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UNITED STATES

GENERAL TRADE POLICY

US General Trade Policy Highlights

Deputy USTR Punke Participates in India's WTO Trade Policy Review

On September 14, 2011, Deputy US Trade Representative (USTR) Michael Punke provided comments on India's trade and trade-related policies at India's fifth Trade Policy Review (TPR), which took place from September 14-16, 2011 at the World Trade Organization (WTO) headquarters in Geneva, Switzerland. TPRs are an exercise, mandated by the WTO Agreements, in which member countries' trade and related policies are examined and evaluated at regular intervals.

In his statement, Ambassador Punke highlighted the increasingly important trading partnership between the United States and India with his statement that "[t]he total value in goods between our two countries has increased over threefold since 2001, with over half of that coming in the last five years despite the recent global economic downturn." Ambassador Punke also congratulated India that its 8.4 percent average growth has played a crucial role in the expansion of the country's middle class.

Despite India's impressive growth rate, Ambassador Punke noted that the United States continues to encourage India to increase the openness of the country's trading regime so that the country can better harness the benefits of trade. He cited a number of policy areas over which the United States has expressed particular concern, including:

- **Government Procurement.** Although the United States welcomes India's decision to become an observer to the WTO Government Procurement Agreement (GPA), Ambassador Punke expressed frustration that the Indian government has recently restricted certain areas of government procurement to Indian goods and services;

- **Intellectual Property Rights (IPR)**. In his statement, Ambassador Punke noted that India's IPR policies continue to fall short of international best practices;

- **Import Policies**. Ambassador Punke encouraged India to reduce "exceedingly high" tariffs and remove sanitary and phytosanitary measures (SPS) and Technical Barriers to Trade (TBT) "with no scientific or other justifiable basis under the WTO Agreements" on agricultural imports. He also cited India's National Solar Mission as an example of a case in which the Indian government has adopted policies that prohibit imports entirely;

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- **Export Policies**. In his statement, Ambassador Punke noted that the United States is disappointed that India has pursued a series of "trade-distorting export incentives," especially in sectors such as textiles and apparel, where India committed to gradually phase out export subsidies starting in 2007;

- **Foreign Direct Investment (FDI)**. According to Ambassador Punke, the United States is disappointed that India has recently signaled that it may impose FDI caps or other investment restrictions in sectors such as pharmaceuticals and banking; and

- **Transparency**. Although Ambassador Punke congratulated India on the steps it has taken towards improving the transparency and effective functioning of its policymaking institutions, he noted that the United States continues to be concerned about the lack of transparency in many aspects of India's trade policy. Most notably, Ambassador Punke stated that "[i]n addition to India's failure to submit required notifications to the WTO, particularly in the areas of agriculture, subsidies, SPS and TBT, India does not regularly issue draft regulations or engage in the timely public consultations that would ensure the development of sound policies in matters regarding trade and investment."

Ambassador Punke encouraged India to address these areas of concern by implementing meaningful economic reforms that embrace an open trade policy. Experts note that the United States is likely to broach some of these issues with India again when the two countries resume Bilateral Investment Treaty (BIT) negotiations, which were originally scheduled to resume in August 2011.

USTR Requests Comments on Trade and Investment Partnership Initiative with Middle East and North Africa Region

On September 7, 2011, the US Trade Representative (USTR) published a notice in the Federal Register (FR), seeking comments in regard to the possible launching of the Trade and Investment Partnership Initiative to bolster trade within the Middle East and North Africa (MENA) region and promote greater MENA integration with the United States ("Initiative"). The FR notice states that the Initiative is meant to "further reinforce cooperation with, and expand economic ties to a part of the world undergoing profound change." USTR will receive concrete and specific ideas from interested stakeholders regarding the Initiative until October 15, 2011.

According to the FR notice, the MENA region has a population of over 400 million, an expanding regional gross domestic product (GDP) exceeding USD 2.4 million and USD 1 trillion in various sovereign investment funds, which supposes "significant potential opportunities for US exporters and investors." The notice states that, pursuant to President Obama's May 19, 2011 speech, the Trade and Investment Partnership Initiative for the MENA region is meant to: (i) facilitate more trade within the region; (ii) build on existing agreements to promote integration with US and European markets; and (iii) open the door for those countries that adopt high standards of reform and trade liberalization to construct a regional trade agreement. In regard to the specific focus areas to be covered in the Initiative, the FR notice lists several possibilities, including: (i) technical barriers to trade in goods; (ii) services; (iii) agriculture; (iv) trade facilitation; (v) investment; (vi) intellectual property; (vii) transparency; and (viii) small- and medium-sized enterprises.

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Despite the FR notice"s general nature, experts note that additional details regarding the possible scope and design of the Initiative have surfaced since President Obama"s May 19 speech. USTR Ron Kirk noted in his July 26, 2011 remarks made at the Bretton Woods Committee meeting that the Initiative could include features similar to those contained in both the African Growth and Opportunity Act (AGOA) and the Trans-Pacific Partnership (TPP). Other sources have noted that the initial phase of the Initiative will most likely focus on: (i) boosting the economic stability of Tunisia and Egypt during their respective political transitions; and (ii) enhancing intra-regional cooperation among the countries with which the United States already has a free trade agreement (FTA), namely Israel, Jordan, Morocco, Bahrain and Oman. Although the conceptual phase of the Initiative is already underway, experts note that continuing instability as a result of the so-called "Arab Spring" may prevent USTR from transitioning to the implementation phase of the Initiative at as rapid a pace.

USTR Welcomes WTO Appellate Body Decision to Uphold Panel Ruling on Chinese Tire Imports

On September 5, 2011 US Trade Representative (USTR) Ron Kirk issued a statement applauding the World Trade Organization (WTO) Appellate Body decision to uphold in full the WTO Panel decision of December 13, 2010, which rejected China"s legal claims against the US government"s use of a safeguard measure to impose additional duties on imported Chinese passenger vehicle and light truck tires. According to USTR Kirk, "We have said all along that President Obama"s decision to impose duties on Chinese tires was fully consistent with our WTO obligations. A WTO Panel agreed with us and now the Appellate Body has confirmed it."

