



# White & Case LLP General Trade Report - JETRO

January 2011

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# UNITED STATES

## GENERAL TRADE POLICY

### Forecast 2011: New Congress Could Bring New Priorities

#### Summary

After a year of trade policy stagnation in the United States, shift in domestic political dynamics in the United States – namely the election of the Republican-controlled House of Representatives combined with a focus on job creation and debt reduction – could create the policy space needed for significant trade policy achievements in 2011. However, the Obama Administration has shown only modest signs of moving forward with a robust and coherent trade agenda. All of the bilateral Free Trade Agreements (FTAs) negotiated by the previous Administration remain unimplemented, and only in late 2010 were there signs of possible movement by the United States to implement the US-Korea FTA (KORUS). President Obama did outline a trade policy in March 2010, but that document has provided little impetus to US activity on the bilateral and multilateral stage. Approval of at least KORUS is likely but prospects for consideration and passage of the pending FTAs with Colombia and Panama in 2011 remain unclear. The US continues to engage in negotiations with its Trans-Pacific Partnership (TPP) FTA partners, however, the ambitious schedule for completion of the agreement (set for November 2011) seems unlikely to be met. The past year also witnessed little progress on the multilateral Doha Round, and it remains unclear if key WTO Members can generate the momentum needed to conclude the Round in 2011. Several WTO disputes involving the United States are ongoing, from the US practice of “zeroing” to alleged Chinese subsidies to wind energy equipment manufacturers. Furthermore, the Obama Administration has demonstrated a preference for addressing trade irritants before the WTO as well as through bilateral consultation and dialogue as opposed to unilateral action such as legislation to impose sanctions. US trade tensions with China seem to have reached a plateau and are unlikely to escalate in 2011, a sentiment reinforced by a recent visit to Washington, DC by Chinese President Hu Jintao during which Presidents Obama and Hu were able to reach agreements on a range of trade tensions. Moreover, last year’s Congressional focus on China’s currency policies are likely to fade, as the Republican-controlled House pursues other US trade policy priorities.

#### Analysis

The year 2011 will likely feature standard trade themes, including but not limited to: (i) Congressional approval of pending bilateral Free Trade Agreements (FTAs) and continued US negotiation of the TPP FTA; (ii) a challenging but less acrimonious US-China relationship with less focus on China’s currency practices; (iii) Congressional reauthorization of US preference programs; (iv) uncertain progress in the stalled “Doha Round” of World Trade Organization (WTO) negotiations; and (v) US involvement in several WTO dispute settlement proceedings. We review these themes below.

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## I. POTENTIAL ACTIVITY ON US TRADE AGREEMENTS

There is likely to be increased activity on pending bilateral free trade agreements (FTAs) in the forthcoming year. The new Republican leadership in the House of Representatives, notably incoming House Ways and Means Trade Subcommittee Chairman Rep. Kevin Brady (R-TX), has expressed a desire to move all pending FTAs (*i.e.*, Colombia, Korea, and Panama) to a final vote within the first six months of 2011. While the President's 2010 Trade Policy Agenda, released in March 2010, states a desire to resolve and implement all outstanding FTAs, the Administration has expressed objections to moving the three pending FTAs as a single package in Congress, or in tight succession. Rather, the Administration has expressed a desire to obtain passage of the nearly complete KORUS FTA by July 1, 2011, with the two remaining FTAs to be considered at a later date. Thus, while 2011 will likely see some action on pending FTAs, the precise contours of that action remain uncertain, and likely subject to political posturing between Congressional Republicans and the Administration. Heightened emphasis on job creation and export promotion, and pressure from Congressional Republicans could create important policy space for the United States to make progress on FTAs in 2011.

On Trade Promotion Authority (TPA), TPA expired in mid-2007 and the Administration has expressed little desire to recover it. While implementing legislation for the US-Korea and US-Panama FTAs can arguably still be considered in Congress under TPA, the lack of TPA renewal for future FTA negotiations (or to consider implementing legislation for the US-Colombia FTA) will continue to affect US trade policy in 2011 and beyond. US trading partners view TPA as an essential commitment to liberalized trade and a necessary tool for trade negotiations with the United States, and they could view the absence of TPA as an indication that the United States is not committed to free trade. The absence of TPA could mean that US trading partners will continue distancing themselves from negotiating with the United States because they have no guarantee that Congress will not alter a negotiated trade agreement once completed (indeed, US trading partners have continued their negotiation of bilateral and regional FTAs with other countries in light of the United States' "stalled" trade policy and the lack of movement in the Doha Round). Nonetheless, although TPA expired in mid-2007, USTR seems to be moving ahead on FTA negotiations with the Trans-Pacific Partnership (TPP) countries under a TPA model. Also, Sen. Joseph Lieberman and Sen. Rob Portman introduced a bill on January 25, 2011 (Creating American Jobs through Exports Act of 2011) that would reauthorize TPA, but the bill has seen little movement and garnered only modest attention since its introduction.

### Latin America: Colombia and Panama FTAs

**Colombia.** Little progress on advancing the US-Colombia FTA was made in 2010. The Obama Administration has indicated that it is working with Colombia to improve its labor code, and reduce violence against labor union officials. However, the Administration has not indicated what steps, if any, Colombia would need to take in order to address outstanding US concerns. Earlier this month, House Ways and Means Committee Ranking Member Rep. Sander Levin (D-MI) visited Colombia, likely in anticipation of renewed Congressional focus on the US-Colombia FTA. Senate Finance Committee Chairman Sen. Max Baucus (D-MT) is also expected to visit Colombia in February 2010, and is believed to support passage of the US-Colombia FTA. The government of Colombia has indicated its intent to step up lobbying efforts to push the agreement to a vote. Colombian Vice President Garzón visited Washington, DC in late-January 2011 to kick off these efforts. House Republicans, led by House Ways and Means Trade Subcommittee Chairman Rep. Brady have also expressed a desire to move

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forward with consideration of the agreement. House Democrats, led by House Ways and Means Trade Subcommittee Ranking Member Rep. Joseph Crowley (D-NY) have not rejected this proposal out of hand, though Rep. Crowley has also expressed a willingness to defer to USTR the scheduling of FTA votes. USTR Kirk has indicated the Administration's preference to move forward with the KORUS FTA by July 1, 2011, with the US-Colombia FTA to be considered at an as of yet unspecified time thereafter. **Therefore, while prospects for introduction to Congress and passage of the implementing legislation for the US-Colombia FTA in 2011 remain unclear, pressure is mounting both on the part of congressional Republicans and within President Obama's own party to submit the US-Colombia FTA to Congress for a vote.**

**Panama.** Despite the relative lack of controversy surrounding it, the US-Panama FTA remains stalled. The US-Panama FTA was initially held hostage by political situations in Panama that raised alarm among some US legislators. The September 1, 2007 election of Pedro Miguel González Pinzón as President of Panama's National Assembly altered the FTA's support in Congress in 2008 because González Pinzón has an outstanding warrant for his arrest in the United States for the June 1992 slaying of US Army Sgt. Zak Hernández Laporte and the attempted murder of Sgt. Ronald Marshall outside Panama City. González Pinzón, however, completed his term of office in September 2008, and his departure from the National Assembly cleared the way for Congressional consideration of the FTA. The US-Panama FTA is considered by many a non-controversial trade agreement (especially because a majority of products from Panama already enter the United States duty-free) with big geopolitical linkages (*i.e.*, the Panama Canal is an important sea route). A US-Panama Tax Information Exchange Agreement reached on November 30, 2010 addressed most of the issues US lawmakers had with moving forward on the US-Panama FTA but labor reform remains a sticking point with Congressional Democrats and the Obama Administration. However, the Administration has not indicated what specific steps Panama would need to take in order to address these lingering concerns. As noted above, Republicans in the House have indicated a desire to press ahead with the US-Panama FTA. However, the Administration remains committed to passage of the KORUS FTA before moving to the FTA with Panama. **The US-Panama FTA could again see little Congressional action, though pressure from House Republicans could result in progress being made in 2011, particularly if the Obama Administration agrees to consider the US-Panama FTA implementing legislation with that of KORUS in mid-2011.**

