WHITE & CASE

White & Case LLP
General Trade Report - JETRO

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UNITED STATES

GENERAL TRADE POLICY

Treasury Decides Again Not to Label China a Currency Manipulator

Summary

On May 27, 2011 the US Department of the Treasury submitted to Congress its semi-annual report on international economic and exchange rate policies. The Treasury report found none of the United States' major trading partners, including China, to be manipulating its currency for the purpose of preventing effective balance of payments adjustment or gaining unfair competitive advantage in international trade from the second half of 2010 through April 2011.

Analysis

I. THE REPORT'S FINDINGS

In the report, Treasury again chose not to label China a "currency manipulator," despite the Department's view that China's currency, the renminbi (RMB), remains undervalued. Treasury is required to submit the report to Congress under the 1988 Omnibus Trade and Competitiveness Act to determine "whether countries manipulate the rate of exchange between their currency and the US dollar (USD) for purposes of preventing effective balance of payments adjustment or gaining unfair competitive advantage in international trade." The release of the report was due April 15th, as required by law. Sources opine that the delayed release allowed the US to secure commitments from their Chinese counterparts in bilateral and multilateral negotiations, such as the May 2011 Strategic & Economic Dialogue (S&ED). The current Treasury report found none of the United States' major trading partners to be manipulating its currencies for the above cited purposes from the second half of 2010 through April 2011.

The report cites several factors in support of the Department's conclusion that the RMB remains undervalued, including: (i) China's sustained purchase of large amounts of foreign currency reserves; (ii) the largely unchanged level of China's real effective exchange rate; and (iii) the expected widening of China's current account surplus. The report notes that, from the June 2010 G-20 Summit in Toronto, where Chinese President Hu Jintao committed to allowing greater flexibility of the RMB against other major currencies, through April 2011, the RMB appreciated, in nominal terms, by 5.1 percent against the USD. The report emphasizes, however, that the appreciation of the RMB against the US dollar, in real terms, over the same period approximates 9 percent due to inflationary pressure within China.

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According to the report, inflation targeting is a key agenda item for Chinese authorities in 2011. Although the People"s Bank of China has increased lending rates and reserve requirements, the inflation rate has continued to climb. Treasury"s report notes that the Chinese government will need to address the exchange rate in order to contain inflation, arguing that "a more rapid pace of nominal appreciation would enable China to achieve the needed adjustment in the real value of its currency while simulateneously reducing inflationary pressures in its domestic economy." In its report, Treasury cites recent comments made by the People"s Bank of China Deputy Governor Hu Xiaolin and Premier Wen Jiabao as possible signs of the Chinese government"s increased recognition of the role of exchange rate appreciation in addressing inflation in China.

According to the report, the Chinese government recognizes that China is too large of an economy relative to its trading partners to rely on an export-led growth model. The report welcomes China"s recent commitments at the S&ED to move toward domestic consumption-driven growth by raising wages, namely minimum wages, at a pace commensurate with increases in productivity, and allowing for an increase in household incomes at a rate faster than GDP growth. However, the Treasury report notes that China"s continued purchase of large amounts of foreign reserves and sustained current account surplus support an undervalued RMB and work against the government"s efforts to transition its economy in this manner. Therefore, the report states that "exchange rate flexibility must play an important role in rebalancing China"s economy towards domestic demand-led gowth."

II. REACTION TO THE REPORT

Reaction to the report was mixed, with some lawmakers and industry groups expressing disappointment at Treasury"s decision not to take a firmer position toward China, while others supported Treasury"s decision:

- **Rep. Mike Michaud (D-ME)** issued a statement, expressing disappointment with the Obama Administration"s failure to label China a currency manipulator. He also found it notable that the United States is considering a ree trade agreement (FTA) with Korea when the Treasury report calls on Korea to stop intervening in its currency;

- **Sen. Rob Portman (R-OH)** expressed disappointment with the Obama Administration"s continued insistence that China is not a currency manipulator;

- **Executive Director of the Alliance for American Manufacturing Scott Paul** stated that the Treasury report"s verdict on Chinese currency is disappointing but posited that "the decision will enhance our ability to pass legislation in Congress designed to deter China and other countries from misaligning their currencies in order to gain a trade advantage;" and

- **US-China Business Council (USCBC) Vice President Erin Ennis** praised Treasury"s decision not to label China a currency manipulator, stating that, while USCBC does advocate that China allow its exchange rate to better reflect market forces, they also believe that labeling China a currency manipulator "would achieve nothing."

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Outlook

As with the previous report released in February 2011, the latest Treasury report carefully walks a fine line between addressing the concerns of: (i) those who posit that China continues to adversely affect US industries and workers by unfairly manipulating the RMB and, absent any indication that China will take meaningful steps to discontinue this practice, the United States should apply corrective, countervailing (CVD) duties on imports of Chinese goods; and (ii) those who advocate a more moderate engagement with China on the currency issue. Experts note that, on the one hand, Treasury seems to partially agree with the first group (*i.e.*, (i) above), comprised largely of US organized labor, a handful of US companies and many Democratic lawmakers, that believes that the RMB remains undervalued. On the other hand, however, Treasury seems to appease the second group, (*i.e.*, (ii) above), comprised largely of US industry groups, by stopping short of labeling China a currency manipulator, which would require the Treasury Secretary to initiate expedited bilateral negotiations with China on its currency valuation. Experts also note that Treasury"s inclusion in the report of language to explain its belief that the real rather than the nominal USD-RMB exchange rate is a more reliable indicator of China"s overall cost-competitiveness with the United States is another example of its alignment with the second group.

Treasury stopping short of labeling China a currency manipulator helps the Obama Administration avoid stoking unnecessary bilateral tensions, particularly in light of the more constructive tone of recent bilateral consultations between US and Chinese officials. During the May 2011 S&ED, the United States and China made progress on such issues as promoting strong, sustainable and balanced growth, strengthening financial systems and improving financial supervision, and enhancing trade and investment cooperation. Treasury"s decision also falls in line with the Obama Administration"s preference for bilateral and multilateral dialogue and consultation in addressing China"s trade policies, rather than direct confrontation. In this regard, the Obama Administraton will likely continue to urge China to reform its currency practices through these avenues. In Congress, it is likely that certain House and Senate lawmakers will continue to advocate legislation aimed at unilaterally addressing the alleged manipulation of the RMB. However, it is unlikely that legislation similar to the Currency Reform for Fair Trade Act (HR 2378), which passed in the House during the 111th Congress, will move far in the current 112th Congress as the Republican congressional leadership has expressed its unwillingness to allow such legislation to move forward. Therefore, as Republicans enjoy majority-control of the House and increased representation in the Senate, congressional movement on the currency issue will not disappear but is unlikely to go far.

US General Trade Policy Highlights

Representative Tom Reed to Join House Ways and Means Committee

On June 2, 2011, the House Republican Steering Committee reportedly voted to appoint Rep. Tom Reed (R-NY) to the House Committee on Ways and Means ("Committee"). Capitol Hill sources note that Rep. Reed will occupy the Committee seat left vacant by former Rep. Dean Heller (R-NV), whom the Governor of Nevada appointed to occupy the Senate seat left vacant by the resignation of former Sen. John Ensign (R-NV) in May 2011.

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Having assumed office in January 2011, Rep. Reed has virtually no voting record in regard to trade. However, he supports passage of the three pending free trade agreements (FTAs) with Korea, Colombia and Panama, and he signed the March 1, 2011 letter sent to President Obama by new and returning Republican members of the House, urging the President to submit the FTAs" implementing bills to Congress by September 2011. His predecessor on the Committee, former Rep. Heller, was generally supportive of trade issues. During his January 2007 to May 2011 tenure in the House, former Rep. Heller voted on 5 out of 9 occasions to eliminate trade barriers, including voting in favor of the US-Peru FTA in 2009 and the Andean Trade Preference Act of 2007, and voting against the Currency reform for Fair Trade Act in 2010 (HR 2378), which would have allowed the Department of Commerce (DOC) to levy countervailing duties on goods imported from China based on alleged undervaluation of the renmimbi (RMB). Former Rep. Heller did, however, vote twice to ban Mexican trucks from operating in US territory. It remains unknown whether Rep. Reed will assume the generally pro-trade position of his predecessor on the Committee.

We attach the March 1, 2011 House Republican letter for your reference. Please let us know if you have any questions.

Senate Panel Approves Commercial Seafood Consumer Protection Act

On June 8, 2011 the Senate Committee on Commerce, Science and Transportation ("Committee") reported the Commercial Seafood Consumer Protection Act ("S. 50" or "Act") out of Committee for floor consideration. S. 50, co-sponsored by Sens. Daniel Inouye (D-HI), Olympia Snowe (D-ME) and David Vitter (R-LA), aims to prevent domestic and foreign seafood producers and exporters from substituting certain types of seafood with cheaper alternatives, and to strengthen government regulation of seafood safety.