According to Section 16 of China"s WTO Accession Protocol ("Accession Protocol"), countries importing goods from China have the ability to impose safeguard measures on imports from China alone, using rules that are less stringent than the general multilateral disciplines set out in the WTO Agreement on Safeguards. Section 16 of the Accession Protocol was implemented into US law through the US-China Relations Act of 2000, which added Section 421 to the Trade Act of 1974 ("Trade Act"). This China-specific safeguard mechanism will expire in 2013, 12 years after China"s 2001 WTO accession.

On September 11, 2009 President Obama decided to impose additional duties on imports of certain tires from China for a period of three years. In addition to the normal 4 percent duty already applied to imported tires, an additional 35 percent duty was added to certain tires from China for the first year. The additional duty fell to 30 percent in the second year and will fall to 25 percent in the third and final year. The decision to impose the safeguard measure was made after the US International Trade Commission (ITC) found, in response to a petition brought by the United Steelworkers, that surging imports of Chinese tires had caused or were threatening to cause market disruption to US producers of like or directly competitive products.

China challenged the legality of the increased tariffs in front of the WTO Dispute Settlement Body (DSB). On December 13, 2010 the WTO Panel reported that the United States did not act inconsistently with its obligations under Section 16 of the Accession Protocol through its imposition of the safeguard measure on imports of certain tires from China. China appealed the ruling and on September 5, 2011 the Appellate Body released its report, which dismissed China"s challenge to the Panel"s ruling.

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More specifically, the Appellate Body report found, *inter alia*, that: (i) the Panel was correct in ruling that US authorities did not fail to properly evaluate whether imports of the targeted Chinese tires were "increasing rapidly" as required in Section 16 of the Accession Protocol; (ii) with respect to the particular causation standard set out in Section 16 of the Accession Protocol, the term "a significant cause" requires that rapidly increasing imports make an "important" or "notable" contribution in bringing about material injury to a domestic market; (iii) the Panel was correct in ruling that the ITC did not err in its assessment of the conditions of competition in the overall US tire market; (iv) the Panel was correct in its ruling that China failed to establish that the ITC improperly attributed injury caused by other factors to imports from China; (v) the Panel's finding that the ITC's reliance on overall coincidence between an upward movement in imports from China and a downward movement in injury factors supported the ITC's finding that rapidly increasing imports from China were a significant cause of material injury; and (vi) the Panel did not act inconsistently with Article 11 of the Dispute Settlement Understanding (DSU) in its review of the ITC's causation analysis.

Experts note that the WTO Panel and subsequent Appellate Body rulings on imports of Chinese tires establish an important precedent, as they mark the first time the WTO has ruled on the WTO-consistency of a safeguard measure under Section 16 of the Accession Protocol.

USTR Requests WTO Consultations With China Regarding Duties on Poultry

On September 20, 2011 US Trade Representative (USTR) Ron Kirk announced that the United States has asked for World Trade Organization (WTO) consultations with China regarding antidumping and countervailing duties China has imposed on US chicken "broiler products," which are both chicken products that are not cut into pieces, as well as various cuts and pieces. According to USTR Kirk, the Obama Administration's goal "is to [achieve] real results for American exporters and support American jobs that depend on trade, including as many as 300,000 poultry industry jobs potentially affected in this case."

Pursuant to the WTO Dispute Settlement Understanding (DSU), China and the United States now have 60 days to resolve their differences through consultations. In the event that the consultations fail to produce a satisfactory solution within 60 days, the United States can request adjudication on the issue by a WTO panel. According to USTR Kirk, "we always prefer to settle disputes with negotiation rather than litigation […] but we won't negotiate indefinitely, because US farmers, ranchers, small business owners, and workers can't afford to wait when their exports are being blocked and American jobs are at stake."

The Chinese government announced in April 2010 it would impose countervailing duties of between 4 and 31.4 percent on most US chicken imports. Five months later, in September 2010, the Chinese government announced that it would also levy antidumping duties of between 50.3 and 105.4 percent on imports of US chicken products. Sources note that US poultry producers sold roughly USD 650 million of chicken products to China in both 2008 and 2009, but shipments fell to approximately USD 136 million in 2010 and totaled only USD 37 million in the first half of 2011.

According to USTR, China's imposition of these duties violates numerous provisions under the General Agreement on Tariffs and Trade (GATT) as well as the WTO's Antidumping Agreement (ADA) and the WTO's

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Agreement on Subsidies and Countervailing Measures (SCM Agreement). More specifically, the United States is concerned that China failed to calculate the true cost of production based on data supplied by the US industry. According to a September 20, 2011 joint statement by the USA Poultry & Egg Export Council and the National Chicken Council, China used "average cost of production" to determine normal value, which reflects neither market realities nor the way in which companies in the industry commonly keep their accounts. In addition, the United States has accused the Chinese government of failing to undertake an objective evaluation of the causal link between the effect of the dumped and subsidized imports and the alleged injury suffered by Chinese producers.

When asked whether or not the Chinese government's imposition of duties on US chicken imports could be seen as a retaliatory action against US duty impositions, USTR General Counsel Timothy Reif stated "China has said publicly that they are using the countervailing duty, antidumping mechanism as a retaliatory tool." Several lawmakers, including Chairman of the House Ways and Means Subcommittee on Trade Kevin Brady (R-TX) and Chairman of the House Ways and Means Committee Dave Camp (R-MI) as well as Sen. Stabenow (R-MI), welcomed USTR's request for WTO consultations. According to Rep. Brady "China must abide by its international commitments—and when it does not—the United States should not hesitate to enforce its rights at the WTO."

Experts note that USTR's September 20 request reflects the Obama Administration's strong emphasis on the WTO dispute settlement body (DSB) as a key means of resolving its bilateral trade issues with China. Out of the 12 times that the United States has requested WTO consultations with China since China first joined the WTO in 2001, 7 have been initiated under the Obama Administration. The other cases initiated by the Obama Administration include DS 373 on financial information services, DS 387 on Chinese "famous brands," DS 394 on raw materials, DS 413 on electronic payment services, DS 414 on grain-oriented electric steel, and DS 419 on wind subsidies. According to USTR Kirk "[f]rom day one of the Obama Administration, we've been clear that when it comes to enforcement and China, we have one simple request of our Chinese partners: „live up to the promises you made when you joined the WTO.'" Nonetheless, experts also assert that the Obama Administration is likely using this WTO enforcement action against China as a means of securing the Democratic base before it moves forward with its consideration of the three pending free trade agreements with Korea, Colombia and Panama, which portions of the Democratic base, including organized labor, oppose.

