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General Trade Report - JETRO

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UNITED STATES

GENERAL TRADE POLICY

ITC Launches Investigation into DFQF for LDCs despite Lack of Optimism for Meaningful December Package

Summary

On July 8, 2011 the International Trade Commission (ITC) published a notice in the Federal Register, announcing the initiation of an investigation to determine the probable economic effect of providing duty-free, quota-free (DFQF) treatment for imports from least developed countries (LDCs). According to the Federal Register (FR) notice, all interested parties may submit comments through September 16, 2011. The ITC expects to deliver the report, in confidential format, to the US Trade Representative (USTR) no later than February 16, 2012.

Analysis

USTR Ron Kirk sent a letter on June 16, 2011 to ITC Chairman Deanna Okun under Section 332 of the Tariff Act of 1930 requesting the investigation. In his letter, USTR Kirk notes that the World Trade Organization (WTO) Members reached agreement at the December 2005 WTO Ministerial Conference in Hong Kong to provide DFQF market access to products from LDCs (as determined by the United Nations). USTR Kirk's letter noted that US negotiators had previously announced that the United States would implement this initiative together with the outcome of the Doha Development Round ("Doha Round" or "DDA") negotiations and, In preparation for the implementation of this commitment, the USTR had requested in 2007 that the ITC provide an analysis of the economic effects of providing DFQF to LDCs. USTR Kirk is now asking that the ITC update its 2007 analysis, which was based on 2002 trade data, by using 2010 figures to better reflect the post-financial crisis world economy.

I. WANING HOPE FOR DOHA

The request for and subsequent institution of an investigation on the effect of DFQF from LDCs was made in response to the current debate surrounding the upcoming DDA Ministerial Conference from December 15-17, 2011. According to experts, the DDA negotiating parties no longer believe they will be able to conclude the DDA by the December 2011 Ministerial. In lieu of concluding negotiations on all the DDA issues, WTO Director General (DG) Pascal Lamy is currently calling on parties to come to agreement on a few, select issues to be submitted as part of a partial December Doha package.

DG Lamy has called on countries to prioritize the inclusion of several key concessions to LDCs, including: (i) DFQF for LDC exports; (ii) simplified rules of origin for LDCs; (iii) waiver for LDCs from future services market

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access agreements at the WTO; and (iv) concessions on cotton subsidies. Major negotiating parties, particularly the United States, have assumed the positions that all negotiating partners should make concessions toward the December Doha package. Thus US negotiators rebuff the idea of a partial December Doha package that only includes concessions to LDCs on the part of developed nations. In response, DG Lamy has put a number of potential "LDC-plus" issues on the table, including (i) a trade facilitation agreement; (ii) export competition; (iii) a monitoring mechanism for special and differential treatment; (iv) a "step forward" on fisheries subsidies; and (v) a "step forward" on environmental goods and services.

In considering how to implement a DFQF for LDCs, the United States must decide which products (if any), as identified in the Harmonized Tariff Schedule (HTS), to exclude from the program. USTR will likely consider its stakeholders, as well as those to whom it has already given trade preferences, before it makes this decision. More specifically, USTR Kirk has asked that the ITC consider the effect of a DFQF for LDCs on: (i) industries in the United States producing like or directly competitive products; (ii) consumers; (iii) imports under current US preference programs, including the African Growth and Opportunity Act (AGOA), the Generalized System of Preferences (GSP), the Andean Trade Promotion and Drug Eradication Act (ATPDEA), and the Caribbean Basin Initiative; and (iv) imports from Free Trade Agreement (FTA) partners.

A number of WTO LDCs, particularly those in Africa, have asked the United States to implement a DFQF on 97 percent HTS chapter headings. The majority of the remaining 3 percent of goods are likely those in the textiles and apparel chapters of the HTS, but may also include goods such as sugar and tobacco. The United States is particularly wary of extending DFQF to apparel exporters in LDC countries such as Bangladesh and Cambodia that are more competitive than AGOA producers and could erode the US textile and apparel industry's current competitive advantage. Nonetheless, in his letter, USTR Kirk specifically asked that the ITC evaluate the effect of a DFQF on the textiles and apparel chapters.

Outlook

The United States' current position on DFQF for LDCs is largely the same as it has been for most issues addressed in the DDA. More specifically, the US negotiators have stated that they can only agree to fulfill the 2005 pledge to provide DFQF if key developing countries, such as China, India and Brazil, also make concessions of interest to the United States. Experts note that the current gridlock over what concessions should be included in the December Doha package does not look as though it will be resolved in the near-term such that fulfillment of the US commitment on DFQF for LDCs look less than likely by December 2011. In this regard, it is also important to note that the USTR has requested that the ITC complete its report by February of 2012, two months after the December Ministerial.

Commerce Publishes New Proposed Rules to Guide the Transfer of Items from USML to CCL

Summary

On July 15, 2011 the US Commerce Department (DOC) published proposed regulations in the Federal Register (FR), outlining plans to restructure the Commerce Control List (CCL) to include items that will likely be removed

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from the more stringent controls of the US Munitions List (USML). The proposed regulations are a subject of debate at the July 18-21, 2011 DOC Bureau of Security and Industry Annual Update Conference. Comments on the proposed regulations may be submitted to DOC Bureau of Industry and Security no later than September 13, 2011. The Department of State (DOS) is expected to refer to this proposed rule when it begins alerting Congress of its intention to remove certain items from the USML as required under Section 38(f) of the Arms Export Control Act (AECA).

Analysis

In August 2009 President Obama directed his Administration to conduct a review and revision of the US export control system. The export control reform initiative is one part of the Obama Administration's three-part effort to double exports in five years. In regard to export control reform, the Obama Administration determined that fundamental reform of the system would be needed in each of its four key component areas, with a transformation to: (i) a Single Control List; (ii) a Single Primary Enforcement Coordination Agency; (iii) a Single Information Technology (IT) System; and (iv) a Single Licensing Agency.

The July 15 proposed regulations take an initial step toward accomplishing the first of the four goals sought by the Obama Administration. In order to combine the USML, which is governed by the International Traffic in Arms Regulations (ITAR), and the CCL, which is governed by the Export Administration Regulations (EAR), the two lists must first be made more reflective of and complimentary to each other. By eventually combining these lists, the Obama Administration hopes to facilitate military cooperation and trade with close US allies and enhance the US industrial base by making it easier to export dual-use items.

The July 15 proposed rule includes a number of suggested regulatory changes that create the framework for the transfer of USML items to the CCL. We highlight these proposed regulatory changes below:

II. CREATION OF THE ECCN 600 SERIES

The proposed rule creates a new Export Control Classification Number (ECCN) under the CCL known as the "600 Series." The CCL's ECCN is an alpha-numeric code with five fields (*e.g.* 3A001) that describes the item and indicates licensing requirements. An item with an ECCN 600 Series number (*e.g.* 3A601) will identify it as an item that was previously on the USML list and moved to the CCL list, as well as an item with specialized licensing requirements. The addition of this new series would effectively create a "Commerce Munitions List" (CML), *i.e.*, a list of items that are subject to controls less restrictive than those on the USML but more restrictive than the controls to which the majority of the other CCL items are subject. The classifications of items on this list will closely track the classifications created under the Wassenar Agreement, one of the four multilateral export control regimes in which the United States participates. The proposed rule states that the creation of the CML is a necessary intermediate step to eventually create a single dual-use and munitions control list.

III. REVISED RULES ON LICENSING REQUIREMENTS

The proposed rule requires that all items listed under the new ECCN 600 series apply and receive a license for export to every country except Canada, unless a license exception is available. On June 16, 2011 the finalized version of the Strategic Trade Authorization (STA) license exception rules were published. If an ECCN 600 series

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item is qualified for an STA license exception, an exporter may sell that item to a group of 36 countries without a license, as long as the exporter attains from the buyer a commitment that the item will not be shipped outside that group. There are also a number of recordkeeping requirements. For example, exporters are required to keep a log of all shipments made with an STA license exception and identify the specific consignee statement associated with every shipment. The STA license exception rules are expected to eliminate 3,000 of the 22,000 export licenses issued last year. According to Commerce Secretary Gary Locke, the STA license exception rules "enhance national security by removing unnecessary red tape in trade with allies while diverting resources to items that require greater control and simultaneously taking pains to prevent re-exportation to nonauthorized destinations."

IV. NEW DEFINITIONS OF KEY TERMS

The proposed rule also suggests new definitions of relevant terms, including "specially designed," "end terms," "parts," and "components." These definitions have been worded such that they can apply to both former USML items placed in the new 600 series ECCNs on the CCL, as well as items that remain on the revised USML.

The definition of the term "specially designed" is particularly important, as DOC and DOS must both recognize a "basket category for controlling militarily less significant items 'specially designed' for defense articles that move to the CCL." Under the current definition of "specially designed," design intent is difficult to discern, but under the proposed rule, the new definition will meet certain objective criteria, making it easier to determine whether the item belongs on the CCL or the USML. According to Assistant Secretary of Commerce for Export Administration Kevin Wolf, the new "specially designed" definition seeks to "eliminate the ambiguous concept of design intent and base the definition on propositions that could be subjected to a series of 'yes' or 'no' questions that could be used across both the EAR's CCL and the ITAR's USML."

