WHITE & CASE

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General Trade Report - JETRO

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UNITED STATES

GENERAL TRADE POLICY

SEC Holds Roundtable Event to Discuss Implementation of Dodd-Frank Conflict Minerals Provisions

Summary

On October 18, 2011 the US Securities and Exchange Commission (SEC) held a public roundtable to discuss the SEC's required rulemaking under Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), which the 111th Congress passed and President Obama enacted into law in July 2010. Section 1502 of the Dodd-Frank Act states that it is the sense of Congress that the exploitation and trade of "conflict minerals," defined as gold, tin, tungsten and tantalum, originating in the Democratic Republic of Congo (DRC), have financed conflict in the eastern region of that country.

Analysis

The SEC published its proposed rule for the implementation of Section 1502 in December 2010. In its proposed rule, the SEC recommends requiring any issuer under Sections 13 (a) or 15 (d) of the Securities Exchange Act of 1934 for which conflict minerals are necessary to the functionality or production of a product manufactured, or contracted to be manufactured, by that issuer to disclose in the body of its annual report whether its conflict minerals originated in the DRC or an adjoining country. If the conflict minerals originated from the specified region, the SEC's proposed rule recommends that the issuer be required to furnish a separate report that includes a description of the measures taken by the issuer to exercise due diligence on the source and chain of custody of its conflict minerals.

In December 2010 the SEC stated its intention, as required by the Dodd-Frank Act, to implement the final rule by April 15, 2011. On February 3, 2011, however, the SEC announced that it was extending the deadline for the submission of comments until March 2, 2011. In April 2011, the SEC revealed revised plans to publish the final implementing rule for Section 1502 between August and December 2011. In a letter sent to SEC Chairwoman Mary Schapiro on September 23, 2011, five Democratic lawmakers[1] urged the SEC to issue the final rule for Section 1502 "as soon as possible." Shortly therafter, on September 29, 2011, the SEC announced it would hold a public roundtable to discuss the rule.

The roundtable event consisted of two panel sessions, during which SEC Directors and Commissioners posed questions regarding the implementation of Section 1502 and panelists provided remarks on the same. Below we provide summaries of the questions posed by the SEC and the comments provided by the panelists:

[1] The letter was signed by Reps. Bass (D-CA), Berman (D-CA), Frank (D-MA), McDermott (D-WA), and Payne (D-NJ).

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I. PANEL ONE

SEC Questions

Questions posed to panel one panelists included, *inter alia*:

- Should the SEC provide guidance regarding when a conflict mineral is necessary to the functionality or production of a product as part of its definition of a conflict mineral?
- Should the final SEC rule include a *de minimus* exemption or threshold?
- Should the final rule specify or define a reasonable country of origin inquiry?

Panelists' Comments

David Bouffard, Vice President, Public Relations, Signet Jewelers. Mr. Bouffard stated that Signet Jewelers has decided not to wait for the SEC to publish the final rule for Section 1502 and has already begun to implement the changes necessary to develop a responsible supplier chain of custody program. Some of the obstacles Signet has encountered through this process include: (i) there is no reliable infrastructure within the DRC and neighboring countries to track the origin of minerals from any potentially conflict-tainted mine; (ii) Signet has no direct relationship with refineries closest to the source of the raw material; and (iii) there is no viable certification and validation system at the mine-, refinery- or intermediate-supplier level. For these reasons, Mr. Bouffard emphasized the importance of the "phased-in approach" to the SEC's rule.

Mike Davis, Campaign Leader for Conflict Resources, Global Witness. According to Mr. Davis, Section 1502 has already had positive impacts within the DRC. More specifically, it has catalyzed the demilitarization of some mines in eastern DRC and efforts by certain companies to clean up their supply chains. In addition, leading electronics manufacturers have already implemented the new law's requirement to trace metals in their products back to the smelters that refine them. Mr. Davis noted that, despite these laudable efforts, the US Chamber of Commerce "is working at all levels to derail the regulations and continue business as usual." In closing, he noted that it is crucial that the SEC announce clear and robust rules as soon as possible so as not to lose the momentum that has been gained and to make sure that companies know what standards they have to meet and when.

Bennet Freeman, Senior Vice President, Sustainability Research and Policy, Calvert Investments. Mr. Freeman outlined several key viewpoints on behalf of Calvert Investments in regard to the SEC's rule, including, but not limited to: (i) all companies across the value and supply chain should be covered by the rule to ensure the greatest degree of transparency possible; (ii) the rule should not allow a *de minimus* threshold; (iii) companies should be required to disclose the steps they are taking to develop and implement systems to comply with the rule; (iv) the SEC rule should refer to specific due diligence standards that are consistent with international standards, most notably, those promoted by the Organization for Economic Cooperation and Development (OECD); and (v) there should be a smelter auditing protocol which is performed by an independent third party.

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Andrew Matheson, President, Boston Silicon Materials. Mr. Matheson noted that it's been 10 years since United Nations first released its report describing the nexus between the export of conflict minerals and violence in the DRC. Although he stated that he was sensitive to the need for adequate assistance to ensure compliance with the rule, he also stated that enough time has already passed. According to Mr. Matheson, companies have already had ample warning over the issue and should not require multiple processes to enact the rule. He noted that this is not just an issue within the United States; foreign companies also need to be part of the process.

Sandy Merber, Counsel, Internatinal Trade Regulation and Sourcing, General Electric. According to Mr. Merber, a company like General Electric (GE) uses thousands of suppliers who have access to the minerals identified as conflict minerals, *i.e.*, tin, tantalum, tungsten and gold. Mr. Merber stated that, because of this complexity, the final rule for Section 1502 must provide issuers with "the flexibility to design and execute reasonable country of origin inquiries and due diligence processes that are appropriate for their specific situations." A reasonable country of origin determination process may include contractual obligations that are followed up and verified through statistical sampling and possibly a tiered approach which entails different requirements for major versus minor suppliers. At this point, Mr. Merber noted that any attempt to too closely define what the country of origin or due diligence processes should be will be either too unattainable for some supply chains or not sufficiently rigorous for other supply chains. As such, he noted that flexibility should be allowed for, but the SEC should also require full and complete disclosure on the part of companies so investors can make the choice.

Yedwa Zandile Simelane, Senior Vice President, Corporate Affairs, AngloGold Ashanti. According to Ms. Simelane, the SEC roundtable event would have benefitted if the panel had more African voices on it. In addition, she noted the supply chain for gold is more complicated that the supply chains for the other minerals covered by Section 1502. As a result, the date upon which the aspects of Section 1502 associated with gold should be required to be implemented should be no earlier than January 2014. Finally, she urged the SEC to consider the unintended adverse effects Section 1502 could have on legitimate mining in the regions of interest in Africa. For example, Ms. Simelane stated that unintended defacto embargoes already exist as a result of the legislation.

Irma Villarreal, Chief Securities Counsel and Assistant Corporate Secretary, Kraft Foods. According to Ms. Villarreal, when the SEC issued its proposed rule for Section 1502, many companies, including Kraft, were surprised to find that disclosure requirements would apply to them. Because Kraft uses materials like tin in its packaging for goods like coffee and biscuits, it is subject to the rules. The SEC's proposed rules require issuers to publish an annual conflict minerals report as an exhibit to their Form 10-K, *i.e.*, balance sheet, income statement and statement of cashflows. According to Ms. Villarreal, including the conflict minerals report in the Form 10-K is problematic because issuers may not be able to achieve the same level of certainty regarding their mineral suppliers as the other aspects of their Form 10-K. Instead, Ms. Villarreal suggested that companies file the conflict minerals report as a separate report.

II. PANEL TWO

SEC Commissioner Questions

Questions posed to panel two panelists included, *inter alia*:

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- Should the final rule make reference to a specific set of due diligence guidelines?
- Many commentators have suggested that gold should be treated differently from other conflict minerals. Does that fact that the OECD has not yet completed its standards for gold mean that reporting requirements for gold under Section 1502 should be delayed and if so, how long should they be delayed?
- What is the appropriate scope and objective of the private sector audit? In particular, if the SEC were to require management to follow a framework for completing an audit, such as that published by the OECD, would this result in a more cost-effective audit?
- Should the required scrap and recycled material reporting required by the SEC rule require issuers to submit a conflict minerals report and an audit?
- A significant amount of these minerals are stockpiled or in the pipeline. Should there be a separate, transition rule for them?