Senate Prepares for Consideration of Currency Legislation

On September 26, 2011, House Senate Majority Leader Harry Reid (D-NV) scheduled a vote to invoke cloture on a motion to proceed to consideration of S. 1619 "Currency Exchange Rate Oversight Reform Act of 2011" ("S. 1619" or "bill") for October 3, 2011. The bill was introduced on September 22, 2011 by Sen. Sherrod Brown (D-OH) and is currently co-sponsored by a bipartisan group of 19 Senators.[1]

[1] S. 1619 is co-sponsored by Sens. Blumenthal (D-CT), Burr (R-NC), Cardin (D-MD), Casey (D-PA), Collins (R-ME), Conrad (D-ND), Gillibrand (D-NY), Graham (R-SC), Hagan (D-NC), Manchin (D-WV), Menendez (D-NJ), Nelson (D-NE), Reed (D-RI), Schumer (D-NY), Sessions (R-AL), Snowe (R-ME), Stabenow (D-MI), and Whitehouse (D-RI).

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According to Rule XXII of the Standing Rules of the United States Senate, a two-thirds majority, or 60 votes, is required to invoke cloture. If cloture is invoked on October 3, the Senate will have 30 hours to consider the motion to proceed to consideration of S. 1619. This timeframe can be extended by a three-fifths majority vote or shortened by unanimous consent. Once time has elapsed, the Senate will vote on the motion. If the Senate approves the motion to proceed to consideration of S. 1619, debate over the bill itself will commence. If the Senate moves to consider the bill, it will be one of only two amendable trade bills to be brought to the Senate floor this year (the first was HR 2382 "To Extend the Generalized System of Preferences," passed by the Senate on September 22, 2011). As a result, sources expect that it will be the target of a number of amendments, both related and unrelated to currency manipulation unless Sens. McConnell (R-KY) and Reid agree to limit the amendments offered.

The bill is seen as a conglomeration of several pieces of past and current legislation, including, but not limited to HR 2378 "Currency Reform for Fair Trade Act," which was passed by the House in 2010 and S.1607 "The Currency Exchange Rate Reform and Oversight Act," which was passed by the Senate Finance Committee in 2007. The bill contains a number of key provisions which, if passed, 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."

Regarding (iii), S. 1619 lays out specific criteria upon which the Treasury Department must base its identification and obligates the US government to take action against those countries whose currencies are cited in the report. The Treasury Department is required to immediately engage in consultations with each country cited in the report. If countries with currencies the report identifies as "fundamentally misaligned currencies for priority action" do not adopt policies to eliminate the misalignment, S.1619 identifies specific actions that the US government must take immediately and, if the country still doesn't adopt the appropriate policies, 90 and 360 days afterwards. If the designated country has not adopted the necessary policies within 90 days the bill requires, *inter alia*: (i) DOC to reflect currency undervaluations in dumping calculations for products produced or manufactured in the designated country; and (ii) the US government to forbid the Overseas Private Investment Corporation (OPIC) from financing or insuring projects in the designated country. If the designated country has still not adopted the necessary policies within 360 days, the bill requires: (ii) the US Trade Representative (USTR) to request World Trade Organization (WTO) Dispute Settlement Body (DSB) consultations; and (ii) the Treasury Department to consult with the Federal Reserve Board in regard to remedial intervention in global currency markets.

Outside of the US government, reaction to the introduction of S. 1619 has been mixed. Labor unions such as AFL-CIO and the USW have lauded the bill. In contrast, a group of 51 trade associations wrote a letter to Sens. Reid and McConnell on September 21, 2011 calling the bill "counterproductive not only to the goals related to China's exchange rate that we all share, but also to our nations broader objectives of addressing the many and growing challenges that we face in China."

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Experts note that reaction from the Obama Administration and Congress has likewise been mixed and that, as a result, the bill"s chances for passage are far from certain. With respect to the Obama Administration, White House Press Secretary William Carney stated on September 28, 2011 that the Obama Administration "shares the goal of achieving further appreciation of China"s currency." Nonetheless, experts note that S.1619 runs counter to President Obama"s policy of engaging rather than confronting China on bilateral trade issues. On September 28, 2011, Sen. Hatch (R-UT) wrote a letter to President Obama calling on him to reveal his exact position on the bill. Experts note that because the bill has been portrayed by its supporters as essential to spurring US employment and protecting US competitiveness, the Obama Administration is unlikely to come out publically against it, and will more likely continue to discretely pressure members of Congress to prioritize consideration of the President"s American Jobs Act.

Sen. Reid has thus far neglected to schedule a vote on the American Jobs Act and has instead noted, "I don"t think there are any more important jobs measures than China trade." Sources note that while the support needed to pass S. 1619 may exist in the Senate, the legislation faces a more difficult path to passage in the House. Even though similar legislation, HR 639 "Currency Reform for Fair Trade," currently has 200 co-sponsors, experts note that House Speaker John Boehner (R-OH), in cooperation with House Majority Leader Eric Cantor (R-VA), and House Ways and Means Chairman David Camp (R-MI) have not yet publicly expressed support for the consideration of currency legislation. Without the support of these Congressmen, experts note that consideration of the legislation is unlikely. Although Rep. 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.

SEC Schedules Public Roundtable to Discuss Implementation of Dodd-Frank Conflict Minerals Provisions

On September 29, 2011 the US Securities and Exchange Commission (SEC) announced that it will host a public roundtable on October 18, 2011 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 was passed and made into law by the 111th Congress in July 2010. According to SEC Chairwoman Mary Schapiro, "[w]e are committed to writing an effective rule as soon as possible, and the roundtable will help us do that."