#### Asia-Pacific: KORUS and the TPP FTAs

**Korea.** Of the three pending FTAs, the KORUS FTA received the most attention from the Administration in 2010. For a time, it looked as if the FTA might be beyond hope. The failure of US and Korean negotiators to resolve differences on autos and beef ahead of a self-imposed deadline of the November 2010 G-20 meeting in Seoul produced serious doubts as to the agreement's future. However, on December 3, 2010, USTR Kirk and Korean Trade Minister Kim Jong-Hoon announced that the United States and Korea had resolved issues related to tariffs on autos. This supplemental agreement, which modifies the terms of the KORUS FTA originally signed in June 2007, essentially delays phase-outs on auto tariffs. Most notable is that the United States will be allowed to maintain a 25% tariff on Korean trucks until year eight of the agreement, with a total phase-out by year ten (the FTA as signed in 2007 would have required a linear phase-out of the 25% tariff over ten years). USTR Kirk has expressed a desire to obtain Congressional approval of the KORUS FTA by July 1, 2011. Despite the Administration's commitment, a number of potential issues remain outstanding. First, the December 2010 supplemental agreement did not address US concerns about market access for beef and it is unclear whether

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any further substantive changes to the KORUS FTA will be made before its submission to Congress. Thus, failure to resolve market access for beef could generate opposition. Second, it is unclear if the December 2010 supplemental agreement will be considered under the now-expired TPA provisions. While the 2007 Agreement qualifies KORUS for TPA procedures, there are concerns that the substantive changes made at the end of 2010 make the amended KORUS FTA ineligible for TPA. Despite these possible impediments, the Administration appears keen to finalize and obtain passage of the KORUS FTA during 2011. The December 2010 supplemental agreement appears to have paved the way to meeting that goal, and pressure from the US business community mounts as the July 2011 implementation of the US-Korea FTA looms on the horizon. **Coupled with the Republican-controlled House, it seems likely that the KORUS FTA will be implemented in 2011.**

**Trans-Pacific Partnership FTA.** The Trans-Pacific Partnership (TPP) FTA represented the most active negotiating front for the United States during 2010. Initially notified to Congress in December 2009, The TPP negotiating parties<sup>1</sup> conducted four rounds of negotiations in 2010. Progress on the agreement has been characterized by some as uneven. For instance, negotiators have produced draft texts in a number of non-controversial areas including goods, customs, and sanitary and phytosanitary measures. However, in other areas, such as investment, financial services, textiles and rules of origin, progress has been much slower, with some countries, including the United States, having failed to table formal proposals.

The most recent round of negotiations held in New Zealand in December 2010 revealed significant divisions on two major issues:

- **Intellectual Property Rights (IPR).** New Zealand argued that the IPR-related provisions in the TPP should follow the World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) while the United States argued that TRIPS does not satisfactorily offer protection of IPR, particularly with respect to copyright and trademark issues. The US position on IPR is also typical of its FTA negotiations.
- **Investment.** Labor unions and advocacy groups from both Australia and New Zealand signaled their strong opposition to the inclusion of an investor-state mechanism in the Agreement whereby foreign investors would be allowed to challenge a sovereign government in response to that government taking regulatory action unfavorable to the foreign investor. Negotiators from Australia and New Zealand argued that an investor-state mechanism would restrict the ability of a TPP member to regulate in such areas as environment, labor, access to medicines and food labeling. These negotiators also argued that the investor-state mechanism lacks transparency and accountability and that the appeals processes in the arbitration tribunals charged with adjudicating in dispute settlements are deficient. The United States, which has pushed for and achieved the inclusion of the investor-state mechanism in previous FTAs, supports the inclusion of the mechanism in the TPP, arguing that US foreign direct investment (FDI) in other TPP member countries will be greater if US investors are able to engage directly with the foreign government in dispute settlement proceedings. Congressional Democrats, however, have expressed opposition, at least with respect to New Zealand and Australia, claiming that both have court systems that would adequately protect foreign investment.

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<sup>1</sup> United States, Singapore, Chile, Brunei, Peru, Australia, New Zealand, Malaysia and Vietnam

In addition to the issues arising from the most recent negotiating round, other sectoral issues are likely to pose challenges to negotiators in 2011. This includes market access for dairy and beef, and textile issues. The US has also made no proposals for the labor or environment chapters of the TPP FTA. President Obama pledged in his election campaign that US trade agreements must contain 21st Century obligations in terms of labor and the environment. However, to date, this rhetoric has not been expressed in the form of concrete proposals. The current TPP contains a labor memorandum of understanding (MOU) and an environmental cooperation agreement between the parties that pledge that the parties will work together to promote sound labor and environmental practices, while respecting the right of parties to set, administer and enforce their own labor and environmental laws. US negotiators could, however, seek to strengthen the labor and environmental provisions of the agreement beyond the current language, thereby potentially lengthening negotiations.

A number of structural issues also remain unaddressed in the TPP FTA negotiations. For example, the United States continues to push for a “hybrid” approach on market access such that already existing bilateral market access schedules (as part of current FTAs in effect) would remain in place and a separate, overarching market access schedule would take effect for countries between which no bilateral market access schedule exists. The US “hybrid” approach proposal is not, however, supported by Australia, which has expressed a strong interest in re-opening the US-Australia FTA in order to gain better access to the US dairy market. New Zealand also opposes the “hybrid” approach.

Even if negotiators are able to meet the ambitious timeline set for conclusion of the TPP, a significant obstacle remains: Congress. As noted above, TPA has expired. And while the TPP FTA has been notified to Congress in accordance with the TPA, there has been little indication from Congressional leaders that they would be willing to accord a completed TPP FTA the benefit of the “fast-track” procedures under TPA. A second problem that could arise in Congress with respect to the TPP FTA is the status of Vietnam within the agreement. Some Members of Congress have already expressed reservations with Vietnam’s involvement. House Ways and Means Committee ranking member Rep. Sander Levin (D-MI) has noted that the US participation in the TPP FTA negotiations presents a “challenge within a new trade policy of grappling with the inclusion of a country, Vietnam, transitioning from a non-market economy with government control of key sectors, restrictions in the Vietnamese labor market, and absence of worker rights.” In December 2010, the National Council of Textile Organizations indicated that it would be willing to support Vietnam’s inclusion in the TPP FTA if sufficient safeguards against Vietnamese apparel exports were included. It remains unclear, however, how Congress will treat the inclusion of Vietnam in any agreement submitted for consideration. Thus, while work on the TPP FTA negotiations will continue into 2011, it is far from clear that an agreement will be finalized before the end of the year. Moreover, the lack of a credible path forward in terms of Congressional approval could make it difficult for the United States to effectively negotiate the final terms of any deal.

