariff Bills (MTBs).** Chairman Brady expressed his support for MTBs, *i.e.* bills that request the temporary reduction or suspension of duties on certain US imports in order to improve the competitiveness of US manufacturers. He argued that MTBs are different from earmarks and thus should be granted by Congress; and
- **WTO Doha Negotiations.** Although Chairman Brady acknowledged that the next steps for the WTO Doha negotiations remain unclear, he stated his support for the negotiation of innovative sectoral agreements within the WTO. According to Chairman Brady, such plurilateral agreements could focus on issues such as trade in environmental goods or services.

According to Chairman Brady, the US government must capitalize on the momentum created by the October 2011 passage of the three FTAs between the United States and Colombia, Panama and Korea and pursue a robust trade agenda. Nonetheless, experts note that the distractions associated with the looming 2012 congressional and Presidential elections will likely serve as an obstacle to maintaining momentum behind the US trade agenda.

CAFC Finds That US CVD Law Does Not Apply to NME Countries

On December 19, 2011 the US Court of Appeals for the Federal Circuit (CAFC) affirmed the US Court of International Trade's (CIT) October 2010 finding in *GPX Int'l Tire Corp. v. United States*, which ruled that the US Department of Commerce's 2007 interpretation of the US countervailing duty (CVD) law as permitting the imposition of CVDs on goods from China was "unreasonable" because of the high likelihood of "double counting" when both CVDs and antidumping duties are assessed against goods from "non market economy" (NME) countries. The CAFC, however, affirmed on a different ground, holding that "when amending and reenacting countervailing duty law in 1988 and 1994, Congress legislatively ratified earlier consistent administrative and judicial interpretations that government payments cannot be characterized as „subsidies“ in a non-market economy context, and **thus that countervailing duty law does not apply to NME countries.**" (emphasis added.)

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USTR Responds to EU Compliance Report on WTO Airbus Case with Request for Consultations, Request for Authorization to Impose Countermeasures

On December 9, 2011 USTR Ron Kirk announced that the United States has requested WTO consultations with the EU regarding the EU's December 1, 2011 notification that it has fully complied with the WTO Appellate Body ruling in *European Communities and Certain Member States--Measures Affecting Trade in Large Civil Aircraft* (DS316). In a December 9, 2011 press release, USTR also states that the United States has simultaneously asked the WTO Dispute Settlement Body (DSB) for permission to impose countermeasures against the EU.

USTR initiated DS316 in October 2004. The May 2010 Panel Report found, *inter alia*, that "launch aid" provided by certain EU member states to the European aircraft manufacturer Airbus is prohibited by the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). The EU appealed the Panel's ruling in July 2010. On May 18, 2011 the WTO Appellate Body circulated its findings, which affirmed the panel's central findings.

According to Article 7.9 of the WTO SCM Agreement, a WTO Member country has 6 months to withdraw, or take the appropriate steps to remove the adverse effects of, a subsidy found to be prohibited by the SCM Agreement. On December 1, 2011, exactly 6 months after the Appellate Body Report was adopted, EU Trade Commissioner Karel De Gucht released the *EU Compliance Report to the WTO Dispute Settlement Body in DS316*, which outlined 36 actions the EU has taken to come into compliance with the WTO DSB's ruling. In its December 9 press release, USTR claimed that "the EU has not withdrawn the subsidies in question and has, in fact, granted new subsidies to Airbus" development and production of large civil aircraft." USTR therefore requested permission to impose countermeasures under Article 22.2 of the WTO Dispute Settlement Understanding (DSU). According to USTR these countermeasures would likely be in the range of USD 7-10 billion per year, but will not be imposed until the United States and the EU engage in "further WTO proceedings."

Experts note that, in light of the time and resources the United States and the EU have already invested in DS316, it is not surprising that this issue remains unresolved. It is expected that the United States and the EU will be prepared to defend their respective positions at the next meeting of the DSB, which is scheduled for December 19, 2011.

USTR Requests WTO Dispute Settlement Panel with China Regarding Duties on Poultry

On December 8, 2011, USTR Ron Kirk announced that the United States has requested that the WTO establish a dispute settlement panel to address the antidumping (AD) and countervailing (CV) duties China has placed on US chicken "broiler products," which are both chicken products that are not cut into pieces, as well as various cuts and pieces. According to USTR Kirk, "[t]he United States will not stand idly by while China appears to have misused its trade remedy laws and put American jobs at risk."

The December 8 request follows USTR's September 20, 2011 request for WTO consultations with China regarding the same issue. The WTO Dispute Settlement Understanding (DSU) gives parties 60 days to resolve

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their differences through consultations. Consultations between the United States and China were held on October 28, 2011. According to USTR, the parties were unable to resolve the dispute. The WTO DSU states that the panel, which typically consists of 3 governmental and/or non-governmental individuals (none of whom can be citizens of the countries party to the dispute), should issue its report on the case within 6 months of the date on which the panel is formed. If the panel concludes that the contested measure is inconsistent with a WTO agreement, the panel will use its report to identify the inconsistent measure and recommend that the WTO member concerned bring the measure into conformity. If the member disagrees with the panel's conclusion, it may appeal the case to the WTO Appellate Body for further review.

The Chinese government announced in April 2010 it would impose CV duties of between 4 and 31.4 percent on most US chicken imports. Five months later, in September 2010, the Chinese government announced that it would also levy antidumping duties of between 50.3 and 105.4 percent on imports of US chicken products. Sources note that US poultry producers sold roughly USD 650 million of chicken products to China in both 2008 and 2009, but shipments fell to approximately USD 136 million in 2010 and totaled only USD 37 million in the first half of 2011.

According to USTR, China's imposition of these duties violates numerous provisions under the General Agreement on Tariffs and Trade (GATT) as well as the WTO's Antidumping Agreement (ADA) and the WTO's Agreement on Subsidies and Countervailing Measures (SCM Agreement). More specifically, the United States is concerned that China failed to calculate the true cost of production based on data supplied by the US industry. According to a September 20, 2011 joint statement by the USA Poultry & Egg Export Council and the National Chicken Council, China used "average cost of production" to determine normal value, which reflects neither market realities nor the way in which companies in the industry commonly keep their accounts. In addition, the United States has accused the Chinese government of failing to undertake an objective evaluation of the causal link between the alleged dumped and subsidized imports and the alleged financial injury suffered by Chinese producers.

