



White & Case LLP General Trade Report - JETRO

November 2011

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UNITED STATES

GENERAL TRADE POLICY

Is Everybody Winning? A Review of China's First Decade of WTO Membership

Summary

This year marks the 10-year anniversary of China's accession to the World Trade Organization (WTO). After China joined the global trade organization in 2001, it implemented a number of measures in order to fulfill its membership commitments. These measures ranged from the reduction and elimination of tariffs and non-tariff barriers, the liberalization of certain investment and services sectors, and the amendment, revocation and implementation of a myriad of laws and regulations.

China officially announced in July 2010 its fulfillment of all WTO commitments. Although few countries deny that China has implemented significant reforms and achieved impressive economic growth since joining the WTO, many countries have also raised concerns that China's policymaking and policy implementation with respect to certain key legal and regulatory issues runs counter to the spirit of the WTO. In other instances, countries have formally alleged through both bilateral and multilateral complaints that China has failed to implement certain WTO commitments or follow WTO rules. The issues of concern range from excessive government intervention in the Chinese domestic and international trade financial markets to slower-than-expected liberalization of vital economic sectors.

Today, China and the rest of the world show numerous signs of having benefited from China's WTO membership. The initial reforms China undertook as part of its accession have helped integrate the world's largest exporter deeper into the global economy and expand its role in the global production chain. China has also gradually increased its participation level in the WTO Dispute Settlement Body (DSB), and its membership has given rise to a number of other trends, including increased influence within the WTO Doha Development Agenda (DDA). Current global economic trends and China's long-term interests suggest that China's role in the WTO will continue to expand over the next decade of its membership. On the other hand, experts agree that whether or not China is successful in establishing itself as a core, leading member of the WTO will largely depend on its efforts to carry out its remaining WTO commitments and comply with WTO rules in key areas.

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Analysis

I. OVERVIEW OF CHINA'S WTO ACCESSION

On November 10, 2001, and following 15 years of negotiations, China's WTO accession was approved by unanimous consent at the WTO Ministerial in Doha, Qatar. Immediately after the formal signing ceremony, China notified the WTO that it had ratified the instruments of accession, paving the way for China to become the WTO's 143rd member on December 11, 2001. Shortly thereafter, former US President George Bush announced that the United States would grant China permanent normal trade relations (PNTR), beginning with the date of WTO accession, by certifying to Congress that China's WTO membership agreement met all US legislative requirements.

Since then, China has taken a number of difficult steps to implement the measures necessary to fulfill its WTO commitments. Such measures include China's substantial reduction and elimination of tariffs, significant removal of non-tariff barriers, increased liberalization of a number of investment and services sectors, and an overhaul of trade laws and regulations in compliance with WTO rules.

Tariff Reduction and Elimination

China gradually phased out its tariffs from an average level of 15.3 percent in 2001 to 9.8 percent in 2010.¹ According to the Chinese Ministry of Finance, most of these tariff reductions were carried out over the first five years following accession. In 2002, China reduced its import tariffs on over 5,300 types of products, bringing the average tariff level from 15.3 percent to 12 percent. In 2005, China reduced tariffs on over 900 products, reducing the average tariff level to 9.9 percent. As a result of eliminating or reducing a range of tariffs, China's trade in goods increased from USD 509.8 billion in 2001 to USD 3 trillion in 2010, making China the world's largest exporter and second largest importer of goods.² The benefit of China's swift reduction of tariffs is best seen in the transformation of its automobile and agriculture sectors. By July 1, 2006, China had fulfilled all of its commitments for tariff reductions on automobiles and automobile parts. China's average tariff rate for automobiles substantially declined from 70-80 percent in 2001 to the current level of 25 percent. The tariff level for automobile parts declined from 18-65 percent in 2001 to the current 10 percent.³ Similarly, according to China's National Bureau of Statistics, China's average tariff rate for agricultural products was reduced to 15.2 percent in 2007, while the global average rate remained at 62 percent. Overall, China's tariff reduction and elimination efforts over the past ten years have played a significant role in propelling China into the ranks of global trading superpowers.

¹ "Review of the Past Decade of China's WTO Accession," January 30, 2011. See <http://invest.people.com.cn/GB/13851560.html>

² Wang Chao, China's Vice Minister of Commerce, "A speech on the Academic Conference in Memory of the 10th Anniversary of China's WTO Accession," September 16, 2011.

³ See http://news.xinhuanet.com/fortune/2009-12/15/content_12651301.htm

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Non-tariff Barriers

Within the first five years following WTO accession, China removed a variety of non-tariff barriers to trade in a number of product areas, including tariff rate quotas (TRQs), import licenses, import quotas, import tendering, and technical barriers. For example, China eliminated TRQs on a range of agricultural products, including soybeans, barley, rapeseed, and corn oil, leaving only tariffs in place. By January 1, 2005, China had eliminated as part of its WTO commitments non-tariff measures affecting 337 categories of products, including import licensing, quotas and tendering requirements. These products include automobiles, motorcycles, electronic machinery and equipment, petroleum products, rubber products, and chemical fertilizers.

Services Liberalization

In keeping with its WTO commitments, China has liberalized more than 100 services sectors during the past decade, including banking, insurance, telecommunications, distribution, and logistics. It also provided significant market-access opportunities for foreign services providers in areas in which China has less competitive advantage, including information technology, education and training, legal services, medical services, and culture and sports. As a result of this liberalization, China's trade in services increased from USD 71.9 billion in 2001 to USD 362.4 billion in 2010, making China the world's third largest importer and fourth largest exporter of services.⁴

Investment Liberalization

Following WTO accession, China has liberalized investment through the removal of geographic restrictions and the expansion of business scope for foreign investment, especially in the services sectors. China has also liberalized investment by allowing for increased foreign shares in Sino-foreign joint ventures and the increased presence of wholly foreign-owned enterprises in certain sectors. For example, in 2004, the Chinese government began to relax franchising requirements and geographic restrictions for foreign investment in a number of services sectors, including telecommunications, construction, distribution, banking, insurance, tourism, and transportation. In 2004 China also allowed for the establishment of wholly foreign-owned enterprises in sectors including leasing services and construction. As a result of these measures, China's actual utilized foreign investment increased from USD 46.88 billion in 2001 to USD 105.73 billion in 2010, an increase of 125.54 percent.⁵

Improvement of Legal and Regulatory Regime

China has also overhauled its legal and regulatory regime over the past decade by repealing, amending and legislating thousands of laws and regulations related to trade in goods and services, investment, and intellectual property rights (IPR). The central government clarified and amended over 2,300 different laws and regulations,

⁴ Wang Chao, China's Vice Minister of Commerce, "A speech on the Academic Conference in Memory of the 10th Anniversary of China's WTO Accession," September 16, 2011.

⁵ "Past Decade of China's WTO Accession: Foreign Investment Full Integration in China's Market," *China Business Update*, September 23, 2011. See http://cbu.ec.com.cn/article/cbuzqjm/cbutbch/201109/1163455_1.html

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and local governments clarified over 190,000 different laws, regulations and policy measures.⁶ These legal and regulatory initiatives were carried out within the following areas, among others:

- **Fair Trade:** *Foreign Trade Law* (amended in 2004), *Antidumping Regulations* (2002, amended in 2004), *Countervailing Duty Regulations* (2002, amended in 2004), and *Safeguard Regulations* (2002, amended in 2004).
- **Import and Export:** *Customs Law* (amended in 2000), *Regulations on Import and Export Duties* (amended in 2003), *Law on Import and Export Commodity Inspection* (amended in 2002), *Regulations on Administration of Import and Export of Technologies* (2001), *Regulation on the Place of Origin of Import and Export Goods* (2004).
- **Services:** *Commercial Banking Law* (amended in 2003), *Securities Law* (amended in 2004), *Insurance Law* (amended in 2009), *Regulations on Telecommunications* (2000), *Measures for the Administration of Foreign Investment in Commercial Fields* (2004), *Provisions on the Administration of Foreign-Funded Telecommunications Enterprises* (amended in 2008).
- **Investment:** *Law on Sino-Foreign Joint Ventures* (amended in 2001), *Law on Sino-Foreign Joint Cooperative Ventures* (amended in 2000), *Law on Foreign-Funded Enterprises* (amended in 2000), *Company Law* (amended in 2005), *Provisions on Establishment of Investment Companies by Foreign Investors* (amended in 2004), *Measures for the Administration of Foreign-Invested Mineral Exploration Enterprises* (2008), *Provisions on Merger or Acquisition of Domestic Enterprises by Foreign Investors* (amended in 2006), *Anti-Monopoly Law* (2007), *Enterprise Income Tax Law* (amended in 2007).
- **IPR:** *Patent Law* (amended in 2008), *Trademark Law* (amended in 2001), *Copyright Law* (amended in 2010).

II. BENEFITS FROM CHINA'S WTO ACCESSION

Benefits for China

After a decade of development under the WTO framework, China has shown numerous signs of having benefited greatly from accession. The total value of China's imports and exports with the world surged from approximately USD 300 billion in 2001 to USD 1.5 trillion in 2010.⁷ The increase in the size, power and liberalization of China's markets over the past decade has helped it achieve the status of global trading superpower.

China has attempted to leverage this tremendous increase in global trade to improve its citizens' standard of living. China's gross domestic product (GDP) increased from USD 1.73 trillion in 2001 to USD 6.30 trillion in 2010, at an average annual growth rate of 10 percent, while the country's per capita GDP increased from USD

⁶ Wang Chao, China's Vice Minister of Commerce, "A speech on the Academic Conference in Memory of the 10th Anniversary of China's WTO Accession," September 16, 2011.

⁷ "China's WTO Anniversary," *China Business Review*, October-December 2011.

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1,038 in 2001 to USD 4,481 in 2011.⁸ From a social policy standpoint, the Chinese government has also attempted to improve income distribution as well as its national social security, education and health care systems. Over 200 million people have been lifted out of poverty as a result of China's unparalleled growth,⁹ a number that has contributed greatly to the decline of the global poverty rate.

In addition, the policies China has adopted since 2001 have helped it integrate deeper into the global economy as well as expand its role in the global production chain. According to the Vice Minister of the Administration of Quality Supervision, Inspection and Quarantine (AQSIQ), China has a strong comparative advantage in the manufacture of electronic appliances, leather, furniture, bicycles, and down garments, each of which account for more than 50 percent of global market share.¹⁰ While maintaining its traditional strength in the production and export of labor-intensive products, China has also started to foster the production of high value-added goods, such as electronic information products, software and photovoltaic cells. According to statistics from China's General Administration of Customs (GAC), electronic and machinery products as well as high-tech products currently make up over 50 and 25 percent of China's total export of industrial products by value, respectively. More recently, the Chinese government has also promoted the domestic production of goods that use home-grown technologies, independent IPRs, and wholly domestic-owned brands. This increase in the number of emerging and competitive Chinese industries has allowed many Chinese companies to move up the value chain. As evidence of this trend, China's value-added rate of its inward processing trade increased from 56.9 percent in 2001 to 77.4 percent in 2010.¹¹

China's WTO membership has also allowed Chinese companies to compete directly with foreign companies across a number of industries, stimulating domestic reforms and enhancing productivity across the country. Competition with foreign peers has forced Chinese companies to adopt advanced technologies and management methods. This has led to the emergence of a number of Chinese companies who own the rights to their own core technologies and IPRs. The automobile industry serves as a good example of a sector in which Chinese companies have benefited from competition with foreign companies. Since the 1990s, nearly all the big-brand vehicle manufacturers from the United States, Europe, Japan, and Korea have built production bases in China and established joint ventures with Chinese counterparts. The presence of these foreign rivals led Chinese automobile companies to realize that they could only survive by advancing their technological level and expanding their production scale. Such initiatives have, in turn, helped China's automobile industry develop into one of the country's pillar industries. The total production value of China's automobile industry increased from RMB 443.3 billion in 2001 to RMB 4.34 trillion in 2010.¹² According to the China Association of Automobile

⁸Wang Chao, China's Vice Minister of Commerce, "A speech on the Academic Conference in Memory of the 10th Anniversary of China's WTO Accession," September 16, 2011.

⁹ "Review of the Past Decade of China's WTO Accession," January 30, 2011. See <http://invest.people.com.cn/GB/13851560.html>

¹⁰ See <http://info.homea.hc360.com/2009/09/141008447138.shtml>

¹¹ Wang Chao, China's Vice Minister of Commerce, "A speech on the Academic Conference in Memory of the 10th Anniversary of China's WTO Accession," September 16, 2011.

¹² See <http://www.nbd.com.cn/newshtml/20110903/20110903154532206.html>

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Manufacturers, both China's production and sale of automobiles exceeded 18 million units in 2010, a year-on-year increase of 30 percent and a new world record. Moreover, China was the largest producer and consumer of automobiles in 2009 and 2010.

Foreign competitive pressure has also allowed numerous Chinese companies across a number of sectors other than automobiles, including high-speed rail, ship-building, telecommunications, machinery, and environmental protection, to compete internationally.

Benefits for the World

China's WTO accession has also benefitted the rest of the world in several ways. First, China's sustained growth and improved regulatory environment have made it increasingly attractive to international investors. Approximately 480 of the world's top 500 companies currently have operations in China.¹³ As part of its WTO accession, China committed to opening markets in crucial sectors, including agriculture and services. China also committed to creating an equal-opportunity and more transparent business environment for foreign investors. Today, improved market access and increased investment opportunities have helped China become an important market for global products and services. China's top ten imported products come from the following categories of products: electronic machinery, mineral fuel and oil, ores, power-generation, optics and medical equipment, plastics, chemicals, vehicles, copper, and iron and steel. China's importation of these products increased at a rate ranging from 165 percent to 2,486 percent during the 2001-2010 period.¹⁴ China's service sectors have also become increasingly attractive for foreign investment, especially in the finance, telecommunications, logistics, accounting, law, and computer services sectors.¹⁵

Second, China's stable economic growth has contributed to global stability and prosperity. After the global financial crisis broke out in late 2008, China stimulated domestic demand, continued the liberalization of its markets, and pulled through the crisis without resorting to overly protectionist measures. In 2009, for example, imports increased by 2.8 percent over 2008 levels, making China the only major economy to maintain positive growth in imports amid the financial crisis.¹⁶ In 2010, China's total value of imports and exports was USD 2.973 trillion, a year-on-year increase of 34.7 percent.¹⁷ China contributed to the global recovery from the crisis by helping to sustain the exports of many crisis-afflicted countries, increase overseas investments and create job opportunities.

