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UNITED STATES

GENERAL TRADE POLICY

SPECIAL US REPORT – LEGAL ANALYSIS

CAFC Finds That US CVD Law Does Not Apply to NME Countries

Summary

On December 19, 2011, the United States Court of Appeals for the Federal Circuit (CAFC) ruled in *GPX International Tire Corp. v. United States*[1] (*GPX International Tire*) that US countervailing duty (CVD) law does not apply to merchandise from nonmarket economies (NMEs). This report provides background information on the CVD statute's application to NMEs, and a preliminary legal analysis of the CAFC's December 19th ruling. An overview of reactions to the ruling and possible future responses to it is also presented. The major findings of this report may be summarized as follows:

- The CAFC's ruling is broader than the lower US Court of International Trade's (CIT) 2010 ruling in the same case that the Department of Commerce (DOC) must change its methodology for applying CVDs to NMEs in order to avoid the risk of "double counting";

- Until the CAFC decision is final (i.e., all judicial avenues have been foreclosed), DOC will continue to conduct pending investigations and to initiate new ones pursuant to its existing CVD/NME policy. For example, on January 18, 2012 DOC initiated CVD investigations against wind towers from China and steel wire hangers from Vietnam;

- DOC is expected to appeal the GPX decision, but it is unlikely that the CAFC or the U.S. Supreme Court will accept DOC's request. Depending on the venue chosen, however, DOC's appeal(s) may not be disposed of until October 1, 2012. In the event DOC's requests are rejected and in the absence of legislative action, DOC will be forced to revoke 24 existing CVD orders, 5 pending CVD investigations and 2 recently filed CVD petitions against NMEs;

- The Obama Administration is pursuing a "two-track" approach to the CAFC ruling of both legislative and judicial action. With respect to appeals, DOC is currently considering whether to request a rehearing before the CAFC, the extended rehearing petition deadline is now March 5, 2012. With respect to legislation, the

[1] No. 2011-1107, -1108, 1109 (Fed. Cir. Dec. 19, 2011).

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Administration has asked Congress to pass a bill that: (i) enables CVDs to be applied to subsidized imports from NMEs; (ii) enables DOC to proceed on initiated cases seeking to impose CVDs on such imports; and (iii) enables the CVD orders now in place to remain in effect; and

- Any CVD/NME legislation could prove problematic, as it could be challenged in US courts or at the World Trade Organization (WTO), and might attract controversial amendments (e.g., on currency "manipulation").

Analysis

I. BACKGROUND

Application of the Countervailing Duty Law to Nonmarket Economies

Under US law (19 USC § 1671(a)), a "countervailing duty" "shall be imposed" on merchandise imported into the United States if: (i) DOC determines that "the government of a country […] is providing […] a countervailable subsidy" for the merchandise's manufacture, production, or export; and, (ii) in the case of a World Trade Organization (WTO) member, the International Trade Commission (ITC) makes the necessary determination of injury to domestic industry. The statute, by its terms, makes no reference to NMEs.[2]

DOC first considered whether to apply the CVD law to imports from NMEs in 1983, when domestic producers petitioned for the imposition of CVDs on steel imports from Czechoslovakia and Poland. Citing the conceptual and practical difficulty of identifying and determining subsidization in economies in which all costs, prices, and profits are already controlled by the state, DOC issued a negative determination and concluded that the CVD law did not apply in a nonmarket context.[3] The DOC determination was appealed and overturned by the CIT, but the CAFC in *Georgetown Steel Corp. v. United States*[4] (*Georgetown Steel*) reinstated DOC's decision. In that case, the CAFC ruled that Congress likely did not intend to apply the CVD statute to NMEs,[5] and that DOC's conclusion was reasonable.[6]

This CVD/NME policy remained DOC's position until 2007 (although DOC did carve out an exception for cases where the subsidized industry is deemed "market-oriented"[7]). In November 2006 DOC initiated a CVD

[2] *Id.* slip op. at 5.

[3] *Final Negative Countervailing Duty Determination: Carbon Steel Wire Rod from Czechoslovakia*, 49 Fed. Reg. 19,370 (May 7, 1984).

[4] 801 F.2d 1308 (Fed. Cir. 1986).

[5] *Id.* at 1317-18.

[6] *Id.* at 1318.

[7] *Final Negative Countervailing Duty Determinations: Oscillating and Ceiling Fans from the People's Republic of China*, 57 Fed. Reg. 24,018 (June 5, 1992).

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investigation concerning coated free sheet paper from China[8] - only the second time since *Georgetown Steel* that DOC had accepted a CVD petition in connection with an NME.[9] In early 2007, DOC issued a preliminary affirmative determination,[10] as well as a memorandum determining that, because the present-day Chinese economy is significantly different from the Soviet-style economies contemplated in the *Georgetown Steel* litigation, it was now possible to identify and measure subsidies to Chinese producers as required by the CVD statute.[11] As a result, the memorandum concluded that DOC's existing policy no longer barred the application of the CVD law to Chinese imports.[12]

GPX International Tire

The coated free sheet paper case was terminated due to a negative determination of injury by the International Trade Commission, but DOC's new CVD/NME policy remained in place. In 2007, US tire manufacturer Titan Tire Co. petitioned for the imposition of antidumping duties (ADs) and CVDs on certain tires from China, and DOC issued a final AD/CVD affirmative determination in July 2008.[13] After the issuance of a final affirmative injury determination by the ITC on August 29, 2008,[14] DOC issued an AD/CVD order on Chinese tire imports, and duties were imposed on September 4, 2008.[15] In response, a Chinese respondent and the US parent of one of the other respondents, as well as the domestic manufacturers, appealed DOC's determination before the CIT.

After consolidating the actions, the court concluded in *GPX International Tire Corp. v. United States*[16] that DOC was not barred by statutory language from applying the CVD statute to imports from a NME country but, if DOC intends to apply the CVD law and the AD law simultaneously to such imports, then it must change its application methodology.[17] The CIT found that because the joint application of CVDs and ADs to NME imports resulted in a

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[8] *Notice of Initiation of Countervialing Duty Investigations: Coated Free Sheet Paper from the People's Republic of China, Indonesia and the Republic of Korea*, 71 Fed. Reg. 68,546 (November 27, 2006).

[9] TODD B. TATTELMAN, CONG. RESEARCH SERV., RL 33976, UNITED STATES' TRADE REMEDY LAWS AND NON-MARKET ECONOMIES: A LEGAL OVERVIEW 9-10 (2007).

[10] *Amended Preliminary Affirmative Countervailing Duty Determination: Coated Free Sheet Paper from the People's Republic of China*, 72 Fed. Reg. 17,484 (April 9, 2007).

[11] SHAUNA LEE-ALAIA & LAWRENCE NORTON, IMP. ADMIN., DEP'T OF COMMERCE, C-570-907, WHETHER THE ANALYTICAL ELEMENTS OF THE GEORGETOWN STEEL OPINION ARE APPLICABLE TO CHINA'S PRESENT-DAY ECONOMY 10 (2007).

[12] *Id.* at 2.

[13] F*inal Affirmative Determination of Sales at Less Than Fair Value: New Pneumatic Off-the-Road Tires from the People's Republic of China, 73 Fed. Reg. 40,485 (July 15, 2008); Final Affirmative Countervailing Duty Determination: New Pneumatic Off-the-Road Tires from the People's Republic of China*, 73 Fed. Reg. 40,480 (July 15, 2008).

[14] *Determination: Off-the-Road Tires from China*, 73 Fed. Reg. 51,842 (Sept. 5, 2008).

[15] *Notice of Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Duty Order: New Pneumatic Off-the-Road Tires from the People's Republic of China*, 73 Fed. Reg. 51,624 (Sept. 4, 2008); *Countervailing Duty Order: New Pneumatic Off-the-Road Tires from the People's Republic of China*, 73 Fed. Reg. 51,627 (Sept. 4, 2008).

[16] 645 F.Supp.2d 1231 (Ct. Int'l Trade 2009).

[17] *Id.* at 1234-35, 1243.

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high potential for the "double counting" of duties, DOC's refusal to adopt adjustments to guard against this contingency rendered DOC's methodology "unreasonable."[18] The CIT's decision followed an attempt (via remand) to allow DOC to adopt a reasonable methodology to address the risk of double counting.[19] The US government and domestic manufacturers thereafter appealed the CIT's decision to the CAFC.

II. CAFC RULING

- In its December 19, 2011 ruling, the CAFC panel first disagreed with the CIT's grounding its conclusion on the narrow and discrete issue of double counting. The court observed that the extent to which the CVD law may prohibit double counting was unclear, and that DOC had determined that it was unclear that double counting had indeed occurred.[20] The CAFC, however, then went on to affirm the CIT's judgment on the different and much broader ground that DOC's pre-2007 position, upheld judicially in *Georgetown Steel*, that "government payments cannot be characterized as 'subsidies' in a [NME] context, and thus that [the CVD statute] does not apply to NME countries," had been "legislatively ratified" by Congress when the legislature amended and reenacted the CVD law in 1988 and 1994,[21] and therefore must be faithfully applied in the instant case. The CAFC's decision may be summarized as follows:

- First, the CAFC disposed of two arguments by DOC: (i) that the CVD law's plain language required the application of CVDs whenever a countervailable subsidy is found—an argument the court found unconvincing in light of *Georgetown Steel*'s holding that the CVD statute did not compel the application of CVDs to NMEs;[22] and (ii) *Georgetown Steel* was not an independent interpretation of the CVD law but, instead, merely stood for the proposition that the court should defer to the prevailing DOC interpretation—an argument that the CAFC also rejected because, even if true, it was rendered moot by Congress' ratification of DOC's 1984 policy;[23]

- Second, the CAFC set out the law on legislative ratification. First, Congress is presumed to be aware of a widely known administrative or judicial interpretation of a statute, and to adopt that interpretation when it reenacts a statute without change.[24] The presumption of ratification is even stronger where the legislative history demonstrates that Congress was indeed well aware of the prior interpretation.[25] And once Congress has ratified a statutory interpretation through reenactment, agencies no longer have discretion to change it;[26]

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[18] *Id.* at 1240-43.

[19] GPX Int'l Tire Corp. v. United States, 715 F.Supp.2d 1337, 1344-47 (Ct. Int'l Trade 2010).

[20] GPX Int'l Tire Corp. v. United States, No. 2011-1107, slip op. at 11 (Fed. Cir. Dec. 19, 2011).

[21] *Id.* slip op. at 4.

[22] *Id.* slip op. at 12.

[23] *Id.* slip op. at 14.

[24] *Id.* slip op. at 15.

[25] *Id.*

[26] *Id.* slip op. at 16-17.

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- Third, the CAFC applied the law on legislative ratification to the facts of the case at bar. The CAFC noted that there was a "significant argument" for legislative ratification as early as 1984, when Congress declined to amend the NME trade remedy provisions, even though the legislative history showed that the legislature was aware of DOC's recent CVD decision.[27] In fact, in DOC's own *Georgetown Steel* brief the department pointed to the congressional inaction as evidence of legislative ratification.[28] The CAFC further concluded that Congress's subsequent actions in 1988 and 1994 amounted to even clearer instances of legislative ratification.[29] In both years, the legislature, despite demonstrating an awareness of the increasingly entrenched *Georgetown Steel* decision, amended or reenacted US trade law without incorporating changes that would explicitly make the CVD statute applicable to NMEs;[30] and

- Finally, the CAFC rejected three other DOC arguments: (i) that *Georgetown Steel* only applied to NMEs in which subsidies could not be identified, rather than to all NMEs—a contention the CAFC dismissed because the court disagreed that *Georgetown Steel* made such a distinction and, more importantly, the decision was not perceived by Congress as drawing that distinction;[31] (ii) that Congress indicated in a 2000 law that the CVD statute should be applied to China—an assertion that the CAFC rejected because the tribunal determined that the legislation merely intended DOC to continue existing practice and apply the CVD law to China *if* China was no longer a NME or had a market-oriented industry;[32] and (iii) that a 2010 unenacted House bill, whose legislative history explained that currency undervaluation could constitute a countervailable subsidy, manifested a congressional intent to apply the CVD law to China[33]—an argument which enjoyed little success before the panel because the bill was never voted on by the Senate, and "it is well established that statements made in connection with unenacted legislation generally shed little light on the proper interpretation of a prior statute."[34]

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[27] *Id.* slip op. at 17-18.

[28] *Id.* slip op. at 18.

[29] *Id.* slip op. at 18.

[30] In 1988 the House of Representatives inserted into its trade law bill a provision that would have expressly made the CVD law applicable to NMEs, and the legislative history indicates the provision was a direct response to *Georgetown Steel*. *Id.* slip op. at 18-19. Tellingly, the provision was rejected by the House-Senate conference committee, which described *Georgetown Steel* as "[p]resent law" but did not opt to alter it. *Id.* slip op. at 19-20. The CAFC found Congress's rejection was "persuasive evidence" that Congress did not wish to apply CVDs to NME imports. *Id.* slip op. at 21. Congress again ratified the prevailing DOC interpretation in 1994, according to the tribunal, when the legislature "reenacted most of the [CVD law]" but proclaimed in the legislative materials that the definition of "subsidy" would not be changed, *id.* slip op. at 13, 22-23, and briefly referred to *Georgetown Steel*'s holding. *Id.* slip op. at 23.

[31] *Id.* slip op. at 23-24.

[32] *Id.* slip op. at 24-25.

[33] *Id.* slip op. at 25.