Experts note that USTR's December 8 request comes in the context of increased tension between the United States and China regarding the application of trade remedy laws. After several US solar firms filed a petition on October 19, 2011 alleging that China subsidizes and dumps its exports of crystalline silicon photovoltaic cells to the United States, China's Ministry of Commerce (MOFCOM) announced, on November 29, 2011, its decision to launch its own investigation into the US government's support of the US renewable energy industry. More recently, on December 14, 2011, MOFCOM also announced that it will place AD/CV duties on several types of imported autos from the United States. In response to MOFCOM's actions, USTR Kirk stated on December 15, 2011 that the US government "[is] not going to back down, and [the US government] will never adopt a notion that exercising our rights under the WTO is somehow sparking a trade war."

COAC Recommends Switch to Prospective System of Duty Assessment and Collection

On December 7, 2011 the Advisory Committee on Commercial Operations of Customs and Border Protection (COAC) adopted a recommendation from the COAC Antidumping and Countervailing Duties Subcommittee for the US government to adopt a prospective system to assess antidumping (AD) and countervailing (CV) duties.

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According to the Department of Commerce (DOC), the United States is the only country in the world that currently uses a retrospective system of AD/CV duty assessment.

Under the retrospective system, at the conclusion of the original investigation, DOC issues an AD/CV duty order that requires an estimated duty rate be applied to relevant imports at their time of entry. If an interested party feels that this rate does not accurately reflect the actual amount of dumping or subsidization that is occurring, they can request an administrative review beginning one year after the DOC order is issued. During an administrative review, DOC calculates the final duty rate retrospectively, *i.e.*, DOC uses data collected after the estimated rate was issued to determine the actual amount of dumping or subsidization that has already occurred.⁴ If the actual amount of dumping or subsidization is found to be greater than is reflected in the estimated rate, the relevant importers will be charged accordingly and the duty rate will increase for future shipments. If the actual amount of dumping or subsidization is found to be less than that reflected in the estimated rate, the relevant importers will be refunded accordingly and the duty rate will decrease for future shipments.

In a prospective system of duty assessment and collection, the investigatory process is carried out in much the same way as it is in the retrospective system. Although there are many variations on the prospective system of duty assessment and collection, generally speaking, the major difference between a retrospective and prospective system is that the prospective system does not allow for administrative reviews in which the final duty rate is determined retrospectively. Once the administering authority (*e.g.*, DOC) issues an AD/CV duty order, the duty rates are assumed to be final and are collected on relevant imports at their time of entry. According to the World Trade Organization Antidumping Agreement, countries using a prospective system must allow interested parties to receive a refund in the event that they can prove that the duty collected at the time of entry exceeded the actual margin of dumping. If, however, dumping is found to have increased over the level of duties paid, additional duties are not usually collected. Nonetheless, a new future duty rate can be calculated if an interested party requests an “interim” or “changed circumstances” review.

During the December 7, 2011 meeting, COAC’s Subcommittee on Antidumping and Countervailing Duties (“Subcommittee”) presented its Executive Summary and Draft Recommendations (“Recommendation”), in which it recommended the switch to a prospective system of duty assessment as a means of “effectively administer[ing] the AD/CVD laws as well as maximiz[ing] revenue collection.” The Subcommittee suggested that Customs and Border Protection (CBP) work together with the Treasury Department (“Treasury”) and DOC to design the prospective system. Because the switch to a prospective system will require a change in US law, namely the Tariff Act of 1930, the Subcommittee also suggested that these agencies maintain contact with relevant congressional committees of jurisdiction.

The Subcommittee’s Recommendation was backed by COAC on the same day. Experts note that now the Recommendation will be reviewed by CBP, which will provide COAC with its opinion by February 2012.

⁴ If an administrative review is not requested, the estimated AD/CV duty rate importers paid when the merchandise entered the United States becomes the final amount of duties assessed.

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According to the Subcommittee's Recommendation, a framework outlining the switch to a prospective system could be available for public comment and subsequent legislative activity "within 12 months." Regardless of whether or not the US government decides to change its duty assessment and collection system, the Subcommittee's Recommendation further stated that it will "continue to work with CBP on a wide range of additional ideas to improve AD/CVD enforcement and collection."

David Johanson Sworn In as New ITC Commissioner

On December 8, 2011 David Johanson, a Republican from Texas, was sworn in as a Commissioner of the US International Trade Commission (ITC). President Obama nominated Mr. Johanson to serve as ITC Commissioner on April 7, 2011. The US Senate confirmed Mr. Johanson's nomination by unanimous consent on October 31, 2011. His term as ITC Commissioner will expire on December 16, 2018.

The ITC is an independent, nonpartisan agency responsible for: (i) providing trade expertise to both the US legislative and executive branches of government; (ii) determining the impact of imports on US industries; and (iii) directing actions against certain unfair trade practices, such as intellectual property right (IPR) infringement. The ITC is headed by 6 Commissioners, each of whom is nominated by the President and confirmed by the Senate.⁵ According to the ITC, no more than 3 Commissioners may be of any one political party. Including Mr. Johanson, there are currently 3 Republicans and 3 Democrats serving as ITC Commissioners. Each Commissioner's term lasts 9 years; a new Commissioner is brought on once every 18 months. Mr. Johanson will replace Charlotte Lane, who has served as an ITC Commissioner from August 2003 to December 2011.

During his September 12, 2011 Senate confirmation hearing, Mr. Johanson stated that he was confident his background in international trade has prepared him well to take on the role of ITC Commissioner. Most recently, Mr. Johanson served as International Trade Counsel on the Republican staff of the Senate Finance Committee. In this position, Mr. Johanson was responsible for matters involving the World Trade Organization (WTO), the Free Trade Area of the Americas (FTAA) and the Trans-Pacific Partnership (TPP). Mr. Johanson also worked on legislation for a number of trade preference programs, Trade Adjustment Assistance, and the 2008 Farm Bill. In addition, Mr. Johanson was involved in developing and passing the implementing legislation for the FTAs between the United States and Australia, Bahrain, Chile, Colombia, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Morocco, Nicaragua, Oman, Panama, Peru, Singapore, and South Korea. Before working for the Senate Finance Committee, Mr. Johanson practiced law at the firm Stewart and Stewart. He also worked for Senator Phil Gramm (R-TX), Representative Wally Herger (R-CA), and Rep. George Radanovich (R-CA).