¹³ "Review of the Past Decade of China's WTO Accession," January 30, 2011. See <http://invest.people.com.cn/GB/13851560.html>

¹⁴ "China's WTO Anniversary," *China Business Review*, October-December 2011. See <http://www.Chinabusinessreview.com>

¹⁵ "Past Decade of China's WTO Accession: Foreign Investment Full Integration in China's Market," *China Business Update*, September 23, 2011. See http://cbu.ec.com.cn/article/cbuzgjm/cbutbch/201109/1163455_1.html

¹⁶ See <http://news.hexun.com/2010-07-22/124340590.html>

¹⁷ MOFCOM data released on January 14, 2011.

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III. SHORTCOMINGS OF CHINA'S WTO COMPLIANCE SINCE ACCESSION

Paragraph 18 of Part I of China's WTO Accession Protocol states that China shall be subject to a Transitional Review Mechanism (TRM) for the first eight years and the tenth year of its WTO membership.¹⁸ During the annual TRM, which takes place within each WTO committee and is reported to the General Council, WTO members review and may voice concerns regarding China's WTO compliance efforts. Despite the alleged focus on WTO compliance issues, many member countries have also taken the opportunity to raise general concerns regarding China's trade policies. In turn, China is required to provide relevant information and may raise issues of its own regarding the WTO commitments it, or other member countries, have made.

During October 2011, China began its tenth and final WTO TRM. Experts expect that the General Council report, which will contain details on the TRM, will become available in January 2012. After the final TRM is completed, China will continue to be required to participate in the periodic WTO Trade Policy Review Mechanism (TPRM). The objective of the TPRM is not, *per se*, to review a country's WTO compliance efforts. Instead, the WTO states that the Mechanism is meant to increase transparency and understanding of countries' trade policies and practices, and enable a multilateral assessment of the effects of policies on the world trading system. All WTO members are subject to the TPRM. To date, China's trade policies have been reviewed under the TPRM in 2006, 2008 and 2010.¹⁹

Although China's final TRM has not yet been completed, comprehensive records of China's eighth TRM, which took place in 2009, are available and serve as a sufficient indicator of what issues are likely being raised during the final TRM. According to the 2009 General Council Report, the representatives of China, the United States, Cuba, the European Union (EU), Japan, and Venezuela participated in the 2009 TRM of China. Of these members, the United States, the EU and Japan were the most active participants in the process. Analysis of their comments provides an instructive overview of how exactly three of China's top trading partners perceive China's current trade policies, and where exactly they believe China falls short of its WTO commitments. Below we summarize selected comments from the EU, Japan and the United States, delivered in certain WTO committees during China's 2009 TRM.

Committee on Market Access

EU.²⁰ The EU expressed concern regarding, *inter alia*: (i) China's application of export quotas that are not allowed under China's WTO Accession Protocol and generally prohibited under Article XI of the GATT on

¹⁸ China's WTO Accession documents can be accessed at: http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm

¹⁹ China's TPRM documents can be found at: http://www.wto.org/english/tratop_e/tpr_e/tp330_e.htm

²⁰ Please note that all cited WTO documents use the term "EC" instead of "EU."

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General Elimination of Quantitative Restrictions; and (ii) China's Compulsory Certification Scheme (CCC) regulations, which, according to the EU, serves as a market access barrier to a number of European goods.²¹

Japan. Japan noted, *inter alia*, that: (i) China levies a 100 percent export tax on 32 chemical fertilizers that are not covered under Annex 6 to China's WTO Accession Protocol; and (ii) China has decreased the number of export licenses it issues for coal in violation of GATT Article XI.²²

United States. The United States raised several issues, including, but not limited to: (i) China's imposition of export restraints on rare earths, which are inconsistent with GATT Article XI; and (ii) China's application of a valued-added tax (VAT) exemption for certain Chinese fertilizers, which, according to the United States, serves as a market access barrier for fertilizer from the United States.²³

Committee for Trade in Goods

Japan. Japan noted, *inter alia*, that: (i) China's imposition of export taxes on certain raw materials violates Section 11.3 of Part I of China's Accession Protocol; and (ii) that China's export prohibition on natural sand contravenes Article XI of the General Agreement on Tariffs and Trade (GATT) 1994.²⁴

United States. The United States noted, *inter alia*, that: (i) China's imposition of export restraints on rare earths is WTO-inconsistent; and (ii) China's subsidization of its domestic textiles sector may contravene Article 3 of the WTO Subsidies Agreement.²⁵

Committee on Anti-Dumping Practices

Japan. Japan raised concerns regarding the fact that the only parties who can gain access to the questionnaire from China's official website regarding antidumping (AD) investigations are those exporters or producers that have already been known to the investigating authority.²⁶

²¹ WTO Committee on Market Access, "Transitional Review Mechanism Pursuant to Paragraph 18 of the Protocol of the Accession of the People's Republic of China: Communication from the European Communities," September 22, 2009, (WTO Document G/MA/W/97).

²² WTO Committee on Market Access, "Transitional Review Mechanism Pursuant to Paragraph 18 of the Protocol of the Accession of the People's Republic of China: Communication from Japan," September 22, 2009, (WTO Document G/MA/W/96).

²³ WTO Committee on Market Access, "Communication from the United States," September 22, 2009, (WTO Document G/MA/W/98).

²⁴ WTO Council for Trade in Goods, "Transitional Review Mechanism Pursuant to Paragraph 18 of the Protocol of the Accession of the People's Republic of China: Communication from Japan," October 20, 2009, (WTO Document G/C/W/626).

²⁵ WTO Council for Trade in Goods, "Transitional Review Mechanism Pursuant to Paragraph 18 of the Protocol of the Accession of the People's Republic of China: Communication from the United States," October 27, 2009, (WTO Document G/C/W/628).

²⁶ WTO Committee on Anti-Dumping Practices, "Transitional Review Mechanism Pursuant to Paragraph 18 of the Protocol of the Accession of the People's Republic of China: Questions from Japan," October 9, 2009, (WTO Document G/ADP/W/475).

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United States. The United States expressed concern over reports from sources that, *inter alia*, interested parties in China's recent AD proceedings have experienced difficulties obtaining sufficiently detailed non-confidential summaries of relevant information.²⁷

Committee on Subsidies and Countervailing Measures

EU. The EU noted, *inter alia*, that: (i) although China committed in its Accession Protocol to notify the WTO of any domestic subsidy it imposes, China has only submitted one subsidy notification to the WTO since it became a member; and (ii) China provides trade-distorting subsidies to its domestic industries in the form of tax rebates, tax exemptions, the provision of land and land rights, subsidized prices of raw materials and industrial inputs and subsidized loans.²⁸

United States. The United States raised the following issues, among others: (i) although China has stated that its decisions regarding state-owned enterprises (SOEs) are based solely on commercial considerations, it appears as though China makes investment decisions on SOEs in accordance with its industrial policy and not market economy principles; and (ii) local Chinese authorities appear to partake in the practice of providing free or considerably underpriced land as a subsidy to investors whose projects they favor even though this practice is not condoned by Chinese law.²⁹

Committee on Technical Barriers to Trade

EU. The EU noted, *inter alia*, that: (i) it has repeatedly requested that China, in keeping with its WTO commitments, establish a single official journal for publishing all laws, regulations and other measures; and (ii) China uses Chinese-specific national compulsory standards in various sectors, where relevant international standards are readily available, without providing adequate justification for the deviation.³⁰

Japan. Japan expressed concern over, *inter alia*: (i) China's unnecessary use of national standards, which according to Japan contravenes Article 2.4 of the WTO Technical Barriers to Trade (TBT) Agreement; and (ii)

²⁷ WTO Committee on Anti-Dumping Practices, "Transitional Review Mechanism Pursuant to Paragraph 18 of the Protocol of the Accession of the People's Republic of China: Questions from the United States," September 30, 2009, (WTO Document G/ADP/474).

²⁸ WTO Committee on Subsidies and Countervailing Measures, "Transitional Review Mechanism Pursuant to Paragraph 18 of the Protocol of the Accession of the People's Republic of China: Questions from the European Communities," October 15, 2009, (WTO Document G/SCM/W/550).

²⁹ WTO Committee on Subsidies and Countervailing Measures, "Transitional Review Mechanism Pursuant to Paragraph 18 of the Protocol of the Accession of the People's Republic of China: Questions from the United States," October 7, 2009, (WTO Document G/SCM/W/548).

³⁰ WTO Committee on Technical Barriers to Trade, "Transitional Review Mechanism Pursuant to Paragraph 18 of the Protocol of the Accession of the People's Republic of China: Communication from the European Communities," October 29, 2009, (WTO Document G/TBT/W/326).

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China's "Instructions on factory inspections," which do not have a clear legal relationship with the mandatory requirements under the CCC scheme.³¹

United States. The United States raised the following issues, among others: (i) China mandates compliance with a non-consensus based standard in the case of mobile handsets, which China requires be enabled with a Chinese system known as Wireless Local Area Network Authentication and Privacy Infrastructure (WAPI); and (ii) China should consider allowing test results performed by laboratories outside China to be considered for purposes of conformity assessment procedures.³²

Committee on Sanitary and Phytosanitary Measures

EU. The EU raised the following issues, among others: (i) China imposes restrictions on imports of pork and beef from the EU due to H1N1 and Bovine-Spongiform Encephalopathy (BSE) concerns, respectively, that are not supported by the internationally accepted standards of the World Organization for Animal Health (OIE); and (ii) China failed to provide prior notification regarding its plans to introduce and implement the new Chinese Food Safety Law.³³

United States. The United States noted, *inter alia*, that: (i) China imposes restrictions on imports of pork and beef from the United States due to H1N1 and BSE concerns, respectively, that are not supported by the standards of the OIE; and (ii) China restricts imports of poultry from the states of Virginia, Kentucky, Idaho and Arkansas due to concerns regarding low pathogenicity notifiable avian influenza (LPNAI) that are not consistent with OIE guidelines.³⁴

Committee on Trade in Services

EU. The EU noted, *inter alia*, that: (i) China has yet to approve European companies' applications for the use of foreign Computer Reservation Systems for air transport services, despite commitments China made under GATS

³¹ WTO Committee on Technical Barriers to Trade, "Transitional Review Mechanism Pursuant to Paragraph 18 of the Protocol of the Accession of the People's Republic of China: Communication from Japan," October 26, 2009, (WTO Document G/TBT/W/325).

³² WTO Committee on Technical Barriers to Trade, "Transitional Review Mechanism Pursuant to Paragraph 18 of the Protocol of the Accession of the People's Republic of China: Communication from the United States," October 21, 2009, (WTO Document G/TBT/W/324).

³³ WTO Committee on Sanitary and Phytosanitary Measures, "Transitional Review Mechanism Pursuant to Paragraph 18 of the Protocol of the Accession of the People's Republic of China: Questions from the European Communities," October 20, 2009, (WTO Document G/SPS/GEN/968).

³⁴ WTO Committee on Sanitary and Phytosanitary Measures, "Transitional Review Mechanism Pursuant to Paragraph 18 of the Protocol of the Accession of the People's Republic of China: Questions from the United States," October 7, 2009, (WTO Document G/SPS/GEN/963).

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Articles XVI and XVII; and (ii) China requires that foreign personnel of construction companies fulfill a residency requirement that may violate China's national treatment commitments.³⁵

Japan. Japan noted, *inter alia*, that: (i) foreign architects and engineers must present a graduation degree in order to obtain license approval from the Chinese government, but the degrees of foreign universities are not recognized by the Chinese government; and (ii) China may be in violation of its GATS commitments through its prohibition of foreign suppliers of household-use game machines and software.³⁶

United States. The United States raised the following issues, among others: (i) in its Accession Protocol China committed to, but still does not, allow majority foreign-owned chain store retailers with more than 30 outlets to sell motor vehicles; and (ii) China's Postal Law prohibits "foreign businesses" from investing in or operating Chinese domestic express delivery of "letter articles."³⁷

Committee on Trade in Financial Services

EU. The EU noted, *inter alia*, that: (i) China has not yet opened its electronic payment services sector to foreign service suppliers, despite its GATS commitments; and (ii) China's foreign ownership cap for existing Chinese banks appears to still be in place and foreign funded banks are only permitted to apply for branches one at a time.³⁸

Japan. Japan expressed concern over, *inter alia*: (i) China's practice of requiring that the senior staff of insurance companies undergo certain training that appears to favor domestic rather than foreign insurance companies; (ii) China's requirement that the dissolution of foreign-funded insurance companies not take place for a certain period after establishment, a requirement that appears inconsistent with China's WTO Accession Protocol.³⁹

United States. The United States noted, *inter alia*, that: (i) non-life insurance companies have not yet been able to obtain approval to supply political risk insurance in China, despite China's WTO commitment to do so; and (ii)

³⁵ WTO Council for Trade in Services, "Transitional Review Mechanism Pursuant to Paragraph 18 of the Protocol of the Accession of the People's Republic of China: Communication from the European Communities," October 13, 2009, (WTO Document S/C/W/306).

³⁶ WTO Council for Trade in Services, "Communication from Japan," October 21, 2009, (WTO Document S/C/W/307).