The fifth round of TPP FTA negotiations is expected to be held in February in Chile. **TPP FTA negotiators have planned four additional negotiating rounds for 2011, with the goal of concluding the agreement by the time of the APEC Summit scheduled for November 2011. However, this timeline may be overly optimistic.**

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### Other Agreements

In the past, the United States has employed Trade and Investment Framework Agreements (TIFAs) and Bilateral Investment Treaties (BITs) with viable US trading partners. Both types of agreements are considered precursors to full-fledged FTAs and provide some benefits to US trading partners while strengthening trade ties at the same time. The United States has already initiated BIT negotiations with China, India and Vietnam in the past several years. BITs have three main purposes: (i) to protect investment abroad in countries where investor rights are not already protected through existing agreements; (ii) to encourage the adoption of market-oriented domestic policies that treat private investment in an open, transparent, and non-discriminatory way; and (iii) to support the development of international law standards consistent with these objectives. BITs protect the rights of the participating countries' foreign subsidiaries and investors in their BIT partner's home market and, under US trade policy, typically precede formal FTA negotiations.

During 2010, the United States did not formally commence any new BIT and TIFA negotiations with trading partners. In 2009, the Administration tasked the State Department with creating a panel to conduct a formal review of investment provisions in US FTAs and the US model BIT. Despite expectations that the BIT review process would be completed during 2010, the review process is ongoing. US officials have stated that "during the review, the United States will continue technical discussions in the BIT negotiations and informal discussions that have already begun, including those with China, India and Vietnam." Under Secretary of State for Economic, Energy, and Agricultural Affairs Robert Hormats recently stated that Congress will be consulted during the upcoming year on the US model BIT. One issue that may receive attention is the extent to which environment and labor provisions should be included in BITs. No timeline for consultation with Congress has been established. **As with 2010, the forthcoming year could see little progress in terms of new US BITs or TIFAs.**

## II. US-CHINA RELATIONS

Trade relations with China will likely continue to be a focus both for Congress and the Administration in 2011. However, the election of a Republican majority in Congress will likely broaden the range of US-China trade issues that are discussed and lead to a less adversarial tone from Congress, particularly in the House of Representatives. In 2010, Congress emphasized China's currency practices, and many Members took an aggressive stance on the issue. House Ways and Means Chairman Rep. Dave Camp (R-MI) and Trade Subcommittee Chairman Rep. Kevin Brady (R-TX) have indicated that they intend to focus on a broader China agenda, including compliance with multilateral obligations. Furthermore, both have indicated that China currency legislation (HR 2378, a bill authorizing the Department of Commerce (DOC) to apply US countervailing duties (CVD) on goods imported from countries deemed to have fundamentally misaligned currencies) passed in September 2010 would not be brought up again for hearings or a vote.

Trade relations between China and the United States were also recently boosted by Chinese President Hu Jintao's visit to Washington, DC. The joint statement issued at the conclusion highlighted progress on a number of issues:

- **Government Procurement.** China agreed to end its policy of conditioning government procurement on the origin of the intellectual property (IP). China also reaffirmed its intention to table a revised offer for accession

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to the World Trade Organization's Government Procurement Agreement (GPA). As opposed to China's original offer for accession to the GPA, the revised offer encompasses government purchases by so-called "sub-central" entities;

- **IPR.** China agreed to audit the use of licensed software by government agencies and to make available to the United States the results of those audits. At the 21st session of the Joint Commission on Commerce and Trade (JCCT), held from December 14-15, 2010 in Washington, DC, China had agreed to enforce the use of licensed software in government agencies. Consequently, China's most recent commitment to carry out audits of the use of this software is a further step toward addressing US concerns over IPR;
- **Currency.** Before broaching the issue of the alleged misalignment of the Chinese currency (RMB) at the joint press conference, Presidents Obama and Hu agreed that, in order to ensure a stronger and more balanced global economic growth, China will need to boost domestic demand and deal with rising inflation, and the United States will need to spend less, save more and increase exports. President Obama, directly addressing the contentious issue of currency, then posited that "the RMB remains undervalued" and that the United States will continue to look for the value of the RMB to be increasingly driven by the market. Further adjustment in the exchange rate, according to President Obama, "can be a powerful tool for China to boost domestic demand and lessen inflationary pressures in [its] economy"; and
- **Bilateral Investment Treaty (BIT).** Presidents Obama and Hu reaffirmed their commitment to the ongoing negotiations for a US-China BIT. Successfully concluding the BIT, according to the joint press statement, would facilitate and protect investment, and enhance transparency and predictability for both US and Chinese investors.

**While it is too soon to tell what effect President Hu's visit will eventually have on US-China economic relations, it seems likely that domestic political attention on China trade in 2011 will fall short of the partisan rancor witnessed in 2010.** However, enforcement will likely remain a top priority for the United States *vis-à-vis* China. The United States has not hesitated to use domestic tools (such as the 2009 Section 421 decision on Chinese tires and AD/CVD investigations) to respond to Chinese trade practices, and although future Section 421 cases appear unlikely, other domestic enforcement efforts should continue. Moreover, USTR will likely continue to challenge China's compliance with multilateral obligations through formal WTO dispute settlement. However, the heightened tensions that have characterized the last 18 – 24 months of US-China relations should recede in 2011.

### III. US PREFERENCE PROGRAMS

In past years, members of US Congress have vowed to explore amendments to US preference programs. However, the expiry of the Generalized System of Preferences (GSP) program owing to a dispute over sleeping bags, and the scheduled expiration of the Andean Trade Promotion Act (ATPA) on February 13, 2011 have made renewal, as opposed to reform, the top priority in terms of preference programs. Additionally, Senator Grassley's departure from the Senate Finance Committee means that a primary advocate for preference program reform will no longer be a part of the legislative process at the committee level. House and Senate staff have been meeting to discuss a path forward for the renewal of GSP and ATPA, but details have yet to emerge. **Short-term reauthorization of these preference programs, retroactive to the beginning of 2011, appears**

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**somewhat likely and would constitute a victory, given the dispute that emerged over GSP at the end of 2010.**

#### **IV. DOHA NEGOTIATIONS**

Completion of a final WTO Doha Round agreement has been delayed several times over the past few years, and 2010 did not witness any concrete movement forward beyond firm promises made by leaders at the G-20 Summit in Seoul, Korea and at the APEC Summit in Yokohama, Japan in November 2010 to conclude the Round before 2012. Early indications suggest that 2011 could see some attempt to advance the Doha Round and recent statements by US Ambassador to the WTO Michael Punke have indicated a sense of urgency in pushing the Doha Round forward. However, the United States has not yet put forth to its negotiating partners any new concrete commitments and other major trading partners have offered little sign of willingness to make the concessions needed to make any meaningful progress on the Round. Despite the uncertainty of the Round, the Obama Administration has been taking steps that signal potential future movement on the negotiations. For example, the Administration has recently been soliciting the negotiating priorities of the US agricultural sector. Pressure to reduce the budget deficit in the United States could create a window of opportunity to make further concessions on agricultural subsidies, though such windows have previously failed to produce major gains in the Doha Round.

The negotiations suffer from the same issues that have bogged down the multilateral talks over the past several years. Agriculture negotiations continue to stall over several issues, including the needed reductions in agricultural support programs in developed countries and an agriculture special safeguard mechanism (SSM). Developed and developing countries continue to argue over the final contents of an agriculture agreement, and at this stage, the United States and other WTO Members have not indicated that they are willing to issue revised offers. Similar to the agriculture negotiations, the non-agricultural market access (NAMA) negotiations also remain entrenched on several issues, including tariff coefficients for which WTO Members must agree on the "Swiss formula" of tariff cuts. Finally, the Rules and Services negotiations continue to be victim of the Agriculture and NAMA talks, with WTO Members focusing their energies on Agriculture and NAMA and devoting little of their attention to Services and Rules.

