November 2006

Japan External Trade Organization
WTO and Regional Trade Agreements Monthly Report

IN THIS ISSUE

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Summary of Reports

United States

UNCTAD Releases World Investment Report on FDI from Developing and Transition Economies

On September 16, 2006, the United Nations Conference on Trade and Development (UNCTAD) published the *World Investment Report 2006 - Foreign Direct Investment (FDI) from Developing and Transition Economies: Implications for Development*. We summarize herein the report's findings on Asia and Latin America.

GAO Issues Report on CBP's Revised Bonding Policy: Uneven Implementation Remains Problematic

On October 18, 2006, the Government Accountability Office (GAO) released a report on the U.S. Customs and Border Protection's (CBP) revised bonding policy. The GAO reports that since 2003, CBP has been unable to collect at least $480 million in antidumping (AD) and countervailing (CV) duties and beginning in July 2004, revised its policy on continuous bonds (CB) that importers post to secure payment of duties, taxes, and charges on imports. CBP used imports of warmwater shrimp as a test case for the revised CB policy and GAO reports that the policy "potentially significantly increases the amount of the bonds for affected importers." The GAO report examines why and how CBP revised its CB policy, and the effects of the revised policy. We review herein the report's findings.

The full GAO report can be found at http://www.gao.gov/new.items/d0750.pdf.

Special Report: 2006 Election Results and Implications for Trade Issues in Congress

On November 7, 2006, voters changed the ruling majorities in Congress and delivered control of the United States House of Representatives and Senate to Democrats for the first time since 1994. In this report, we analyze those changes and discuss their implications on major trade issues in Congress.

Cato Institute Releases Paper on the Hidden Cost of U.S. Rice Subsidies

On November 16, 2006, the Cato Institute Center for Trade Policy Studies released "Grain Drain: The Hidden Cost of U.S. Rice Subsidies" that explores U.S. government support for domestic rice industry.

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According to author **Daniel Griswold, Director of the Center for Trade Policy Studies**, U.S. rice subsidies cost American taxpayers "three times over," and U.S. rice support drives international rice prices down. We discuss herein the briefing paper and its findings.

The Cato Institute paper is available at http://www.freetrade.org/pubs/briefs/tbp-025es.html.

United States Highlights

We want to alert you to the following United States developments:

- U.S. and Russia Sign Bilateral Agreement as Part of Russia's WTO Accession Bid
- Members of Congress Call for GSP, ATPDEA Extension During Lame-Duck Session
- Modifications to U.S. Harmonized Tariff Schedule Set for January 1, 2007 Implementation
- Peru and Colombia Re-Open Markets to U.S. Beef Products

Free Trade Agreements

U.S. and Malaysia Complete Third Round of FTA Negotiations

On October 30, 2006, U.S. and Malaysian officials met in Kuala Lumpur, Malaysia for the third round of formal bilateral Free Trade Agreement (FTA) negotiations. Officials from the Office of the United States Trade Representative (USTR) conducted discussions with their Malaysian counterparts in several areas including market access for agriculture, goods and textiles, investment and rules of origin (ROOs). The United States and Malaysia plan to convene a fourth round of talks in San Francisco the week of January 8, 2007.

Free Trade Agreements Highlights

We want to alert you to the following Free Trade Agreements developments:

- United States Signs TIFA With Lebanon
- U.S. and Colombia Sign FTA While Democrats Urge Renegotiation of Labor Provisions in Peru and Colombia Agreements
- Update on USTR's Latin America Agenda
- U.S.-Uruguay BIT Enters Into Force
- Costa Rica To Implement DR-CAFTA in Early 2007

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Multilateral

United States Lists Areas of Concern During China TRM Process

On October 16, 2006, the United States circulated a communication to World Trade Organization (WTO) Members as part of the WTO's "transitional review" of China's adherence to its WTO accession commitments. As part of its WTO accession package that it signed in 2001, China agreed to undergo annual reviews of its compliance efforts through 2009, with a final review in 2011. In its communication, the United States outlined several areas of concern, including automobiles, textiles and state-owned enterprises (SOEs). The United States' primary focus in most of these areas was potential Chinese subsidization in violation of China's accession commitments and the WTO's Agreement on Subsidies and Countervailing Measures (the Subsidies Agreement). WTO officials noted that China did not provide written responses to WTO Members' concerns as it had done in previous annual reviews. China argued that has limited administrative resources to respond in writing to all the questions and thus responded to Members' concerns during a meeting of the WTO Subsidy Committee. We review these concerns herein and China's response.

WTO Appellate Body Issues Report on U.S.- EC Customs Dispute

The World Trade Organization (WTO) Appellate Body (AB) has rendered a mixed ruling in a U.S. challenge to the European Community's system of customs administration (DS315). While the Appellate Body ruled in favor of the United States on a number of threshold procedural issues, it declined to "complete the analysis" by adjudicating the substantive aspects of the major U.S. claims. The decision leaves the door open to a new challenge by the United States.

WTO Compliance Panel Releases Decision in United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina

A WTO "compliance" Panel has ruled that the United States failed to implement the 2004 rulings of the WTO in a dispute over the imposition of U.S. anti-dumping duties on steel pipe from Argentina. The Panel found that the measures challenged by Argentina remained in breach of U.S. obligations under the Anti-Dumping Agreement, both "as such" and "as applied." The decision of the Panel in *United States –*

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Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina: Recourse to Article 21.5 of the DSU by Argentina (DS268) was released on November 30, 2006.

Multilateral Highlights

We want to alert you to the following Multilateral developments:

- WTO Director-General Lamy Announces Informal Re-Start to Doha Negotiations
- WTO General Council Approves Vietnam's Bid for Membership; House Rejects Initial Vietnam PNTR Vote

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Reports in Detail

United States

UNCTAD Releases World Investment Report on FDI from Developing and Transition Economies

Summary

On September 16, 2006, the United Nations Conference on Trade and Development (UNCTAD) published the *World Investment Report 2006 - Foreign Direct Investment (FDI) from Developing and Transition Economies: Implications for Development*. We summarize herein the report's findings on Asia and Latin America.

Analysis

I. Background

UNCTAD is a permanent United Nations body established in 1964 to "maximize the trade, investment and development opportunities of developing countries and assist them in their efforts to integrate into the world economy on an equitable basis."[1] UNCTAD produces the yearly World Investment Report (WIR) which analyzes global FDI trends, emphasizing one specific FDI topic each year. The selected topic in the 2006 Report was "FDI from Developing and Transition Economies." UNCTAD defines developed countries as those belonging to the Organization for Economic Cooperation and Development (OECD), including Lichtenstein, Andorra, Israel, Monaco and San Marino. UNCTAD labels countries from Southeast Europe and the Commonwealth of Independent States (CIS) as "transition economies." The remainder of countries not included on either of these lists are considered by UNCTAD to be "developing economies."

II. Global Trends in FDI

A. Overall FDI Trends and Developments

The WIR 2006 reported that total global inflow of FDI rose by 29 percent in 2005. FDI inflows have increased in both developed and developing countries. Cross-border Mergers and Acquisitions (M&A)

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[1] United Nations Department of Economic and Social Affairs, Division of Sustainable Development, *available at* http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21chapter2.htm

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have increased the share of FDI inflow growth, whereas the rate of green-field investments fell by two percent. Inward FDI (measured as FDI inflows relative to the share of total GDP) has also increased in both developed and developing countries. Africa had the largest growth increase, with inward FDI rising by 78 percent in 2005. Inward FDI in South, East and Southeast Asia increased by 26 percent, whereas Latin America and the Caribbean only saw an increase of three percent.

The WIR 2006 noted that FDI outflows from developing countries increased in 2005 by four percent from the previous year. The strongest growth in FDI outflow came from West Asia with an increase of outward FDI by 11 percent. FDI flows from South, East and Southeast Asia decreased despite a six-fold increase of Chinese FDI outflow.

Current FDI growth is primarily driven by several sectors, mainly oil and gas, utilities, banking and real estate, but a considerable amount of FDI also went to transport and computer software and manufacturing sectors related to primary sector products, such as oil refining, rubber and plastic production and metals. The WIR 2006 attributed the current growth in global FDI to continued global economic growth, financial inflows from collective investment institutions (such as private equity funds and hedge funds) and institutional changes leading to deregulation.

