



# White & Case LLP General Trade Report - JETRO

March 2011

## In This Issue

United States.....1

Free Trade Agreements ..... 18

# Table of Contents

<b>UNITED STATES .....</b>	<b>1</b>
<b>GENERAL TRADE POLICY .....</b>	<b>1</b>
USTR Releases 2011 Trade Policy Agenda.....	1
USTR Kirk Testifies before Senate Finance Committee on 2011 Trade Policy Agenda; Pending FTAs Dominate Discussion .....	5
<b>General Trade Policy Highlights .....</b>	<b>10</b>
China Requests Consultation with United States over AD on Shrimp .....	10
Rep. Aderholt and Sen. Sessions Introduce Bills to Renew Preference Programs .....	11
WTO Appellate Body Reverses Panel Finding on AD/CVD Double-Counting on NME Goods .....	12
Obama Administration Releases Memorandum Proposing Changes to US Trade-related Departments and Agencies .....	12
US Senators Urge Treasury and Interior Departments to Exert Pressure on China over Rare Earth Mineral Trading Practices.....	13
US Criticizes China's Non-Compliance with WTO Ruling on Audiovisual Medium.....	14
USTR Releases 2011 NTE Report on Foreign Trade Barriers, Report on Sanitary and Phytosanitary Measures and Report on Technical Barriers to Trade.....	15
<b>FREE TRADE AGREEMENTS .....</b>	<b>18</b>
Rep. Levin Urges Movement on KORUS; Outlines "21st Century Model for Trade" .....	18
<b>Free Trade Agreement Highlights .....</b>	<b>21</b>
Republican Lawmakers Send Letter to Senate Majority Leader Urging Movement on Three Pending FTAs .....	21
Lawmakers Urge President Obama to Move on US-Colombia and US-Panama FTAs and Revisit FTAA .....	22
Democratic Lawmakers Urge President Obama to Remove Investor-State Mechanisms from FTAs .....	23
Generic Drug Makers Push for Loosened IPR Provisions in TPP .....	24
Colombia Completes Review of FTA with Canada; Expects Implementation by July 1, 2011 .....	24

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WHITE & CASE LLP | i

# UNITED STATES

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## GENERAL TRADE POLICY

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### USTR Releases 2011 Trade Policy Agenda

#### Summary

On March 1, 2011, the Office of the United States Trade Representative (USTR) released the “2011 Trade Policy Agenda and 2010 Annual Report of the President of the United States on the Trade Agreements Program.” We review below the Administration’s 2011 trade agenda.

#### Analysis

##### I. BACKGROUND

On March 1, 2011, USTR unveiled the “2011 Trade Policy Agenda and 2010 Annual Report of the President of the United States on the Trade Agreements Program.” The report discusses the Obama Administration’s trade priorities for 2011 and presents an overview of 2010 trade activities and USTR initiatives.<sup>1</sup> According to the report, the President’s 2011 trade agenda will focus on the goal of doubling US exports by 2015, as set forth in the Administration’s National Export Initiative (NEI). Noting six quarters of “steady economic recovery,” the report asserts that US exports are up nearly 17% over the previous year. The report acknowledges an “ambitious scope of work” to advance negotiations with trading partners to open markets and bolster existing ties. The report maintains, however, that for trade to grow across the world, major economies must “share responsibility” and that “global rules for trade need updating to reflect the rise of the emerging economic powers.” In a departure from the 2010 Trade Policy Agenda, this year’s report acknowledges the “positive role” imports can play in the US economy by “serving as inputs to value-added US production and supporting well-paying jobs here in the United States.” The report maintains that it will meet the goal of “better jobs for more Americans” by crafting “new trade initiatives to increase our country’s and our citizens’ ability to compete in the global marketplace.”

##### II. TRADE AGENDA ITEMS

According to the report, the trade items that the Obama Administration will focus on in 2011 include:

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<sup>1</sup> The full report is available at: [http://www.ustr.gov/2011\\_trade\\_policy\\_agenda](http://www.ustr.gov/2011_trade_policy_agenda)

## Trade Rules Enforcement

The report points to the importance of trade enforcement by noting that the “United States” commitment to expanding markets and opposing protectionism in a multilateral, rules-based global trading system constitutes a central element of the Administration’s trade policy agenda.” Key issues that exist under trade agreements, the report notes, include various market access barriers to US goods and services as well as recourse to trade remedies when necessary. The report details the Administration’s 2010 filing of the first labor case ever brought by the United States under a trade agreement. The filing was against Guatemala and alleges that the country “failed to perform labor rights inspections, to take action to address labor law violations and to enforce orders involving labor rights” all in contravention of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR). With respect to Mexico, the report outlines the US request under the North American Free Trade Agreement (NAFTA) for a dispute settlement panel to consider Mexico’s failure to move a dispute over “dolphin safe” labeling of tuna products from the World Trade Organization’s Dispute Settlement Body (WTO DSB) to NAFTA’s dispute settlement mechanism. The report also notes actions under the US-Canada Softwood Lumber Agreement (SLA) in which a request for dispute settlement consultations with Canada was made over its alleged practice of providing timber to Canadian softwood lumber producers at “far below market price,” as well as the United State’s victory in arbitration surrounding a number of provincial assistance programs implemented by Quebec and Ontario.

## Free Trade Agreements

The report notes that the December 2010 supplemental agreement on market access for automobiles has allowed the United States and Korea to conclude the US-Korea FTA (KORUS) negotiations. While the report estimates that KORUS will support at least 70,000 American jobs, issues pertaining to Korean market access for US beef still linger. Aside from noting continued close cooperation with Congress, the report avoids a specific time-table for a finalized version of KORUS and, instead, indicates the goal of securing approval “as soon as possible.”

The report also references the pending FTAs with Colombia and Panama. The report positively cites the new Juan Manuel Santos Administration in Colombia as having “launched several major initiatives addressing the concerns of labor and human rights groups.” Similarly, the report indicates that Panama has made “significant progress in reforming its labor regime” and has taken “significant steps to achieve greater tax transparency.” Although falling short of giving specific deadlines for the conclusion of both FTAs, the report indicates a goal of resolving outstanding issues “as quickly as possible this year so that [the Obama Administration] can move [the FTAs] forward for Congressional consideration immediately thereafter.”

The report notes that the Trans-Pacific Partnership (TPP) FTA with Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore and Vietnam “moved forward steadily” in 2010. In outlining various cross-cutting issues, including increasing compatibility of regulatory systems of TPP countries and promoting connectivity between US companies and emerging Asia-Pacific production and distribution networks, the report stresses the importance of the Agreement in enhancing the competitiveness of American exporters in the region. The report states the United States “intend[s] to make significant progress toward the swift conclusion of the TPP,” and

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notes that five negotiating rounds are planned for 2011, with one having already taken place in February in Santiago, Chile.

#### WTO Doha Round

The report notes the United States' "strong focus" at the WTO in 2010 on "intensifying market-opening Doha Development Agenda (DDA) negotiations." An "ambitious, balanced, and market-opening outcome" in the Doha Round negotiations in 2011 could, according to the report, provide expansion of both world trade and US exports, as well as provide support for jobs in developing countries. While noting the importance of increased access to markets, the report indicates that the United States remains committed to providing "broad duty-free and quota-free market access to least developed countries as part of the implementation of a successful conclusion to the WTO's Doha Round."

#### Other Multilateral Fora

The Asia-Pacific Economic Cooperation (APEC) has the potential to, according to the report, "revitalize economic recovery in the Asia-Pacific and support more jobs here at home." With APEC's 21 member economies representing nearly half of the world's population and more than half of the global economy, the report indicates that APEC is a "key to the United States" robust engagement in the Asia-Pacific." In particular, the report indicates that the United States will chair and host the 2011 APEC forum, thereby giving the United States "a historic opportunity to advance a trade and investment agenda" in the Asia-Pacific region. During the 2010 forum in Japan, the report notes the agreement of leaders to take concrete steps to achieve free trade in the region through regional agreements such as TPP and by taking steps to prevent the surfacing of technical barriers to trade. Similarly, the report notes the importance of the Association of Southeast Asian Nations (ASEAN) and its ten-member countries which make up the United States' fourth largest export market and its fifth largest two-way trading partner.