[34] *Id.*

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At the end of its decision, the CAFC left DOC and (indirectly) Congress with an invitation: "[I]f [DOC] believes that the law should be changed, the appropriate approach is to seek legislative change."[35]

III. REACTIONS

DOC indicated on December 20, 2011, that it was disappointed by the CAFC decision, and was considering legislative and judicial options. In the private sector, the American Iron and Steel Institute (AISI) stated that it was "gravely concerned" with CAFC's decision, which the organization said "[gave] Chinese producers and exporters a license to unfairly attack the US market with the full resources of the Chinese government." AISI urged the Obama Administration and Congress to "begin work immediately to enact legislation clarifying that the CVD law [continued] to apply to [NMEs]."[36] Similarly, the United Steelworkers (USW) harshly criticized the ruling and vowed to "work with the [Obama] Administration and call on Congress to either overturn the court's decision, or amend the law."[37]

On the respondent side, the Consuming Industries Trade Action Coalition (CITAC) on December 20th wrote to DOC, requesting that the department, in view of the CAFC decision, suspend all CVD investigations and administrative reviews concerning NME imports, instruct Customs and Border Protection (CBP) to cease the collection of CVD deposits, and request a stay of all court proceedings relating to CVDs on NME goods.[38] China's Ministry of Commerce (MOFCOM) on December 23rd commented on the ruling in a statement which criticized US CVD investigations against Chinese merchandise as "not only in violation of WTO rules, but also not in line with US law," and called on the United States to "[correct] the wrongdoing […] as soon as possible."[39] The Chinese government, in a letter written by its US attorneys on January 3, 2012, also urged DOC to drop its CVD investigation against Chinese solar panel imports. It is believed that US importers and Chinese manufacturers in that investigation are also considering making such a request.

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[35] *Id.* slip op. at 26.

[36] Press Release, American Iron and Steel Inst., AISI Urges the Admin. and Cong. to Act Quickly to Overturn Misguided Court Decision Allowing Subsidized Chinese Imports to Harm U.S. Manufacturers (Dec. 21, 2011), http://www.steel.org/sitecore/content/Global/Document%20Types/News/2011/AISI%20Urges%20The%20Administration%20and%20Congress%20to%20Act%20Quickly.aspx.

[37] Press Release, United Steelworkers, USW Criticizes Court Ruling that Dismisses China's Countervailing Duties (Dec. 21, 2011), http://www.usw.org/media_center/releases_advisories?id=0472.

[38] Letter from Lewis E. Leibowitz, Counsel, Consuming Indus. Trade Action Coal., to Paul Piquando, Assistant Sec'y for Imp. Admin., Dep't of Commerce (Dec. 20, 2011) (on file with author).

[39] Press Release, Ministry of Commerce, MOFCOM Commented on US CAFC's Ruling of Off-Road Tires Case (Dec. 23, 2011) (China), http://english.mofcom.gov.cn/aarticle/newsrelease/significantnews/201112/20111207897927.html.

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Outlook

I. POSSIBLE RESPONSES TO CAFC'S DECISION

A. Agency Action

On January 18, 2012 DOC initiated CVD investigations against wind towers from China[40] and steel hangers from Vietnam.[41] Experts note these investigations serve as evidence of DOC's intention not to change its practice in the near term—*e.g.*, alter its CVD methodology in connection with NMEs, terminate its CVD investigations and/or CVD orders in place against imports from NMEs, or avoid initiating new investigations—in response to the CAFC decision. DOC custom has been to continue its existing policies in pending cases, notwithstanding unfavorable court rulings, until the rulings become final (*i.e.*, there is no longer possibility of appeal). Therefore, DOC is expected to maintain its current practice at least for the duration of the appeal period(s), which is explained more fully below.

B. White House Action

During the week of January 19, 2012, the Obama Administration revealed that its preliminary approach to the CAFC ruling involves a "two-track" strategy of both legislative and judicial efforts. In a letter to the respective Chairman and Ranking Member of the Senate Finance Committee and the House Ways and Means Committee, DOC Secretary John Bryson and US Trade Representative (USTR) Ron Kirk informed the committees that the Administration was still considering its options for appealing the ruling. Regardless of the Administration's final decision, Ambassador Kirk and Secretary Bryson urged the legislators to proceed legislatively with an amendment to the CVD law. In particular, they noted that the lawmakers should consider legislation that would achieve the following objectives: (i) enable CVDs to be applied to subsidized imports from NMEs; (ii) enable DOC to proceed on initiated cases seeking to impose CVDs on such imports; and (iii) enable the CVD orders now in place to remain in effect. According to the letter, Congress and the Administration have until February 2, 2012—the end of the original 45-day statutory deadline for a petition to the CAFC to rehear the case—to find a legislative solution to the CAFC ruling. As noted below, that deadline has been extended to March 5, 2012. In the event that legislative and judicial actions both fail, the letter states that DOC would be forced to revoke 24 existing CVD orders, end 5 pending investigations, and not act on 2 recently filed petitions.

On January 20, 2012, the Obama Administration requested a 60-day extension to the Febrary 2nd deadline to file a rehearing petition. The request was opposed by the respondents, who would only consent to a 14-day

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[40] *Fact Sheet: Commerce Initiates Antidumping Duty Investigations of Utility Scale Wind Towers from the People's Republic of China and the Socialist Republic of Vietnam and a Countervailing Duty Investigation of Utility Scale Wind Towers from China*, Dep't of Commerce, *available at* http://ia.ita.doc.gov/download/factsheets/factsheet-prc-vietnam-uswt-adcvd-init-20120119.pdf.

[41] *Fact Sheet: Commerce Initiates Antidumping Duty Investigations of Steel Wire Garment Hangers from Taiwan and the Socialist Republic of Vietnam and a Countervailing Duty Investigation of Steel Wire Garment Hangers from Vietnam*, Dep't of Commerce, *available at* http://ia.ita.doc.gov/download/factsheets/factsheet-vietnam-taiwan-swgh-adcvd-init-20120119.pdf.

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extension. The CAFC on January 24, 2012 decided to grant the Administration an extension of 30 days, setting the new rehearing petition deadline as **March 5, 2012**.

1. Judicial Appeal

As noted above, the Obama Administration has indicated that it is exploring whether to seek a rehearing before the CAFC. DOC can petition the CAFC for a panel or *en banc* rehearing (*i.e.*, a rehearing by the original three-judge panel or the entire court, respectively). As indicated above, DOC initially had 45 days after entry of judgment to petition for a panel or *en banc* rehearing (*i.e.*, until February 2, 2012),[42] but the CAFC extended the deadline by 30 days (*i.e.*, until March 5, 2012). The CAFC may take more than twenty working days to act on a panel rehearing request, and more than sixty working days to act on an *en banc* rehearing request. Thus, the CAFC's decision on any DOC rehearing request may not be issued until **early June 2012**.

Although not indicated in the joint letter to Congress, DOC might also appeal the CAFC's decision to the U.S. Supreme Court. Parties seeking Supreme Court review have 90 days (including weekends and holidays) after entry of judgment in the lower court to petition for a writ of *certiorari*, by which the Supreme Court accepts the case for review.[43] If parties petitioned for a rehearing by the lower court, the 90-day period begins to run from the lower court's denial of the rehearing request, or subsequent entry of judgment after rehearing the case.[44] The Court on average decides to grant or deny the petition in six to eight weeks after the petition has been filed, but is not bound by any particular deadline. Petitions that are filed near or during the Court's summer recess (usually beginning in late June or early July) are generally acted upon when the Court reconvenes in late September, and the decision is typically announced the day following (if *certiorari* is granted) or on the first Monday of October (if *certiorari* is denied).[45] Thus, if DOC petitions the CAFC for an *en banc* rehearing, then petitions the Supreme Court for *certiorari* after its rehearing request is denied, it is possible that the various appeals for judicial reexamination may not be finally disposed of until **October 1, 2012**.

Experts opine that DOC is likely to appeal the CAFC decision at the last possible moment in order to delay the risk that the CAFC ruling becomes final and thus give Congress more time to act. (As mentioned above, the Obama Administration already sought to extend the deadline for petitioning the CAFC to rehear the case.) Lawyers following the case point out that DOC complied with the CIT's ruling under protest, so the probability is high that the department will continue the lawsuit, even though the CAFC decision was even more adverse than that of the CIT.

On the other hand, most practitioners believe that it is unlikely that the CAFC or the Supreme Court will agree to reexamine the case. As noted above, DOC (and the domestic industry) has three appeal options: (i) petition for a rehearing by the same appellate panel; (ii) petition for a rehearing by the CAFC *en banc*, or (iii) petition the

[42] FED. CIR. R. 40(e); FED. R. APP. P. 35(c).

[43] SUP. CT. R. 13.1.

[44] *Id.* at R. 13.3.

[45] Eugene Gressman, Supreme Court Practice §§ 1.3, 5.2 (9th ed. 2008).

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Supreme Court for a writ of *certiorari*. Rehearing by the original panel requires the consent of a majority of the panel and a showing that the panel overlooked or misapprehended points of fact or law.[46] CAFC panels rarely grant rehearings—court data show that since 2001, only an average of 3 percent of petitions for panel rehearings have been granted at the CAFC each fiscal year. It would be particularly surprising if such a petition is granted in *GPX International Tire*, as the decision was endorsed unanimously by all three judges on the panel. A rehearing *en banc* analogously requires the assent of a majority of the active judges of the full court.[47] Such agreement for reconsideration is rare, because under CAFC internal procedures all judges—including those not on the panel—already had the chance to comment on a ruling before its issuance.[48] Furthermore, US appellate procedure rules expressly disfavor *en banc* rehearing, which normally is not ordered unless it is necessary to harmonize the court's decisions, or the proceeding involves "a question of exceptional importance."[49] Since 2001, on average less than 2.5 percent of petitions for *en banc* rehearing are successful at the CAFC each fiscal year. The CAFC's 30-day extension to the deadline to petition for a rehearing does not alter the likelihood that the court will accept a re-hearing request in this case.

Experts also doubt the probability of a Supreme Court review of the case. The Court, under Chief Justice Roberts, is known for denying *certiorari* to cases of a highly technical nature and/or for which there is little unsettled law. By contrast, the Court usually accepts cases involving issues on which there is a clear divergence among the lower courts, or novel legal issues. In this case, there is no divergence among lower courts and the primary legal question—legislative ratification—appears well-settled. Unless the appellants can point to a novel issue of law or clear legal error by the CAFC, it is unlikely that the Supreme Court would choose to weigh in on the application of a settled legal doctrine to the facts of this case. Practitioners caution, however, that DOC might continue to initiate CVD investigations in relation to NME goods even after the Supreme Court denies *certiorari*. The legal force of such action, however, would be unclear, and DOC's decision would likely face legal challenge.

C. Congressional Action

Regardless of whether the CAFC and/or the Supreme Court agree to reexamine the CAFC panel's decision, it is widely expected that Congress will comply with the Obama Administration's request and seek to amend the law to expressly permit the imposition of CVDs on NME imports. Indeed, even before the CAFC decision, two such bills had been introduced in the Senate.[50] Experts believe such legislation would pass with strong bipartisan support, given strong support in both parties for trade remedies bills. On the other hand, passage would be less certain if more controversial provisions, such as one on currency "manipulation," are attached to any CVD/NME bill.

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[46] FED. CIR. R. 40(a).

[47] FED. R. APP. P. 35(a).

[48] *See* FED. CIR. INTERNAL OPERATING PROCEDURES #10, para. 5 (stating that a precedential opinion's authoring judge will circulate the opinion to the entire court).

[49] FED. R. APP. P. 35(a).

[50] S. 1130, 112th Cong. (2011); S. 1267, 112th Cong. (2011).

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Judging from the congressional bills introduced since 2003 which seek to expressly apply the CVD law to NMEs, the amendment would almost certainly propose to effect the change by amending 19 USC § 1671(a)(1) to insert "(including a nonmarket economy country)" after the term "country" in each place it appears. The bill may also contain a disclaimer that the status of a country as a NME for the purposes of AD law (19 USC §§ 1673 – 1673h) is not affected. Double counting probably would not be prohibited, as only two bills[51] (both from 2005) have sought to do so. The amendment might, on the other hand, add to an existing provision (19 USC § 1677(5)(E)) to permit or require the use of surrogate values when calculating subsidies in the case of NMEs (or China in particular). The definition of "countervailable subsidy" (19 USC § 1677(5)) may, additionally, be altered to state that whether a subsidy exists is to be determined without regard to the relevant country's NME status. Finally, any bill would likely include a provision retroactively applying the law to 2007, so as to expressly maintain existing CVD orders on Chinese or other NME imports.[52]

II. CONCLUSION

The Administration is expected to eventually seek judicial reexamination of the appellate ruling, but it is likely that the Administration will wait to file its request until the last possible moment (*i.e.* March 5, 2012), in order to delay final disposition of the case and the need for congressional action.

In the meantime, the Obama Administration will work with congressional leaders to craft a legislative response that can pass both Chambers of Congress in a timely and efficent manner. It is unclear, however, if the Administration will be able to avoid partisan conflicts and/or amendments to any CVD/NME legislation, particularly as the 2012 elections draw closer. For example, congressional Republicans could: (i) refuse to consider CVD/NME legislation until the Obama Administration addresses and Congress votes on the extension of Permanent Normal Trade Relations (PNTR), *i.e.*, Most Favored Nation (MFN), status to Russia; or (ii) demand that the requested CVD/NME language be attached to a bill that extends PNTR status to Russia.[53] Congressional Democrats may also try to add to the bill an amendment that counteracts China's alleged currency manipulation. Any linkage to Russia PNTR may slow down the process of passing the amendment to the CVD statute, as lawmakers have expressed interest in addressing a number of US-Russia issues before revoking the Jackson-Vanik amendment's application to Russia. Such maneuvering probably would not threaten the CVD/NME bill's chances of passage. On the other hand, the addition of currency provisions could seriously jeopardize the legislation.