We provide below S. 50"s main points:

- **Commercially Marketed Seafood Consumer Protection Safety Net.** Under S. 50, this so-called "safety net," which Congress has asked the Department of Commerce (DOC), the Federal Trade Commission (FTA) and any other relevant federal agencies to develop, calls for: (i) the implementation of interagency agreements within 180 days of the date of enactment of the Act with respect to, *inter alia*, coordinating inspections of foreign facilities, standardizing data on seafood names, enhancing labeling requirements and sharing information concerning observed non-compliance with US seafood requirements domestically and in foreign countries; (ii) the drafting of a report within one year of the date of enactment of the Act on seafood marketing, labeling and fraud in the United States; and (iii) the coordination with the National Oceanic and Atmospheric Administration to report deceptive seafood marketing and fraud, as well as provide outreach to consumers about seafood testing, labeling substitution and strategies to combat fraud;

- **Certified Laboratories.** S. 50 calls for DOC to work with the Department of Health and Human Services (DHHS) to "increase the number of laboratories certified to the standards of the Food and Drug Administration (FDA) in the United States and in countries that export seafood to the United States for the purpose of analyzing seafood";

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- **Contaminated Seafood.** S. 50 allows for refusal of entry into the United States of all imports of seafood or seafood products originating in a country or with an exporter whose products US officials determine do not meet the requirements established under applicable US federal law. Under S. 50, if it is determined that there is a lack of certified laboratories in a country, the Commerce Secretary may "order an increase in the percentage of shipments tested of seafood originating from such country to improve detection of potential [safety] violations." Nonetheless, the bill would allow for shipments from a country or exporter deemed to have sub-par standards if the individual exporter can present evidence that a specific shipment of seafood meets the requirements of applicable federal laws and that the shipment has been inspected by a federal agency;

- **Inspection Teams.** S. 50 calls for the federal agencies to send one or more inspectors to a country from which seafood exported to the United States originates in order to "assess practices and processes being used in connection with the farming, cultivation, harvesting, preparation for market or transportation of such seafood and […] provide technical assistance related to the requirements established under applicable federal laws";

- **Seafood Identification.** Lastly, the bill calls for a standardized list of names for seafood that takes into account taxonomy, current labeling regulations, international law and custom, market value and naming procedures.

International ocean protection organization Oceana praised the Senate Committee for approving the bill, noting "[t]here are simply too many federal agencies doing too little to address seafood fraud." In late May 2011, Oceana released a report entitled "Bait and Switch: How Seafood Fraud Hurts our Oceans, Our Wallets and Our Health," in which it alleged that, although "84 percent of the seafood eaten in the [United States] is imported, only 2 percent is currently inspected and less than 0.001 percent specifically for fraud."

Experts opine that, although Oceana's report highlighted seafood safety and fraud, it was the early June 2011 outbreak of E. Coli in Europe that likely gave the Committee the impetus to report S. 50 to the floor for consideration. However, these experts further opine that the introduction of S. 50 is more likely driven by the domestic industry's desire to shield the US seafood market from foreign imports than by genuine concern for consumer safety. It remains unknown if and when a floor vote will be held for S. 50.

Senate Energy Hearing Reveals Partisan Divide over Rare Earth Minerals

On June 9, 2011, the Subcommittee on Energy of the Senate Energy and Natural Resources Committee ("Committee") held a hearing on legislation relating to critical minerals and materials, including rare earth minerals and materials. Although the Senators expressed bipartisan support for reducing US dependence on foreign suppliers' critical minerals, the hearing highlighted a largely partisan disagreement as to the reason behind the shortage of rare earth minerals mined and processed in the United States. According to Republican Committee members, the shortage can be attributed to US government permitting delays. In contrast, the Committee's Democratic members argue that China's alleged anticompetitive pricing, which makes rare earth mining

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unprofitable for US producers, is responsible for the shortage. The Committee members did not discuss Chinese rare earth mineral export restraints.

Consistent with the Republican argument, Sen. Lisa Murkowski (R-AL) defended at the hearing the Critical Minerals Policy Act (S. 1113), a bill she sponsored, which focuses on streamlining the US critical mineral and material mining permitting process by establishing a "Critical Minerals Working Group" within the Department of the Interior (DOI) to identify and implement measures to expedite the permitting for companies engaged in the exploration and development of critical mineral and material facilities in the United States. According to Sen. Murkowski, it takes 7-10 years for a new mine to receive the necessary permits. However, the Democratic Committee members argued that, regardless of permitting issues, it is not profitable for US firms to produce critical minerals and materials due to China"s large global market share and, in regard to rare earth minerals, its recent decision to consolidate production into a single company. These factors, according to Democratic Committee members, allow China to lower the price of rare earths to a level at which US firms cannot compete.

Although the Committee members also discussed the Critical Minerals and Materials Promotion Act (S. 383), introduced by Sen. Mark Udall (D-CO), S. 383 does not address the anticompetitive pricing of critical minerals and materials by China alleged by the Democratic Committee members. Instead, it focuses on ensuring unrestricted domestic and global supply chains for critical minerals and materials, by directing DOI to cooperate with international bodies to assess these supply chains.

Although the Democrats presented a unified position at the hearing in arguing that China"s pricing policy is to blame for a shortage of US-mined and -produced critical minerals and materials, that S. 383 does not include language on China"s allegedly uncompetitive pricing practices reveals the Democrats" lack of consensus over how to address the issue. Also, while Republicans do not espouse the same view on China"s pricing policies on rare earths, both parties largely agree that restraints imposed by the Chinese government on exports of rare earth minerals are not consistent with China"s obligations under the World Trade Organization (WTO). Therefore, while it remains unclear what steps lawmakers will take to encourage increased US production of critical minerals and materials, lawmakers will likely continue to pay close attention to Chinese rare earth mineral production, pricing and export policies in the near future.

Senators Introduce Bill to Reform Duty Suspension Process

On June 9, 2011 Sens. Jim DeMint (R-SC) and Claire McCaskill (D-MO) introduced a bipartisan bill entitled "Removing Hurdles for American Manufacturers Act of 2011" ("S. 1162" or "Act"). The Act attempts to revise the current process by which temporary duty suspensions or reductions are granted to intermediate imported goods not readily available in the domestic market and used in the US manufacturing process. The Office of the US Trade Representative (USTR) states that the primary purpose of duty suspensions and reductions is to help US companies compete at home and abroad by reducing costs and increasing the competitiveness of their products.

We provide S. 1162"s main points below:

- **Responsibility for drafting duty suspension legislation shifts from Congress to the International Trade Commission (ITC)**. Under the Act, the ITC, not Congress, will consider and vet requests for duty

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suspensions and reductions. The Act requires that every two years the ITC submit to the Senate Finance Committee and House Ways and Means Committee proposed legislation to: (i) extend existing temporary duty suspensions and reductions; and (ii) amend the Harmonized Tariff Schedule (HTS) to include new temporary duty suspensions and reductions;

- **The ITC is required to solicit and consider outside opinions.** In formulating the proposed legislation, S. 1162 requires the ITC to solicit and consider the views of interested federal agencies and the public. In addition to public hearings, the ITC must publish the proposed legislation in the Federal Register 60 days before it plans to submit the legislation to Congress so as to solicit and consider the views of the industry and the public;

- **The criteria currently used to determine whether a duty suspension qualifies remain the same.** The Act stipulates that the ITC may not recommend proposed legislation if: (i) an interested federal agency determines that the duty suspension or reduction is not in the interest of the United States; (ii) a domestic producer can prove that it produces the item for which duty suspension or reduction is recommended in commercially available quantities; (iii) the loss in revenue to the United States as a result of the reduction or suspension exceeds $500,000 (adjusted for inflation); or (iv) the suspension or reduction is to be in effect for more than 3 years.

Congress has struggled to resume the duty suspension process since the last tranche of suspensions and reductions, authorized under the 2006 Miscellaneous Tariff Bill, expired on December 31, 2009. Historically, each duty suspension or reduction has been lobbied for by a requesting company's Congressman. As a result, experts have speculated that the 112th Congress' House ban on earmarks, or guarantees of federal expenditures to particular recipients in appropriations-related documents, could jeopardize, if not eliminate, Congress' ability to construct new duty suspension legislation. Although S. 1162 circumvents the issue of earmarking by making the ITC, and not Congress, responsible for proposing duty suspension and reduction legislation, the Act ensures that Congress stays involved in the process by reserving its right to dispose of the ITC's proposed legislation. Nonetheless, to date, the bill has no other sponsors, which makes it difficult to forecast whether Congress is ready to relinquish any authority in the duty suspension and reduction process.

House Passes Bill With Provision Halting Payments to Brazil Under Cotton Deal

On June 16, 2011 the House passed the "Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2012" ("HR 2112" or "Act"). Provision 751 of the Act, an amendment originally proposed by Rep. Ron Kind (D-WI) on June 15, 2011, prohibits the US government from continuing to pay USD 147 million annually to the Brazil Cotton Institute as part of an interim solution to Brazilian allegations before the World Trade Organization Dispute Settlement Body (WTO DSB) that United States provides prohibited and actionable subsidies to US producers, users and/or exporters of upland cotton. Under this interim solution, accorded in August 2010, Brazil agreed not to impose WTO-authorized countermeasures against the United States if the United States either: (i) makes this USD 147 million annual payment: or (ii) ends its practice of providing the subsidies in question.