Section 1502 of the Dodd-Frank Act states that it is the sense of Congress that the exploitation and trade of conflict minerals such as gold, tin, tungsten and tantalum, originating from the Democratic Republic of Congo (DRC), have financed conflict in the eastern region of that country. In order to curtail the humanitarian crisis that has resulted from this conflict, Section 1502 of the Dodd-Frank Act requires, *inter alia*, that persons for whom conflict minerals are necessary to the functionality or production of a product manufactured by that person file an annual disclosure report with the SEC, stating whether any such conflict minerals originated in the DRC or a contiguous country. If a person reports that minerals from the region were used, it must also report: (i) the due diligence measures taken on the source and chain of custody of such minerals; and (ii) the products manufactured, or contracted to be manufactured, that are not "DRC conflict-free." The Act defines "DRC conflict-

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free" as products that do not contain minerals that directly or indirectly support the operations of armed groups in the region.

In order to implement Section 1502 of the Act, the SEC proposed changes to the annual reporting requirement of issuers that file reports pursuant to Section 13(1) or 15(d) of the Securities Exchange Act of 1934. The SEC published these proposed changes in the Federal Register (FR) on December 23, 2010 and requested that stakeholders submit comments on the proposal through January 31, 2011. In the notice, the SEC also 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 published an FR notice 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 Chairwoman Schapiro on September 23, 2011, five Democratic lawmakers[2] urged the SEC to issue the final rule for Section 1502 "as soon as possible." According to the letter, "[u]nless the regulations are promulgated soon, we risk missing an entire year of implementation, since the law requires companies to begin reporting in the first fiscal year after regulations are finalized. For many companies, the fiscal year begins in January." In addition, the letter urges the SEC not to weaken the final implementing rule. More specifically, the lawmakers call on the SEC to require the following in its final rule: (i) the full and immediate implementation of the reporting requirements; (ii) the use of only two different mineral identifications in the annual reports: "DRC conflict-free" and "Not DRC conflict-free;" (iii) the utilization of the Organization for Economic Cooperation and Development (OECD) due diligence standard; (iv) equal reporting standards for all conflict minerals; and (v) all manufacturing companies to participate in the reporting process.

On July 22, 2010 the US Court of Appeals ruled against the SEC in *Business Roundtable v. Securities and Exchange Commission* with its rejection of an SEC rule, mandated by the Dodd-Frank Act, that would have allowed investors or shareholder groups that own at least 3 percent stock for 3 years to put their own board nominees on proxy statements. In order to avoid similar legal challenges in the future, experts note that the SEC is now more carefully considering how to proceed with the remaining Sections of the Dodd-Frank Act it is required to implement. By hosting a roundtable, experts note that the SEC is hoping to mitigate current tensions between SEC issuers and human rights organizations regarding the requirements of the final rule.

US and Philippines Hold TIFA Meeting

From September 22-23, 2011 the United States and the Philippines held a Trade and Investment Framework (TIFA) meeting in Washington, DC. According to US Trade Representative (USTR) Ron Kirk, who met with Philippine Secretary of Trade and Industry Gregory Domingo on September 21 to open the TIFA meeting, the Philippines and the United States share a commitment to the promotion of trade between their two countries as a means of creating more opportunities for their citizens.

[2] 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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The USTR states that two-way trade in goods between the United States and the Philippines was valued at USD 15 billion in 2010. The Philippines is a significant market for a number of US exports including agricultural products, *e.g.* wheat and soybeans, as well as services. The United States and the Philippines meet regularly through the US-Philippines TIFA, which was signed in November, 1989, to discuss different aspects of their bilateral trade relationship and coordinate on issues related to the World Trade Organization (WTO), Asia-Pacific Economic Cooperation (APEC), and Association of Southeast Asia Nations (ASEAN).

According to USTR, the United States and Philippines discussed the key bilateral trade issues of customs and intellectual property during the TIFA meeting. Other bilateral trade issues covered included agriculture and trade and labor issues. In addition, the Philippines and the United States discussed the upcoming November 2011 APEC Leaders" Summit. Ambassador Kirk also briefed Secretary Domingo on progress being made in the Trans-Pacific Partnership (TPP) negotiations, which the Philippines has expressed interest in eventually joining. The USTR has outlined long-term structural reforms that the Philippines must make with respect to government procurement and constitutional provisions in order to join TPP. On the Philippine side, the Department of Trade and Industry continues to consult with relevant government agencies, members of Congress, the private sector, and members of civil society to find ways to review existing domestic regulations and legislation in order to meet the standards of the TPP Agreement. However, it predicts that strengthening these laws will require a five to eight year process. For this reason the Philippines plans to engage in consultations with other TPP partners to gauge their needs and find ways to learn how the Philippines can meet each party"s standards.

Lastly, the two countries discussed the Partnership for Growth (PFG), an initiative aimed at promoting broad-based economic reform in the Philippines. Although the program is still in its planning phase, USTR has stated that the PFG will be also used as a means of preparing the Philippines to join TPP.

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FREE TRADE AGREEMENTS

President Obama Submits to Congress Pending FTAs with Korea, Colombia and Panama

On October 3, 2011, President Obama formally submitted to Congress the implementing legislation for the three pending free trade agreements (FTAs) with Korea, Colombia and Panama. Congressional Republicans largely welcomed the submission of the FTAs‟ implementing bills while reaction was mixed among Congressional Democrats, industry groups and organized labor representatives. The FTAs‟ implementing bills are expected to pass in both the House and the Senate and, barring unforeseen delays, could be ratified before Korean President Lee Myung-bak‟s state visit to the United States, which commences on October 13, 2011.