Panelists' Comments

Susan Baker, Portfolio Manager and Research Analyst, ESG Research and Shareholder Advocacy, Trillium Asset Management. According to Ms. Baker, Trillium believes that analyzing and integrating environmental, social and governance data into the investment decision-making progress is necessary. However, meaningful reporting is not always available or precise. Ms. Baker made several comments on the proposed rule, including: (i) issuers' disclosure under the regulations should be sufficiently complete to allow investors to understand the way in which the issuers determined the origin of conflict minerals; (ii) reporting standards should apply equally to all 4 conflict minerals; and (iii) rules should require the annual conflict minerals report to be published, not furnished, within the Form 10-K, 20-F or 40-F of relevant issuers.

Benedict Cohen, Chief Counsel, Litigation, The Boeing Company. According to Mr. Cohen, The Boeing Company has five broad recommendations for the SEC's proposed rule: (i) the rules should incorporate a multi-year phase-in period; (ii) the rule must maintain a reasonable country of origin rule; (iii) the final rule should include a temporary intermediate category of indeterminate country of origin; (iv) the rule's due diligence guidelines should be consistent with OECD guidelines; and (v) the final rule should reflect the reality that no manufacturer of complex end products can, as a practical matter, map the conflict minerals embedded in the thousands of suppliers in its supply chain to the mine or achieve a chain of custody such that it could positively note the origin of each of the conflict minerals in each of its end parts. Mr. Cohen emphasized that Boeing's supply chains must remain flexible in order to respond quickly to changes in price, quality or a disruption like a natural disaster. As a result, any supply chain map of conflict minerals would be rendered out-of-date upon publication.

Darren Fenwick, Senior Manager of Government Affairs, Enough Project. According to Mr. Fenwick, in order to effectuate Section 1502 the SEC must implement a strong final rule. The final rule should entail, *inter alia*: (i) the proposed rule's provisions on recycled and scrap material; and (ii) provisions that require due diligence and country of origin standards to be conducted under a reasonable standard of care, which requires more than just a

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passive acceptance by the issuer of the information provided by their suppliers. In addition, Mr. Fenwick noted that some industry estimates of the cost associated with implementation of the rule are inflated.

Lawrence Heim, Director, Elm Consulting Group International. According to Mr. Heim, the SEC should recognize that the auditing standards promoted by organizations such as OECD establish the lowest common denominator globally for auditor qualifications in the environmental health and safety arena and yet the global supply chain for tin, tantalum, tungsten and gold rests upon those standards. Mr. Heim noted that the zero tolerance policy of the SEC rule drives companies to develop management systems to the atomic level, which is neither reasonable nor achievable.

Tim Mohin, Director of Global Corporate Responsibility, Advanced Micro Devices. In his comments, Mr. Mohin made three main points: (i) the intent behind Section 1502 is laudable, as DRC has suffered from conflict and human rights abuses for years; (ii) the SEC's proposed rule would be more efficient if the SEC synchronized the reporting requirements such that the supply chain would only have to respond once a year; and (iii) the final rule is not sufficient to solve the problem. Advanced Micro Devices (AMD) supports the State Department's public-private alliance focused on conflict-free sourcing from DRC.

Kay Nimmo, Manager, Sustainability and Regulatory Affairs, ITRI. Ms. Nimmo noted, *inter alia*, that: (i) exemption is essential for existing un-smelted minerals and refined metal stocks currently held by industry, investors and government stockpiles; (ii) recycling should be rewarded, not penalized, by the final SEC rule; requiring auditing and conflict mineral reporting for secondary material is a disincentive to the reuse of resources that "goes against almost every other regulatory policy"; and (iii) it is essential that the SEC find ways to create incentives for prior investment in DRC; only a phase-in process for the rule will allow for this.

Jennifer Prisco, Legal Counsel, Global Supply Chain, TE Connectivity. According to Ms. Prisco, TE Connectivity supports an implementation of Section 1502 that enables companies to conduct meaningful due diligence and provide reliable, simply-stated reports on whether their products are conflict-free. Mr. Prisco urged the SEC to define the term "conflict-free" as: products which, to the extent discernible, by reasonable interpretation of commercially practicable due diligence, do not appear to have originated in conflict mines. By defining the term as such, companies such as TE Connectivity will be able to execute effective and reasonable due diligence without incurring excessive costs that impact companies' competitiveness in global markets.

Mike Reiss, Director, Materials Management Corporation. In his opening comments, Mr. Reiss discussed collecting information in the gold industry. According to Mr. Reiss, the gold business is split into two sections: the visible section and the less visible section. In the visible part, there are traders, refiners, and an array of consumers, who are governed by the bank secrecy acts, anti-money laundering, and customer due diligence standards. In the less visible market, operations fly under the tax and regulatory radars, record keeping is minimal, and there is no customer loyalty. This less visible market is a less reliable source of information, but it remains an important raw materials source for the visible market. At the points where these two markets meet, the volume of metal exchanged is large and the transfers are complicated. Members of the visible portion of the gold market are working actively with the OECD, as well as industry groups such as the London Bullion Market Association and World Gold Council, which have all issued due diligence indication and guidelines promoting third party audits. If the SEC regulations are going to be effective, they should adopt these gold industry initiatives.

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Darrel Shubert, Partner, National Office, Ernest & Young/Chair, Auditing Standards Board, American Institute of Certified Public Accountants. Mr. Shubert discussed the examination of non-financial information and how that process is smilar to, but also different from, the audit of traditional financial information. The examination under the attestation standards for non-financial information requires that the auditor be independent of the subject matter and the issuer. He noted with concern that the SEC's proposed rule is not clear about the subject matter or the objective of the examination for the audit. Without this information, Mr. Schubert noted that a Certified Public Accountant (CPA) will not be able to determine how to perform the examination nor how much it will cost. In addition, Mr. Schubert noted that the criteria management should use to prepare and present the subject matter was not detailed in the proposed rule. He stated that suitable criteria against which to assess the fair presentation of the subject matter must have each of the following attributes: (i) objectivity; (ii) measurability; (iii) completeness; and (iv) relevance.

Outlook

In closing, SEC Director of Corporate Finance Meredith Cross noted that the comment period on the proposed rule for Section 1502 has been reopened. She also asserted that more precise information about costs associated with the proposed provisions of the rule would be much appreciated. Although Director Cross did not mention a deadline for the publication of the final rule, panelists urged the SEC to consider the OECD's standards on gold, which are due to be published in November 2011, prior to the publishing the final rule.

House Ways and Means Committee Holds Hearing on US-China Economic Relationship

Summary

On October 25, 2011 the House Ways and Means Committee held a hearing on the US-China economic relationship. Two US government officials, Deputy US Trade Representative Demetrios Marantis and the Treasury Department's Undersecretary for International Affairs Lael Brainard, answered lawmakers' questions in regard to a number of US-China bilateral trade issues. Although the hearing was scheduled in response to heightened concern in regard to China's alleged currency manipulation, many other issues were discussed, including, but not limited to: (i) intellectual property rights (IPR) protection; (ii) indigenous innovation; (iii) and US-China trade disputes at the World Trade Organization.

Analysis

The Senate approved the Currency Exchange Rate Oversight Reform Act of 2011 (S 1619) on October 11, 2011 with 46 Democrats and 15 Republicans supporting the measure. S 1619 does not contain language specifically focusing on China's alleged currency manipulation, although it is widely understood that the aim of the bill's supporters is principally to target China. Although the bill did receive some Republican support in the Senate, House Republican Leadership, including Speaker of the House John Boehner (R-OH) and House Majority Leader Eric Cantor (R-VA) have expressed caution in regard to the United States acting unilaterally to address China's currency practices. Instead, House Ways and Means Committee Chairman Dave Camp (R-MI) agreed to hold the October 25 hearing to discuss a wider range of issues comprising the US-China economic relationship.

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I. OPENING REMARKS

Below we summarize the opening remarks, as delivered by the Committee Leadership and the hearing witnesses:

- **House Ways and Means Chairman Dave Camp (R-MI).** In his opening remarks, Rep. Camp noted that "[w]hile the Chinese market is a large and rapidly growing destination for US exports, China willfully disregards its international obligations and impedes fair commerce." More specifically, Rep. Camp asserted that China steals IP, subsidizes domestic industries, prevents imports of US agricultural products through the use of discriminatory regulations, blocks exports of rare earths and intervenes in its currency market. Rep. Camp expressed disappointment that the United States and China have yet to resume their Bilateral Investment Treaty (BIT) negotiations due to the delay in the Obama Administration's review of the BIT model. In closing, he lauded the US Trade Representative (USTR) for its recent actions, which include the filing of a counter-notification against China at the World Trade Organization (WTO) regarding its failure to notify the Organization of its domestic subsidies, and USTR's utilization of the WTO to pressure China on its reported internet censorship and restriction.