B. Recent Developments in International Investment Agreements (IIA)

The WIR 2006 stated that International Investment Agreements (IIA) continue to become more complex and sophisticated and include in greater detail measures to promote public interest, such as environmental-, health- and safety standards. The WIR 2006 argues that civil society and stakeholders can better accept IIAs thanks to these public interest features. The WIR 2006 also noted that IIAs are increasingly adopted into Free Trade Agreements (FTAs). According to the report, developing countries engage more frequently in IIAs: the number of IIAs in which developing countries participated rose from 42 in 1990 to 644 by the end of 2005.

C. Trans-National Companies (TNCs)

The WIR 2006 ranked the hundred largest non-financial TNCs and the hundred largest non-financial TNCs from developing countries. The global list of the hundred largest non-financial TNCs is topped by General Electric, Vodaphone and Ford. 85 percent of the companies on this list have headquarters in the European Union, Japan or the United States. Only five companies on the list are from developing countries.

The list of the hundred largest TNCs from developing countries is topped by Hutchison Whampoa (Hong Kong/China) followed by Petronas (Malaysia), Singtel (Singapore), Samsung (Republic of Korea) and

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CITIC. The companies on this list have expanded their activities abroad in 2005, and their foreign assets increased by 36 percent in 2005. However, the total foreign assets of the companies on this list remain less than the foreign assets of General Electric alone.

D. FDI Future Prospects

The WIR 2006's outlook for FDI indicated that 2006 should experience continued growth. Prospects for 2007 and beyond, however, are less certain. The WIR stated that confidence will remain strong for investment in Asian economies, Brazil, the Russian Federation, Mexico and Turkey and Eastern Europe. Prospects look less bright for Africa and the rest of Latin America. The report also notes that investors have lost some confidence in Western Europe (excluding the United Kingdom) due to the increased competition from emerging markets and Western Europe's perceived protectionism. The WIR 2006 expects FDI in natural resources to increase over the next several years, thanks to high demand from China. Healthcare could also experience high growth.

III. Regional Trends in FDI

A. South, East and Southeast Asia, and Oceania

The WIR 2006 noted that total FDI inflows have grown rapidly in this region, but at different rates. In 2005, Southeast Asia witnessed a 45 percent increase in FDI inflows, South Asia a 34 percent increase and East Asia a 12 percent increase, whereas FDI inflow to Oceania declined. East Asia still holds its position as the most important area of the region for inward FDI, but Southeast Asia is gaining importance. FDI inflows to Southeast Asia continued to rise despite an economic slowdown in 2005.

2005 FDI in the Asian regions grew in all economic sectors. The growth in the primary sector was mainly driven by M&A in agro-industry. FDI growth in the manufacturing sector was fuelled by large green-field projects in low-cost Southeast Asian countries. Large financial sector deals in China primarily caused the growth in the services sector. The WIR 2006 noted that FDI increased in research and development (R&D) activities, and other high value-added and knowledge intensive activities.

FDI outflow from these regions remain high even though levels decreased from those in 2004. Investors are primarily based in Hong Kong, China, Taiwan, Singapore and Korea. The WIR 2006 stated that the amount of intraregional FDI flows has grown within the region. Services remained the most important sector for outward FDI, but capital flows to the manufacturing sector and natural resources have also increased. China and India invested heavily in oil and mining in 2005 and 2006.

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The WIR 2006 stated that countries in South, East and Southeast Asia continued to open up to inward FDI, particularly in the services sector. In 2005, India opened its economy to foreign retailers, increased the permitted level of foreign ownership in telecommunications companies and began to open up sectors such as radio and construction industries to FDI. China lifted geographical restrictions on foreign banks and travel agencies, allowed for 100 percent foreign hotel ownership and minority ownership of television programming, movie production and distribution. Malaysia allowed for 100 percent foreign ownership in venture capital firms.

The WIR 2006 concluded that growth among the Asian regions is likely to continue, and further expansion in FDI is expected. The WIR 2006 stated that India and China are the most attractive locations for FDI among emerging markets, and that increased purchasing power will continue to fuel FDI inflows and perhaps lead to a further rise in FDI outflows.

B. Latin America and the Caribbean

FDI inflows to Latin America and the Caribbean increased slightly in 2005, rising by no more than three percent, excluding FDI inflows to offshore financial centers. FDI inflows were also unevenly distributed throughout the region. Inflows to South America rose by 20 percent, whereas inflows to Central America and Caribbean countries remained unchanged from 2004.

Since 2001, FDI in the services sector has declined, a trend that continued in 2005. For example, the WIR 2006 claimed that private companies are reluctant to invest in water and sanitation services due to increasing regulatory disputes in Latin America and the Caribbean. Despite government policy changes, primary sector investment increased. The only gas- and oil-producing country in the region that witnessed a decline in FDI was Bolivia, due in part to delays and uncertainty surrounding its implementation of a new oil and gas law, which made investors reluctant to invest in Bolivia. FDI in mining also grew, but the WIR 2006 stated that local hostility towards mining activities has increased due to the rise in mining projects and environmentalist backlash. Increased U.S. demand has led to growth of FDI in the manufacture sector in Mexico.

FDI outflow from the region rose by 19 percent. Excluding financial offshore centers, Mexico was the leading foreign investor from the region.

The WIR 2006 stated that inflows of FDI to Latin America and the Caribbean are expected to slow down in 2006 and 2007.

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Outlook

The availability of low-cost labor combined with a growing middle class has lead to shifts in FDI flow trends within developing and transition economies. These shifts are likely to continue over the next several years. On a positive note, the WIR 2006 seems to conclude that investment decisions are increasingly driven by market access, resulting in a shift toward more investments in knowledge-based and skilled labor-intensive production which in turn could lead to greater innovation and competitiveness for developing and transition economies. The WIR 2006, however, noted that economic growth attributable to the increase in Asian and Latin American inward FDI has not improved conditions for the poor in these regions. This could potentially lead to a backlash in government FDI-friendly policies, especially in Latin America.

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GAO Issues Report on CBP's Revised Bonding Policy: Uneven Implementation Remains Problematic

Summary

On October 18, 2006, the Government Accountability Office (GAO) released a report on the U.S. Customs and Border Protection's (CBP) revised bonding policy. The GAO reports that since 2003, CBP has been unable to collect at least $480 million in antidumping (AD) and countervailing (CV) duties and beginning in July 2004, revised its policy on continuous bonds (CB) that importers post to secure payment of duties, taxes, and charges on imports. CBP used imports of warmwater shrimp as a test case for the revised CB policy and GAO reports that the policy "potentially significantly increases the amount of the bonds for affected importers." The GAO report examines why and how CBP revised its CB policy, and the effects of the revised policy. We review herein the report's findings.

The full GAO report can be found at http://www.gao.gov/new.items/d0750.pdf.

Analysis

I. Background

Importers declare the estimated duties on their imported merchandise upon entry into the United States. Subsequently, CBP determines whether the importer's estimates of import duties and fees were accurate or whether additional duties are owed. As a way to protect the U.S. government's interests against revenue lost from importers' failure to pay the full amount of duties owed, CBP requires importers to maintain bond coverage. The bond allows CBP to recover liquidated damages up to the amount of the bond in the event that the importer fails to satisfy one or more obligations specified in the bond (including the payment of all duties, taxes, and charges on imports entered under the bond). The bond must be guaranteed by an approved surety.

There are two types of CBP bonds: a single entry bond or a continuous bond (CB). A single entry bond applies only to specific import transactions, and is generally in an amount no less than the total entered value of the merchandise plus all duties, taxes, and fees. A CB applies to all of an importer's import transactions for a given year. Under previous CBP bonding guidelines, the amount of a CB was set equal to 10 percent of the duties, taxes, and fees owed by the importer in the previous 12 months, but not less than $50,000. In July 2004, however, CBP amended its CB policy to require that CBs covering imports of agriculture/aquaculture goods subject to AD/CV duties be increased by an amount equal to the applicable

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AD/CV deposit rate multiplied by the entered value of the merchandise in the previous 12 months. So far, CBP has only applied the amended CB policy to imports of warmwater shrimp subject to AD duties.