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[51] H.R. 3283, 109th Cong. (2005); S. 1421, 109th Cong. (2005).

[52] Giving retroactive effect to an amendment to make the CVD statute applicable to NMEs might, at first blush, raise concerns in US courts in connection with the Constitution's express or implied ban on: (i) ex post facto laws; (ii) bills of attainder; (iii) deprivations of property without due process of law; and (iv) violations of the separation of powers. Such challenges, however, would appear to be difficult in view of the relevant precedents. The potential retroactive legislation may also be challenged in the WTO under the General Agreement on Tariffs and Trade (GATT) Article X:2 and certain Appellate Body jurisprudence thereon, and under GATT Article XXIII:1(b). The outcome, though, would be unclear as jurisprudence interpreting those articles are limited.

[53] Lawmakers have used this method of extending PNTR by adding the appropriate provisions to other pieces of trade-related legislation. For example, Georgia was granted PNTR in Title III of the Tariff and Trade Suspension Act of 2000. Similary, Armenia was granted PNTR in Title II of the Miscellaneous Trade and Technical Corrections Act of 2004.

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In the meantime, DOC will continue to operate in pending investigations and on new petitions pursuant its existing CVD/NME policy, and duties will continue to be collected under the 24 outstanding CVD orders on NME imports. If Congress and the Administration cannot agree on a plan to ensure the smooth passage of the CVD/NME legislation, and all avenues for judicial reexamination are closed—October 1st at the latest—DOC would very likely face a significant number of legal actions in US courts demanding the revocation of standing CVD orders, the termination of ongoing CVD investigations, and the refund of paid duties. The department at that time would most likely oblige.

USTR Touts Successes, Calls for New Path Forward at WTO Eighth Ministerial Conference

Summary

The World Trade Organization (WTO) Eighth Ministerial Conference (MC8) was held in Geneva, Switzerland from December 15-17, 2011. In a December 17, 2011 press release, US Trade Representative (USTR) Ron Kirk stated that, although numerous "cooperative successes" were achieved at the MC8, "much work" remains to be done.[54] More specifically, USTR Kirk lauded WTO members for the completion of the terms of accession for Russia, Montenegro and Samoa and the conclusion of negotiations to revise the WTO Government Procurement Agreement (GPA). USTR Kirk also praised several new initiatives that aim to boost trade and development for least developed countries (LDCs). Looking forward, USTR Kirk reiterated his belief that WTO members must use "credible, innovative" approaches to complete the Doha Development Round ("Doha round" or "DDA").

Analysis

The topmost decision-making body at the WTO is the WTO Ministerial Conference, which brings together the trade ministers of WTO member countries approximately every 2 years. During the December 2011 MC8, a plenary session was held in addition to three working sessions on the following themes: (i) importance of the multilateral trading system and the WTO; (ii) trade and development; and (iii) the Doha round. Below we highlight the key outcomes associated with the MC8, from the US government's perspective.

I. THE DOHA ROUND IMPASSE

WTO members initiated the Doha round at the WTO Fourth Ministerial Conference in Doha, Qatar in November 2001. Although WTO Director General (DG) Pascal Lamy outlined a plan in December 2010 for WTO negotiators to complete the Doha round in time for the MC8, WTO negotiators agreed in June 2011 that a full Doha round package could not be agreed upon by December 2011. Efforts by WTO negotiators in the final months leading up to the MC8 also failed to deliver an "early harvest," *i.e.*, a partial package of Doha round deliverables.

[54] USTR Kirk's statement regarding the Eighth Ministerial is available here: http://www.ustr.gov/about-us/press-office/press-releases/2011/december/statement-us-trade-representative-ron-kirk-regard

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In the MC8 "Elements for Political Consensus," ("Political Consensus") released on December 17, 2011, trade ministers acknowledged that the Doha round negotiations are currently at an impasse. According to the Political Consensus, trade ministers have agreed that "there are significantly different perspectives on the possible results that [WTO] [m]embers can achieve in certain areas of the single undertaking. In this context, it is unlikely that all elements of the Doha Development Round could be concluded simultaneously in the near future."[55] In an effort to move the Doha round forward and ensure the WTO remains relevant in the 21st century, DG Lamy announced in his MC8 opening statement that he would establish a "panel of multi-stakeholders of the WTO" to study current and future trade patterns and obstacles as well as possible ways in which the multilateral trading system can continue to transform trade into development, growth, jobs and poverty alleviation.[56] The panel will report their findings to WTO members by the end of 2012.

In his MC8 opening statement, USTR Kirk stated that the reasons for the breakdown of Doha round negotiations can be summed up by the following predicament: "[T]he WTO has not come to terms over core questions of shared responsibilities among its biggest and most successful [m]embers. The world has changed profoundly since this negotiation began a decade ago, most obviously in the rise of the emerging economies. The results of our negotiations thus far do not reflect this change, and yet they must if we are to be successful."[57] This statement reflects the longheld US position that all WTO members, including developing countries such as Brazil, India and China, must make a meaningful contribution to the final package of deliverables before the United States can agree to a final Doha round deal.

Despite the current deadlock, USTR Kirk noted that the US government is willing to "make progress wherever possible on the Doha mandate." Sources note that this statement suggests the US government is interested in the negotiation of plurilateral WTO agreements, *i.e.*, agreements on issues about which a subset of WTO members can agree upon, instead of continuing to negotiate the Doha round deal as a "single undertaking" under the Doha mandate, *i.e.*, an approach in which every item of the mandate is negotiated as part of an indivisible final package of deliverables. In fact, Deputy USTR Michael Punke stated at the MC8 that the US government is currently exploring the idea of pursuing a plurilateral agreement under Article V of the General Agreement on Trade in Services (GATS), which allows WTO member countries to pursue services trade liberalization deals among themselves on a preferential basis, provided certain criteria are met. Sources note that the US government is particularly interested in addressing issues in the following services sectors through a plurilateral agreement: (i) financial services; (ii) express delivery services; (iii) energy services; (iv) retail services; (v) telecommunications services; and (vi) professional services. Observers further note that another possible WTO plurilateral would cover environmental goods and services. Experts look to the WTO's Government Procurement and Information Technology (ITA) Agreements as examples which might be followed in future WTO plurilateral agreements.

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[55] The Political Consensus can be accessed here: http://www.wto.org/english/thewto_e/minist_e/min11_e/official_doc_e.htm

[56] DG Lamy's opening statement can be accessed here: http://www.wto.org/english/thewto_e/minist_e/min11_e/min11_inaug_e.htm

[57] USTR Kirk's opening statement can be accessed here: http://www.wto.org/english/thewto_e/minist_e/min11_e/min11_statements_e.htm

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In the absence of progress on the Doha round negotiations, the output from MC8 was focused on three issues where agreement was possible, namely: (i) approval of the terms of accession for Russia, Montenegro, and Samoa; (ii) the revision of the WTO Government Procurement Agreement; and (iii) initiatives designed to benefit LDCs.

II. WTO ACCESSION OF RUSSIA, MONTENEGRO AND SAMOA

On December 16, 2011, WTO ministers adopted Russia's terms of accession to the WTO. On the following day, WTO ministers also adopted Montenegro and Samoa's terms of accession. All three countries must now ratify their WTO terms of accession through their own domestic ratification processes. Thirty days after these countries notify the WTO that their respective domestic ratification processes have been successfully completed, the three countries will become full WTO members.

Experts note that Russia's accession marks an important milestone for the WTO. According to DG Lamy, with Russia's accession, the WTO will cover 97 percent of global trade. Observers note that Russia's accession is also significant from the perspective of the US government. According to USTR, integrating Russia into the rules-based trading system and providing the means to enforce those rules will further strengthen US commercial interests. In a factsheet regarding Russia's accession, the White House outlines the following key benefits that Russia's terms of accession will offer to the US government and businesses:[58]

- **A Stronger Mechanism for US-Russia Trade Relations.** The factsheet notes that Russia is the largest nation to remain outside the WTO. Russia is also the last of the Group of 20 (G20) countries to join the Organization;

- **Reduced Russian Tariffs on Key US Exports.** The factsheet states that Russia's terms of accession require Russia to join the WTO Information Technology Agreement. In addition, Russia has commited to cut tariffs in sectors of interest to US businesses, including but not limited to: (i) chemicals; (ii) construction equipment; (iii) civil aircraft; and (iv) numerous agricultural products, including dairy, grains, oilseeds, horticultural products, wine and meat;[59]

- **More liberal Russian Treatment for US Services Exports.** According to the factsheet, Russia is undertaking enforceable market access commitments covering service sectors of interest to US businesses, including, but not limited to: (i) telecommunication services; (ii) financial services; (iii) energy services; and (iv) computer services;

- **Firm Commitments for the Protection and Enforcement of Intellectual Property Rights.** Although Russia has already amended its domestic laws to comply with the WTO Agreement on Trade-Related

[58] The White House factsheet is available here: http://www.ustr.gov/webfm_send/3212

[59] The DOC ITA's factsheets regarding opportunities by sector are available here: http://www.ustr.gov/countries-regions/europe-middle-east/russia-and-eurasia/russia-0

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Aspects of Intellectual Property Rights (TRIPS), the factsheet states that, upon accession, Russia will be required to enforce those laws in compliance with relevant WTO provisions;

- **Enforceable Disciplines to Ensure Rules-Based Treatment of US Agricultural Exports.** According to the fact sheet, Russia will be required to apply WTO rules on sanitary and phytosanitary (SPS) measures starting on "day one" of its formal accession; and

- **Improved Transparency in Trade-Related Rule-Making.** The factsheet notes that Russia's terms of accession require it to notify the WTO of certain trade policies and measures it has implemented.

Before either Russia or the United States can reap the benefits associated with Russia's accession, Russia must ratify its terms of accession through its domestic ratification process. Observers expect this process to be successfully completed by mid-2012. Even after Russia has formally joined the WTO, the United States will not be able to take advantage of Russia's WTO membership until Congress grants Russia permanent normal trade relations (PNTR), *i.e.*, most-favored nation (MFN) status. On December 15, 2011 President Obama took a step towards granting Russia PNTR with his determination, under Section 1106(a) of the Omnibus Trade and Competitiveness Act of 1988, that provisions dealing with Russia's state-trading enterprises within the Russia's WTO terms of accession are stringent enough not to require the President to invoke the non-application provisions of the WTO Agreement. Despite this determination, experts note that revocation of the Jackson-Vanick Amendment's (under Title IV of the Trade Act of 1974) application to Russia will likely represent the most difficult step in granting Russia PNTR. The Jackson-Vanick Amendment prevents the United States from establishing PNTR with a country unless that country fulfills certain "freedom of emigration" conditions under the Amendment. Experts note that lawmakers will want to address other issues with respect to US-Russia relations before voting on the revocation of the Jackson-Vanick Amendment's application to Russia. Such issues are likely to include, *inter alia*: (i) international security concerns, especially with respect to Iran; (ii) Russia's record on the protection of human rights; (iii) Russia's ability and willingness to protect intellectual property rights (IPR); and (iv) market access for US agricultural products. Experts note that the Obama Administration has prioritized the goal of working with Congress to synchronize its offer of PNTR to Russia with Russia's formal accession. In an effort to lay the groundwork for an eventual vote on the issue, House Ways and Means Trade Subcommittee Chairman Kevin Brady (R-TX) has stated his intention to hold a hearing regarding Russia's accession in early 2012.

III. REVISION OF THE GOVERNMENT PROCUREMENT AGREEMENT

On December 15, 2011, trade ministers representing parties to the GPA announced that they had reached agreement on a revised GPA. The GPA, which currently has 42 members, originally entered into force in 1996. Although the revised Agreement took 10 years to negotiate, USTR Kirk noted that, in the wake of the Doha round impasse, the revised GPA "demonstrates the [WTO's] ability to fulfill negotiating mandates."

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According to a USTR factsheet, the revised GPA will provide the following benefits to US businesses:[60]

- **Expanded Coverage of Central Government Entities.** Additional central government entities from the following countries are covered under the revised GPA: numerous countries in the European Union (EU), Aruba, Hong Kong, Israel, Liechtenstein, Korea, and Switzerland;

- **Expanded Coverage of Sub-Central Government Entities**. Additional sub-central government entities in the following countries are covered under the revised GPA: Japan, Korea, Israel and Canada;

- **Expanded Coverage of Services Sectors.** A total of 50 additional categories of services in Aruba, Hong Kong, Israel, Japan, Korea, Singapore and Switzerland are covered under the revised GPA;

- **Expanded Coverage of Government Enterprises.** New government enterprises in Israel, Liechtenstein, Japan and Taiwan are covered under the revised GPA;

- **Phasing-Out of Israel's Requirements for Domestic Content**. Israel has committed to reduce offsets from the current level of 20 percent to zero over 15 years under the revised GPA;

- **New Issues Coverage.** The factsheet states that the revised GPA addresses new challenges in the area of government procurement, including electronic procurement. The updated GPA also clarifies transitional measures for developing countries interested in acceding to the GPA; and

- **US-EU Bilateral Procurement Forum.** The United States and the European Union (EU) have agreed to establish a Bilateral Procurement Forum that will "explore the possible expansion of procurement commitments, primarily on a national treatment basis."

Although the revised GPA offers additional opportunites for US businesses in foreign procurement markets, sources note that the US government did not expand the US sub-central government entities covered under the GPA beyond the 37 states currently covered. Sources report that the United States did, however, subject 12 additional central government agencies to the GPA.[61] In addition, the US government was able to maintain all of its current exclusions and exceptions, including its exclusion of set-asides for small and minority-owned firms.