- **House Ways and Means Ranking Member Sander Levin (D-MI)**: In his opening remarks, Rep. Levin noted that "China exports [to the United States] four times as much as the United States exports to China; Chinese exports increasingly compete in key areas with American products; and China continues to erect barriers to our exports." According to Rep. Levin, Fred Bergsten of the Peterson Institute for International Economics has claimed that eliminating China's currency misalignment would "produce at least a million good jobs, mainly in manufacturing." Rep. Levin applauded the Senate for passing legislation addressing currency misalignment. He urged the House to pass the "Currency Reform for Fair Trade Act" (HR 639). In closing, he stated that just because currency is not China's only "predatory" and trade-distorting policy does not mean that Congress should not act on it. He further stated that acting on China's currency misalignment does not mean that Congress should not act on other key issues related to US-China bilateral trade, including IPR, indigenous innovation, trade-distorting subsidies, and discriminatory product standards, among others.

- **Lael Brainard, Undersecretary for International Affairs, US Treasury**: According to Undersecretary Brainard, in order to derive a better balance of benefits from trade and investment opportunities with China, three main challenges must be addressed. These include: (i) China must shift to a pattern of growth that can be sustained, drawing on domestic consumption, not excessive dependence on exports; (ii) China must address its discriminatory policies against products and services, especially those in which the United States is competitive; and (iii) China must address its "rampant" IPR violations. With respect to China's exchange rate regime, Undersecretary Brainard asserted that although China's currency has appreciated nearly 7.5 percent against the US dollar since China resumed exchange rate adjustment in June 2010, it remains misaligned and a faster rate of appreciation is needed.

- **Demetrios Marantis, Deputy US Trade Representative (USTR)**: According to Ambassador Marantis, the Obama Administration's coordinated approach to US-China trade relations focuses on: (i) enforcement: the Obama Administration has initiated 5 disputes against China; (ii) results-oriented dialogue: the United States engages China on bilateral trade issues through the Security and Economic Dialogue (S&ED) as well as the

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Joint Commission on Commerce and Trade (JCCT); and (iii) strengthened global trading rules: in October 2011 the United States submitted, at the WTO, a subsidy counter-notification against China. Ambassador Marantis noted that this year's JCCT will focus on IPR, indigenous innovation, investment restraints, and industrial policies, among other issues.

Following opening remarks, committee members and witnesses proceeded to a question and answer period.

II. QUESTION AND ANSWER

Below we paraphrase questions asked and answers given during the hearing in regard to certain key US-China bilateral trade issues:

- **Rep. Camp** asked what the Obama Administration is doing to address China's IPR violations. **Undersecretary Brainard** responded that the Obama Administration maintains continuous contact with Chinese authorities on the issue and, in these discussions, US officials emphasize that China is not going to achieve the next level of economic development if China does not satisfactorily address the issue of IPR protection.

- **Rep. Camp** also asked what the Obama Administration's views are of the Senate bill, S 1619, which recently passed the Senate, as well as HR 639, which is a similar bill sponsored by Rep. Levin in the House. **Undersecretary Brainard** responded that President Obama shares Congress' goal of providing US workers and companies with a level playing field in China. She also noted that aspects of pending legislation may not be consistent with the United States' international obligations. When pressed to provide specifics, she stated "[The Obama Administration has] been and will remain, I think, reluctant to discuss particular aspects of legislation because [it] want[s] to make sure that [it is] in a strong capacity to defend whatever legislation becomes law."

- **Rep. Sam Johnson (R-TX)** asked how much of an issue it is that China holds so much US debt. **Undersecretary Brainard** responded that the United States has the deepest, most liquid government security market in the word, which creates a strong demand for US securities. She also noted that the United States faces a big challenge in addressing its medium-term deficit and debt. According to Undersecretary Brainard, "[the United States] need[s] to get on a path of declining debt and deficit once [its] recovery is secured."

- **Rep. Kevin Brady (R-TX)** stated that, with respect to US-China trade relations, it is a mistake to have a currency-only focus from Congress. He noted that trade barriers also exist in agriculture, manufacturing, technology services, and defense industries. According to Rep. Brady, Congrees feels as though the Obama Administration is not doing enough to manage the US-China trading relationship. He asked the witnesses whether they felt such criticism was fair. **Undersecretary Brainard** responded that the US government's approach to the US-China economic relationship is "currently more coordinated than it has even been before." In addition, she stated that "[the Obama Administration has] a very tight list of priorities because [it] know[s] that, if [it] go[es] after 20 things, [it] probably won't get one. If [it] go[es] after four at a time, [it will] get them done and move to the next."

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- **Rep. Pat Tiberi (R-OH)** asked whether the Obama Administration thinks China will retailiate if Congress passes pending currency legislation. More specifically, he asked whether his constituents, who are already suffering from a poor economic recovery, will face increased prices on goods coming from China as a result of the legislation. **Ambassador Marantis** responded that "there are always concerns that China may retaliate, but [the United States] need[s] to use the tools that [it has] to address concerns so that [it] can make progress."

- **Rep. Geoff Davis (R-KY)** asked the witnesses to compare China's trade relationships with countries in the Asia-Pacific region to the United States' trade relationships in the same region. **Ambassador Marantis** responded that China has been extraordinarily active in the Asia-Pacific region. He noted that the United States' competitive share in the Asia-Pacific region has declined as China's competitive share in the region has increased. As a result, he stated that the United States must increase its participation in the region. According to Ambassador Marantis, the US government is pursuing this goal through increased engagement in the Asia-Pacific Economic Cooperation (APEC), the implementation of the US-Korea free trade agreement (FTA), and the negotiation of the Trans-Pacific Partnership (TPP) agreement.

- **Rep. Charles Boustany (R-LA)** noted that China has some 70 BITs. He asked for a status update with respect to the United States' BIT negotiations with China. **Ambassador Marantis** responded that Presidents Obama and Hu have reaffirmed their commitment to negotiating a BIT. He stated that the United States has engaged in 6 rounds of technical consultations with China regarding a BIT. He noted that the US government has not yet completed its internal review of the BIT model. **Undersecretary Brainard** also noted it is still unclear whether and when China is going to be able to meet the high level of standards that the United States wants to pursue through a remodeled BIT. According to Undersecretary Brainard, "[t]hat is what [the United States has] to ascertain before [it] can really move forward at a more accelerated pace on the BIT."

- **Rep. Boustany** also asked for a status update on China's efforts to join the WTO Government Procurement Agreement (GPA) process. **Ambassador Marantis** responded that China joining the WTO GPA is a priority issue for the Obama Administration. He stated that President Hu has promised that China will submit a revised offer to join the WTO GPA before the end of 2011 that will cover, for the first time ever, sub-central entites.

- **Rep. Xavier Becerra (D-CA)** stated that there are three major issues with China manipulating its currency: (i) it artificially raises the prices of US exports in China; (ii) it suppresses the prices of Chinese imports into the United States; and (iii) currency manipulation places US exporters at a competitive disadvantage vis-a-vis Chinese exporters in third-country markets. He asked the witnesses whether they agreed with these three points. **Undersecretary Brainard** responded that China's exchange rate has appreciated against the US dollar over the last 15 months more rapidly than it has against any other country in the world. According to Undersecretary Brainard, "that is because [the United States has] applied consistent pressure on [China] to do so."

- **Rep. Mike Thomson (D-CA)** noted that the US solar industry just filed an illegal subsidies case against China. According to Rep. Thomson, China is "selling solar cells [in the United States] at below market prices and it's because of very, very lucrative Chinese grants, discounted raw materials, discounted costs on land,

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power, water and export assistance levels that are far beyond what the WTO allows." He asked what the prospects are for the case moving forward. **Ambassador Marantis** responded that one of the biggest issues the US government has had with China's green energy subsidies has been a lack of transparency. As a result, he noted, "[the United States] filed a counter-notification at the WTO in October 2011 to basically call out China on over 200 subsidies that it is providing, many of which are in the green technology sector. That will help [the United States] assess the WTO consistency of these measures."

- **Rep. Jim Gerlach (R-PA)** asked what kind of progress is being made with respect to China's use of indigenous innovation. **Ambassador Marantis** responded that China has made important progress in in the area of indigenous innovation. Nonetheless, he added, "the new problem that's coming up in indigenous innovation that we really need to address this year is with respect to electric cars."

- **Rep. Lynn Jenkins (R-KS)** asked if the Chinese government has shown any willingess to raise the Foreign Direct Investment (FDI) cap in China's life insurance sector and whether lifting the cap is a priority for the US government. **Ambassador Marantis** responded that the United States is frustrated with the remaining restrictions China imposes on foreign investment and insurance is one of the sectors about which the USTR is especially concerned.