II. Reasons for CBP's Revision of the CB Policy

GAO reports that since 2003, CBP has been unable to collect more than $480 million in AD and CV duties. For this reason, CBP revised its CB policy in July 2004 to reduce three main risks of uncollected AD/CV duties that it identified. First, the old CB policy (*i.e.*, the 10 percent or $50,000 formula) frequently generated bonds that were insufficient to ensure payment of AD/CV duties. Second, because the final AD/CV duties are determined long after the imports enter the United States, the final AD/CV duties ultimately owed by the importer can potentially be much higher than the estimated amounts paid as cash deposits by the importer upon entry of the merchandise. This forces CBP to go back to importers to collect additional duties, which importers are sometimes unwilling or unable to pay. Third, CBP examined uncollected AD/CV duties and determined that large portions were attributable to imports from China and to agriculture and aquaculture products. According to CBP, importers of agriculture and aquaculture products "shared certain characteristics, such as low capitalization, that made them a high risk for being unable to pay the full amount of AD/CV duties owed."

III. CBP's New CB Policy: Revision and Implementation

According to the GAO, CBP revised its CB policy internally and then conducted outreach prior to applying the revised policy to shrimp importers. The report states that an internal CBP working group concluded that a revision was within CBP's legal authority and would be "less burdensome on importers than other options." CBP selected imports of warmwater shrimp as a test case (warmwater shrimp imports were undergoing an AD investigation at the time) because: (i) warmwater shrimp shared characteristics with other agriculture and aquaculture products that "indicated a risk that CBP may not be able to collect the full amount of duties owed"; (ii) warmwater shrimp represented a large volume of imports and faced potentially high AD duties; and (iii) "shrimp imports were duty-free, therefore, most shrimp importers had no history of normal duty payments and had minimum $50,000 bonds."

The report notes that CBP's goal was to "balance its interest in ensuring that AD/CV duties were collected, with its interest of not imposing an unnecessarily excessive burden on importers or international commerce." Nevertheless, while CBP considered that the revised CB policy would possibly cause sureties to charge higher premiums, CBP did not consider additional collateral requirements that sureties could impose in exchange for their agreement to underwrite large increases in CB amounts. Indeed, importers reported that sureties typically require 100 percent collateral before they will underwrite CBs

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subject to CBP's revised policy. Moreover, although CBP claims that it conducted outreach with certain agencies and groups including shrimp importers before implementing the revised policy, certain importers criticized CBP for not providing adequate notice or soliciting formal public comments on the draft policy and for applying the policy solely to shrimp.

The GAO report finds that "CBP's implementation of the revised CB policy lacked transparency and consistency." CBP applied the revised CB policy in February 2005 to importers of shrimp subject to AD duties, which were issued by the U.S. Department of Commerce on February 1, 2005. CBP sent the shrimp importers letters demanding that they post higher bond amounts within 30 days. Results were mixed: some importers complied with the CBP demand, whereas the majority requested lower bond amounts. Although CBP initially declined to consider requests to adjust the bond amounts, it later agreed to lower some bonds. Even so, GAO reports that CBP did not formally write down the criteria that it considers in making bond adjustments, nor did it make these criteria publicly available. Also, in August 2005, CBP publicly clarified the bond policy appeal procedures, although it did not explain what evidence its officials would accept from importers to justify reducing bond amounts. GAO also reports that CBP based bond requirements on different data time periods for different importers, potentially resulting in inconsistent treatment.

Although CBP has identified additional products to which it might apply the revised CB policy, any decision to apply the revised policy to additional products is on hold pending domestic and international legal challenges to the policy.

IV. Effects of Revised CB Policy

GAO finds that the revised CB policy is affecting revenue protection, shrimp imports, and importing firms, but notes that the Department of Commerce's ongoing review of AD rates for shrimp imports and other factors make it premature to draw definitive conclusions. Although CBP estimates indicate that more revenue is protected as a result of the new bond policy, the GAO report states the that "CBP's degree of success in protecting revenue will depend on a variety of factors[,]" including but not limited to recent settlements between shrimp exporters and the domestic industry. The GAO report also notes that shrimp importers are reporting that the costs associated with higher bond amounts are substantial and that importers pay higher premiums and typically must also post 100 percent collateral required by sureties.

GAO also notes that the data it reviewed "suggest that while the overall quantity and value of U.S. shrimp imports have not changed significantly since the AD petition was filed, the amount of shrimp imported from AD duty versus non-duty countries changed significantly, and the changes varied by country." The

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revised CB policy significantly increased bond requirements for some importers who reported that the higher bonds and collateral requirements were "negatively affecting many smaller shrimp importing businesses, causing them to stop importing or to exit the industry."

V. GAO Recommendations

GAO recommends that the CBP Commissioner conduct a formal review of the "lessons CBP can learn from implementing the revised CB policy on shrimp imports" in order to ensure that CBP's goal of ensuring collection of AD/CV duties without imposing an excessive burden on importers or international trade and commerce is achieved. GAO states that the review should include specific steps to obtain importers' views on the policy and examine whether the policy appropriately addresses the underlying risks to CBP's collection of AD/CV duties. GAO also recommends that the CBP Commissioner develop clear and consistent guidance for implementing the policy and take steps to inform covered importers of the basis upon which CBP will reduce importers' bond requirement, so as to ensure full transparency and remedy inconsistent implementation of the CB policy.

Outlook

The GAO report finds that CBP's "uneven implementation" of its revised CB policy to warmwater shrimp imports has provided CBP with an opportunity to learn from its mistakes and remedy them. As GAO noted, if CBP wishes to extend and implement the revised bonding policy to other imported products, CBP will have to ensure that the policy does not translate to higher costs for importers and is applied in a consistent, transparent and uniform manner. By doing this, GAO concludes that CBP can balance its needs in collecting duties owed with its interest of not imposing an excessive burden on importers and international trade.

In response to the GAO's recommendations, CBP has published notice in the Federal Register of procedures that CBP will employ to impose the revised CB policy on imports of merchandise designated "Special Categories," and has solicited public comments on the procedures. (*See Monetary Guidelines for Setting Bond Amounts for Importations Subject to Enhanced Bonding Requirements*, 71 Fed. Reg. 62276 (October 24, 2006)) (please see attachment). Specifically, the CBP notice formalizes procedures that CBP will employ to (i) designate "Special Categories" of merchandise that will be subject to additional bonding requirements; (ii) notify individual importers that they will be subject to additional bonding requirements; and (iii) afford individual importers already subject to additional bonding requirements an opportunity to request that CBP reconsider their bond amounts. The notice also discloses the criteria that CBP will consider in deciding which merchandise should be designated a "Special Category" and that

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CBP will consider in deciding whether to reconsider an importer's bond amount. Comments must be received by December 26, 2006.

Notably, the GAO report does not comment on litigation pending before the U.S. Court of International Trade (CIT) challenging CBP's new CB policy. Two industry associations, the National Fisheries Institute (NFI) and the Seafood Exporters Association of India, have brought separate challenges to CBP's new CB policy before the CIT. In the NFI case, the CIT imposed a confidential preliminary injunction order on November 13, 2006, suggesting that the CIT judge believes that NFI has raised a serious claim that CBP's new bonding policy is potentially illegal. (The public version of the CIT's preliminary injunction order will be available on or after December 1, 2006.) In addition to the U.S. court actions, the governments of Thailand and India have both requested the establishment of World Trade Organization (WTO) dispute settlement panels to determine whether the amended CB guidelines are consistent with U.S. obligations under the WTO Agreements. Thus, although CBP has already taken action in response to GAO's recommendations, there remains the possibility that CBP's amended CB policy will be found illegal under U.S. law or inconsistent with U.S. obligations under the WTO Agreements.

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Special Report: 2006 Election Results and Implications for Trade Issues in Congress

Summary

On November 7, 2006, voters changed the ruling majorities in Congress and delivered control of the United States House of Representatives and Senate to Democrats for the first time since 1994. In this report, we analyze those changes and discuss their implications on major trade issues in Congress.