In the statement he provided for his September 12, 2011 Senate confirmation hearing, Mr. Johanson put forth, "[i]f confirmed, I assure the [Senate] Finance Committee that I will administer [US] trade remedy laws in accordance with congressional intent. I will apply these laws in a fair and objective manner, and my decisions will

⁵ The other ITC Commissioners include: Deanna Okun (Chairman), Irving Williamson, Daniel Pearson, Shara Aranoff, Dean Pinkert, and David Johanson.

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be based on facts.” Mr. Johanson also promised to respond in a timely manner to requests from Congress concerning trade-related information and analysis.

United States and Rwanda Ratify BIT

On December 2, 2011, US Trade Representative (USTR) Ron Kirk and Rwandan Minister of Trade and Industry Francois Kanimba ratified the US-Rwanda bilateral investment treaty (BIT) by exchanging instruments of ratification signed by President Obama and Rwandan Prime Minister Damien Habumuremyi. The US-Rwanda BIT was originally signed on February 19, 2008. The US Senate approved the BIT by unanimous consent on September 26, 2011. The BIT will enter into force 30 days from when the treaty was ratified.

According to USTR, which co-led the negotiation of the US-Rwanda BIT with the Department of State (DOS), the treaty provides legal protections that underscore the two countries’ shared commitment to open investment and trade policies. These protections include: (i) non-discriminatory treatment of investors and investments; (ii) the right to freely transfer investment-related funds; (iii) prompt, adequate and effective compensation in the event of an expropriation; (iv) freedom from specified performance requirements (*i.e.* technology transfer); (v) provisions that ensure transparency in governance; and (vi) the right to bring investment disputes before an international, neutral arbitration panel.

The US-Rwanda BIT is the first BIT that the United States has signed with an African country in almost a decade. The United States currently has 40 other BITs in force, 5 of which are with countries in sub-Saharan Africa. According to USTR Kirk, the US government sees Rwanda “as a leader in seeking to transform its economy through open trade and investment. [The US government] hopes that the US-Rwanda bilateral investment treaty will serve as a model for future agreements with other African countries.” Experts note the US government currently sees Mauritius and Ghana as likely candidates for the negotiation of a BIT with the United States.

Formal BIT negotiations were placed on hold in 2009, when the Obama Administration announced its intention to review the BIT model, which was last reworked in 2004. Because the US-Rwanda BIT was signed in February 2008, the treaty’s ratification process has not been interrupted by the review of the BIT model. Experts note that Congress and the Obama Administration are currently exploring ways in which the BIT model can be restructured to include provisions that deal with labor and environmental protection, as well as state-owned enterprises. Critics note that the Obama Administration’s failure to complete its review of the BIT model places the United States as an economic disadvantage, as it prevents the US government from concluding BITs with important trading partners, such as China and India. Nonetheless, experts opine that, with the 2012 Presidential campaign looming, the review is now unlikely to be completed before the next Presidential term starts in January 2013.

House and Senate Lawmakers Urge Commerce Secretary and USTR to Reconsider Proposal on Zeroing

In a November 28, 2011 letter, House Ways and Means Committee Ranking Member Sander Levin (D-MI), House Ways and Means Trade Subcommittee Ranking Member Jim McDermott (D-WA), Sen. Charles Schumer (D-NY) and Sen. Sherrod Brown (D-OH) expressed to Department of Commerce (DOC) Secretary John Bryson and US Trade Representative (USTR) Ron Kirk concerns relating to DOC’s proposal to revise its antidumping

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(AD) duty regulations, particularly in regard to the practice of “zeroing.” DOC’s proposed rule change aims to comply with World Trade Organization (WTO) Appellate Body (AB) rulings in cases brought by EU, Japan, and Mexico, who have complained that DOC’s continued use of zeroing in AD proceedings is a violation of WTO obligations.

DOC proposed on December 28, 2010: (i) changing the fundamental AD calculation methodology used in AD administrative review proceedings; (ii) ending DOC’s practice of disregarding negative dumping margins, or “zeroing,” in the calculation of overall weighted-average dumping margins for AD administrative review proceedings; and (iii) ending the use of zeroing in AD investigations in which a transaction-to-transaction dumping margin calculation methodology is applied. The principle concerns cited in the lawmakers’ November 28 letter are as follows:

- **AB Boundaries.** The lawmakers claim to “fundamentally” disagree with the AB rulings on the use of zeroing as these rulings “impose obligations on the United States that are not found anywhere in the WTO Antidumping Agreement.” The letter asserts that the AB “has no authority to create and impose new rules on WTO members” but, rather, is designed to “clarify existing provisions of [WTO] agreements.” The lawmakers urge the Obama Administration to “reestablish boundaries.” for AB review in order to preserve the United States’ ability to “address unfair and anti-competitive [trade] practices by countries such as China;” and
- **Prospective Nature of Action.** The lawmakers request that, to the extent that the Obama Administration does move to implement the AB rulings on zeroing, this effort be prospective in nature in that it must: (i) “close the door on pending [WTO cases against the US practice of zeroing];” and (ii) the Obama Administration should pursue negotiations with WTO partner countries to remove AB-created disciplines in cases involving zeroing in order to restore the ability of the United States to apply the full scope of trade remedy measures.

The lawmakers’ letter also urges the Obama Administration to ensure that US trade remedy laws “meaningfully address the harm caused by unfairly traded imports,” e.g., review DOC procedures for cases in which: (i) “US affiliates” absorb antidumping duties on behalf of foreign producers; and (ii) dumping occurs which targets specific customers, periods of time and/or geographical areas (“targeted dumping”).

That the letter garnered the signatures of only organized labor-friendly Democrats and no Republicans suggests that the recommendations contained therein likely enjoy only moderate support in the Democrat-controlled Senate and very little support in the Republican-controlled House. In regard to the Executive Branch from which the modification to the US practice of zeroing must emanate, the Obama Administration has expressed on several occasions its intention to come into compliance with the AB rulings although, almost a year after the December 2010 DOC proposal was published in the Federal Register (FR), it remains unclear what form DOC’s final rule on zeroing will assume. Experts note that the crafting of the final rule implementing the AB rulings presents significant challenges, particularly those relating to the recalculation of past dumping margins and

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refunds under Section 129 of the Uruguay Round Agreements Act (URAA).⁶ For example, the European Union (EU) has complained that DOC's December 2010 proposal does not provide for refunds to EU companies whose dumping margins were assessed under the zeroing methodology. However, Section 129 states that the implementation of the rulings shall apply to: (i) unliquidated entries; and (ii) goods that enter the United States on or after the date on which USTR instructs DOC to implement the rulings. Section 129 could therefore prevent DOC and Customs and Border Control (CBP) from recalculating past dumping margins and providing EU companies with refunds on certain goods, e.g., already liquidated goods or goods having entered the United States before USTR instructs DOC to implement the rulings. In light of these considerations, it remains unclear how the Obama Administration will adopt the AB ruling while appeasing both the countries having brought WTO zeroing cases against the United States and complying with Section 129 procedures.