#### Trade Preference Programs

The report points to the "key role" preference programs play in the United States' "efforts to boost poor and developing economies through enhanced access to the American market." The Generalized System of Preferences (GSP) is described in the report as saving costs on imports and the Andean Trade Preference Act (ATPA) is referenced as having a "positive effect on drug-crop eradication and crop substitution in the Andean region." The African Growth Opportunity Act (AGOA) is noted as providing an increase in trade and development by "providing expanded duty-free access to 37 beneficiary countries in sub-Saharan Africa." The report indicates that, in December 2010, Congress passed a short-term extension of ATPA but was unable to renew GSP. The report does observe, however, that "failure to renew and extend these programs will undermine the economic development efforts of many poor countries and negatively affect US businesses and consumers." A long-term reauthorization of both the ATPA and GSP is an Administration goal in 2011.

#### Trade Relations with "BRIC" Countries

Brazil, China and India are cited in the report as emerging economies which have "fundamentally changed the landscape" of trade. On Brazil, the report notes the interest of the Administration to "expand and diversify our

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WHITE & CASE LLP | 3

economic relationship.” Governments from both countries met in November 2010 to discuss trade and investment policy matters under the US-Brazil Bilateral Consultative Mechanism. Since then, the report notes that the two countries are “advancing negotiations on a new framework to build upon common and mutually beneficial interests, including trade facilitation, technical barriers to trade, intellectual property rights protection, and services and investment issues.”

With regard to China, the report discusses trade deficit and states that China “often employs practices that impede trade.” In light of these practices, the report lists commitments made by China that have resulted from both the Strategic and Economic Dialogue (S&ED) and the Joint Commission on Commerce and Trade (JCCT), including commitments to enforce intellectual property rights, to address Internet piracy, and to eliminate discriminatory “indigenous innovation” criteria used in government procurement practices. In 2011, the Administration intends to “continue to pursue robust formal and informal meetings and dialogue with China” which will include “numerous working groups and high-level meetings under the auspices of the S&ED and the JCCT.”

On India, the report cites the country as one of the “most significant markets for growth in US exports and investment.” Although the report notes that efforts will need to be made to eliminate trade barriers, such as practices prohibiting entry of several US agricultural products and restrictions on foreign investment in key sectors, the report indicates that the United States will “continue to use all available mechanisms [...] to promote an open and transparent trade and investment regime in India.”

The report cites Russia as an “important potential market for US exporters,” but notes that the United States faces “significant challenges” in its trade partnership with Russia. These challenges, according to the report, can be overcome by Russia gaining accession to the WTO. In so doing, the report states that US economic interests will benefit by “integrating Russia into a system of fixed rules governing trade behavior, and by providing the means to enforce those rules and Russia’s market access commitments.” In addition to assisting Russia in its bid to gain membership into the WTO, the report also notes the US interest in “extending permanent normal trade relations status to Russian goods.”

### Investment

The report notes that the Administration intends to build on the “substantial progress” made in the 2009-2010 review of the Model Bilateral Investment Treaty (BIT). The objective, according to the report, is to “produce an updated model that preserves core investor protections without compromising governments’ ability to regulate in the public interest, fosters competitive neutrality in foreign markets dominated by state-owned enterprises, and enhances transparency and labor and environmental protection.” The report highlights the recent completion of the first round of BIT negotiations with Mauritius and indicates that full completion of the Model BIT review will “enable the intensification of negotiations with key emerging economies” such as China and India.

### Energy and Environment

According to the report, the Administration remains committed to using trade as a “vehicle to facilitate progress on energy and environmental goals.” The report cites US involvement in the WTO Doha negotiations to eliminate barriers to trade in environmental goods and services as well as to “strengthen disciplines on harmful fisheries subsidies.” The report notes that the Administration continues to work with Peru to reform its Amazon forest

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management policies in order ensure it fulfills its commitments under the relevant chapters pertaining to the environment in the US-Peru FTA.

## Outlook

The 2011 Trade Policy Agenda closely mirrored that of 2010, focusing heavily on the role exports play in expanding the US economy and generating jobs in the United States. The report discusses many details pertaining to the TPP negotiations but provides far less specifics on the pending FTAs with Korea, Colombia and Panama. While the report notes the recent progress made on KORUS (the December 3, 2010 supplemental agreement on autos), the Obama Administration makes no direct reference to a specific timetable for a finalized version of the Agreement. In regard to the US-Colombia and US-Panama FTAs, the report indicates that progress has been made in such key areas of each agreement as labor rights and tax issues but gives no specific details regarding when the Agreements will be concluded and submitted to Congress. The lack of specificity in the 2011 report with regard to all three outstanding FTAs is consistent with the 2010 Trade Policy Agenda as well as the Administration's recent rhetoric, and thus leaves doubt as to when specifically the Obama Administration will declare the Agreements finalized, draft the the Agreements' implementing language and submit it to Congress.

Trade enforcement is a clear priority for the Administration in 2011. The report notes several examples of the US enforcement of various rules with its trading partners. Most notably, the report points to the filing of the labor case against Guatemala under DR-CAFTA and, also, points to several IPR violation issues with trading partners, notably China. The report indicates that the Obama Administration will seek advancement on these issues in 2011 through bilateral and multilateral consultation and dialogue as well as through application of US trade remedy law.

One clear distinction between the 2010 and the 2011 Trade Policy Agenda is in the area of imports. In the report for 2011, the Administration notes the benefits of imports for the US economy, which is language that does not appear in the 2010 report. While the reference to imports is encouraging to trade observers who have long called for trade focus beyond just export promotion, the mention of imports is brief and its reference alone does not indicate a committed focus to this aspect of trade.

While many areas of the trade agenda lacked specific details, the report generally expressed interest in moving forward on an "ambitious scope of work" related to trade. While this is encouraging rhetoric, it is of particular note that with the upcoming Presidential election in 2012, it may be difficult for the Administration as well as Congress to pursue an aggressive trade agenda in the coming year.

## USTR Kirk Testifies before Senate Finance Committee on 2011 Trade Policy Agenda; Pending FTAs Dominate Discussion

### Summary

On March 9, 2011, United States Trade Representative (USTR) Ron Kirk testified before the Senate Committee on Finance on the President's 2011 Trade Policy Agenda, which USTR published on March 1, 2011. USTR

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Kirk's testimony covered, among other things, a path forward on the pending US-Colombia, US-Panama and US-Korea Free Trade Agreements (FTAs), enforcement of global trade rules through the World Trade Organization (WTO) Dispute Settlement Body (DSB), the protection of intellectual property rights (IPR), establishing Permanent Normal Trade Relations (PNTR) with Russia prior to its expected accession to the WTO, the need to open foreign markets to meet the Obama Administration's goal under the National Export Initiative (NEI) of doubling US exports by 2015, the needed concessions on the part of the United States' trading partners in the context of negotiating the Doha Development Round, the importance of US preference programs, such as the Generalized System of Preferences (GSP) and the Andean Trade Promotion Act (ATPA), and other trade initiatives.

## Analysis

### I. TESTIMONY GIVEN

Although USTR Kirk's testimony touched upon a broad range of trade agenda items such as WTO dispute settlement proceedings, preference programs and the NEI, the statements made by his interlocutors on the Senate Finance Committee, Chairman Sen. Max Baucus (D-MT) and Ranking Member Sen. Orrin Hatch (R-UT), focused primarily on the need for the Obama Administration to move forward with the pending US-Colombia, US-Panama and US-Korea FTAs.