V. GUIDANCE FOR FIRST TRANCHE

According to the reform initiative, all 21 categories of the USML will be revised in order to become more "positive," "tiered," and "aligned" with the items on the CCL. As of now, only category VII has been revised. This category largely consists of such items as military vehicles and tanks. The new rule proposes the transfer of an initial tranche of items from USML's Category VII to the CCL. Sources note that if DOS begins the Section 38(f) process in a timely manner, items included in Category VII could be transferred from USML to CCL as early as September 2011. White House Chief of Staff William Daley has noted that 11,000, or approximately 90 percent of the 12,000 Category VII items, will be shifted to the CCL. Of these, Chief of Staff Daley predicts that about 50 percent will be eligible automatically for license-free export, subject to certain compliance and re-export requirements, to US allies and regime partners. About 35 percent of the transferred items will require an export license, but could be eligible for the STA license exception after government approval. The last 15 percent of the items will likely no longer be subject to a license requirement to almost all countries. After the movement of category VII items commences, Chief of Staff Daley stated that DOC and DOS would begin the process of revising and moving Category VI (naval vessels) and VIII (aircraft) items.

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Outlook

During a time of deadlocked congressional debates over the debt ceiling and the passage of the three pending free trade agreements (FTAs), DOC, DOS and Obama Administration officials are touting the July 15 publication of the proposed rules as an indication that the Administration is committed to the expedient completion of its stated goals under the export control reform initiative. Nonetheless, the Obama Administration must eventually deal with Congress when it attempts to change current law in an effort to combine the USML and CCL. Experts note the current steady pace of progress on this reform initiative may be hamstrung by eventual congressional confrontation. A number of lawmakers, including Rep. Ileana Ros-Lehtinen (R-FL), have already introduced legislation to limit the extent to which the Obama Administration can ease export control and increase the congressional role in reforming the system. Despite this pending confrontation, Chief of Staff Daley has reported he expects that the process of combining the lists, an exercise which would reduce the need to license US high-technology exports by some 50 percent, could be concluded as early as the end of 2012.

US General Trade Policy Highlights

United States and India Agree to Restart BIT Talks

On July 19, 2011 US Secretary of State Hillary Clinton and Indian Minister of External Affairs Shri S.M. Krishna announced plans to resume technical-level negotiations on a bilateral investment treaty (BIT) in August 2011 in Washington. This announcement follows a June 22, 2011 meeting between US Trade Representative (USTR) Ron Kirk and Indian Minister of Commerce and Industry Anand Sharma in which the two officials agreed to restart the BIT negotiations "as soon as possible."

The United States has negotiated BITs with over 39 countries. According to USTR, the BIT program has three main purposes:

- to protect investment abroad in countries where investor rights are not already protected through existing agreements;
- to encourage the adoption of market-oriented domestic policies that treat private investment in an open, transparent, and non-discriminatory way; and
- to support the development of international law standards consistent with these objectives.

BIT talks between the United States and India stalled in 2009 when the Obama Administration announced its intention to rework the labor and environmental dimensions of the US model BIT. Nonetheless, Assistant Secretary of State for Economics, Energy and Business Jose Fernández stated on July 5, 2011 that "[F]or the most part, I think, people will find that the new model BIT does not differ that much from the old model BIT. So we feel we can start technical negotiations with the Indians."

Experts note that recent interest in restarting US-India BIT talks comes as the Indian government makes plans to unveil a new manufacturing policy initiative that will entail the development of 9 existing industrial zones and the

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construction of 5 new “mega industrial townships” in India. Indian Minister of Commerce Sharma recently noted, “[w]e want America—its institutions, its industries, its investor—to be our partners in this.” The United States has signaled its approval of India’s efforts to attract foreign direct investment (FDI), but has also expressed a desire to accelerate negotiation of a BIT in order to ensure that US investors receive the same treatment as domestic, Indian companies.

Sen. Stabenow Urges USTR Not to Tolerate Russia’s Automotive Policy

On July 20, 2011 Sen. Debbie Stabenow (D-MI) sent a letter to US Trade Representative (USTR) Ron Kirk, urging him to include the removal of certain aspects of Russia’s automotive policy as part of Russia’s possible accession to the World Trade Organization (WTO). In her letter, Sen. Stabenow states that this policy “reduces US automobile exports to Russia by putting American-made vehicles at a distinct disadvantage.”

In 2005 Russia imposed an automotive policy that afforded reduced tariffs on imported auto parts to automakers that produced at least 25,000 autos per year in Russia. In late 2010, Russia revised the policy by increasing that required number of autos to 300,000, doubling the local content rules from 30-60 percent, and requiring more Russia-based research and development. Although the United States has called this policy inconsistent with the WTO Trade-Related Investment Measures (TRIMS), major US auto companies, including Ford and General Motors, have already signed investment agreements with Russian authorities under the revised policy.

Automotive policy is just one of a number of outstanding issues Russia faces in its bid for WTO accession. Other key issues for the WTO Working Party negotiators include sanitary and phytosanitary standards (SPS), tariff-rate quotas (TRQ), and tariff reductions. In addition to addressing these issues, the United States must overcome several procedural issues with regard to Russian accession. If US lawmakers fail to pass legislation establishing Russia Permanent Normal Trade Relations (PNTR) before their accession occurs, Russia may deny most favored nation (MFN) market access to US firms that they would otherwise enjoy such a status as a result of Russia being part of the WTO. However, granting Russia PNTR will require either repealing or continuing to annually waive Russia from the Jackson-Vanik Aendment (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. Although the US President has annually waived Russia from the Jackson-Vanik Amendment since 1994, thus allowing for non-permanent normal trade relations (NTR), Russia has not officially “graduated” from Jackson-Vanik coverage.

Although Sen. Stabenow’s letter was not signed by any other member of Congress, experts note that US negotiators have already expressed opposition to Russia’s automotive policy. In this regard, Sen. Stabenow’s letter serves more as a warning that, although Russia would like to complete its WTO accession before the December 2011 WTO Ministerial meeting, US and WTO Working Party negotiators should not relent on any of the issues they have urged Russia to address as part of WTO accession process, namely Russia’s automotive policy.

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FREE TRADE AGREEMENTS

House and Senate Committees Hold Mock Markups of FTAs; Possible TAA Inclusion Remains Unclear

Summary

On July 7, 2011 the House Committee on Ways and Means and the Senate Committee on Finance held mock markups of draft implementing bills for the three pending free trade agreements (FTAs) with Colombia, Panama and Korea. A number of other programs, including Trade Adjustment Assistance (TAA), the Generalized System of Preferences (GSP) and the Andean Trade Preference Agreement (ATPA) were also considered during the mock markups. Although both committees voted to pass the FTAs, GSP and ATPA, a strongly partisan split emerged over the issue of whether TAA should also be included in an implementing bill. As a result, the Democrat-controlled Senate decided to consider TAA in its mock markup while the Republican-controlled House decided to do the opposite. Given that each committee took a different approach to the issue, President Obama is left with a less than clear choice regarding whether or not to include TAA in the final implementing legislation to be formally submitted to Congress.

Analysis

I. BACKGROUND

In March 2011 congressional Republicans promised not to consider any trade-related nomination until President Obama sent all three FTAs' implementing bills to Congress for consideration. In May 2011 the Obama Administration announced that it would condition its submission of the FTAs' implementing bills to Congress on the renewal of a bolstered version of TAA. The scope and cost of TAA was expanded under the 2009 American Recovery and Reinvestment Act (ARRA), *i.e.*, the 2009 stimulus bill, to include US service workers displaced by off-shoring, agricultural workers and workers not otherwise affected by imports under an FTA to which the United States is party. However, the bolstered TAA provisions contained in the 2009 ARRA expired on February 13, 2011. Congressional Republicans object to the renewal of a bolstered TAA, citing ineffectiveness and abuse of the program as well as its inflated cost, particularly in the context of growing concerns over untenable US government spending levels and debt load.

Although the Obama Administration submitted the FTAs' draft implementing bills for mock markup consideration on June 28, 2011, strong partisan disagreement over TAA renewal emerged. As submitted by the President, the US-Korea FTA bill contained renewal language for a reported "compromise" version of TAA and the US-Colombia FTA bill contained renewal language for GSP and ATPA. In a demonstration of their opposition to any linkage between the FTAs and TAA, the Republican Senate Finance Committee members boycotted the first scheduled mock markup session on June 30, 2011. On July 5, 2011 the House Ways and Means Committee announced that the date for their mock markup had been set for July 7, 2011 and, a few days later, the Senate Finance

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Committee schedule their mock markup for a second time on the same day as that of the House Ways and Means Committee.

II. SENATE FINANCE COMMITTEE MOCK MARKUP

Senate Finance Committee Chairman Sen. Max Baucus (D-MT) submitted for consideration at the Senate mock markup the US-Korea FTA bill with the TAA renewal provisions included. In addition, he called for the consideration of the US-Colombia FTA, which included provisions renewing GSP and ATPA and the US-Panama FTA.

In his opening statement, Sen. Baucus explained, "I know that there are differences of opinion on the process for extending TAA. I have included it in the [US-]Korea FTA bill for this mock markup. But that does not foreclose discussion of other options for extending TAA. I remain open to those options, as long as they provide certainty that the bipartisan TAA deal will be enacted in tandem with the FTAs." Despite this statement of flexibility, Senate Finance Committee Ranking Member Sen. Orrin Hatch (R-UT) stated in his opening statement that he would be forced to vote against the US-Korea FTA if TAA was included in the implementing legislation.