- **Rep. Jenkins** also noted that China is now the world's largest automobile market. According to Rep. Jenkins, liability insurance for drivers is mandatory, but the market remains closed to non-Chinese providers. She asked what steps the Chinese government has taken towards liberalizing this market. **Undersecretary Brainard** responded that the Chinese press has recently reported that the China Insurance Regulatory Commission (CIRC) has put forward a proposal to open this market, but the US government has not yet seen the proposal. According to Undersecretary Brainard, "[t]his issue will be prominent in the upcoming JCCT."

- **Rep. Erik Paulsen (D-MN)** noted that the US medical industry is concerned about the price controls that are being proposed by the Chinese government. He asked how the US government is dealing with this issue. **Ambassador Marantis** responded that the United States has two serious issues on the medical device front: (i) price controls; and (ii) redundant regulatory requirements. With respect to price controls, he stated that, over the past five years, the United States has been successful in stopping China from imposing price controls on medical devices. Nonetheless, he noted that, in August 2011, the Chinese government released a proposal that suggested that China would soon implement price controls. He stated that the US government is "working very hard to encourage the Chinese government not to follow through with this proposal."

- **Rep. Rick Berg (R-ND)** asked if USTR has the tools necessary to address US-China trade issues. More specifically, he asked Ambassador Marantis to name one or two items with which USTR could better execute its mandate in regard to the US-China trade relationship. **Ambassador Marantis** responded that he would like USTR to be able to continue to make progress on key bilateral trade issues, stating that USTR "has the adequate tools to address […] concerns."

- **Rep. Joseph Crowley (D-NY)** lauded USTR for challenging China's prohibition on foreign suppliers from processing payment card transactions in China. He asked for a status update on the case. **Ambassador Marantis** responded that the case is a very important one because it is emblematic of broader trends that USTR sees in China, especially with respect to China's efforts to foster homegrown "national champions" that

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monopolize the supply certain services. According to Ambassador Marantis, "[US officials have] worked really hard in developing and in bringing in the electronic payment services case. It's now before a WTO panel, and [these officials] would expect a ruling from the WTO sometime next year."

- **Rep. Diane Black (R-TN)** noted that China has been restricting exports of rare earth minerals to the United States and Japan. More specifically, she stated that "last week China's largest rare earth producer suspended production of rare earth minerals for one month in a very apparent effort to maintain artificially high prices." Rep. Black asked what the US government is doing to address this issue. **Ambassador Marantis** responded that the US government has already brought a case against China at the WTO regarding China's export restraints. Although the case did not include rare earths specifically, it did affect other raw materials. The United States won the case before the WTO panel, and the case is currently pending before the appellate body. He further stated that the case is "another example of a WTO challenge that tackles systematic problems that [the United States faces] in [its] relationship with China." **Undersecretary Brainard** also commented on the significance of the United States' victory in the raw materials case. She stated that "[t]he USTR has taken WTO enforcement actions very strategically in those areas where the judgement is that it will have the biggest overall impact in setting precedent for other barriers. So the win that [the United States] had in the area of raw materials was extremely important. Hopefully, that will accelerate progress on the rare earths issue."

Outlook

Although the hearing's participants discussed China's alleged currency manipulation, currency was not the central theme. Instead, lawmakers raised a number of other concerns regarding the US-China bilateral trade relationship. In response, the witnesses acknowledged a bevy of issues that currently plague bilateral trade between the two countries, but were also careful to defend the Obama Administration's management of the relationship, which has been characterized by engagement through bilateral dialogue and cooperation and an avoidance of direct, unilateral confrontation. Experts note that while the hearing's broad discussion of issues reflects the House Republican Leadership's desire to take a more comprehensive approach to the US-China economic relationship as opposed to moving on the currency issue alone, the hearing's impact on the prospects for House consideration of currency legislation remain unclear. House Republican leadership has stated on several occasions that the United States should address China's allegedly unfair currency practices as only one part of a larger US-China trade agenda and not hinge the bilateral relationship on currency alone. In the past, this position has been shared by the Obama Administration. It cannot be ruled out, however, that the desire to take action against China's currency regime could gain momentum among House Republican plenary members, who enjoy majority-control of the chamber, in which case, House Republican Leadership could cede and allow for consideration of currency legislation. Were this to occur, experts posit that pressure would then mount on the Obama Administration to articulate its official position on China currency matters by either vetoing or enacting such legislation. Regardless of future congressional action on China currency matters, the issues broached by lawmakers during the hearing will likely inform the US government's agenda for the upcoming JCCT, which is likely to be held in late November or early December 2011.

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US General Trade Policy Highlights

United States, Seven Other Countries Sign Anti-Counterfeiting Trade Agreement

On October 1, 2011, the United States and seven other countries met in Japan to sign the Anti-Counterfeiting Trade Agreement (ACTA). The other countries to sign the Agreement were Australia, Canada, Japan, Korea, Morocco, New Zealand and Singapore. According to a joint statement following the signing, the countries indicated that ACTA provides "a mechanism for the parties to work together in a more collaborative manner to achieve the common goal of effective [intellectual property rights (IPR)] enforcement."

In an effort to establish an international framework for IPR protection and enforcement, the ACTA initiative was jointly spearheaded by Japan and the United States in 2006. Formal negotiations of the Agreement began in June 2008 and included eleven participants – the eight which recently signed the Agreement on October 1 as well as the European Union (EU), Mexico, and Switzerland – and the final Round of negotiations were held in October 2010.

The three main areas of ACTA include:

- Enhancement of international cooperation**,** including law enforcement cooperation with respect to criminal enforcement and border measures;
- Promotion of sound enforcement practices, including the development of specialized expertise within each country's competent authorities responsible for the enforcement of IPR; and
- Establishment of a legal framework for IPR enforcement, including assurances that enforcement procedures are available so as to permit effective action against any act of infringement of intellectual property rights covered by ACTA.

According to Chapter VI of ACTA, ratification procedures require individual countries to sign the Agreement and then deposit an "instrument of ratification, acceptance or approval." The final step refers to the process in which an individual country notifies other signatory countries of the completion of its domestic approval process. Under Article 40 of ACTA, the Agreement enters into force 30 days following the deposit of the instrument of the sixth signatory.

Although the EU, Mexico, and Switzerland did not sign the Agreement at the ceremony, representatives of each were present and "confirmed their continuing strong support for and preparations to sign the Agreement as soon as practicable," according to the joint press statement following the ceremony. Sources indicate that the EU and Switzerland have yet to make sufficient progress in their respective domestic approval procedures to sign the Agreement, while Mexico faces strong opposition to the Agreement from its Senate. In particular, sources note that the EU, in contrast to US procedures, cannot approve the Agreement without the consent of the European Parliament. In the United States, USTR has long maintained that ACTA is consistent with US law and therefore does not require Congressional approval. Consequently, ACTA is treated as an executive agreement and, thus,

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USTR contends it "may therefore enter into and carry out the requirements of the Agreement under existing legal authority, just as it has done with other trade agreements." Critics, however, remain skeptical as to whether ACTA is in fact consistent with current US law, pointing in particular to potentially conflicting areas pertaining to injunctions and damages. Additionally, opponents of the Agreement contend that USTR does not have the authority to ratify the Agreement without congressional approval.

According to USTR, the United States will likely use a formal letter signed by USTR Ron Kirk or a Deputy USTR as its instrument of ratification. No specific time-table has been given for when the United States will deposit this instrument but USTR Ambassador Miriam Sapiro noted in her remarks at the signing ceremony that, "(s)ince ACTA is consistent with United States law and does not require further legislation on our part, we anticipate depositing our instrument of acceptance without delay."

House, Senate Prepare for Final Vote on FTAs, TAA

On October 5, 2011, White House Chief of Staff William Daley stated that the House of Representatives will vote on legislation to implement the three pending free trade agreements (FTAs) with Colombia, Panama and Korea, as well as an amendment to legislation renewing the Generalized System of Preferences (GSP) that will renew certain lapsed provisions of Trade Adjustment Assistance (TAA), on October 12. Senate Majority Leader Harry Reid (D-NV) announced on October 6 that the Senate also has plans to vote on the FTAs on October 12. The Senate has already passed legislation to renew GSP and TAA. The October 12 House and Senate votes are scheduled one day before Korean President Lee Myung-bak is scheduled to meet with President Obama in the United States for an official state visit.

The House Ways and Means Committee held a markup on October 5 on the three pending FTAs. In bipartisan votes, the Committee reported out HR 3079, the US-Panama FTA with a vote of 32-2, HR 3080, the US-Korea FTA with a vote of 31-5, and HR 3078, the US-Colombia FTA with a vote of 24-12. The US-Colombia FTA sparked the most debate with Rep. Levin (D-MI) arguing that there should be explicit language in the FTA's implementing legislation that links the successful implementation of the Colombia Labor Action Plan to the FTA's entry into force. In his letter accompanying the submission of the US-Colombia FTA's implementing legislation to Congress, President Obama states "Colombia must successfully implement key elements of the Action Plan before I will bring the Agreement into force."