Analysis

President Obama formally submitted to Congress implementing language for the three pending free trade agreements (FTAs) with Korea, Colombia and Panama after having arrived at a compromise with lawmakers on passage of certain lapsed provisions of the Trade Adjustment Assistance (TAA) program. We provide below analysis on this reported compromise, the legislative vehicle through which the FTAs‟ implementing legislation will be considered, additional measures included in this legislation and reaction to its submission:

I. COMPROMISE DEAL ON TAA

In May 2011, the Obama Administration announced that it would condition its submission of the FTAs‟ implementing bills to Congress on the renewal of a bolstered version of TAA.[3] Congressional Republicans objected to the renewal of a bolstered TAA, citing ineffectiveness and abuse of the program as well as its inflated cost, particularly in the context of concerns over untenable US government spending levels and debt load. After an impasse of more than three months, the US Senate passed a bill (H.R. 2832) on September 22, 2011 to extend the Generalized System of Preferences (GSP) through July 31, 2013,[4] with an amendment renewing certain lapsed provisions of the Trade Adjustment Assistance (TAA) program. The TAA/GSP package bill was subsequently sent to the House for consideration, where a stand-off ensued between the Republican leadership, which insisted that the FTAs‟ implementing bills be submitted to Congress before House consideration of the TAA/GSP package bill, and the Obama Administration, which insisted that the House pass the TAA/GSP package bill before it makes its submission.

[3] The scope and cost of TAA was expanded under the 2009 American Recovery and Reinvestment Act (ARRA), *i.e.*, the 2009 stimulus bill, to include US service workers displaced by off-shoring, agricultural workers and workers not otherwise affected by imports under an FTA to which the United States is party. However, the bolstered TAA provisions contained in the 2009 ARRA expired on February 13, 2011.

[4] H.R. 2832 contemplates retroactive application of tariff preferences under the GSP program as well as an increase in customs user fee from 0.21 to 0.3464 *ad valorem*

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The stand-off ended after President Obama reportedly received assurances from Speaker of the House John Boehner (R-OH) that the TAA/GSP package bill would be considered in tandem with the FTAs‟ implementing bills, were the Obama Adminstration to submit them to Congress. Additionally, the House Rules Committee met on October 3, 2011 to establish guidelines for such tandem consideration, thus reinforcing the assurances given to President Obama.

Consideration under TPA Procedural Rules

Under Trade Promtion Authority (TPA) procedural rules, the committees to which the FTAs‟ implementing bills are referred (principally the House Ways and Means and the Senate Finance Committees) have 45 legislative days to consider the bills before they are automatically discharged and/or reported to the floor of each chamber, where a vote must occur within 15 legislative days. In this regard, lawmakers may not amend the bills, be it in committee or on the chamber floor, and debate is limited to 20 hours, thus avoiding the threat of a filibuster, *i.e.*, right to unlimited debate.

Shortly after President Obama submitted to Congress the FTAs‟ implementing bills on October 3, 2011, House Ways and Means Committee Chairman Dave Camp (R-MI) scheduled a full committee markup of the bills for October 5, 2011. Senate Finance Committee Chairman Max Baucus (D-MT) has committed to holding a similar markup session after the House passes the TAA/GSP package bill, a position also held by by Senate Majority Leader Harry Reid (D-NV).

There have been questions surrounding the TPA-eligibility of the US-Korea and US-Colombia FTAs:

- **US-Korea FTA.** The United States and Korea reached a supplemental agreement on autos on December 3, 2010 after TPA expired in July 2007, thus raising questions as to the TPA-eligibility of the entire agreement. Experts do not, however, expect any point of order to be raised to block consideration of the Agreement with Korea under TPA rules; and

- **US-Colombia FTA.** In 2008, Speaker of the House Nancy Pelosi (D-CA) successfully led an effort to strip the US-Colombia FTA of its full TPA protection after President George W. Bush submitted its implementing legislation to Congress. However, experts note that the Senate Parliamentarian will likely find that the resubmission of the US-Colombia FTA will trigger TPA protection in the Senate, and House leadership can push a closed rule, effectively applying TPA protection to the implementing bill.

The FTAs‟ implementing bills are therefore not expected to face major challenges in regard to their TPA-eligibility.

II. CONTENT OF IMPLEMENTING BILLS

The FTAs‟ implementing bills submitted to Congress by President Obama reflect the three concluded agreements negotiated between the United States and the three respective parties. Additionally, the bills incorporate the following provisions:

- **Customs User Fees.** Section 503 of the US-Korea FTA implementing bill, titled “Rate for Merchandise Processing Fees,” provides for the customs user fees to be increased from 0.21 to 0.3464 *ad valorem*. This

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rate increase mirrors that included in H.R. 2832, and is included to offset the cost of the FTAs in terms of lost import duty revenue; and

- **ATPA.** Section 501 of the US-Colombia FTA, titled "Extension of the Andean Trade Preference Act [(ATPA)]," provides for this preference program to be extended through July 31, 2013, (when GSP will also expire under the TAA/GSP package bill) and for tariff preferences afforded under the program to apply retroactively on certain customs entries.

The US-Colombia and US-Panama FTA implementing bills also include provisions on import relief, particularly textile and apparel safeguard measures, under which US industries may enjoy relief if it is found that imports of Colombian and Panamanian articles constitute a case of substantial injury (or threat thereof) to the domestic industry producing a similar article. The US-Korea FTA implementing bill includes similar import relief language, in addition to a provision on safeguard measures concerning motor vehicle imports from Korea.

III. REACTION TO SUBMISSION OF THE FTAS' IMPLEMENTING BILLS

Congressional Republicans largely welcomed the FTA implementing bills"s submission. However, reaction was mixed among Congressional Democrats, industry groups, and organized labor representatives:

- **Senate Minority Leader Mitch McConnell (R-KY)** welcomed the submission of the FTAs" implementing bills, stating that he "looks forward to passing them through the Senate in short order;"

- **Senate Finance Committee Ranking Member Orrin Hatch (R-UT)** lauded the Obama Administration"s submission of the FTAs" implementing bills, stating that "the President should have sent these three long-stalled trade agreements years ago [as] [t]hey represent thousands of American Jobs and billions of dollars in US exports;"

- **Senate Finance Committee Chairman Max Baucus (D-MT)** hailed the submission of the FTAs" implementing bills, stating that "the next step is to approve [the implementing bills] and for the House to [pass TAA renewal] at the same time;"

- **Chairman of the Senate Foreign Relations Committee John Kerry (D-MA)** welcomed the submission of the FTAs" implementing bills, urging Congress to "consider and approve [them] as soon as possible;"