On November 30, 2011, China circulated its third offer to join the GPA. As part of its 2001 accession to the WTO, China committed to join the GPA "as soon as possible." According to sources, China's latest offer proposes expanding upon China's second offer by also offering coverage of two new service sectors as well as of sub-

[60] The USTR factsheet is available here: http://www.ustr.gov/about-us/press-office/fact-sheets/2011/december/benefits-united-states-revised-wto-government-procur

[61] The additional agencies were: the Advisory Council on Historic Preservation, the Court Service and Offender Supervision Agency for the District of Colombia, the Federal Energy Regulatory Commission, the Federal Labor Relations Authority, the Millennium Challenge Corporation, the National Assessment Endowment for the Humanities, the U.S. Marine Mammal Commission, and the U.S. Access Board.

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central entities in three of China's independent municipalities and two provinces. In response to China's submission, USTR Kirk noted "China still has some distance to go before the procurement that it is offering is comparable to the extensive procurement that the United States and other parties cover under the GPA." More specifically, the US government has urged the Chinese government to submit an offer that covers state-owned enterprises (SOEs), and additional sub-central entities and services, and reduces its thresholds for the size of covered contracts. On December 15, 2011, Chinese Commerce Minister Chen Deming accused GPA members of delaying China's accession to the GPA by raising the bar for entry. Despite this charge, Minister Deng further stated that China will continue to negotiate the terms of its accession to the GPA.

IV. LDC INITIATIVES

When the Doha round was launched in 2001, trade ministers agreed that the negotiations should seek to help developing countries, and LDCs in particular, secure a share in the growth of world trade commensurate with the needs of their economic development. Once WTO negotiators agreed that they would not be able to come to agreement on a final package of Doha round deliverables by MC8, they set about negotiating several LDC initiatives for trade ministers to adopt at MC8. In the Political Consensus, trade ministers agreed to, *inter alia*: (i) provide assistance to LDCs acceding to the WTO; (ii) extend the LDC transition period under Article 66.1 of the TRIPS Agreement; and (iii) establish a waiver mechanism to allow for the extension of preferential treatment to services and service suppliers of LDCs.

In advance of MC8, on December 14, 2011, USTR announced several new LDC initiatives the US government will take in order to bolster the initiatives to which trade ministers agreed at MC8. According to a USTR factsheet regarding these initiatives, the new commitments include, *inter alia*:[62]

- **Enhancements to the African Growth and Opportunity Act (AGOA).** The Obama Administration will urge Congress to enact legislation that renews AGOA's third country fabric provisions until 2015;

- **Market Access for Upland Cotton.** The factsheet states that the US government will: (i) launch the review process to consider adding Upland cotton fiber to the list of products eligible for duty-free treatment for LDCs through the Generalized System of Preferences (GSP); and (ii) seek Congressional action to provide quota-free access for LDCs on all Upland cotton fiber tariff lines;

- **Extension of Cotton-Related Trade Capacity Building.** The US government plans to introduce a follow-on program to the US Agency for International Development's (USAID) West African Cotton Improvement Program once the Program expires in 2012. The follow-on program will be funded with USD 16 million over four years. One of the follow-on program's key elements will be the use of a Development Credit Authority guarantee and Public Private partnership to "drive private debt to investment funds and organizations that will make debt and equity investments in small- and medium-sized enterprises operating in agricultural value chains in West Africa;" and

[62] The USTR factsheet is available here: http://www.ustr.gov/about-us/press-office/fact-sheets/2011/new-us-initiatives-boost-trade-and-investment-opportunities-l

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- **Improved Utilization of US Trade Preference Programs.** The factsheet states that the US government plans to launch a new USAID program to provide the technical assistance necessary to ensure that LDCs are able to take full advantage of US trade preference programs.

In addition to these new initiatives, the factsheet outlines several LDC initiatives the US government has already committed to, including, but not limited to: (i) African Competitiveness and Trade Expansion Initiative; (ii) Partnership for Trade Facilitation; (iii) GSP; (iv) Millenium Challenge Corporation; (v) Aid for Trade; (vi) Feed the Future; and (vii) the US-East African Community Trade and Investment Initiative.

Sources note that LDC trade ministers welcomed the LDC initiatives announced by not only WTO trade ministers and the US government, but also the EU and China at MC8. Nonetheless, LDC ministers expressed disappointment that further steps had not been taken by the US government to reduce their allegedly trade-distorting cotton subsidies. Sources note that the US government has refused to reduce its cotton subsidies unless other countries, specifically China, also commit to reduce their cotton subsidies.

Outlook

Looking forward, experts do not expect WTO negotiators to achieve progress on the Doha round in the near future. Observers note that 2012 will bring Presidential elections in numerous countries, including France, Mexico and the United States, as well as a political transition in China. In addition, the EU is expected to continue to struggle with its sovereign debt crises. As a result of these conditions, experts note that, in the near term, key WTO members will not likely be in a position to make the commitments necessary to bring the Doha round to a close. In spite of stalled Doha round negotiations, experts note that WTO members have increasingly come to depend on the WTO Dispute Settelement Body (DSB) to settle contentious trading issues, *e.g.*, misapplication of trade remedies and illegal use of subsidies. As a result, some experts opine that WTO members will continue their increased use of the WTO dispute settlement system in the near term. Experts further expect that, in response to the WTO's current state-of-play, the Obama Administration will: (i) take additional steps in its exploration of the possibility of negotiating WTO plurilateral agreements; and (ii) place additional emphasis on the completion of the Trans-Pacific Partnership (TPP), albeit without committing to a 2012 deadline. Sources note that the TPP offers the US government a forum through which it can ensure that certain dynamic Asia-Pacific economies adopt the "WTO-plus" standards it favors in key areas such as IPR enforcement, labor protection and disciplines for SOEs.

US General Trade Policy Highlights

US and Korean Officials Hold Third Round of Working-Level Meetings Regarding Implementation of KORUS

From January 9-10, 2012, Korean and US officials held the third working-level meeting in Seoul regarding the implementation of the US-Korea Free Trade Agreement ("KORUS"). The first and second working-level meetings were held in Washington, DC from December 5-6, 2011 and December 19-20, 2011, respectively. KORUS was signed on June 30, 2007. After the US Congress passed implementing legislation for KORUS on October 12, 2011, President Obama signed the legislation into law on October 21, 2011. Shortly thereafter, the Korean

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National Assembly passed legislation approving KORUS on November 22, 2011. Although the agreement has been ratified by both countries, it cannot enter into force until each country demonstrates that it is in compliance with those obligations that will take effect immediately after the agreement takes effect.

At the third working-level meeting, Korean and US officials discussed each other's respective laws and regulations related to implementation of the trade agreement to verify that they have complied with the obligations made in the agreement. The Korean government claims to have already enacted the legal changes necessary to come into compliance with the agreement. In particular, the Korean National Assembly passed 14 laws necessary to implement KORUS on November 22, 2011, which is the same day it passed the agreement. In addition, observers note that relevant Korean ministries also published new regulations necessary to implement the agreement in the Korean *Official Gazette* in late November 2011. According to the United States Trade Representative (USTR), the implementing legislation for KORUS contained all changes to US law necessary to bring the United States into compliance with the agreement. USTR has further stated, however, that there are several regulatory measures the US government must enact before it can be considered as being in compliance with the agreement. More specifically, President Obama will issue a presidential proclamation several days before or on the day KORUS enters into force that will modify certain tariff lines and product-specific rules of origin, and make additional administrative changes covering issues such as customs and procurement.

The next step towards implementation is the exchange of formal diplomatic notes confirming that both sides have come into compliance with their obligations. According to article 25.4.1 of KORUS, the agreement will enter into force 60 days after the notes are exchanged, or on such other date as the Parties may agree.

The implementation of KORUS has been prioritized for several reasons. First, US businesses are eager to curb the EU's burgeoning control of market share in Korea, a recent development made possible by the EU-Korea FTA, which has been provisionally applied since July 1, 2011. Second, members of Korea's current ruling party, the Grand National Party (GNP) are eager to see the agreement enter into force before Korean parliamentary elections commence in April 2012, as opposition parties have spurred public anger regarding certain aspects of the agreement, including the investor-state dispute settlement provisions. Should an opposition party gain control of the Korean National Assembly before the agreement is entered into force, it could upset the implementation process.

President Obama Proclaims Modifications to the US Harmonized Tariff Schedule

On January 4, 2012, the Obama Administration published in the Federal Register Presidential Proclamation 8771 ("Proclamation"), effecting a series of modifications to the US Harmonized Tariff Schedule (USHTS). In the Proclamation, President Obama asserts that the modifications are in conformity with the US obligations under the International Convention on the Harmonized Commodity Description and Coding System ("Convention") and consistent with the "national economic interest" of the United States.

The modifications proclaimed by the President are those recommended by the US International Trade Commission (ITC). Pursuant to Section 1205 of the Omnibus Trade and Competitiveness Act of 1988, the ITC is required to recommend to the President modifications to the USHTS that reflect amendments made to the

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Convention. The World Customs Organization (WCO) issues amendments to the Convention approximately every five years. On June 29, 2009, the WCO adopted the most recent set of amendments to the Convention. In response, the ITC launched investigation No. 1205-7 on February 26, 2010 to formulate corresponding recommendations to the USHTS. The ITC's final report on proposed modifications to the USHTS was published in June 2010. The final modifications proclaimed by the President in his Proclamation are listed in Annex I of ITC Publication 4276, entitled "Modifications to the Harmonized Tariff Schedule of the United States Under Section 1206 of the Omnibus Trade and Competitiveness Act of 1988" ("Publication 4276").

In addition to suggesting changes that conform the USHTS to amendments made to the Convention, the Proclamation commits the United States to the "continuation of previously proclaimed staged duty reductions" that the were committed to under various bilateral, regional and multilateral trade agreements, including, but not limited to: (i) the United States-Singapore Free Trade Agreement (FTA); (ii) the United States-Chile FTA; (iii) the United States-Australia FTA; (iv) the United States-Morocco FTA; (v) the United States-Bahrain FTA; (vi) the United States-Oman FTA; and (vii) the United States-Peru Trade Promotion Agreement. The modifications recommended by the ITC and proclaimed by President Obama will result in alterations to approximately 54 of the 99 chapters of the USHTS, including, *inter alia*: 29, 38, 73, 84, 85, 87, 90 and 91.

The modifications will become effective thirty days after the January 4 release of the Proclamation.

Obama Administration Announces Reorganization of Trade-Related Government Bodies

President Obama announced on January 13, 2012 a proposal to reform, reorganize and consolidate business- and trade-related government bodies. The purpose of this government restructuring, according to the Obama Administration's Fact Sheet on the matter, is to promote "competitiveness, exports and [US] business." This announcement is the first phase of an earlier proposal President Obama offered in his 2010 State of the Union speech to reorganize and consolidate the federal government.

Following the State of the Union speech, the Obama Administration released, on March 11, 2011, a memorandum to the heads of executive departments and agencies of the federal government, proposing preliminary steps to consolidate and reorganize the executive branch of the federal government to address: (i) areas of overlap and duplication; (ii) unmet needs; and (iii) possible cost savings. President Obama's March 11 memorandum directed US Government Chief Performance Officer (CPO) Jeffrey Zients to submit to the President within 90 days recommendations on the consolidation and reorganization. This first phase of restructuring reflects many of these recommendations.

In order to effect this restructuring, President Obama is seeking from Congress fast-track authority, which, if granted, would require Congress to vote up or down on the restructuring proposal within 90 days after these proposals are made. Under this fast-track authority, which the Obama Administration has preliminarily labeled the "Consolidation Authority Act," President Obama first proposes consolidating into one department:

- **The Department of Commerce's (DOC)** core business and trade functions, namely its trade law enforcement and export promotion activities;

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- **The Small Business Administration (SBA)**, which is charged with providing financial and non-financial support to US small-sized businesses;
- **The Office of the United States Trade Representative (USTR)**, which is charged with articulating US trade policy and negotiating trade agreements;
- **The Import-Export Bank**, which is charged with financing the overseas purchase of US exports;
- **The Overseas Private Investment Corporation (OPIC)**, which is charged with insuring and financing US ventures in developing countries; and
- **The United States Trade and Development Agency (USTDA)**, which is charged with advancing economic development and US commercial interests in developing and middle income countries.

The Fact Sheet claims that the current co-existence of these six US government bodies is "redundant and inefficient," and causes an inability on the part of small-sized US firms to find "even the most basic answers to the most basic questions." Therefore, the Obama Administration asserts that, once brought under a single department, the above-enumerated government functions will have one phone number at which to be reached and, in regard to web access, a website called "Business USA," which will provide US firms of all sizes information about how to start or increase export activities.

Reaction to the President Obama's January 13 announcement has been largely negative. While lawmakers and industry representatives generally agree with the Obama Administration's stated goal of streamlining government activities, particularly in the current context of high budget deficits and an untenable debt load, there is great concern that merging trade-related agencies and/or departments with separate and distinct mandates may, in itself, cause inefficiency. For example, House Ways and Means Committee Chairman Dave Camp (R-TX), House Ways and Means Committee Ranking Member Sander Levin (D-MI), Senate Finance Committee Chairman Max Baucus (D-MT), George W. Bush Administration USTR Susan Schwab, National Foreign Trade Council (NFTC) President Bill Reinsch and Coalition for Employment through Exports (CEE) President John Hardy have issued statements expressing general concern that DOC's focus on enforcement of US trade law might not necessarily combine well that of the USTR, which focuses on negotiating and maintaining trade liberalizing agreements, and that such "nimble" bodies as USTR would become less so if absorbed into a larger department.