US and EU Convene TEC Meeting, Commit to New Initiatives and Craft Joint Approaches on Trade-Related Issues

On November 29, 2011 the Transatlantic Economic Council (TEC) convened in Washington, DC. The meeting, which followed the November 28, 2011 EU-US Summit, was co-chaired by EU Trade Commissioner Karel De Gucht and US Deputy National Security Advisor for International Economic Affairs Michael Froman. The TEC, which was established in 2007 and meets at least once a year, is the primary forum for economic dialogue between the EU and the United States.

According to the EU-US TEC Joint Statement, the November 29 TEC meeting resulted in a number of new initiatives designed to facilitate economic cooperation and convergence between the United States and the European Union (EU). Below we summarize two important initiatives committed to at the meeting:

- **High-Level Working Group on Jobs and Growth.** At the November 29 EU-US Summit, President Obama, European Commission President Jose Manuel Barroso and European Council President Herman van Rompuy directed the TEC to launch a "High-Level Working Group on Jobs and Growth" ("Group"). According to a White House fact sheet, the Group must "identify policies and measures to increase EU-US trade and investment to support mutually beneficial job creation, economic growth, and international competitiveness." The Group will be co-chaired by US Trade Representative (USTR) Ron Kirk and EU Trade Commissioner De Gucht. The White House fact sheet further states that the Group will examine policy options in five areas, namely: (i) barriers to trade in goods such as tariffs and tariff-rate quotas; (ii) the reduction, elimination or prevention of barriers to trade in goods, services and investment; (iii) opportunities to increase the compatibility of standards and regulations; (iv) the reduction, elimination or prevention of "behind the border" nontariff barriers in the trade of goods, services and investment; and (v) cooperation on the development of rules and principles on global issues of shared concern and shared economic goals relating to third countries. The Group must provide an interim report in June 2012 and final recommendations and conclusions by the end of 2012; and

⁶ Section 129 outlines the procedures a WTO member must follow when complying with adverse WTO decisions in trade remedy disputes.

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- **Secure Traders Program.** After five years of negotiation and cooperation, EU and US officials agreed at the November 29 TEC meeting to mutually recognize their respective secure traders systems. The EU-US Secure Traders Program will allow certified economic operators in both the EU and the United States to benefit from more expeditious and simple customs procedures. The goal of the Program is to reduce the costs, time delays and red tape, *i.e.*, burdensome bureaucracy, associated with EU and US customs procedures. The Program is set to become operational by June 2012.

In addition to the establishment of the High-Level Group on Jobs and Growth and the Secure Traders Program, the EU-US TEC Joint Statement outlines ways in which the United States and the EU will work together to develop joint approaches to a number of trade-related issues, including, *inter alia*:

- **Electric Vehicles and Smart Grids.** EU and US officials signed a “letter of intent” to establish two interoperability centers, one in the United States and one in Italy, which will work to develop a common, EU-US joint approach to the testing of products such as electric vehicles and smart grids with the goal of developing the global standards for these products;
- **Emerging Technologies.** EU and US officials agreed to “intensify cooperation” to develop joint approaches to regulatory issues and trade barriers associated with a number of new technologies, including nanotechnology and cloud computing;
- **Raw Materials.** EU and US officials agreed to develop joint trade policies aimed at encouraging the stable supply of raw materials as well as eliminating barriers associated with trade in raw materials;
- **Investment.** EU and US officials agreed to enhance cooperation on investment measures as they pertain to barriers in third countries; and
- **Regulatory Issues.** EU and US officials adopted and encouraged the implementation of several agreements meant to increase regulatory cooperation, including “Common Understanding on Regulatory Principles and Best Practices” as well as “Building Bridges Between the US and EU Standards System.”

Experts note that the commitments made at the November 29 TEC meeting reflect the changing dynamic of the EU-US trading relationship. More specifically, initiatives such as the High-Level Working Group on Jobs and Growth reflect the shared interest in restructuring the EU-US trading relationship in such a way that both the EU and the United States overcome their current, shared challenges of high levels of debt and unemployment as well as slow economic growth. With regard to this potential restructuring, USTR Kirk has stated that all options are on the table, “ranging from „TEC plus” to a potential [free trade agreement].” Experts opine that it is still too soon to anticipate what recommendations the Group is likely to make. In addition, the EU-US joint approaches to numerous economic areas reflect the growing need for the EU and the United States to work together to increase their market share in emerging markets such as China, Brazil, and India. Despite the commitments made at the TEC meeting, experts note that efforts to promote a significantly deeper EU-US trading relationship will not likely be pursued until the current European debt crisis subsides.

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USITC Commissioners Unanimously Vote to Allow Continuance of AD/CVD Investigations in Chinese Solar Panel Case

On December 2, 2011, the United States International Trade Commission (ITC) determined, by the unanimous vote of all six Commissioners, that US industry is likely injured by crystalline silicon photovoltaic cell imports originating in China and allegedly subsidized and sold in the United States at less than fair value. USITC's affirmative determination allows the Department of Commerce (DOC) to continue conducting antidumping (AD) and countervailing duty (CVD) investigations on these imports.

SolarWorld Industries America, Inc. ("Petitioner"), supported by the Coalition for American Solar Manufacturing, filed the petition for the AD/CVD investigations on October 19, 2011. On November 8, 2011, DOC initiated said investigations, covering merchandise falling under Harmonized Tariff System of the United States (HTSUS) subheadings 8501.61.00.00, 8507.20.80, 8541.40.60.20 and 8541.40.60.30. DOC is expected to deliver its preliminary AD determination on or around March 22, 2012 and its preliminary CVD determination on or around January 12, 2012.