- **Speaker of the House John Boehner (R-OH)** hailed the submission of the FTAs" implementing bills and stated that they will be considered and voted on "consecutively and in tandem with Senate-passed TAA legislation;"

- **House Majority Leader Eric Cantor (R-VA)** welcomed the submission of the FTAs" implementing bills, stating that he "looks forward to swift action from the Senate and the [Obama Administration] to implement [the FTAs];"

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- **House Ways and Means Committee Ranking Member Sander Levin (D-MI)** lauded the Obama Administration for having submitted the implementing bills for the FTAs, which "Democrats [fixed][5] so that they work for US businesses and workers and spread the benefits of trade more broadly;"

- **House Ways and Means Subcommittee on Trade Jim McDermott** hailed the submission of the implementing bills for the US-Korea and US-Panama FTAs, but stated that he will not support the US-Colombia FTA as "the [Obama] Administration's efforts have fallen short and failed to address union violence and impunity [in Colombia];"

- **The New Democrat Coalition**, comprising 42 Democratic House lawmakers, welcomed the submission of the FTAs' implementing bills, stating that it is "committed to working with the [Obama] Administration to move the [FTAs] forward to help [the United States] compete in the global market place;"

- **Representatives from the US Dairy Export Council and the National Milk Producers Federation** lauded the Obama Administration for having submitted the implementing bills for the FTAs, stating that the FTAs "have the potential to expand US exports and create thousands of export-supporting jobs in the US dairy industry;"

- **Chairman John Negroponte of the Council of the Americas**, an organization with broad US corporate membership, welcomed the submission of the FTAs' implementing bills, stating that the FTAs "provide better [market] access to [Korea, Colombia and Panama];"

- **US Chamber of Commerce President and CEO Thomas Donahue** lauded the Obama Administration for having submitted the implementing bills for the FTAs, adding that "the Chamber [also] supports the bipartisan compromise on TAA;"

- **Chairman Harold McGraw of the Emergency Committee on American Trade**, a coalition with broad US corporate membership, urged "Congress to consider and pass" the FTAs' implementing bills, GSP renewal and TAA;"

- **National Cattlemen's Beef Association President Bill Donald** welcomed the submission of the FTAs' implementing bills, stating that implementation of the FTAs will "create roughly 250,000 [US] jobs;"

- **National Foreign Trade Council President Bill Reinsch** lauded the Obama Administration for having submitted the implementing bills for the FTAs, urging Congress "to approve the [FTAs' implementing bills] as soon as possible;"

- **Coalition of Service Industries Chairman Bill Topeta** welcomed the submission of the FTAs' implementing bills, stating that the FTAs will "open up key new markets for US service providers;"

[5] Rep. Levin refers to the April 7, 2011 Labor Action Plan reached between the United States and Colombia, and the December 3, 2010 supplemental agreement on automobiles reached between the United States and Korea

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- **Motion Picture Association of America Senior Executive Vice President Michael O'Leary** lauded the Obama Administration for having submitted the implementing bills for the FTAs, urging Congress to approve the FTAs' implementing bills in order to open markets for the US entertainment industry and further protect US movies from IP theft;

- **US Meat Export Federation President and CEO Philip Seng** welcomed the submission of the FTAs' implementing bills, stating that the FTAs will "ensure a level playing field for US [meat] exports internationally;"

- **AFL-CIO President Richard Trumka** criticized President Obama's submission of the FTAs' implementing bills, stating that the Agreements are flawed and will "further hasten the decline of the [US] middle class;" and

- **Head of the House Working Group on Trade Michael Michaud (D-ME)** lamented the submission of the FTAs' implementing bills, stating that the FTAs "are bad for the middle class and will not create [US] jobs."

Outlook

Experts note with a good measure of confidence that all three FTAs enjoy the support necessary in both the House and the Senate to be approved without delay despite strong opposition from many within the Democratic base, a minority in the House, and lingering doubts concerning TPA-eligibility of the US-Korea and US-Colombia FTAs. However, sequencing remains an important detail as Senate Democratic leadership has clearly indicated that the House must proceed to consideration of the GSP-TAA package bill before the Senate will consider the FTAs' implementing bills. Although House Republican leadership has provided the Obama Administration with assurances in regard to GSP-TAA consideration in tandem with that of the FTAs' implementing bills, these assurances reflect a compromise deal that is delicate and depends largely on both Congressional Democrats and Republicans, as well as the Obama Administration, faithfully carrying out promises made in this regard. If and when the FTAs' implementing bills pass Congress, President Obama will likely enact into law the US-Korea and US-Panama FTAs shortly thereafter. In contrast, experts note that President Obama stated in the letter to Congress accompanying the US-Colombia FTA's implementing bill that Colombia must implement the key element of the April 7, 2011 Labor Action Plan before he will enact the US-Colombia FTA into law. There are questions surrounding the Obama Administration's susceptibility to US organized labor's accusations that Colombia is not meeting its commitments under this action plan and, consequently, it remains unclear whether the US-Colombia FTA will take effect in the near-term.

Free Trade Agreement Highlights

Low Participation in Pilot Cross-Border Trucking Program May Impede Efforts at Longer-Term Solution

On September 1, 2011 Mexican Secretary for Transportation and Communication Dionisio Perez-Jacome reported that, since the United States and Mexico signed a Memorandum of Understanding (MOU) on July 6, 2011 formally outlining a pilot program to allow Mexico-domiciled motor carriers to operate throughout the United States, a total of 7 Mexican carrier companies have applied for the program. Associate Administrator for the US

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Federal Motor Carrier Safety Administration (FMCSA) William Quade stated on August 31, 2011 that this low participation rate may impede the efforts of the both Mexico and the United States to implement a longer-term solution to the cross-border trucking dispute.