During debate, the Republicans attempted, but failed, to pass an amendment removing the provisions that renewed TAA from the US-Korea FTA. A number of other amendments were proposed, but none were approved. In the end, the Democrats, who hold a majority in the Senate, were able to overcome Republican opposition and pass all three pieces of implementing legislation in the mock markup with TAA renewal language included.

III. HOUSE WAYS AND MEANS COMMITTEE MOCK MARKUP

In contrast to the Senate Finance Committee mock markup session, House Ways and Means Committee Chairman Rep. Dave Camp (R-MI) decided the House Committee should do a mock markup of the US-Korea FTA without TAA renewal language. In addition, he called for the consideration of the US-Colombia FTA, which included provisions renewing GSP and ATPA, and the US-Panama FTA.

During the House mock markup session's opening remarks, Rep. Camp explained that, although he, the Obama Administration and Sen. Baucus had come to an agreement on the substance of a compromise version of TAA last week, they had not come to a decision on the vehicle by which it should be considered by Congress. Although Rep. Camp urged the Obama Administration to back away from its current approach of seeking to include TAA renewal in the draft US-Korea FTA implementing bill, he also stated his willingness to consider separate TAA legislation "on the same day" as the final FTA implementing legislation were the FTAs and TAA to be submitted as separate bills instead of as a package.

During debate the House Democrats attempted, but failed, to pass a number of amendments adding TAA to the implementing legislation. In addition, the Democrats proposed, but could not pass, an amendment linking the entry into force of the Colombia FTA to a certification by the President that Colombia has met its commitment under the April 7, 2011 labor action plan, which aims to address lingering US concerns over the labor code and violence against organized labor leaders in Colombia. In an effort to send a strong message of dissatisfaction with the substance of the implementing legislation, the Democrats voted against each of the FTA implementing

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bills. Despite the Democrat vote *en bloc*, the Republicans, who hold a majority in the House, were able to pass all three pieces of draft implementing legislation without any amendments, *e.g.*, TAA renewal language.

Outlook

Now that the Senate and the House have held mock markups of the FTA implementing legislation, President Obama must decide what the FTAs' formal implementing legislation should include, particularly that of the US-Korea agreement to which the President and congressional Democrats want to attach TAA renewal language. Once President Obama submits the FTAs' formal implementing bills, Trade Promotion Authority (TPA) prevents lawmakers from amending the bills but, rather, only allows for them to vote up or down on the same. For this reason, experts agree that President Obama will need to work closely with both the House and Senate leadership in order to decide whether or not to submit TAA with the FTAs. If they do not reach a deal over TAA, experts opine that the passage of the FTAs, GSP and ATPA may also be in jeopardy. Although there are a myriad of variables at play that prevent experts from agreeing on what form President Obama will submit the FTAs' formal implementing bills and whether they will be passed in both Chambers, experts note that there are three likely scenarios, which we have outlined below:

- **The President submits TAA with the FTAs; TAA passes with the FTAs.** Under this scenario, the President submits TAA with the final FTA implementing legislation as a package but the House decides to consider TAA and the FTAs separately under a closed House rule. If both TAA and the FTAs are passed, Speaker of the House Rep. John Boehner (R-OH) can submit them as one piece of legislation under TPA procedural rules to the Senate where they will be considered in an up or down vote without lawmakers being able to amend them. If the Senate votes to approve the FTA-TAA package bill, it will be sent to the President for his signature;

- **The President submits TAA with the FTAs; the FTAs pass and TAA fails.** Under this scenario, the President submits TAA with the final FTA implementing legislation as a package and the House decides to consider TAA and the FTAs separately. However, if the Republican majority in the House votes against the passage of TAA, Speaker Boehner will have to submit to the Senate a version of the FTAs that will be different from the original version the President submitted. At that point, Senate Majority Leader Sen. Harry Reid (D-NV) will have to decide whether to relent on TAA and pass the clean FTA implementing bills in much the way the House did, or to insist on TAA renewal and allow the FTAs to die; or

- **The President submits the FTAs alone.** In this scenario, the President submits the final FTA implementing legislation without TAA, but only after he has received assurances from both House and the Senate leadership that TAA will also be considered. In this scenario it is likely that the FTAs would pass both Chambers.

  Both Sen. Baucus and Rep. Camp's opening statements at the July 7 markups suggest that both parties may be willing to compromise over the way in which TAA is considered by Congress. By agreeing to separate, but virtuously simultaneous votes on TAA and the FTAs' final implementing legislation, Congress would be able to avoid voting down the FTAs' implementing bills over concerns that TAA will unnecessarily contribute to government spending. Despite the signal that a bipartisan deal may be possible, experts agree that the fate

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of the FTAs, and GSP, ATPA, and TAA lies in President Obama's ability to compromise with Senate and House leadership.

Free Trade Agreement Highlights

Mexico, United States Sign Memorandum of Understanding toward Formally Resolving Cross-Border Trucking Dispute

On July 6, 2011 US Department of Transportation (DOT) Secretary Ray LaHood and Mexican Transportation and Communication Secretary Dionisio Perez-Jacome signed a memorandum of understanding (MOU) formally outlining a reciprocal, phased-in program to allow Mexico-domiciled trucks to operate in US territory, as envisaged under NAFTA, and for Mexico to lift the "retaliatory tariffs" imposed on certain US goods. In response to the signing of the MOU, Mexico announced that it will eliminate half of its retaliatory duties on US exports to Mexico by July 8, 2011. The countries have agreed that the remaining retaliatory duties will be eliminated once the first Mexican truck crosses into US territory, a move that US Department of Agriculture (USDA) Secretary Tom Vilsack expects to take place within as little as 45 days.

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 a 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, in response to the US ban on Mexican trucks, Mexico's Secretary of Economy (SE) published in the Official Gazette a list of 89 US goods on which Mexico would impose retaliatory import duties 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.

Secretary LaHood circulated a concept paper to Congress and the government of Mexico on January 6, 2011, proposing a solution to the dispute. On March 3, 2011 the Obama Administration announced that the United States and Mexico agreed on a "path" forward to resolve the dispute. The April 13, 2011 Federal Register (FR) description of and request for comments on this path forward (in the form of a cross-border long-haul trucking pilot program) revealed that the program's design is quite similar to the 2007 Demonstration Project on NAFTA Trucking Provisions instituted under President Bush. In particular, both programs require that Mexican truckers hold valid requisite vehicle operating licenses and pass both a controlled substance testing and safety audit before entering the United States. Although both programs require the monitoring of Mexican trucks in the United States, the 2011 program calls for enhanced monitoring through the installation of electronic on-board recorders (EOBRs) on Mexican trucks in the United States.

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Reaction to the July 6, 2011 MOU has been mixed. Groups such as the US Chamber of Commerce, the Retail Industry Leaders Association (RILA) and the Emergency Committee for American Trade have praised the agreement as one which paves the way for the elimination of retaliatory tariffs on US goods. In contrast, such critics of the program as the International Brotherhood of Teamsters and the Owner-Operator Independent Drivers Association (OOIDA) have moved to block its implementation. OUIDA filed a lawsuit with the US Court of Appeals on July 6, 2011 arguing that the Transportation Secretary LaHood exceeded his statutory limitations in establishing the program. In addition, Reps. Peter DeFazio (D-OR) and Duncan Hunter (R-CA) introduced the bill "Protecting America's Roads Act" ("HR 2407" or "bill") on July 6, 2011 reportedly to limit the implementation of the program. HR 2407 prohibits DOT from granting permanent operating authority to Mexican trucking companies under the pilot program. The bill also prohibits DOT from paying for the EOBRs.

Since Secretary LaHood first issued his concept paper in January 2011, Mexico and the United States have moved quickly to implement the pilot program and repeal the "retaliatory tariffs." Nonetheless, experts agree that the disparate reactions to the MOU reflect the sharp divide between the US business community, which supports the program, and US organized labor, which opposes it. On one side, pro-free trade lawmakers and industry representatives support the program as it will lead to the elimination of the retaliatory tariffs levied on US exports to Mexico and will likely hold cost-savings for firm that have cross-border operations. In contrast, US organized labor, particularly the Teamsters, is generally unsupportive of the proposal, considering it an attack on US jobs and a threat to US highway safety.

USTR Declines to Initiate Two Section 301 Investigations Relating to CAFTA-DR and US-Israel FTA

On July 8, 2011, the Office of the US Trade Representative (USTR) declined to investigate two Section 301 petitions against Israel and the Dominican Republic under their respective free trade agreements (FTAs) with the United States. The petitions were originally filed on May 24, 2011.

The first petition, brought by the Institute of Research: Middle Eastern Policy (IRMEP), alleged that during the negotiation of the US-Israel FTA (1984-1985), the Government of Israel misappropriated business confidential information provided to the USTR and the International Trade Commission (ITC) by US companies and industries, and used this information to gain a systematic advantage in the US market. USTR based its decision not to initiate an investigation on two grounds: (i) as an organization involved in Middle East policy formation, IRMEP lacked standing to file such a petition; and (ii) the petition did not address any current acts, policies or practices of the Government of Israel that burden or restrict US commerce, but instead addressed an alleged act by the Government of Israel that occurred 27 years ago.