³⁷ WTO Council for Trade in Services, "Transitional Review Mechanism Pursuant to Paragraph 18 of the Protocol of the Accession of the People's Republic of China: Communication from the United States," October 26, 2009, (WTO Document S/C/W/308).

³⁸ WTO Committee on Trade in Financial Services, "Transitional Review Mechanism Pursuant to Paragraph 18 of the Protocol of the Accession of the People's Republic of China: Communication from the European Communities," October 12, 2009, (WTO Document S/FIN/W/70).

³⁹ WTO Committee on Trade in Financial Services, "Transitional Review Mechanism Pursuant to Paragraph 18 of the Protocol of the Accession of the People's Republic of China: Communication from Japan," October 22, 2009, (WTO Document S/FIN/W/71).

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China appears to prohibit foreign-funded banking institutions from acquiring equity stakes in Chinese-funded banks beyond the 25 percent threshold, despite China's GATS commitment to eliminate such restrictions.⁴⁰

Committee on Trade-Related Investment Measures

EU. The EU expressed concern over, *inter alia*: (i) Article 23 of the National Development and Reform Commission's (NDRC) Steel Industry Development Policy states, which states that, when investing in the Chinese steel industry, foreign investors may not have a controlling stake; and (ii) although China does not require technology transfers under its Law on Sino-Foreign Joint Ventures, European companies have found that Chinese authorities continue to consider technology transfer agreements a *de facto* requirement in joint venture contracts.⁴¹

United States. The United States noted, *inter alia*, that: (i) China's restrictions on the equipment industry often discourage foreign companies with the most advanced equipment from investing in China; and (ii) China has placed "medical institutions" in the "restricted" category of its *Catalogue for the Guidance of Foreign Investment Industries*.⁴²

Committee for Trade-Related Aspects of Intellectual Property Rights

EU. The EU raised concerns that, *inter alia*: (i) European companies doing business in China lack proper access to the judicial or administrative enforcement systems because of cumbersome notarization and legalization requirements; and (ii) criminal prosecution for IPR infringement in China remains ineffective.⁴³

Japan. Japan noted, *inter alia*, that: (i) cases of IPR infringement in China remain high because in China the equipment used to counterfeit goods is not destroyed after the counterfeit goods have been seized; and (ii) the judicial reviews conducted by China's Intellectual Property Tribunal are beset by delays.⁴⁴

⁴⁰ WTO Committee on Trade in Financial Services, "Transitional Review Mechanism Pursuant to Paragraph 18 of the Protocol of the Accession of the People's Republic of China: Communication from the United States," October 23, 2009, (WTO Document S/FIN/W/72).

⁴¹ WTO Committee on Trade-Related Investment Measures, "Transitional Review Mechanism Pursuant to Paragraph 18 of the Protocol of the Accession of the People's Republic of China: Communication from the European Communities," October 5, 2009, (WTO Document G/TRIMS/W/69).

⁴² WTO Committee on Trade-Related Investment Measures, "Transitional Review Mechanism Pursuant to Paragraph 18 of the Protocol of the Accession of the People's Republic of China: Communication from the United States," October 2, 2009, (WTO Document G/TRIMS/W/67).

⁴³ WTO Council for Trade-Related Aspects of Intellectual Property Rights, "Transitional Review Mechanism Pursuant to Paragraph 18 of the Protocol of the Accession of the People's Republic of China: Communication from the European Communities," October 21, 2009, (WTO Document IP/C/W/540).

⁴⁴ WTO Council for Trade-Related Aspects of Intellectual Property Rights, "Transitional Review Mechanism Pursuant to Paragraph 18 of the Protocol of the Accession of the People's Republic of China: Communication from Japan," October 20, 2009, (WTO Document IP/C/W/537).

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United States. The United States has expressed concern that, *inter alia*: (i) Chinese officials seem to have been urging more lenient enforcement of IPR laws in light of the recent global financial crisis; and (ii) in 2008, 81 percent by value of infringed goods seized at the US border originated in China and that China's IPR violations affect a number of US industries, including pharmaceuticals, electronics, batteries, auto parts, industrial equipment, toys, and musical instruments.⁴⁵

IV. CHINA IN THE DISPUTE SETTLEMENT BODY

China's participation in the WTO dispute settlement system, as both a respondent and a complainant, has increased since it joined the WTO. China's level of involvement during its first five years as a WTO member (2001-2006) was relatively low: China was a complainant in one case and a respondent in two cases.⁴⁶ This relatively low level of participation could be attributed to the Chinese government's expressed preference for resolving trade disputes through diplomacy and bilateral negotiations, and Chinese enterprises' unfamiliarity with the WTO Agreements, and the operation of the dispute settlement system in particular. China was generally understood at this time to be a reluctant litigant. This is evident not only from the small number of disputes in which China was a complainant, but also from China's willingness to reach a "mutually agreed solution" with the United States in 2004, in a case concerning value added tax on integrated circuits (DS 309: *China-Value Added Tax on Integrated Circuits (US)*).

During the latter part of China's first decade of WTO membership there was a significant increase in China's participation in the WTO dispute settlement system. According to WTO statistics, from 2007-2011, China was a complainant in 7 cases and a respondent in 13 cases. Chinese enterprises clearly had become more familiar with their rights under the WTO Agreements, and learned how to use the WTO dispute settlement system to assert those rights.

Thus, from 2001-2011, China was a complainant in 8 cases, a respondent in 15 cases, and a third party in 78 cases at the DSB.⁴⁷ Out of the 8 cases in which China was a complainant, the respondents were China's two largest trading partners – the United States and the EU. Furthermore, 6 out of 8 of these cases were related to antidumping, countervailing and safeguard measures. The exceptions included a case targeted at a piece of US legislation regulating poultry imports, which had the effect of banning poultry imports from China (DS 392: *US - Poultry (China)*), and another case which concerned import tariffs imposed by the United States on certain passenger vehicle and light truck tires from China (DS 399: *US – Tyres (China)*).

⁴⁵ WTO Council for Trade-Related Aspects of Intellectual Property Rights, "Transitional Review Mechanism Pursuant to Paragraph 18 of the Protocol of the Accession of the People's Republic of China: Communication from the United States," October 16, 2009, (WTO Document IP/C/W/538).

⁴⁶ Disputes concerning the same subject matter and claims, and joined for purposes of dispute settlement proceedings, are counted as one for purposes of this review. Information on China's participation in the WTO DSB is available here: http://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm#results

⁴⁷ See http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

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China's participation as a third party in 78 cases probably indicates, in addition to the great breadth of its trading interests, a conscious decision to learn about the system in depth by close observation.

V. DEVELOPMENTS AND TRENDS RELATED TO CHINA'S FIRST DECADE OF WTO MEMBERSHIP

US Perspective on China's WTO Compliance

Pursuant to the US-China Relations Act of 2000, the US Trade Representative (USTR) is required to deliver annually a "Report to Congress on China's WTO Compliance" ("Report"). USTR is currently gathering comments from its stakeholders, including US businesses, trade associations and labor unions, in order to compile its 2011 Report. An overview of USTR's 2002 to 2010 Reports illustrates some of the overarching trends of China's WTO compliance efforts, as perceived by the United States.⁴⁸

In each year's report, the United States highlights its priority concerns regarding China's WTO compliance. Although these issues change from year to year, four issues have remained on the list every year, including China's: (i) lack of transparency; (ii) ineffective enforcement of IPR; (iii) unsubstantiated restriction of agricultural imports; and (iv) use of overzealous regulatory requirements and foreign access barriers in the services sectors.

During the first four years of China's WTO membership, USTR noted with approval China's successful implementation of a series of WTO commitments, including reducing tariffs, removing non-tariff barriers, and making legal improvements in intellectual property protection and in transparency. Starting in 2006, however, USTR began to note that China's progress towards market liberalization and structural reform was slowing down. According to USTR, this change came about largely as a result of a growing tendency toward increased state intervention in the Chinese economy. In more recent years, this state intervention policy has taken the form of "indigenous innovation" practices and an increased role for SOEs.

China's Role in the Doha Development Agenda

The dynamic of the WTO Doha Development Agenda (DDA) underwent a fundamental transformation with the accession of China to the WTO. The DDA was officially launched in November 2001 and has yet to be concluded. Previous rounds of negotiations (e.g. the Kennedy Round, the Tokyo Round, the Uruguay Round, etc.) were largely dominated by similar trade agendas of developed countries such as the European Communities, the United States, Japan, and Canada. The Doha Round, however, has been dominated by the conflicting ambitions of the industrialized powers on the one hand and the major emerging economies on the other, and has in effect become the first North-South round. The clearest expression of the divergence between them is in the negotiations on industrial tariffs, where the United States and others have been pressing for significant reductions by the emerging economies, whose tariffs are in general much higher than those of

⁴⁸ USTR's Reports are available at: http://www.ustr.gov/archive/Document_Library/Reports_Publications/Section_Index.html

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developing countries. This has been refused on the grounds that it would be inconsistent with development needs and the vocation of the Round.

Although WTO Director General (DG) Pascal Lamy originally expressed optimism regarding the opportunity to complete the DDA by the 8th Ministerial Conference in December 2011, WTO negotiators have now agreed that this will not be possible. Nor will it be possible to achieve an early harvest of results in the less controversial areas. Whether the Round can be kept alive or perhaps revived in future on the basis of a revised agenda will depend to a very significant extent on the relationship between China and the United States, which is now clearly the key factor in WTO negotiations.

China's Trends in International Trade

Since China acceded to the WTO, its patterns of international trade have also changed in several ways. Most notably, China has signed 10 free trade agreements (FTAs) with more than 31 countries and areas.⁴⁹ More than half of these FTAs have been negotiated with other Asian countries. In China's 12th Five-Year Plan, the Chinese government states that regional cooperation is a top priority on China's international trade agenda during the 2011-2015 period.⁵⁰

China's WTO entry has also facilitated greater trade between developing countries. The WTO states that total trade by developing countries expanded by 17 percent, compared with total trade by developed countries, which only expanded by 13 percent.⁵¹ According to WTO DG Pascal Lamy, China has been largely responsible for this shift in trade flows.⁵²

VI. CHALLENGES GOING FORWARD

Non-Market Economy Status

As a precondition for its entry into the WTO, China agreed in 1999 that WTO members, in applying antidumping duty laws to Chinese imports, could continue to treat China as a non-market economy (NME) country and would not have to grant China market economy status (MES) for 15 years after the date of China's accession to the WTO, or until 2016. This has made it difficult for China to defend itself against international dumping allegations, as foreign countries are entitled to use price or production data from third countries ("surrogate country") to determine dumping margins for Chinese imports, which is often perceived as arbitrary or inappropriate, and the resulting dumping duties tend to be exceedingly high. WTO statistics show that in recent years, China has

⁴⁹ Information on China's FTAs is available at: <http://fta.mofcom.gov.cn/english/index.shtml>

⁵⁰ Wang Yong, "China's WTO Anniversary: WTO Accession, Globalization, and a Changing China," *China Business Review*, October-December 2011.

⁵¹ Lamy, Pascal, "Interview: China's WTO Anniversary: China's Role in the WTO," *China Business Review*, October-December, 2011.

⁵² *Ibid.*

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become one of the most frequent subjects of new dumping investigations. Nonetheless, China's record of continuous economic reform since the 1970s and increased trade with other WTO members has given China some leverage in addressing its desire to change its MES. Indeed, the Chinese government has used a number of bilateral and multilateral fora to broach the issue and negotiate for change.

Government Procurement Agreement

In its Accession Protocol, China committed to initiate negotiations for accession to the WTO Government Procurement Agreement (GPA) "as soon as possible." China made its initial offer for accession to the WTO GPA in December 2007. After several rounds of negotiations with other WTO member countries, China submitted its second bid to join the GPA in July 2010. Since then, WTO members, particularly the United States, have put pressure on China to submit a third and final bid that covers sub-central government entities. Sources note that Chinese officials have committed to submit a third bid by the 8th Ministerial Conference in December 2011.

WTO-Plus Issues

Many developed countries are currently struggling to find a way to address trade issues with China within the WTO framework. Issues that have arisen since China acceded to the WTO, such as ineffective IPR enforcement and government support of SOEs, do not always represent clear violations of the WTO Agreements. Developed countries have nonetheless attempted to dispute these trade issues in front of the DSB. They have also made efforts to raise the standards of certain WTO Agreements. For example, the United States has expressed a desire to elevate the minimum standards of the WTO TRIPS Agreement in order to more effectively ensure the enforcement of IPR.

Outlook

Experts predict that, in the coming weeks, a number of WTO member countries will make significant use of China's tenth TRM, as it represents the last time countries will be able to use this forum to address concerns regarding China's WTO compliance efforts. Although the final TRM has not yet been completed, sources report that the United States has used this year's TRM to again raise concerns regarding China's failure to notify the WTO regarding its use of domestic subsidies. Even though the end of the TRM represents a symbolic transition in China's on-going WTO membership process, WTO observers note that: (i) China established itself as an important member of the WTO soon after it joined the Organization; and (ii) other WTO members are likely to continue to raise concerns regarding China's WTO commitments after the TRM has ended. For example, WTO members are widely expected to increase their calls for China to join the WTO GPA in the run-up to the December 2011 WTO Ministerial Meeting.

In its 12th Five-Year Plan, the Chinese government outlines its plan to lead China's economy away from an export-led growth model and toward a more domestic demand-driven economy. The increased buying power of a growing Chinese middle class indicates that such a transition will be increasingly grassroots and natural, rather than policy driven. This effort to move China's economy away from heavy reliance on exports underscores China's interest in an open global trading system, and thus its interest in maintaining a high level of participation within and influence over the WTO. Nonetheless, experts note that the country's successful transition will largely

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depend on its willingness to further liberalize its markets, implement structural reforms, and carry out its remaining WTO commitments.