Experts note that this proposal should be viewed through the lens of campaign politics, *i.e.*, this proposal is meant to provide the appearance of increasing government efficiency at a time when confidence in government among voters is at historic lows. Whether this is the case or the Obama Administration is truly intent on carrying forward this restructuring remains unclear. In the case of the latter, experts posit that the Obama Administration will likely be unsuccessful as each of the government bodies to be consolidated is under the purview of distinct congressional committees which, in turn, are unlikely to want to relinquish supervisory authority over these bodies.

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FREE TRADE AGREEMENTS

Analysis of Comments Submitted in Response to the Possible Inclusion in TPP of Japan, Mexico and Canada

Summary

On January 13, 2012, the period during which the US Trade Representative (USTR) was accepting comments from interested parties in regard to Japan, Canada and Mexico potentially joining the Trans-Pacific Partnership (TPP) expired. The comments submitted came from a wide array of US and non-US companies, industry coalitions and think tanks, and were generally supportive of Canada and Mexico joining TPP although they conveyed cautious support of Japan's possible inclusion in the agreement.

Analysis

In the context of the November 2011 Asia Pacific Economic Cooperation Summit held in Hawaii, Japan, Canada and Mexico expressed interest in joining the TPP negotiations, which US officials welcomed while signaling that domestic consultation would be necessary before giving definitive acquiescense. Consequently, USTR Trade Policy Staff Committee's (TPSC) three December 7, 2011 Federal Register Notices invited interested persons to provide comments to assist USTR in assessing the expression of interest on the part of Japan, Mexico, and Canada in the TPP negotiations "in light of the TPP's high standards for liberalizing trade and specific issues of concern to the United States regarding [these three countries'] barriers to agriculture, services, and manufacturing trade, including non-tariff measures [(NTB)]." TPSC particularly invited comments on the following: (i) Economic costs and benefits to US producers and consumers of eliminating tariffs and eliminating or reducing non-tariff barriers on goods and services traded with the potential entrants; (ii) The the potential entrants' treatment of specific goods (described by HTSUS numbers), including product specific import or export interests or barriers; (iii) Adequacy of existing customs measures to ensure that only qualifying imported goods from the potential entrantsreceive preferential treatment, and appropriate rules of origin for goods entering the United States; (iv) The potential entrants' sanitary and phytosanitary (SPS) measures or technical barriers to trade that should be addressed; (v) Existing barriers to trade in services between the United States and the potential entrants that should be addressed; (vi) Relevant electronic commerce issues; (vii) Relevant trade-related intellectual property rights (IPR) issues; (viii) Relevant investment issues; (ix) Relevant competition-related matters; (x) Relevant government procurement issues; (xi) Relevant environmental issues; (xii) Relevant labor issues; (xiii) Relevant transparency issues; (xiv) Relevant issues related to innovation and competitiveness, new technologies and emerging economic sectors, the participation of small- and medium-sized businesses in trade, and the development of efficient production and supply chains.

I. JAPAN

Overall, stakeholders expressed cautious optimism regarding the accession of Japan to the TPP. Many groups see Japan's accession to the TPP as an opportunity to address longstanding US-Japan trading issues and thus

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they enthusiastically welcome Japan's participation. Other groups expressed a strong desire for the Japanese government to resolve certain bilateral trading issues before acceding to the TPP. Few companies actively opposed the accession of Japan to the TPP, but key sectors, including autos, agriculture and services expressed more caution than optimism with respect to Japan's participation. The following is a sector-by-sector and issue-by-issue sampling of the comments submitted regarding Japan's possible accession to the TPP:

Autos

- **American Automotive Policy Council.** The American Automotive Policy Council (AAPC), which represents Chrysler, Ford and General Motors, opposes Japan's accession to the TPP at this time. According to the AAPC, the Japanese government uses several measures, including currency intervention and an auto regulatory regime that is not harmonized with that of the rest of the world, in order to restrict US auto exports to Japan. The AAPC believes that Japan's unwillingess to reform suggests that, were they to join the TPP, they would "lock-in the already one-way trade relationship that Japan's closed auto market has created, and significantly delay, if not prevent proceeding with a high-quality TPP trade agreement"; and

- **Association of Global Automakers.** The Association of Global Automakers (AGA), which represents Honda, Hyundai and Toyota, among other auto companies, supports Japan's inclusion in TPP. In their statement, the AGA states that they believe prospective TPP members should not be subject to "pre-negotiation" demands, especially those related to the removal of non-tariff barriers. In addition, they call upon the US government to discuss its own tariff structure within the context of the TPP, including its tariff rates on imported trucks.

Manufacturing.

- **General Electric.** General Electric (GE) supports Japan's interest in joining the TPP, citing their belief that Japan's inclusion will contribute "to the further development, transparency and accessibility of Japanese markets for US companies." According to GE, TPP negotiations with Japan should focus on achieving, *inter alia*: (i) increased transparency in the bidding and approval process in the Japanese government's procurement process; (ii) fair and transparent processes for approving new devices and innovative technologies; (iii) more predictable regulations for the secured lending process; and (iv) increased flexibility in Japan's labor market to allow for enhanced labor mobility and greater productivity;

- **National Association of Manufacturers.** The National Association of Manufacturers (NAM) supports the inclusion of Japan in the TPP negotiations, but cites several areas of concern, including: (i) non-tariff barriers in the auto and auto parts, medical equipment, pharmaceutifcals, blood products, nutritional supplements, and cosmetic sectors; (ii) investment. More specifically, NAM supports the inclusion of an investor-state dispute mechanism that applies to all TPP parties, including Japan and Australia; and (iii) currency intervention. NAM holds that countries such as Japan should not engage in the protracted intervention in currency markets; and

- **American Iron and Steel Institute.** The Amercian Iron and Steel Institute (AISI) urges USTR to "proceed with caution" with regard to Japanese participation in TPP. According to AISI, US negotiators need to address several US-Japan trading issues, including: (i) the tariff and non-tariff barriers Japan uses against US

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exports of steel and autos; (ii) the Japanese government's "historic efforts to use trade negotiations to try to weaken US trade remedy laws"; (iii) the Japanese government's repeated intervention in currency markets; and (iv) the Japanese government role in state-owned enterprises (SOEs). AISI opposes the addition of Japan to TPP "unless there is a solid reason to believe that Japan's participation will actually result in real and open access to the Japanese market."

Agriculture.

- **California Table Grape Commission.** The California Table Grape Commission requests that USTR ensure "adequate resolution" of certain tariff and non-tariff barriers as a pre-condition for Japan's accession to the TPP. With respect to non-tariff barriers, the Commission noted that Japan's "positive list" regulatory system for pesticide maximum residue limits (MRLs) poses a challenge to US exports of horticultural goods. The Commission would like to see Japan conduct regulatory reviews of new pesticides in tandem with the US government, rather than after a pesticide has been approved for commercial use in the United States;

- **National Cattlemen's Beef Association.** The National Cattlemen's Beef Association stated that, for Japan to join the TPP, the Japanese government should first exhibit a willingess to abide by higher standards by relaxing its age restriction on US beef. The Association also urged the Japanese government's to complete its review of domestic testing standards for Bovine Spongiform Encephalopathy (BSE). According to the Association, the Japanese government and all TPP members should agree to abide by the highest sanitary and phyto-sanitary (SPS) standards possible, in accordance with the World Trade Organization (WTO) and the World Organization for Animal Health (OIE);

- **USA Rice Federation.** The US Rice Federation supports the inclusion of Japan in TPP. The Federation holds that all rice tariff lines must be included for negotiation in connection with Japan's admission to the TPP. According to the Federation, US rice exports lack meaningful market access to a broad range of Japanese customers due to the Japanese government's use of a simultaneous-buy-sell (SBS) system. In addition, the Federation is concerned with several non-tariff barriers the Japanese government uses, including: (i) MRL testing protocols that are high in cost and not standardized; and (ii) mandatory testing for the presence of certain genetically modified traits that have never been discovered in certain types of US rice imports; and

- **National Milk Producers Federation and the US Dairy Export Council.** The National Milk Producers Federation and the US Dairy Export Council ("Dairy groups") welcome the announcement of interest by Japan of joining TPP and urge USTR to "do all it can" to help Japan join the TPP negotiations "as swiftly as possible." According to the Dairy groups, Japan's dairy tariffs are, as a whole, high and its system of specific tariffs, tariff-rate quotas, quotas for specific uses, and safeguards make access to the Japanese market difficult for US dairy products to achieve. If Japan joins the TPP, the Dairy groups will make expanded market access for US dairy products in Japan a "high priority." The Dairy groups would also like Japan to expand its list of approved food additives once it joins the TPP. According to the Dairy groups, Japan and other TPP members should also agree to the following: (i) legal remedies in the SPS chapter; and (ii) a new approach to protecting Geographic Indicators (GIs) that will serve as a better alternative to the model currently proposed by the European Union (EU).

Nutrition Products and Beverages.

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- **Distilled Spirits Council.** The Distilled Spirits Council supports Japan's inclusion in TPP. Should Japan join the agreement, the Council will seek to secure the following: (i) the Japanese government's agreement to follow through with its commitment to formally "bind" the zero tariffs at the WTO on gin, rum, vodka, and liquor that have been in place on an applied basis since 2002; (ii) mutual recognition of "Bourbon" and "Tennesee Whiskey" as distinctive products of the United States and recognition of "Japanese Single Malt Whisky" as a distinctive product of Japan; and (iii) the Japanese government's agreement to prohibit the sale of distilled spirits products whose lot codes have been erased, tampered or aletered and assess appropriate penalties upon violators; and

- **Herbalife.** Herbalife welcomes Japan's inclusion in TPP because of the opportunity it would provide to both lower tariffs and address the persistent, behind-the-border non-tariff barriers that have long restricted trade with Japan. Specifically, Herablife would like Japan to commit to the following: (i) the immediate elimination or, at a maximum, a three-year elimination of Japan's 15 percent tariff on Formula 1 protein powders and dietary supplements; and (ii) the allowance of science-based, ingredient specific health claims the be used for product labeling and advertising. In addition, Herbalife urges Japan and all other TPP members to agree upon a list of acceptable ingredients, including food additives for nutritional supplements, and active ingredients for cosmetic products.

Textiles and Apparel.

- **United States Association of Importers of Textiles and Apparel.** The United States Association of Importers of Textiles and Apparel (USA-ITA) supports the inclusion of Japan in the TPP negotiations because Japan is the second largest retail market in the world and its consumers consistently demonstrate a keen interest in fashion and retail. According to USA-ITA, the Japanese government should agree to allow for the duty-free entry of imported apparel, which currently incurs tariffs as high as 16 percent. USA-ITA also urges the Japanese government to improve its customs processing in the distribution sector by, for example, exempting exporters with good compliance records from a 5 percent consumption tax for clear cargo; and

- **American Apparel and Footwear Association.** The American Apparel and Footwear Association (AAFA) supports Japan's inclusion in the TPP. Nonetheless, AAFA urges USTR to address Japan's quota levels for leather footwear imports, which are currently "exceedingly" small.

Retail.

- **National Retail Federation.** The National Retail Federation supports the expeditious inclusion of Japan in TPP negotiations. The goals of the Federation with respect to the inclusion of Japan in TPP can be summarized as follows: (i) the Japanese government should ease the restrictions it has against setting up store operations, as outlined in the "Large Retail Store Law," (ii) the Japanese government should also revise its "closed, burdensome and multilayered" distribution system, which currently hinders the ability of foreign retailers to run their supply chains efficiently; (iii) the Japanese government should eliminate the high tariffs, quotas and other barriers to a range of consumer and food products sold at retail; and (iv) Japan should be included in the TPP's harmonized rules of origin; and

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- **Wal-Mart.** Wal-Mart welcomes the inclusion of Japan in TPP as an excellent opportunity to address the trade and competition barriers that hinder Wal-Mart business operation in Japan. According to Wal-Mart, Japan maintains "exorbitant" tariffs on rice, dairy, fish, citrus, and red meat. In addition, Wal-Mart would like Japan to revise the 55-day cold treatment and methyl bromide fumigation treatment currently required of imports of US apples.

Pharmaceuticals and Bio-Technology.

- **Novartis Corporation.** The Novartis Corporation supports Japan's inclusion in the TPP, particularly if the TPP negotiations lead to improvements in Japan's regulatory environment for approving innovative biopharmaceuticals, and more permanent, predictable and transparent approaches to national drug pricing and reimbursement policies. In determining Japan's readiness to participate in the TPP negotiations, Novartis urges USTR to ensure that the Japanese government is willing to address several issues, including: (i) the need for a domestic appeal process for government pricing and reimbursement decisions; and (ii) an improvement upon current efforts to improve the clinical trial environment and accelerate the domestic review timeline for new pharmaceuticals by introducing criteria for more transparency by regulators when determining initial prices and tightened criteria for subsequent pricing and reimbursement reviews and modifications.

Services.

- **UPS.** UPS strongly supports Japan's inclusion in the TPP. UPS hopes that the TPP will help address several "behind-the-border" issues in Japan, including the regulatory preference given to Japan Post's Express Mail Service (EMS). UPS believes a competitive market in which both Japan Post and private sector firms can compete on an equal footing can be ensured through the following: (i) EMS prices should be required to reflect the full cost of providing the service and commitments should be made to prevent Japan Post from cross-subsidization; (ii) the Japanese government should either abolish its duty assessment system for EMS or lower the threshold of JPY200,000 to JPY10,000; (iii) the Japanese government should reexamine the preferential treatment given to EMS packages by exempting them from quarantine requirements under the Act of Domestic Animal Infection Diseases Control and Plant Protection Act; (iv) the Japanese government should require the same advance cargo information of private carriers and EMS to Japan Customs; and (v) the Japanese government should afford EMS and private carriers the same parking regulations.