The second petition, brought by two US nationals, alleged that, from 1961 to 1962, the Government of the Dominican Republic expropriated property without adequate compensation. In carrying out these expropriations, the petitioners alleged that the Government of the Dominican Republic had, *inter alia,* breached its obligation to provide "prompt, adequate and, effective compensation" with respect to investments covered by the Dominican Republic-Central American FTA (CAFTA-DR). The USTR based its decision not to initiate the an investigation on three grounds: (i) the petition did not allege that the property of a US investor had been expropriated; (ii) the USTR is not in a position to investigate events that occurred five decades ago, well before CAFTA-DR entered

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into force; and (iii) such an allegation could be addressed more effectively and directly through Investor-State dispute resolution under Chapter 10 of CAFTA-DR.

Under Section 301 of the Trade Act of 1974, "the United States may investigate and sanction foreign countries that maintain acts, policies and practices that violate, or deny US rights or benefits under, trade agreements, or are unjustifiable, unreasonable or discriminatory and burden or restrict US commerce." A petition may be filed with USTR requesting an investigation of a particular practice of a foreign country and whether that country is violating its trade agreement commitments. USTR must determine whether to initiate a formal Section 301 investigation within 45 days of receipt of the petition.

Texas Energy Company Notifies Canada of Intent to Seek Arbitration Under NAFTA over Ontario Feed-In Tariff Program

On July 14, 2011, Texas-based Mesa Power Group, LLC ("Mesa") submitted to Canada a notice of intent to file a claim against Canada for its alleged failure to meet international obligations contained in the North American Free Trade Agreement (NAFTA) with regard to the province of Ontario's Green Energy Act as well as the subsequent feed-in tariff (FIT) program. This notice was submitted under NAFTA's investor-state dispute settlement mechanism, whereby a private investor may challenge a government before a dispute resolution panel.

Canada's Green Energy Act, enacted on May 14, 2009, created the FIT Program, which aimed to encourage the production of renewable energy in Ontario. The Ontario Power Authority, the state-owned enterprise responsible for implementing the FIT program, guarantees electrical grid access to renewable energy producers through long-term fixed price contracts. In regard to the NAFTA obligations allegedly violated by the FIT program, Mesa cites the following:

- **Article 1105 – Minimum Standard of Treatment.** Mesa alleges that Canada failed to accord it the minimum standard of treatment by directing the Ontario Power Authority to change the rules for awarding power purchase agreements (PPAs) under the FIT program, thus causing the Ontario Power Authority to ignore the technical merits of Mesa's wind projects and, instead, rely on "capricious and irrelevant political considerations" in the awarding of contracts;

- **Article 1106 – Performance Requirements.** Mesa alleges that Canada imposed on it several "prohibited" Canadian and Ontario content requirements and "buy local" performance requirements as a precondition for obtaining approval of commercial contracts under the FIT program; and

- **Article 1503 – State Enterprises.** Mesa alleges that Canada failed to ensure, through regulatory control, administrative supervision or the application of other measures, that the Ontario Power Authority act in a manner consistent with Canada's obligations under NAFTA in regard to the FIT program.

In addition to the allegations regarding the FIT program, Mesa alleges that Canada also violated NAFTA Articles 1102 and 1103 (National Treatment and Most Favored Nation Treatment, respectively) by providing more favorable transmission treatment to Boulevard Associates Canada, Inc., a Canadian company, and Korea-based Samsung, which were in circumstances similar to those of Mesa.

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Article 1119 of NAFTA (Notice of Intent to Submit a Claim to Arbitration) requires the disputing investor to deliver to the opposite disputing party a written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted, specifying, *inter alia*: (i) the provisions of NAFTA alleged to have been breached; (ii) the issues and factual basis for the claim; and (iii) the relief sought and the approximate amount of damages claimed. Mesa is seeking damages of no less than CND 775 million for "loss, harm, injury, moral damage, loss of reputation and damage caused by or resulting from Canada's breach of its" NAFTA obligations.

Mesa Power expects to file a formal NAFTA Notice of Arbitration at any point after October 3, 2011. The filing of this second notice formally begins an international arbitration that will review the fairness and propriety of the government actions in Canada. In the case "Canada – Certain Measures Affecting the Renewable Energy Generation Sector (DS 412)," Japan has separately challenged the FIT program before the World Trade Organization (WTO) Dispute Settlement Body (DSB), alleging that its local content requirements violate Canada's WTO obligations. Japan formally requested that a panel be established although the DSB has not yet proceeded to do so.

Lawmakers Send Letter Urging USTR to Push KORUS-Style IPR Provisions for TPP

On July 13, 2011, a bipartisan group of 22 House lawmakers sent a letter to President Obama, urging him to base the US proposal for intellectual property rights (IPR) provisions in the context of the Trans-Pacific Partnership (TPP) negotiations on IPR provisions contained in the still-pending US-Korea free trade agreement (FTA). The lawmakers urged President Obama to reject efforts on the part of TPP negotiating partners and others "to weaken [TPP IPR] standards below those contained in the US-Korea FTA."

In their letter, the lawmakers posit that the United States "has the most to lose from weak IP standards in foreign markets" as US IP-intensive industries "employ more than 19 million Americans, […] and account for approximately 60 percent of US exports." In this regard, the lawmakers state that "[i]nadequate protection of US [IPR in foreign markets] could impair future investment in research and development and discourage the capital investments critical to [creating] jobs in the United States."

The United States Trade Representative (USTR) tabled its proposed IPR text in early February 2011 before the fifth round of TPP talks in Chile. This proposed text did not include language on patent linkage, patent term extension and data exclusivity[1], which are three areas included in the so-called May 10 issues[2]. Pressure from US pharmaceutical companies ensured that strong language on these three issues was included in the still-pending US-Korea FTA.

Sources note that USTR could table a revised IPR proposal that includes at least some these IPR-related May 10 issues at the September 2011 TPP negotiating round in the United States. However, sources also opine that the

[1] Data exclusivity refers to the period of time an original patent holder may withhold from generic manufacturers data concerning the safety and efficacy of a drug.

[2] The Bush Administration and congressional Democrats arrived at an agreement on May 10, 2007 to modify the IP provisions in the US-Peru, US-Panama and US-Colombia FTAs, allowing for access to affordable medicines in these developing countries.

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already difficult US trade policy panorama resulting from the apparent paralysis surrounding the still-pending FTAs with Korea, Colombia and Panama has thus far caused USTR to refrain from tabling this revised proposal. If the Obama Administration submits to Congress the FTAs' implementing bills and Congress passes the same before the August 2011 recess, USTR will likely table this revised IPR proposal in time for consideration at the September 2011 TPP negotiating round. If the FTAs are not submitted and passed -a situation that is becoming ever more likely- these IPR-related May 10 issues could be shelved until Autumn or Winter 2011.

The letter's signees are Reps. Christopher Murphy (D-CT), Howard Coble (R-NC), Mary Bono Mack (R-CA), John R. Carter (R-TX), David Dreier (R-CA), Tim Griffin (R-AR), Richard Hanna (R-NY), Marsha Blackburn (R-YN), Ted Deutch (D-FL), Blake Farenthold (R-TX), Brett Guthrie (R-KY), Tim Huelskamp (R-KS), Lynn Jenkins (R-KS), Hank C. Johnson (D-GA), Leonard Lance (R-NJ), Jeff B. Miller (R-FL), Edolphus Towns (D-NY), Bill Johnson (R-OH), Adam Kinzinger (R-IL), Rick Larsen (D-WA), Donald A. Manzullo (R-IL) and Jim Cooper (D-TN).

OAS Agrees to Host Environmental Matters Secretariat under the US-Peru TPA

On July 17, 2011, Organization of America States (OAS) Secretary General (SG) José Miguel Insulza sent a letter to United States Trade Representative (USTR) Ron Kirk, consenting to an April 27, 2011 USTR request for the OAS Department of Sustainable Development (DSD) to host the Secretariat of Environmental Matters under the US-Peru Trade Promotion Agreement (TPA). SG Insulza's letter notes that the United States and Peru must still complete an agreement with the OAS to establish the regulatory framework for the US-Peru Environmental Matter Secretariat to operate within the OAS-DSD, in accordance with the rules and procedures of the same.

USTR Kirk's April 27 letter proposed that a Secretariat: (i) be established, under Article 18.8 of the US-Peru TPA, to receive and consider submissions filed by any person who asserts that a party is failing to effectively enforce its environmental laws; and (ii) prepare factual records concerning such submissions under Article 18.9 of the US-Peru TPA. USTR Kirk's April 27 letter also proposed that the OAS-DSD host said Secretariat and provide the same with the technical support and office equipment necessary for it to carry out its functions.

SG Insulza's consent to host the US-Peru Environmental Matter Secretariat comes amidst heightened activity on the part of the USTR in regard to Peru's alleged failure to come into compliance with a number of its own environmental laws, as envisaged under the US-Peru TPA.[3] For example, after Peru missed an August 1, 2010 deadline under the US-Peru TPA to come into full compliance with the Forestry Annex, US and Peruvian environmental groups asked USTR to request consultations with Peru. Consequently, the United States began to engage Peru and specifically broached the issue at such US-Peru bilateral fora as the Subcommittee on Forest Sector Governance and the Environmental Affairs Council meetings on April 27, 2011, as well as at the Environmental Cooperation Commission meeting on April 28, 2011. Largely as a result of this collaboration, in mid-June 2011 the Peruvian Congress approved a revised Forestry and Wildlife law, which included key reforms needed for compliance with the US-Peru TPA Forestry Annex. Following this success, however, both US and

[3] On May 10, 2007, President Bush and House Democrats reached a compromise deal to break a partisan stalemate on the US-Peru Trade Promotion Agreement (TPA) and allow for its consideration in Congress, provided the Agreement include, among other things, core international environmental protection standards.