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Rep. Kind's amendment was approved after Agriculture Committee Chairman Rep. Frank Lucas (R-OK) successfully removed two similar amendments by arguing that they contravened the second clause of House Rule XXIV, which states that an amendment to a general appropriation bill shall not be deemed to be in order if it changes an existing law. The first was an amendment proposed by Rep. Rosa DeLauro (D-CT), which would have diverted the USD 147 million currently paid annually to the Brazil Cotton Institute to the US Women, Infant and Children's food assistance program. The second was proposed by Rep. Jeff Flake (R-AZ) and would have allowed the US Department of Agriculture (USDA) to make payments to Brazil, but would have required USDA to offset these payments via equivalent cuts to direct subsidy payments to US cotton farmers.

The provision prohibiting payments to Brazil is just one of the controversial aspects of this Act. On June 13, 2011, the White House announced its opposition to HR 2112 by detailing 10 different aspects of the Act it felt "undermined core government functions and investments key to economic growth and job creation" through a Statement of Administration Policy ("Statement"). Most notably, the Statement asserts that eliminating the payments to Brazil "preempts the resolution process and would open the door to retaliation negatively affecting US exports and interest."

After the Act passed the House, Rep. Lucas and House Ways and Means Trade Subcommittee Chair Rep. Kevin Brady (R-TX) vowed to ensure that the deal with Brazil remain in place. According to Rep. Lucas, Brazil's retaliatory measures could be imposed on a range of US products beyond those produced in the agriculture industry and could also include negligent behavior towards US intellectual property.

The intense debate surrounding the House vote on Provision 751 stems from the perception among many US voters that the United States, despite a reportedly untenable debt load and unsustainable government spending, is simply giving money to Brazil. Experts agree that both Republican and Democratic lawmakers have had difficulty in explaining to their respective constituencies that the United States is not giving this money away but, rather, that the payment is necessary in order to avoid Brazil imposing WTO-authorized countermeasures against the United States. Experts further agree that it will be equally if not more difficult for lawmakers to draw down government support for the domestic cotton industry, which is the original cause for the US-Brazil dispute before the WTO DSB. In this regard, it is unlikely that current cotton subsidy levels will change until next year when Congress considers the 2012 Farm Bill, at which time many experts doubt that lawmakers will effect any measurable reduction in these subsidies, especially given past Republican and Democratic support for these programs.

HR 2112 has since been referred to the Senate Committee on Appropriation and it remains unclear if or when the Committee will report the bill to the Senate floor for consideration.

Senate Bill Seeks to Counteract Foreign Currency Manipulation

On June 21, 2011 Sens. Olympia Snowe (R-ME) and Jay Rockefeller (D-WV) introduced the "Currency Exchange Rate Transparency Act" ("Bill").[1] Before submitting a free trade agreement (FTA) or a proposal to extend Permanent Normal Trade Relations (PNTR), the Bill would require the President to certify that the trading partner's government has not manipulated its currency in the previous 10 years. According to Sen. Snowe,

[1] The bill has not yet been assigned a House Resolution number.

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"American job creators cannot afford to enter into trade agreements with known violators of international trade laws."

The Bill states that the President must certify that the country being considered for an FTA or PNTR with the United States has not "engaged in the intervention or manipulation of the rate of exchange between the country's currency and the United States dollar for purposes of preventing effective balance of payments adjustment or gaining unfair competitive advantage in international trade." In the event that the implementing legislation for the proposed FTA or PNTR does not contain a provision approving the certification provided by the President, or the President does not provide the certification, a Senator may raise a point of order, which is a legislative action employed when a lawmaker claims that a rule has been broken. If the point of order is sustained by the Chair of the Senate floor, the Senate must cease consideration of the bill. However, consideration of the bill may resume if a majority of the members of the Senate vote to waive the point of order.

Experts opine that this bill seeks to address currency manipulation in general and China's alleged currency manipulation in particular. According to the Sen. Rockefeller's press release, "[A]s China continues to undervalue its currency to undercut market competition, it also incentivizes other nations to follow its model as a way for their exporters to stay competitive with low-priced Chinese products." Experts further posit that if the Bill is passed in the near future, the President may have to certify that Korea, Colombia, and Panama have not manipulated their currencies within the past ten years before submitting the three pending FTAsto Congress. For future agreements, including current negotiations related to the Trans-Pacific Patnership with the United States, the US Trade Representative (USTR) will have to consider whether FTA partners have manipulated their respective currencies. Depending on its application, the "Currency Exchange Rate Transparency Act" could also affect the establishment of PNTR with Russia in the context of its accession to the World Trade Organization (WTO).

There are currently several other pieces of proposed legislation to address China's alleged currency manipulation. The first, "Currency Reform for Fair Trade Act" ("HR 639"), was introduced by House Ways and Means Ranking Member Rep. Sander Levin (D-MI) on February 10, 2011. HR 639 has a counterpart bill in the Senate, S 328, also titled "Currency Reform for Fair Trade Act". These bills would prevent the US Commerce Department from dismissing a petitioner's allegation that an undervalued currency serves as an actionable subsidy simply because non-exporters may have benefitted from the undervaluation. On June 16, 2011 Democratic leaders of the House announced that they had filed a discharge petition on HR 639. This discharge petition needs the signatures of a simple majority, or 218 House members, to successfully move HR 639 to the House floor for a full House vote. A bipartisan group of eight senators is preparing an alternative currency bill currently known as the "Currency Exchange Rate Oversight Reform Act of 2011."[2] Although the bill has yet to be introduced, it includes the same measure on actionable subsidies found in HR 639 as well as a provision that would change the rules governing how the US Treasury Department determines whether a currency has been undervalued.

The "Currency Exchange Rate Transparency Act" represents a new approach to addressing the currency issue with which lawmakers have long struggled. Many lawmakers blame currency manipulation by foreign countries,

[2] The Senate group backing this bill includes Sens. Charles Schumer (D-NY), Lindsey Graham (R-SC), Sherrod Brown (D-OH), Debbie Stabenow (D-MI), Robert Casey (D-PA), Olympia Snowe (R-ME), Jeff Sessions (R-AL), and Richard Burr (R-NC).

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particularly China, for the loss of jobs in the United States. Although the House passed the "Currency Reform for Fair Currency Act of 2010" by a significant margin in the 111th Congress, lawmakers have thus far failed to report similar legislation, namely HR 639, to the House floor in the 112th Congress. As the United States is not currently considering PNTR or an FTA with China, the "Currency Exchange Rate Transparency Act" would avoid the direct confrontation in which HR 639 would otherwise result. Nonetheless, experts agree that, if passed, this piece of legislation could indirectly put pressure on China to revalue its currency by putting terms on FTAs and PNTR with China"s major trading partners.

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FREE TRADE AGREEMENTS

Free Trade Agreement Highlights

House Lawmakers Send Letter to USTR Urging Careful Negotiation of the TPP Textiles Chapter

On June 1, 2011, 26 Republican and 26 Democratic House lawmakers[3] sent a letter to US Trade Representative (USTR) Ron Kirk, calling on him to include stringent textile and apparel provisions in the Trans-Pacific Partnership (TPP). The House lawmakers claim that, without these stringent provisions, the TPP agreement could "displace critical US textile, and apparel jobs and undermine important trade relationships in the Western Hemisphere that support nearly two million jobs."

The letter recommends that three key items be included in the textiles and apparel chapter of TPP:

- **Special market access rules.** Alleging that Vietnam's Non-Market Economy (NME) status affords its textile and apparel sector certain advantages, the letter suggests that USTR consider options such as "excluding certain tariff lines altogether, negotiating tariff reductions versus phase-outs, and extended duty phase-down/phase-out periods;"

- **Yarn-forward rule of origin (ROO).**[4] The letter puts forth that Vietnam mostly uses yarn and fabric imported from China as inputs and that, without a yarn forward ROO, the Vietnamese market "does not offer significant export opportunities for US yarn and fabric producers." The letter also suggests that any form of departure from the yarn-forward rule should not be included; and

- **Customs enforcement.** The letter requests that USTR strengthen customs enforcement rules, arguing that the prevention of illegal transshipment will, like a strict yarn-forward rule of origin, ensure that China does not benefit unfairly from the TPP agreement. According to the House lawmakers, "[t]he past five years have demonstrated that the present set of customs rules developed under the CAFTA agreement are easily

[3] Reps. Trey Gowdy (R-SC), John Barrow (D-GA), Sanford Bishop (D-GA), Bruce Braley (D-IA), Paul Broun (R-GA), G.K. Butterfield (D-NC), David Cicilline (D-RI), Howard Coble (R-NC), Michael Conaway (R-TX), Joe Courtney (D-CT), James Clyburn (D-SC), Peter DeFazio (D-OR), Rosa DeLauro (D-CT), Jeff Duncan (R-SC), John Duncan (R-TN), Renee Ellmers (R-NC), Virginia Foxx (R-NC), Phil Gringrey (R-GA), Morgan Griffith (R-VA), Raul Grijalva (D-AZ), Walter Jones (R-NC), Marcy Kaptur (D-OH), Larry Kissell (D-NC), James Langevin (D-RI), Tom Latham (R-IA), Tom Marino (R-PA), Thaddeus McCotter (R-MI), James McGovern (D-MA), Patrick McHenry (R-NC), Mike McIntyre (D-NC), Michael Michaud (D-ME), Brad Miller (D-NC), Mick Mulvaney (R-SC), Sue Wilkins Myrick (R-NC), Randy Neugebauer (R-TX), Alan Nunnelee (R-MS), Bill Pascrell (D-NJ), Thomas Petri (R-WI), David Price (D-NC), David Roe (R-TN), Martha Roby (R-AL), Mike Rogers (R-AL), Linda Sanchez (D-CA), Terri Sewell (D-AL), David Scott (D-GA), Tim Scott (R-SC), Heath Shuler (D-NC), Betty Sutton (D-OH), Melvin Watt (D-NC), Lynn Westmoreland (R-GA), Joe Wilson (R-SC), and Henry Johnson (D-GA).