Shortly before the ITC issued its December 2 determination, a group of 6 Democratic Senators and 53 Democratic House lawmakers⁷ sent a letter to President Obama expressing support for US AD/CVD measures to be applied to solar panel imports from China. The lawmakers' letter seconds SolarWorld's petition and alleges that the Chinese government unfairly provides its domestic green industry with: (i) loans at below-market interest rates; (ii) cheap or free land from local or provincial governments; (iii) tax breaks and other state assistance; (iv) a price advantage by means of currency undervaluation; and (v) access to export credit. In addition to expressing support for the Chinese solar panel AD/CVD investigations, the lawmakers also urge President Obama to dedicate greater resources and attention to enforcement activities before the World Trade Organization (WTO), and to cooperate with Congress to support US green manufacturing through such measures as targeted tax credits.

⁷ Rep. Edward J. Markey (D-MA), Rep. Sander Levin (D-MI), Sen. Ron Wyden (D-OR), Rep. Steny Hoyer (D-MD), Rep. Chris Van Hollen (D-MD), Sen. Sherrod Brown (D-OH), Rep. Peter DeFazio (D-OR), Rep. Mazie Hirono (D-HI), Sen. Charles Schumer (D-NY), Rep. Mark Critz (D-PA), Rep. Ben R. Lujan (D-NM), Sen. Sheldon Whitehouse (D-RI), Rep. Dennis J. Kucinich (D-OH), Rep. Betty McCollum (D-MN), Sen. Carl Levin (D-MI), Rep. Carolyn B. Maloney (D-NY), Rep. Jackie Speier (D-CA), Sen. Jeff Merkley (D-OR), Rep. Edolphus "Ed" Towns (D-NY), Rep. Jim Moran (D-VA), Rep. Peter Visclosky (D-IN), Rep. Jerrold Nadler (D-NY), Rep. Michael Michaud (D-ME), Rep. Linda Sanchez (D-CA), Rep. John Conyers, Jr. (D-MI), Rep. Bobby L. Rush (D-IL), Rep. Charles B. Rangel (D-NY), Rep. Jim McGovern (D-MA), Rep. John Garamendi (D-CA), Rep. Steve Cohen (D-TN), Rep. Louise M. Slaughter (D-NY), Rep. Lloyd Doggett (D-TX), Rep. David Cicilline (D-RI), Rep. John D. Dingell (D-MI), Rep. G. K. Butterfield (D-NC), Rep. Mike McIntyre (D-NC), Rep. Rosa L. DeLauro (D-CT), Rep. Chris Murphy (D-CT), Rep. Earl Blumenauer (D-OR), Rep. Emanuel Cleaver, II (D-MO), Rep. Raul M Grijalva (D-AZ), Rep. John Lewis (D-GA), Rep. Dave Loebsack (D-IA), Rep. Daniel Lipinski (D-IL), Rep. Pete Stark (D-CA), Rep. Peter Welch (D-VT), Rep. Roscoe Bartlett (R-MD), Rep. John Carney (D-DE), Rep. Gary Peters (D-MI), Rep. John F. Tierney (D-MA), Rep. Gene Green (D-TX), Rep. Kurt Schrader (D-OR), Rep. Barbara Lee (D-CA), Rep. Dale Kildee (D-MI), Rep. Heath Shuler (D-NC), Rep. Rush Holt (D-NJ), Rep. Collin C. Peterson (D-MN), Joe Baca (D-CA), Rep. Adam B. Schiff (D-CA)

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Despite the ITC's December 2 affirmative determination and the apparent strong support from Senate and House Democratic lawmakers for the US government to enforce trade rules both unilaterally and before the WTO, there remains a deep divide in the United States between supporters and detractors of the ongoing DOC AD/CVD investigation into imports of solar equipment from China. Detractors, comprised of US suppliers of inputs to Chinese solar cell firms as well as wholesale and end-user buyers of finished Chinese solar cells, argue that imposing trade remedy measures on imports of Chinese-origin solar cells will likely make solar energy unaffordable for Americans. On the contrary, supporters posit that China's alleged dumping and subsidization threaten the viability of the US solar industry. Regardless of whether DOC issues affirmative preliminary CVD and AD determinations in January and March of 2012, respectively, new Chinese investigations into US support of its domestic green industry have vindicated fears that China would retaliate. In the context of the US-China trading relationship, which is already tense due to China's alleged currency undervaluation and IPR violations, as well as US restrictions on Chinese foreign direct investment (FDI), the imposition of US trade remedy measures on Chinese-origin solar cells could potentially derail constructive US-China dialogue regarding not only bilateral trade, but also other areas of cooperation.

President Obama Moves toward Granting PNTR to Russia in Making 1106(a) Determination

On December 15, 2011, President Obama issued a determination under Section 1106(a) of the Omnibus Trade and Competitiveness Act of 1988 ("Section 1106(a)") with respect to Russia, declining to invoke the non-application provisions of the WTO Agreement. President Obama's determination represents one in a series of steps the US government must take before it can grant Permanent Normal Trade Relations (PNTR), *i.e.*, Most Favored Nation (MFN) status, to Russia.

Russia was formally invited to join the World Trade Organization (WTO) on December 16, 2011. Sources note that Russia is expected to complete its domestic ratification process and formally accede to the WTO by mid-2012. The US Congress must pass and the President must enact legislation establishing PNTR with Russia before its formal accession occurs in order to prevent Russia from denying MFN market access to US firms, which they would otherwise enjoy as a result of Russia's WTO membership.

Section 1106(a) requires that, before a country accedes to the WTO, the US President determine the following: (i) whether that country's state-trading enterprises account for a significant share of that country's exports or goods that compete with imported goods; and (ii) whether the state-trading enterprises of that country unduly burden, restrict, or adversely affect the US economy or US trade. If the President finds (i) and (ii) to be in the affirmative, the President can choose to withhold extension of the application of the WTO Agreement between the United States and the acceding country until that country enters into an agreement with the United States that requires the acceding country's state-trading enterprises to participate responsibly in the international trading system.

The President's December 15 Section 1106(a) determination finds the following: (i) Russia's state trading enterprises account for a significant share of Russia's exports and goods that compete with imports into Russia; and (ii) Russia's state trading enterprises unduly burden and restrict, or adversely affect, the foreign trade of the United States or of the US economy, or are likely to result in such a burden, restriction or effect. Despite the

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affirmative determinations of (i) and (ii), the memorandum further states that: (i) the terms and conditions for Russia's accession to the WTO include Russia's commitments that it will ensure that state-owned and state-controlled enterprises will operate in a manner consistent with applicable provisions of the WTO Agreement; (ii) Russia's state-trading enterprises will make purchases and sales based solely on commercial considerations; and (iii) US businesses will have an adequate opportunity to compete with Russia's state-trading enterprises. As a result of these findings, the President states, "[t]hus my determinations under section 1106(a) do not require invocation of the non-application provisions of the WTO Agreement."