US Hosts 2011 APEC Summit

Summary

The United States hosted the 2011 Asia Pacific Economic Cooperation (APEC) Summit from November 8-13, 2011 in Honolulu, Hawaii. During the Summit, APEC countries made commitments in regard to a number of issues, including regional trade and economic integration, green growth and regulatory coherence. On the sidelines of the APEC Summit, members of the Trans-Pacific Partnership met to discuss progress made to-date on the Agreement, the expansion of the Agreement's membership, and next steps for the negotiation and finalization of the Agreement. In addition to attending the APEC Leaders Meeting and the TPP Leaders' Meeting, President Obama also held bilateral meetings with the leaders of several APEC countries, including China, Japan and Russia.

Analysis

I. 2011 APEC MINISTERIAL STATEMENT AND LEADERS DECLARATION

As the host of the 2011 APEC Summit, US Trade Representative (USTR) Ron Kirk noted that the United States, during its *pro tempore* presidency of APEC, has sought to make progress on the following: (i) regional economic integration and expanding trade; (ii) green growth; and (iii) regulatory coherence and cooperation. APEC countries addressed these issues through a number of events, including the APEC Ministerial Meeting, which was held on November 11, 2011, and the APEC Leaders' Meeting, which was held on November 13, 2011. Two key sets of documents were released at the conclusion of these meetings that outline commitments made by APEC countries in regard to these three issue areas. These documents include the 2011 APEC Leaders Declaration⁵³ ("Leaders' Declaration") and corresponding Annexes and the 2011 APEC Ministerial Statement⁵⁴ ("Ministerial Statement") and corresponding Annexes. Below we highlight key commitments made at the 2011 APEC Summit cited in these documents.

Strengthening Regional Economic Integration and Expanding Trade

- **De Minimus Values.** Annex A of the Ministerial Statement⁵⁵ states that "higher *de minimus* values provide considerable economic benefits to customs administrations, the private sector, and consumers through costs

⁵³ The Leaders' Declaration is available here: http://www.apec.org/Meeting-Papers/Leaders-Declarations/2011/2011_aelm.aspx

⁵⁴ The Ministerial Statement is available here: http://www.apec.org/Meeting-Papers/Ministerial-Statements/Annual/2011/2011_amm.aspx

⁵⁵ Annex A of the Ministerial Statement is available here: http://www.apec.org/Meeting-Papers/Ministerial-Statements/Annual/2011/2011_amm/annex-a.aspx

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savings and reductions in trade transaction costs.” According to Annex A, participating APEC economies⁵⁶ agree to: (i) exempt express and postal shipments from customs duties or taxes and from certain entry documentation requirements for shipments valued at or less than USD 100; and (ii) work toward broader application of *de minimus* treatment in the region;

- **Small- and Medium-Sized Enterprises (SMEs).** In Annex B of the Ministerial Statement,⁵⁷ APEC ministers commit to undertake certain actions to address barriers facing SMEs trading in the region, including, *inter alia*: (i) develop best practices for export credit agencies to improve SMEs’ access to financing; (ii) ease access to basic information on how to register SMEs’ intellectual property (IP); and (iii) enhance access to information on the benefits of free trade agreements (FTAs) through summaries of relevant chapters on the APEC website on tariffs and rules of origin in relevant languages; and
- **Innovation Policy.** In Annex A of the Leaders’ Declaration,⁵⁸ APEC leaders commit to the promotion of effective, non-discriminatory and market-driven innovation policy through the following measures, among others: (i) ensure that technical regulations and requirements serve legitimate public policy objectives related to health, safety, security, etc.; (ii) refrain from adopting measures that make the location or development of IP a condition for eligibility for government procurement preferences; and (iii) ensure that decisions regarding the terms and conditions of transfer of technology are left to the relevant enterprises.

Promoting Green Growth

- **Trade and Investment in Environmental Goods.** Annex C of the Leaders’ Declaration⁵⁹ commits APEC leaders to taking the following actions, among others: (i) in 2012, develop a list of environmental goods on which APEC countries agree to reduce applied tariff rates to 5 percent or less by 2015, “taking into account economies’ economic circumstances”; and (ii) by the end of 2012, eliminate existing local content requirements that distort environmental goods and services in the region;
- **Demonstration Motor Vehicles.** In Annex C of the Ministerial Statement,⁶⁰ APEC ministers state that “an important part of the process of introducing and expanding access to [green automotive technologies designed to lower or eliminate emissions and increase fuel economy] is through the ability of manufacturers

⁵⁶ Participating economies include: Brunei, Hong Kong, Japan, Korea, Malaysia, New Zealand, Russia, Singapore, Taiwan, and the United States.

⁵⁷ Annex B of the Ministerial Statement is available here: http://www.apec.org/Meeting-Papers/Ministerial-Statements/Annual/2011/2011_amm/annex-b.aspx

⁵⁸ Annex A of the Leaders’ Declaration is available here: http://www.apec.org/Meeting-Papers/Leaders-Declarations/2011/2011_aelm/2011_aelm_annexA.aspx

⁵⁹ Annex C of the Leaders’ Declaration is available here: http://www.apec.org/Meeting-Papers/Leaders-Declarations/2011/2011_aelm/2011_aelm_annexC.aspx

⁶⁰ Annex C of the Ministerial Statement is available here: http://www.apec.org/Meeting-Papers/Ministerial-Statements/Annual/2011/2011_amm/annex-c.aspx

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to test demonstration prototypes or early version of these vehicles in individual economies.” In order to improve import procedures for these demonstration vehicles, ministers agreed to develop coordinated policies that, *inter alia*: (i) give access to a small number of imported demonstration vehicles for six months; and (ii) streamline import procedures for these demonstration vehicles by providing duty-free and tax-exempt treatment; and

- **Remanufactured Goods.** Annex D of the Ministerial Statement,⁶¹ Ministers state that the practice of imposing trade restrictive non-tariff measures on exports of remanufactured goods can “limit the opportunities for remanufacturing industries to grow in developing and developed economies and cause the APEC region to miss out on the significant environmental benefits from more robust trade in remanufactured goods.” Accordingly, participating economies⁶² agree to the following actions, among others: (i) apply import-related measures specifically concerning used goods only to used goods and refrain from applying them to remanufactured goods; and (ii) treat remanufactured goods like corresponding new goods when applying tariffs or other border changes.

Regulatory Coherence and Cooperation

- **Coherence for Key Goods.** In the Ministerial Statement, ministers agree to promote regulatory coherence for the following: (i) medical products procedures; (ii) chemicals; (iii) services; and (iv) wine; and
- **Good Regulatory Practices.** In Annex D of the Leaders’ Declaration,⁶³ leaders agree to further implement, before November 2013, good regulatory practices through the following actions, among others: (i) develop, use or strengthen processes, mechanisms, or bodies to enable a whole of government approach in the development of regulations; (ii) develop, use or strengthen mechanisms for assessing the impact of regulations; and (iii) conduct public consultation regarding regulatory practices.

In addition to the Ministerial Statement, Leaders’ Declaration, and their associated Annexes, the APEC Summit produced several other key documents, including the APEC High Level Policy Dialogue on Open Governance and Economic Growth,⁶⁴ the APEC High Level Policy Dialogue on Disaster Resiliency⁶⁵ and the APEC Ministers’

⁶¹ Annex D of the Ministerial Statement is available here: http://www.apec.org/Meeting-Papers/Ministerial-Statements/Annual/2011/2011_amm/annex-d.aspx

⁶² Participating economies include: Australia, Canada, Chile, Japan, Korea, Mexico, New Zealand, Papua New Guinea, Singapore, Taiwan, and the United States.

⁶³ Annex D of the Leaders’ Declaration is available here: http://www.apec.org/Meeting-Papers/Leaders-Declarations/2011/2011_aelm/2011_aelm_annexD.aspx

⁶⁴ The APEC High Level Policy Dialogue on Open Governance and Economic Growth is available here: http://www.apec.org/Meeting-Papers/Ministerial-Statements/Annual/2011/2011_amm/2011_governance.aspx

⁶⁵ The APEC High Level Policy Dialogue on Disaster Resiliency is available here: http://www.apec.org/Meeting-Papers/Ministerial-Statements/Annual/2011/2011_amm/2011_disaster.aspx

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Statement on the WTO, the Doha Development Agenda [DDA] Negotiations, and Resisting Protectionism (“Ministers’ Statement on the WTO”).⁶⁶

In the Ministers’ Statement on the WTO, ministers state that, even though a conclusion of all elements of the DDA is unlikely in the near future, “none of [the APEC countries] intends to abandon efforts that would allow for better progress toward the ultimate conclusion of the DDA.” Accordingly, Ministers further stated that WTO negotiations must use fresh approaches in order to make progress on the DDA. More specifically, the Ministers suggested that WTO negotiators consider the possibility of “advancing pragmatically in specific areas under the Doha work program where progress can be achieved.” Experts note that this statement suggests that APEC countries are no longer committed to the completion of the DDA as a single undertaking.

II. TPP BROAD OUTLINES

At the margins of the APEC Summit on November 12, 2011, the leaders of the countries party to the Trans-Pacific Partnership⁶⁷ (TPP) announced the broad outlines⁶⁸ of the TPP Agreement (“Outline”) that will enhance trade and investment among TPP members.

Key Features

According to the Outline, the following are the five defining features of the TPP Agreement:

- **Comprehensive Market Access:** seeks to eliminate tariff and non-tariff barriers to goods and services;
- **Fully Regional Agreement:** facilitates the development of supply and production chains that encompass all TPP members;
- **Cross-cutting Trade Issues:** addresses: (i) regulatory coherence, (ii) competitiveness and business facilitation; (iii) concerns SMEs have raised about the difficulty of understanding and using FTAs; and (iv) the varying levels of development among the TPP members;
- **New Trade Challenges:** includes those related to competition, the digital economy and green technologies.
- **Living Agreement:** allows for updating of the Agreement as well as expansion of its members.

⁶⁶ The APEC Ministers’ Statement on the WTO, the Doha Development Agenda Negotiations, and Resisting Protectionism is available here: http://www.apec.org/Meeting-Papers/Ministerial-Statements/Annual/2011/2011_amm/dda-statement.aspx

⁶⁷ The current members of the TPP include the United States, Peru, Chile, New Zealand, Australia, Brunei, Malaysia, Vietnam, and Singapore

⁶⁸ The Outlines of the Trans-Pacific Partnership Agreement is available here: <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement>

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Scope

According to the Outline, the Agreement will cover all key trade and trade-related areas as well as new and emerging trade and cross-cutting issues. The new cross-cutting commitments are intended to reduce costs, enhance regional trade flows, increase the participation of SMEs, and promote economic growth and higher living standards. Although TPP members agree to adopt high standards, the Outline states that they have also agreed on the need to “appropriately address sensitivities and the unique challenges faced by developing country members, including through trade capacity building, technical assistance, and staging of commitments as appropriate.”

Legal Texts

The Outline provides an overview of each of the 20 legal texts contained in the Agreement. Below we provide highlights from each text’s overview:

- **Competition.** The TPP will include commitments on “the establishment and maintenance of competition laws and authorities, procedural fairness in competition law enforcement, transparency, consumer protection, private rights of action and technical cooperation;”
- **Cooperation and Capacity Building.** TPP members are currently considering the adoption of text that will establish a mechanism to facilitate capacity building assistance after TPP has been implemented;
- **Cross-Border Services.** TPP members have agreed on most of the “core elements” of the cross-border services chapter. The text strikes a balance between providing fair, open and transparent markets while also preserving the right of governments to regulate in the public interest;
- **Customs.** TPP negotiators have reached agreement on most aspects of this chapter. The text aims to establish customs procedures that are predictable and transparent, as well as capable of facilitating expedited trade and regional supply chain integration;
- **E-Commerce.** TPP negotiators are discussing the following issues within the e-commerce chapter: (i) customs duties in the digital environment; (ii) authentication of electronic transactions; (iii) consumer protection; (iv) information flows; and (v) treatment of digital products;
- **Environment.** TPP negotiators are currently considering how to address the following issues within the environment chapter: (i) marine fisheries and other conservation issues; (ii) biodiversity; (iii) invasive alien species; (iv) climate change; and (v) environmental goods and services;
- **Financial Services.** The TPP’s financial services text will promote transparency, non-discrimination and fair treatment, while also protecting “the right of financial regulators to take action to ensure the integrity and stability of financial markets, including in the event of a financial crisis.” The text will also include dispute settlement provisions;

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- **Government Procurement.** TPP members are seeking comparable coverage of procurement by all TPP countries, while recognizing the need to facilitate the opening of the procurement markets of developing countries through the use of a transitional mechanism;
- **Intellectual Property.** This chapter will cover many forms of IP, including, but not limited to: (i) trademarks; (ii) geographical indicators; (iii) copyright and related rights; (iv) patents; (v) trade secrets; and (vi) data required for the approval of certain regulated products;
- **Investment.** The text will include language on: (i) minimum standard of treatment; (ii) rules of expropriation; (iii) prohibitions on specified performance requirements; and (iv) an investor-State dispute settlement mechanism;
- **Labor.** TPP members are currently discussing how to include mechanisms, within the labor chapter, that ensure “cooperation, coordination and dialogue” on labor issues. In addition, the chapter will seek to improve workers’ well-being and employability as well as promote human capital development and high-performance workplaces;
- **Legal Issues.** TPP member have made progress on provisions concerning the following issues: (i) dispute settlement; (ii) exceptions from agreement obligations; and (iii) disciplines addressing transparency in the development of laws and regulations;
- **Market Access for Goods.** This chapter will include tariff elimination as well as the elimination of non-tariff measures. In addition, TPP members are considering proposals related to the following: (i) import and export licensing; (ii) remanufactured goods; (iii) agricultural export competition; and (iv) and food security;
- **Rules of Origin.** TPP members have agreed to seek a common set of rules of origin. In addition, they are currently considering approaches to cumulation for verification of preference claims;
- **Sanitary and Phytosanitary Standards (SPS).** TPP members have agreed to “reinforce and build upon” the WTO SPS Agreement. The TPP’s SPS chapter will contain new commitments on the following: (i) science; (ii) transparency; (iii) regionalization; (iv) cooperation; and (v) equivalence. TPP negotiators are also considering bilateral and multilateral proposals on import checks and verifications;
- **Technical Barriers to Trade (TBT).** This text will “reinforce and build upon” the WTO TBT Agreement. It will include commitments on the following: (i) compliance periods; (ii) conformity assessment procedures; (iii) international standards; (iv) institutional mechanisms; (v) and transparency. TPP negotiators are also considering proposals regarding the following: (i) regulatory cooperation; (ii) trade facilitation; (iii) disciplines on conformity assessment procedures; and (iv) transparency;
- **Telecommunications.** TPP negotiators have agreed on the need for reasonable network access for suppliers through interconnection and access to physical facilities. They are also “close to consensus” on language regarding the transparency of the regulatory process and the rights of appeal of decision. Proposals have also been submitted regarding the high cost of international mobile roaming and choice of technology;

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- **Temporary Entry.** This chapter will include provisions designed to promote transparency and efficiency in the process of applications for temporary entry into TPP countries;
- **Textiles and Apparel.** This chapter will address the following: (i) market access for textiles and apparel goods; (ii) customs cooperation and enforcement procedures; (iii) rules of origin; and (iv) a special safeguard; and
- **Trade Remedies.** TPP members have affirmed their WTO rights and obligations regarding trade remedies. They are currently considering proposals that address the issue of transparency, procedural due process, and a transitional regional safeguard mechanism.