The House Rules Committee issued a single closed rule on October 6 to govern House consideration of all four pieces of legislation, namely: (i) HR 2382, GSP-TAA legislation; (ii) HR 3078, the US-Colombia FTA; (iii) HR 3079, the US-Panama FTA; and (iv) HR 3080, the US-Korea FTA. The rule limits debate on TAA-GSP legislation to one hour. In addition, it limits debate on each of the three FTAs to 90 minutes. The rule also provides a closed rule for the consideration of the US-Colombia FTA and GSP-TAA legislation, which prohibits House lawmakers from offering amendments to them. This closed rule is especially important for the US-Colombia FTA as, unlike the US-Korea and US-Panama FTAs, it is not protected from amendments by Trade Promotion Authority (TPA).

Also on October 6, the Senate Finance Committee announced that it will hold a hearing on October 11 to markup the three FTAs. During the hearing, the Committee will also consider several key trade-related nominations. The scheduling of this markup sends a sign that key Senate Democrats have dropped their previous stipulation that

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the House must first pass TAA before the Senate considers the FTAs. Although Senate Rules dictate a layover requirement between Committee markup and Senate floor consideration of up to 3 days, the requirement can be waived by unanimous consent. Such a waiver would pave the way for the Senate to vote on the FTAs on October 12, one day after the Committee markup.

Experts note that plans for a more expeditious consideration of the FTAs and TAA comes as the Obama Administration has put significant pressure on Congress to schedule a final vote on the US-Korea FTA before the arrival of Korean President Lee. While the FTAs enjoy significant bipartisan support in both Chambers, experts note that the renewal of certain lapsed provisions of TAA is not supported by the majority of Republicans, who hold the majority in the House. Experts further note that whether the US-Korea FTA achieves its timely passage will depend largely on whether the Senate carries through with its plan to hold an October 11 markup of the FTAs, regardless of how the House votes on TAA.

Senate Passes Bill to Address Fundamentally Misaligned Currencies

On October 11, 2011, the Senate approved the Currency Exchange Rate Oversight Reform Act of 2011 (S. 1619) with 46 Democrats and 16 Republicans supporting the measure. S. 1619 does not contain language specifically focusing on China's alleged currency manipulation, although it is widely understood that the aim of the bill's supporters is principally to target China.

S. 1619 contains a number of key provisions which, if enacted into law, would: (i) require the Department of Commerce (DOC) to investigate whether currency undervaluation by a government provides a countervailable subsidy if a US industry requests investigation and provides the proper documentation; (ii) prevent DOC from refusing to investigate a subsidy allegation based on the single fact that a subsidy is available in circumstances in addition to export; and (iii) repeal the currency provision in current law and replace it with a new framework that requires the US Treasury Department to present a biannual report to Congress that identifies both "fundamentally misaligned currencies" and "fundamentally misaligned currencies for priority action." The bill was originally introduced by Sen. Sherrod Brown (D-OH) on September 22, 2011 and cosponsored by a bipartisan group of 22 Senate lawmakers.

The Senate voted on October 6 to invoke cloture on the bill in order to limit debate on the same and ensure that amendments offered thereafter were germane. After Sen. Tom Coburn (R-OK) offered a motion to suspend cloture rules, a motion supported by the presiding Senate Parliamentarian, Senate Majority Leader Harry Reid (D-NV) called and succeeded in a vote to override the Senate Parliamentarian, thus enforcing the cloture rules. Senate Minority Leader Mitch McConnell (R-KY) lamented Sen. Reid's decision to block amendments to S. 1619, asserting that to do so effectively disenfranchised Senate Republicans in the matter.

Despite S. 1619's passage in the Senate and apparent support from a number of congressional Republicans, experts note that the bill is unlikely to advance in the House. Similar legislation (Currency Reform for Fair Trade Act (H.R. 639)) does enjoy considerable bipartisan support among House lawmakers, however, House Republican Leadership, including Speaker of the House John Boehner (R-OH), House Majority Leader Eric Cantor (R-VA) and House Ways and Means Committee Chairman Dave Camp (R-MI), has expressed caution in regard to the United States acting unilaterally to address China currency practices. Rather, Reps. Boehner,

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Cantor and Camp assert that China's alleged currency manipulation should be addressed as a part of a larger discussion on China's trade practices and any US action on China should fall in line with US obligations under the World Trade Organization (WTO). Without the support of Reps. Boehner, Cantor and Camp, experts note that House consideration of the legislation is unlikely. Although House Ways and Means Committee Ranking Member Sander Levin (D-MI) has filed a discharge petition in order to force a vote on HR 639, experts are skeptical as to whether the petition, which will need the support of at least 40 Republicans, will get the 218 signatures necessary to force a vote. Nonetheless, Rep. Camp has committed to holding a Congressional hearing in October 2011 to address currency, as well as other US-China bilateral trade issues.

Senator's Letter Questions Constitutionality of US Entrance into ACTA

In an October 12, 2011 letter to President Obama, Senate Finance Subcommittee on Trade Chairman Ron Wyden (D-OR) cast doubt on the constitutional power of President Obama to enter the United States into the Anti-Counterfeiting Trade Agreement (ACTA) as a partner bound to the agreement. Sen. Wyden's letter requests that President Obama "declare that ACTA does not create any international obligations for the [United States]", *i.e.*, that ACTA is not a binding agreement or, at the least, "provide Congress, and the public, a legal rationale for why ACTA should not be considered by the Congress."

The United States, Australia, Canada, Japan, Korea, Morocco, New Zealand and Singapore met in Japan on October 1, 2011 to sign ACTA.[2] ACTA establishes a broad range of minimum standards in regard to intellectual property rights (IPR) protection with which the Agreement's members agree to comply. These minimum standards cover three principle areas: (i) enhancing international cooperation on IPR matters; (ii) promoting effective IPR enforcement practices; and (iii) strengthening national legal frameworks for IPR enforcement in the areas of criminal enforcement, enforcement at the border, civil and administrative actions and distribution of copyrighted material on the Internet.

US Trade Representative (USTR) officials have long asserted President Obama's authority to enter the United States into ACTA as a "sole executive agreement" without seeking congressional authorization or approval with the argument that the Agreement is consistent with existing US law and thus does not require the enactment of implementing legislation. In a challenge to USTR's position, Sen. Wyden's letter questions the relevance of ACTA's consistency with existing US law and further notes that, while Article II of the US Constitution delegates to the Executive Branch the power to make treaties, Article I of the US Constitution delegates to Congress exclusive powers to "regulate foreign commerce and protect intellectual property."

Sen. Wyden's letter echoes concerns held by many US legal scholars that President Obama, by entering the United States into ACTA as a sole executive agreement without the authorization or approval of Congress, has effectively usurped the powers constitutionally conferred upon Congress to regulate commerce and protect intellectual property. Nonetheless, experts posit that Congress will not likely challenge the Obama Administration

[2] Mexico, the European Union and Swizterland were also ACTA negotiating members but, due to difficulties with their respective internal approval procedures, have yet to sign the Agreement.

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because: (i) throughout ACTA's negotiations, USTR maintained close contact with Congress such that many US proposals contained concessions reflecting lawmakers' concerns; (ii) there is a general lack of interest on the part of the private sector to render ACTA's IPR enforcement provisions non-binding; and (iii) both Republican and Democratic lawmakers generally support the United States' efforts to pressure its trading partners to more effectively ensure stringent IPR enforcement.

Treasury Announces Delay in Release of Semi-Annual Currency Report

On October 14, 2011 the US Treasury Department ("Treasury") released a statement declaring its intention to delay the publication of its semi-annual "Report to Congress on International Economic and Exchange Rate Policies" ("Currency Report"). According to the Omnibus Trade and Competitiveness Act of 1988, the Currency Report is due on October 15 of each year.

The press release states that Treasury will delay the publication of the Currency Report until after several key international meetings have taken place, which will help Treasury to "assess progress" made within certain currency markets. These meetings include: (i) the G-20 Finance Ministers and Central Bank Governors Meeting from October 14-15, 2011; (ii) the G-20 Leaders Summit from November 3-4, 2011; (iii) the Asia-Pacific Economic Cooperation (APEC) Finance Ministers Meeting on November 10, 2011; and (iv) the APEC Leaders Meeting from November 12-13, 2011.