[4] A yarn forward rule of origin requires that the yarn production and all subsequent operations (*i.e.*, fabric production through apparel assembly) occur within the countries party to the trade agreement.

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evaded by fraudulent producers, most of whom reside in China." For this reason, the letter asks that customs rules be updated in TPP to include effective tracking of apparel inputs.

Experts largely agree that USTR will likely table language on textiles at or before the next round of TPP negotiations, which will be held from June 20-24, 2011 in Vietnam. Experts further agree that, given USTR's recent history of tabling yarn-forward rules of origin, it is likely to strongly consider this option for TPP. However, recently negotiated US bilateral and multilateral FTAs have also contained varying degrees of exemptions to the yarn-forward ROO. In this regard, experts are divided as to whether USTR will shield US industry through exemptions to ROOs or, as the House lawmakers have requested, special market access rules. A central theme that complicates this issue is the membership of the TPP, which will likely increase after the Agreement is concluded. USTR must craft its textile trade proposal in a way that considers the textiles and apparel supply chain of future TPP partners.

Obama Administration Considers Moving FTA(s) and TAA in One Bill

On June 3, 2011 House Ways and Means Ranking Member Rep. Sander Levin (D-MI) stated at a Center for American Progress event that the Obama Administration is considering including language renewing an expanded version of the Trade Adjustment Assistance (TAA) program in the implementing bill for one or more of the pending free trade agreements (FTAs) with Colombia, Panama or Korea. Congressional Republicans largely oppose renewal of an expanded TAA and insist that the Obama Administration immediately submit the implementing language for the pending FTAs. Congressional Democrats and the Obama Administration insist that the passage of the FTAs is contingent upon passage of an expanded 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 provide assistance and retraining to US service workers displaced by off-shoring, agricultural workers and workers not otherwise affected by imports under an FTA to which the US is party. However, this expanded version of TAA expired on February 13, 2011 such that the program has returned to its 2002 scope and level of funding. Analysts note that congressional Republicans oppose renewing an expanded TAA, citing concerns over the high cost of the program. Furthermore, congressional Republicans largely agree that the three pending FTAs will be more effective at addressing high US unemployment than TAA as they will open markets currently closed to US exports of goods and services. In mid-May 2011, however, the Obama Administration put forth that it would not submit the implementing legislation for the US-Korea, US-Colombia and US-Panama FTAs without Congress providing a credible assurance that it will renew an expanded TAA.

Experts note that, were the Obama Administration to pursue an FTA-TAA package bill, such a bill would at least include the US-Colombia FTA implementing language. Packaging the US-Colombia FTA with TAA would allow the Obama Administration to submit and move beyond the US-Colombia FTA, thus appeasing congressional Republicans, while offering something in return to US organized labor, which is fiercely opposed to the Agreement with Colombia. A TAA-Korea FTA package bill is less likely, according to experts, because: i) congressional Republicans would be reluctant to consider TAA without having secured passage of the FTA with Colombia; and ii) the Obama Administration would be reluctant to jeopardize an agreement as economically significant as the US-Korea FTA for TAA renewal. It remains unclear, however, if the Obama Administration will

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choose to pursue an FTA-TAA package bill and, if so, when and in what form such bill will be introduced to Congress.

House Ways and Means Democrats Urge USTR to Include Stronger Environmental Provisions in TPP

On June 3, 2011 all 15 Democrats on the House Committee on Ways and Means[5] sent a letter to US Trade Representative (USTR) Ron Kirk urging him to table a "strong" environmental chapter in the Trans-Pacific Partnership (TPP). Although USTR tabled a partial environmental chapter at the March, 2011 round of TPP negotiations, USTR is likely to table the chapter's remaining content at the upcoming June 2011 round in Vietnam.

In the letter, the House lawmakers lauded USTR's efforts to address the issues of illegal trade in wood, illegal wildlife trade, fisheries subsidies, marine conservation and shark preservation through the provisions tabled at the March round of TPP negotiations. However, the letter calls for the additional adoption of the so-called "May 10" environmental provisions into the chapter. 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. In the June 3rd letter, Democrats called for the inclusion of the following "May 10" environmental provisions in TPP: (i) effective enforcement of multilateral environmental agreements; (ii) the non-derogation from a party's environmental laws; and (iii) the application of dispute settlement provisions to the environmental obligations assumed by each TPP member under the Agreement. The letter cites a 2009 letter written by then House Minority Leader Rep. John Boehner (R-OH), Minority Whip Eric Cantor (R-VA), Ways and Means Committee Ranking Member Dave Camp (R-MI) and Ways and Means Trade Subcommittee Chairman Kevin Brady (R-TX) in which these Republican lawmakers laud the inclusion of (i), (ii) and (iii) in the US-Korea Free Trade Agreement (FTA).

At a press conference following the release of the June 3 letter, Rep. Earl Blumenauer (D-OR), a co-signer, stated that these provisions "help to build stronger environmental laws around the world, generate sustainable development in all the partner countries, and give force to the President's call for a high-standards agreement." According to Rep. Sander Levin (D-MI), also a co-signer, failure to include these provisions would be a "non-starter."

Although the June 3 letter cites past Republican support for the environment-related May 10 issues, the June 3 House letter failed to garner the signature of a single Republican lawmaker. Experts note that, while Republican lawmakers are not against the May 10 environmental issues in principle, they are likely cautious in regard to insisting that they be included in an agreement such as TPP, which comprises nine countries of disparate levels of development and abilities to adopt, implement and enforce such environmental rules. The Obama Administration, for its part, deems as "21st century" the May 10 environmental issues although it has thus far

[5] Reps. Earl Blumenauer (D-OR), Sander Levin (D-MI), Charlie Rangel (D-NY), Jim McDermott (D-WA), Pete Stark (D-CA), John Lewis (D-GA), Lloyd Doggett (D-TX), Mike Thompson (D-CA), John Larson (D-CT), Ron Kind (D-WI), Bill Pascrell (D-NJ), Joe Crowley (D-NY), Allyson Schwartz (D-PA), Linda Sanchez (D-CA), and Mike Honda (D-CA).

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instructed USTR to prioritize in TPP negotiations other such "21st century" issues as regulatory coherence, competitiveness, small- and medium-sized enterprises and supply chain efficiency. Nonetheless, experts agree that USTR eventually tabling an environmental chapter reflecting the May 10 issues depends less on US partisan politics and more on whether US negotiators believe such environmental provisions can be enforced by all members of the Agreement.

Colombia Meets Second Milestone under US-Colombia FTA Labor Action Plan

On June 13, 2011, United States Trade Representative (USTR) Ron Kirk issued a press statement confirming that Colombia has met the June 15, 2011 milestones set out under the April 7, 2011 action plan agreed to by President Obama and Colombian President Juan Manuel Santos. The Action plan, titled "Leveling the Playing Field: Labor Protections and the US-Colombia Trade Promotion Agreement," aims to address lingering US concerns over the labor code and violence against organized labor leaders in Colombia as well as clear the way for President Obama to submit the implementing language for the US-Colombia free trade agreement (FTA) to Congress.

We highlight below a few of the June 15 milestones:

- Secure legislation establishing a separate Labor Ministry to provide better institutional capacity to protect labor rights;
- Secure legislation to establish criminal penalties, including imprisonment, for employers that undermine the right to organize and bargain collectively or threaten workers who exercise their labor rights;
- Accelerate the effective date from July 2013 to June 2011 of new legal provisions, including significant fines, to prohibit and sanction the misuse of cooperatives and other employment relationships that undermine workers" rights;
- Reduce by 75 percent the backlog of risk assessments for unionists applying for protection;
- Issue internal guidance to prosecutors to accelerate action on labor violence cases;
- Develop a plan and identify budgetary needs for victims" assistance centers specializing in human rights cases, *e.g.*, crimes against unionists; and
- Develop a methodology for posting aggregate information about all completed criminal cases involving labor violence to date on the Prosecutor General Office"s website.

Colombia must meet several more milestones, including the hiring of 480 labor inspectors by December 15, 2011 in order to fulfill its commitments under the April 7 action plan. Experts note, however, that even if Colombia meets these milestones, the FTA will not necessarily move forward, as the April 7 action plan does not contain any language that requires the Obama Administration to submit the FTA"s implementing language to Congress

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by any particular date. Furthermore, the Obama Administration and Congressional Democrats have conditioned the passage of one or more of the FTAs (US-Colombia, US-Korea and US-Panama) on passage of an expanded Trade Adjustment Assistance (TAA) program, which Republicans fiercely oppose. In light of these considerations, it remains unclear when the Obama Administration will submit the US-Colombia FTA's implementing bill to Congress.