Tariff Schedule and Other Market-Opening Packages

The final tariff schedule will cover all goods. With regard to services, TPP members are negotiating on a “negative list” basis, which presumes comprehensive coverage but allows countries to negotiate specific exceptions to commitments. Government procurement packages that broaden coverage and also recognize TPP countries’ individual sensitivities will also be included.

III. TPP EXPANSION AND NEXT STEPS

TPP leaders also discussed the expansion of the Agreement’s membership and the next steps of the Agreement’s negotiating process during their November 12 meeting. Three new members announced their interest in seeking to join TPP negotiations during the APEC Summit: (i) Japan; (ii) Mexico; and (iii) Canada. According to Deputy National Security Advisor Mike Froman, it is unlikely that TPP countries will allow new members to renegotiate already agreed-upon TPP texts. Although he acknowledged that Korea and Taiwan have also expressed interest in joining the negotiations, Mr. Froman noted that TPP leaders did not discuss the possible accession of either country during the November 12 meeting.

In the “Trans-Pacific Partnership Leaders Statement,”⁶⁹ TPP leaders instructed their negotiating teams to meet in early December 2011 to continue their work and to schedule additional negotiating rounds for 2012. Although not mentioned in the Leaders’ Statement, Mr. Froman stated that during their November 12 meeting, TPP leaders made a plan to finalize the Agreement in the next year. According to President Obama, “[i]t is an ambitious goal, but [the TPP leaders] are optimistic that we can get it done.” While Mr. Froman suggested that TPP negotiators may be able to finalize a legal text for TPP trade ministers to review at the mid-2012 APEC Trade Ministers’ Meeting, which will be held in Russia, he was careful to add that TPP leaders have not set a firm deadline for the completion of the Agreement.

⁶⁹ The Trans-Pacific Partnership Leaders Statement is available here: <http://www.ustr.gov/about-us/press-office/press-releases/2011/november/trans-pacific-partnership-leaders-statement>

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IV. US BILATERAL MEETINGS

During the APEC Summit, President Obama held bilateral meetings with the leaders of several APEC countries, including, but not limited to, China, Japan and Russia. Below we provide highlights on these bilateral meetings:

US-China Bilateral Meeting

On November 12, 2011, Presidents Obama and Hu met to discuss a number of bilateral, as well as regional and international issues of mutual concern. Experts note that President Obama broached several issues of concern, including the Chinese government's IPR, government procurement and currency policies. Experts also note that President Hu called on President Obama to accelerate the US export control reform initiative, which will increase trade opportunities for countries such as China, especially in the high-tech sector, and further liberalize US markets to Chinese investors. On the regional and global front, both leaders affirmed their commitments to fulfill APEC's long-term goal of establishing the Free Trade Area of the Pacific (FTAP), and resolving global economic challenges through joint efforts. In addition, the leaders discussed security concerns involving Iran and North Korea, as well as the issues surrounding climate change. When President Obama expressed hope that China will take on more responsibility and play a greater role in international affairs, President Hu sent the message that the global decision making process should better reflect the growing role of emerging economies.

Outside the US-China bilateral meeting, President Obama provided comments on key issues related to the bilateral trade relationship. Regarding the issue of China's currency policies, President Obama noted that "[t]here are very few economists who do not believe that the [renminbi (RMB)] is not undervalued." After he acknowledged a slight improvement in China's exchange rate over the past year, he remarked that the recent Senate vote on the "Currency Exchange Rate Reform and Oversight Act of 2011" (S 1619) is evidence that many Americans "are getting frustrated with the pace of change in China's economy." Regarding IPR, President Obama stated that "for [US businesses] not to get the kind of protection that [they] need in a large marketplace like China is not acceptable." He also mentioned the need to address China's government procurement policies, especially as they relate to Chinese state-owned enterprises.

US-Japan Bilateral Meeting

During their November 12, 2011 bilateral meeting, President Obama and Japanese PM Noda discussed a range of issues related to APEC and the upcoming East Asia Summit, as well as PM Noda's expressed interest in having Japan join the TPP negotiations. President Obama welcomed PM Noda's statement that he would "put all goods, as well as services, on the negotiating table for trade liberalization." In addition, President Obama noted that he has instructed USTR Kirk to "begin the domestic process of considering Japan's candidacy, including consultations with Congress and US stakeholders on specific issues of concern in the agricultural, services and manufacturing sectors."

US-Russia Bilateral Meeting

On November 12, 2011 Presidents Obama and Medvedev met to discuss a number of bilateral issues, including security issues related to Afghanistan and Iran, as well as Russia's impending accession to the WTO. President Obama noted that his administration will "consult closely with Congress about ending the application of [the

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Jackson-Vanik Amendment to the US Trade Act of 1974] to Russia, so that US businesses can take advantage of Russia's membership in the WTO." The Jackson-Vanik Amendment prevents the United States from establishing permanent normal trade relations (PNTR) with a country unless that country's "freedom of emigration" requirements laid out in the Amendment.

Outlook

As the host of the 2011 APEC Summit, the Obama Administration attempted to send a clear message that an expanded trading relationship with the countries of the Asia-Pacific region is a top priority for the United States. For the Obama Administration, this shift in focus is crucial due to the lingering financial obstacles faced by some of the United States' more traditional trading partners, particularly those in Europe. Nonetheless, experts note that the APEC countries were unable to achieve many of the concrete commitments the United States originally proposed in early 2011. Moreover, because APEC is a non-binding partnership, member economies are not statutorily bound to the commitments they made at the 2011 APEC Summit. Despite this, the Obama Administration has used APEC as a platform upon which to pursue the TPP, which, if finalized, would represent a binding trade agreement between member countries. At the 2011 APEC Summit, President Obama urged TPP member countries to finalize the Agreement in 2012. In order to gain the domestic support necessary to finalize the Agreement in the midst of the 2012 Presidential election, President Obama will need to successfully frame his Administration's focus on an expanded trading relationship in the Asia-Pacific region as an effort to build the US economy and create more jobs.

US General Trade Policy Highlights

Senate Approves Appropriations Bill Funding Trade-Related Agencies; Amendment Offering Increased Funding for USTR Approved

On November 1, 2011, the Senate passed, with a vote of 69-30, the "Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2012" ("Act" or HR 2112). The Act's provisions provide funding for several trade-related agencies for fiscal year 2012.

The Act passed the House on June 6, 2011 as a measure to fund the Department of Agriculture (USDA) and the Food and Drug Administration (FDA), among other agencies. In the Senate Appropriations Committee, Sen. Inouye (D-HI) amended the legislation to also include funding for the Department of Commerce (DOC), the US Trade Representative (USTR), the Department of Justice (DOJ), the Department of Transportation (DOT) and the Department of Housing and Urban Development (HUD). The Act, as amended, provides DOC's International Trade Administration (ITA)⁷⁰ with approximately USD 441 million for Fiscal Year (FY) 2012, which is USD 9

⁷⁰ The ITA promotes US competitiveness through such practices as the promotion of US nonagricultural exports and the enforcement of US anti-dumping (AD) and countervailing (CVD) duties.

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million less than DOC ITA's FY 2011 appropriation. The Act also provides the International Trade Commission (ITC)⁷¹ with approximately USD 80 million for FY 2012, which is USD 1.6 million less than was appropriated to them in FY 2011.

Although the Senate Appropriations Committee originally appropriated approximately USD 47 million in HR 2112 to USTR, on October 20, 2011 the Senate adopted an amendment offered by Sen. Bingaman (D-NM) to increase USTR's funding to approximately USD 51 million. The amount is approximately USD 3 million more than USTR had in FY 2011; it is also commensurate with what the Obama Administration requested in its annual budget. As he offered the amendment, Sen. Bingaman noted, "if American businesses and workers are to benefit from trade agreements, the United States needs to do more to ensure [its] trading partners are competing fairly. This means [the United States has] to enforce [US] trade agreements and US trade laws." With respect to trade enforcement activities, Sen. Bingaman specifically stated that USTR needs to do more to counteract China's unfair trading practices, which include the use of rare earth export restraints and World Trade Organization (WTO) inconsistent subsidies, among others.

Trade enforcement is a central component the Obama Administration's trade policy. Beyond negotiating trade liberalization agreements, another general mandate of USTR, which operates within the Executive Office of the President, is to seek US trading partners' compliance with their obligations under bilateral and multilateral trade agreements. For example, USTR under the Obama Administration participated in the establishment of an arbitral panel to address Guatemala's alleged labor-related violations of the Dominican Republic-Central American Free Trade Agreement (DR-CAFTA). In mid-2011 USTR also successfully urged Peru to pass the laws necessary to bring it into compliance with the environmental provisions under the US-Peru FTA. With respect to US-China trade relations, USTR has initiated 5 WTO disputes against China since President Obama came to office. This increase in USTR's budget, as well as Congress' more recent disapproval of the state of the US-China trade relationship, as manifested by the Senate passing S 1619 to address currency misalignment and the House Ways and Means Committee holding a hearing to discuss US-China trade issues, suggests an increased interest among lawmakers in trade enforcement activities. However, it remains unclear whether this increased interest will, in the medium- to long-term, translate into USTR significantly shifting its resources away from trade agreement negotiation activities toward further enforcement activities.

G-20 Members Conclude Cannes Summit, Promote Key Trade-Related Policies

On November 4, 2011 the Group of Twenty (G-20) Finance Ministers and Central Bank Governors concluded their Summit in Cannes, France, and released the "Cannes Summit Final Declaration" ("Declaration") as well as "The Cannes Action Plan for Growth and Jobs" ("Plan"). In both the Plan and the Declaration, G-20 members commit to implementing fiscal and monetary policies to secure a more stable global economic recovery from the financial crisis of 2008.

⁷¹ The ITC is an independent federal agency with investigative responsibilities related to US trade, including assessment of import injury to US industry.

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At the Summit, G-20 members addressed a number of high-profile issues, including *inter alia*: (i) high unemployment; (ii) sovereign debt risk; (iii) vulnerabilities in emerging markets; and (iv) high commodity prices. The Plan and Declaration put forth a number of financial and social objectives as well as several key trade-related policies. These trade policies articulate support for:

- **Market-determined exchange rates.** In the Plan, G-20 members affirm their commitment to move more rapidly toward market-determined exchange rate regimes. The Plan lauds the changes Russia recently made to its foreign exchange regime and welcomes China's "determination" to increase its exchange rate flexibility;
- **The Doha Development Agenda (DDA).** Although the G-20 members confirm their support for the DDA in the Declaration, they also state that World Trade Organization (WTO) members "will not complete the DDA if [they] continue to conduct negotiations as [they] have in the past." Instead, the Declaration encourages "fresh, credible" approaches to the 2012 DDA negotiations, especially in regard to issues of concern for Least Developed Countries (LDCs); and
- **Vigilance against protectionist policies.** In the Declaration, G-20 members reaffirm their promise, originally made during the 2010 G-20 Summit in Toronto, Canada, to roll back any new protectionist measures, including new export restrictions and WTO-inconsistent measures aimed at stimulating exports. The Declaration also asks the WTO, the Organization for Economic Cooperation and Development (OECD), and the United Nations Conference on Trade and Development (UNCTAD) to report semi-annually on G-20 members' efforts to carry out their commitment not to use protectionist policies.

Experts note that the Plan and Declaration provide important insight into the likely tone and issues to be discussed at the upcoming WTO 8th Ministerial Conference, which will be held December 8-11, 2011 in Geneva, Switzerland. Although efforts in 2011 to complete the DDA negotiations have proven largely fruitless, experts predict that WTO members will use the December Ministerial to further articulate the "fresh, credible" approaches that should be used in future negotiations, be they in the context of DDA or an alternative approach to multilateral trade liberalization. In addition, the Declaration states that G-20 members "look forward to welcoming Russia as a WTO member by the end of the year." Although Russia's Working Party Report, *i.e.* the document that details an acceding country's commitments on opening its markets and applying WTO rules, has not yet been finalized, experts are hopeful that Russia will be welcomed into the WTO at the December Ministerial.