Analysis

I. Election Outcomes

On November 7, 2006, voters changed the ruling majorities in Congress and delivered control of the United States House of Representatives and Senate to Democrats for the first time since 1994. The Democratic party takes control of the Senate with a 51-49 majority, which includes independents Joe Lieberman and Bernie Sanders who both will caucus with Democrats. In the House, Democrats will have a ruling majority of 234-201.

A. House of Representatives

In the House, Rep. Nancy Pelosi (D-CA) will become the first female Speaker of the House. All committee chairmanships and majorities in the House will change hands in 2007. Rep. Charles Rangel (D-NY) will lead the House Ways and Means Committee, succeeding current Chairman Bill Thomas (R-CA), who is retiring. After the election, Rangel provided his outlook on pending trade legislation in Congress:

- **Vietnam Permanent Normal Trade Relations (PNTR)**. Rangel stated that the House will likely approve the Vietnam PNTR legislation in the coming weeks.
- **Generalized System of Preferences (GSP) and the Andean Trade Preferences and Drug Eradication Act (ATPDEA).** Rangel also expressed a desire for Congress to extend the GSP and the ATPDEA, both of which will expire at the end of 2006.
- **Peru Trade Promotion Agreement (PTPA).** Rangel stated that Democrats will continue to oppose to the PTPA unless a provision is added incorporating core international labor standards.
- **China.** Rangel opined that the Bush Administration has “not been tough enough” with China on its alleged unfair trade practices, but he added that legislative actions against China are not the best course of action.

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Rangel also noted more generally that he wants the committee to return to bipartisanship, and that he is planning a bipartisan retreat for all committee members with Treasury Secretary Henry Paulson and United States Trade Representative (USTR) Susan Schwab "in order to get a clear sense of the Administration's legislative priorities."

B. Senate

The 2006 elections will bring ten new members to the Senate. Among them, former Rep. Benjamin Cardin (D-MD) takes over for Paul Sarbanes (D-MD) as one of Maryland's two Senators. Cardin has served in the House since 1987 and has been Member of the Ways and Means Committee, Ranking Member of the Trade Subcommittee and a Member of the Human Resources Subcommittee. Cardin has backed several free trade agreements but voted against the Oman FTA in 2006.

Sherrod Brown, another Democrat, takes over for former Ohio Senator Mike DeWine (R-OH). Brown served for Ohio's 13th district in the House and during his time as a Representative, opposed both the North American Free Trade Agreement (NAFTA) and the Dominican Republic- Central American Free Trade Agreement (DR-CAFTA). Brown has stated open trade serves only to displace U.S. workers, weaken environmental laws and hurt "middle-class" Americans in small rural communities. Those voters, he continued, are the ones that sparked Tuesday's Democratic sweep. Brown added that President Bush has "no choice" but to work with Democrats on trade issues in the 110th Congress, and that the Senate will be less inclined to support White House trade priorities, like Presidential Trade Promotion Authority (TPA).

Like the House, committee chairmanships and majorities will switch in the new Senate. Most notably, Sen. Max Baucus (D-MT) will take over as Chairman of the Finance Committee, succeeding current Chairman Charles Grassley (R-IA). Baucus said he will use his position on the Finance Committee to work on energy, education, health care and trade issues. This is Baucus' second time to chair the committee after a brief tenure when Democrats took the Senate in 2001. Baucus has opined that the Senate Finance Committee is "arguably the most important committee in the whole Congress," and that "it has jurisdiction over virtually all the revenue that is raised." Baucus will continue to hold weekly meetings with Grassley. Joining Baucus in the Senate Finance Committee will be Democrat Sens. Debbie Stabenow (MI), Maria Cantwell (WA) and Ken Salazar (CO).

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II. Election Impact on Trade Issues

A. TPA

The Congressional shuffle will almost certainly affect the outlook for TPA. With a Democrat majority in both Congressional chambers, the chances of renewing and extending TPA before its June 30, 2007 expiry are remote. TPA is an Administration-led initiative, and Democrats might seize the chance to exact "revenge" on the Bush Administration and deny it TPA. Republicans did this very thing to President Clinton in 1997, denying him "fast track" negotiating authority (now TPA) for the remainder of his tenure. Beyond issues of partisanship, TPA's future is in jeopardy because many Democrats have been upset over the Administration's refusal to heed their advice on U.S. trade agreements during TPA's consultation phase.[2]

There are several other key drivers to TPA renewal. First, if USTR Susan Schwab can successfully re-start the stalled World Trade Organization (WTO) Doha negotiations before TPA expires (all signs indicate that WTO Members are willing to renew talks in the new year), then Congress may consider renewing TPA until a Doha agreement is completed. Congress could also vote to extend TPA for the limited purpose of securing the Doha deal. The September 30, 2007 expiry of the 2002 Farm Bill could play a part in Doha's future because U.S. farm programs are at the center of the Doha controversy. The United States will likely have to alter its farm support programs in order to inject forward movement into the multilateral talks. If Congress feels that it can alter its farm programs in the next Farm Bill so that the United States complies with current and future WTO obligations, then other WTO Members might return to the negotiating table, making a final Doha agreement more attainable. With better prospects for Doha, Congress might be willing to renew TPA to ensure the immense benefits that a Doha deal would provide U.S. businesses and consumers. FTA negotiations, specifically U.S. negotiations with South Korea, will also influence TPA renewal. If USTR progresses with Korean FTA negotiations but fails to complete the deal by March 30, Congress might be willing to renew TPA – limited only to the Korea FTA - in order to secure the final agreement.

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[2] By law, Congress can only suggest to the President revisions to U.S. trade agreements and then vote on the ultimate deal. It cannot amend the agreements.

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B. Free Trade Agreements

1. Korea and Malaysia FTAs

The Congressional power shift is unlikely to affect the ultimate passage of either the Korean or Malaysia FTAs, which are currently under negotiation. Both countries' labor and environmental practices adhere to international standards and are therefore unlikely to engender large scale Democratic opposition. The Korea agreement enjoys strong support from incoming Senate Finance Committee Chairman Sen. Max Baucus (D-MT), who will welcome U.S. and Korean negotiators to his home state of Montana in early January for the sixth round of formal negotiations. Baucus has also voiced support for the U.S.-Malaysia FTA, stating that the agreement will create "opportunities for U.S. exporters to sell their goods and services in one of the world's major markets."

Moreover, with the exception of a few difficult issues, for example automobile tariffs in the Korea FTA or services and government procurement in the Malaysia agreement, neither FTA contains provisions that are likely to draw intense opposition from the U.S. business community. Rather, U.S. businesses have expressed strong support for both agreements as they recognize their potential commercial opportunities. The Korea FTA is the largest bilateral FTA that the United States has negotiated since NAFTA, and Korea is the United States' 7th largest trading partner. Malaysia is the United States' tenth largest trading partner, and an FTA with Malaysia would more closely link the U.S. economy to that of Southeast Asia. Businesses are therefore likely to continue lobbying Congress for the agreements' passage.

Traditionally, negotiators agree on the less controversial issues during the first few rounds of FTA talks and leave the more difficult ones for the final rounds. Thus, the biggest challenge facing the Korea and Malaysia FTAs is not Congressional rejection but completing the agreements before TPA's June 30, 2007 expiry. USTR has demonstrated an apparent willingness to compromise on some of these more difficult issues to move negotiations forward; too flexible a negotiating position, however, could lessen Congressional and business support for the agreements. As discussed above, if USTR is unable to complete the agreements with Korea and Malaysia by Spring 2007, and if USTR can convince Congress that it will complete the agreements, Congress could consider an extension of TPA applicable only to one or both of these agreements.

2. Peru and Colombia FTAs

It seems likely that the Peru and Colombia FTAs will be most affected by the changes in Congress. On November 8, 2006, incoming Ways and Means Committee Chairman Charles Rangel (D-NY) stated that Democrats would not consider the PTPA until "it has been renegotiated to include improved provisions on

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international labor standards." Sources report that most Democrats oppose the agreement in its current form, and that the FTA will only be considered by the 110th Congress in 2007. Democrats will likely seek to re-negotiate the agreement, especially on its labor and environment provisions. Outgoing House Ways and Means Committee Chairman Bill Thomas (R-CA) was also pessimistic about a possible vote on the U.S.-Peru FTA during the "lame-duck session" and criticized the Administration for not sending the FTA's implementing legislation during the week of November 13. He echoed Rangel's statement that both the Peruvian and Colombian agreements would likely be considered by the next Congress in 2007. Democrats could also seek to re-negotiate labor provisions in the Colombia FTA if not oppose the agreement altogether.