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Peruvian officials agreed that the establishment of an Environmental Matter Secretariat would further streamline this consultation process.

Experts note that the enforcement or inclusion in trade agreements of such so-called "non-trade issues" as environment and labor protection standards have come to the forefront of the Obama Administration's trade policy. Department of Labor (DOL) Bureau of International Labor Affairs' June 10, 2011 decision to initiate an investigation into alleged labor-related violations of the US-Bahrain FTA in addition to USTR's activity relating to Peruvian compliance with the US-Peru TPA's environmental provisions indicate a decided tendency on the part of the Obama Administration toward enforcing labor and environmental commitments made under existing trade agreements. Furthermore, negotiating members of the Trans-Pacific Partnership (TPP) have noted US insistence on the inclusion of stringent labor and environmental protection standards in the Agreement and have suggested that such insistence could hamper efforts to conclude negotiations in the near-term. Nonetheless, experts opine that the Obama Administration will likely continue to push compliance of labor and environmental provisions in existing agreements and seek the inclusion of the same in future agreements.

Republican Lawmakers Commit to Supporting a Separate TAA Bill with Bipartisan Reforms

On July 19, 2011, 12 Republican Senators sent a letter to President Obama, committing support for a Trade Adjustment Assistance (TAA) renewal bill, were it to be submitted to Congress separately from the implementing bills for the free trade agreements (FTAs) with Korea, Colombia and Panama. Sen. Rob Portman (R-OH), who spearheaded the July 19 letter along with Sen. Roy Blunt (R-MO), has since expressed his willingness to vote in favor of TAA renewal before the Senate considers the FTAs' implementing bills as long as the FTA bills are submitted without TAA renewal language.

Although the Obama Administration submitted the FTAs' draft implementing bills for mock markup consideration on June 28, 2011, strong partisan disagreement over TAA renewal soon emerged. As submitted by the President for mock markup, the US-Korea FTA bill contained renewal language for a reported "bipartisan compromise" version of TAA. Soon after they were submitted, however, congressional Republicans expressed strong opposition to the inclusion of TAA renewal language in any of the FTAs' implementing legislation.

In the Senate mock markup session, Senate Finance Committee Chairman Sen. Max Baucus (D-MT) submitted for consideration the US-Korea FTA bill with the TAA renewal provisions included. During the Committee debate, the Republicans attempted, but failed, to pass an amendment removing the provisions that renewed TAA from the US-Korea FTA implementing bill. In the end, the Committee Democrats, who hold a majority in the Senate, were able to overcome Republican opposition and pass all three pieces of FTA implementing legislation in the mock markup with TAA renewal language included. In contrast to the Senate Finance Committee mock markup session, House Ways and Means Committee Chairman Rep. Dave Camp (R-MI) submitted for consideration the US-Korea FTA without TAA renewal language. During debate, the House Democrats attempted, but failed, to pass a number of amendments adding TAA to the implementing legislation. Despite Democrat opposition, the Republicans, who hold a majority in the House, were able to pass all three pieces of draft FTA implementing legislation without any amendments, *e.g.*, the inclusion of TAA renewal language.

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If TAA is eventually included in one of the FTAs' implementing bills, *e.g.*, US-Korea FTA, and submitted to Congress under Trade Promotion Authority (TPA) procedural rules, experts posit that it then becomes a matter of procedure in regard to how the chambers will consider the bills. In this case, Speaker of the House Rep. John Boehner (R-OH) could decide to extirpate TAA out of the FTA implementing bill, in which case the FTA bills and TAA renewal would be considered separately under closed House rule, *i.e.*, no amendment may be offered. Given both the FTAs and TAA pass in the House, House leadership would then need to re-package them for transmission to the Senate in order for TPA procedural rules to continue to apply. If only the FTAs pass, as congressional vote counters expect would occur, and TAA fails, Senate Majority Leader Harry Reid, upon receiving the House passed FTAs, would need to decide whether to insist on TAA renewal, thus letting the FTAs die, or consider the FTAs without TAA.

White House Chief of Staff Bill Daley has expressed a certain willingness on the part of the Obama Administration to submit TAA and the FTAs' implementing language as separate bills given speedy passage of TAA can be ensured. Despite the commitment made in Sen. Portman's July 19th letter, Assistant US Trade Representative for Public and Media Affairs Carole Guthrie noted on July 21, 2011 that the Administration still needs a commitment from the "leadership in both chambers on the specifics of how they will move the three trade agreements and TAA" before the Obama Administration submits the FTAs' implementing bills to Congress. While different members of Congress continue to seek support for their preferred method of passing the FTAs, experts note that the window of opportunity for passing them before the August recess is quickly coming to a close. Nonetheless, Sen. Mitch McConnell (R-KY) has argued that the Administration should at least submit the FTAs' implementing legislation before the August recess. Once it is submitted, Congress will only have 45 legislative days to schedule a vote, and therefore will be forced to hold a vote in September.

DOL Accepts Peruvian Union Petition to Review Government's Alleged Labor Violations under US-Peru FTA

On July 26, 2011 the Department of Labor (DOL) Office of Trade and Labor Affairs (OTLA) published a notice on the Federal Register (FR), announcing the acceptance, on July 19, 2011, of a petition filed by the National Union for Unity of Peruvian State Revenue Service Workers (*Sindicato Nacional de Unidad de Trabajadores de Superintendencia Nacional de Administración Tributaria (*SINAUT)) to review, pursuant to Article 17.2 of the US-Peru free trade agreement (FTA), labor violations allegedly committed by the Peruvian State Revenue Service (SUNAT). SINAUT originally filed the petition on December 29, 2010 and, having now accepted the petition, OTLA must complete the review and publish a public report on the same within 180 days.

In their December 29, 2010 submission, SINAUT alleged that SUNAT, and therefore the Peruvian Government, was in violation of Article 17.2 of the US-Peru FTA. Article 17.2 states "Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights, as stated in the International Labor Organization (ILO) Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998) (ILO Declaration): (i) freedom of association; (ii) the effective recognition of the right to collective bargaining; (iii) the elimination of all forms of compulsory or forced labor; (iv) the effective abolition of child labor and, for purposes of this Agreement, a prohibition on the worst forms of child labor; and (v) the elimination of discrimination in respect of employment and occupation." More specifically, SINAUT claimed in its petition that the Peruvian Government

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had violated their right to collective bargaining by refusing to negotiate in good faith and engage constructively at various stages of the collective bargaining process.

OTLA's decision to review the submission does not indicate any determination as to the validity of SINAUT's allegations. Nonetheless, should OTLA decide that the Peruvian Government's actions were inconsistent with its labor commitments under the US-Peru FTA, Article 17.7 of the same states that OTLA may request cooperative labor consultations with Peru in order to reach a mutually satisfactory resolution of the matter.

The DOL's decision to accept SINAUT's petition reflects President Obama's emphasis on promoting what his Administration deems a "21st century" FTA policy, which is characterized, in part, by a clear focus on the enforcement of labor provisions contained in existing FTAs. In addition to the investigation into the Peruvian Government's actions, similar reviews and dispute settlement processes are also currently being conducted regarding alleged labor violations by the Guatemalan and Bahraini Governments under their respective FTAs with the United States. The Obama Administration has also required Colombia to bolster its protection of organized labor before submitting the US-Colombia FTA's implementing bill to Congress, and has made labor protection a central theme in the US negotiating position in the context of the Trans-Pacific Partnership (TPP). According to experts, while most current and future US FTA partners agree in informal discussions that providing workers with basic rights is an optimal outcome of any FTA, incorporating these issues into a formal FTA and ensuring enforcement of these issues is far more difficult, particularly when the FTA partner is a developing country with historically weak labor and environmental protections. Consequently, these experts are skeptical of the United States' ability to conclude such future FTA negotiations as those for the TPP that include strong labor provisions.

Lawmakers Send Letter to President Calling for 12 Years of Protection on Biologics in TPP

On July 27, 2011 a bipartisan group of lawmakers sent a letter to President Obama, urging him to support current US law on biologics in the context of the Trans-Pacific Partnership (TPP) negotiations. During the 111th Congress, US lawmakers passed the Patient Protection and Affordable Care Act, which prohibits any biosimilars, or generic drugs, from being approved for production until 12 years after the date on which the new biologic drug was first licensed. According to the letter, "[t]he US-led biopharmaceutical industry would be disadvantaged if the [United States] does not ensure consistency with US law as part of TPP, because foreign countries do not provide the same type of protection rules."

Public health advocates note that, if 12 years of patent protection are provided for in the TPP agreement, TPP parties' generic pharmaceutical companies would be prohibited from producing generic forms of new biologic drugs for 12 years following their release. The July 27 letter states that 12 years of patent protection is "critical to keeping and expanding high-value US jobs offered by America's biotech sector and spurring the R&D investment needed to seize extraordinary opportunities for medical advances to combat our most costly and challenging diseases." If approved in TPP, the provision would provide the longest period of pharmaceutical intellectual property (IP) protection ever agreed to in a US FTA.