#### USTR Kirk

USTR Kirk's testimony generally mirrored the content of the recently released President's Trade Policy Agenda, which focused on opening foreign markets to US goods and services and enforcing US trade rights, although he did not point to the benefits of imports for US businesses and consumers as did the President's Trade Policy Agenda. USTR Kirk's testimony can be summarized as follows:

- **US-Korea FTA.** USTR Kirk stated that the Obama Administration has "completed the preparatory work on [KORUS] implementing legislation and associated documents and [is] prepared to begin technical discussions with [Congress]";
- **US-Panama FTA.** USTR Kirk stated that the Obama Administration is "on track to resolve [outstanding tax and labor issues] this year (2011) and will send the Agreement to Congress once that is complete";
- **US-Colombia.** USTR Kirk stated that he is committed to working with [Congress] to address the [outstanding concerns regarding labor rights and violence in Colombia] this year (2011) and will "prepare the agreement for congressional consideration immediately thereafter";
- **TPP.** USTR Kirk stated that "the successful conclusion of the Trans-Pacific Partnership" is a critical objective of the Obama Administration but provided no timeframe with respect to when this would be accomplished;
- **Doha.** USTR Kirk stated that "to move [the] agreement forward, [the United States] need[s] market access commitments from all countries – including the advanced emerging nations –commensurate with their role in

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WHITE & CASE LLP | 6

the global economy" but did not offer details on any further concessions the United States would be willing to make to push the Doha Round negotiations forward;

- **Russia.** USTR Kirk noted that the Obama Administration "will continue [its] efforts to bring Russia into the WTO –including work with Congress to grant Russia PNTR"; and
- **Preference Programs.** USTR Kirk stated that US preference programs" help foster economic growth for the world's poor and create well-paying American jobs" and that "they should be renewed";

USTR Kirk's testimony also covered progress made by the United States in 2010 on IPR protection and alleged unfair government procurement practices abroad, namely in China, WTO DSB rulings favorable to the United States (including those related to the US safeguard mechanism against Chinese tire imports, the concurrent application of US antidumping (AD) and countervailing (CVD) duties on products from non-market economies (NME) and subsidies afforded to Airbus), and the NEI.

#### Chairman Baucus

Chairman Baucus' statement was primarily focused on seeking passage of the pending US-Colombia, US-Panama and US-Korea FTAs. However, Chairman Baucus' testimony also broached US trade policy toward China in the areas of multilateral trade rules enforcement and IPR protection. Chairman Baucus' statement can be summarized as follows:

- **US-Korea FTA.** Chairman Baucus lauded the Obama Administration for having arrived at the December 3, 2010 supplemental agreement on autos, which allowed the United States and Korea to declare the Agreement finalized but noted that "the President promised to keep working on [Korean market access for beef], but [the United States does] not yet have an agreement";
- **US-Colombia and US-Panama FTAs.** Chairman Baucus stated that "Colombia has made [progress] in strengthening labor rights, reducing violence and stepping up prosecutions" and that, as a result of the United States not having ratified the US-Colombia FTA, while China has tripled its Colombian market share over the last two years, the United States' share has dropped by 20 percent. In reference to ratifying both Agreements, Chairman Baucus asserted that the United States "must map a course, and [the United States] must act now"; and
- **China.** Chairman Baucus stated that the United States "must map a course of action that leads to a stable and dynamic economic relationship with China," citing the US challenge before the WTO of alleged Chinese subsidies to its wind power equipment industry, reported IPR violations in China and suspected manipulation of the renminbi (RMB).

Linking the above-detailed items to the President's NEI goal of doubling US exports by 2015, Chairman Baucus further stated that the United States "must approve [its] pending FTAs and [it] must meet the challenges China presents."

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WHITE & CASE LLP | 7

### Ranking Member Hatch

Although Ranking Member Hatch dedicated a significant portion of this statement to criticizing President Obama's economic policies in general, his trade-related remarks focused almost exclusively on seeking passage of the pending US-Colombia, US-Panama and US-Korea FTAs. Ranking Member Hatch's trade-related statement can be summarized as follows:

- **US-Korea FTA.** Ranking Member Hatch noted that, while more progress needs to be made on Korean market access for US beef exports, "[KORUS] remains a strong agreement." He further noted that "[he] supports [KORUS] and want[s] to see it move as soon as possible"; and
- **US-Colombia and US-Panama FTAs.** Ranking Member Hatch stated that, in 2008, "the United States was the main supplier of corn, wheat and soybeans to Colombia, accounting for 71 percent of the market" and that today, as a result of the United States not having ratified the US-Colombia FTA, "[the United States]" market share is just 27 percent." In regard to the effects of not having ratified the US-Panama FTA, Ranking Member Hatch posited that "[the United States] continue[s] to lose out on lucrative government procurement projects." In an apparent effort to link passage of the US-Korea FTA to that of the US-Panama and US-Korea FTAs, Ranking Member Hatch stated, "If the President ignores the will of Congress and sends the Korea agreement without Colombia and Panama, I will do everything I can to make sure that those two agreements are considered at the same time as Korea."

Although Ranking Member Hatch's statement concurred with that of USTR Kirk and Chairman Baucus in that the passage of the three pending FTAs is critical to meeting the NEI's goal of doubling US exports by 2015, it stood apart in that, instead of pointing to foreign trade barriers as obstacles to meeting the NEI's goal, it highlighted the need to do away with "burdensome regulations, high taxes and government deficits" in the United States as the way forward to meeting this goal.

## II. REACTION

USTR Kirk's testimony before the Senate Finance Committee drew reactions from various congressional, industry and trade observers. Reaction can be summarized as follows:

- **Representative Mike Michaud (D-ME).** Representative Michaud, Chairman of the House Trade Working Group, was critical of the testimony given by USTR Kirk due to a lack of specifics and a failure to modernize trade deals. In characterizing the Administration's current trade policy, Representative Michaud noted that it is "appalling that they're pushing leftover Bush-negotiated free trade agreements and negotiating the Trans-Pacific Partnership from the same failed model." Representative Michaud also opined that the United States needs a "new direction" which does not include "more trade deals that offshore American jobs, undermine our manufacturing sector, and do nothing to combat other countries' currency manipulation";
- **Representative George Miller (D-CA).** Representative Miller, senior Democrat on the House Education and the Workforce Committee, noted his concern over KORUS and cited the projection by the International Trade Commission that the agreement "will result in a net reduction of US manufacturing jobs." On the US-Colombia FTA, Representative Miller pointed to USTR Kirk's testimony that the Administration will "address

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WHITE & CASE LLP | 8

concerns” pertaining to violence and attacks on trade union leaders in Colombia. Representative Miller stated that he “surely hope[s] that the Administration will do more than ‚address concerns’ about more than a decade of ruthless violence against union leaders in Colombia and demand tangible results on the ground, as verified by those who are the targets of violence, before submitting a free trade agreement with Colombia”;

- **National Foreign Trade Council (NFTC).** The NFTC noted it was “encouraged” by USTR Kirk’s remarks on the progress made on both the US-Colombia and US-Panama FTAs and “urge[d] the Administration to move as quickly as possible to prevent the further erosion of US market share.” Although “pleased” by USTR Kirk’s announcement of submitting KORUS to Congress soon, the NFTC noted that it “echo[es] the call made by several members of the committee [...] for the Administration to move past the verbal commitment to advance the Colombia and Panama agreements, and set an aggressive timeline to get them done as soon as possible this year.” The NFTC continued that “[i]t’s past time to move forward. Action is needed now.” Trade preference programs were also discussed by the NFTC and it urged Congress “to approve legislation extending each of them, on their own merits, as soon as possible.” On the Doha Round, the NFTC noted that it will be “critical” for the United States to take a leadership role in advancing the talks;
- **National Association of Manufacturers (Association).** The Association expressed its dissatisfaction with the movement on the outstanding FTAs by noting that “our competitors in Europe and Asia continue to move aggressively to open those markets and gain preferential access for their manufactured goods exports.” The Association also stated that it “wants all three pending trade agreements submitted to Congress and acted upon as quickly as possible”;
- **Public Citizen.** Public Citizen noted that USTR Kirk “repeatedly promises to truly fix Bush’s leftover job-killing trade deals – but, at the same time, he’s before Congress pushing forward three of Bush’s NAFTA-style deals for approval.” Public Citizen stated that because the Administration did not “fix the many glaring problems” associated with KORUS, a “battle” will ensue both in Congress and the American public over the agreement; as a result, Public Citizen expressed its hope that the Administration will “take a different approach” with the outstanding US-Colombia and US-Panama FTAs. To that end, Public Citizen noted that “Colombia’s deeply ingrained violence and Panama’s tax-haven status must be eliminated”; and
- **American Insurance Association (AIA).** The AIA noted the importance of FTAs and stated that “granting US businesses greater access to foreign markets through trade is an essential component to maintaining a robust insurance marketplace and protecting American jobs and workers.” Specifically, the AIA noted that KORUS is “particularly significant for insurers as Korea is one of the top ten insurance markets in the world and this agreement sets a new and higher standard for insurance provisions in FTAs.”