Labor Department Accepts AFL-CIO Petition to Investigate Bahrain's Alleged Noncompliance with US-Bahrain FTA Labor Commitments

On June 10, 2011 the Bureau of International Labor Affairs at the US Department of Labor (DOL) announced that it has accepted the petition brought on April 21, 2011 by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) concerning the alleged failure of the Government of Bahrain to comply with its commitments under Article 15.1 of the US-Bahrain Free Trade Agreement (FTA). DOL now has 180 days to investigate the allegations before issuing a recommendation to the Labor Secretary on whether to begin consultations with Bahrain.

Under Article 15.1 of the US-Bahrain FTA, the United States and Bahrain are obligated to uphold commitments under the *International Labor Organization (ILO) Declaration on Fundamental Principles and Rights at Work and its Follow Up (1998)* ("ILO Declaration"). The AFL-CIO alleges that, as a result of the general unrest that has afflicted Tunisia, Egypt, Libya and other Middle Eastern and Maghreb states since January 2011, the government of Bahrain has, *inter alia*, engaged in the targeted dismissal and arrest of workers who have engaged in protest, shut down the web site of the General Federation of Bahraini Trade Unions (GFBTU), and prohibited trade union activity. In its submission to DOL, AFL-CIO states that these actions violate Conventions 87, 89 and 111 of the ILO Declaration, which enshrine "the rights of freedom of association and the right to organize and non-discrimination."

The DOL is following its internal procedure for the consideration of and investigation into the petition. However, if DOL decides to request consultations with Bahrain over any of the issues raised in the AFL-CIO petition, it must follow the labor consultations procedure laid out in Article 15.6 of the US-Bahrain FTA. According to this article, "[A] Party may request consultations with the other Party regarding any matter arising under [the] Chapter by delivering a written request to the other Party's contact point. Unless the Parties agree otherwise, consultations shall commence within 30 days after a Party delivers a request." If these consultations fail, the Parties must create a Joint Subcommittee on Labor Affairs to resolve the issue by consulting governmental or non-governmental expertise.

The AFL-CIO has requested that the US government withdraw from the FTA with Bahrain if the labor dispute settlement process laid out in the US-Bahrain FTA does not lead to the Bahrain government's termination of its alleged anti-union campaign. Nonetheless, US Trade Representative (USTR) Ron Kirk signaled last week that a unilateral withdrawal from the FTA was unlikely.

If the United States decides to request consultations with Bahrain, it will be the second labor case ever brought by the United States against an FTA partner. The United States initiated the first case in July 2010 after the AFL-CIO requested that the US government seek consultations with Guatemala, a member of the Dominican

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Republic-Central America FTA (CAFTA-DR), regarding its alleged failure to effectively enforce its labor laws. Unfortunately, consultations in September and December of 2010 failed to resolve the issue. Most recently, USTR decided to proceed to the next step, as laid out under the CAFTA dispute settlement process, which, in a slight variation of the US-Bahrain FTA labor consultations procedure, calls for a meeting of cabinet-level representatives of the consulting Parties.

The DOL"s decision to accept the AFL-CIO petition reflects President Obama"s emphasis on promoting what his Administration deems a "21st century" FTA policy, which is characterized by a clear focus on the enforcement of labor and environmental provisions. In addition to the allegations against Bahrain and Guatemala, the Obama Administration frequently engaged Peruvian authorities in early 2011 to ensure that its government passed a forestry and wildlife law to bring the country into compliance with the environmental provisions of the US-Peru FTA (this law was passed in June 2011). 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 and environmental 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 and protecting the environment are optimal outcomes of any FTA, incorporating these issues into a formal FTA and ensuring enforcement of these issues are 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 and environmental provisions.

USTR Confirms Passage of Law in Peru for Forestry Compliance

On June 16, 2011, US Trade Representative (USTR) Ron Kirk issued a statement, announcing the passage in the Peruvian Congress of a Forestry and Wildlife law ("Law"), which includes key reforms needed for compliance with the United States-Peru Trade Promotion Agreement (PTPA) Annex on Forest Sector Governance ("Forestry Annex"). The Forestry Annex aims to combat trade associated with illegal logging as well as illegal trade in wildlife, and further promote sustainable management of Peru's natural resources. According to USTR, passage of the law represents a milestone in Peru"s implementation of its PTPA environmental commitments.

Local sources note that the Law is superior to the 2008 forestry legislation it replaces. More specifically, the Law includes provisions addressing the following:

- **Biofuels.** The Law prohibits biofuels from being considered legal plantations in protected forests;
- **Bidding.** The Law puts in place a more competitive bidding process for forest lands available for logging;
- **Protected wood.** The Law establishes a system to trace protected wood species;
- **Contact point.** The Law creates a point of contact for queries relating to forestry-related infractions;
- **Usufruct of forests.** The Law stipulates that communities owning a forest have exclusive rights to goods and services relating to the same; and

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- **Local enforcement.** The Law affords local authorities the power to investigate and punish forestry- and wildlife-related crimes.

USTR Kirk stated that the Government of Peru has also made other unprecedented changes to its legal and regulatory regimes in order to implement its commitments under the Forestry Annex, citing: (i) the amendment of the Peruvian Criminal Code to increase penalties for forest, wildlife and environmental crimes; (ii) the assignment of ecological police officers and prosecutors to remote regions in Peru; (iii) the creation of a Ministry of Environment; and (iv) the assumption of other important environmental stewardship duties.

After Peru missed the August 1, 2010 deadline under the PTPA 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. Peruvian President Alan Garcia is expected to enact the Law before the end of June 2011.

TPP Members Conclude Seventh Round of Negotiations

On June 24, 2011, the nine members[6] of the Trans-Pacific Partnership (TPP) concluded the seventh round of negotiations in Vietnam. Although members addressed a number of key issues, including market access, transparency, telecommunications, customs, environment, intellectual property, regulatory coherence and development, US Trade Representative (USTR) Ron Kirk stated in his June 24 press release that TPP negotiators would need to "redouble" their efforts in the months ahead in order to arrive at a broad, outline agreement by the self-imposed November 2011 deadline.

According to USTR Kirk, TPP negotiators "reviewed new proposals that the United States and other TPP countries tabled this round including [those] on intellectual property rights (IPR), transparency, telecommunications, customs, [and] environment." USTR Kirk also noted that members made significant progress on the so-called "cross-cutting" issues, particularly regulatory coherence, and made commitments in the areas of market access for goods, services and government procurement. Contrary to what was expected, however, US negotiators did not propose any further language to clarify its eventual position on such May 10 issues[7] as IPR (data exclusivity, patent linkage, patent term extensions and protection terms for biologics), environment and labor, nor did it broach the issue of State-Owned Enterprises (SOEs), an issue that is likely to prove difficult due to SOEs' prevalence in the Vietnamese economy.

USTR Kirk's statement also mentioned a number of issues requiring further work. For example, negotiating parties are still working to "close the gap" on their respective positions in regard to agriculture and textiles, and

[6] United States, Singapore, Chile, Brunei, Peru, Australia, New Zealand, Vietnam and Malaysia.

[7] 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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sources note continued disagreement on market access for dairy and sugar. According to USTR Kirk, significant additional progress will be needed if negotiators wish to complete the "outlines of an ambitious 21st century agreement" before the Asia Pacific Economic Cooperation (APEC) Leaders' meeting in November 2011. In anticipation of the eighth round of negotiations in the United States in September 2011 and the ninth round of negotiations in Peru in October 2011, USTR Kirk guaranteed that US negotiators would continue to consult closely with Congress and stakeholders on existing proposals, revised offers and new proposals.

Experts agree that the outline agreement to be presented at the November 2011 Asia-Pacific Economic Cooperation (APEC) summit in Hawaii will be broad and will not likely contain much beyond polished legal texts and a few of the less contentious chapters. Furthermore, due to an already difficult US trade policy environment and the desire on the part of the Obama Administration not to expend much political capital on trade liberalization prior to the November 2012 presidential election, US negotiators could defer until 2013 difficult discussions on such contentious issues as dairy and sugar market access, SOEs, textiles, and May 10 IPR, labor and environmental provisions. However, it cannot be ruled out that US negotiators could table proposals in these areas prior to 2012 if the Obama Administration and lawmakers overcome the current FTA/TAA impasse[8], which has paralyzed US trade policy for most of 2011.

Republican Senate Finance Committee Members Prevent Quorum at FTA Mock Markup; Partisan Stalemate Paralyzes Movement on FTAs

On June 30, 2011, Republican members of the Senate Finance Committee boycotted a mock markup session on the three pending free trade agreements (FTAs) with Korea, Colombia and Panama. By refusing to attend the session, the Republicans prevented the Committee from meeting the quorum required to proceed with the mock mark up. The Republican Senate Finance Committee members, as well as the Republican congressional leadership, principally object to the Obama Administration having included language to renew an enlarged version of the Trade Adjustment Assistance (TAA) program in the US-Korea FTA implementing bill.