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This position goes against that articulated in President of the Generic Pharmaceutical Association (GPhA) Bob Billings' June 10, 2011 letter to President Obama, in which he urges President Obama to use the principles that the May 2007 Bipartisan Trade Deal ("May 10 Agreement") laid out for the protection of intellectual property rights in the TPP negotiations.[4] According to the May 10 Agreement, intellectual property rights provisions should be constructed such that "developing country free trade agreement partners are able to achieve an appropriate balance between fostering innovation in, and promoting access to, life-saving medicines." In order to do this, GPhA President Billings' letter urges President Obama to exclude provisions relating to intellectual property rights for biologic products in TPP. In doing so, Billings states that generic drug manufacturers will be able to "drive down costs and support public health by providing access to affordable medicine."

The disagreement over patent protection for biologics in TPP is just one of a number of current debates surrounding pharmaceuticals in TPP. Other recent disagreements have surfaced over issues such as national drug pricing and reimbursement as well as pre-grant patent opposition systems. The proliferation of pharmaceutical-related issues reflects the vastly different priorities the developed and developing TPP countries have for the production and consumption of pharmaceutical products. In this regard, experts note that the goal of developing a single, consistent pharmaceutical policy for the current, not to mention future, TPP countries represents one of the larger obstacles to its completion.

Mexico Publishes Details on Mutual Recognition of Telecommunication Equipment Conformity Assessments with the United States under NAFTA

On July 28, 2011, the Mexican Secretary of Economy (*Secretaría de Economía* (SE)) published a notice in the *Official Gazette*, announcing the details of mutual recognition by the United States and Mexico of each party's testing laboratories for and results of telecommunications equipment conformity assessments. US Trade Representative (USTR) Ron Kirk and Mexican Secretary of Economy Bruno Ferrari signed the agreement underlying this mutual recognition in Paris on May 25, 2011.

The Agreement covers equipment subject to regulation, including wired/wireless and terrestrial/satellite equipment, and calls upon the parties to hold joint meetings and training opportunities for officials involved in designating and recognizing testing laboratories and reviewing conformity assessments. The SE notice stated that the announcement of mutual recognition stems from Article 1304(6) of the North American Free Trade Agreement (NAFTA), which states that each Party "shall adopt, as part of its conformity assessment procedures, provisions necessary to accept the test results from laboratories or testing facilities in the territory of another Party for tests performed in accordance with the accepting Party's standards-related measures and procedures."

[4] The May 10 issues, 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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According to USTR Kirk, this mutual recognition will save US and Mexican telecommunications equipment manufacturers resources otherwise spent on additional product testing prior to exporting the equipment to the other party, thus lowering prices for end-users. The Agreement entered into force on June 10, 2011.

Congress Examines Different Vehicles for Moving FTAs, TAA After August Recess

On July 26, 2011, US Trade Representative (USTR) Ron Kirk stated at an event hosted by the Bretton Woods Committee that congressional leadership had reached a "framework" agreement for passing the free trade agreements (FTAs) and Trade Adjustment Assistance (TAA). Although USTR Kirk did not give any specific details on the framework, he stated that the Obama Administration would employ said framework once Congress reconvenes in September 2011 in order to pass TAA and the FTAs, and would also be open the hearing arguments from Senate Minority Leader Mitch McConnell (R-KY) for the renewal of Trade Promotion Authority (TPA), which allows Congress to vote up or down on an FTA without amending it.

When the Obama Administration submitted the implementing bills for the three pending FTAs with Colombia, Panama and Korea for Congressional mock mark-ups on June 28, 2011, a bipartisan compromise version of TAA was included in the US-Korea FTA implementing legislation. In addition, renewal language for the Generalized System of Preferences (GSP) and the Andean Trade Promotion and Drug Eradication Act (ATPDEA) was included in the US-Colombia FTA implementing legislation. Soon after the FTAs' implementing legislation was submitted, however, partisan debate ensued over whether TAA should be included in FTA implementing legislation. The Republican-controlled House removed TAA from the US-Korea FTA and the House Ways and Means Committee passed in mock markup all three pieces of FTA implementing legislation without amendments. In contrast, the Democrat-controlled Senate conserved TAA in the US-Korea FTA and the Senate Finance Committee passed in mock markup all three pieces of legislation without amendment. The different results of each mock mark-up left the Obama Administration without a clear path forward for submitting the FTAs' final implementing legislation and TAA renewal to Congress.

USTR Kirk's July 25 statement prompted a number of lawmakers to elaborate on the "frameworks" they are currently considering as a vehicle for the passage of TAA and the FTAs.

- On July 27, 2011 House Ways and Means Chairman Rep. Dave Camp (R-MI) stated at a US Chamber of Commerce event that the framework accorded by congressional leadership entails four steps: (i) the Senate would vote on TAA; (ii) the Obama Administration would send the FTAs to Congress; (iii) the House would vote on TAA and the FTAs; and (iv) the FTA-TAA package legislation would be sent from the House to the Senate for a floor vote. A few hours later, Democratic Aides in the Senate impugned Rep. Camp's assertion that such a path forward had been accorded. In this scenario sources note that GSP is likely to be included in the US-Colombia FTA implementing legislation;

- Also on July 27, 2011, Sen. Ron Wyden (D-OR) articulated at a National Foreign Trade Council (NFTC) the following steps for moving the FTAs and TAA: (i) the House would pass a stand-alone TAA bill; (ii) the Obama Administration would send the FTAs' implementing bills to Congress; (iii) the House would pass the

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FTAs; and (iv) TAA and the FTAs would be sent to the Senate for a floor vote. In this scenario sources note that GSP is likely to be included in the US-Colombia FTA implementing legislation; and

- Sources reported a third option for the passage of the FTAs and TAA on July 27, 2011. This third option would entail the following steps: (i) the House would vote on the renewal of GSP; (ii) the GSP bill would be amended to include TAA and then would be sent to the Senate for a Senate floor vote; (iii) the GSP/TAA package would be sent to the House for a House vote; (iv) the Obama Administration would send the FTAs' implementing legislation to Congress; (v) the House would vote on the FTAs; (vi) the Senate would vote on the FTAs. Sources note that this third option details a process similar to that proposed by Rep. Camp.

In addition to the passage of the FTAs and TAA, USTR Kirk remarked that the Obama Administration is open to hearing Sen. McConnell's argument for the renewal of TPA, which expired on July 1, 2007. Although the three pending FTAs were all negotiated under TPA, the Obama Administration is currently negotiating the Trans-Pacific Partnership without TPA, which experts note undermines US credibility at the negotiating table. Sen. McConnell first proposed the renewal of TPA on June 23, 2011 as a means of resolving a partisan impasse over how to move the FTAs and TAA. While a number of lawmakers have also expressed support for TPA renewal, debate has ensued over whether now is the best time to consider such a measure as the formation of a TPA renewal bill would likely require lawmakers to consult with business, labor and consumer groups. Rep. Kevin Brady (R-TX) has remarked that the process of forming TPA legislation could slow down the approval of the three FTAs or result in a hastily drafted TPA bill.

Experts agree that the recent articulation of numerous, differing frameworks for the passage of the FTAs and TAA indicates that, even if a framework has been accorded for TAA-FTA passage as USTR has stated, it is likely still too undeveloped to delineate a step-by-step process by which the legislation will be considered by the chambers. The divergence in views over TPA, as well as the vehicle for passing TAA and the FTAs, gives experts reason to opine that further negotiation between the Obama Administration and the congressional leadership is needed. Consequently, experts believe the FTAs will most assuredly not be submitted to Congress until after the debt ceiling issue has been resolved and lawmakers have returned from August recess.

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MULTILATERAL

WTO Panel Rules Against US Anti-Dumping Measures in Vietnam Shrimp Case, Including "Zeroing"

Summary

A WTO Panel has ruled that anti-dumping measures taken by the United States on shrimp from Vietnam violated US obligations under the WTO Anti-Dumping Agreement. The Panel ruled in favour of Vietnam on most – although not all – of the claims arising from the administrative reviews of the anti-dumping order by the United States Department of Commerce (USDOC).

Significance of Decision / Commentary:

The WTO-inconsistency of "zeroing" is nothing new, and this Panel Report is the most recent addition to the considerable corpus of jurisprudence ruling against this practice. The WTO Appellate Body has ruled against the use of zeroing both in original investigations and reviews, and the Panel in this case reviewed and applied that case law.

In a Concurring Opinion in its 2009 decision in US – Continued Zeroing, one Member of the Appellate Body pleaded for an end to the litigation on zeroing: "The Appellate Body has decided the matter. At a point in every debate, there comes a time when it is more important for the system of dispute resolution to have a definitive outcome, than further to pick over the entrails of battles past. With respect to zeroing, that time has come." The Panel in the present case agreed: "[O]n the question of zeroing, the Appellate Body has spoken definitively, the Appellate Body's decisions have been adopted by the DSB, and the membership of the WTO is entitled to rely upon these outcomes."

The Panel addressed a number of highly technical – yet very important – issues related to the establishment of margins of dumping in administrative reviews, as described below. The Panel resolved these technical claims in a purposeful manner, insisting that investigating authorities adhere to core principles established by the Appellate Body.

Analysis

I. BACKGROUND: THE CHALLENGED MEASURES

The USDOC imposed anti-dumping duties on certain warmwater shrimp from Vietnam in 2004, prior to Vietnam's 2007 accession to the WTO.

This case involved not the original anti-dumping investigation, but rather the administrative reviews of the order. Virtually every country in the world other than the United States maintains a prospective system for collecting anti-dumping duties, *i.e.*, the duties are assessed at the time of entry of the goods. By contrast, under

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the US retrospective duty assessment system, a cash deposit is required upon entry, and the definitive duties are determined during the annual administrative reviews of the order conducted by the USDOC. In the present case, Vietnam challenged two administrative reviews of the order on shrimp.