## Outlook

Despite experts having noted that the tone of the 2011 Trade Policy Agenda seemed to depart from that of the 2009 and 2010 Trade Policy Agendas in that it underscored not only the importance of increasing US exports but also the benefits of imports for US businesses and consumers, USTR Kirk’s March 9, 2011 testimony before the Senate Finance Committee, according to these experts, did not reflect this change in tone. In fact, in carefully examining USTR Kirk’s prepared testimony, it can be observed that the word “export” occurs seven times while the word “import” occurs only once and it is in reference to the WTO ruling that upheld the US application of a

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WHITE & CASE LLP | 9

safeguard (SG) mechanism against a “harmful surge of Chinese tire imports.” Furthermore, while USTR Kirk’s testimony covered a broad swath of US trade agenda items and employed an optimistic tenor in doing so, it provided few specifics in regard to concrete steps the Obama Administration is taking to achieve the successful conclusion of any one of the items or when this will be done.

Analysts also note that, despite USTR Kirk’s testimony having dedicated almost an equal amount of time to each Trade Policy Agenda item, the testimonies given by Chairman Baucus and Ranking Member Hatch, as well as the discussion that followed, seemed to dedicate a disproportionate amount of time to questioning USTR Kirk about the pending FTAs, particularly the Agreements with Colombia and Panama. In this regard, it is worth noting that both Chairman Baucus and Ranking Member Hatch expressed in unequivocal terms their preference for the implementing language for the US-Colombia, US-Panama and US-Korea FTAs to be submitted to and considered in Congress as a single package or, at least, in tight succession. In reference to the still unclear path forward on the US-Colombia and US-Panama FTAs, USTR Kirk stated in his testimony his often-used narrative that the United States should “not sign agreements for agreements” sake” (although several Obama Administration officials, including Secretary of State Hillary Clinton, have noted all three pending Agreements could be approved before 2012). The Obama Administration is eager to see the US-Korea FTA approved in the near-term but is far less enthusiastic about the US-Colombia and US-Panama FTAs in their current form. Experts note that a standoff could be brewing between congressional Republicans, pro-FTA congressional Democrats and the Obama Administration, the latter of which ultimately decides when the implementing legislation for the three pending agreements will be submitted to Congress. If the Obama Administration attempts to submit the implementing language for the US-Korea FTA without including the implementing language for the US-Colombia and US-Panama FTAs or, at least, provide pro-FTA lawmakers with some guarantees as to when the Agreements with Colombia and Panama will be ready for Congressional consideration, experts note that President Obama runs the slight but very real risk that these lawmakers, who would otherwise vote enthusiastically for the passage of KORUS, could turn their back on the same. While the lawmakers’ threat of not passing KORUS without significant forward movement on the Agreements with Colombia and Panama is widely considered an empty one given the economic importance of KORUS, President Obama not moving on the Agreements with Colombia and Panama will, at the very least, make difficult his pursuit of many of the other items included in the 2011 Trade Policy Agenda and in USTR Kirk’s testimony.

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

### **China Requests Consultation with United States over AD on Shrimp**

On 28 February 2011, China requested consultations with the United States before the World Trade Organization’s (WTO) Dispute Settlement Body (DSB) regarding US antidumping (AD) measures on certain frozen warmwater shrimp imported from China (DS422). China alleges that the US Department of Commerce’s (DOC) use of “zeroing” in the original investigation and several administrative reviews to calculate dumping margins for the subject merchandise is inconsistent with the United States’ WTO obligations under the WTO Anti-Dumping Agreement. Furthermore, China claims that, in the sunset review of the antidumping order, DOC’s use of margins calculated in the original investigation and administrative reviews is also inconsistent with the United States’ obligations under the Agreement.

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WHITE & CASE LLP | 10

The WTO's Appellate Body has consistently ruled against DOC's use of the zeroing methodology in all stages of AD proceedings, from original investigations to administrative and five-year sunset reviews. As a result, on December 28, 2010, the US Department of Commerce (DOC) proposed a revision to its (AD) duty regulations that, if implemented, would (i) end DOC's practice of zeroing in the calculation of overall weighted-average dumping margins for AD administrative review proceedings; and (ii) end the use of zeroing in AD investigations in which a transaction-to-transaction dumping margin calculation methodology is applied. However, complainants in several of the WTO cases, including Japan, the European Union and Mexico, have expressed concern that DOC's December 28, 2010 proposal may not bring the United States entirely in line with its WTO obligations. In filing this consultation request, the Chinese government appears to share these concerns.

## Rep. Aderholt and Sen. Sessions Introduce Bills to Renew Preference Programs

On March 3, 2011, Rep. Robert Aderholt (R-AL) introduced in the House of Representatives the Free and Fair Trade Act (H.R. 913) to renew the Generalized System of Preferences (GSP) and Andean Trade Promotion Act (ATPA) programs through 2012. H.R. 913 is the House companion bill of Senate bill S. 433 (Free and Fair Trade Act of 2011), which Sen Jeff Sessions (R-AL) introduced also on March 3, 2011. Both bills exclude from GSP non-down-filled sleeping bags and neither bill contain language for the renewal of the Trade Adjustment Assistance (TAA) program.

Shortly before the 111th Congress adjourned, the US House of Representatives and the Senate passed on December 22, 2010 a reduced version of the Omnibus Trade Bill (H.R. 6517), which included a six-week extension of ATPA and TAA, but did not contain language for renewal of GSP due to a firm objection from Sen. Sessions who argued that, were preferential tariff treatment afforded to non-down-filled sleeping bags under GSP, American jobs would be lost, namely those of employees of Exxel Outdoors, a US company with an Alabama factory that produces similar sleeping bags. Consequently, GSP was allowed to expire on December 31, 2010 (the six-week extension of ATPA and TAA later expired on February 12, 2011).

Despite GSP and ATPA generally enjoying bi-partisan support, there has been little congressional movement on their renewal since the 112th Congress began on January 5, 2011. This is in part due to the priority congressional Republicans have put on the implementation of the US-Korea, US-Colombia and US-Panama FTAs. Beyond the renewal of TAA, congressional Democrats have thus far failed to define trade policy priorities for the current Congress. Republicans, according to experts, are largely unwilling to discuss TAA renewal until the Obama Administration submits pending FTAs to Congress and, meanwhile, the Obama Administration and Congressional Democrats are seeking guarantees from congressional Republicans on TAA renewal. In this context, preference program renewal currently has received little congressional attention. Lawmakers such as Sen. Robert Casey (D-PA), Sen. Sherrod Brown (D-OH) and Sen. John McCain (R-AZ) have introduced bills to renew GSP and/or ATPA and have seen little or no movement on them in committee.

H.R. 913 has been referred to the House Ways and Means, House Appropriations and House Budget Committees, and S. 433 has been referred to the Senate Finance Committee. It remains unclear if and when these bills will be marked up and reported out of committee.

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WHITE & CASE LLP | 11

## **WTO Appellate Body Reverses Panel Finding on AD/CVD Double-Counting on NME Goods**

On March 11, 2011, the WTO Appellate Body issued its decision in *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (WT/DS379/AB/R). The Appellate Body reviewed a Panel Report, which assessed a complaint by China over antidumping (AD) and countervailing (CVD) duties imposed on four products from China: i) circular welded carbon quality steel pipe; ii) light-walled rectangular pipe and tube; iii) laminated woven sacks; and iv) certain new pneumatic off-the-road (OTR) tires. In each of these investigations, the US Department of Commerce (DOC) had treated China as a non-market economy (NME) to determine normal value and calculate dumping margins.

The Appellate Body decision reverses the Panel's finding with respect to "double remedies" - i.e., the DOC's simultaneous application of AD and CVD duties on imports from countries designated as NMEs. The Appellate Body found that DOC's practice is inconsistent with Article 19.3 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). The decision by the Appellate Body is consistent with a finding last year by the US Court of International Trade (USCIT) that double-counting violates US trade law.

## **Obama Administration Releases Memorandum Proposing Changes to US Trade-related Departments and Agencies**

On March 11, 2011, the Obama Administration released a memorandum to the heads of executive departments and agencies of the federal government, proposing preliminary steps to consolidate and reorganize the executive branch of the federal government. The first focus of this consolidation and reorganization, according to the memorandum, will be on the departments and agencies related to trade, exports and "overall competitiveness" although the memorandum did not give a definitive list of the departments and agencies involved in these functions that are subject to the consolidation and reorganization.