- **American Council on Life Insurers.** The American Council on Life Insurers (ACLI) welcomes Japan's expression of interest in joining TPP. According to ACLI, two problemactic situations persist in the Japanese insurance market that present challenges to US insurers, namely: (i) Japan Post Insuracne (JPI) enjoys a number of statutory, regulatory, and other governmental privileges that distort competition in the insurance sector; and (ii) Insuracne businesses operated by cooperatives known as "kyosai" enjoy business, tax and regulatory advantages over US insurance suppliers. ACLI holds that Japan's interest in participating in TPP offers an opportunity to address these issues. In order to ensure a level playing field, the ACLI requests that USTR seek an agreement from the Japanese government to: (i) eliminate or modify policies, laws, and practices regarding JPI and kyosai that distort competition; (ii) provide no new or modified product offerings by JPI until equivalent conditions of competition have been established between JPI and US insurance

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suppliers; (iii) provide for prior consultation with affected TPP negotiating parties with respect to any proposed measures that would affect the foreign insurance providers' access to the Japanese market; and (iv) implement measures to ensure full transparency with respect to the regulation and reform of JPI and the kyosai.

Environment.

- **World Wildlife Fund, TRAFFIC North Amerca, and the Wildlife Conservation Society.** The World Wildlife Fund, TRAFFIC North America, and the Wildlife Conservation Society ("Environmental groups") suggest that, before new participants are accepted into the TPP, USTR have a high degree of confidence that the achievement of a strong environmental agreement in the TPP will not be compromised. In assessing Japan's readiness, the Environmental groups recommend that USTR seek evidence, rather than just assurances from Japan, that they are willing to live up to the high standards of the TPP's efforts at environmental conservation. According to the Environmental groups, Japan and all TPP members should commit to the following in the context of the TPP: (i) effective fisheries management programs that prohibit subsidies that contribute to overfishing and limit illegal fishing; (ii) new and meaningful disciplines on fisheries subsidies; enforce existing measures in regional fishery management organizations, and support further measures to strengthen and improve these organizations' conservation rules; (iii) the conservation of shark populations, including action to deter certain shark-finning practices; (iv) stronger measures against trade in illegal timber forest degradation; and (v) full implementation of species-specific resolutions from the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

Intellectual Property.

- **International Intellectual Property Alliance.** The International Intellectual Property Alliance (IIPA) supports Japan's inclusion in TPP. According to IIPA, the Japanese government already has a relatively strong and modern copyright law, responsive copyright enforcement agencies and few significant market access barriers for IP-intensive products. Nonetheless, IIPA would like Japan to commit to the following, *inter alia*, in the context of the TPP: (i) more effective enforcement tools against online copyright infringements; (ii) reform of Japan's private copying exception to exclude from the exception the downloading of all types of copyright works from known infringing sources, and to provide criminal penalties for downloading in appropriate circumstances; and (iii) extension of terms of copyright protection for all works; and

- **Motion Picture Association of America.** The Motion Picture Association of America (MPAA) supports Japan's accession to the TPP. With respect to IP protection, MPAA notes that although Japan is a member of the Anti-Counterfeiting Trade Agreement (ACTA), there are several online piracy-related issues that persist in Japan that the MPAA could be solved criminalizing the following Japanese laws: (i) those that prohibit the downloading of unauthorized "sound and visual recordings"; and (iii) those that prohibit the unauthorized circumvention of technological protection measures.

Labor.

- **American Federation of Labor – Congress of Industrial Organizations.** The American Federation of Labor – Congress of Industrial Organizations (AFL-CIO) does not support the inclusion of Japan, or any other

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new member in the TPP before US negotiators complete the TPP and prove that it has the capability of providing US workers with tangible benefits. According to the AFL-CIO, US-Japan interactions to date have failed to resolve several trade-distorting practices the Japanese government uses, including currency manipulation and non-tariff barriers in the automotive industry. Thus the AFL-CIO fears that, if US negotiators fail to use a new approach, Japan's accession to the TPP will result in a unilateral granting of trade benefits without any commensurate economic benefit accrusing to US workers.

II. NAFTA PARTNERS (MEXICO AND CANADA)

The comments submitted in regard to the possible entry of Mexico and Canada to TPP were generally enthusiastic about expanding TPP's members ship and, in particular, about using TPP to update certain provisions under NAFTA which, according to several US companies and industry groups, are no longer in sync with the needs of the North American businesses. The following is a sector-by-sector sampling of the comments submitted in regard to Mexico's possible inclusion in TPP:

Manufactured Goods

- **National Association of Manufacturers.** The National Association of Manufacturers (NAM) supports the inclusion of Mexico and Canada in TPP, highlighting the large size of the Canadian and Mexican markets for exported US goods. However, NAM emphasizes that the inclusion of Mexico and Canada in the agreement should lead to an expansion of trade and investment commitments beyond those in place under NAFTA, particularly in regard to non-tariff barriers (NTBs) and investment;

- **Dupont.** Dupont supports Canada's inclusion in TPP, citing its own highly integrated cross-border supply chain operations. Howewer, Dupont conditions this support on Canada's commitment to accept TPP texts already negotiated and not to complicate or delay the process for concluding negotiations. Dupont also urges US officials to leverage progress made on streamlining customs and other border procedures in its engagement with Canada on TPP; and

- **General Electric.** General Electric (GE) supports the inclusion of Mexico and Canada in TPP, noting the importance of GE's North American supply Chain. However, GE asserts that the following guidelines should govern TPP members' consideration of future accessions to TPP: (i) global trade rules should be consistent with internationally-established labor and environmental standards, protect intellectual property rights (IPR), and promote market transparency; and (ii) all parties should obey the rules in that state-owned enterprises (SOEs) and technical standards should not be used to restrict market access, governments should promulgate regulation in a transparent manner and should refrain from provided trade-distorting subsidies, and WTO decisions must be respected. Specifically in regard to Canada, GE states that it has encountered market-distorting barriers to trade in Canada such as local content rules, which GE urges US officials to address with Canada in the context of TPP

Textiles, Apparel and Footwear

- **Footwear Distributors and Retailers of America.** The Footwear Distributors and Retailers of America (FDRA) support the inclusion of Mexico and Canada in TPP, noting that both countries represents a new

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consumer and investment market for US brands to expand sales, foreign partnerships and retail presence. Specifically in regard to Mexico, FDRA asserts that the Mexican footwear industry operates under often difficult NAFTA rules such that, were TPP to contain more liberal rules of origin and improved market access benefits, the Mexican footwear manufacturing industry would likely see an immediate increase in investment and production shifts away from China. In regard to Canada, FDRA notes that bringing Canada into TPP could cause certain types of footwear producers to shift away from China as a result of expanded tariff preferences for footwear among TPP countries. However, for the sake of seeing a rapid conclusion of negotiations, FSRA prefers Mexico and Canada to accede to a finished TPP;

- **US Association of Importers of Textiles and Apparel.** The US Association of Importers of Textiles and Apparel (USA-ITA) supports the inclusion of Mexico and Canada in TPP, noting the large size of both countries' consumer markets and contribution to North American supply chains. USA-ITA points out: (i) that eliminating Mexico's and Canada'a high MFN tariff peaks on imported apparel would benefit Mexican and Canadian consumers and support jobs in the United States; and (ii) that inclusion of Mexico and Canada in TPP would help to harmonize rules of origin (ROOs) and customs procedures across the different trade partners with which the United States has FTAs in place;

- **National Council on Textile Organization.** The National Council on Textile Organization (NCTO) does not support Mexico's inclusion in TPP, asserting that US textile exports to Mexico would be hurt by "subsidized" textile inputs from Vietnam, and US textile exports to the other CAFTA countries would wain as trade shifts to Mexico to take advantage of these "subsidized" Vietnamese inputs. In this regard, NCTO posits that, were Mexico to become a TPP member, it would disrupt supply chains between both the United States and Mexico and the United States and the CAFTA countries;

- **American Apparel & Footwear Association.** The American Apparel & Footwear Association (AAFA) supports the inclusion of Mexico and Canada in TPP, citing both countries' large export markets and, also, noting that a Mexico- and Canada inclusive TPP would suppose a "much-needed" update to NAFTA, particularly in regard to such supply chain issues as ROOs. Nonetheless, in regard to Mexico, AAFA urges US authorities to: (i) address claims that Mexico has recently imposed burdensome import documentation requirements for tariff preferences to be granted; (ii) make the US-Mexico pilot cross-border trucking program permanent; (iii) press Mexican authorities to refrain from imposing any WTO-inconsistent antidumping and/or safeguard measures and customs documentation requirement in regard to apparel, footwear and textile imports. In regard to Canada, AAFA urges US authorities to engage Canadian authorities on unclear and bureaucratic apparel- and footwear-related safety regulations imposed by three Canadian provinces, which some US firms allege discriminate against imports.

<u>Agriculture</u>

- **National Pork Producers Council.** The National Pork Producers Council (NPPC) supports Mexico's inclusion in TPP, noting that it will increase US exports and make the North American food production and export industry more cost-competitive. NPPC urges US authorities to seek NAFTA- and WTO-plus sanitary and phytosanitary (SPS) measures with Mexico in the context of TPP, and posit that having Mexico under the same ROO regime as the United States' trading partners in Asia would boost US exports as Mexican exports

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would likely carry a greater degree of US content. In regard to Canada, NPPC cautiously support its inclusion in TPP, noting that the provision of countervailable subsidies to the Canadian hog market causes significant trade distortions to the North American hog market, and that these distortions must be resolved prior to Canada admission to TPP;

- **National Grain and Feed Association and North American Export Grain Association.** National Grain and Feed Association (NGFA) and North American Export Grain Association (NAEGA) support the inclusion of Mexico and Canada in TPP, noting that it will provide for gains to both US, Mexican and Canadian agricultural economies and consumer interests. Moreover, NGFA and NAEGA asserts that a Mexico- and Canada-inclusive TPP will enhance food security and predictability of supply;

- **National Cattlemen's Beef Association.** The National Cattlemen's Beef Association (NCBA) cautiously supports inclusion of Mexico in TPP, noting that Mexico has restricted US beef imports to cattle slaughtered under 30 months of age, and also prohibits certain cuts such as ground beef. NCBA urges US authorities to consider such non-science-based decisions on the part of Mexico when weighing its bid to join TPP. In contrast, NCBA strongly supports Canada's bid to accede to TPP, citing Canada's long standing commitment to employing science-based methodologies in evaluating food safety;

- **National Potato Council.** The National Potato Council (NPC) supports Mexico's inclusion in TPP, noting that the agreement's high standards would resolve many of the potato-related US-Mexico trade issues not already contemplated under NAFTA. NPC puts forth that US fresh potato market access is limited to the 26 kilometer zone adjacent to the border, and that Mexico currently imposes non-science-based phytosanitary measures on US potato exports. These issues, according to NPC, would be better addressed within the context of TPP. NPC also supports the inclusion of Canada in TPP, noting that current Canadian restrictions on US potato exports could better be addressed within the context of TPP;

- **National Milk Producers Federation and US Dairy Export Council.** The National Milk Producers Federation (NMPF) and the US Dairy Export Council (USDEC) supports the Mexico's inclusion in TPP only if Canada also accedes as the inclusion of both countries would be necessary for there to exist a seamless North American dairy market. Also, having Mexico (and Canada) within TPP, according to NMPF and USDEC, would effectively extend to such prior US FTAs as NAFTA new higher standard provisions relating to SPS measures and geographic indicators, which have proved troublesome for US milk producers and exporters in recent years. Nonetheless, NMPF and USDEC cite tight restrictions on dairy imports, *e.g.*, tariff-rate quotas (TRQs), which could be better addressed within the context of TPP.

<u>Communications, Aerospace, Medical Devices and Miscelaneous High Tech</u>

- **Business Software Alliance.** The Business Software Alliance (BSA) supports Mexico's inclusion in TPP, noting that Mexico is a top US trading partner and has played a constructive role in regional and international negotiations in the past. In regard to concerns specific to Mexico's expression of interest, BSA urges US authorities to: (i) seek barrier-free e-commerce and trade in services; (ii) facilitate the free movement of data across national boundaries, *e.g.*, cloud computing and data flows; (iii) pursue TPP provisions that best combat piracy. BSA also supports the inclusion of Mexico in TPP, and hopes that the Canadian Parliament

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will soon enact copyright reform legislation to update "outdated" IPR laws that are "well below the anticipated standards of […] TPP."

- **Information Technology Industry Council.** The Information Technology Industry Council (ITIC) supports the inclusion of Mexico and Canada in TPP, noting that it would yield significant benefits and lead to an even stronger, more commercially relevant TPP outcome. ITIC highlights the following as areas where standards should be set high in regard to engagement with Mexico and Canada on TPP: (i) that regulation be promulgated in a transparent manner; (ii) that conformity assessments should ensure the greatest degree of compliance at the lowest level of government intervention, as justified by risk assessments; (iii) that IPR protections be vigorously pursued; (iv) that cross-border data flows be protected by strong, binding provisions; (v) that trade in services, particularly computer and related services, be greatly liberalized; (vi) that no further restrictions be placed on the import and commercial sale of goods containing cryptographic capabilities; and (vii) that all TPP countries, including Mexico and Canada, were they to accede, join the WTO Information Technology Agreement.