Treasury's statement comes on the heels of the Senate's October 11, 2011 passage of "Currency Exchange Rate Oversight Reform Act" (S. 1619). S. 1619 does not contain language specifically focusing on China's alleged currency manipulation, although it is widely understood that the aim of the bill's supporters is principally to target China. Despite the legislation's 63-35 passage in the Democrat-controlled Senate, experts are less certain that the legislation will be considered in the Republican-controlled House. Although the "Currency Reform for Fair Trade Act" (H.R. 639) currently has 225 co-sponsors, its discharge petition, filed by Rep. Levin (D-MI), lacks the 218 signatories necessary to force a House floor vote. Importantly, House Republican leadership has expressed its preference for addressing China's alleged currency manipulation as part of a broader discussion of US-China bilateral trade issues. This preference was reinforced on October 12, 2011, when the House rejected 236-192 an effort to amend the implementing legislation of the US-Colombia free trade agreement (FTA) to include currency legislation provisions. A large number of Democratic lawmakers and some Republican lawmakers have called on President Obama to take an unequivocal stance on currency legislation although experts note that currency legislation runs counter to President Obama's policy of engaging rather than confronting China on bilateral trade issues. The President has thus far avoided taking a clear, public position against the legislation, instead choosing to, *inter alia*, increase his rhetoric against China's abuse of the international trading system and express concern regarding the WTO-consistency of currency legislation.

Experts note that in late 2010 Treasury also delayed releasing its Currency Report under similar Congressional pressure to counteract China's alleged currency manipulation. On September 29, 2010 the House passed 378-79 the "Currency Reform for Fair Trade Act" (H.R. 2378). Afterwards, Treasury waited to release its Currency Report until after China made significant commitments with respect to key bilateral trade issues at the December 2010 US-China Joint Commission on Commerce and Trade (JCCT). Treasury eventually released its Currency Report

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in February 2011; the report did not label China a currency manipulator. With sources positing that the 2011 JCCT will likely take place in late November or early December 2011, experts opine that Treasury is likely to once again to wait until after the JCCT has been held to release the its Currency Report.

United States Pressures Georgia on Russian WTO Accession; Georgia Assents but Hurdles Remain

In October 25, 2011 remarks on US foreign policy made at the Heritage Foundation in Washington, DC, House Speaker John Boehner (R-OH) effectively conditioned consideration in the US House of legislation to establish with Russia Permanent Normal Trade Relations (PNTR) on Russia and Georgia arriving at a solution to the border dispute stemming from the 2008 war between the two countries. Georgia, which had long since blocked Russian accession to the World Trade Organization (WTO), subsequently agreed on October 27, 2011 to a Swiss-brokered compromise solution to the border dispute and, thus tentatively lifted its blockage to allow for such accession to occur.

The US Congress must pass and the President must enact legislation establishing PNTR, *i.e.*, most favored nation (MFN) status, with Russia before its accession occurs in order to prevent Russia from denying MFN market access to US firms which they would otherwise enjoy as a result of Russia being within the WTO. Rep. Boehner, who controls the House legislative calendar and, therefore, largely determines which measures are considered, stated in his remarks that only when there is an agreement between Russia and Georgia which respects the "territorial integrity" of Georgia "will there be any movement [in the US House] on [establishing PNTR with Russia]."

Prior to the October 27, 2011 announcement, Georgia had initiated a hold on Russia's WTO accession bid due to the reported occupation by Russian military forces of the Georgian Abkhazia and South Ossetia regions. According to sources, US officials applied sustained diplomatic pressure on Georgia to lift the hold as a way to ease US-Russian relations strained over US plans to build a ballistic missile defense system in Central Europe, a system to which Russian remains vehemently opposed. Experts assert that Georgia's blockage of Russia's WTO accession bid had never been insurmountable as, had Georgia not eventually acquiesced, the United States and other existing WTO members could have circumvented the need to gain Georgia's approval by seeking a majority vote as opposed to unanimous consent. Sources note that, aware of this alternative option, Georgia chose to concede in order to avoid its will being overlooked.

Beyond Georgia's now granted tentative assent on Russia's accession bid, Rep. Boehner noted that there are several other matters of concern to the United States that need to be addressed. These matters include:

- **Information Technology Trade.** Certain WTO members have expressed concern that Russia may not fulfill its 2006 commitment to join the Information Technology Agreement (ITA) upon acceding to the WTO. Nonetheless, Russia has reiterated its intention to join the ITA;

- **Automotive Sector Investment.** Certain WTO members have opined that aspects of Russian regulations, which condition duty-free treatment on imports of auto parts on local content requirements and production-level minimums, would be inconsistent with WTO investment provisions. While the European Union and

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Russia have arrived at a bilateral agreement on these issues, the US officials assert that a final agreement remains elusive at the multilateral-level;

- **Agricultural Market Access.** Certain WTO members have expressed concern in regard to Russian tariff-rate quotas (TRQs) on such products as meat and sugar. Additionally, these members point to certain Russian farm support program as being "trade distorting;"

- **Customs Union.** Certain WTO members allege that the Commonwealth of Independent States Free Trade Zone and Customs Union ("CIS Customs Union") comprising Russia, Belarus and Kazakhstan violates WTO rules as its common external tariff exceeds its constituents' WTO bound rates. Russia has reportedly pushed to revise the rules of the CIS Customs Union but concerns remain; and

- **Human Rights.** Certain WTO members cite alleged human rights violations in Russia as a stumbling block to it acceding to the WTO. In contrast, experts note that similar concerns were overcome in China's WTO accession bid.

As an addition hurdle, achieving PNTR for Russia in the United States 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, Russia has not officially "graduated" from Jackson-Vanik coverage.

Despite the remaining hurdles, however, experts note that the Obama Administration, having enacted into law the once pending free trade agreements (FTAs) with Korea, Colombia and Panama, is now focusing efforts on urging Congress to pass legislation establishing PNTR with Russia before it accedes to the WTO, which could occur in December 2011. There is significant resistance, however, among many lawmakers to establishing PNTR with Russia before seeing the final Russian accession agreement. Whether US firms enjoy MFN market access in Russia immediately upon its accession, therefore, largely depends on the ability of the Obama Administration and US industry groups to sell to lawmakers the benefits of establishing PNTR before Russia gains WTO accession.

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FREE TRADE AGREEMENTS

Free Trade Agreement Highlights

DOT Signals Readiness to Implement Pilot Program for US-Mexico Cross-Border Trucking

On October 6, 2011, the US Department of Transportation (DOT) Secretary Ray LaHood sent respective letters to Vice President Joe Biden, who also serves as the President of the Senate, and Speaker of the House John Boehner (R-OH), stating that DOT has fulfilled the statutory requirements to initiate a pilot program under which Mexico-domiciled motor carriers ("Mexican trucks") will receive authorization to operate in the United States beyond the border commercial zones. Secretary LaHood's letters also state that DOT has received assurances from Mexican authorities that US trucks will, in turn, receive reciprocal treatment to operate in Mexico.

Section 6901(b)(1) of the US Troop Readiness, Veterans' Care, Katrina Recovery and Iraq Accountability Appropriations Act of 2007 (Public Law 110-28) directed DOT Office of Inspector General (OIG) to report to Congress before implementing the US-Mexico cross-border trucking pilot program regarding DOT compliance with the safety-related statutory requirements contained in Section 350(a) of the Department of Transportation and Related Agencies Appropriations Act of 2002 (Public Law 107-87). On August 22, 2011, DOT OIG identified in its report to Congress five areas in which further action was needed on the part of the Federal Motor Carrier Safety Administration (FMCSA) to comply with Section 350(a) of Public Law 107-87. We provide below a summary of the subsequent action taken by FMCSA to address DOT OIG's concerns:

- **Safety Audits and Compliance Reviews.** FMCSA has developed a plan to send auditors to Mexico in order to carry out pre-authorization safety audits (PASAs) and compliance reviews;
- **Coordination with CBP.** FMCSA has developed a plan detailing procedures to coordinate with Customs and Border Patrol (CBP) and authorities of individual states to ensure that Mexico-domiciled trucks and drivers involved in the pilot program are properly inspected at the US-Mexico border;
- **Driver and Truck Authorization Verification.** FMCSA has developed a system by which to allow it and state enforcement officers to verify that a truck and driver are authorized to operate beyond the border commercial zones. This system includes an online query database and visor cards issued to the trucking companies and carried by the drivers;
- **Electronic Monitoring Devices.** FMCSA has contracted a supplier of these devices and has developed a plan to install them in Mexican trucks once the carrier receives authorization to participate in the program;
- **Training for Inspections and Enforcement Personnel.** FMCSA provided webinars to state law enforcement to explain the pilot program's policies and procedures to be followed upon encountering participating trucks/drivers, and trained auditors to carry out PASAs and compliance reviews.