In late January 2011, two informal minister-level meetings on the Doha Round were held on the sidelines of the annual World Economic Forum in Davos, Switzerland. While no breakthrough was made at these meetings, some experts opine that the meetings created momentum towards completing the Doha Round in 2011. World Trade Organization Director-General Pascal Lamy also held a Green Room meeting with senior officials in late January 2011. According reports, the chairmen of the negotiating groups are expected to issue revised texts in all issue areas by the end of March, and to attempt to reach major breakthroughs in a ministerial meeting held in the summer. **Revitalizing the Doha Round will clearly require major steps by major players early in the year if any progress is to be achieved by year's end.** While no major US trade partners have expressed a desire to walk away from the Doha Round completely, November 2011 will mark the 10-year anniversary of the launch of the Round. A failure to complete an agreement in 2011 would only fuel calls to abandon negotiations completely.

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## V. WTO DISPUTE SETTLEMENT PROCEEDINGS

**Although there may be little movement on the stalled Doha Round, the United States will likely be busy on the trade dispute front**, handling complaints from its trading partners on a range of issues, from “zeroing” to subsidies:

- **Zeroing.** The United States Department of Commerce’s (DOC) practice of “zeroing” in antidumping investigations and administrative reviews has been one of the most extensively-litigated measures in the WTO and, similar to 2010, the United States could see more dispute settlement activity regarding this methodology in 2011. Despite DOC’s proposal to abandon the use of “zeroing”, key US trading partners, namely the EU and Japan, question whether DOC’s proposal will bring the United States in line with the several WTO rulings on the matter (DS294, DS322, DS350 and DS402).
- **Farm subsidies.** The United States may also be involved in disputes brought by other WTO Members regarding US agricultural support in 2011. The Obama Administration supports US ethanol subsidies and has also left unaltered US sugar policy, despite multiple adverse WTO rulings. Consequently, WTO Members may bring the United States to task on its agricultural support through dispute settlement measures. There is, however, a possibility that the United States could commit to gradually draw down its agricultural support programs in the medium-term. Were G-20 and APEC leaders to fulfill their November 2010 commitment to conclude the Doha Round before 2012, the United States would almost certainly be required to reduce its agricultural subsidy programs in order to gain desired concessions from such large emerging economies as Brazil, China and India on market access for industrial goods and services. The current US farm support programs are funded through 2012 under the Food, Conservation and Energy Act of 2008 such that, were the Doha Round not to be concluded before then, the agricultural support programs under the United States’ next farm bill will likely use the Uruguay Round commitments as a benchmark.
- **US-Brazil Cotton Subsidy Dispute.** Regarding the long-standing US-Brazil cotton dispute (DS267) in which, in November 2009, a WTO Dispute Settlement Panel formally gave authorization for Brazil to impose sanctions on US imports in response to US subsidies to cotton production, Brazil has expressed general satisfaction with US efforts to implement an April 2010 agreement whereby the United States is to modify its export credit guarantee program, establish a USD 147 million technical assistance fund for Brazilian cotton farmers and declare beef from the Brazilian Santa Catarina region free of foot-and-mouth disease. Brazil continues to insist, however, that the United States must eliminate all subsidies to its domestic cotton production such that further WTO Dispute Settlement Panel activity is possible in 2011.
- **Raw Materials Export Retraints in China.** This ongoing dispute involves a complaint by the United States, Mexico and the EU on China’s export quotas and duties on certain raw materials used for the production of steel and chemicals (DS394). According to the Dispute Panel, a decision on DS394 is expected in the first half of 2011.
- **AD/CVD Double Remedy on Certain Good from China.** A WTO Dispute Settlement Panel found in favor of the United States on October 22, 2010 in a dispute brought by China in September 2008 (DS379) concerning AD and CVD measures applied by DOC on certain Chinese imports. The Panel found that the United States has the right to impose both AD and CVD duties on dumped and subsidized products from such non-market

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economies (NMEs) as China. China filed an appeal to this ruling on December 1, 2010, and the WTO Appellate Body's ruling is expected in mid-March.

- **Boeing-Airbus.** The ongoing Boeing-Airbus dispute between the United States and the EU will continue in 2011. The dispute centers on the payment of government subsidies to the US aircraft-manufacturer Boeing Company and its European rival, Airbus. A WTO Dispute Settlement Panel is expected to rule by mid-2011 on EU allegations concerning US government subsidies afforded to Boeing in the form of research and development contracts and tax breaks (DS353) although an interim report distributed only to the parties in late January 2011 reportedly back some of the EU claims. In a related case (DS316), the United States is claiming that Airbus has also received significant government subsidies in the form of preferential "launch loans."
- **Canadian Feed-In Tariffs.** The United States asked on September 28, 2010 to participate as a third-party in WTO dispute proceedings (DS412) brought by Japan concerning Ontario's (Canada) green energy feed-in tariff (FIT) program, which Japan alleges contains discriminatory domestic content rules that favor Canadian suppliers over foreign suppliers. According to reports, the proceedings, still in the consultations phase, have yielded little progress such that the case will likely lead to a formal Dispute Settlement Panel being assembled in 2011.
- **Chinese Subsidies to Wind Energy.** USTR announced on December 22, 2010 that it had initiated WTO dispute settlement proceedings (DS419) challenging alleged illegal subsidies given by China to its domestic producers of wind energy equipment. The United States claims that the subsidies are prohibited under WTO rules due to grants awarded under the "Special Fund for Wind Power Manufacturing" program are reportedly contingent upon the Chinese equipment manufacturers using parts and components made in China. If the United States and China fail to resolve the matter within 60 days of the consultations being requested, the United States may request that a Dispute Settlement Panel rule on the claims. This Canada-Japan FIT dispute could be a harbinger of future WTO disputes over "green" energy and technologies.

## VI. PROPOSED DOC CHANGES TO AD/CVD PROCEEDINGS

A key element of the Obama Administration's National Export Initiative (NEI), a policy announced by President Obama in the State of the Union Address on January 27, 2010 to double US exports by 2015, is to more rigorously enforce US trade remedy laws. Stemming from this, DOC has proposed and requested comments on several changes to US AD/CVD procedural rules for both case initiations and administrative reviews. These changes encompass modifications to the fundamental AD calculation methodology used in administrative review proceedings, the *de facto* criteria examined to establish a separate rate in antidumping proceedings involving non-market economy countries and the methodology for respondent selection in AD proceedings. These proposed changes, coupled with the above-mentioned DOC proposal to abandon the use of "zeroing", constitute a notable shift in the application of US trade remedy law. On balance, according to experts, these changes could collectively create an environment in which US industry might perceive greater incentives to file petitions for initial AD/CVD investigations. Final rules on the proposed changes are expected in the first half of 2011.