Peru and Colombia will lose the duty-free access to the U.S. market that each country currently receives under the ATPDEA if the Act is allowed to expire on December 31, 2006. Peru and Colombia have intensely lobbied the U.S. government to pass the agreements before the end of the year. Congressional consideration of the Peru and Colombia FTAs could occur during the "lame-duck" session but Congress could push consideration into 2007, after the ATPDEA has expired.

Sources report that Congress will most likely not have time to consider the U.S.-Peru FTA during the "lame-duck" session because it must address other legislation, including appropriations bills and laws that expire at year-end. Because Colombia and the United States only signed the agreement on November 22, Congress will begin consideration of that agreement in 2007. It is unclear what type of modifications legislators will request that the Administration make before the President submits the Colombia FTA's formal implementing legislation to Congress for a final vote. In comparison to Peru, the Colombian agreement appears to have more supporters in Congress, but the FTA's labor provisions continue to be controversial. A vote on the U.S.-Peru FTA during the week of December 4, 2006 is still possible but unlikely.

3. Other FTAs

USTR continues to negotiate with Panama and with the United Arab Emirates (UAE) on the countries' respective FTAs. Although the Administration has stated that these FTAs are important initiatives, the bilateral agreements are not as important as the Korea and Malaysia FTAs. If USTR wants Congress to consider these agreements under TPA, then it must complete negotiations by Spring 2007. Democrats may demand that USTR focus on both agreements' labor and environment chapters, particularly for the

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UAE FTA based on the kerfuffle over the “slave labor provision” in the Oman FTA.[3] Because USTR has not yet concluded these negotiations, Democrat demands for additional labor and environmental talks might not affect the FTAs’ ultimate passage but instead could prolong negotiations and negotiation timelines. If so, USTR could fail to complete FTA negotiations with both countries after the Spring 2007 deadline.

C. PNTR for Vietnam

On November 13, 2006, the U.S. House of Representatives failed to pass a bill (H.R. 5602) under suspension of rules granting Vietnam PNTR. The vote was 228 to 161, 32 votes short of the necessary two-thirds majority to pass the bill under suspension. Opponents to the bill included 66 Republicans, 94 Democrats and one Independent. A total of 43 members did not vote, a significant number that Congressional sources opine could have changed the vote’s outcome. Most of the Representatives not voting had not yet arrived in Washington D.C. following trips to home states for the November 7 elections. The House will likely re-consider the bill under normal voting procedures in December although there is a possibility that Congress could leave the PNTR vote for early 2007. President Bush had hoped to grant PNTR to Vietnam by the time Vietnam hosted the Asia Pacific Economic Conference (APEC) summit in Hanoi November 13-15. Instead, he will likely have to wait for Congress’ December or early 2007 decision. The bill’s failure to pass under suspension does not necessarily provide an indication of Congressional views on the issue. Congressional pundits opine that Republicans brought the bill to the floor under suspension of rules too quickly. As noted, many Republicans that did not vote had not yet arrived from their election trips to home states. As such, the failure to grant PNTR to Vietnam under suspension may have been more about bad timing that it was a struggle between Democrats and Republicans.

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[3] During Congressional consideration of the Oman FTA, Democrats were angered after the Bush Administration omitted a provision to deny trade benefits to any imports made with forced labor. The forced labor provision would have denied trade preferences to any Omani products made with slave labor and was offered by Senate Democrats as an amendment to the FTA’s formal implementing legislation. Senators Kent Conrad (D-ND), Jeff Bingaman (D-NM), and John Kerry (D-MA) sponsored the amendment. On May 18, the Finance Committee unanimously approved a draft version of the legislation, with the slave labor amendment, during its "mock markup" of Oman FTA legislation. Under TPA, however, amendments approved in mock markups are only advisory in nature. The Administration thus forwarded the FTA’s formal implementing legislation to Capitol Hill on June 26 without the forced labor amendment, arguing that the amendment is unnecessary because U.S. law already prohibits the importation of goods made by forced labor. James Mendenhall, General Counsel at the Office of the United States Trade Representative (USTR) added that the amendment may also be inconsistent with the requirements of TPA, which allow Congress only to suggest measures that are "necessary and appropriate" to implement trade agreements. Under TPA, the bill will now be subject to an up or down vote, without amendment.

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On November 28, 2006, Vietnam's National Assembly approved by an overwhelming majority Vietnam's WTO Accession Protocol. On November 7, 2006, the United States applied the "non-application clause" with respect to Vietnam. With the non-application provision, the United States will not grant Vietnam the trade concessions to which WTO Members are normally entitled once Vietnam completes its ratification and fully accedes to the WTO. Although Vietnam may choose not to grant the United States the full range of benefits under its WTO concession if the United States invokes the "non-application" clause, the 2001 U.S.-Vietnam Bilateral Trade Agreement (BTA) obligates Vietnam to extend at least most favored nation (MFN) treatment to the United States for trade in goods. Vietnam would not, however, be obligated to extend to the United States any benefits deriving from its WTO accession that are not explicitly indicated in the BTA. Such benefits could include MFN treatment for services, removal of non-tariff barriers (NTBs) or other market access measures.

D. Preference Programs

Several U.S. preference programs are set to expire on December 31, 2006, including GSP and the ATPDEA. Rep. Rangel indicated on November 15 that the House would likely consider legislation extending both programs during its "lame-duck" session in December. Rangel stated that an agreement had been reached in the House to "pave the way for renewing benefits for Andean countries under the Andean Trade Preference Act and for developing countries under the Generalized System of Preferences, as well as for Haiti." Outgoing Ways and Means Committee Chair Bill Thomas (R-CA) confirmed Rangel's statements and added that he was working on a bill that would include both preferential programs' extension. As such, upon Congress' return in December, it will likely vote on GSP and the ATPDEA, although a vote could be pushed to early 2007 based on Congress' packed schedule upon its December return. GSP enjoys strong U.S business support as well as Congressional backing, and the ATPDEA's renewal is helped by Congress' likely inability to consider the Peru and Colombia FTAs in 2006 and USTR's support for the ATPDEA for all beneficiary countries. Congress will likely extend both programs for a defined period of time and use that time to review the programs' criteria, membership and other aspects. A short extension provides Congress with extra time to amend the programs yet still maintain support from powerful U.S. business lobbies that wish to see both programs' continued.

Outlook

The Democratic victory in the House and Senate will result in a change in leadership in both houses that could halt progress on pending trade legislation, in particular on the U.S.-Peru and U.S.-Colombia FTAs. Democratic support for trade liberalization has eroded sharply. Recent FTAs such as DR-CAFTA and the

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U.S.-Oman FTA received only 15 and 22 Democratic votes respectively. Rep. Pelosi has pressured party Members to vote against previous trade liberalization agreements such as DR-CAFTA for political reasons, and as the incoming House Speaker, she is likely to oppose other items in the Bush Administration's trade agenda. Many Democrats have also expressed dissatisfaction with the Administration's failure to consult with them during trade negotiations on issues such as labor standards. However, Pelosi and other Democrats may also use their control in Congress to build consensus with the Administration and Republicans. Democrats could be more open to Administration-led trade initiatives if Republicans are willing to work with them and trade Democrat concessions on trade issues for Republican support for key Democrat initiatives like a minimum wage increase. Regardless of whether Democrats will butt heads with Republicans or work with them on trade issues, historical evidence of divided government indicates that the 110th Congressional trade agenda will suffer likely from gridlock.

The renewal chances of either GSP or the ATPDEA appear better because leading Democrats like Rep. Rangel and Sen. Baucus have expressed support for these programs. The timeframe for consideration remains unclear, but it appears lawmakers will return to these matters during the week of December 4, 2006 to arrive at a decision on some form of renewal before the programs expire on December 31, 2006. However, if Congress finds itself too busy with appropriations and other non-trade related maters, then a vote on GSP and the ATPDEA would likely occur in early 2007. As noted, GSP enjoys enough U.S. business support and Congressional that it merits consideration during the lame-duck session. ATPDEA's renewal has also revived thanks to Democratic support. Congress is likely to consider both programs for a defined period of time and use that time to review and amend both programs as it deems necessary.