II. ZEROING: "THE APPELLATE BODY HAS SPOKEN DEFINITIVELY"

Zeroing refers to the practice whereby an investigating authority discounts so-called "negative dumping margins" to zero. Where the export price of a product is lower than the price in the exporting country, this creates a positive dumping margin. However, when zeroing is used, investigating authorities do not give any credit for negative dumping margins, *i.e.*, when the export price of the product is higher than the price in the exporting country. The investigating authority does not average positive and negative dumping margins together – instead, it considers all negative dumping margins to be zero. This has the effect of inflating the overall average dumping margin, and can lead to the imposition or maintenance of anti-dumping duties which may not otherwise apply at all.

Article 2.4 of the Anti-Dumping Agreement requires that when an investigating authority calculates dumping margins, a "fair comparison" must be made between the export price and the normal value. Vietnam argued that the application by the USDOC of "simple zeroing" in the administrative reviews at issue violated this provision.

The United States did not contest that it used simple zeroing in the administrative reviews for shrimp from Vietnam. However, it noted that the margins of dumping resulting from the reviews were either zero or *de minimis*. The United States argued, among other things, that where the margins of dumping were zero or *de minimis*, "they cannot be characterized as 'artificially inflated' or 'inherently unfair.'" The Panel rejected this US position, reasoning that "[e]ven in cases where no anti-dumping duties are assessed, the application of zeroing distorts the prices of certain export transactions, because export transactions made at prices above normal value are not considered at their real value." The Panel therefore ruled that the United States breached Article 2.4 by using zeroing in the reviews.

Vietnam also successfully claimed against the WTO-consistency of zeroing "as such." The Panel recalled that the Appellate Body had already ruled against the use of simple zeroing in reviews. While the Panel assessed the US arguments to the contrary in the current case, it noted that "the Appellate Body has considered, and rejected, these very same arguments in prior dispute settlement proceedings."

The Panel therefore ruled that the use of simple zeroing in reviews violated US obligations under both GATT Article VI and Article 9.3 of the Anti-Dumping Agreement, which provides that the amount of the anti-dumping duty cannot exceed the margin of dumping.

III. PANEL REJECT VIETNAM'S CLAIMS ON LIMITATIONS ON THE NUMBER OF SELECTED RESPONDENTS

Article 6.10 of the Anti-Dumping Agreement requires investigating authorities to "determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation." However, it also sets out an important exception: "[i]n cases where the number of exporters, producers, importers or types of

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products involved is so large as to make such a determination impracticable", the authorities can "limit their examination either to a reasonable number of interested parties or products by using samples…."

In the present case, the USDOC considered it "impracticable to examine all respondents for which an administrative review had been requested" and therefore limited the number of respondents selected for individual review.

Vietnam's claims on this point were very narrow. As the Panel noted, "Vietnam is not challenging the USDOC's decision to conduct limited examinations" as impracticable. Nor did it challenge the number of exporters or producers which the USDOC included in its sample. Instead, Vietnam claimed that "the USDOC's repeated use of limited examination […] caused the USDOC to undermine the rights of exporters and producers provided for in other provisions of the Anti-Dumping Agreement that are dependent on each exporter or producer having individual margins of dumping."

The Panel rejected this argument, reasoning that it would render "meaningless" the exception provided for in Article 6.10. It stated that "despite the general preference for individual margins, investigating authorities need not determine individual margins for all known exporters and producers in all cases." Related claims made by Vietnam regarding the use of selected exporters were also rejected.

I. "ALL OTHERS" RATE BASED ON ZEROING: INVESTIGATING AUTHORITY'S DISCRETION IS "NOT UNLIMITED"

Article 9.4 of the Anti-Dumping Agreement imposes certain disciplines on investigating authorities in their selection of the so-called "all others" rate, *i.e.*, the anti-dumping duty applied to imports from exporters or producers not included in the examination. As the Panel noted, "Article 9.4 states the general rule that this maximum allowable 'all others' rate is equal to the weighted average of the margins of dumping established with respect to individually-examined exporters." However, this general rule is qualified. The provision goes on to state in part that "authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins […]."

In the present case, all the respondents selected for individual examination in the reviews received a zero or a *de minimis* margin of dumping. It was unclear how the "all others" rate should be applied in this situation. In an earlier case, the Appellate Body referred to this as a "lacuna" in the Agreement, because "while Article 9.4 prohibits the use of certain margins in the calculation of the ceiling for the 'all others' rate, it does not expressly address the issue of how that ceiling should be calculated in the event that all margins are to be excluded from the calculation, under [these] prohibitions [original emphasis]."

Yet despite this "lacuna", the Panel considered that prior Appellate Body authority stood for "a more general proposition that any 'margin of dumping' calculated or relied upon by an investigating authority in the context of the application of the disciplines of the Agreement must be calculated consistently with Article 2", which sets out the rules for a determination of dumping. The Panel thus considered that "any individual margin of dumping which the investigating authority relies upon in determining the maximum allowable 'all others' rate must of necessity have been calculated in conformity with the provisions of Article 2". The Panel added that "[t]his is true irrespective of whether or not all individual margins are zero, *de minimis* or based on facts available."

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The Panel thus stressed that "if an investigating authority limits its investigation and applies an 'all others' rate to non-selected exporters, its discretion in doing so is not unlimited." Thus, the "the margins of dumping which are used to establish the maximum allowable 'all others' rate must be ones which, at the time the 'all others' rate is applied, conform to the disciplines of the Agreement."

Applying these principles to the case before it, the Panel ruled that "an investigating authority that determines the maximum allowable 'all others' rate on the basis of dumping margins calculated with the use of zeroing" acts inconsistently with the Agreement, specifically Article 9.4.

The Panel also rejected a temporal argument raised by the United States. As noted above, the original investigation took place prior to Vietnam's accession to the WTO. The United States argued that "the USDOC merely continued to apply the 'all others' rate initially applied in the original investigation during the […] reviews [original emphasis]." The Panel dismissed this argument, saying that the "USDOC made a new and distinct 'all others' rate determination in each of the administrative reviews which are before us." In the view of the Panel, the "facts squarely contradict the suggestion by the United States that the USDOC merely continued to apply the 'all others' rate from the original investigation in the two reviews at issue."

Thus, the Panel concluded that the United States breached Article 9.4 "as a result of the USDOC's imposition, in the […] administrative reviews, of an 'all others' rate determined on the basis of margins of dumping calculated with zeroing[.]"

II. RATE ASSIGNED TO VIETNAM-WIDE ENTITY: AN "ALL OTHERS" RATE CANNOT BE "CONDITIONAL ON THE FULFILLMENT OF SOME ADDITIONAL REQUIREMENT"

Vietnam also successfully challenged the USDOC decision to assign a high anti-dumping margin to the so-called "Vietnam-wide" entity.

This claim arose from the fact that the USDOC treated Vietnam as a non-market economy. The Department "applied a rebuttable presumption that all shrimp exporting companies are controlled by the Government of Vietnam, such that they may be treated as operating units of a single, government-controlled, Vietnam-wide entity, rather than individual exporters in their own right." Exporting companies that were considered part of the "Vietnam-wide entity" were assigned neither their own, individual margins, nor the residual "all others" rate, but rather a distinct – and much higher – rate.

The Panel stated that "the text of Article 9.4 seems clear in requiring that […] any rate assigned to non-selected respondents should not exceed the maximum allowable amount provided for in that provision." The Panel added that "[t]here is nothing in the text of Article 9.4 suggesting that authorities are entitled to render application of an 'all others' rate conditional on the fulfilment of some additional requirement." According to the Panel, Article 9.4 "provides no legal basis for the USDOC not to have applied an 'all others' rate to the Vietnam-wide entity."

The Panel similarly ruled against the USDOC decision to have recourse to "facts available" (*i.e.*, information provided other than by the interested parties). Article 6.8 allows an investigating authority to use "facts available" in cases where "any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation[.]" However, as the Panel noted, "the

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USDOC had decided not to apply an 'all others' rate to the Vietnam-wide entity before any question of non-cooperation could have arisen[.]" The Panel therefore concluded that the USDOC violated Articles 9.4 and 6.8 of the Anti-Dumping Agreement.

The decision of the Panel in United States – Anti-Dumping Measures on Certain Shrimp from Vietnam (DS404) was released on July 11, 2011.

WTO Releases 2011 World Trade Report; Evolution and Impact of PTAs Highlighted

Summary

On July 20, 2011, the World Trade Organization (WTO) released the 2011 World Trade Report, an annual publication that aims to deepen understanding about trends in trade, trade policy issues and the multilateral trading system. The 2011 Report is divided into two parts: (i) a brief and general treatment of world trade in 2010; and (ii) a detailed discussion on the history, content, impact and future of preferential trade agreements (PTAs). In his introduction, WTO Director General (DG) Pascal Lamy highlights two trends in international trade relations that surfaced in 2010: first, that PTAs are increasing in number and prominence and, second, that the content of PTAs is evolving and deepening. We provide analysis of the Report below.