The Obama Administration's mid-May 2011 decision to condition its submission to Congress of the FTAs implementing language on Congress passing legislation to renew a bolstered version of TAA drew fierce criticism from congressional Republicans. 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 renewing 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. Consequently, both sides arrived at an impasse with the Obama Administration many congressional Democrats insisting that the FTAs and TAA move in tandem and congressional Republicans opposing any linkage between the FTAs and TAA.

[8] The Obama Administration has conditioned the submission to Congress of the implementing bills for the FTAs with Korea, Colombia and Panama on passage of a bolstered Trade Adjustment Assistance, a position fiercely opposed by congressional Republicans.

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Democrats and Republicans had seemingly overcome this impasse on June 28, 2011 when the Obama Administration issued the FTAs‟ draft implementing bills for mock markup consideration. 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 the Generalized System of Preferences (GSP) and the Andean Trade Promotion and Drug Eradication Act (ATPDEA). However, Republican congressional leadership quickly denied claims of a bipartisan compromise, alleging that the Obama Administration acted unilaterally to include TAA in the US-Korea FTA bill and arguing that Republican leadership remains opposed to any linkage between FTAs and TAA. Republican Senate Finance Committee members therefore boycotted the mock markup session of these draft bills on June 30, 2011.

The June 30 Republican boycott effectively demonstrates that, with the Obama Administration and congressional Democrats and Republicans in difficult talks over how to draw down government spending and whether to raise the US government‟s statutory debt limit, the Republicans are unwilling to accept a costly and, in their opinion, ineffective TAA simply in order to move forward on the FTAs. While the Republican boycott has resulted in a stalemate with no clear solution on the horizon, experts note that it was a prudent move on the part of Republican leadership in order to prevent the Obama Administration from achieving FTA-TAA linkage.

Experts in congressional procedure posit that Speaker of the House Rep. John Boehner (R-OH) is now the lynchpin as, constitutionally, such revenue-related measures as FTAs must be considered first in the House. Rep. Boehner has stated that he wants to avoid holding a vote on an FTA bill containing TAA. Rep. Boehner could allow for the US-Korea FTA and TAA to be considered separately under regular order instead of under Trade Promotion Authority (TPA) procedure. According to experts, doing so would not strip the US-Korea FTA of TPA status in the Senate if: i) both bills pass separately without being amended; and ii) both bills, once passed, are transmitted in one measure to the Senate for consideration. However, once this measure is received in the Senate, Senate Minority Leader Sen. Mitch McConnell (R-KY) would need to decide whether to consider under TPA procedures an FTA-TAA package almost as if the bills had not been considered separately in the House. Given Sen. McConnell‟s fierce opposition to an FTA-TAA linkage, he is unlikely to enthusiastically support this option.

Although less likely, another way forward on at least the US-Korea FTA is for the FTA to be considered and passed separately from TAA under regular order in the House without amendment. Were this to be the case, Senate Democratic leadership would also need to pass the FTA without amendment under regular order and the FTA would then need to be enacted into law by President Obama, who would be unenthusiastic about doing so if TAA were not included in the bill. Given that each side has expressed such an avid commitment to their negotiating position, it is still too early to predict how both parties will overcome this stalemate.

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Multilateral

WTO Appellate Body Rules that Certain Provisions of Thai VAT on Imported Cigarettes Violate GATT National Treatment Obligations

Summary

On June 17, 2011, the WTO Appellate Body ruled that certain provisions of Thailand"s Value Added Tax (VAT) for imported cigarettes violated the national treatment obligations of Thailand under the General Agreement on Tariffs and Trade (GATT) 1994. The United States participated in this dispute as a third party.

Significance of Decision / Commentary:

National treatment

This dispute was adjudicated under the two core national treatment disciplines of GATT Article III: the so-called "charge" provision of Article III:2, and the "non-charge" provision of Article III:4. Thailand"s measures were found to be inconsistent with both disciplines.

Under the "charge" provision of Article III:2, imported products cannot be subjected to internal taxes in excess of those applied to like domestic products. The jurisprudence of the GATT and the WTO has interpreted this obligation strictly. In the present case, the Appellate Body affirmed an earlier ruling that "even the smallest amount of „excess" is too much." The Philippines successfully challenged a Thai law that granted a VAT exemption for resellers of domestic cigarettes, but not for resellers of imported cigarettes. Accordingly, the law was found to breach GATT Article III:2.

The "non-charge" provision of GATT Article III:4 does not deal with taxes or internal charges. Instead, it requires that imported products must be provided treatment that is "no less favourable" than that provided to like domestic products with respect to regulations affecting internal sale. In the present case, Thai law imposed additional administrative requirements, including reporting requirements, on the resellers of imported cigarettes that did not apply to resellers of domestic cigarettes. The Appellate Body affirmed that this violated Article III:4.

In the current dispute, the Appellate Body did not establish any new jurisprudential principles, but rather affirmed and applied the existing case law.

Due process

A separate due process issue arose in this dispute as a result of an exhibit (an expert opinion from a Thai tax lawyer) that was provided to the Panel by the Philippines late in the proceedings. After the second hearing, the Philippines included this exhibit as part of its comments on Thailand"s answers to the Panel"s questions. Thailand later complained that the Panel accepted and relied on this exhibit without giving Thailand

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the right to comment on it. Thailand argued that the Panel thus breached its obligation under Article 11 of the Dispute Settlement Understanding (DSU) to "make an objective assessment" of the matter before it.

The Appellate Body dismissed Thailand"s claim under DSU Article 11. It stressed the importance of due process in WTO dispute settlement, but ruled that this exhibit was part of the rebuttal evidence of the Philippines, and therefore admissible.

However, the Appellate Body also considered that Thailand should have objected earlier. It noted that Thailand did not object to the exhibit when it was submitted, but rather "seven months later, in its comments on the Panel's Interim Report." It indicated that "Thailand could have requested an opportunity to respond when the Philippines submitted the exhibit in question, but it did not." The Appellate Body indicated that "Thailand's failure to request an opportunity to respond is a consideration relevant to our overall assessment of whether, in the circumstances of this case, the Panel's conduct denied due process to Thailand."

Thus, a failure to object will be a "relevant consideration" in any subsequent due process challenge. Based on this decision, a cautious litigant would want to submit substantive comments on late evidence to avoid implicitly waiving its due process rights.

This decision could make it difficult for WTO Panels to manage the end stages of a dispute settlement process. If a litigant provides late comments, then the requirements of due process could obligate a Panel to give the other party an opportunity to respond. Most Panels discourage "comments on comments" at the final stages of a dispute. Yet this Appellate Body decision raises doubts as to when a disputing party needs to pick up – or put down – its pen.

Analysis

I. BACKGROUND: THE CHALLENGED MEASURES

The Philippines challenged the WTO-consistency of Thai measures related to the tax treatment of imported cigarettes. Thai law imposes VAT tax obligations on the parties to a product distribution chain. However, as the Appellate Body noted, there is "an exemption from VAT for all sales of domestic cigarettes by resellers in the distribution chain for domestic cigarettes", whereby "resellers of domestic cigarettes incur no VAT liability[.]" The Philippines challenged this tax regime as inconsistent with the national treatment obligations of Thailand under GATT Article III.

II. GATT ARTICLE III:2: "EVEN THE SMALLEST AMOUNT OF 'EXCESS' IS TOO MUCH"

The first sentence of GATT Article III:2 provides that "[t]he products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products." The Philippines argued that Thailand violated this provision because "Thailand imposes VAT liability on imported cigarettes in excess of that applied to like domestic cigarettes through an exemption from VAT for resales of domestic cigarettes."

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The Appellate Body began its analysis on this issue by recalling the prior jurisprudence under this provision. It noted that when a measure "subjects imported products to taxes or charges in excess of those applied to like domestic products, it will be inconsistent with the first sentence of Article III:2." It reiterated that "even the smallest amount of 'excess' is too much."

The Appellate Body rejected Thailand's argument that its VAT measure consisted "solely of administrative requirements" that were not subject to Article III:2. It found that the Thai measure was not a mere administrative requirement, as it "affects the respective tax liability imposed on imported and like domestic cigarettes[.]" The Appellate Body similarly dismissed Thailand's argument there was no breach of Article III:2 because resellers could take certain actions to avoid the imposition of VAT. Quoting from its decision in Korea – Beef, the Appellate Body reasoned that the intervention of "some element of private choice" did not relieve Thailand of its "responsibility under the GATT 1994 for the resulting establishment of competitive conditions less favourable for the imported product than for the domestic product."

The Appellate Body therefore upheld the Panel's ruling that Thailand acted inconsistently with Article III:2 "by subjecting imported cigarettes to VAT liability in excess of that applied to like domestic cigarettes."

III. GATT ARTICLE III:4: REGULATORY DIFFERENCES CANNOT "DISTORT CONDITIONS OF COMPETITION"

GATT Article III:4 provides in part that "[t]he products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use." In the present case, the Philippines argued that Thailand accorded "less favourable treatment" to imports because the law imposed additional administrative requirements, including reporting requirements, on the resellers of imported cigarettes. These obligations did not apply to resellers of domestic cigarettes.