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Now that FMCSA has addressed all of DOT OIG's concerns, Secretary LaHood's letter posits that DOT has satisfied all statutory requirements for the formal initiation of the pilot program.

Articles 1108 and 1206 of NAFTA, as well Annex I ("Reservations for Existing Measures and Liberalization Commitments") provide for the liberalization of cargo trucking services in US and Mexican border states by December 18, 1995 with such liberalization intended to encompass the entire territories of both countries by January 1, 2000. With the exception of the period between April 27, 2007 and March 11, 2009 when the US and Mexican Governments collaborated on the implementation of a pilot cross-border trucking program that allowed a limited number of Mexican trucking companies access to US territory, the United States has not fulfilled its obligations under NAFTA pertaining to granting national and/or most favored nation (MFN) treatment to Mexican firms engaged in cross-border transport of cargo. In March 2009, in response to the United States' alleged failure to fulfill its NAFTA obligations, Mexico's Secretary of Economy (SE) sought and won before the NAFTA Dispute Settlement Panel the right to impose retaliatory import duties on certain US goods. However, in July 2011, DOT arrived at a broad framework agreement with Mexican authorities for the implementation of a cross-border trucking pilot program and, in response, Mexico tentatively agreed to phase out the retaliatory tariffs imposed.

Despite the apparent progress made recently to resolve this US-Mexico dispute, experts note that it remains unclear when the United States will actually implement the cross-border trucking pilot program. In statements made on October 6, 2011, Mexican Secretary of Economy (SE) Bruno Ferrari welcomed Secretary LaHood's efforts but expressed caution toward assuming that the dispute is nearing its end. In his remarks, SE Ferrari noted that, under the July 2011 agreement, some Mexican trucks were to be authorized to operate beyond the border commercial zone by late September 2011 but that the US authorities have missed this deadline and that, should the United States not implement the pilot program by mid- to late-October, Mexico will again impose the retaliatory tariffs on US goods.

House and Senate Pass FTAs with Korea, Colombia and Panama; Bill Renewing GSP and TAA Clears Congress

On October 12, 2011 the House and Senate passed implementing legislation for three pending free trade agreements (FTAs) with Colombia, Korea and Panama. In addition, the House passed an amendment to the bill renewing the Generalized System of Preferences (GSP) that will renew certain lapsed provisions of Trade Adjustment Assistance (TAA). The Senate had already passed legislation to renew GSP and TAA on September 22, 2011. In light of the passage of the FTAs, on October 13, 2011, Korean President Lee Myung-bak congratulated both chambers of Congress and welcomed continued US-Korea cooperation and friendship.

The three pending FTAs' implementing bills were considered first in the House. Prior to the vote, Rep. Levin (D-MI) entered a motion to recommit the US-Colombia FTA's implementing bill to the House Ways and Means Committee in order to attach to it legislation addressing currency misalignment but the motion failed with a vote of 129-236. In largely bipartisan votes, the House passed the US-Colombia FTA's implementing bill (H.R. 3078) with a vote of 262-167, the US-Panama FTA's implementing bill (H.R. 3079) with a vote of 300-129, and the US-Korea FTA's implementing bill (H.R. 3080) with a vote of 278-151. Soon thereafter, the House passed by a vote

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of 307-122 an amendment to the GSP renewal bill (H.R. 2832)[3] renewing certain lapsed provisions of TAA. Minutes after the House passed all four measures, the Senate floor votes began on the implementing bills for the three FTAs. In similarly bipartisan votes, the Senate passed the US-Korea FTA's implementing bill (S. 1642) with a vote of 83-15, the US-Panama FTA's implementing bill (S. 1643) with a vote of 77-22 and the US-Colombia FTA's implementing bill (S. 1641) with a vote of 66-33.

In a statement following the votes, US Trade Representative (USTR) Ron Kirk noted that President Obama is expected to sign the three FTAs into law within the coming days. However, President Obama stated in the letter to Congress accompanying the implementing legislation he would not bring the US-Colombia FTA into law until Colombia has "implement[ed] key aspects of the [April 7, 2011 Labor] Action Plan," such that the prospects for near-term enactment of the FTA with Colombia remain unclear. Nonetheless, USTR Kirk stated that "USTR will commence immediately the necessary work to bring the agreements into force as soon as possible." Experts note that the strong bipartisan support for the three FTAs, as can be observed in the House and Senate vote counts, demonstrate that the true delay in passing the Agreements was not a result of a lack of sufficient support among lawmakers and voters. Rather, the delay stemmed from the Obama Administration's efforts to incorporate its trade policy, which places heavy emphasis on issues such as labor protection, into the FTAs. Consequently, while the FTAs' passage augurs well for the acceptance of future comparable free trade initiatives among lawmakers and voters, experts note that the Obama Administration is likely to continue to require high standards on "non-trade" issues, which may prolong future trade agreement negotiations. Experts note that this is likely to prove true within the context of the Trans-Pacific Partnership (TPP), the completion of which will also likely be hindered by looming 2012 Presidential election.

Deputy USTR Marantis Gives Update on TPP Negotiations

On October 14, 2011, Deputy US Trade Representative (USTR) Demetrios Marantis updated the Washington International Trade Association (WITA) on progress made in the Trans-Pacific Partnership (TPP) negotiations. According to Deputy USTR Marantis, the USTR has "followed through" on its commitment to actively consult with stakeholders regarding its efforts to build regional economic integration in the Asia-Pacific region through TPP.

In his prepared comments and answers to audience members' questions, Deputy USTR Marantis addressed the successes and challenges of TPP negotiations. According to Deputy USTR Marantis, since USTR Ron Kirk notified Congress that the United States would join TPP in December 2009, USTR has tabled text in more than 20 negotiating groups, including but not limited to, financial services, intellectual property rights, government procurement, investment and environment. Within each of these negotiating groups, USTR is using "new and innovative approaches." For example, the United States proposed including new obligations in TPP that address illegal trade in fisheries, wildlife and logging. In addition, Deputy USTR Marantis mentioned efforts to address issues such as transparency and regulatory coherence within the small- and medium-sized enterprises (SMEs) text, which have hitherto made it difficult for US businesses to take full advantage of the opportunities offered by free trade agreements (FTAs).

[3] The GSP-TAA legislation renews the GSP program through July 31, 2013 and applies tariff benefits retroactively

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Deputy USTR Marantis also acknowledged areas in which TPP negotiations have encountered obstacles. The varying levels of development of the countries party to the TPP have resulted in divergent priorities and abilities to undertake commitments. Nonetheless, Deputy USTR Marantis noted that the United States has provided assistance to TPP member countries that will help ensure they are able to implement their TPP commitments. He also mentioned that negotiations regarding services, and financial services in particular, have proven difficult to conclude. Significant challenges have also arisen over texts regarding issues such as disciplines for state-owned enterprises (SOEs), an issue the United States has never before addressed within the context of an FTA. USTR decided not to table its SOE proposal at the 8th round of TPP negotiations in favor of additional stakeholder consultations. In his October 14 comments, Deputy USTR Marantis stated that USTR would table its SOE proposal during the 9th round of negotiations.

Looking ahead, Deputy USTR Marantis stated that TPP member countries are "on track" to reach the broad outlines of an agreement by the Asia Pacific Economic Cooperation (APEC) Leaders Summit, which will be held from November 12-13, 2011 in Honolulu, Hawaii. He added that "there will be outstanding work beyond Hawaii." When asked whether USTR is ready to ask Congress to renew Trade Promotion Authority (TPA), a fast-track procedure by which Congress can pass the implementing legislation for FTAs, Deputy USTR Marantis noted that the Obama Administration would seek TPA "at the appropriate time."

The 9th round of TPP negotiations takes place from October 19-28, 2011 in Lima, Peru. On October 19 sources noted that USTR circulated its updated SOE proposal to TPP member countries. Despite this development, experts note that USTR has signaled that it is unlikely to also table its proposal on labor during the 9th round. Regardless of what additional texts are tabled, experts note that negotiators will have to achieve significant results on controversial issues, as the 9th round is the last round of TPP negotiations before the APEC Leaders Summit takes place in November 2011.

United States Implements Pilot Cross-Border Trucking Program; Mexico Lifts Remaining Retaliatory Tariffs Imposed on US Goods

On October 21, 2011, the Mexican Secretary of Economy published a notice in the *Official Gazette*, abrogating the import tariffs imposed on certain US goods in retaliation for the United States not allowing Mexico-domiciled motor carriers ("Mexican Trucks") to operate in US territory. SE's abrogation of the remaining retaliatory tariffs coincided with the first Mexican truck entering US territory.