The memorandum, titled "Government Reform for Competitiveness and Innovation", directs the US Chief Performance Officer (CPO) Jeffrey Zients to:

- Establish a Government Reform for Competitiveness and Innovation Initiative to review trade-related departments and agencies and identify: i) areas of overlap and duplication; ii) unmet needs; and iii) possible cost savings;
- Consult with heads and staff of trade-related departments and agencies as well as with members of Congress, business leaders, representatives from organized labor and non-governmental organizations (NGO) and government reform experts to gain input on ways to improve effectiveness and efficiency ;
- Submit to the President within 90 days recommendations on consolidating and streamlining trade-related departments and agencies based on the following principles: i) trade-related departments and agencies "should facilitate the competitiveness of American businesses, large and small, and American workers"; ii) the responsibilities, authorities, programs and requirements of trade-related departments and agencies "should

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WHITE & CASE LLP | 12

be transparent, understandable and easily accessible to the American Public"; and iii) the organization of trade-related departments and agencies should "reduce inefficiencies and overlapping responsibilities, maximize return on taxpayer dollars and best serve the American public."

According to the memorandum, the recommendations of the CPO will serve as the basis for presidential and congressional action on the matter.

The March 11, 2011 Government Reform for Competitiveness and Innovation memorandum comes as part of a larger initiative the Obama Administration has undertaken to reform the federal government. President Obama, in his January 25, 2011 State of the Union address, stated that promoting US long-term economic growth and competitiveness depends on reducing the deficit, investing in education, innovation and infrastructure, and maximizing the efficiency and effectiveness of US government departments and agencies. Consolidating and streamlining trade-related departments and agencies is the first step in the effort to improve government operations. However, experts warn that proposals to consolidate US trade-related departments and agencies could have negative, unintended effects on US trade policy. Sources suggest, for instance, that one possible consolidation could be the integration of the Office of the US Trade Representative (USTR) into the Department of Commerce (DOC). These experts opine that moving USTR into a larger bureaucracy such as DOC could limit the flexibility USTR enjoys in negotiating trade agreements and litigating disputes before the World Trade Organization. They further note that because US trade-related departments and agencies do not all share a common mandate (e.g., DOC's focus on enforcement of US trade law and USTR's focus on trade liberalization), consolidation could create more inefficiencies than it eliminates.

CPO Jeffrey Zients' recommendations to President Obama are expected by mid-June 2011.

## **US Senators Urge Treasury and Interior Departments to Exert Pressure on China over Rare Earth Mineral Trading Practices**

On March 16, 2011, four US Senators signed a letter sent to US Treasury Secretary Timothy Geithner and Interior Secretary Ken Salazar, urging them to exert pressure on China to address allegedly unfair trading practices regarding rare earth minerals (REM), which the United States increasingly employs in national security and green energy applications. The letter states that China's "anticompetitive" export restraints of REMs "are exacerbating global supply problems at a time when world demand continues to climb." According to the letter, the United States is 100 percent dependent on imports of REMs, and China produces 95 percent of the world output.

In the letter, the Senators request that Secretary Geithner instruct the US Executive Director at each multilateral bank to which the United States is a financial contributor not to approve financing for the government of China or for a project located within China involving the mining of REMs or the smelting, separation or production of the same. The Senators posit that "the United States' support for multilateral bank international development initiatives should not extend to projects directly at odds with our own national and economic security needs."

Furthermore, the Senators note that China also prohibits foreign investors in China from mining REMs and from participating in REM smelting and separation projects except in the case of a joint venture with a Chinese

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WHITE & CASE LLP | 13

firm. Citing US mining law, which prohibits foreign investment in mineral exploration and purchase in the United States when the foreign country in question does not extend reciprocal treatment to US mining firms, the Senators' letter requests that Secretary Salazar "enforce reciprocal prohibitions with respect to Chinese investment in mineral exploration and purchase in the United States [...] until China lifts its [REM] foreign investment prohibitions." The Senators observed that "the United States should not sit passively while China's investment policies hamstring US companies and undermine our national and economic security needs."

Experts note that it is of little surprise that Sen. Debbie Stabenow (D-MI), Sen. Charles Schumer (D-NY), Sen. Robert Casey (D-PA) and Sen. Sheldon Whitehouse (D-RI) are the signees of this letter, considering that these lawmakers have, in the past, aggressively argued for unilateral action to be taken to address China's allegedly unfair trading practices, including reported currency misalignment, China's indigenous innovation policies and government subsidies given to Chinese green energy equipment producers. Experts opine, however, that Secretaries Geithner and Salazar are unlikely to heed the requests contained in the Senators' letter as they do not fall in line with the Obama Administration's past approach to engagement with China on trade issues, which is characterized by an express preference for bilateral and multilateral dialogue, consultation and cooperation rather than unilateral action that could trigger retaliatory actions by China. Experts cite progress on irritants in the US-China trade relationship at such forums as the November 2010 meeting of the Joint Commission on Trade and Commerce (JCCT), the May 2010 meeting of the Strategic and Economic Dialogue (S&ED), and the World Trade Organization (WTO). Additionally, the United States has brought a case (DS394) against China before the WTO Dispute Settlement Body (DSB) involving Chinese restraints on exports of raw materials. Experts believe that the Obama Administration will likely prefer to continue to apply pressure on China with respect to its REM export restraints in the context of the WTO DSB instead of applying unilateral measures as the Senators' letter requests.

## US Criticizes China's Non-Compliance with WTO Ruling on Audiovisual Medium

On March 25, 2011, the US mission to the World Trade Organization (WTO) issued a statement before the Dispute Settlement Body (DSB) criticizing China's alleged failure to comply with a WTO ruling that sided with the United States in a case involving several measures concerning the distribution of audiovisual (AV) media in China (China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (DS363)). According to the statement, there has been a lack of progress on the part of China to bring its measures into compliance with the WTO ruling and, consequently, the US mission is discussing with its Chinese counterpart how "to handle any eventual requests for compliance and authorization to suspend concessions."

The United States requested consultations with China on April 10, 2007 concerning certain measures restricting trading rights with respect to imported films for theatrical release, audiovisual home entertainment products (e.g., video cassettes and DVDs), sound recordings and publications (e.g., books, magazines, newspapers and electronic publications). The United States claimed that these measures were not consistent with China's WTO obligations in that they reserved for certain Chinese state-designated and wholly or partially state-owned enterprises the right to import films for theatrical release, audiovisual home entertainment products, sound recordings and publications. The United States also sought consultations concerning certain measures restricting market access for, or discriminating against, foreign suppliers of distribution services for publications

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WHITE & CASE LLP | 14

and foreign suppliers of audiovisual services (including distribution services) for audiovisual home entertainment products. In this regard, the United States claimed that various Chinese measures imposed market access restrictions or discriminatory limitations on foreign service providers seeking to engage in the distribution of publications and certain audiovisual home entertainment products.

On August 12, 2009, the DSB issued its report on DS363, which largely upheld US claims over the WTO-inconsistency of the Chinese measures on trading rights and distribution services. China notified its decision to appeal the DSB report on September 22, 2009. However, on December 21, 2009, the Appellate Body (AB) circulated its report, which largely agreed with that of the DSB. On July 12, 2010, the United States and China agreed that China would implement DSB's recommendations before March 19, 2011.

Although it remains officially unclear how the United States and China will move forward on DS363, sources note that it is likely that the United States will request authorization for trade retaliation against China before the WTO, with which China would likely disagree, particularly in regard to the degree of retaliation. Experts note that, were this to occur, the United States and China would likely then seek arbitration.

DS363 is one of many cases between the United States and China brought before the DSB. Other such examples include a case brought by China (DS379) regarding concurrent US AD/CVD orders on goods from non-market economies (NMEs), another case brought by China (DS399) regarding US safeguard measures against Chinese tire imports, and a case brought by the United States (DS419) regarding alleged illegal subsidies afforded to Chinese manufacturers of wind power equipment. The March 25, 2011 US statement regarding China's alleged failure to implement the DSB's recommendation in a timely manner is consistent with the Obama Administration's past approach to engagement with China. That approach is characterized by an express preference for bilateral and multilateral dialogue, consultation and cooperation concerning contentious trade issues as opposed to unilateral action that could trigger retaliatory actions on the part of China.

## **USTR Releases 2011 NTE Report on Foreign Trade Barriers, Report on Sanitary and Phytosanitary Measures and Report on Technical Barriers to Trade**

On March 30, 2011, the United States Trade Representative (USTR) published its 2011 National Trade Estimate (NTE) Report on Foreign Trade Barriers in addition to the 2011 Report on Technical Barriers to Trade (TBTs) and the 2011 Report on Sanitary and Phytosanitary Standards (SPSs).