The Appellate Body noted that "Article III:4 forms part of the broader framework set out in Article III, which ensures that Members provide equality of competitive conditions for imported products in relation to domestic products." In order to establish a violation of Article III:4, it said that three elements had to be established: "(i) that the imported and domestic products are 'like products'; (ii) that the measure at issue constitutes a law, regulation, or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of the products at issue; and (iii) that the treatment accorded to imported products is less favourable than that accorded to like domestic products." Only the third element was at issue in this appeal.

The Appellate Body recalled its earlier jurisprudence that "treatment no less favourable" in Article III:4 will arise when the measure at issue "modifies the conditions of competition in the relevant market to the detriment of imported products [original emphasis]." It added that "the mere fact that a Member draws regulatory distinctions between imported and like domestic products is, in itself, not determinative of whether imported products are treated less favourably within the meaning of Article III:4." Rather, what is relevant is "whether such regulatory differences distort the conditions of competition to the detriment of imported products."

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Turning to the current case, the Appellate Body stated that "[t]he uncontested fact that resellers of imported cigarettes are subject to certain administrative requirements, whereas resellers of like domestic cigarettes are not, itself provides a significant indication that imported cigarettes are accorded less favourable treatment." After examining this and other evidence, it concluded that the Panel"s analysis was sufficient to support its finding that "the additional administrative requirements modify the conditions of competition to the detriment of imported cigarettes", in breach of GATT Article III:4.

IV. DSU ARTICLE 11: DUE PROCESS IS "A CRITICAL MEANS OF GUARTANTEEING THE LEGITIMACY OF AND EFFICACY OF A RULES-BASED SYSTEM OF ADJUDICATION"

DSU Article 11 requires a WTO Panel to "make an objective assessment of the matter before it…." Thailand argued that the Panel "failed to ensure due process and to make an objective assessment of the matter" by accepting and relying on a particular exhibit tabled by the Philippines after the second hearing "without affording Thailand any opportunity to respond to that evidence."

Before turning to the issue of the exhibit, the Appellate Body stressed the importance of due process in WTO dispute settlement. It stated that "[d]ue process is intrinsically connected to notions of fairness, impartiality, and the rights of parties to be heard and to be afforded an adequate opportunity to pursue their claims, make out their defences, and establish the facts in the context of proceedings conducted in a balanced and orderly manner, according to established rules." The protection of due process by Panel was thus "a crucial means of guaranteeing the legitimacy and efficacy of a rules-based system of adjudication." As a general rule, "due process requires that each party be afforded a meaningful opportunity to comment on the arguments and evidence adduced by the other party." At the same time, the Appellate Body acknowledged that "due process may also require a panel to take appropriate account of the need to safeguard other interests, such as an aggrieved party's right to have recourse to an adjudicative process in which it can seek redress in a timely manner, and the need for proceedings to be brought to a close."

The Appellate Body noted that "panel proceedings consist of two main stages, the first of which involves each party setting out its „case in chief, including a full presentation of the facts on the basis of submission of supporting evidence", and the second designed to permit the rebuttal by each party of the arguments and evidence submitted by the other parties." However, it cautioned that "the submission of evidence may not always fall neatly into one or the other of these categories, in particular when panels themselves, in the exercise of their fact finding authority, seek to pursue specific lines of inquiry in their questioning of the parties."

Turning to the specific issue on appeal, the Appellate Body ruled that the Panel"s acceptance of the exhibit did not breach DSU Article 11. According to the Appellate Body, the exhibit was part of the Philippines" rebuttal evidence. Moreover, it noted that Thailand did not object to the exhibit when it was submitted, but rather "seven months later, in its comments on the Panel's Interim Report." It indicated that "Thailand could have requested an opportunity to respond when the Philippines submitted the exhibit in question, but it did not." Thus, the Appellate Body rejected Thailand"s argument that the Panel breached DSU Article 11.

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V. ARTICLE XX(D): PANEL'S APPROACH "MANIFESTLY INCORRECT", BUT THAILAND'S DEFENSE DISMISSED

Thailand also argued that its measures could be justified under the exception provided for in GATT Article XX(d). Article XX(d) allows, in certain circumstances, measures that are "necessary to secure compliance" with GATT-consistent laws or regulations.

The Appellate Body observed that "in order to make out an Article XX(d) defence, a respondent must, inter alia, identify „laws or regulations which are not inconsistent" with the GATT 1994, and establish that the measure found to be GATT-inconsistent is „necessary" to secure compliance with such „laws or regulations."

The Panel had dismissed Thailand's Article XX(d) defence, but in doing so had a made a cross-reference not to the WTO-consistent laws with which Thailand argued that compliance had been sought, but rather to the VAT laws that the Panel had already found to be WTO-inconsistent. The Appellate Body found that "[r]ead literally, this cross-reference means that the Panel considered that the additional administrative requirements could not be justified as necessary to secure compliance with those same additional administrative requirements because the additional administrative requirements had already been found to be inconsistent with Article III:4." The Appellate Body considered this to be a "manifestly incorrect approach." It therefore reversed the Panel's finding that Thailand had not discharged its burden of demonstrating that the additional administrative requirements were necessary to secure compliance with Thailand's VAT laws.

However, it rejected Thailand's request to reverse the Panel's Article III:4 finding on the grounds that the Panel erred in its analysis of Thailand's Article XX(d) defence. The Appellate Body also pointed to "critical flaws" in Thailand's presentation of its Article XX(d) defence to the Panel, including certain arguments that were "patently underdeveloped." In the Appellate Body's view, "the arguments and evidence put forward by Thailand fail, on their face, to establish the requisite elements of an Article XX(d) defence."

On a separate point of appeal, the Appellate Body also upheld the finding of the Panel that Thailand acted inconsistently with Article X:3(b) of the GATT 1994 "by failing to maintain or institute independent tribunals or procedures for the prompt review of guarantee decisions."

The decision of the Appellate Body in Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines (DS371) was released on June 17, 2011.

Multilateral Highlights

United States, Korea Set Timeline for US Compliance With WTO Zeroing Ruling

In a joint statement circulated to World Trade Organization (WTO) members on June 22, 2011, the United States and Korea announced that they have agreed on a "reasonable" period of time for the United States to implement the recommendations and rules of the WTO Dispute Settlement Body (DSB) in the dispute "Use of Zeroing in Antidumping Measures Involving Products From Korea" (DS402). According to the circulated communication, the

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United States will implement the WTO panel"s rulings in regard to the calculation of dumping margins on imports of stainless steel plates in coils and stainless steel sheet and strip in coils no later than November 24, 2011, and imports of diamond saw blades and parts no later than October 24, 2011.

DS 402 was initiated on November 24, 2009, when Korea requested consultations with the United States regarding its use of zeroing in three antidumping cases involving certain products from Korea, namely stainless steel plate in coils, stainless steel sheet and strip in coils and diamond saw blades and parts thereof. According to Korea, the US Department of Commerce"s (DOC) use of zeroing in its final determinations, amended final determinations, and antidumping duty orders in the three mentioned cases is inconsistent with the United States" obligations under Article VI of GATT 1994 and Articles 1, 2.1, 2.4.2, and 5.8 of the Antidumping Agreement.[9] The United States did not contest Korea"s assertions. The Panel"s report, circulated to WTO Members on January 18, 2011, upheld Korea"s claim and was not appealed by the United States.

Under its standard AD calculation methodology, DOC disregards any negative dumping margins found, *i.e.*, transactions with an export price exceeding normal value, and does not offset an exporter"s dumped transactions with non-dumped sales. To date, the WTO has issued more than 20 rulings on the zeroing issue, with most of the challenges targeting DOC"s use of this methodology.

The United States has signaled its intention to curtail the zeroing practice several times. In December, 2006 DOC announced that, as a result of adverse WTO rulings on the issue, it was abandoning the use of average-to-average zeroing in future dumping investigations. However, the change did not affect existing antidumping duty orders. In December 2010, DOC announced that it would go further, unveiling a proposal that would eliminate average-to-average zeroing in administrative reviews and sunset reviews of existing antidumping measures. Although this change has been proposed, DOC has yet to issue a rule. Consequently, it remains unknown whether DOC will issue a final rule to entirely abandon the practice of zeroing or only address zeroing in response to individual DSB complaints.

USTR Announces Chinese Government Decision to End Wind Power Equipment Subsidies

On June 7, 2011, US Trade Representative (USTR) Ron Kirk announced that China has terminated the Special Fund for Wind Power Equipment Manufacturing ("Special Fund"), which the United States challenged before the World Trade Organization (WTO) Dispute Settlement Body (DSB). The Special Fund was alleged to have afforded subsidies in the form of grants of up to USD 22.5 million to Chinese wind turbine manufacturers that agreed to use domestic parts and components instead of importing these inputs.

In September 2010, the United States Steelworkers (USW) filed a petition requesting that the Obama Administration, under Section 301 of the Trade Act of 1974 ("Section 301"), initiate dispute settlement proceedings before the WTO DSB to pressure the Chinese government to desist from providing "unfair" support

[9] Article 2.4.2 of the Antidumping Agreement states that "the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis."