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## Outlook

Although 2011 promises a milder congressional stance on China and some advancement of US trade agreements, US trade policy overall should not differ drastically from that of 2010. The United States continues to battle high unemployment, the lingering economic woes of the economic crisis continue to contribute to a certain measure of skepticism toward free trade on the part of the US electorate and the Obama Administration remains an unenthusiastic advocate of trade liberalization. However, the shift in the US Congress resulting from the November 2010 midterm elections, in which the typically pro-free trade Republicans gained majority-control of the House and greater representation in the Senate, does give the Obama Administration a certain measure of maneuvering room to pursue the few free trade initiatives it does support, including the introduction to Congress of the implementing legislation for KORUS. Nevertheless, it should be noted that President Obama has, in the past, been reluctant to expend political capital in pursuit of a more liberal (pro-free trade) US trade agenda such that the prospects for the Obama Administration to send to Congress the implementing legislation for the US-Colombia and US-Panama FTAs remains unclear. It is possible that, due to the small significance of the US-Panama FTA in terms of trade volume and the little controversy surrounding it, the Obama Administration could attach the implementing legislation for this FTA to that of KORUS without much resistance from his own Democratic base. Sources note, however, that US organized labor has quietly promised to dedicate significant resources to block the US-Colombia FTA from consideration and passage in Congress. Consequently, beside recent comments from Secretary of State Hillary Clinton and Vice President Joseph Biden suggesting possible congressional consideration of the US-Colombia FTA in 2011 once "key issues" are addressed, there is no other strong indication that the Agreement will be implemented in 2011 although this possibility cannot be ruled out.

With regard to non-FTA US trade policy in 2011, a greater Republican voice in the current 112th Congress will likely translate into engagement with China on a broader range of trade issues such as IPR, indigenous innovation and compliance with multilateral obligations. Also, the calls for unilateral action to address China's currency practices will likely be muted as compared to 2010 although they will not disappear. On US trade preference programs, while the prospects in 2011 for a comprehensive GSP reform remain unclear, it is likely that GSP (as well as ATPA) will be renewed once a solution to the dispute on sleeping bags is found. This GSP renewal will likely contain language applying benefits retroactively as has been done in the past when GSP has expired. On the Doha Round, whether the Round is completed depends upon the willingness of the United States and other developed economies to make the concessions needed on reducing its farm support programs and, also, on the willingness of emerging economies to offer greater market access for industrial goods and services. Furthermore, negotiating parties need to make these concession offers in the first quarter of 2011 in order to be able to conclude the Round before 2012, a year which experts deem difficult for further progress to be made due to political considerations. Any significant reduction in US farm support is a hard proposition for the Obama Administration to sell to a rural American electorate, particularly as campaigns for the 2012 presidential elections are soon to commence, but the widely-known need for the United States to reduce spending could facilitate the Obama Administration effecting these reductions. As of yet, however, neither developed nor emerging economies has come forward with these needed concession offers although sources note Doha negotiating activity in Geneva is at its highest level since 2008 when the talks collapsed such that the possibility that the Round be completed in 2011 cannot be ruled out. Finally, US involvement in WTO Dispute Settlement proceedings either directly or as a third-party is likely to remain strong in light of the Obama Administrations

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express preference for this avenue of engagement on contentious trade issues and the willingness of US trading partners, particularly China, to engage on this front.

In conclusion, official US trade policy as dictated by the Executive Branch (Obama Administration) will very much mirror that of 2010, focusing on increasing US exports while enforcing US trade laws, including trade remedy measures. The unofficial, parallel US trade policy emanating from the Legislative Branch, however, will be measurably less hostile to trade liberalization in 2011 as compared to Congress' stance in 2009 and 2010 due to Republican gains in the November 2010 elections. This shift toward a more free trade-friendly legislative agenda will likely allow the Obama Administration to pursue certain trade items with which it agrees while applying pressure on the Administration to engage on the trade items it would otherwise ignore.

## ***General Trade Policy Highlights***

### **House Ways and Means Chairman Announces Republican Appointments to Subcommittees for 112th Congress**

On December 6, 2011, the House Ways and Means Committee Chairman Rep. Dave Camp (R-MI) announced the Republican appointments to several House Ways and Means subcommittees for the 112th Congress, including that of Trade. Rep. Kevin Brady (R-TX) will serve as Chairman of the House Ways and Means Subcommittee on Trade and will be accompanied by the following House Members: Rep. Geoff Davis (R-KY), Rep. Dave Reichert (R-WA), Rep. Wally Herger (R-CA), Rep. Devin Nunes (R-CA), Rep. Vern Buchanan (R-FL), Rep. Adrian Smith (R-NE), Rep. Aaron Schock (R-IL) and Rep. Lynn Jenkins (R-KS). House Democrats have yet to announce their appointments to these Subcommittees.

Republicans appointed to the Full House Ways and Means Committee are Chairman Dave Camp (R-TX), Rep. Wally Herger (R-CA), Rep. Sam Johnson (R-TX), Rep. Kevin Brady (R-TX), Rep. Paul Ryan (R-WI), Rep. Devin Nunes (R-CA), Rep. Pat Tiberi (R-OH), Rep. Geoff Davis (R-KY), Rep. Dave Reichert (R-WA), Rep. Charles Boustany (R-LA), Rep. Dean Heller (R-NV), Rep. Peter Roskam (R-IL), Rep. Jim Gerlach (R-PA), Rep. Tom Price (R-GA), Rep. Vern Buchanan (R-FL), Rep. Adrian Smith (R-NE), Rep. Aaron Schock (R-IL), Rep. Chris Lee (R-NY), Rep. Lynn Jenkins (R-KS), Rep. Erik Paulsen (R-MN), Rep. Rick Berg (R-ND) and Rep. Diane Black (R-TN). Democrats appointed to the Full House Ways and Means Committee are Ranking Member Sander Levin (D-MI), Rep. Charles Rangel (D-NY), Rep. Pete Stark (D-CA), Rep. Jim McDermott (D-WA), Rep. John Lewis (D-GA), Rep. Richard Neal (D-MA), Rep. Xavier Becerra (D-CA), Rep. Lloyd Doggett (D-TX), Rep. Mike Thompson (D-CA), Rep. John Larson (D-CT), Rep. Earl Blumenauer (D-OR), Rep. Ron Kind (D-WI), Rep. Bill Pascrell (D-NJ), Rep. Shelley Berkley (D-NV) and Rep. Joseph Crowley (D-NY).

Upon announcing the Republican appointments to the subcommittees, Chairman Camp noted the "big challenges ahead of [the United States] to reinvigorate the economy and create jobs." Among the challenges Chairman Camp noted was to "expand [the US'] trade opportunities."

Further appointments to the House Ways and Means Committee and Subcommittees can be found here: <http://waysandmeans.house.gov/About/Members.htm#7>.

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## US Requests Binding Arbitration with Canada over Softwood Lumber

On January 18, 2011, the Office of the US Trade Representative (USTR) announced that the United States is requesting binding arbitration under the 2006 Softwood Lumber Agreement (SLA), which put in place certain pricing measures to restrict US-bound Canadian exports of softwood lumber. In particular, USTR alleges that the Canadian province of British Columbia is “mis-assigning” timber harvested on public lands as “Grade 4” (salvage timber) and selling it to domestic exporters of softwood lumber at prices below what is provided for under the SLA timber pricing system. In addition, USTR notes that the share of this “Grade 4” timber from public lands in British Columbia has increased dramatically since the SLA entered into force, and therefore argues that the mentioned “mis-assignment” has the effect of reducing or offsetting the 2006 SLA’s export measures and of harming US workers and firms in the lumber industry.” Canadian Trade Minister Peter Van Loan has countered, however, that the increased proportion of “Grade 4” logs is attributable to an infestation of the mountain pine beetle in British Columbia, as well as that the pricing system referenced in the US complaint is no longer in effect because it was amended in July 2010 to address US lumber industry concerns about the large increase in “Grade 4” lumber.