Experts note that although the President's Section 1106(a) determination represents an important step, the revocation of the Jackson-Vanick Amendment's (under Title IV of the Trade Act of 1974) application to Russia will represent the more difficult hurdle towards granting Russia PNTR. The Jackson-Vanick Amendment prevents the United States from establishing PNTR with a country unless that country fulfills certain "freedom of emigration" conditions under the Amendment. Experts note that lawmakers will want to address other issues with respect to US-Russia relations before voting of the revocation of the Jackson-Vanick Amendment's application to Russia. Such issues are likely to include, *inter alia*: (i) international security concerns, especially with respect to Iran; (ii) Russia's record on the protection of human rights; (iii) Russia's ability and willingness to protect intellectual property rights (IPR); and (iv) market access for US agricultural products. In the words of House Ways and Means Trade Subcommittee Chairman Kevin Brady (R-TX), "I've counted a lot of votes in my time. This will be a very heavy lift."

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FREE TRADE AGREEMENTS

Free Trade Agreement Highlights

TPP Negotiators Complete “Mini-Round” of Negotiations

From December 5-9, 2011, the Malaysian government hosted an informal round of negotiations on the Trans-Pacific Partnership (TPP) Agreement in Kuala Lumpur. As instructed by the leaders of the TPP countries, who met on the sidelines of the November 11-13, 2011 Asia Pacific Economic Cooperation (APEC) Leaders Summit in Honolulu, Hawaii, negotiators from all nine countries currently party to the TPP⁸ attended the meeting to continue their work on the Agreement and schedule further negotiation rounds for 2012.

Although only select TPP working groups convened during the meeting, a December 9, 2011 press release from the US Trade Representative (USTR) labeled the meeting the tenth TPP negotiating round. Working groups that met during the meeting included those relating to: (i) market access; (ii) investment; (iii) services; (iv) non-conforming measures; (v) rules of origin; and (vi) intellectual property rights (IPR). According to USTR, teams negotiating the tariff packages for the following also met: (i) industrial goods; (ii) agricultural goods; and (iii) textiles. The parties agreed not to hold stakeholder sessions or media briefings following the round in Kuala Lumpur. In addition, they also agreed that no bilateral discussions would be held with any other countries (*i.e.*, Canada, Japan, Mexico, etc.) that have expressed interest in joining in the negotiations. Finally, the parties also worked toward crafting a schedule for the 2012 TPP negotiation rounds. The next full round of TPP negotiations is tentatively scheduled to take place in early March 2012 in Australia.

Since Canada, Mexico and Japan expressed interest in joining TPP at the November 2011 APEC Leaders Summit, the US government has intensified its focus on the Agreement. On December 7, 2011 USTR published a Federal Register notice requesting comments on the possible addition of these 3 countries to the Agreement. In addition, USTR Ron Kirk met with the Senate Finance Committee on December 8, 2011 to discuss the Agreement. Finally, the House Ways and Means Committee will hold a hearing on TPP on December 14, 2011.

Although USTR Kirk has welcomed the interest of these 3 countries in joining TPP, he has also stated that the possible expansion of TPP cannot be allowed to distract countries currently party to the TPP from negotiating a final Agreement. In light of this stated position, Assistant USTR (AUSTR) for Japan, Korea and APEC Affairs Wendy Cutler recently articulated the new “two-track” approach USTR will take with regard to TPP. According to AUSTR Cutler, USTR will maintain a simultaneous yet separate focus on both: (i) continuing the current negotiation of the TPP Agreement; and (ii) consultations regarding the addition of the 3 new countries to the TPP. With respect to (ii), AUSTR Cutler further noted that USTR will engage in a consultative process regarding the possible addition of Japan, Mexico and Canada to TPP that will resemble the “intensive and inclusive” approach

⁸ Current members of the TPP include: the United States, Malaysia, Brunei, Vietnam, Singapore, Chile, Australia, New Zealand, and Peru.

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USTR used to consult stakeholders as it negotiated the December 2010 agreement for US-Korea Free Trade Agreement (FTA). By taking the time to thoroughly address stakeholder concerns, AUSTR Cutler noted that USTR hopes it can achieve strong, bi-partisan congressional support.

Experts note that, despite USTR's goal of garnering strong congressional support, the Obama Administration currently lacks the negotiating authority required to submit a finalized TPP agreement to Congress for an up-or-down vote, *i.e.* Trade Promotional Authority (TPA).⁹ On November 30, 2011, USTR Kirk acknowledged that the Obama Administration will eventually have to request TPA from Congress. Although he commented that his agency has already engaged in a "quiet dialogue" with Congress regarding this issue, USTR Kirk also stated that "[USTR] wants to make sure [the process by which it secures TPA] is a thoughtful process and [USTR] can get it in an expedited manner." Experts note that if and when TPP nears completion, the Obama Administration will likely intensify work with Congress to craft legislation extending TPA in such a manner that allows USTR to fast-track congressional consideration of a finalized TPP Agreement, but does not provide President Obama with a broader trade agenda to pursue.

Despite the increased attention paid to TPP in the weeks following the November 2011 APEC Leaders Summit, experts note that TPP negotiators will have to overcome serious hurdles in order to complete TPP's legal texts before the 2012 deadline the Obama Administration has set. More specifically, experts expect TPP negotiators to experience gridlock over a number of contentious issues, including disciplines for state-owned enterprises (SOEs), IPR protection, and labor rights, among others. Although it remains unclear how much of an issue the international trade agenda will be in the 2012 US Presidential election, experts also note that President Obama will have to successfully frame TPP negotiations in the context of job creation and export growth in order to garner the domestic support needed to pursue a finalized TPP.

House Ways and Means Trade Subcommittee Holds Hearing on TPP

On December 15, 2011, the House Ways and Means Trade Subcommittee held a hearing on the ongoing negotiations of the Trans-Pacific Partnership (TPP) Agreement. During the first panel of the hearing, Deputy US Trade Representative (USTR) Demetrios Marantis testified regarding the negotiation of the Agreement's legal texts as well as the interest expressed by Japan, Mexico and Canada in joining the Agreement.