### 2011 National Trade Estimate Report on Foreign Trade Barriers

The annual NTE report, as required by the Omnibus Trade and Competitiveness Act of 1988, is an inventory of the most significant foreign barriers to: i) US exports of goods and services; ii) foreign direct investment by US persons; and iii) protection of intellectual property rights (IPR). The report provides, where feasible, quantitative estimates of the foreign practices' impact on the value of US exports. The 2011 NTE report classifies foreign trade barriers into the following categories:

- Import policies

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WHITE & CASE LLP | 15

- Standards, testing, labeling, and certification
- Government procurement
- Export subsidies
- Lack of intellectual property protection
- Services barriers
- Investment barriers
- Anticompetitive practices with trade effects tolerated by foreign governments
- Trade restrictions affecting electronic commerce
- Other barriers

The report examines the largest export markets for the United States, including 58 nations, the European Union, Taiwan, Hong Kong and the Arab league.

### 2011 Report on Technical Barriers to Trade

The 2011 Report on TBTs focuses on significant foreign trade barriers in the form of product standards, technical regulations and testing, certification, and other procedures involved in determining whether products conform to standards and technical regulations (conformity assessment procedures). The report describes US efforts to identify and eliminate TBTs, identifies and describes significant standards-related trade barriers currently facing US producers, and presents US government initiatives to eliminate or reduce the impact of these barriers.

The report identifies TBT measures in 19 countries or groups of countries: Argentina, Brazil, China, Colombia, the EU and its Member States, the GCC and its Member States, India, Indonesia, Japan, Korea, Malaysia, Mexico, Russia, Saudi Arabia, South Africa, Taiwan, Thailand, Turkey, and Vietnam.

### 2011 Report on Sanitary and Phytosanitary Standards

The 2011 Report on SPS Measures describes significant barriers to US food and farm exports arising from measures applied by foreign governments on the grounds that they are necessary to protect human, animal, or plant life or health from risks arising from the entry or spread of pests, from plant- or animal-borne pests or diseases, or from additives, contaminants, toxins, or disease-causing organisms in foods, beverages, or feedstuffs. The report is focused on SPS measures that appear to be unscientific, unduly burdensome, discriminatory, or otherwise unwarranted and create significant barriers to US exports. The report includes a discussion of SPS issues that affect US exports in multiple foreign markets, and identifies and describes “significant unwarranted SPS-related trade barriers currently facing US exporters, along with US Government initiatives to eliminate or reduce the impact of these barriers.”

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WHITE & CASE LLP | 16

The report identifies SPS measures in the following 47 countries or groups of countries: Argentina, Australia, Bolivia, Brazil, Chile, China, Colombia, Costa Rica, Ecuador, Egypt, El Salvador, Ethiopia, the European Union and its member states, Guatemala, the Gulf Cooperation Council (GCC) and its member states, Honduras, Hong Kong, India, Indonesia, Israel, Jamaica, Japan, Kazakhstan, Kuwait, Mexico, Morocco, New Zealand, Nicaragua, Norway, Peru, Philippines, Russia, Saudi Arabia, Singapore, South Africa, the South African Development Community, South Korea, Sri Lanka, Switzerland, Taiwan, Thailand, Turkey, Ukraine, United Arab Emirates, Uruguay, Venezuela, and Vietnam.

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WHITE & CASE LLP | 17

## FREE TRADE AGREEMENTS

### Rep. Levin Urges Movement on KORUS; Outlines “21st Century Model for Trade”

#### Summary

On March 29, 2011, Rep. Sander Levin (D-MI), the Ranking Member of the House Committee on Ways and Means, delivered a speech at the Peterson Institute for International Economics (Washington, DC) on outstanding issues in and looming challenges to US trade policy. Rep. Levin's remarks addressed pending free trade agreements (FTAs) with Korea, Colombia and Panama, the expiration of the Generalized System of Preferences (GSP), the Andean Trade Promotion and Drug Eradication Act (ATPDEA) and the Trade Adjustment Assistance (TAA) program, the blockage of the Miscellaneous Tariff Bill (MTB), and China's adherence to global trading rules. We discuss below Rep. Levin's remarks in greater detail.

#### Analysis

##### I. PENDING FREE TRADE AGREEMENTS

Rep. Levin spoke first about the US-Colombia FTA, sharing his observations from two fact-finding missions to the country in April 2009 and January 2010. During these missions, Rep. Levin exchanged views “first-hand with business representatives, non-governmental organizations (NGOs) and workers in a variety of fields as well as with an array of [Colombian] government officials.” In regard to the US-Korea FTA, Rep. Levin noted that Korea “has stood as one of the most closed markets to industrial goods in general and automotive in particular” and that the December 3, 2010 supplemental agreement on automotive trade has positively contributed to “replacing one-way [trade] with two-way trade.” Rep. Levin briefly commented on the US-Panama FTA, stating that the Panamanian government is currently working to address the few outstanding US concerns over tax-haven issues and the labor code.

Commenting on reported Republican threats to halt US trade policy in Congress until the Obama Administration submits not only the implementing legislation for the US-Korea FTA but also that for the US-Colombia and US-Panama FTAs, Rep. Levin asserted that doing so would minimize the economic importance of the US-Korea FTA. He further pointed out that, in light of that the European Union-Korea FTA enters into force in July 2011, any US action that delays implementation of the US-Korea FTA will cause US firms to be at a disadvantage in the Korean market. Rep. Levin signaled that it is the Republicans who are “holding up action” on US trade issues and not the Democrats, and he urged the Obama Administration to “hold its ground” and continue to insist that each trade measure, including the pending FTAs with Colombia and Panama, move only when they “are ready for action.”

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WHITE & CASE LLP | 18

### US-Colombia FTA

Rep. Levin noted that US concerns over violence against organized labor leaders and labor code loopholes in Colombia have not, to date, been adequately addressed. He highlighted certain areas in which further progress needs to be made:

- There remains a “wholesale impunity from punishment for crimes of violence [against labor leaders].” Only 3 of 42 murders of labor leaders in 2008 resulted in a conviction; and
- In Colombia, “workers are not able to exercise their basic international rights, in particular their right to organize and bargain collectively.” He also highlighted a move on the part of many Colombian employers toward creating “associated cooperatives”, which, according to Rep. Levin, leave “the vast majority of workers without a voice in their workplace.”

Rep. Levin did note, however, that President Obama and Colombian President Juan Manuel Santos “are actively discussing concrete steps to address and resolve long outstanding issues relating to worker rights [...] and to violence and impunity.” He quoted US Trade Representative (USTR) Ron Kirk’s March 9, 2011 testimony before the Senate Finance Committee in stating that “any timetable [for President Obama submitting the US-Colombia FTA’s implementing language to Congress] will be contingent on the successful resolution of these issues.”

### US-Korea FTA

Rep. Levin stated that Congress should “approve the US-Korea FTA before Memorial Day [2011],” noting that USTR Kirk, at the behest of the Obama Administration, “should send the draft implementing legislation to Congress immediately and request [that] the House Ways and Means Committee undertake an expeditious review and voluntary „mock markup“ [of the draft bill].” Rep. Levin asserted that, after the “mock markup”, the Obama Administration should send the actual implementing language to Congress so that it may be introduced officially under Trade Promotion Authority (TPA) procedural rules.

### US-Panama FTA

Rep. Levin asserted that, due to the Obama Administration having “worked to conclude talks on a Tax Information Exchange Agreement (TIEA),” Panama is no longer an unchallenged tax haven. He noted that Panama is pursuing measures “to ensure that its laws reflect international core standards,” including the elimination of legal loopholes that allowed company-directed unions as well as the elimination of prohibitions on the right to collectively bargain in the maritime sector. Rep. Levin stated that further legislative action “is underway” in Panama to address outstanding US concerns over tax-haven issues and the labor code although he did not provide any specifics regarding the progress of these measures or whether they will satisfy US demands, particularly within the Democratic congressional caucus.