- **Association of Electrical and Medical Imaging Equipment Manufacturers.** The Association of Electrical and Medical Imaging Equipment Manufacturers (AEMIEM) supports Mexico's inclusion in TPP, noting that Mexico is a major importer of Electrical and Medical Imaging Equipment. In regard to its possible accession, AEMIEM recommends that Mexico be prepared to: (i) provide full national treatment to exporters from the United States and other TPP parties; (ii) achieve full transparency of standards and regulations; (iii) fully open its market for services, particularly testing and technical services, distribution services, energy services, environmental services and medical services; (iv) fully open its government procurement market; (v) fully protect IPR through cooperation with other TPP parties and seizing of counterfeit/pirated goods. AEMIEM also supports Canada's inclusion in TPP, although it asserts that Canada must commit to: (i) fully open its government procurement market; (ii) fully open its market for services, particularly testing and technical services, distribution services, energy services, environmental services and medical services; and (iii) fully protect IPR through cooperation with other TPP parties and seizing of counterfeit/pirated goods;

- **Boeing.** Boeing supports the inclusion of Mexico and Canada in TPP, noting that both countries are large suppliers of aerospace parts to the United States, and are also large purchasers of Boeing commercial aircraft and defense goods. In regard to concerns specific to the expression of interest on the part of Mexico and Canada, Boeing points to border delays that increase inventory and depreciation costs, and posits that all TPP members should support such provisions that: (i) include customs facilitation procedures that reduce border processing times; (ii) improve transparency; (iii) utilize effective risk management tools; (iv) and eliminate unnecessary fees; and

- **Advanced Medical Technology Association.** The Advanced Medical Technology Association ("AdvaMed") supports the inclusion of Mexico and Canada in TPP, asserting that it would create an improved North American competitive environment, effectively update NAFTA provisions, and increase US exports to both countries. However, AdvaMed urges US negotiators to explain to their Mexican and Canadian counterparts the importance of the current TPP principles and objectives for medical technology, and ensure that both countries support them as part of a TPP final agreement.

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Food, Beverage and Personal Care Products

- **American Meat Institute.** The American Meat Institute (AMI) supports Mexico's inclusion in TPP, noting that Mexico is one of the largest export destinations for US beef, pork and poultry. AMI emphasizes its support for any initiative to expand TPP membership as long as new entrants are committed to the stated goals of reducing or eliminating both tariff and non-tariff barriers to trade;

- **Personal Care Products Council.** The Personal Care Products Council (PCPC) supports the inclusion of Mexico and Canada in TPP, noting that it would result in increased trade and investment opportunities, and would contribute to technological innovation and greater consumer safety. However, PCPC puts forth the following priorities for US-Mexico and US-Canada trade in personal care products: (i) all TPP countries should adopt internationally recognized Cosmetic Good Manufacturing Practice (GMP) guidelines to ensure consistency in quality and quantity; (ii) if one TPP member approves a positive (active) ingredient, other TPP countries should implement an expedited approval process for the same product, and restrictions on ingredients should be based on sound science; and (iii) TPP countries should harmonize the rule of ingredient listing;

- **American Frozen Food Institute.** The American Frozen Food Institute (AFFI) supports the inclusion of Mexico and Canada in TPP, noting that partnerships with Mexico and Canada under NAFTA have allowed many US frozen fruit and vegetable processors to extend the growing season by sourcing crops from these countries when US harvests end. AFFI posits that a Mexico- and Canada-inclusive TPP will help resolve SPS related barriers faced by US frozen food producers upon exporting to Mexico. However, AFFI warns that the accession of a new member to TPP should not result in the reopening of already negotiated texts, a slowing of the negotiating process, the modifying of negotiating objectives or the introduction of any special concessions;

- **Distilled Spirits Council of the United States.** The Distilled Spirits Council of the United States (DSCUS) supports Mexico's inclusion in TPP, noting that Mexico is an important and growing market for US spirits exports. DSCUS encourages the Obama Administration to work closely with Mexican officials to ensure Mexico's full participation as a TPP member;

- **Association of Food, Beverage and Consumer Products.** The Association of Food, Beverage and Consumer Products (GMA) supports Mexico's inclusion in TPP, noting that Mexico is a major export market for GMA companies and that GMA companies also depend on Mexico as a source for raw materials for their respective products. However, GMA does cite: (i) Mexico's allegedly non-transparent manner in which it promulgates regulations such that GMA emphasizes that Mexico must accept high standard texts on transparency and regulatory coherence; (ii) Mexico's alleged non-scientifically-based arguments for prohibiting US exports of cattle over 30 months in age such that GMA emphasizes that Mexico must agree to eliminate this "unjustified trade barrier." In regard to Canada, GMA support also supports its inclusion in TPP, although it urges US officials to engage their Canadian counterparts on: (i) trade-restrictive quotas and compositional standards for dairy, pork and poultry products; and (ii) redundant inspection procedures for meat and poultry products.

Services

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- **Coalition of Service Industries.** The Coalition of Service Industries (CSI) supports Mexico's inclusion in TPP, noting that it would provide US services firms with improved market access and solidify TPP as the basis for an eventual free trade area of the Asia-Pacific. Specifically in regard to engagement with Mexico on TPP, CSI urges US officials to ensure Mexico upholds TPP high standard provisions on: (i) IPR; (ii) business person mobility, *i.e.*, visas; (iii) transparency of process and regulatory transparence, particularly in regard to the provision of financial services; (iv) cross-border provision of telecommunications-related services; (v) customs and trade facilitation, particularly in regard to impacts on express delivery services. CSI also supports Canada's inclusion in TPP, although it urges US officials to ensure Canada upholds TPP high standard provisions on: (i) IPR; (ii) business person mobility, *i.e.*, visas; (iii) foreign investment in the telecommunications sector; and (iv) customs and trade facilitation;

- **FedEx.** FedEx supports Mexico's inclusion in TPP, noting that it would provide economically significant market access opportunities for US workers, farmers, ranchers, service providers and small businesses. Specifically in regard to engagement with Mexico on TPP, FedEx asserts that Mexico must agree to uphold high standard provisions on: (i) customs and trade facilitation, *e.g.*, development of preclearance processes and inspection criteria based on risk management principles, transparency in regulatory changes, implementation of paperless procedures, raising the *de minimus* clearance level, and providing liability relief to express delivery service companies; and (ii) ground transportation regulations, *e.g.*, removal of size and weight restrictions on delivery trucks. FedEx also supports Canada's inclusion in TPP, although it asserts that Mexico must agree to uphold high standard provisions on: (i) customs and trade facilitation; and (ii) *de minimus* levels;

- **National Retail Federation.** The National Retail Federation (NRF) supports the inclusion of Mexico and Canada in TPP, noting that both countries are key parts of the US retail industry's global value and supply chain. NRF asserts that TPP will update NAFTA provisions that are out of touch with the current business reality such as: (i) those relating to e-commerce; and (ii) the yarn-forward rule of origin for textiles and apparel, which is used in NAFTA with Mexico and Canada, is "designed to restrict […] rather than promote trade and investment" and should, therefore, be abandoned as a general rule; and

- **American Council for Life Insurers.** The American Council for Life Insurers (ACLI) supports the inclusion of Mexico and Canada in TPP, noting that economic recovery and job creation in the United States depends on its ability to promote open and free trade and investment with such "key partners." ACLI asserts that Mexico and Canada will be strong allies in supporting TPP provisions that: (i) address the trade-distorting effects of state-owned enterprises (SOEs); (ii) ensure unhindered cross-border data flows; and (iii) remove requirements that lead to "forced [domestic] localization" of services firms.

<u>Pharmaceuticals</u>

- **Pharmaceutical Research and Manufacturers of America.** The Pharmaceutical Research and Manufacturers of America (PhRMA) supports the inclusion of Mexico and Canada in TPP, noting that it could further facilitate US-Mexico and US-Canada trade and economic cooperation. However, PhRMA believes that, before acceding, Mexico and Canada must first come into compliance with its commitments under

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NAFTA and WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in regard to: (i) data protection; (ii) patent enforcement; and (iii) patent term restoration; and

- **Generic Pharmaceutical Association.** The Generic Pharmaceutical Association (GPhA) does not support the inclusion in TPP of Mexico nor that of Canada, asserting that NAFTA already provides an adequate framework for the protection of IPR, effectively balancing the promotion of innovation and access to affordable medicines. According to GPhA, if new issues need to be addressed, it should be done through NAFTA. GPhA further notes that adding Mexico and Canada to TPP at this late stage may pose unnecessary addional challenges to the timely conclusion of the negotiations.

Iron & Steel, Machinery, Automobiles and Auto Parts

- **Motor & Equipment Manufacturers Association.** The Motor & Equipment Manufacturers Association (MEMA) does not explicitly express whether it supports the inclusion in TPP of Mexico and Canada, having submitted comments entirely void of any mention of "Mexico" or "Canada." MEMA does strongly urge US officials to ensure that all current and future TPP members commit to greatly reducing or entirely eliminating arbitrary non-tariff barriers (NTBs) such as environmental- and safety-related technical standards;

- **National Marine Manufacturers Association.** The National Marine Manufacturers Association (NMMA) supports the inclusion in TPP of Mexico and Canada, noting that it could reverse the US deficit with Mexico in trade of recreational boats and marine engines, and suppor the current surplus with Canada. However, NMMA asserts that the following guidelines should inform US officials' consideration of both countries' respective accession bid: (i) Mexico and Canada must be willing to expand trade and investment commitments beyonf NAFTA levels; (ii) Mexico and Canada must not attempt to roll back any commitments under NAFTA; and (iii) Mexico and Canada must accept previously negotiated texts, uphold the high ambition of the agreement, and not serve to slow the negotiation timeframe.

- **Caterpillar.** Caterpillar cautiously supports the inclusion in TPP of Mexico and Canada. According to Caterpillar, ROOs written for the TPP that govern trade of waste, scrap, recovered and remanufactured goods should not be parallel to the treatment afforded to these goods under NAFTA and, should Mexico and Canada attempt to push NAFTA-style ROOs, the qualification of these goods for preferential tariff treatment will be made far more challenging.

- **American Iron and Steel Institute.** The American Iron and Steel Institute (AISI) supports the inclusion in TPP of Mexico and Canada, noting that it will serve to further strengthen the already close trade relationship between the United States and its NAFTA partners. AISI expresses hope that Mexico and Canada, were they to accede to TPP, would support the United States in addressing a number of concerns, including "trade-distorting behavior by state-owned enterprises in Asia."

Energy and Mineral Extraction

- **Chevron.** Chevron supports Mexico's inclusion in TPP, noting that, although Mexico places harsh restrictions on participation by private investors in the development of Mexico's energy resources, it is the sovereign right of any country to do so. Were Mexico to institute constitutional changes allowing for such

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private participation, Mexico's alignment with a strong TPP chapter on investment would undoubtedly attract and sustain investment in Mexico. Chevron also supports Canada's expression of interest in TPP, noting that Canada, like Mexico, would push a strong investment chapter;

- **ConocoPhillips.** ConocoPhillips supports Canada's expression of interest in TPP, noting the strong linkage of commodity and product flows and already highly integrated nature of the United States and Canada. Like Chevron, ConocoPhillips highlights the importance of investment in energy sector development and thus strongly urges USTR to prioritize Canada's inclusion in TPP.

- **Teck.** Teck, which operates a zinc mine in Alaska, supports Canada's inclusion in TPP, noting that Canada's exclusion could adversely affect the export and trade of US-mined minerals. Teck also asserts that Canada's negotiating position in many disciplines would likely be in line with that of the United States such that Canada's inclusion in TPP would likely strengthen the US negotiating position.

Labor

- **American Federation of Labor – Congress of Industrial Organizations.** The American Federation of Labor – Congress of Industrial Organizations (AFL-CIO) does not support the inclusion in TPP of Mexico and Canada, noting that more than 700,000 jobs have disappeared in the United States since the entry into force of NAFTA with Mexico and Canada. However, the AFL-CIO states that it would support the inclusion of Mexico and Canada if the agreement were to: (i) include strong and enforceable labor standards; (ii) moderate the extreme investor rights found under Chapter 11 of NAFTA; and (iii) ensure that IPR provisions promote affordable access to medicines as well as fair returns on investment in research and development.

Outlook

At the November 2011 Asia-Pacific Economic Cooperation (APEC) Summit, US officials welcomed the expression of interest on the part of Japan, Mexico and Canada in joining the TPP. Nonetheless the path forward for these three countries' accession to the agreement is unclear. The US government is not the deciding TPP member with respect to possible new entrants, but the firm opposition of the United States to the accession of any single party, or even prolonged hesitation on the part of the US government would likely imperil a possible entrant's candidacy. The Obama Administration, of which USTR TPP negotiators are part, is preparing for the November 2012 presidential and legislative elections aware that skepticism toward free trade typically increases during US elections seasons. Consequently, USTR is wary of being perceived as anything less than very thorough in its assessment of Japan's readiness to join TPP, as many US industries, especially the auto, agricultural and services industries, have unresolved issues related to market access in Japan. The Obama Administration is also likely concerned that actively pursuing the inclusion in TPP of Mexico and Canada could be perceived as an attempt to expand NAFTA, an agreement which a large portion of the Democratic base claims ships jobs offshore. In addition to these US political considerations, experts posit that the number of negotiating items still unresolved (*e.g.*, tariff schedules, labor, environment IPR, SOEs, etc.) is still so great that a 2012 conclusion to the agreement seems improbable, such that the Obama Administration is unlikely to feel any great measure of urgency in courting new entrants before 2013.