The Democratic majority in both chambers could prevent the Administration from garnering enough votes to renew TPA, but Democrats could focus on consensus-building and work with the Republicans to extend TPA, albeit likely in a more limited form. Wholesale extension of TPA without changes allowing for increased Congressional influence over trade agreements is highly unlikely. As noted, however, movement in the Doha round and progress on key FTA negotiations (*i.e.*, South Korea) will affect Congressional consideration of TPA renewal, as well as the form of TPA that Congress considers. Chances of renewal are not good, but a better picture of the Democrats' stance on TPA extension should emerge during the first few months of the 110th Congress, as Democrats publicly stake their positions on other trade issues. Much the same outlook applies to FTAs. Democrats will certainly focus on labor and environmental provisions which could prolong FTA negotiations and their ultimate consideration, but Congress should pass the South Korea FTA next year <u>if</u> USTR can complete the agreement in time.

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Congress will certainly consider the Peru and Colombia FTAs at the beginning of the 110th Congress, but their prospects of passage have dwindled with Democrats' return to power. It is too early to tell what will happen with the Malaysia, Panama and UAE FTAs.

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Cato Institute Releases Paper on the Hidden Cost of U.S. Rice Subsidies

Summary

On November 16, 2006, the Cato Institute Center for Trade Policy Studies released "Grain Drain: The Hidden Cost of U.S. Rice Subsidies" that explores U.S. government support for domestic rice industry. According to author **Daniel Griswold, Director of the Center for Trade Policy Studies**, U.S. rice subsidies cost American taxpayers "three times over," and U.S. rice support drives international rice prices down. We discuss herein the briefing paper and its findings.

The Cato Institute paper is available at http://www.freetrade.org/pubs/briefs/tbp-025es.html.

Analysis

On November 16, 2006, the Cato Institute Center for Trade Policy Studies released "Grain Drain: The Hidden Cost of U.S. Rice Subsidies" that explores U.S. government support for domestic rice industry. According to author Daniel Griswold, "rice is the world's most important food commodity and also the most protected and subsidized." Griswold states that rice is grown and eaten on every continent (minus Antarctica), and that this alone makes rice one of the most important global commodities. He notes in the report that governments, including in the United States, support rice production through the use of tariffs, tariff rate quotas (TRQs) and export subsidies, citing that average global tariffs on rice imports are 43 percent. Griswold adds that many countries practice "tariff escalation" in which they impose higher tariffs on imports of more processed forms of rice as a way to protect domestic employment in rice mills and encourage further domestic production. The report notes that the United States and the EU are two of the largest dispensers of rice production subsidies that distort international rice prices: through subsidies, the United States and the EU stimulate overproduction of rice and increase the global supply of rice thus putting downward pressure on global rice prices.

The United States is the world's tenth largest rice producer. According to Griswold, the U.S. government supports domestic rice production via tariffs on imported rice and direct subsidies based on production, prices and historical acreage. The 2002 Farm Bill provides three subsidy programs for U.S. rice producers: (i) direct payments; (ii) countercyclical payments; and (iii) marketing assistance loans. Combined, the three programs delivered between $473 million and $1,774 million in taxpayer subsidies to rice producers each year since 1998. Griswold states that the U.S. program thus causes "Americans [to] pay for the rice program three times over—as taxpayers, as consumers, and as workers." The report

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states that direct taxpayer subsidies to the rice sector will likely average $700 million annually through 2015. The report also notes rice support payments do not always go to individual rice farmers and that the U.S. rice program has paid owners of land that has been removed from rice farming altogether, adding further costs for American taxpayers. According to the report, the majority of rice payments are concentrated among a small number of large producers, and the rice support program increases rice prices for U.S. consumers.

On the international front, U.S. rice support decreases rice prices by 4 - 6 percent and thus "perpetuates poverty and hardship for millions of rice farmers in developing countries." According to the report, because the U.S. program promises support for rice producers, "American rice farmers [have] switched from growing for the market to growing for the government," which in turn deflects the cost of adjustment to external shocks from U.S. farmers to poor farmers in developing countries such as Vietnam, India and Thailand. The report states that "by stimulating overproduction, U.S. rice subsidies increase the global supply of rice and thus put downward pressure on global prices." Griswold adds that the U S. program makes the United States vulnerable to challenges in the World Trade Organization (WTO); WTO Members allege that the U.S. program violates the United States' multilateral commitments to restrict domestic subsidies that injure other WTO Members. The U.S. program also compromises the United States' ability to effectively negotiate for more open markets abroad by undermining U.S. credibility. For example, Griswold states that U.S. farm subsidies were a major obstacle to a successful conclusion of the WTO Doha Round multilateral negotiations.

Griswold suggests that the U.S. Congress and President Bush should adopt a more market-oriented rice program in the upcoming 2007 Farm Bill[4] and should repeal tariffs and phase out subsidies. Griswold also suggests that the United States should eliminate the market loan program for U.S. rice farmers. He adds that Congress should eliminate rice support programs as soon as possible so as to avoid challenges against the United States at the WTO.

Outlook

Rice subsidies will undoubtedly serve as a major point of discussion in Congress' upcoming debates on the 2007 Farm Bill. The Bush Administration has already expressed its desire for a re-written Farm Bill and will likely push Congress to approve a new omnibus farm package. Domestic rice farmers will likely

[4] The 2002 Farm Bill is scheduled to expire on September 30, 2007. The 110th Congress will begin exploring renewing or re-writing the Farm Bill in January 2007.

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oppose a major overhaul of the Farm Bill because the program means cash for farmers. The U.S. program, however, does lead to higher prices for U.S. rice consumers. According to the report, "U.S. [rice] tariffs of 3 to 24 percent still keep domestic rice prices higher than they would be if Americans could buy rice freely from producers abroad." As such, downstream users and consumers will support overhaul of the program because it would likely lower rice prices. Congress will thus have to balance the demands of U.S. farmers and consumer lobbying groups in deciding how to proceed with the program in a new Farm Bill. Congress' ultimate decision will depend on the efficacy of these groups' lobbying efforts, as well as the vulnerability of the current U.S. rice program to challenge at the WTO and the status of the WTO's stalled Doha Round of trade negotiations. If Doha remains unfinished and WTO Members have not threatened to challenge the U.S. rice program at the WTO, it is likely that the program will remain at or near current levels, despite the Administration's calls for reform.

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United States Highlights

U.S. and Russia Sign Bilateral Agreement as Part of Russia's WTO Accession Bid

On November 10, 2006, U.S. officials announced that the United States and Russia successfully concluded in principle a bilateral agreement as part of Russia's accession to the World Trade Organization (WTO). The bilateral accession negotiations began in 1994, when Russia first began its attempt to accede to what was then the General Agreement on Tariff and Trade (GATT). Russia and the United States signed the bilateral deal on November 19 on the sidelines of the Asia-Pacific Economic Cooperation (APEC) summit in Hanoi. Russian Economy Minister German Gref and United States Trade Representative (USTR) Susan Schwab signed the bilateral agreement. After the signing, Schwab stated that the bilateral agreement establishes an enforcement mechanism for intellectual property protection, as well as rules for increased bilateral market access for goods and services.

According to USTR, the agreement creates new market access opportunities for U.S. providers of goods and services to the Russian market and will strengthen economic relations between the two countries. The agreement also resolves contentious issues such as sanitary and phytosanitary standards (SPS) and requires Russia to reduce tariffs on manufactured goods to an average of 8 percent. The agreement also encourages greater transparency and a strengthening of the rule of law in Russia and fosters economic reform in Russia. For financial services, the agreement allows 100-percent foreign ownership of banks and securities firms in Russia and also allows foreign insurance companies to operate through subsidiaries and branches after a transition period. On intellectual property, the agreement creates a "binding blueprint" that Russia will follow to address piracy and counterfeiting and to improve IPR protection and enforcement.