Articles 1108 and 1206 of NAFTA, as well Annex I ("Reservations for Existing Measures and Liberalization Commitments") provide for the liberalization of cargo trucking services in US and Mexican border states by December 18, 1995 with such liberalization intended to encompass the entire territories of both countries by January 1, 2000. With the exception of the period between April 27, 2007 and March 11, 2009 when the US and Mexican Governments collaborated on the implementation of a pilot cross-border trucking program that allowed a limited number of Mexican trucking companies access to US territory, the United States has not fulfilled its obligations under NAFTA pertaining to granting national and/or most favored nation (MFN) treatment to Mexican firms engaged in cross-border transport of cargo. In March 2009, in response to the United States' alleged failure to fulfill its NAFTA obligations, Mexico's Secretary of Economy (SE) sought and won before the NAFTA Dispute Settlement Panel the right to impose retaliatory import duties on certain US goods.

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In July 2011, the US Department of Transportation (DOT) arrived at a broad framework agreement with Mexican authorities for the implementation of a cross-border trucking pilot program and, in response, Mexico tentatively agreed to phase out the retaliatory tariffs imposed. In order to comply with US statutory requirements and implement the pilot program as agreed under the broad US-Mexico framework agreement, however, DOT needed to address outstanding concerns relating to the safety of Mexican trucks such as: (i) execution of safety audits and compliance reviews; (ii) coordinating with US Customs and Border Patrol (CBP); (iii) verifying driver and truck authorization; (iv) employing electronic monitoring devices; and (v) training inspection and enforcement personnel. DOT Secretary Ray LaHood notified Senate and House leadership on October 6, 2011 that DOT had fulfilled the safety-related statutory requirements required to initiate the pilot program and, on October 14, 2011, DOT issued the first cross-border authorization to a Mexican trucking company.

In an official statement, SE noted that the pilot program is only the first step toward an eventual authorization for Mexican trucks to operate unhindered in US territory. Furthermore, SE asserted that the Mexico reserves the right to re-establish retaliatory tariffs should the United States again breach its cross-border trucking-related obligations under NAFTA.

TPP Members Conclude Ninth Round Negotiations in Peru; Broad Outline Agreement Expected for November 2011 APEC Summit

On October 28, 2011, the nine members[4] of the Trans-Pacific Partnership (TPP) concluded the ninth round of negotiations in Peru. During the negotiations, the United States tabled its proposed language on state-owned enterprises (SOEs) and labor, and defended its previously-submitted intellectual property rights (IPR) proposal. As the last round of negotiations before the November 11-12, 2011 Asia-Pacific Economic Cooperation (APEC) Summit, which will be held in Hawaii, United States, TPP members also used the ninth round as an opportunity to take stock of where progress has been made and where progress will need to be made after the APEC Summit.

Area-specific negotiating groups met to discuss such disciplines as investment, customs procedures, cooperation, environment, personnel mobility, (financial) services, rules of origin (ROO), sanitary and phytosanitary (SPS) measures, technical barriers to trade (TBTs), government procurement, competition and e-commerce. In regard to the US negotiating agenda, we provide below a few highlights of USTR's activity during the round:

- **Horizontal issues.** USTR asserts that members made "considerable progress" on such horizontal issues as regulatory coherence, competitiveness, small- and medium-sized enterprise (SME) insertion and development. The Obama Administration has made the inclusion of language on these horizontal issues a centerpiece of the US TPP negotiating agenda. In remarks to stakeholders, USTR has characterized such issues as key elements of a "21st century" trade agreement. However, consensus on specific horizontal issues such as regulatory coherence remains elusive as certain TPP members continue to express concern that harmonizing regulation across the TPP members could pose conflicts with existing domestic measures.

[4] TPP member countries include the United States, Australia, New Zealand, Peru, Chile, Brunei, Singapore, Malaysia, and Vietnam.

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- **SOEs.** Sources note that USTR decided not to table its SOE proposal during the eighth round of TPP negotiations due to opposition from the US business community regarding a provision of the text which would have allowed governments to create new SOEs that could be exempt from the proposed disciplines. Sources further note that USTR addressed this issue after the eighth round and tabled a revised text on the first day of the ninth round of TPP negotiations. USTR asserts that its proposal on SOEs stems from close consultation with US domestic stakeholders and lawmakers, and is designed to "level the playing field" for US exporters and workers by addressing distortions to trade and competition resulting from "unfair" advantages governments afford SOEs. Sources note that initial discussions on USTR's SOE text were constructive, although there remain significant differences in this regard between the US position and that of certain TPP members, particularly Vietnam.

- **Labor.** Despite intercessional statements suggesting the contrary, USTR tabled its proposal on labor rights during the ninth round of TPP negotiations. That the United States tabled its proposals for both SOEs and labor before the APEC summit represents progress, as both areas are considered among the more contentious of those covered in TPP. Although USTR asserts that negotiators had a "productive exchange" regarding the proposal during the ninth round, experts claim that more substantive negotiations regarding the proposal are not likely to commence until after the APEC Summit. In addition, sources note that the US proposal tabled in Peru is incomplete such that USTR will need to table supplemental text on specific labor issues in later rounds.

- **IPR.** Members continued discussions on the US IPR proposal, which USTR asserts achieves the goals of the IPR-related provisions of the May 10 agreement.[5] However, sources note that several negotiating members, principally Peru, have challenged the US IPR proposal, alleging that the pharmaceutical patent protections contained therein are excessively strong in the areas of patent term extensions, data exclusivity and patent linkage. In contrast, experts note that the patent protections contained in the US IPR proposal are weaker than those contained in the US-Korea FTA.

- **Market access.** The Parties met both collectively, and bilaterally with the United States, to discuss market access offers. According to sources, US negotiators are continuing to pursue the negotiation of a new market access schedule only with countries with which the United States does not already have FTAs in effect. Such TPP members as Australia, which has an FTA in effect with the United States, object to this approach, arguing that the United States closing the door to renegotiating existing market access schedules provides little incentive for current US FTA partners to make concessions in other areas. US officials assert that a future partial renegotiation of existing market access schedules should not be ruled out but that USTR's near-term focus for market access is on engaging those TPP members without an FTA with the United States.

- **SMEs.** US negotiators participated in an event aimed at creating opportunities for SMEs to develop business across the TPP countries. At the event, US negotiators informed stakeholders of progress made in

[5] The May 10 issues, a compromise deal reached in 2007 by then President Bush with House Democrats to break a partisan stalemate on the US-Peru and US-Panama Free Trade Agreements (FTAs) and allow for their consideration in Congress, provided for the inclusion in pending and future FTAs of core international labor and environmental protection standards and loosened IPR provisions

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negotiating provisions relevant to SME insertion and received input from these stakeholders on further SME-specific concerns. A key pillar among the agreement's horizontal issues, the Obama Administration has lent considerable importance to SME insertion in the context of the TPP negotiations.

Since TPP members acknowledged that they would not be able to meet the original goal of concluding negotiations on the Agreement by the November 2011 APEC Summit, the Obama Administration has made significant efforts to manage stakeholder expectations. At first, the Obama Administration stated that the TPP parties would have a "framework Agreement" by the Summit; starting in mid-2011 they began to state that the parties would present the "broad outlines" of the Agreement at the Summit. Experts note that, while the outlines of the Agreement presented to APEC leaders will likely address the majority of the topics that TPP negotiators have agreed should be included in the final Agreement, the outlines of the Agreement will likely lack the key details needed to resolve the more contentious issues associated with topics such as market access and rules of origin. These experts further note that the November 2012 US presidential elections will make it difficult for negotiators to make significant progress on the TPP over the next 12 months, as US negotiators will hesitate to commit to ambitious language that may draw criticism from President Obama's already trade-skeptic electoral base. Also complicating the prospects for near-term progress on the TPP is Japanese Prime Minister Yoshihiko Noda's expected announcement during the November 2011 APEC summit that Japan will pursue accession to the TPP negotiations. Japan's decision regarding TPP, which was originally expected in mid-2011, was delayed by the March 2011 earthquake and tsunami.[6] Japan's accession represents an added challenge to progress on the Agreement, as Japan may not be willing to fully accept the provisions of the Agreement that have already been agreed to by the other nine TPP members and, aware of the importance of its sizable consumer economy, could bring steep demands to the negotiating table that will add another degree of difficulty to the consensus-building efforts of the negotiators.

Despite these potential complications, the parties have agreed on a tentative schedule for 5 more negotiating rounds beyond the November 2011 APEC Summit, the first of which will be held in March 2012.

[6] Worthy of noting is that Prime Minister Noda faces considerable domestic challenges to this pursuit as TPP members have long since insisted that, as a condition to its accession, Japan scale back its farm support and push for liberalization and further deregulation across several sectors, two areas which face strong domestic opposition.

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