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Free Trade Agreement Highlights

Update on Implementation of US Bilateral FTAs with Latin America

Summary

On October 12, 2011 Congress passed the implementing legislation for three free trade agreements (FTAs), namely: (i) the US-Korea FTA (KORUS); (ii) the US-Colombia FTA; and (iii) the US-Panama FTA. President Obama signed the three pieces of legislation into law on October 21, 2011. Although all three FTAs have been ratified, they have not yet been entered into force. The Obama Administration has sent signals that it has prioritized entering into force KORUS ahead of the US-Colombia FTA and the US-Panama FTA. Nonetheless, work on the implementation of the latter two bilateral FTAs between the United States and Latin America is also underway. Before they are entered into force, Panama and Colombia must fulfill numerous legal requirements outlined in the agreements, and Colombia must demonstrate that it has taken key steps towards providing enhanced protection of labor rights in Colombia. While the US government claims that it does not need to enact any legal changes in order to fulfill its own obligations under the agreements, it is expected to enact several regulatory changes before the agreements are entered into force. Below we summarize the key obligations that each country must meet before the US-Colombia and US-Panama FTAs can be entered into force.

Analysis

I. US OBLIGATIONS

The Office of the US Trade Representative (USTR) holds that the implementing legislation for the US-Panama and US-Colombia FTAs contained all changes to US law necessary to bring the United States into compliance with the agreements. USTR has further stated, however, that there are several regulatory measures the US government must enact before it can be considered as being in compliance with the agreement. More specifically, President Obama will issue a presidential proclamation several days before or on the day that each agreement enters into force that will modify certain tariff lines and product-specific rules, and make additional administrative changes covering issues such as customs and procurement.

II. COLOMBIA OBLIGATIONS

The US-Colombia FTA was signed on November 22, 2006. The Colombian Congress approved the agreement in June 2007. Although both countries have ratified the agreement, it will not enter into force until the parties exchange written notifications certifying that they have completed the legal requirements they agreed to in the agreement. According to Article 23.4.1 of the of the US-Colombia FTA, the agreement will enter into force 60 days after, or on any other date the parties agree to, after these diplomatic notes have been exchanged.

Legal Requirements

Sources note that the Colombian government still has several legal requirements it must fulfill with respect to the agreement, including several to which the Colombian government committed under Chapter 16 of the US-

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Colombia FTA, which deals with intellectual property rights (IPR). Observers note that, in order to fulfill these obligations, the Colombian Congress must, *inter alia*: (i) pass a law to address the liability of Internet service providers (ISPs) for IPR-infringing material posted by users, *i.e.*, "secondary liability;" (ii) ratify the International Convention for the Protection of New Varieties of Plants of 1991; and (iii) ratify the Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite of 1974.

Labor Rights-Related Requirements

The Colombia Action Plan Related to Labor Rights ("Action Plan") was unveiled by the Colombian and US governments on April 7, 2011 in an effort to satisfy US Democratic lawmakers' concerns regarding the Colombian government's allegedly poor labor rights protection record and move forward the US congressional ratification process of the US-Colombia FTA. The Action Plan requires the Colombian government to meet specific labor rights-related requirements by certain pre-determined deadlines. Sources note that the Colombian government successfully fulfilled recent requirements, including, *inter alia*, the hiring and training of at least 100 new labor inspectors by December 15, 2011.

In a letter accompanying his October 3, 2011 submission of implementing legislation for the US-Colombia FTA to Congress, President Obama made clear that, in addition to fulfilling all of its legal obligations, the Colombian government must also "successfully implement key elements" of the Action Plan before he will bring the agreement into force. Sources note that it remains unclear which key elements of the Action Plan Colombia will have to fulfill. As a result of this lack of clarification, Democratic lawmakers have continued to bring attention to the issue.

For example, on October 12, 2011 Sen. Ron Wyden (D-OR) and three Democratic Senators[63] wrote a letter to USTR Ron Kirk, in which the Senators requested formal annual reports, starting in February 2012 and continuing for no less than 10 years, detailing Colombia's compliance with the Action Plan. On December 8, 2011 Senate Majority Leader Harry Reid (D-NV) and 18 Democratic Senators[64] also sent a letter to USTR Kirk and Labor Department Secretary Hilda Solis requesting quarterly briefings and written reports in regard to the Action Plan. In addition, on November 16, 2011, House Minority Leader Nancy Pelosi (D-CA) and seven democratic lawmakers[65] announced, in a letter to Colombian President Juan Manuel Santos, the establishment of the Congressional Monitoring Group on Labor Rights in Colombia. According to the letter, the Group will work closely with the Obama Administration, the Colombian government, as well as US and Colombian labor

[63] The three other Senators who signed the letter include Sens. Ben Cardin (D-MD), Robert Menendez (D-NJ), and Debbie Stabenow (D-MI).

[64] The 18 other Senators who signed the letter include Sens. Sherrod Brown (D-OH), Jeff Bingaman (D-NM), Tom Harkin (D-IA), Debbie Stabenow (D-MI), Charles Schumer (D-NY), Patrick Leahy (D-VT), Robert Casey (D-PA), Claire McCaskill (D-MO), Ben Cardin (D-MD), Robert Menendez (D-NJ), Al Franken (D-MN), Frank Lautenberg (D-NJ), Jon Tester (D-MT), Barbara Boxer (D-CA), Kirsten Gillibrand (D-NY), Patty Murray (D-WA), Amy Klobuchar (D-MN), and Sheldon Whitehouse (D-RI)

[65] The seven lawmakers include Reps. Sander Levin (D-MI), George Miller (D-CA), Rosa DeLauro (D-CT), James McGovern (D-MA), Mike Michaud (D-ME), Sam Farr (D-CA), and Joseph Crowley (D-NY).

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organizations and non-governmental organizations in an effort to ensure that Colombia successfully implements the Action Plan.

In an effort to address Democratic lawmakers' concerns, on January 5, 2012 USTR Kirk and Secretary Solis sent a letter to Sen. Wyden in which they noted that the Colombian government has met numerous specific milestones to date in the Action Plan, including "putting resources and legal tools in place to better protect labor rights, prevent violence against unionists, and prosecute the perpetrators of such violence." The letter also commits USTR Kirk and Secretary Solis to providing interested Senators and staff with: (i) quarterly briefings regarding the implementation of the Action Plan; and (ii) reports the Colombian government provides regarding the Action Plan.

I. PANAMA OBLIGATIONS

The US-Panama FTA was signed on June 28, 2007. The Panamian Congress passed the agreement on July 11, 2007. According to Article 22.5.1 of the US-Panama FTA, the agreement will enter into force 60 days after, or on any other date the parties agree to, after these diplomatic notes have been exchanged. Like Colombia, sources note that Panama must also ratify several international treaties related to IPR. Sources also contend that Panama must make several changes to the way in which it administers its tariff-quota system in accordance with Article 3.14 of the US-Panama FTA, before it can be considered to be in full compliance with its obligations under the agreement. Sources note that Panamanian officials have, as of yet, only notified US officials on the enactment of approximately half of these measures needed for compliance.

Outlook

Despite the uncertainties surrounding Colombia's remaining unfulfilled commitments under the US-Colombia FTA and the Action Plan, experts agree that it is still possible that the agreement is entered into force sometime in 2012. Experts cite the recent and upcoming trips made by US and Colombian officials as evidence that both governments have prioritized the implementation of the agreement. For example, US officials travelled to Colombia from November 8-9, 2011 in order to launch the implementation effort. In addition, Colombian Labor Minister Rafael Pardo is expected to visit Secretary Solis sometime in January 2012. From January 10-13, 2012 House Speaker John Boehner (R-OH) and six other bipartisan lawmakers met Colombian President Santos in Cartegena de Indias, Colombia to discuss, among other issues, the implementation of the US-Colombia FTA.

At the earliest, observers note that the US-Colombia FTA could be entered into force in time for President Obama's April 14-15, 2012 trip to Cartegena de Indias, Colombia for the Summit of the Americas. Nonetheless, experts have expressed doubt regarding the Colombian Congress' ability to pass legislation implementing key provisions of the agreement by mid-2012. If the agreement's implementation gets delayed too far past April 2012, experts note that the Obama Administration may try to further delay the implementation until 2013 due to a desire to avoid a dispute with its union supporters regarding labor rights in Colombia in the months immediately prior to the 2012 Presidential election.

Although the US-Panama FTA is widely considered to be the least controversial of all three FTAs passed by Congress in October 2011, experts agree that because the the market opportunities Panama presents to US businesses are not as abundant as those offered by Korea and Colombia, USTR is not as focused on the

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implementation of the US-Panama FTA. Experts agree with the American Chamber of Commerce in Panama's (AmCham Panama) prediction that the FTA is likely to be entered into force in late 2012 or early to mide-2013. Nonetheless, US officials have met with Panamian officials on several occasions to discuss the implementation of the agreement, including: (i) a November 9-10, 2011 trip made by USTR to Panama City, Panama to launch implementation efforts; and (ii) a January 13, 2011 visit by Panamaian President Ricardo Martinelli to Cartegena de Indias, Colombia to discuss the implementation of the US-Panama FTA with Speaker Boehner and six other bipartisan lawmakers during their visit to Colombia.

Top Republican Trade Committee Members Urge USTR Not to Expand Scope of Labor Chapter in TPP

On December 21, 2011, the four top Republican House and Senate trade committee members[66] sent a letter urging US Trade Representative (USTR) Ron Kirk not to expand the scope of the Trans-Pacific Partnership's (TPP) labor chapter beyond that defined by the labor chapters of the United States' free trade agreements (FTAs) with Korea, Colombia, Panama and Peru. According to the lawmakers, such an expansion would "seriously undermine support for the TPP and jeopardize [c]ongressional approval of the [A]greement."

USTR tabled a partial proposal for TPP's labor chapter in October 2011 at the ninth round of TPP negotiations. At the November 2011 Asia-Pacific Economic Cooperation (APEC) Leaders Summit, TPP negotiators presented the broad outlines of the TPP Agreement. Sources note that USTR circulated additional components of its labor proposal to TPP parties in late December 2011.

In their December 21 letter, the lawmakers state that, although they fully support the goal of ensuring the safety and fair treatment of workers through FTAs, they would rather support this goal by including FTA provisions that provide labor-related capacity building, and not provisions that expand upon labor-related obligations. By stating their aversion to a move by the Obama Administration to expand labor-related obligations in the TPP beyond those defined in the labor chapter of the United States' FTAs with Korea, Colombia, Panama and Peru, the lawmakers effectively stated their belief that the scope of TPP's labor chapter should not exceed that outlined in the "May 10 Agreement."[67] The lawmakers outlined numerous reasons for why the Obama Administration should not go beyond the May 10 Agreement's labor provisions, including but not limited to:

- **Countries May Bring Labor Disputes Against the United States.** According to the lawmakers' letter, expanded labor obligations may create an opportunity for countries to bring disputes regarding certain US

[66] The four lawmakers who signed the December 21 letter include: House Ways and Means Chairman Dave Camp (R-MI), House Ways and Means Trade Subcommittee Chairman Kevin Brady (R-TX); Senate Finance Committee Ranking Member Orrin Hatch (R-UT), and Senate Finance Subcommittee on International Trade, Customs and Global Competitiveness Ranking Member John Thune (R-SD).

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

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labor laws. More specifically, the lawmakers cite US labor policies regarding family farms as potentially vulnerable to a labor dispute under an expanded labor chapter in TPP;

- **The Completion of the TPP Agreement May be Delayed.** The lawmakers state that expanded labor obligations would "inevitably bog down and delay the conclusion of the TPP;"

- **New Market Access Opportunities May be Lost.** According to the lawmakers' letter, the proposal of broader labor obligations may incite TPP parties to offer less significant market access concessions within the context of the Agreement; and

- **Any Changes to US Labor Laws should be Considered Under Regular Congressional Order.** According to the lawmakers' letter, the Obama Administration should not seek to change US labor law indirectly by committing to obligations within TPP that exceed current law. Observers note that a completed TPP Agreement would most likely be considered by Congress under Trade Promotion Authority (TPA), which would not allow lawmakers to amend any aspect of the Agreement.

Sources note that aspects of USTR's labor proposal reflect the May 10 agreement, while others exceed its scope. For example, sources note that, like the May 10 Agreement, the US labor proposal for TPP requires that countries adopt, maintain and enforce in their laws the rights outlined in the 1998 International Labor Organization (ILO) Declaration on the Fundamental Principles and Rights at Work, but not the "core" ILO Conventions. On the other hand, sources note that the US labor proposal for TPP differs from the May 10 Agreement in that it includes provisions regarding the following, *inter alia*:

- **Complaints.** Sources note that the US proposal includes provisions detailing how TPP countries should handle complaints about labor rights violations submitted by the public and timeframes for doing so;

- **Forced or Child Labor.** According to sources, the US proposal includes provisions that urge TPP countries to reduce trade in products made through forced or child labor;

- **Trade Zones.** Sources note that the US proposal includes provisions that require TPP countries to apply their national labor laws in export processing zones and free trade zones; and

- **Investment-Related Concerns.** According to sources, the US proposal includes provisions that ensure investment activity is sensitive to labor rights.

Experts note that labor rights, disciplines for state-owned enterprises (SOEs) and intellectual property rights protections (IPR) are among the most contentious issues covered in the TPP. Experts further note that issues such as labor rights present a particular challenge to the Obama Administration, as Republican and Democratic lawmakers have distinctly different views regarding the issues, as do developed and developing countries party to the TPP. Observers opine that USTR does not likely want to invite a stalemate similar to that which led to the May 10 agreement in 2007. While the December 21 letter had few signees, it is worth noting that the lawmakers who did sign it are the House and Senate trade committee's top Republican members. Because these lawmakers can appreciably influence their party's vote with respect to a completed TPP Agreement, experts note that the letter has likely caught the attention of USTR.

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