## **II. “21ST CENTURY MODEL FOR TRADE”**

Rep. Levin asserted that the trade agenda for the 112th Congress should be “broad” and should further a “new 21st century model of trade” to include but not be limited to:

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WHITE & CASE LLP | 19

- A. US Preference Programs.** Rep. Levin opined that GSP and ATPDEA have been held “hostage” to gridlock on other, unrelated trade measures (such as the pending FTAs and TAA) and posited that it is “inexcusable” that they have been allowed to lapse. He stated that, instead of pursuing short-term renewals of the programs, Republicans and Democrats “should be working together to address outstanding issues relating to longer-term operation [of GSP and ATPDEA]”;
- B. TAA.** Rep. Levin asserted that TAA should be reinstated immediately as it provides retraining assistance to workers “displaced [...] and dislocated from the impact of trade.” Furthermore, he lamented that TAA was “being held up in part as barter for” the Obama Administration submitting to Congress the implementing language for the US-Colombia FTA;
- C. MTB.** Rep. Levin asserted that congressional Republicans have allowed their self-imposed ban on “earmarks” (certain provisions in bills to spend approved funds) to block passage of MTB, which provides for reduced import tariffs to be applied on a finite list of goods entering the United States. Many congressional Republicans consider the tariff concessions afforded under MTB to be earmarks and, therefore, according to Rep. Levin, have blocked passage of the bill;
- D. Trade Rules Enforcement.** In this regard, Rep. Levin focused on China and posited that it presents a serious enforcement challenge in the ways: i) its system of governance is much more opaque than the systems of all other commercially significant WTO Members; ii) its provinces and municipalities adopt WTO-inconsistent laws that contradict WTO-consistent rhetoric from Beijing; and iii) US companies are often unwilling to help USTR develop WTO cases because they fear China will retaliate against them. He opined that Congress should “direct increased funds to USTR to ensure that it has the tools to investigate and prosecute Chinese WTO violations.”
- E. Currency.** Rep. Levin put forth that China’s alleged currency misalignment has cost US firms and estimated USD 125 billion in net exports and posited that HR 2378 (The Currency Reform for Fair Trade Act) passed in the House in September 2010 during the 111th Congress was “WTO-consistent legislation to address China’s currency manipulation.” He further asserted that House Republicans (of the current 112th Congress) “decision that currency issues are not a top priority reflects an allegiance to an outdated model that international trade issues will work themselves out over time without much damage.”

In addition, Rep. Levin offered a few comments on the values behind the “21st century model for trade”, presenting the US-Peru FTA as an example and highlighting the Agreement’s bolstered provisions on labor and the environment, limited rights of foreign investors in the United States and modified data exclusivity provision granting easier access to generic medicines.

## Outlook

Rep. Levin’s remarks on the pending FTAs and other trade measures are a good indicator of the trade agenda of House Democrats in the current 112th Congress and, to a lesser extent, of the Senate Democrats and the Obama Administration. While passage of the US-Korea FTA is now expected to occur by mid-2011, House Democrats remain largely opposed to the passage of the US-Colombia FTA due to the allegedly unaddressed violence against labor leaders and subpar labor standards although experts attribute this opposition to influence

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WHITE & CASE LLP | 20

exerted by US organized labor, which reportedly has committed sizeable resources to defeating the Agreement with Colombia. Sources note that, because Republicans enjoy majority-control of the House and that Senate Democrats have historically been more inclined to vote in favor of FTAs than their House counterparts, were the Obama Administration to submit the US-Colombia and US-Panama FTAs' implementing legislation to Congress with that of the US-Korea FTA or shortly thereafter, the Agreements with Colombia and Panama would likely pass. However, experts opine that the Obama Administration, despite having directed USTR to intensify talks with the Colombian and Panamanian governments to resolve the outstanding US concerns, is stalling on the US-Colombia and US-Panama FTAs also due to pressure from US organized labor, from which President Obama will require support in the 2012 presidential elections. In light of mounting pressure on the part of congressional Republicans, it remains unclear whether the Obama Administration will indefinitely delay submission to Congress of the agreements with Colombia and Panama, succumbing to pressure from US organized labor, or whether the Obama Administration will acquiesce, submitting all three pending FTAs in 2011.

In regard to GSP, ATPDEA, TAA and MTB, experts opine that none of these measures will be considered in Congress until the Obama Administration submits, at least, the implementing language for the US-Korea FTA. These experts note, however, that it is more likely that the Obama Administration will need to submit the implementing language for all three FTAs before Republican and Democratic lawmakers will commit to resolving the impasse on these other measures. Experts also assert that currency legislation will not likely move far in the 112th Congress although discussion about it will not be entirely muted.

## ***Free Trade Agreement Highlights***

### **Republican Lawmakers Send Letter to Senate Majority Leader Urging Movement on Three Pending FTAs**

On March 14, 2011, 44 Republican lawmakers signed a letter sent to Senate Majority Leader Sen. Harry Reid (D-NV), setting an ultimatum whereby, until President Obama submits to Congress the implementing legislation for the US-Colombia and US-Panama Free Trade Agreements (FTAs), the Republican Senate leadership will "use all the tools at [its] disposal to force action, including withholding support for any nominee for Commerce Secretary and any trade-related nominees." Every Republican Senator signed the letter with the exception of Sen. Olympia Snowe (R-ME), Sen. Susan Collins (R-ME) and Sen. Rand Paul (R-KY).

The letter points to President Obama's "apparent lack of interest in seeking approval of these free trade agreements" that would "provide new export opportunities for US businesses and workers." Further, the letter notes that Colombia and Panama are "signing bilateral free trade agreements with the European Union, Canada and other countries at the expense of US workers", and, as a result, US companies are losing market share in these markets.

President Obama nominated on March 9, 2011 Secretary of Commerce Gary Locke as the next US Ambassador to China, a post currently held by Ambassador Jon Huntsman who will step down on April 30, 2011. While it remains unclear whom the Obama Administration will appoint as the next Commerce Secretary, sources note that US Trade Representative Ron Kirk tops a short list of candidates for the post. The March 14, 2011 letter

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WHITE & CASE LLP | 21

sent to Senate Majority Leader Reid, however, makes clear that, barring the Obama Administration making significant forward movement on the US-Colombia and US-Panama FTAs, Republican leadership will block Senate confirmation of any Commerce Secretary candidate the Obama Administration chooses, in addition to the pending confirmation of Paul Piquado as Assistant Secretary for the Department of Commerce's (DOC) Import Administration (IA), Eric Hirschorn as DOC Undersecretary for Industry and Security, Michael Punke as Deputy USTR, Islam Siddiqui as Chief Agricultural Negotiator and Alan Bersin as Head of US Customs and Border Patrol (CBP).

The US-Colombia FTA was signed on November 22, 2006 and the US-Panama FTA was signed on June 28, 2007 and, although the Obama Administration appears ready to submit to Congress the implementing language for the US-Korea FTA in the coming weeks, it has avoided providing any guarantees regarding a timeline for the submission of the US-Colombia and US-Panama FTA implementing language, citing concerns over violence against union leaders in Colombia and tax-haven issues in Panama as well as alluding to a lack of support among lawmakers for the Agreements. In this regard, while the March 14, 2011 letter does not resolve the alleged problems of violence and tax information transparency in Colombia and Panama, respectively, it does demonstrate that the Agreements do, indeed, enjoy the needed support to pass in Congress given that, on March 1, 2011, 67 freshman House Republicans sent a similar letter to President Obama pledging their support for passing the pending FTAs.

## **Lawmakers Urge President Obama to Move on US-Colombia and US-Panama FTAs and Revisit FTAA**

On March 17, 2011, seven Republican lawmakers sent President Obama a letter, urging him to "immediately" submit to Congress the implementing legislation for the US-Colombia and US-Panama Free Trade Agreements (FTAs) "so that [the United States] can begin to reap the benefit of these important agreements." In the letter, the lawmakers also urged President Obama to "engage willing partners in the [western] hemisphere to negotiate a Free Trade Area of the Americas (FTAA) [in order to] open additional export markets for the United States."

Senators Marco Rubio (R-FL), Mark Kirk (R-IL), Lamar Alexander (R-TN), Roy Blunt (R-MO), Charles Grassley (R-IA), Mike Johanns (R-NE) and Ronald Johnson (R-WI) suggest in the letter that the agreements with Colombia and Panama are "an important and necessary first step toward a broader trade policy." By re-launching FTAA, according to the lawmakers, President Obama "will create opportunities for higher incomes in the [United States] and foreign policy stability and growth in the Western Hemisphere." President Clinton launched the FTAA during the first Summit of the Americas in 1994. Differences over market access between the United States and Latin American nations, however, led the 35 negotiating members to miss the agreement's original 2005 completion date and, over time, lose interest in the agreement.