USTR first requested formal consultations with Canada under the SLA on October 8, 2010, but the parties’ failure to achieve a suitable agreement in this manner led to the decision to pursue binding arbitration. As a next step, USTR will send the final request to move forward to the US Department of Justice, which will file the formal request with the London Court of International Arbitration for binding arbitration. Per Article 14.9 of the 2006 SLA, the United States and Canada are then to nominate their respective arbitrators within 30 days of the request for binding arbitration being received by the Court.

This most recent dispute is the third the United States has brought under the SLA. In the first dispute, the tribunal ruled in favor of a US claim that Canada did not properly calculate export quotas of US-bound softwood lumber during the first six months of 2007, and ordered Canada to impose an additional CND 68.26 million in export duties in compensation. In the second dispute, which is still ongoing, the United States claims that several Canadian initiatives at the provincial level provide assorted subsidies to softwood lumber exporters in contravention of the 2006 SLA.

## Presidents Obama and Hu Meet and Make Progress on Government Procurement and IPR Protection; Currency Remains Sensitive

US President Barack Obama and Chinese President Hu Jintao met in Washington, DC on January 19, 2011 to discuss economic, political and security issues facing both the United States and China. At the meeting, the United States secured important commitments from China concerning government procurement policies and intellectual property protection (IPR). Also, the Presidents, accompanied by business leaders from both countries, completed business deals (according to a White House press statement) that will increase US exports to China “by more than USD 45 million,” “support 235,000 [US] jobs” and “increase China’s investment in the United States by several billion dollars.” In a joint statement, Presidents Obama and Hu affirmed their commitment to liberalizing global trade and investment and to opposing trade and investment protectionism, and they agreed to

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"work proactively to resolve bilateral trade and investment disputes in a constructive, cooperative, and mutually beneficial manner."

At the meeting, the Presidents exchanged the views on issues of mutual concern and reviewed progress achieved since President Obama's state visit to China in November 2009. We detail below the highlights of the meeting outcomes:

- **Government Procurement.** China agreed to end its policy of conditioning government procurement on the origin of the intellectual property (IP). China also reaffirmed its intention to table a revised offer for accession to the World Trade Organization's Government Procurement Agreement (GPA). As opposed to China's original offer for accession to the GPA, the revised offer encompasses government purchases by so-called "sub-central" entities;
- **IPR.** China agreed to audit the use of licensed software by government agencies and to make available to the United States the results of those audits. At the 21st session of the Joint Commission on Commerce and Trade (JCCT), held from December 14-15, 2010 in Washington, DC, China had agreed to enforce the use of licensed software in government agencies. Consequently, China's most recent commitment to carry out audits of the use of this software is a further step toward addressing US concerns over IPR;
- **Currency.** Before broaching the issue of the alleged misalignment of the Chinese currency (RMB) at the joint press conference, Presidents Obama and Hu agreed that, in order to ensure a stronger and more balanced global economic growth, China will need to boost domestic demand and deal with rising inflation, and the United States will need to spend less, save more and increase exports. President Obama, directly addressing the contentious issue of currency, then posited that "the RMB remains undervalued" and that the United States will continue to look for the value of the RMB to be increasingly driven by the market. Further adjustment in the exchange rate, according to President Obama, "can be a powerful tool for China to boost domestic demand and lessen inflationary pressures in [its] economy";
- **Bilateral Investment Treaty (BIT).** Presidents Obama and Hu reaffirmed their commitment to the ongoing negotiations for a US-China BIT. Successfully concluding the BIT, according to the joint press statement, would facilitate and protect investment, and enhance transparency and predictability for both US and Chinese investors; and
- **Agreement on Cooperation in Science and Technology.** The Presidents welcomed the signing of the extension of this long-standing bilateral agreement and committed to strengthening cooperation in areas such as agriculture, health, energy, environment, fisheries, and technological innovation.

Analysts note that, despite US and Chinese commitments to cooperate in the above-listed areas, there remain significant challenges for the US-China bilateral relationship in 2011 and beyond. While President Obama downplayed China's alleged currency misalignment at the meeting with President Hu, some members of the US Congress remain focused on currency. Future US legislation to address China's currency practices such as the Currency Reform for Fair Trade Act (HR 2378), which passed the House in September 2010, is unlikely to move in the current session of Congress due opposition from the new Republican leadership in the House. Nevertheless, US labor unions, certain industries and some Democratic members of Congress, including House

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Ways and Means Committee Ranking Member Rep. Sander Levin (D-MI), House Democratic Whip Rep. Steny Hoyer (D-MD), Sen. Charles Schumer (D-NY) and Senate Finance Committee Chairman Sen. Max Baucus (D-MT), have expressed continued concern over China currency. Prior to President Hu's visit, Sen. Schumer confirmed his intention to re-introduce currency legislation in the Senate (tentatively titled "Currency Exchange Rate Oversight Reform Act of 2011") to treat the alleged currency misalignment as a countervailable subsidy, despite the poor prospects for its success.

Also a challenge facing the US-China bilateral relationship is the much needed progress in the near-term on the stalled Doha Round. Attending leaders at the G-20 Summit held in Seoul, Korea in November 2010 and at the subsequent APEC Summit in Yokohama, Japan expressed a strong commitment to moving forward with the Doha Round but, for this to be possible, developed countries, including the United States, will need to make adjustments to their respective agricultural support programs and emerging economies, including China, will need to make further concession with respect to market access for industrial goods and services. While Presidents Obama and Hu expressed in the joint press statement that they will direct their respective WTO negotiators to "engage in across-the-board negotiations to promptly bring" the Doha Round to a "successful, ambitious, comprehensive and balanced conclusion", the window of opportunity to do so is short such that significant progress on these concessions needs to be made no later than the first quarter of 2011. US Ambassador before the WTO Michael Punke stated last week that Chinese negotiators are reluctant to engage, although sources note that Ambassador Punke has given little indication of what the United States is willing to formally offer to advance the Doha Round this year.

On the other hand, contributing to an easing of US-China economic relations, analysts note that skepticism in the United States concerning China's currency practices is gradually fading despite renewed calls on the part of Democratic lawmakers to pass currency legislation. Treasury Secretary Timothy Geithner stated at a January 12, 2011 policy speech that while the USD-RMB exchange rate has only experienced a nominal annual appreciation of 3 percent since June 2010, the real appreciation of the RMB has been closer to 10 percent due to strong inflationary pressures in China. According to Secretary Geithner, firms decide where to invest and with whom to trade based on the real exchange rate as opposed to the nominal exchange rate and, in real terms, there has been a satisfactory appreciation of the RMB (although he added that the Chinese currency does remain undervalued). Such analysis from a high level Obama administration official is a clear signal that the White House will likely not treat China's currency as its foremost economic concern in 2011.

Analysts also note that both countries are increasingly aware of the acute need for constructive bilateral dialogue and cooperation due to interdependency of the US and Chinese economies and the negative effect that an adversarial US-China commercial relationship would have on global and regional economic growth. President Obama noted at the meeting that China is one of the top destinations for US exports, accounting for USD 100 billion in goods and services, and that US exports to China are growing close to twice as fast as US exports to the rest of the world, and President Hu noted that the economic health of the United States will continue to be of great importance for Chinese exports and overseas investments. Therefore, while challenges do lie ahead for the United States and China and disputes will inevitably arise, both countries appear ready to address these challenges and to ensure the overall health of the bilateral trading relationship.