During the question and answer period of the first panel, lawmakers posed questions relating to key TPP issues to Deputy USTR Marantis. Below we highlight the key issues addressed:

- **Access to Medicines.** According to the Trade Subcommittee's Ranking Member Jim McDermott (D-WA), the US proposal regarding access to medicines in the TPP will harm the ability of the United States to continue

⁹ TPA expired on July 1, 2007.

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effectively treating sick people in developing countries.¹⁰ Deputy USTR Marantis responded that the US proposal will help drive access to medicines in a way that also fosters innovation;

- **Data Protection for Biologics.** A number of lawmakers, including Reps. Wally Herger (R-CA), Aaron Schock (R-IL), John Larson (D-CT), and Lynn Jenkins (R-KS) asked Deputy USTR Marantis to comment on provisions regarding data protection for biologics in the TPP. Deputy USTR Marantis stated that USTR has not yet tabled text on the issue and that “it’s an open question in terms of how to handle it” as the Affordable Health Care for America Act mandates 12 years of data protection for biologics and the Obama Administration’s 2012 budget assumes 7 years of data protection for biologics;
- **Intellectual Property Rights.** Reps. Charles Boustany (R-LA) and Dave Reichert (R-WA) asked Deputy USTR Marantis to comment on the TPP’s intellectual property rights (IPR) chapter. Deputy USTR Marantis noted that the chapter will strengthen traditional approaches to trademark protection and geographic indicators, and include provisions that require criminal penalties for trade secret theft;
- **Services.** Reps. Dave Reichert (D-WA) and Joseph Crowley (D-NY) asked Deputy USTR Marantis how TPP will create a level playing field for US service providers in the Asia-Pacific region. According to Deputy USTR Marantis, TPP negotiators are working to address a number of services barriers in the Asia-Pacific region, including licensing requirements in the financial services sector, high equity limitations, and access to data in the electronic commerce sector;
- **Labor.** House Ways and Means Subcommittee on Trade Chairman Kevin Brady (R-TX) reiterated his view that TPP’s labor chapter should not include provisions that go beyond the “May 10 Agreement.”¹¹ In contrast, Rep. Lloyd Dogget (D-TX) stated his view that the labor provisions of the “May 10 Agreement” should serve as the minimum standard for the TPP’s labor chapter. Rep. Dogget also expressed his support for the inclusion of the International Labor Organization (ILO) core standards in the TPP;
- **China.** A number of lawmakers, including Reps. Geoff Davis (R-KY) and Vern Buchanan (R-FL) asked Deputy USTR Marantis how TPP will affect the US-China bilateral trading relationship. According to Deputy USTR Marantis, TPP will establish a model for how trade should be conducted in the Asia-Pacific region, with countries that both are and are not party to the TPP;
- **Japan.** Several lawmakers asked questions regarding Japan’s interest in joining TPP. Rep. Crowley stated his view that Japan should be required to address issues such as market access for imports of US autos

¹⁰ In September 2011 USTR released a white paper explaining its Trade Enhancing Access to Medicines initiative for the TPP. According to the white paper, USTR proposes that TPP countries offer certain pharmaceutical-specific intellectual property protection to innovators who bring medicines to market in TPP countries within an agreed window of time.

¹¹ The May 10 Agreement, a compromise deal reached by then President Bush with House Democrats to break a partisan stalemate on the US-Peru and US-Panama Free Trade Agreements (FTAs) and allow for their consideration in Congress, provided for the inclusion in pending and future FTAs of core international labor and environmental protection standards and loosened intellectual property rights (IPR) provisions.

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before it is allowed to accede to the Agreement. Rep. Adrian Smith (R-NE) asked Deputy USTR Marantis for an update on Japan's efforts to increase market access for US beef. Although Deputy USTR Marantis stated there was "no news" to report, he noted that the TPP's text on sanitary and phytosanitary (SPS) measures will likely go beyond the provisions included in the World Trade Organization (WTO) SPS Agreement.

At the Asia-Pacific Economic Cooperation (APEC) Leaders Summit in November 2011, TPP negotiators presented the broad outlines of the Agreement and President Obama expressed his support for a 2012 completion of the Agreement. Experts note that, despite the increased attention paid to TPP in the weeks following the APEC Leaders Summit, TPP negotiators will have to overcome serious hurdles in order to complete TPP's legal texts before the 2012 deadline President Obama has set. More specifically, experts expect that TPP negotiators will experience gridlock over a number of the issues highlighted by lawmakers during the December 15 Trade Subcommittee hearing, particularly IPR protection and labor rights. The next round of TPP negotiations will be held in Australia in March 2012.

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CUSTOMS

United States and Canada Agree on Border Security and Regulatory Cooperation

Summary

In a December 7, 2011 press conference, President Obama and Canadian Prime Minister Stephen Harper unveiled two bilateral initiatives relating to US-Canada border security and regulatory cooperation. The leaders assert that the Beyond the Border Action Plan (BTB) and the Regulatory Cooperation Council Action Plan (RCC) promote transparency, efficiency and the free and secure flow of people and trade across the US-Canada border without compromising safety and security.

Analysis

BTB and RCC action plans stem from a February 4, 2011 announcement by President Obama and Prime Minister Harper that the US and Canadian governments would work jointly toward facilitating cross-border business, which led to 10 months of bilateral consultation on trade and security. We provide below the key highlights of each action plan.

I. BEYOND THE BORDER

The BTB action plan contained the following two trade-related elements:

- **Trade Facilitation, Economic Growth and Jobs.** The parties agreed to enhance the benefits of their “trusted travelers” programs through: (i) adopting common requirements and a single application for the “trusted travelers” programs and enhancing the benefits of the same; (ii) increasing harmonized benefits to NEXUS members; and (iii) enhancing facilities used by “trusted traveler” programs. The parties also agreed to develop additional initiatives for expediting legitimate travelers through: (i) implementing additional pre-inspection and pre-clearance initiatives; (ii) facilitating the conduct of cross-border business; (iii) providing for a single customs window; (iv) harmonizing low-value shipment processes to expedite customs administration and thus promote supply chain connectivity; and (v) reducing business costs by increasing transparency in the assessment of border fees and charges. In addition, the parties agreed to improve shared border infrastructure and technology through: (i) coordinating border infrastructure investment at major and lesser crossings; (ii) implementing a border wait-time measurement system at crossings; (iii) implementing radio frequency identification (RFID) technology at crossings to facilitate secure passage and expedite processing; and (iv) enhancing binational port operations committees; and
- **Addressing Threats Early.** The parties agreed to stop threats before they arrive in the United States and Canada through: (i) developing a harmonized approach to inbound cargo screening; (ii) mutually recognizing passenger baggage screening; and (iii) conducting joint assessments and audits for plant, animal and food safety systems in third countries. The parties also agreed to establish a common approach to perimeter