The seven Republican lawmakers sent the letter on the eve of President Obama's trip to Latin America (Brazil, Chile and El Salvador), which analysts note is a mission to strengthen economic ties with and increase US exports to the region. Critics of the Obama Administration's trade policy note, however, that President Obama's refusal to send to Congress the implementing language for the pending US-Colombia and US-Panama FTAs due to alleged violence against organized labor leaders in Colombia and tax-haven issues in Panama has adversely affected US economic clout in Latin America. They also note that a more likely reason that the Obama

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WHITE & CASE LLP | 22

Administration is stalling on the agreements is the strong opposition to the US-Columbia FTA on the part of US organized labor, a group that has vigorously supported the Administration. The experts believe that, while it is possible that President Obama could submit the agreements with Colombia and Panama to Congress under intense pressure from congressional Republicans (and many congressional Democrats) to do so, it is unlikely that the Obama Administration will undertake new free trade initiatives such as FTAA prior to the 2012 presidential elections in which US employment will likely be a central theme.

## **Democratic Lawmakers Urge President Obama to Remove Investor-State Mechanisms from FTAs**

On March 18, 2011, 19 House Democrats sent a letter to President Obama, urging him to initiate an amendment to the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA) to remove the investor-state dispute resolution mechanism provision, which allows a foreign investor to challenge through private arbitration a sovereign government's laws and/or regulations that are unfavorable to the foreign investor's in-country operations. In the letter, the lawmakers also request that President Obama commit to removing the investor-state dispute resolution mechanism provisions from the pending US-Korea, US-Colombia and US-Panama FTAs as well as to ensuring that any agreement reached at the conclusion of the ongoing Trans-Pacific Partnership (TPP) negotiations does not provide for investor-state dispute resolution.

The March 18th letter cites current investor-state arbitration suits brought by certain foreign mining companies against El Salvador over Salvadoran policies regarding environmental health and standards for mining permits as a basis for removing investor-state investor protections from FTAs. The letter posits that the Salvadoran government is facing these arbitration suits simply for asserting its "legitimate right to protect its air, water and soil," and "[promote] the health and well-being of its citizens." In this context, the March 18th letter alludes to the presidential campaign of then Senator Barack Obama during which he stated that, with respect to FTAs, he would "ensure that foreign investors rights are limited [...] to protect public safety and promote the public interest." For President Obama not to rein in foreign investor protections provided for in investor-state dispute resolution mechanism provisions of current, pending or future FTAs, according to the March 18th letter, would "limit countries" ability to meet the needs of their citizens."

Experts note that, despite President Obama's promises made during the campaign in regard to curtailing the investor-state dispute resolution mechanism in FTAs, the Obama Administration is unlikely to heed the request of the 19 House Democratic lawmakers to do so. According to experts, in preparation for the 2012 presidential election, President Obama, whom US industry has harshly criticized for not pursuing an aggressive free trade agenda during his tenure in office, has made some efforts to appease US industry in regard to US trade policy, including the expected submission to Congress in the near-term of the US-Korea FTA and the promised resolution in 2011 to outstanding issues surrounding the US-Colombia and US-Panama FTAs. To attempt to modify DR-CAFTA, the three pending FTAs or the already-tabled US investment proposal for TPP, which provides for an investor-state dispute resolution mechanism, according to experts, would be politically costly for President Obama in the 2012 election. As such, the Obama Administration will likely agree to take under consideration the lawmakers' request but will not likely take any concrete action.

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WHITE & CASE LLP | 23

## Generic Drug Makers Push for Loosened IPR Provisions in TPP

On March 18, 2011, the Generic Pharmaceutical Association (GPhA) sent a letter to Assistant United States Trade Representative (USTR) for Intellectual Property Protection Stanford McCoy, urging the USTR to ensure that any intellectual property rights (IPR) proposal tabled by the United States in the context of the Trans-Pacific Partnership (TPP) negotiations be based on the IPR-related commitments contained in the bipartisan New Trade Policy of May 10, 2007 ("May 10 issues"). GPhA posits in the letter that, in contrast to the loosened IPR language of the May 10 issues, the increased standards of IPR protection in "certain recent" FTAs "have created an environment that is not conducive to entry by US generic manufacturers or competition."

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 (FTA) 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 IPR provisions, including those related to patent term extensions, patent linkage and data exclusivity. The May 10 issues changed the "data exclusivity" provision in these FTAs to facilitate generics' entrance into the market by, among other provisions, eliminating any requirement that a drug regulatory agency withhold approval of a generic drug without certifying that no patent would be violated if the generic were marketed. As a result of the May 10 issues, these loosened IPR provisions were included in the US-Peru, US-Colombia and US-Panama FTAs. The agreement with Peru is the only one of the three FTAs to be submitted to and successfully passed in Congress. The loosened IPR provisions were not included in the US-Korea FTA which, consequently, contains far stronger patent provisions.

While GPhA and groups advocating economical access to medicines are pushing for the TPP IPR text to reflect the IPR-related language of the May 10 issues, non-generic pharmaceutical industry groups are urging USTR to instead table text containing stronger patent provisions similar to those of the US-Korea FTA. Sources note that, although USTR tabled an IPR chapter in mid-February 2011, the text did not include any IPR-related May 10 issues. Nonetheless, USTR has hinted that the target US IPR proposal will reflect IPR provisions in "past Asia-Pacific agreements." Many sources have interpreted this to mean that USTR will be pushing for a TPP IPR text similar to that of the US-Korea FTA. However, it cannot be ruled out that USTR could pursue a TPP IPR text that addresses the concerns of generic producers and access to medicine groups as well as non-generic producers although it remains unclear how this could be accomplished.

## Colombia Completes Review of FTA with Canada; Expects Implementation by July 1, 2011

On March 24, 2011, the Colombian Constitutional Court affirmed the constitutionality of the Colombia-Canada Free Trade Agreement (FTA), the final procedural step Colombia needed to implement the FTA. The Embassy of Colombia in Washington notes in a March 30, 2011 press statement that the agreement "should enter into force by July 1st." In order for this to happen, the two countries will engage in an "exchange of notes," which entails indication from each government that it is ready to move forward with the implementation of the agreement. Upon the conclusion of this process, which the Embassy of Colombia expects to happen in late June 2011, the FTA will immediately enter into force.

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WHITE & CASE LLP | 24

Talks between Colombia and Canada were initiated in 2007, and the countries signed the FTA in November 2008. Three parallel agreements pertaining to the environment, labor and human rights were also signed by the two countries. While the recent ruling by the Colombian Constitutional Court marked the final stage of the approval process for Colombia, Canada completed its approval when the agreement received Royal Assent on June 29, 2010.

The Colombia-Canada FTA will feature the elimination of Colombian tariffs on 98% of Canadian goods and provide for enhanced market access for Canadian service sectors. Two-way investment flows are expected to grow between the two countries as a result of reciprocal commitments in various sectors including energy and telecommunications. The Embassy of Colombia press release also notes that both countries have “committed to ensuring their laws respect the International Labor Organization’s Declaration on Fundamental Principles and Rights at Work through the Labor Cooperation Agreement.”

The announcement by the Embassy of Colombia comes at a time when passage of the US-Colombia FTA is uncertain in the near-term and has caused an impasse in US trade policy. Both the Obama Administration and the Office of the United States Trade Representative (USTR) have maintained that more time is needed to resolve human rights issues related to violence against organized labor leaders in Colombia. Nonetheless, Congressional Republicans and some Democrats maintain that Colombia has made the necessary steps toward improving outstanding issues and, consequently, they believe that the Obama Administration should send implementing legislation to Congress immediately.

While the United States continues to debate the human rights issues surrounding violence against organized labor leaders in Colombia, USTR Ron Kirk indicated on March 7, 2011 that the USTR is ready to engage in technical discussions with Congress on the US-Korea (KORUS) FTA. House Ways and Means Chairman Dave Camp (R-MI) has long stated that all three outstanding FTAs (US-Korea, US-Colombia, and US-Panama) should be presented to Congress for approval at the same time. Some members of Congress have gone as far as to suggest that they will not consider KORUS until movement is made on both the Colombia and Panama FTAs although experts opine that this is likely an empty threat given the economic importance of the US-Korea FTA.

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WHITE & CASE LLP | 25