Lawmakers Introduce Legislation to Address Allegedly Unfair Trade Practices of US Trading Partners; China Seen As Obvious Target

On November 2, 2011, Sen. Jeff Merkley (D-OR) introduced S 1779, which is legislation that would require the US Trade Representative (USTR) to notify the World Trade Organization (WTO) if another WTO member fails to disclose to the WTO domestic subsidies it has afforded. On November 4, 2011, Rep. Steve King (R-IA) introduced HR 3375, which is legislation that would impose duties on products from China in an amount equivalent to the estimated loss of revenue to US companies due to China's alleged intellectual property rights (IPR) violations.

We provide below the principle objectives of each bill:

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- S 1779, “A bill to require USTR to notify the WTO if any member of the WTO fails during two consecutive years to disclose subsidies under the Agreement on Subsidies and Countervailing Measures (SCM),” enjoys bipartisan support⁷² although the bill’s co-signers are few. The bill would require USTR to notify the WTO SCM Committee of any WTO member that has failed to disclose, for two consecutive years, domestic subsidies it is required to disclose under Article 25 of the SCM Agreement. Article 25.1 requires that WTO members notify all specific subsidies (at all levels of government and covering all goods sectors, including agriculture) to the SCM Committee on June 30 of each year; and
- HR 3375, “A bill to direct the President to impose duties on merchandise from [China] in an amount equivalent to the estimated annual loss of revenue to holders of United States IPR as a result of violations of such IPR in China” does not currently have any co-sponsors. The bill would require USTR to conduct an annual study to determine this estimated annual loss of revenue resulting from China’s alleged IPR violations. The bill would then require the President, “acting though [USTR],” to impose duties on Chinese imports in the amount equivalent to the revenue loss calculated by USTR in its yearly study. According to the legislation, the proceeds of these duties would go to affected US IP rights holders.

Experts note that these two pieces of legislation come in the wake of increased friction between the United States and China on trade-related matters. With respect to subsidies, experts note that, in October 2011, the United States alleged that China and India failed to disclose to the WTO their respective subsidies afforded over the course of several years. According to USTR, China and India have failed to notify the WTO of nearly 200 and 50 subsidy programs, respectively. As a result, in late October 2011, China submitted to the WTO official notification of its agricultural subsidies from 2005-2008. Upon reviewing this notification, a number of WTO members began to call into question whether China’s agricultural subsidies are WTO-consistent. At the October 25, 2011 House Ways and Means Committee Hearing on the US-China economic relationship testifying US government officials and lawmakers lauded USTR for filing the counter-notification against China. Lawmakers also urged US government officials to cite China for such WTO-inconsistent behavior on a more regular basis.

With respect to IPR, the US International Trade Commission (USITC) conducted a study, at the request of the Senate Finance Committee, which resulted in the May 2011 report “China: Effects of Intellectual Property Infringement and Indigenous Innovation Policies on the US Economy.” The report estimates that US companies’ reported losses from IPR infringement in China amounted to approximately USD 28 billion in 2009. At the October 25 hearing, both lawmakers and testifying US government officials identified China’s IPR violations as a priority issue. During the hearing Rep. Charles Rangel (D-NY) asked Deputy USTR Demetrios Marantis why the US government does not put a tariff on goods imported from China that were produced with IP allegedly stolen from US companies. In response, Ambassador Marantis defended the duties the Obama Administration has already imposed on various imports from China.

⁷² Co-sponsors include Sen. John Barrasso (R-WY), Sen. Michael Enzi (R-WY), Sen. Carl Levin (D-MI), Sen. Charles Schumer (D-NY) and Sen. Olympia Snowe (R-ME).

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According to experts, S 1779 and HR 3375 articulate the sentiment if not the specific policy recommendations lawmakers from both parties have recently voiced in regard to how the Obama Administration should manage the US-China trade relationship. Despite this, experts note that S 1779 and HR 3375 do not enjoy probable chances of passage. HR 3375 has a particularly low chance at passage, as it requires USTR to impose duties⁷³ on China in a manner that experts caution may contravene WTO rules. In addition, experts note that USTR most likely does not have the resources necessary to carry out the yearly study HR 3375 would require. S 1779, which is less confrontational than HR 3375, and, therefore, more in line with the Obama Administration's policy of using engagement and negotiation to manage the US-China relationship, enjoys slightly greater chances of passage. Nonetheless, experts opine that HR 3375 may encroach upon USTR's strategic use of its right to notify the WTO SCM Committee which countries have not disclosed their subsidies. Regardless of whether these bills pass, their introduction reaffirms the message that many lawmakers want the Obama Administration to more aggressively counteract China's allegedly unfair trade practices.

We attach S 1779 and HR 3375 for your reference. Please let us know if you have any further questions.

Commerce Department Initiates AD/CVD Investigation into Solar Cells from China

On November 8, 2011, the Department of Commerce (DOC) initiated antidumping (AD) and countervailing duty (CVD) investigations into imports of solar cells originating in China. Merchandise covered by these proceedings is currently classified in the Harmonized Tariff System of the United States (HTSUS) under subheadings 8501.61.00.00, 8507.20.80, 8541.40.60.20 and 8541.40.60.30.

SolarWorld Industries America, Inc. ("Petitioner"), supported by the Coalition for American Solar Manufacturing, filed AD and CVD petitions on October 19, 2011 against imports of crystalline silicon photovoltaic cells ("CSPV cells") from China. The AD duty petition alleges that imports of CSPV cells from China are being sold or are likely to be sold in the United States at less than fair value (at an alleged dumping rate between 49.88 and 249.96 percent), and that these imports are causing, or threatening to cause, material injury to the corresponding US industry. The petition also alleges that CSPV cells from China benefit from countervailable subsidies (with an estimated subsidy rate exceeding the *de minimus* threshold).

In addition, the petition contains an allegation of critical circumstances, *i.e.*, that there were massive imports over a relatively short period of time, and there is a history of dumping causing material injury, or the importer knew or should have known the exporter was dumping. The petition provides the following quantification of imports of subject merchandise:

- **By volume.** The petition reports the volume of subject imports from China was 17.4 million units in 2010 and 44.6 million units in the first eight months (*i.e.*, January through August) of 2011.⁷⁴ The total volume of

⁷³ Legal experts note that the imposition of import duties is not the mandate of USTR.

⁷⁴ These statistics are based on official US import statistics for HTS 8541.40.6030 and 8541.40.6020.

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imports of CSPV cells from all sources was 86.0 million units in 2010 and 97.7 million units in the first eight months of 2011. Therefore, imports from China of CSPV cells represented 20.2 percent of total imports, by volume, in 2010 and 45.6 percent of total imports in the January through August 2011 period; and

- **By Value.** The petition reports the value of subject imports from China was USD 1.21 billion in 2010 and USD 1.69 billion in the first eight months of 2011. The value of CSPV cells imports from all sources was USD 2.69 billion in 2010 and USD 3.02 billion in the first eight months of 2011. Therefore, imports from China represented 45.0 percent of total imports, by value, in 2010 and 56.0 percent of total imports in the January through August 2011 period.

The petitioner has requested that DOC issue its preliminary critical circumstances determination on an expedited basis, *i.e.*, within 45 days after the filing of the petition. DOC normally makes its preliminary critical circumstances determination with its preliminary injury determination after issuing questionnaires and reviewing data by respondents. Final affirmative critical circumstances determinations by both DOC and the International Trade Commission (ITC) result in the retroactive application of duties on merchandise entered up to 90 days before the imposition of provisional measures.

The submission of the petition and the subsequent initiation of investigation have accentuated a growing disagreement between major actors within the US solar industry. Representatives of US suppliers to Chinese solar cell firms as well as buyers of Chinese solar cells, many of which now comprise the newly constituted Coalition for Affordable Solar Energy, have expressed concern that imposing trade remedy measures on imports of Chinese-origin solar cells could spark a trade war with China, and would likely preclude “making solar [energy] affordable for all Americans.”⁷⁵ In contrast, SolarWorld and the reported 125 firms comprising the Coalition for American Solar Manufacturing as associate members assert that China’s alleged dumping and subsidies threaten the viability of the US solar industry, a position which has since received support from the United Steelworkers (USW) and several high-profile lawmakers, including Chairman of the Senate Finance Subcommittee on International Trade, Customs and Global Competitiveness Ron Wyden (D-OR). Experts note that, at a time when US-China trade relations are already tense due to US action on such issues as China’s alleged currency undervaluation and IPR violations, the imposition of US trade remedy measures on Chinese-origin solar cells could potentially derail constructive US-China dialogue and cooperation as is carried out through the Joint Commission on Commerce and Trade (JCCT) and the Strategic & Economic Dialogue (S&ED). Experts further note that China could retaliate by initiating similar proceedings against US goods.

ITC is scheduled to make its preliminary injury determination on or about December 5, 2011. If the ITC delivers a positive injury determination, DOC will make its AD preliminary determination, at the earliest, in January 2012 and its CVD preliminary determination in March 2012.

⁷⁵ Citation taken from <http://www.coalition4affordablesolar.org>.

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USTR Kirk Lauds Working Party Nod on Russian WTO Accession; Hurdles Remain in United States

In a November 10, 2011 press release, United States Trade Representative (USTR) Ron Kirk lauded the decision made by the Russian Federation Accession Working Party (“Working Party”) to approve the terms and conditions for Russia’s accession to the World Trade Organization (WTO). The Working Party’s affirmative decision is the final procedural step, after 18 years of negotiations, before WTO Ministers formally invite Russia to become a WTO member.

The affirmative decision on Russian accession follows the adoption of a Swiss-brokered agreement by Georgia and Russia, which resolved a border dispute stemming from the 2008 war between the two countries, and thus removed the threat of Georgia blocking Russian accession. According to a WTO press release, Russia has begun undertaking several commitments under its accession agreement to foster greater openness in order to offer “a transparent and predictable environment for trade and foreign investment.” The WTO press statement further notes that, upon formally acceding, Russia will seek to comply, either immediately or within pre-designated time frames, with all WTO provisions, including, *inter alia*, those relating to the following disciplines:

- **Goods market access.** Russia has concluded 57 bilateral agreements on goods market access, agreed to an average bound tariff rate of 7.8 percent (zero percent for information technology goods), and compromised on certain tariff-rate quotas (TRQ);
- **Services market access.** Russia has concluded 30 bilateral agreements on services market access, covering such areas as telecommunications, insurance, banking, transportation, and distribution;
- **Export duties.** Russia has agreed to a bound rate for over 700 tariff lines, including fish and crustaceans, mineral fuels and oils, raw hides and skins, wood, pulp and base metals;
- **Government procurement.** Russia announced its intention to seek accession to the Government Procurement Agreement (GPA) within four years of its WTO accession, at which time Russian government agencies will “award contracts in a transparent manner;”
- **Industrial subsidies.** Russia has agreed to eliminate its industrial subsidies and, in cases in which subsidies are not eliminated, make it such that no subsidy is contingent upon exportation or upon the use of domestic over imported goods. Russia further agreed to notify the WTO of its subsidies as required under the Agreement on Subsidies and Countervailing Measures (SCM);
- **Agricultural subsidies.** Russia has agreed to limit trade distorting agricultural support to USD 9 billion in 2012 and gradually reduce this amount to USD 4.4 billion by 2018. Russia further agreed to bind all agricultural export subsidies at zero percent;
- **Sanitary and phytosanitary measures.** Russia has agreed that all Sanitary and phytosanitary (SPS) measures developed and applied in the Russian Federation will comply with SPS Agreement;

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- **Technical barriers to trade.** Russia has agreed to ensure that all legislation relating to technical regulations standards and conformity assessment procedures comply with the Technical Barriers to Trade (TBT) Agreement;
- **Investment.** Russia has agreed to ensure that all laws, regulations and other measures relating to the Trade-Related Investment Measures (TRIMs) Agreement are WTO-consistent. Russia has further agreed to eliminate, by July 1, 2018, all WTO-inconsistent measures, including preferential tariffs or tariff exemptions, e.g., automobile investment programs; and
- **IPR.** Russia has agreed to apply the provisions of the Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement, including provisions for enforcement, without resorting to any phase-in period.

As for next steps, the WTO press release notes that the Russian accession package will be considered at the December 2011 WTO VIII Ministerial Conference, where WTO Ministers are expected to adopt it. Thereafter, the Russian Federation must ratify its accession package by June 15, 2012, thirty days after which Russia will become a full WTO member.

Despite the warm tentative welcome extended to Russia by USTR Kirk, experts note that several key hurdles remain in the United States for US firms to reap the benefits of Russia's WTO membership. Russia addressed several trade partners' concerns in its accession package, as approved by the Working Party and detailed above, however, certain US lawmakers and industry groups with appreciable influence in Congress are likely to question these assurances Russia has provided. In the context of this potential skepticism in Congress, we highlight below two considerable congressional hurdles that must be overcome in this regard:

- **Permanent Normal Trade Relations.** If US lawmakers fail to pass legislation establishing Russia Permanent Normal Trade Relations (PNTR) before their accession occurs, Russia may deny most favored nation (MFN) market access to US firms that they would otherwise enjoy as a result of Russia being part of the WTO. However, granting Russia PNTR will require either repealing or continuing to annually waive Russia from the Jackson-Vanik Amendment (under Title IV of the Trade Act of 1974), which prevents the United States from establishing PNTR unless the relevant country fulfills "freedom of emigration" conditions under the Amendment. Although the US President has annually waived Russia from the Jackson-Vanik Amendment since 1994, thus allowing for non-permanent normal trade relations (NTR), Russia has not officially "graduated" from Jackson-Vanik coverage; and
- **Section 1106.** Section 1106 of the Omnibus Trade and Competitiveness Act of 1988 requires the President to determine whether Russia's state-trading enterprises (STE) adversely affect the US economy. If the President determines that they do, then the President must withhold application of the WTO Agreement between the United States and Russia until: (i) Russia undertakes formal commitments concerning the business activities of its STEs; or (ii) Congress passes a law extending application of the WTO Agreement to Russia. The President has delegated to USTR the authority to make such determinations.