Most U.S. businesses reacted positively to the announcement. The U.S.-Russia Business Council (USRBC) commended the agreement and called on Congress to quickly approve Permanent Normal Trade Relations (PNTR) for Russia. The National Association of Manufacturers (NAM) issued a statement welcoming the agreement, as did the U.S. Chamber of Commerce. Daniel Christman, Senior Vice President for International Affairs for the Chamber, stated that "if it lives up to its WTO commitments, Russia will offer major new commercial opportunities for U.S. companies, reap the benefits of fair competition, and become a responsible and reliable participant in global markets." Coalition of Services Industries (CSI) chairman Michal Ducker also lauded the conclusion of the bilateral accession agreement,

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stating that it offers "significant market opening commitments which will provide new commercial opportunities for U.S. services suppliers."

On the other hand, the International Intellectual Property Alliance (IIPA) expressed concern that the agreement did not sufficiently cover intellectual property rights. The IIPA stated that Russia's legal reforms and counterfeiting and piracy enforcement mechanisms are not fully WTO-compliant. The Motion Picture Association of America (MPAA) also expressed hope that the agreement would do more to force Russia address IP protection.

Up next, Congress will have to consider Russia's PNTR status. Although the overall reaction to the bilateral agreement was positive, Congressional critics will likely focus on those items that USTR was unable to secure. For example, USTR failed in its effort to get Russia to lift the ban on foreign bank branching in the country - a move that would opened new business opportunities for American final services providers. USTR will likely justify this by stating that Russia did commit to remove its ban on branching in the insurance sector within nine years of joining the WTO as well as review its position on the branching issue when it joins the Organization for Economic Cooperation and Development (OECD). When considering PNTR for Russia, Congress will have to balance U.S. business needs and USTR's capabilities with critics' concerns regarding the bilateral agreements' failures, as well as diplomatic issues unrelated to international trade.

Also important in the process is any potential consideration of the bilateral agreement under Section 1106 of United States trade law. Section 1106 of the Omnibus and Trade Competitiveness Act of 1988 requires the President to determine, with respect to a "major foreign country" seeking admission to the WTO, whether the country's state trading enterprises (STEs) adversely affect the U.S. economy. If the President determines that Russia's STEs adversely affect the U.S. economy, then he must reserve the right of the United States to withhold application of the WTO Agreement between Russia and the United States until: (i) Russia undertakes commitments governing the business activities of its STEs, or (ii) the U.S. Congress passes a law extending the application of the WTO Agreement to Russia. A Presidential determination of "adverse effects" under Section 1106 is rare, and in no instance has the President sought Congressional involvement where he has found "adverse effects." However, the bilateral agreement could encounter problems if it were put to a Congressional vote under Section 1106, particularly if Russia continues to offend U.S. diplomatic and national security interests. Combined with U.S. businesses' IPR and financial services concerns, these issues could heighten Congressional scrutiny of the bilateral agreement, thus impeding successful passage of PNTR and possibly even bringing Section 1106 into play.

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Members of Congress Call for GSP, ATPDEA Extension During Lame-Duck Session

On November 15, 2006, members of the House of Representatives sent a letter to current Speaker of the House Dennis Hastert (R-IL) and Majority Leader John Boehner (R-OH) requesting that Congress schedule a vote on the renewal of the U.S. Generalized System of Preferences (GSP) and the Andean Trade Promotion and Drug Eradication Act (ATPDEA) during the upcoming lame-duck session. Both preference programs are scheduled to expire on December 31, 2006. According to the letter, "the renewal of these preferences is crucial in promoting economic development . . . [and] supporting U.S. geopolitical goals." The members of Congress also indicated that Congress should extend trade preferences to Haiti. Co-signers to the letter included Reps. Henry Cuellar (D-TX), Jim Moran (D-VA), Gregory Meeks (D-NY), Jim McDermott (D-WA), Jim Kolbe (R-AZ), Adam Smith (D-WA), Robert Wexler (D-FL), Norm Dicks (D-WA), William Jefferson (D-LA), Sheila Jackson Lee (D-TX), Earl Blumenauer (D-OR), and James McGovern (D-MA).

Incoming presumptive House Ways and Means Committee Chair Charles Rangel (D-NY) has already indicated that Congress is likely to consider legislation to extend GSP and the ATPDEA upon its return to the lame-duck session on December 4. Outgoing Ways and Means Chair Bill Thomas (R-CA) has echoed Rangel's statements and indicated that he is working on a legislative package that would renew both preference programs and extend African Growth and Opportunity Act (AGOA)-like preferences to Haiti. Congress is likely to consider this legislation in December . All signs point to passage of both preference programs. The GSP program enjoys broad U.S. business support as well as Congressional backing. The ATPDEA is a more contentious issue but with the lack of completion of the Peru and Colombia Free Trade Agreements (FTAs), it seems likely that Congress will extend the ATPDEA until it has completed considering the bilateral agreements. Congressional sources opine that Congress will likely extend both programs for a specific period of time and use that time to amend both programs.

Modifications to U.S. Harmonized Tariff Schedule Set for January 1, 2007 Implementation

In April 2006, the United States International Trade Commission (ITC) released a report titled "Proposed Modifications to the Harmonized Tariff Schedule of the United States" (ITC Publication 3851) in which it listed proposed changes to the Harmonized Tariff Schedule of the United States (HTSUS) that are expected to be implemented on January 1, 2007. The World Customs Organization (WCO) recommended the changes, and the ITC as well as the Office of the United States Trade Representative

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(USTR) investigated and reviewed the proposed changes. The report lists several hundred amendments affecting 83 HTSUS chapters and 240 HTSUS headings. **The majority of the changes affect industrial and high-technology products classified in chapters 84, 85, 87, and 90.**

The Omnibus Trade and Competitiveness Act of 1988 approved the United States' accession to the International Convention on the Harmonized Commodity Description and Coding System ("the HS Convention"). The HS Convention establishes a standardized tariff nomenclature meant to facilitate international trade through the use of a single nomenclature structure for the description, classification, and coding of imports and exports of the contracting parties. Article 3 of the HS Convention requires each contracting party to apply the HS nomenclature as the basis of its customs tariff nomenclature and publication of foreign trade statistics. The HS Convention also created the Harmonized System Committee (HSC), which is comprised of representatives of all the contracting parties to the Convention. One of the HSC's functions is the preparation of recommendations for achieving uniform interpretation of the HS nomenclature by the members and for keeping the HS product categories current, taking into account "technological developments and changing patterns in international trade." These recommendations are issued as amendments to the Convention. Pursuant to Article 16, WCO-recommended amendments to the HS to members "are deemed to be accepted six months after the date of notification of the recommendation, except with respect to contracting parties that notify the WCO of an objection." The last major WCO HTSUS update was in 2002, and this current update reflects negotiated revisions to the HTSUS that have occurred since 2002.

Appendix B of the ITC report lists those duty rates scheduled to be in effect as of January 1, 2007. Any staged duty-rate reductions that have already been established by Presidential Proclamation (*e.g.,* as a result of the bilateral trade negotiations) will continue to be applied beyond the January 1, 2007 implementation date, as appropriate. Specifically, the tariff rate lines in Appendix B reflect the tariff treatment under chapters 1 through 97 under the Dominican Republic–Central America Free Trade Agreement (DR-CAFTA), which was implemented with respect to El Salvador on March 1, 2006, and was implemented with respect to Honduras and Nicaragua on April 1, 2006. All tariff treatment (including that set forth in chapters 98 and 99 of the HTS) under this FTA that may be affected by the Appendix B provisions will be included in the final implementing proclamation along with future staged duty rates for all previously proclaimed agreements.

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Peru and Colombia Re-Open Markets to U.S. Beef Products

On November 3, 2006, United States Trade Representative (USTR) Susan Schwab and U.S. Secretary of Agriculture Mike Johanns announced that Peru and Colombia re-opened their markets to U.S. beef. Schwab stated that the United States was pleased that both countries lifted their bans on U.S. beef and beef products and added that the United States looks forward to other trading partners making similar trade decisions "in accordance with science-based international standards." Johanns noted that the openings represent progress in U.S. efforts to reopen global markets for U.S. beef.