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screening that will promote security and border efficiency through: (i) establishing a common approach to screening travelers; (ii) sharing information to improve immigration and border determinations, establish and verify identities of travelers and conduct early passenger screenings; and (iii) establishing and coordinating entry and exit systems. Additionally, the parties agreed to develop a common approach to assessing threats and identifying those who pose threats through: (i) carrying out joint, integrated threat assessments; (ii) sharing information and intelligence in support of law enforcement; (iii) enhancing domain awareness in air, sea and land environments; and (iv) cooperating to counter violent extremism.

The parties will establish a Beyond the Border Executive Steering Committee (BTB ESC) to oversee the successful implementation of the Action Plan¹² and to ensure transparency and accountability. BTB ESC will first convene before June 30, 2012, with the objective of releasing its first Beyond the Border Implementation Report by December 31, 2012. Additionally, the parties will devise privacy principles to inform and guide information and intelligence sharing under the BTB action plan. US and Canadian officials shall complete these principles by May 30, 2012.

II. REGULATORY COOPERATION COUNCIL

The RCC action plan contains the following four trade-related elements:

- **Agriculture and Food.** The parties agreed to address food safety-related issues through: (i) developing common approaches to food safety to minimize the need for foreign inspections; (ii) enhancing equivalence agreements for meat safety systems; (iii) establishing mutually recognized food safety laboratory criteria, test results and methodologies; (iv) streamlining the certification requirements for meat and poultry. The parties also agreed to address issues relating to agricultural production through: (i) further aligning crop protection product approvals and establishing maximum pesticide residue limits; (ii) further aligning marketing application submission and review processes for veterinary drugs; (iii) developing a perimeter approach to plant protection, using, where possible, certification requirements for cross-border shipments; (iv) developing a common approach to “zoning” of foreign animal diseases. In addition, the parties agreed to address marketing-related issues through: (i) creating a common meat cut nomenclature; and (ii) developing comparable approaches to financial risk mitigation tools for US and Canadian fruit and vegetable producers;

¹² BTB also contains the following two elements that do not appear to have any direct trade-related implications:

- **Cross-Border Law Enforcement.** The parties agreed to deepen cooperative investigation and prosecution efforts through: (i) cooperating on national security and transnational criminal investigations; and (ii) providing interoperable radio capability for law enforcement agents; and
- **Critical Infrastructure and Cyber security.** The parties agreed to enhance the resiliency of shared critical and cyber infrastructure through: (i) executing programs and developing joint products to enhance the protection and resiliency of critical cross-border infrastructure; (ii) protecting vital government and critical digital infrastructure of binational importance; and (iii) expanding joint leadership on international cyber security efforts. The parties also agreed to respond rapidly to and recover from disasters and emergencies in the border region through: (i) managing traffic at the border in times of emergency; (ii) enhancing preparedness and response capacity for health security threats; and (iii) establishing binational plans for chemical, biological, radiological, nuclear and explosive-related emergencies.

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- **Transportation.** The parties agreed to address road and rail transportation-related issues through: (i) ensuring greater alignment of existing motor vehicle safety standards; (ii) reviewing and establishing a common standard setting agenda for all new motor vehicle standards; (iii) jointly supporting the integration of intelligent transportation systems; and (iv) aligning rail safety standards. The parties also agreed to address marine transportation-related issue through: (i) establishing a US-Canada safety and security framework for the Saint Lawrence Seaway and Great Lakes transport system; (ii) aligning marine transportation security requirements to prevent redundancy; and (iii) aligning recreational boat manufacturing standards and developing common standard for lifejackets. Additionally, the parties agreed to: (i) align US and Canadian dangerous goods containment standards; and (ii) cooperate on regulations related to unmanned aircraft systems.
- **Health, Personal Care Products and Workplace Chemicals.** The parties agreed to: (i) implement a Common Electronic Submission Gateway to allow pharmaceutical industry applicants to submit e-documents to both the US Food and Drug Administration (FDA) and to Health Canada; (ii) develop and adopt common monographs for routine over-the-counter drugs; (iii) increase compatibility between US and Canadian routine surveillance good manufacturing practices (GMP) inspection reports; and (iv) align classification and labeling requirements for hazardous workplace chemicals; and
- **Environment.** The parties agreed to: (i) enhance information sharing, technical work-sharing, scientific collaboration and testing under the existing US-Canada Air Quality Committee; (ii) jointly work toward reducing greenhouse gas emissions from locomotives; and (iii) consider an expansion of the US-Canada Air Quality Agreement to better address air particulate matter.

Under the action plan, RCC will convene quarterly to review and discuss progress made by the working groups. Stakeholders will be engaged in these meetings biannually and progress reports will be released to the public on a regular basis.

Outlook

The Obama Administration has emphasized the importance of BTB and RCC, noting that the United States and Canada are each other's largest export markets, with total bilateral trade and investment having totaled approximately USD 1.1 trillion in 2010. In its press release following the announcement of the two initiatives, the Obama Administration also asserted that, in addition to shared bridges, tunnels, pipelines and electricity grids, US-Canada supply chains are "integrally linked," noting that goods often cross the US-Canada border several times throughout the goods' processing. Both the US and Canadian Chambers of Commerce lauded the two initiatives, asserting that BTB can strengthen US and Canadian physical and economic security, and RCC strengthens the competitive position on US and Canadian firms. Experts note that the United States and Canada have, in the past, been able to engage each other in constructive cooperation on commercial matters, but critics note that the initiatives lack specific "next steps" and binding mile markers such that success of the BTB and RCC largely depends on the positive disposition of the two parties to progress on items of mutual interest. With 2012 being an election year in the United States and US job growth showing few signs of accelerating in the near-term, the Obama Administration must frame any forward movement on international trade in the context of creating jobs and increasing exports. In this regard, whether President Obama takes meaningful action to implementing

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BTB and RCC in 2012 in part depends on his administration's ability to communicate how these initiatives will work toward these ends.

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