Articles 1108 and 1206 as well as Annex I ("Reservations for Existing Measures and Liberalization Commitments") of the North American Free Trade Agreement (NAFTA) provided for the liberalization of cargo trucking services in US and Mexican border states by December 18, 1995 and that this liberalization was to encompass the entire territories of both countries by January 1, 2000. Although the United States and Mexico briefly collaborated on the implementation of a pilot cross-border trucking program between April 2007 and March 2009, little movement was seen on the dispute until January 2011, when US Secretary for Transportation Ray LaHood circulated a concept paper to Congress and the government of Mexico outlining a plan that would allow Mexican trucks to operate in the US territory and, in turn, call on Mexico to lift the "retaliatory tariffs" that had been imposed on certain US goods. Once the United States and Mexico signed the July 6 MOU, Mexico lifted 50 percent of the tariffs it had placed on US goods and promised to lift the remaining 50 percent once DOT approves the first Mexican company for participation in the program. Of the 7 Mexican carrier companies that have since applied to participate in the pilot program, Associate Administrator Quade notes that only 2 have completed the paperwork necessary to qualify for the pre-authorization safety audits; he estimates their trucks will likely be ready to roll across the US border sometime in September 2011.

According to an April 13, 2011 Federal Register (FR) notice published by the US Department of Transportation (DOT), approximately 46 Mexican carrier companies will need to participate in the pilot cross-border trucking program before it terminates in 3 years. The FR notice estimates that the participation of approximately 46 Mexican carrier companies will allow DOT to complete the 4,100 safety inspections needed to yield statistically significant findings on the safety of Mexican trucks operating in the United States. The April 13 FR notice states that this "statistically valid sample" must be achieved by the pilot program before a longer-term cross-border trucking program can be implemented. Although Associate Administrator Quade notes that it is unclear whether there will ultimately be adequate participation, experts note that, absent a longer-term cross-border trucking program, Mexico is entitled under NAFTA to re-impose "retaliatory tariffs" on US goods previously lifted.

House Passes Legislation Renewing GSP

On September 7, 2011 the US House of Representatives approved HR 2832, "To extend the Generalized System of Preferences, and for the other purposes" ("bill" or "HR 2832"). According to the US Trade Representative (USTR), the Generalized System of Preferences (GSP) provides preferential duty-free entry for up to 4,800 products imported into the United States from 129 designated beneficiary countries and territories.

HR 2832 was sponsored by Rep. Dave Camp (R-MI) and co-sponsored by Reps. Kevin Brady (R-TX), Sander Levin (D-MI) and Jim McDermott (D-WA). The bill was considered under suspension of the rules, which prohibits amendments, allows for 40 minutes of debate, and requires a two-thirds majority vote or approval by voice vote to pass. During debate, Rep. Robert Aderholt (R-AL) spoke against GSP by arguing that the program allows duty-free entry of sleeping bags from Bangladesh, which hurts Exxel Outdoors, a sleeping bag manufacturer in Alabama. The bill, which was passed by voice vote, renews GSP until July 30, 2013 and permits importers to apply for duty refunds for eligible products imported since the program"s expiration on December 31, 2010. The

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bill also proposes offsetting foregone tariff revenue by increasing the customs user fee rate for the processing of merchandise entered or released into the United States from 0.21% to 0.35% ad valorem for the period of October 1, 2011 through July 1, 2014.

According to experts, HR 2832 is likely to serve as the legislative vehicle by which Congress considers Trade Adjustment Assistance (TAA), the Andean Trade Promotion and Drug Eradication Act (ATPDEA), and the three pending free trade agreements (FTAs) with Korea, Colombia and Panama. Experts opine that the deal will entail a so-called "ping pong" maneuver; now that the House has passed HR 2832: (i) the Senate will amend the GSP renewal bill with TAA renewal language, pass it and send the GSP-TAA package bill back to the House for a vote; (ii) provided the Obama Administration is assured that TAA will be passed as part of the GSP bill, it will submit the FTAs' implementing bills to Congress; (iii) the House will hold votes on the FTAs, TAA, GSP and likely ATPDEA; and (iv) upon passing these measures, the House will send them back to the Senate for a procedural vote.

Experts note that Senate Majority Leader Harry Reid (D-NV) recently affirmed the likelihood that this vehicle will be used to pass GSP, TAA, ATPDEA, and the three pending FTAs with his September 7, 2011 statement that the Senate would not vote on the pending FTAs unless the House first passes a bill to extend TAA. Nonetheless, experts also note that the Senate is likely to consider additional amendments to the GSP-TAA package, and that these amendments could delay or prevent the passage of the legislation. In particular, Sen. Mitch McConnell (R-KY) has insisted that Congress consider a renewal of Trade Promotional Authority (TPA) as part of the GSP-TAA package. In addition, Sen. Sherrod Brown (D-OH) has suggested that the Currency Reform for Fair Trade Act be considered in conjunction with the passage of the GSP-TAA package.

TPP Members Conclude Eighth Round of Negotiations

On September 15, 2011 the nine member countries[6] of the Trans-Pacific Partnership (TPP) concluded the eighth round of negotiations in the United States. In a statement released September 15, 2011 Assistant US Trade Representative (AUSTR) Carol Guthrie noted that "[t]his has been a productive round with progress made toward the goal of concluding an ambitious, 21st-century agreement that will enhance trade and investment among TPP partner countries and support economic growth and development and support the creation and retention of jobs."

According to AUSTR Guthrie, TPP negotiators made significant progress on various chapters during the eighth round. More specifically, she stated that numerous TPP chapters, including Customs, Technical Barriers to Trade, Telecommunications, Government Procurement, Small- and Medium-Sized Enterprises, Regulatory Coherence, Competitiveness and Development are "moving toward closure." Sources note that, for its part, the United States tabled text on a number of issues at the eighth round, including, *inter alia*:

- **Sanitary and Phyto-Sanitary (SPS).** TPP negotiators produced a consolidated text on SPS measures that includes a revised US proposal for commitments on transparency and science-based risk assessments that go beyond World Trade Organization (WTO) requirements. Sources note that the United States wants the

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

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TPP text on SPS measures to go beyond those contained in existing free trade agreements (FTAs), which reiterate the obligations of the WTO SPS Agreement;

- **Pharmaceutical Patents.** On September 12, 2011, the US Trade Representative (USTR) released a "white paper" detailing its Trade Enhancing Access to Medicines (TEAM) strategic initiative for TPP. According to the white paper, USTR has proposed a "TPP access window" which "conditions obligations to apply certain pharmaceutical-specific intellectual property protection on the requirement that innovators bring medicines to TPP markets within an agreed window of time." The proposal goes beyond the intellectual property rights (IPR) guidelines provided in the May 10, 2007 Bipartisan Trade Deal ("May 10 Agreement"); and