In regard to extending PNTR to Russia, experts anticipate a heated debate in Congress, with largely Republican and some Democratic lawmakers advocating for the inclusion of Russia in the global, rules-based trading system as the best manner in which to address contentious US-Russia trade issues and, in contrast, many Democrats

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alleging that, 10 years after having acceded to the WTO, China still implements WTO-inconsistent measures such that a similar outcome can be expected in regard to Russian accession to the WTO. Despite this, experts posit that Congress will likely cave to pressure from US industry seeking Russian market access, and extend PNTR to Russia before its accession occurs or shortly thereafter. With respect to Section 1106 considerations, President Obama's determination is statutorily based on two economic assessments: (i) whether Russia's STEs account for a significant share of either Russia's exports or its domestic production of goods that compete with imports; and (ii) whether Russia's STEs unduly burden and restrict, or adversely affect, the foreign trade of the US or the US economy. The Obama Administration has been consistent in expressing a positive disposition toward Russia acceding to the WTO due to the Russian market access US firms would enjoy as a consequence. Nonetheless, it remains unclear how the Obama Administration, through USTR, will rule under Section 1106 on Russia's STEs. Even if President Obama determines that Russia's STEs adversely affect the US economy, it must be noted that Congress could still extend application of the WTO Agreement to Russia and, in this way, override the President's Section 1106 determination.

US Farm Support Could Experience Deep Changes Due to Deficit-Reduction Effort

On November 7, 2011, Senate Committee on Agriculture Chairwoman Debbie Stabenow (D-MI) and House Committee on Agriculture Chairman Frank Lucas (R-OK) briefed members of the Joint Select Committee on Deficit Reduction (JSC) in regard to a proposal to create a new federal revenue guarantee program for the US agricultural sector ("farm support"). The Food, Conservation and Energy Act of 2008 ("2008 Farm Bill"), which provides for current farm support programs, expires on October 1, 2012.

As part of an August 2011 compromise deal to raise the US Treasury's statutory borrowing limit ("debt ceiling"), Republican and Democratic lawmakers created JSC⁷⁶ and charged it with devising, by November 23, 2011, a USD 1.5 trillion deficit reduction plan to be implemented over the following decade. To this end, Republican and Democratic congressional leadership instructed House and Senate committees to provide JSC with draft proposals on deficit-reducing measures. As Chairpersons of their respective agriculture committees, lawmakers Stabenow and Lucas put forth a farm support proposal containing the following characteristics:

- **ARRA.** The Stabenow-Lucas proposal follows the Aggregate Risk and Revenue Management model (ARRA), whereby a farmer receives payments from the federal government for "shallow losses" if: (i) the average crop revenue at the reporting-district level falls below 90 percent of the average revenue from the preceding five years; and (ii) the individual farmer's year-on-year revenue drops between 10 and 25 percent.⁷⁷ However,

⁷⁶ Six Republicans, equally divided between House and Senate lawmakers, and six Democrats, equally divided between House and Senate lawmakers, comprise JSC: Rep. Jeb Hensarling - Co-Chair (R-TX), Sen. Patty Murray - Co-Chair (D-WA), Sen. Max Baucus (D-MT), Rep. Xavier Becerra (D-CA), Rep. Dave Camp (R-MI), Rep. James Clyburn (D-SC), Sen. John Kerry (D-MA), Sen. John Kyl (R-AZ), Sen. Rob Portman (R-OH), Sen. Pat Toomey (R-PA), Rep. Fred Upton (R-MI), Rep. Chris Van Hollen (D-MD).

⁷⁷ Individual farmer losses greater than 25 percent would not be covered by insurance against "shallow losses," but, rather, would trigger crop insurance payments

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certain Republican and Democratic lawmakers note that the version of ARRA contained in the Stabenow-Lucas proposal offers less support at the individual farm-level in western states where reporting districts are larger as bad weather could adversely affect one part of a large district but, if the district-wide average revenue does not decrease sufficiently, farmers in the affected area of the district would not receive support payments. In contrast, certain other lawmakers posit that individual farm-level support fosters a moral hazard, thus incentivizing poor farm and crop administration;

- **ACRE and SURE elimination.** The Stabenow-Lucas proposal aims to eliminate the Average Crop Revenue Election program (ACRE) and the Supplemental Revenue Assistance (SURE) payments. Under the current ACRE program, as mandated by the 2008 Farm Bill, payments are made to farmers when state- and farm-level revenues fall below certain thresholds but, in exchange for ACRE payments, farmers agree to forego receiving direct and counter-cyclical payments (CCP). As authorized by the 2008 Farm Bill, the US government provides SURE payments to farms suffering crop losses attributable to natural disasters. According to experts, eliminating the ACRE program and SURE payments supposes annual savings of USD 15 billion; and
- **Increase CCP target prices.** The Stabenow-Lucas proposal recommends increasing the target prices for CCP. The 2008 Farm Bill authorizes that, in the event that the average price of a commodity falls below the target price, the farmer receives a payment equal to the number of eligible farm acres multiplied by the payment rate (target price minus market price). However, critics of the CCP plan under the Stabenow-Lucas proposal assert that, although CCPs have been low in recent years due to high commodity prices, costs associated with CCPs could rise significantly if target prices are increased and commodity prices fall precipitously.

Reforming or simply reauthorizing US farm support through the JSC has been met with considerable opposition from lawmakers, agriculture sector representatives, environmental groups and poverty advocates. For instance, in a November 3, 2011 letter, 23 Republican and Democratic House lawmakers⁷⁸ expressed concern to JSC Co-Chairs Sen. Patty Murray (D-WA) and Rep. Jeb Hensarling (R-TX) over efforts on the part of the House and Senate Agriculture Committee Chairpersons to reauthorize US farm support programs outside of regular congressional order, *i.e.*, JSC's recommendations, which are due on November 23, 2011 and could include language relating to farm support reform such as the Stabenow-Lucas proposal, would be considered in Congress without lawmakers being able to filibuster or offer amendments. The 23 lawmakers allege that farm support reform or reauthorization through the JSC, as opposed to through regular order, could result in the

⁷⁸ Rep. Ron Kind (D-WI), Rep. Joseph Pitts (R-PA), Rep. Earl Blumenauer (D-OR), Rep. John Campbell (R-CA), Rep. Donna Christensen (D-Non-voting Delegate from the US Virgin Islands), Rep. Steve Cohen (D-TN), Peter DeFazio (D-OR), Rep. Keith Ellison (D-MN), Rep. Jeff Flake (R-AZ), Rep. Raul Grijalva (D-AZ), Rep. Rush Holt (D-NJ), Rep. Hank Johnson (D-GA), Rep. Barbara Lee (D-CA), Rep. John Lewis (D-GA), Rep. Tom McClintock (R-CA), Rep. Gwen Moore (D-WI), Rep. Jim Moran (D-VA), Rep. Mick Mulvaney (R-SC), Rep. John Olver (D-MA), Rep. Ron Paul (R-TX), Rep. Tom Petri (R-WI), Rep. Adam Smith (D-WA), Rep. Jackie Speier (D-CA), Rep. Pete Stark (D-CA), Rep. Bennie G. Thompson (D-MS), Rep. Edolphus Towns (D-NY), Rep. Henry Waxman (D-CA)

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creation of costly “programs and entitlements with limited congressional scrutiny.” The lawmakers’ letter therefore urges the JSC to resist such proposals as that of Sen. Stabenow and Rep. Lucas.

While it remains unclear to what degree JSC will incorporate the Stabenow-Lucas proposal, or other similar proposals, into its final November 23 recommendations (provided this deadline is met), experts opine that such movement will unlikely result in a scaling back of US farm support, as the congressional voting records of both Sen. Stabenow and Rep. Lucas show a firm support for trade distorting subsidies. Experts also point to the multilateral implications of such movement on US farm support; a failure to appreciably scale back US farm support programs could imperil any future effort to revive the moribund Doha Development Agenda (DDA) as emerging market economies will remain hesitant to concede on services and industrial goods market access if US farm support remains as is. With these considerations in mind, JSC members must now weigh whether to include such farm support language as that included in the Stabenow-Lucas proposal in an eventual deficit-reduction bill. It cannot be ruled out, however, that JSC fails in its attempts to agree to deficit reductions, in which case the 2012 Farm Bill would likely be considered under regular order.

Republican and Democratic House Ways and Means Committee Members Urge that US Action at JCCT Focus on IPR and Other Issues

In a November 17, 2011 letter, all 36 members⁷⁹ of the House Committee on Ways and Means urged United States Trade Representative (USTR) Ron Kirk and Department of Commerce (DOC) Secretary John Bryson to address at the upcoming December 2011 Joint Commission on Commerce and Trade (JCCT) “longstanding and specific concerns” involving US market access in China. The lawmakers also put forth in the letter that the JCCT should serve as a platform from which to help China “rebalance its economy away from export dependence.”

The lawmakers’ letter refers to the October 25, 2011 House Ways and Means Committee Hearing at which committee members cited such US industry China-related concerns as: (i) the granting of World Trade Organization-inconsistent subsidies to domestic firms, including through direct lending; (ii) the implementation of reportedly “harmful” indigenous innovation policies; (iii) the alleged failure to protect intellectual property rights; (iv) alleged undervaluation of the renminbi (RMB); (v) the alleged refusal to liberalize the capital account;⁸⁰ (vi)

⁷⁹ Rep. Dave Camp (R-MI), Rep. Sander M. Levin (D-MI), Rep. Kevin Brady (R-TX), Rep. Jim McDermott (D-WA), Rep. Wally Herger (R-CA), Rep. Charles B. Rangel (D-NY), Rep. Sam Johnson (R-TX), Rep. Fortney Pete Stark (D-CA), Rep. Paul Ryan (R-WI), Rep. John Lewis (D-GA), Rep. Devin Nunes (R-CA), Rep. Richard Neal (D-MA), Rep. Patrick Tiberi (R-OH), Rep. Xavier Becerra (D-CA), Rep. Geoff Davis (R-KY), Rep. Lloyd Doggett (D-TX), Rep. Dave Reichert (R-WA), Rep. Mike Thompson (D-CA), Rep. Charles Boustany (R-LA), Rep. John B. Larson (D-CT), Rep. Peter Roskam (R-IL), Rep. Earl Blumenauer (D-OR), Rep. Jim Gerlach (R-PA), Rep. Ron Kind (D-WI), Rep. Tom Price (R-GA), Rep. Bill Pascrell (D-NJ), Rep. Vern Buchanan (R-FL), Rep. Shelley Berkley (D-NV), Rep. Adrian Smith (R-NE), Rep. Joseph Crowley (D-NY), Rep. Aaron Schock (R-IL), Rep. Lynn Jenkins (R-KS), Rep. Erik Paulsen (R-MN), Rep. Kenny Marchant (R-TX), Rep. Rick Berg (R-ND), Rep. Diane Black (R-TN), Rep. Tom Reed (R-NY).

⁸⁰ Economists note that, given the context, the lawmakers likely meant “Financial Account,” per the International Monetary Fund (IMF) definition of the term, *i.e.*, the account under which all international purchases or sales of financial assets are registered.

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the alleged lack of regulatory transparency; (vii) reported restraints applied to certain exports; and (viii) the implementation of allegedly unscientific sanitary and phytosanitary (SPS) measures. The letter notes that making substantive progress on all issues over the course of a single JCCT is a difficult undertaking, but urges USTR Kirk and Secretary Bryson to seek specific commitments from China on the aforementioned US concerns.

While the letter devotes one paragraph to requesting that action be taken on all the issues enumerated above, experts note that the lawmakers devoted three paragraphs requesting that USTR Kirk and Secretary Bryson seek action on issues relating to IPR. These specific IPR related concerns are as follows:

- **IPR enforcement.** The lawmakers note that China has appeared on USTR's Special 301 Priority Watch List for the last seven years, yet IPR violations continue to occur at "unacceptable levels," particularly software piracy. In this regard, the letter further notes that the Chinese government has yet to fully fulfill its commitment, undertaken at the December 2010 JCCT, to implement certain measures to address software piracy;
- **Forced IPR transfer.** The lawmakers note that China maintains several trade-distorting policies in its renewable energy sector, including that which allegedly forces foreign green technology companies to transfer to a Chinese partner their respective IPRs as a condition to operate in China. The letter posits that, while USTR has initiated investigations into this issue, little progress has been made toward addressing it; and
- **Indigenous innovation.** The lawmakers posit that it remains unclear whether procuring entities are complying with China's commitment, undertaken at the May 2011 Strategic and Economic Dialogue (S&ED), to open the government procurement market to foreign firms which develop their respective IP outside of China. The lawmakers further allege that China employs a myriad of standard-setting and product certification processes, which require US firms to forfeit their IPRs as a condition for operating within China.

That the letter mentioned the full range of US concerns over China's trade practices but appeared to focus on IPR-related issues is largely consistent with the position toward China assumed by Republican congressional leadership, including House Ways and Means Committee Chairman Dave Camp (R-MI), who have, on several occasions, expressed unwillingness to allow China's alleged undervaluation of the RMB to be the centerpiece of US trade policy toward China. In this regard, congressional Republicans and the Obama Administration have, as of yet, been in agreement, *i.e.*, the Obama Administration has not labeled China a currency manipulator and has largely preferred to engage China on trade-related issues through bilateral dialogue and consultations, as well as through multilateral dispute settlement. However, experts note that, in light of the looming 2012 presidential elections and the persistently poor performance of the US job market, the Obama Administration is under increasing pressure from US organized labor, from which his campaign reportedly receives much support, to focus efforts on addressing China's currency practices. It remains unknown whether, in the run-up to the 2012 election, US engagement of China will be characterized by the narrow pursuit of action on the currency matter or by the broad pursuit of action on several of the above-enumerated US concerns, *e.g.*, IPR, SPS measures, regulatory transparency, etc., with currency being but one among many issues broached.