Analysis

Although the first of the two sections is brief, it provides important facts and figures to support its conclusion that, although world trade has rebounded from its 2009 downturn to pre-crisis levels, it has not returned to its pre-crisis long-term trend. The world's gross domestic product (GDP) grew by 3.4 percent in 2010 and, although this number indicates strong growth, the Report argues that a number of factors have made trade and output grow more slowly than they might have otherwise, including: (i) the curtailment of fiscal stimulus measures in many countries; (ii) high oil prices; and (iii) persistent unemployment, which has suppressed domestic consumption in a number of developed countries. In addition, the report notes that, in general, developing economies grew faster than developed economies in 2010.

The Report's second and final section describes the historical and current development of PTAs, examines why PTAs are established, what their content is, and what their economic effects are. The Report concludes by considering the interplay between PTAs and the multilateral trading system. We provide a more detailed analysis of the second section of the report below.

I. BACKGROUND OF AND CURRENT TRENDS IN PTAS

The Report provides discussion on the history of PTAs as well as a snap-shot of the current PTA landscape. It quantifies the sizeable increase in PTA negotiation, conclusion and entrance into force in recent years, by region, type of PTA and level of economic development of PTA partners. The Report also discusses how much trade between PTA partners is subject to preferential treatment. This section provides the following key points:

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- In recent years there has been a considerable increase in the number of PTAs in effect. These PTAs largely consist of agreements between developing countries, cross-regional free trade agreements (FTAs) and bilateral agreements;

- Many recent PTAs have gone beyond traditional market access commitments to include agreements on such issues as intellectual property rights (IPR), product standards, competition and investment polices; and

- Despite the increased number of PTAs, only 16 percent of world trade is eligible for preferential tariffs. In addition, even within the framework of a PTA, most countries continue to provide significant protection for their "sensitive" products.

II. MOTIVES FOR AND CONSEQUENCES OF PTAS

The Report addresses the motives for and consequences of PTAs, with attention paid to both political and economic factors. For the purpose of explaining the motives a country may or may not have for seeking a PTA with another, the report distinguishes between "shallow" agreements, which cover mostly border measures, *e.g.*, tariffs, customs procedures, etc., and "deep" agreements, which cover border measures as well as other rules and domestic policies, *e.g.*, labor, environment, etc. The Report also examines how cross-border harmonization of national policies, *i.e.*, entering into "deep" agreements, is necessary for the development of international production networks. This section provides the following key points:

- While the lowering of tariffs was once the main goal of PTAs, tariffs decreased significantly after World War II and, more recently, have begun to plateau. As a result, tariffs are no longer considered the main goal of PTAs;

- Countries are now using PTAs to develop cross-border regulatory frameworks, thus allowing for "deep" integration with the PTA partner; and

- One explanation for the emergence of these "deep" agreements is the development of international production networks, in which a product is assembled across multiple national borders, a concept which makes the harmonization of national policies as beneficial as the lowering of tariffs.

III. DEPTH AND SCOPE OF PTA COMMITMENTS

The Report provides discussion on the content of PTAs, particularly on the depth and scope of commitments as compared to those contained in WTO agreements. Building on similar discussion in Section II, the Report provides evidence supporting the positive relationship between "deep" agreements and international production networks. This section provides the following key points:

- The proliferation of PTAs has resulted in a decrease in the marginal preferential benefit of each additional PTA;

- The goal of lower tariffs in today's PTAs comes from a desire to avoid trade discrimination, not secure preferential treatment;

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- Beyond tariff reductions, most PTAs now include provisions on services, investment, competition and technical barriers to trade (TBTs); and

- Future research needs to focus increasingly on the reasons for establishing PTAs beyond the tariff reductions.

IV. THE INTERPLAY BETWEEN THE MULTILATERAL TRADING SYSTEM AND PTAS

The Report identifies potential synergies and conflicts between PTAs and the multilateral trading system. In this regard, it examines ways in which the two "trade systems" can harness these synergies and avoid or overcome conflicts. Options for creating a coherent trade policy between the WTO and the growing number of PTAs include:

- Accelerate the multilateral trade negotiations through a more ambitious regulatory agenda as a means of reducing the scope for divergence between PTAs and the multilateral system;

- Fix the deficiencies in the WTO legal framework to more strictly dictate how WTO members can form PTAs (a "hard-law" approach);

- Develop a set of non-binding PTA best practice policies for WTO members to follow (a "soft-law" approach); and

- Extend existing PTAs in a non-discriminatory manner to additional parties in order to reduce the need for additional PTAs and encourage coherence amongst those that remain.

Outlook

At the launch of the World Trade Report 2011, DG Pascal Lamy reiterated the significance of the recent explosion in PTAs. He noted that there are currently 300 PTAs in force and that the global economic crisis has done little to slow the negotiation of dozens more. Although the number of PTAs has grown, DG Lamy noted that the tendency towards "deep" PTAs has brought with it a high risk of market segmentation. Although the expansive membership of the WTO means that it is uniquely situated to formulate the type of widely-accepted, broad-based policies necessary to help PTA partners avoid such issues, the current impasse in the WTO Doha Development Round (DDA) talks has shown that it is not easy for such a large and diverse group of negotiators to come to an agreement on the same "deep" issues contained in bilateral or regional PTAs. This makes the future of PTAs seem even more secure, but leaves experts asking what role the WTO will play in the future of multilateral trade liberalization. For his part, DG Lamy has argued that PTAs and the multilateral trading system need not work at counter purposes.

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Multilateral Highlights

Ambassador Punke Articulates US Position Regarding Failure of WTO Members' to Achieve "LDC-Plus" December Package

In a speech made at the World Trade Organization (WTO) informal Trade Negotiations Committee (TNC) meeting on July 26, 2011, Deputy US Trade Representative (USTR) Michael Punke expressed doubt that any partial package of deliverables, also known as an early harvest, could be agreed upon by the December 2011 WTO Ministerial Conference. Ambassador Punke's speech followed WTO Director General (DG) Pascal Lamy's assessment of the Doha Development Agenda (DDA) negotiations' current state-of-play. Although DG Lamy urged negotiators to continue working on a package of least-developed country (LDC) deliverables for the December Ministerial, Ambassador Punke argued that "a so-called 'Early Harvest' package is not happening and is not going to happen."

After WTO negotiators agreed in May and June 2011 that a full DDA deal could not be agreed upon by the December Ministerial, DG Lamy pushed WTO members to pull together a partial package of LDC deliverables. In particular, he asked that countries prioritize delivery on the following LDC issues: (i) duty-free, quota-free (DFQF) treatment for LDC exports; (ii) simplified rules of origin for LDCs; (iii) waiver for LDCs from future services market access agreements at the WTO; and (iv) concessions on cotton subsidies. In response, countries such as the United States argued that LDC deliverables alone would not address their constituency requirements and that there had to be a "plus" element in addition to the LDC part of the package. DG Lamy put a number of potential "LDC-plus" issues on the table, including: (i) a trade facilitation agreement; (ii) export competition; (iii) a monitoring mechanism for special and differential treatment; (iv) a "step forward" on fisheries subsidies; and (v) a "step forward" on environmental goods and services.

After more than a month of exploring the possibility of an "LDC-plus" package, DG Lamy announced at the July 26, 2011 informal TNC meeting that the probability of members coming to an agreement on such a package was quite low. Instead of continuing to negotiate an unlikely deal, he outlined two possible paths for WTO negotiators to follow once they return from their August break: (i) prepare the non-DDA parts of the December Ministerial and begin discussions on how DDA negotiations should proceed after the December Ministerial; and (ii) continue working on a package of LDC deliverables for the December Ministerial. After laying out the options, DG Lamy stated that he would prefer to see negotiators prepare the non-DDA issues and consider the direction of the post-December DDA negotiations, as well as continue to negotiate an LDC deliverables package for the December Ministerial.

After DG Lamy spoke, Ambassador Punke articulated the United States' position on how WTO negotiators should continue in the wake of a failure to form an "LDC-plus" package. Although he noted that the United States was originally committed to the idea of an early harvest, the United States' position also holds that "the only way a small package would come together was for all major players to be ready to make meaningful contributions." To the extent that agreement could not be reached on the "plus" part of the "LDC-plus" package, Ambassador Punke suggested that the United States could not agree to the "LDC" part of the package. Furthermore, Ambassador Punke argued that continued efforts to negotiate an early harvest "comes at a significant cost,

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crowding out essential work on preparations for the [December] Ministerial." Nonetheless, Ambassador Punke did not completely rule out the chances that some package of deliverables could be agreed upon by the December Ministerial. At the end of his speech, he claimed, "we are certainly open to a creative discussion of development issues."

Although Ambassador Punke's July 26 speech reflects the consistent US position that all major WTO members must make a meaningful contribution to any package of DDA deliverables, this stance now goes against DG Lamy's suggestion of how WTO negotiators should proceed in the months leading up to the December Ministerial. Experts note that, without US support, DG Lamy is unlikely to succeed in his goal of pulling together an LDC deliverables package by December 2011. In his speech, Ambassador Punke blamed the breakdown of negotiations on countries that are more willing to talk about what others should give up than what they themselves can contribute. In contrast, DG Lamy noted that the system should also be blamed. He remarked that "[w]hat we are seeing today is the paralysis in the negotiating function of the WTO, whether it is on market access or on the rule-making. What we are facing is the inability of the WTO to adapt and adjust to emerging global trade priorities, those you cannot solve through bilateral trade deals." Experts opine that, if a December package is not delivered, WTO members may begin to doubt the ability of the organization to bring about broad-based trade liberalization, although they would likely still consider it a proper and well-functioning forum for dispute settlement and agreements of a narrower scope, *i.e.*, plurilaterals.

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