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## US Department of Commerce Makes Changes to Export Control Regime to Facilitate High-Tech Trade with India

On January 25, 2011, the US Department of Commerce Bureau of Industry and Security (BIS) published a Federal Register notice, amending the Export Administration Regulations (EAR) to eliminate certain controls on dual-use items for export to India. The amendments implement several elements contained in the joint statement issued by President Obama and Prime Minister Singh on November 8, 2010 in New Delhi, including the removal of many of India's defense and space-related entities from the Entity List. The EAR prohibits exports of EAR-controlled dual-use goods to entities on the Entity List. BIS has also removed India from three country groups in the EAR and added it to one.

In the November 8, 2010 joint statement, President Obama and Prime Minister Singh put forth that the United States and India should take the lead in global non-proliferation while expanding high-technology trade and cooperation. To meet these objectives, the two leaders included in the joint statement commitments to work together to strengthen the global export control framework, reform US-India export control regulations and policies, and expand bilateral cooperation in civil space, defense and other high-technology sectors. Stemming from these commitments, BIS is removing the following nine Indian entities from the Entity List:

- Bharat Dynamics;
- Certain subordinate entities of India's Defense Research and Development Organization: Armament Research and Development Establishment, Defense Research and Development Lab, Missile Research and Development Complex and Solid State Physics Laboratory; and
- Certain subordinate entities of the Indian Space Research Organization: Liquid Propulsion Systems Center, Solid Propellant Space Booster Plant, Sriharikota Space Center and Vikram Sarabhai Space Center.

BIS is also removing India from country groups D:2, D:3 and D:4 while adding it to A:2, which includes those countries adhering to the Missile Technology Control Regime. These changes will result in the elimination of some controls on export and reexports of certain products to India, and they expand the availability of certain EAR license exceptions. The changes will not change BIS licensing policy with regard to India for items controlled for nuclear nonproliferation (NP1) reasons; such items will still require BIS licenses. Note that these changes do not affect licensing requirements for defense articles controlled by the International Traffic in Arms Regulations (ITAR).

The EAR amendments detailed in the January 25, 2011 Federal Register notice come amidst the Obama Administration's larger campaign to reform US export controls, which aims to strengthen national security as well as the competitiveness of key US manufacturing and technology sectors. As a follow-up to President Obama's November 2010 trip to India and the above-detailed transformation of the US-India export controls framework, US Commerce Department Secretary Gary Locke is leading a delegation of US business leaders on a high-tech trade mission to India from February 6-11, 2011.

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## FREE TRADE AGREEMENTS

### *Free Trade Agreement Highlights*

#### **US Department of Transportation Moves Forward on Mexico Trucking Dispute**

On January 6, 2011, US Department of Transportation (DOT) Secretary Ray LaHood shared an initial concept document with Congress and the government of Mexico aimed at addressing the alleged US violation of several North American Free Trade Agreement (NAFTA) provisions that provide for the liberalization of cargo trucking services between Mexico and the United States. The document addresses the key US concerns over the safety of Mexico-domiciled motor carriers (trucks) and describes a "phased" cross-border trucking program.

Similar to what was provided for under the cross-border trucking pilot program put into place during the Bush Administration, the concept document provides for an inspection and monitoring program which would allow for the United States to monitor Mexican long-haul trucks, its cargo, and its drivers. However, critics of re-starting the cross-border trucking program, principally US labor unions, state that the concept document is not specific enough with regard to how DOT will enforce rules on hours of service limits, drug testing, and emissions standards. Also, the document does not specify whether the use of the term "phased" in the concept document is synonymous with the United States gradually moving toward satisfying Mexico's demands for full market access in compliance with commitments made under NAFTA.

Articles 1108 and 1206 as well as Annex I ("Reservations for Existing Measures and Liberalization Commitments") of NAFTA provided for the liberalization of cargo trucking services in US and Mexican border states by December 18, 1995 and that this liberalization was to encompass the entire territories of both countries by January 1, 2000. Except for the period between April 27, 2007 and March 11, 2009, during which the US and Mexican Governments collaborated on the implementation of the above-mentioned pilot cross-border trucking program that allowed a limited number of Mexican trucking companies to operate in US territory, the United States has not fulfilled its obligations under NAFTA with respect to granting national and/or most favored nation (MFN) treatment to Mexican firms engaged in cross-border transport or cargo.

On March 18, 2009, Mexico's Secretary of Economy (SE) published in the Official Gazette a list of 89 US goods on which Mexico was to impose a retaliatory import duty following the enactment on March 10, 2009 of the Omnibus Appropriations Act of 2009 in the United States, which effectively ended the cross-border trucking program. SE declared in the notice that Mexico decided to maintain the retaliatory tariffs in accordance with Article 2019 of NAFTA, which allows the complaining party (Mexico) in a dispute (in this case, cross-border transport of cargo) to suspend benefits (e.g., market access at preferential import tariff rates) until both the United States and Mexico reach an agreement on resolution of the dispute. To date, these retaliatory tariffs remain in effect although SE periodically changes the list of US goods on which they are applied.

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Experts widely attribute US resistance to the liberalization of cross-border cargo transport to the pressure that the International Brotherhood of Teamsters, which is the labor union representing US truckers, has applied on the successive Clinton, Bush and Obama Administrations. Experts also note that President Obama could lift the prohibition on Mexican trucks without the approval of Congress but that doing so would cost him and certain other Congressional Democrats the political support of labor unions. This theory would appear to find support in the timing of the Obama Administration's announcement, *i.e.*, shortly after the 2010 mid-term elections. Nonetheless, there are some US lawmakers who openly oppose closing the border to Mexican trucks on the basis of concerns over subpar vehicular safety standards in Mexico and claim that the Mexican retaliatory tariffs result in a loss of competitiveness for US goods in Mexico. Furthermore, these lawmakers and other supporters of the United States fulfilling its obligations under NAFTA largely base their opposition to the ban on Mexican trucks from circulating freely in US territory on statistics computed as part of the Bush-era pilot program that showed that Mexican trucks were safer than their US counterparts.

DOT indicated in its press release that the initial concept document is intended to be a "starting point in the renewed negotiations with Mexico." While the US has not put forward a firm timetable for settling all outstanding issues, US Trade Representative Ron Kirk and Mexican Economy Secretary Bruno Ferrari are expected to meet on January 10, 2010 to discuss the concept document. Mexico's SE and Secretary of Transportation have released a joint statement, lauding the Obama Administration's view to resolve the dispute. The release stated that "Mexico is analyzing" the US proposal and is looking for a "permanent and satisfactory agreement that will provide certainty to the Mexican [trucking companies]."

The formal proposal for satisfying the outstanding issues associated with the dispute is expected to be released in the coming months and the public will have an opportunity to provide comments.

## **Lawmakers Introduce Legislation to Reauthorize TPA and Move Pending FTAs; House Ways and Means Holds Hearings on Pending FTAs**

On January 25, 2011, Sen. Joseph Lieberman (I-CT) and Sen. Rob Portman (R-OH) introduced the Creating American Jobs through Exports Act of 2011 (a bill number has not been assigned), which reauthorizes the President's Trade Promotion Authority (TPA) and contains language expressing the support of Congress for passing the pending US-Korea (KORUS), US-Colombia and the US-Panama free trade agreements (FTAs). According to a joint statement released by Sen. Lieberman and Sen. Portman, passage of the three pending FTAs is necessary to increase US exports, create jobs in the United States and advance national security interests. The joint statement also notes that reauthorization of TPA gives "the United States a strong hand at the negotiating table and to get the best possible deal for American businesses – increasing our competitiveness abroad while creating jobs [in the United States]" and that "it is crucial to opening the rapidly-growing Asia-Pacific region" to US exports.