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FREE TRADE AGREEMENTS

Free Trade Agreement Highlights

Japanese PM Announces Intention to Join TPP; Prospect of Japan's Participation Raises Concerns in United States over Certain Japanese Trade Policies

On November 11, 2011, Japanese Prime Minister (PM) Yoshihiko Noda announced his administration's intention to begin consultations with Trans-Pacific Partnership (TPP) countries⁸¹ toward Japan joining TPP negotiations. In anticipation of this announcement, Republican and Democratic US lawmakers and governors wrote letters to President Obama and US Trade Representative (USTR) Ron Kirk voicing concerns in regard to Japan's participation in TPP negotiations. Although the letters cited a range of bilateral trade issues, Japan's auto policy emerged as the issue of greatest concern.

In a November 8, 2011 letter, House Ways and Means Committee Chairman Dave Camp (R-MI) and Ranking Member Sander Levin (D-MI), as well as Senate Finance Committee Chairman Max Baucus (D-MT) and Ranking Member Orrin Hatch (R-UT) urged USTR Kirk "to closely consult with Congress and stakeholders well in advance of any decisions" regarding the addition of Japan to TPP. More specifically, the letter states that US goods such as autos, various agriculture products, including beef, insurance, drugs and medical devices, face significant market access barriers in Japan.

Other lawmakers have singled out Japan's auto policy as a key area of concern:

- In a November 9, 2011 letter, **Sen. Carl Levin (D-MI)** asserted that it would be a "mistake" to allow Japan to become part of TPP. Sen. Levin qualified this statement by noting that Japan should demonstrate a "sustained, multi-year commitment" to open its market to US autos and auto products before the United States considers allowing them to join TPP; and
- On November 9, 2011, **Sen. Sherrod Brown (D-OH)** sent a letter to President Obama, stating that a number of non-tariff barriers have prevented the US auto industry from achieving sufficient access to Japan's market. In addition, he warned that the Japanese government distorts US-Japan trade by intervening in its currency markets, which he claims they have done four times in the past 14 months.

⁸¹ Current TPP members include the United States, Brunei, Malaysia, Vietnam, Chile, Peru, Singapore, Australia, and New Zealand.

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Three governors have also written letters to the Obama Administration urging them to consider the effect Japan joining TPP will have on the US auto industry:

- In his November 4, 2011 letter, **Governor Patt Quinn (D-IL)** stated the “[US] automotive industry, a cornerstone of America’s manufacturing sector, is at the forefront of the current economic recovery.” Although he noted that significant trade opportunities would come with the addition of Japan to TPP, he urged President Obama to seek a clear commitment from Japan to open its domestic automotive market to US autos before allowing Japan to join TPP;
- In his November 7, 2011 letter, **Governor Jay Nixon (D-MO)** wrote that new TPP members, including Japan, should have to demonstrate a “lengthy, proven track record of opening their markets to American exports” before they are allowed to join the Agreement; and
- On November 8, 2011, **Governor Rick Snyder (R-MI)** wrote a letter in which he stated that “[n]o party to the TPP should undermine securing a high-standard TPP agreement, and directly threaten US automotive jobs in both foreign and domestic automaker plants.”

In response to PM Noda’s November 11 announcement on Japan joining TPP, USTR Kirk stated that the Obama Administration would consult closely with domestic stakeholders and Congress regarding this announcement. According to USTR Kirk, “[t]o join the negotiations, Japan must be prepared to meet the TPP’s high standards for liberalizing trade and to address specific issues of concern to the United States regarding barriers to agriculture, services, and manufacturing trade, including non-tariff barriers.”

In light of PM Noda’s November 11 announcement, experts predict that the Obama Administration, as well as other TPP members, will intensify their negotiations with Japan regarding the timing and terms upon which Japan will be allowed to join TPP. Experts note that Japan’s interest in joining an unfinished TPP may delay the conclusion of the same, which USTR Kirk has called for by November 2012. Nonetheless, experts note that with or without the addition of Japan, the 2012 US presidential election has already rendered the November 2012 deadline difficult to achieve.

Within the United States, the addition of Japan to TPP is likely to be met with three different types of responses: (i) Lawmakers and governors such as those who wrote to the Obama Administration from November 4-9, 2011 represent a hesitant group of constituents. These and other stakeholders and members of Congress are likely to continue to either discourage the Obama Administration from allowing Japan to join TPP or urge the Administration to condition Japan’s inclusion upon concessions relating to concerns over specific trade issues, *i.e.*, this group will want the Obama Administration to address Japan’s treatment of US goods, particularly beef and autos, its so-called “interventionist” currency policy, and its services policies, particularly with respect to Japan Post, which the United States and other countries have long held receives preferential treatment from the Japanese government such that foreign providers have difficulty competing in the same market; (ii) A second group of US constituents is likely to welcome Japan’s inclusion in TPP, citing Japan as a large consumer-market destination for US exports, the great potential for enhancing regional supply chain efficiency that Japan offers, and the reassertion of US and Japanese influence in the Asia-Pacific where China’s influence is ever greater; and (iii) A final group is likely to wait and see what type of offer Japan makes to TPP members to secure its participation before deciding whether to support or oppose the country’s inclusion in the Agreement. Experts note

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that, although this group is likely concerned with the same issues articulated by the first, more hesitant group of constituents, they are likely encouraged by the Japanese government's October 18, 2011 announcement that it will revise its risk management rules for Bovine Spongiform Encephalopathy (BSE), a policy decision that may result in the increased import of US beef into Japan. Nonetheless, experts note that members of this third group will likely urge the Obama Administration to secure more, concrete concessions from Japan before agreeing to come out in support of the country's entry into TPP.

National Assembly Ratifies KORUS FTA Despite Strong Opposition

On November, 22, 2011, the Grand National Party (GNP), Korea's ruling conservative political party, unilaterally voted to ratify the Korea-United States Free Trade Agreement (KORUS FTA) amidst a raucous environment in which the opposition party attempted to interrupt the proceedings with tear gas. Despite the near sabotage, the FTA bill passed with no amendments, along with 14 supplementary bills to enact changes to certain existing laws, by a GNP-only vote of 151 out of 169 during a surprise session convened by the GNP.

The two Parties signed the KORUS FTA in Washington, DC on June 30, 2007 following eight rounds of formal negotiations that began in June 2006 and concluded in April 2007. The US Congress approved the FTA on October 12, 2011 (*please refer to the US Trade Alert, dated October 12, 2011*), and President Obama signed into law legislation implementing the Agreement on October 21, 2011. The KORUS FTA is a comprehensive agreement that will liberalize bilateral trade in goods and services and expand market access for investment and government procurement. Once implemented, the Agreement will link two of the world's top economies and further strengthen robust bilateral trade ties.

Under the Agreement, approximately 95 percent of bilateral trade in industrial and consumer products will become duty free within five years from the Agreement's entry into force. The Agreement's tariff elimination schedules classify most products into 11 categories. Tariffs on goods under each category are subject to phased elimination ranging from immediate elimination upon the Agreement's entry into force, including for the majority of electrical, electronic and machinery products, to scaled reduction over periods as long as 10 years for certain sensitive agricultural products and automobiles.

According to Article 24.5, the Agreement will enter into force 60 days after the date the two Parties exchange written notifications confirming that they have completed the necessary domestic ratification procedures to implement the Agreement, or on such other date as mutually agreed by the Parties. Depending on how quickly the Korean government is able to implement a number of necessary technical procedures, the Agreement could enter into force as soon as January 1, 2012.

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CUSTOMS

Philippines and US Sign Trade Facilitation and Customs Administration Agreement and Partnership for Growth

Summary

The Philippines and the United States signed two agreements, namely the *Trade Facilitation and Customs Administration Agreement* (TFCAA) and *Partnership for Growth* (PFG), on November 13, 2011 and November 16, 2011, respectively. The TFCAA provides for simplified customs procedures and customs administration transparency, while the PFG provides for a five-year cooperation program on regulatory reform and fiscal stability to promote sustainable economic growth. In both cases, US officials stated that the agreements would better position the Philippines in its goal of potentially participating in the Trans-Pacific Partnership (TPP). While the Philippines has consistently shown interest in participating in the TPP negotiations, Philippine Trade and Industry Secretary Gregory Domingo stated in local media reports that the Philippines would most likely not be able to participate in the TPP for the next two years due to the extensive regulatory reform and flexibility required by existing TPP members.

Analysis

I. TRADE FACILITATION AND CUSTOMS ADMINISTRATION AGREEMENT (TFCAA)

US Trade Representative (USTR) Ambassador Ron Kirk and Secretary Domingo signed the TFCAA on November 13, 2011 in Honolulu on the sidelines of the Asia-Pacific Economic Cooperation (APEC) Summit to deepen bilateral trade ties. The TFCAA covers specific trade facilitation commitments, including simplified customs procedures and customs administration transparency. According to USTR, the TFCAA would provide transparency and consistency to US exporters. Ambassador Kirk further stated that the TFCAA provisions are similar to those being negotiated in the TPP customs chapter and thus can act as a “building block” towards the Philippines’ participation in the TPP. The Parties did not release further details of the provisions under the TFCAA.

II. PARTNERSHIP FOR GROWTH (PFG)

US Secretary of State Hillary Clinton and Philippine Foreign Affairs Secretary Albert del Rosario signed a *Statement of Principles* on the PFG on November 16 in Manila with Philippine President Benigno S. Aquino III as witness. The PFG is a five-year program that aims to support sustainable, inclusive and broad-based economic growth in the Philippines to help the country foster a “high-performing emerging economy.” The program aims to achieve such growth through greater fiscal stability and regulatory reform to improve the investment climate. Secretary Clinton stated that the regulatory reform under the PFG would improve the Philippines likelihood of joining the TPP. Earlier in October 2011, USTR stated that the PFG will also be used as a means of preparing the Philippines to join TPP (*please refer to the W&C Trade Alert, dated October 4, 2011*).

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A joint analysis identified governance and fiscal issues to be the main constraints to Philippine economic growth. Based on this analysis, the two countries developed a five-year Joint Country Action Plan with four main goals. These goals include (i) “creating a transparent, predictable and consistent legal and regulatory regime,” (ii) “fostering a more open and competitive business environment,” (iii) strengthening the rule of law and increasing efficiency in the court system,” and (iv) “supporting fiscal stability through better revenue and expenditure management.” The PFG will also support the Philippines’ efforts to (i) increase tax revenues to support essential social services, such as health and education; (ii) increase investment in priority sectors, such as energy, infrastructure and tourism; and (iii) accelerate export growth through improved national competitiveness. According to the Philippine government’s press release, the United States will commit 15 of its agencies to work with the Philippine government on the PFG regarding technical capabilities.

The US-Philippines PFG is part of the larger PFG Initiative under US President Obama’s *Presidential Policy Directive on Global Development*. The United States reportedly selected the Philippines as a PFG partner country in January 2011. The two countries discussed the PFG and the Philippine’s potential participation in the TPP during the Trade and Investment Framework (TIFA) meeting in Washington, DC from September 22-23, 2011 (*please refer to the W&C Trade Alert, dated October 4, 2011*). The United States’ other PFG partners include El Salvador, Ghana and Tanzania. The PFG is also in line with the policy reform areas under President Aquino’s *Philippine Development Plan*. According to the US press release, this initiative aims to go beyond traditional aid in a more comprehensive approach.

III. THE POTENTIAL OF THE PHILIPPINES PARTICIPATION IN THE TPP

During the signing of both the TFCAA and the PFG, both Ambassador Kirk and Secretary Clinton stated that these agreements would increase the Philippines’s likelihood in participating in the TPP. The TFCAA covers similar provisions as those being negotiated in the TPP customs chapter, and the PFG would improve the Philippines regulatory environment. The Philippines has shown sustained interest in eventually participating in the TPP negotiations; however, both the Philippine and US government officials have noted that the Philippines will need to effect several policy and constitutional changes before being able to conform with many of the provisions currently being negotiated within the context of TPP. Some of the areas in which the Philippines would likely need to effect changes include customs, intellectual property rights (IPR), government procurement, labor standards, competition policies and environmental protection. In particular, the Philippine Constitution contains provisions barring foreign ownership in a number of service sectors. US companies have expressed interest in the Philippines’ financial, telecommunications, computer and distribution services sector.

According to a USTR official, the United States is taking a “building block” approach to helping the Philippines consider TPP membership by helping them to overcome the non-controversial issues first and address the more controversial issues in a “piecemeal” fashion over time. In the area of government procurement, which experts deem controversial, the United States is currently encouraging the Philippines to become an observer to the World Trade Organization’s (WTO) Government Procurement Agreement (GPA) in order to become more familiar with the GPA’s requirements, which will reportedly be mirrored in the TPP. (*Please refer to the W&C Trade Alert, dated August 31, 2011*)

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In September 2011, Secretary Domingo reportedly asserted that the Philippines would not be able to join the TPP agreement in the next two years due to the amount of preparatory regulatory reform required. Furthermore, the Philippines would be in a weak negotiating position and would want some flexibility in meeting certain TPP commitments. The Philippine Department of Trade and Industry (DTI) estimates that joining the TPP would increase the Philippines' exports by USD 10 billion.

DTI Undersecretary for International Trade Adrian Cristobal informally met with certain TPP members on the sidelines of the APEC Summit to gauge expectations and find ways to learn how the Philippines can meet each party's standards. However, the DTI did not disclose the results of these informal consultations.

Outlook

Analysts expect that while the Philippines government remains interested in participating in the TPP and working to address the preparatory regulatory reform required with capacity-building support from the US government, whether the Philippines manages to accede to the TPP negotiations on a timely basis remains to be seen. In addition to implementing the necessary regulatory reform, which may include constitutional amendments, the Philippines would also have to manage public expectations given the public backlash to the Japan-Philippine Economic Partnership Agreement (JPEPA), which is still facing criticisms for reported unconstitutionality.

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