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to its green technology sector. Specifically, The USW petition alleged that China was violating WTO rules by providing direct and indirect subsidies, such as those afforded through the Special Fund, to its clean energy sector, and requiring foreign clean energy companies to license their technology to Chinese partners as a condition to enter the Chinese market. The USW petition also alleged other WTO violations, including those relating to performance standards and preferential practices employed by the Chinese government, as well as China's export restrictions on "rare earth" elements used to produce wind turbines, solar panels and fluorescent light bulbs.

According to the USW petition, these allegedly unfair practices were contributing to Chinese companies expanding their market share for clean energy equipment at the expense of American workers in those sectors, many of whom are USW members. In October 2010, USTR accepted USW's petition and, as required under Section 301, requested consultations with China before the WTO DSB in regard to the Special Fund. These consultations were later held in February 2011 and focused on the Special Fund's alleged violation of Article 3 of the WTO Agreement on Subsidies and Countervailing Measures (SCM) because they were conditioned on the use of local over imported goods. Following the consultations, according to experts, China began taking steps to revoke the legal measure that had created the Special Fund program.

In his June 7 statement, Ambassador Kirk noted that the termination of the Special Fund is a victory not only for American clean technology innovators and workers, but also for the USTR's efforts to "collectively ensure that each government is playing by the rules." Although all WTO members are required, under Article 25 of the SCM, to submit notification to the WTO regarding the use of subsidy programs, USTR reports that China has only submitted one subsidies notification since becoming a WTO member in 2001. According to Ambassador Kirk, USTR prefers that China be more transparent in regard to its subsidy programs so that it need not undertake substantial investigatory efforts in order to uncover China's subsidy programs.

Experts agree that USTR's acceptance of USW's Section 301 petition and its request for WTO DSB consultations reflects the Obama Administration's preference for engaging China through bilateral and multilateral dialogue and negotiations instead of employing unilateral, retaliatory actions to resolve bilateral trade irritants. Experts further agree that the decision on behalf of the Chinese government to cancel the Special Fund reflects the positive, constructive tone in recent US-China negotiations. During the December 2010 Joint Commission on Commerce and Trade (JCCT), the US and China made progress on the issues of indigenous innovation and government procurement in China and, in the May 2011 Strategic and Economic Dialogue (S&ED), the two parties agreed to expand cooperation to promote macroeconomic and financial market stability. The progress made in the context of the JCCT and the S&ED as well as China's recent decision to terminate the Special Fund are clear but narrow victories for the Obama Administration and likely characterize its future engagement with China on trade issues.

US Official Cites Remaining Obstacles for Russian WTO Accession; PNTR Unknowns Remain

On June 22, 2011, Assistant United States Trade Representative (AUSTR) for the World Trade Organization (WTO) and Multilateral Affairs Chris Wilson spoke at a Washington International Trade Association (WITA) event, where he articulated a few of the remaining difficulties facing Russia in its bid for WTO accession. AUSTR

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Wilson noted that, while US and other WTO Working Party negotiators have been successful in addressing many difficult substantive issues, those that remain outstanding are significant.

AUSTR Wilson highlighted the below substantive issues of concern to Working Party negotiators:

- **Sanitary and Phytosanitary Standards (SPS).** Working Party negotiators note that it remains unclear how Russia will eventually come into compliance with the WTO SPS Agreement as it is currently in the process of drafting SPS regulations and measures. According to negotiators, Russia"s Working Party report will need to be reconciled with new regulations and measures in the context of the customs union between Russia, Belarus and Kazakhstan. For its part, the United States argues that Russia must introduce science-based sanitary regulations for agricultural imports, as called for under the WTO Agreement on Sanitary and Phystosanitary Measures;

- **Automotive Sector Investment.** Working Party negotiators opine that Russia"s regulations, which implement investment restrictions in the automobile sector, would be inconsistent with WTO provisions on investment. These regulations condition duty-free treatment on imports of auto parts on local content requirements and production-level minimums;

- **Tariff-Rate Quota (TRQ).** Working Party negotiators deem as unacceptable the TRQs Russia maintains on imports of US beef, poultry and pork;

- **Tariff Reductions.** Russia must consolidate all the tariff cuts it agreed to make in bilateral negotiations with the United States and some 50 other WTO members into a single tariff schedule.

AUSTR Wilson also highlighted the below substantive issues of concern specifically to US negotiators:

- **Processing Plant Inspections.** US negotiators note that, in regard to sanitation, Russia needs to deem US meat inspections of processing plants as equivalent to their own and, also, restore the meat quota accorded under the 2008 US-Russia Bilateral agreement;

- **Intellectual Property Rights (IPR).** US negotiators point to Russia"s alleged failure to: (i) curb internet piracy; and (ii) enforece already-passed IPR laws;

- **Encryption Key.** US negotiators object to Russia"s insistence that it be provided with commercial software encryption keys.

Experts note that, due to the 2008 territorial conflict between Russia and Georgia, the latter has reportedly vetoed formal Working Party discussions on Russian accession, although negotiators have held these discussions on an informal basis in order not to lose momentum. However, one formal meeting will be necessary before the Working Party delivers its report on Russian accession to the General Council. As Russia and Georgia are in discussions concerning their territorial disagreement, experts opine that Georgia could remove its blockage before 2012.

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Also, there are several procedural issues that the US government must overcome in regard to Russian accession. If US lawmakers fail to pass legislation establishing with Russia Permanent Normal Trade Relations (PNTR) before its accession occurs, Russia may deny most favored nation (MFN) market access to US firms that they would otherwise enjoy as a result of Russia being within the global rules based trading system, i.e., WTO. However, granting Russia PNTR will require either repealing or continuing to annually waive Russia from the Jackson-Vanik amendment (under Title IV of the Trade Act of 1974), which prevents the United States from establishing PNTR unless the relevant country fulfills "freedom of emigration" conditions contained 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 been "graduated" from Jackson-Vanik coverage.

In his remarks, AUSTR Wilson stated that the Obama Administration is eager to see Congress pass legislation establishing PNTR with Russia before it accedes to the WTO. However, experts note that there is significant resistance among many lawmakers to establishing PNTR with Russia before seeing the final Russia accession agreement. Consequently, whether US firms will enjoy MFN market access in Russia immediately upon it acceding to the WTO largely depends on the ability of Obama Administration and US industry groups to sell to lawmakers the benefits of establishing PNTR before Russia gains accession.

United States Foregoes Appeal in Orange Juice Dispute with Brazil; Report Adoption Suggests New Course for Commerce Department on "Zeroing"

On June 17, 2011, the World Trade Organization (WTO) Dispute Settlement Body (DSB) adopted the Panel Report on the case "United States - Anti-Dumping Administrative Review and Other Measures Related to Imports of Certain Orange Juice from Brazil (DS 382)." First circulated to WTO members on March 25, 2011, the Panel Report rules that the United States had acted inconsistently with Article 2.4 of the WTO Anti-Dumping Agreement (ADA) in using, in the First and Second Administrative Reviews of the anti-dumping (AD) duty imposed on orange juice originating in Brazil, "simple zeroing" to determine the weighted-average margins of dumping and the importer-specific assessment rates for the companies Cutrale and Fischer. In addition, the Panel found that the United States" "continued use" of this methodology in successive AD proceedings was also in breach of its commitments under the ADA.[10] In light of these findings, the Panel recommended that the United States adopt the necessary measures to comply with its obligations under the ADA.

In a press statement, the Brazilian Ministry of Foreign Affairs (*Ministério das Relações Exteriores* (MRE)) welcomed the adoption of the report and the United States" decision not to appeal the panel"s ruling. According to the statement, the Report"s adoption represents an important shift in the United States" stance as it is the first time that the United States has decided not to file an appeal in panels involving the practice of "zeroing" in reviews of antidumping proceedings. MRE also announced that it had arrived at an agreement with the United States on a "reasonable period of time" of nine months for implementation of the report. Brazil also stated that it

[10] Under its standard AD review calculation methodology, DOC disregards any negative dumping margins found, *i.e.*, transactions with an export price exceeding normal value, and does not offset an exporter"s dumped transactions with non-dumped sales.

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was confident the United States would fully comply with the DSB"s recommendations. The United States confirmed its commitment to a punctual implementation.

Beyond orange juice from Brazil, Japan requested consultations with the United States before the DSB in November 2004 on the Department of Commerce"s (DOC) "zeroing" practice in investigations, administrative reviews and sunset reviews, *i.e.*, "United States – Measures relating to Zeroing and Sunset Reviews (DS322)." Both the Panel Report and the Appellate Body Report delivered rulings adverse to the United States in this regard. Sources close to the Obama Administration note that it has not yet decided whether it will implement the Reports" rulings and recommendations. However, US officials have repeatedly stated before the WTO that the United States will, indeed, implement these rulings and recommendations. According to experts, the failure to implement them could result in Japan imposing WTO-sanctioned retaliatory measures against the United States. Such recent developments in the United States as the December 2010 public consultations on a DOC proposed rule to end the zeroing practice in certain AD investigations and reviews suggest that the United States will comply with the WTO rulings on "zeroing" although DOC has yet to issue a final rule.

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