The introduction of the Lieberman-Portman bill came on the same day the House Committee on Ways and Means held a hearing on the KORUS, US-Colombia and the US-Panama FTAs as they relate to US job creation. According to the Committee website, "the focus of this hearing was Congressional consideration of the pending

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[FTAs] and the benefits these agreements will bring to American businesses, farmers, workers, consumers and the US economy."

We summarize here the statements and testimony given at the hearing:

- **House Ways and Means Committee Chairman Rep. Dave Camp (R-MI)** welcomed President Obama's announcement of a July 1, 2011 goal for implementing the KORUS but lamented that President Obama has not laid out a similar timetable for the US-Colombia or the US-Panama FTAs. Rep. Camp further noted that, unless progress is made in the near-term on the stalled FTAs, other countries or trading blocs with which Korea, Colombia and Panama have entered into FTAs will secure market share in these three countries previously enjoyed by the United States;
- **House Ways and Means Trade Subcommittee Chairman Rep. Kevin Brady (R-TX)** lauded the Obama Administration's work on KORUS to resolve the outstanding issues over autos but expressed disappointment as the Obama Administration's "silence on the trade agreements with Colombia and Panama." The lack of movement on the part of the United States to implement the pending agreements, according to Rep. Brady, has created a vacuum that others, like Canada, the EU and China, are rushing to fill";
- **President of the Paulson Manufacturing Corporation Roy Paulson** stated that the KORUS, US-Colombia and the US-Panama FTAs are important avenues for growth in US exports and urged the Obama Administration to redouble its efforts in negotiating the Trans-Pacific Partnership (TPP) and re-open the Free Trade Area of the Americas (FTAA);
- **American Farm Bureau Federation President Bob Stallman** stated that the America Farm Bureau Federation supports the passage of the KORUS, US-Colombia and the US-Panama FTAs, noting that they are "important to the bottom line of America's farmers and ranchers, [...] the economic health of [US] rural communities and the overall US economy";
- **International FedEx Express Chief Operating Officer and President Michael Ducker** expressed to the Committee members FedEx's strong support for the passage of the KORUS, US-Colombia and the US-Panama FTAs, noting that the United States could use the three agreements to "leverage the incredible growth rates and rising middle class around the world to create jobs [in the United States]";
- **MetLife Inc. President William Toppeta** stated that MetLife strongly supports the passage of the [KORUS, US-Colombia and the US-Panama FTAs], noting that the US service sector is "poised to succeed [...] more robustly with the assistance of level playing fields and regulatory certainty brought [...] by the pending FTAs"; and
- **Vice President for International Government Affairs Stephen Biegun of Ford Motor Company** expressed Ford's strong support for the KORUS FTA, noting that, in addition to General Motors and Chrysler, the United Autoworkers (UAW) also supports the Agreement. He did not, however, mention the US-Colombia and US-Panama FTAs in his remarks.

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Despite the majority free trade-friendly constitution of the House Ways and Means Committee, a handful of committee members, dissented with the pro-FTA committee members and witnesses. Rep. Xavier Becerra (D-CA) stated that, over the past decade, US multinational corporations have reduced the size of their US-based workforce by 1.9 million and increased their foreign employment by 2.4 million although he did not provide the source of these figures. Rep. Bill Pascrell (D-NJ) countered those witnesses that argued that passage of the pending FTAs would create jobs in the United States, citing a 2007 US International Trade Commission estimate that KORUS would have a “negligible” effect on US aggregate output and employment.

The prospects for passage of the three pending FTAs are better now than was true during the previous 111th Congress because Republicans, who are generally less free trade-averse, enjoy majority-control of the House of Representatives and greater representation in the Senate (although Democrats still hold a simple majority in the Senate). Although most within the House majority (Republicans) are pushing for a concurrent passage of all three pending FTAs, and support in the Senate from both parties for passage of at least the KORUS and US-Panama FTAs is fair, few lawmakers from either chamber are advocating the introduction of implementing legislation for all three agreements in one bill. Sources further note that, despite the Obama Administration having expressed a strong desire to see KORUS implemented before July 1, 2011, President Obama did not express in his January 25, 2011 State of the Union address a willingness to move the US-Colombia and US-Panama FTAs on the same timetable. Thus, while the prospects for the pending FTAs are generally improving, the timeline on the Colombia and Panama FTAs remain uncertain. This uncertainty is compounded by the lack of a clear timeline in either the Creating American Jobs through Exports Act of 2011 or President Obama’s recent State of the Union address. Additionally, House Democrats have expressed a desire to seek enhanced labor and environmental provisions for US-Colombia and US-Panama FTAs. These factors raise questions about ability of House Republicans to advance all three pending FTAs by mid-2011. The reauthorization of TPA contained in the Creating American Jobs through Exports Act of 2011 would, however, allow the Obama Administration to submit to Congress KORUS along with the December 3, 2010 supplemental agreement on autos and pork, which some experts argue materially changes the Agreement and, therefore, would make the Agreement ineligible for consideration under TPA (were TPA not to be reauthorized). Reauthorization would also make the US-Colombia FTA eligible for Congressional consideration under TPA as the Democrat-controlled House stripped it of this eligibility in April 2008.

## Congress Requests New ITC Review of US-Korea FTA

On January 27, 2011, Chairman of the House Ways and Means Committee Rep. Dave Camp (R-MI) sent a letter to United States International Trade Commission (ITC) Chairman Deanna Okun requesting that the ITC update its 2007 report, “US-Korea Free Trade Agreement: Potential Economy-wide and Selected Sectoral Effects.” Required by US Law, the original ITC report was released on September 20, 2007 following the signing of the final text of the US-Korea Free Trade Agreement (KORUS) on June 30, 2007.

Chairman Camp’s request comes on the heels of the joint announcement by US and Korean trade negotiators on December 3, 2010 that they had finalized the legal text of the agreement based on the supplemental proposal agreed by the parties in December 2010. The letter targets the US auto industry and seeks updated ITC assessments “of the impact of the motor vehicle-related provisions in the KORUS FTA [...] on the US passenger vehicle sector” based on the December agreement. The letter notes that the final text of the Agreement will be

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made available to the public by the end of January, and requests that the updated assessment be completed by no later than March 15, 2011.

Under Trade Promotion Authority (TPA), any legislation “entered into” by the President prior to July 1, 2007 would be subject to strict procedural timelines and limitations. The original agreement was signed one day prior to the 2007 deadline, thus subjecting it to TPA’s strict disciplines on congressional consideration (e.g., a prohibition on amendments and 90 day maximum timetable for both the House and Senate consideration). The supplemental agreement, however, has called TPA’s applicability into question. The Obama administration (including USTR) and congressional leaders uniformly contend that despite the December 2010 supplemental agreement, KORUS should still enjoy treatment under the TPA. Some critics, however, maintain that the substantive changes to KORUS in 2010 mean that the agreement was actually “entered into” in 2010, thus removing it from TPA’s procedural protections. Camp’s request that the ITC update its original analysis could provide support for these arguments, but should not affect congressional consideration of the agreement given its broad support among House and Senate leadership.

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