- **Environment.** The United States offered new provisions to the TPP's Environment chapter. Although the United States has already offered text on issues such as fisheries subsidies and illegal logging, the United States tabled additional text that promoted enforcement of multilateral environmental agreements (MEAs) during the eighth round of negotiations. Sources note that the MEAs promoted in the US text reflect those outlined in the environment provisions of the May 10 Agreement, which identifies 7 MEAs for which FTA signatories must fulfill their obligations;

AUSTR Guthrie noted that although additional progress was made on the Industrial, Agricultural, and Textile and Apparel chapters of TPP during the eighth round of negotiations, the TPP negotiators are "still looking for improvements in the packages to achieve the high level of ambition envisioned." AUSTR Guthrie further commented that negotiations on these chapters are especially detailed, as each member country must agree "on some 11,000 tariff lines, as well [on] as the rules of origin associated with them; trade and investment in all service sectors […] and reciprocal access to each other's government procurement markets." Sources note that TPP member countries experienced particular disagreement over the yarn-forward rule of origin that the United States proposed during the seventh round of TPP negotiations.

Despite progress made on the aforementioned chapters, AUSTR Guthrie acknowledged that the United States decided not to table proposals on disciplines for state-owned enterprises (SOEs) and labor rights during the eighth round. As two of the more controversial chapters of TPP, sources note that USTR will likely hold further consultations with domestic stakeholders and Congress before it tables texts. Nonetheless, AUSTR Guthrie noted that these texts could be tabled "within the coming weeks," and thus before the ninth round of negotiations is scheduled to begin in Lima, Peru from October 19-28, 2011.

The TPP member countries hope to craft the broad outlines of an agreement for consideration during the Asia-Pacific Economic Cooperation (APEC) Leaders' meeting in Honolulu, Hawaii from November 8-13, 2011. With only one more round of negotiations remaining before the APEC meeting, experts note that negotiators will have to broach the more controversial aspects of the Agreement, *i.e.*, disciplines for SOEs and labor, which, heretofore, have been the subject of robust and sometimes cantankerous discussions among the membership. In order to achieve concrete results and avoid a logjam in negotiations over such sensitive topics, experts further note that TPP member countries will need to intensify their intercessional work and stakeholder consultations in the run up to the APEC meeting.

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Senate Passes GSP-TAA Legislation

On September 22, 2011 the US Senate passed, by a vote of 70-27, HR 2832 "To extend the Generalized System of Preferences, and for other purposes" ("bill" or "HR 2832"), with an amendment renewing lapsed provisions of the Trade Adjustment Assistance (TAA) program. According to the US Trade Representative (USTR), the Generalized System of Preferences (GSP) provides preferential duty-free entry for up to 4,800 products imported into the United States from 129 designated beneficiary countries and territories and TAA provides training and support to help workers, firms, farmers, and fisherman transition to alternative employment if their jobs are negatively affected by trade.

After adopting, by unanimous consent, a motion to proceed to consideration of HR 2832 on September 20, 2011, the Senate began to debate the bill and propose amendments to it. The bill represented the first opportunity for Senators to offer amendments to a major trade bill on the Senate floor since 2002. Although the Democratic staff of the Senate Finance Committee touted the advantages of a "clean" bill that would only renew GSP and certain lapsed provisions of TAA, sources note that Senators found it difficult to neglect the opportunity to introduce amendments to manifest their respective trade priorities.

Democratic and Republican Senators filed amendments to HR 2832, however, not all of them were offered on the Senate floor. In all, eight amendments were offered by Republican Senators; all of them were defeated. The offered amendments included: (i) amendment 626 offered by Senate Minority Leader Mitch McConnell (R-KY) to renew Trade Promotion Authority; (ii) amendment 641 offered by Sen. Hatch (R-UT) to modify the enactment terms of amendment 633 to renew certain lapsed provisions of TAA ("TAA amendment"); (iii) amendment 625 offered by Sen. McCain (R-AZ) to modify the expiration date for the TAA amendment; (iv) amendment 642 offered by Sen. Hatch (R-UT) to modify the eligibility terms of the TAA amendment; (v) amendment 645 offered by Sen. Kyl (R-AZ) to exclude firms from the TAA amendment; (vi) amendment 651 offered by Sen. Rubio (R-FL) to limit the eligibility terms of the TAA amendment; (vii) amendment 650 offered by Sen. Thune (R-SD) to require the International Trade Commission (ITC) to report on the impact of the delay of trade agreements that have been signed but not implemented; and (viii) amendment 634 offered by Sen. Cornyn (R-TX) to include language on the sale of F-16 aircraft to Taiwan in the TAA amendment. Senate Majority Leader Harry Reid (D-NV), on behalf Senate Finance Committee Chairman Max Baucus (D-MT), Sen. Casey (D-PA), and Sen. Brown (D-OH) offered amendment 633 to renew certain lapsed provisions of TAA. The amendment passed with a vote of 69-28.

Although the bill must now return to the US House of Representatives for a procedural vote, experts note that the details of this next legislative step remain unclear. On September 22, 2011 Sen. Reid stated that the House should pass TAA and then delay enrolling the bill until President Obama submits and both chambers of Congress approve the three pending free trade agreements (FTAs) with Colombia, Panama, and Korea. In contrast, House Speaker John Boehner (R-OH) and Sen. McConnell have called on President Obama to submit the three pending FTAs now so the House can take up the trade pacts and the GSP-TAA package at the same time. In a September 22, 2011 statement USTR Kirk confirmed the lack of clarity on the next legislative step with his statement that "[d]iscussions continue with congressional leadership on how these bills will move through the legislative process." Regardless of what agreement Congressional leadership and the Obama Administration come to regarding the next legislative step, experts note that President Obama will likely submit the implementing legislation for the three pending FTAs within the near-term, as his Administration has stressed the importance of

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presenting the three signed FTAs at the Asia-Pacific Economic Cooperation (APEC) Leaders‟ meeting in November 2011.

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