Peru and Colombia closed their markets to U.S. beef after the December 2003 discovery of a cow in the United States suffering from bovine spongiform encephalopathy (BSE). USTR reports that in 2003, the United States exported a combined total of more than $4 million worth of beef and beef products to Colombia and Peru. Reopening these two markets restores two-thirds of the market access for U.S. beef and beef products in South America.

Peru and Colombia's actions could bode well for their respective FTAs with the United States. Congress has not yet set a date for a vote on the Peru FTA but with its beef market re-opening, Congress might be more inclined to consider the agreement during its lame-duck session. Congress has still not examined the Colombia FTA but like Peru, Colombia may have cast a more positive light on itself by lifting the ban, thus likely providing Congress with a push to consider the FTA. Whether Peru and Colombia re-opened their markets to U.S. beef as part of their FTA strategy remains unknown but the actions shows that the two U.S. trading partners value their trade relationship with the United States and are willing to take action to ensure that their FTAs receive Congressional approval.

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Free Trade Agreements

U.S. and Malaysia Complete Third Round of FTA Negotiations

Summary

On October 30, 2006, U.S. and Malaysian officials met in Kuala Lumpur, Malaysia for the third round of formal bilateral Free Trade Agreement (FTA) negotiations. Officials from the Office of the United States Trade Representative (USTR) conducted discussions with their Malaysian counterparts in several areas including market access for agriculture, goods and textiles, investment and rules of origin (ROOs). The United States and Malaysia plan to convene a fourth round of talks in San Francisco the week of January 8, 2007.

Analysis

U.S. and Malaysian officials met in Kuala Lumpur the week of October 30, 2006 for the third round of formal bilateral FTA negotiations. The United States and Malaysia had planned to hold the round the week of September 18 but postponed talks until late October upon Malaysia's request following the appointment of a new lead negotiator. The talks lasted through the week and 16 negotiating groups met to discuss issues including agriculture, goods and textiles market access, investment and ROOs. Six other working groups—capacity building, competition, e-commerce, investment, legal issues and telecommunications—were unable to meet during the negotiations but will meet before the fourth round. USTR also hosted a separate government procurement seminar to discuss the benefits of the Agreement's government procurement provisions.

Assistant United States Trade Representative (AUSTR) for Asia Pacific Barbara Weisel and Malaysian International Trade and Industry Ministry Secretary General Mohamad Sidek Hassan led the respective U.S. and Malaysian delegations. Although negotiators had considered holding the next round of formal talks in December, they have agreed to wait until January 8, 2007 to allow both parties to take advantage of the third round's momentum and to prepare the groundwork for further progress in the fourth round.

U.S. Sentiment. AUSTR Weisel indicated that she was "extremely pleased" with the progress U.S. and Malaysian negotiators made during the third round and opined that both sides had accomplished their goals. USTR officials were especially pleased with the positive results that they achieved with the government procurement seminar. Weisel cautioned, however, that because a number of sensitive areas remain unresolved, "there is still a lot of work ahead." She stated that she hoped negotiations would conclude in early 2007 and hoped for "significant progress" during the fourth round in January. Weisel

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added that it is up to Malaysia to decide whether it wants to finish the agreement "while the window is still open."

Malaysian Sentiment. Malaysia continues to maintain a cautious approach to negotiations. For example, a USTR source noted that Malaysian officials refused to engage in detailed services discussions until the parties decide on a negative or positive list approach. Malaysia appears unconcerned about completing the agreement by the originally envisioned end-2006 deadline. Malaysian government officials have repeatedly stated that they will not rush to complete an Agreement that does not benefit Malaysia just to meet the United States' deadline under Presidential Trade Promotion Authority (TPA). A recent statement by the Malaysian Ministry of International Trade and Industry (MITI) noted that "there is no specific timeline to conclude the [FTA] negotiations."

Key Issues. The U.S. and Malaysian delegations discussed several key issues during the negotiations' third round:

- **Government Procurement.** Government procurement remains one of the negotiations' most difficult issues. Under Malaysian government procurement laws, the government grants preferential treatment to firms with 51 percent ownership held by ethnic Malays (*Bumiputras*). The government also restricts bidding on certain contracts to firms with at least 30 percent *Bumiputra* ownership. USTR recognizes Malaysia's sensitivities in the area of government procurement, and although U.S. negotiators have not demanded that Malaysia abandon completely its policy favoring ethnic Malays, they have focused their requests on ensuring transparency and predictability in Malaysia's government contract bids. U.S. negotiators have also requested lower ethnic ownership-requirement thresholds to expand Malaysia's government procurement market to U.S. goods and services providers. According to Weisel, USTR will seek "reciprocal access" to the Malaysian market that is equal to access the United States grants Malaysian firms. USTR Senior Procurement Negotiator Jean Hillman Grier led a government procurement seminar during the negotiations to highlight the benefits to Malaysian business of government procurement's inclusion in the Agreement. According to Grier, U.S. legal restrictions that prohibit U.S. government purchases of Malaysian products have cost Malaysian business approximately $250 billion in lost contracts.
- **Services.** Services remains another difficult area in the negotiations as Malaysia continues to push for a positive list approach to the Agreement's services chapters. USTR rejects this approach and insists upon a negative approach that it has used in almost all previous FTAs. Under a negative list approach, the Agreement would liberalize all services except those explicitly excluded during negotiations, ultimately inscribed in a member's services schedule; a positive list approach would only

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include in the Agreement only those services that a party explicitly notes in the text of its respective schedule. Progress in services negotiations is unlikely until negotiators resolve this issue. Regarding specific services, USTR sources report that Malaysian negotiators did not respond with its own counter-text to the U.S. offer on e-commerce and telecommunications and indicated that Malaysia's apparent lack of objections to the offer could indicate progress in these areas. Malaysia did, however, express concern that the text's treatment of digital signatures and electronic transactions might conflict with a recently passed law that governs e-commerce. On financial services, USTR sources indicate that the negotiations exceeded expectations. Negotiators made progress on portfolio management but failed to resolve outstanding issues related to senior management.

- **Labor and Environment.** Negotiators did not engage in extensive discussions related to labor and environmental issues. Malaysia seeks to exclude certain labor and environment provisions in the Agreement, and the Malaysian government has indicated that it does not want environmental or labor provisions subject to dispute resolution under the Agreement. USTR sources indicate, however, that Malaysian negotiators understand that the United States considers these issues to be fundamental components of any trade agreement that it negotiates. Malaysian negotiators have signaled this understanding through, for example, their willingness to discuss potential technical assistance and cooperation programs that the parties could include in a final agreement to help Malaysia meet the FTA's environmental provisions.
- **Market Access.** The Malaysian government has indicated that both sides will likely exchange tariff offers by the end of November 2006. According to U.S. sources, if the parties make progress on the offers before the next formal round of talks in January 2007, negotiators could begin work on bracketed texts during that round. Malaysia has requested early tariff elimination on a number of goods including textiles, garments, rubber and wood products, ceramics, electronics and agricultural products.
- **Pharmaceuticals.** Negotiators reportedly made progress on copyright infringement issues.
- **Intellectual Property (IP).** Sources indicate that U.S. and Malaysian negotiators were unable to resolve differences on a number of IP issues including patents, data privacy and trademarks. Negotiators appear closer to agreement, however, on the FTA's copyright and enforcement provisions. The Malaysian government announced that the parties are considering a number of proposals to protect intellectual property rights (IPR) such as extending protection to sound and scent marks, issuing patents for plants and animals and lengthening the period of copyright protection to 70 from 50 years. U.S. officials have complained of Malaysia's continued IP violations, including

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software piracy, and continue to call for greater transparency and monitoring of Malaysia's IPR protection policies.

- **Rules of Origin (ROOs).** Negotiators made some progress on ROOs during the negotiation. USTR has indicated that it plans to hold a special ROOs seminar, similar to its government procurement seminar, before the fourth formal round of negotiations in January 2007.

Outlook

The U.S. and Malaysian reactions to the talks suggest that although the progress negotiators made was a substantial improvement over that of the previous round, much still remains before the Agreement is completed. USTR seemed pleased with the results of its government procurement seminar and has indicated that it will host similar seminars on other issues including small and medium sized enterprises (SMEs), IPR and services to convince the Malaysian private sector of the FTA's benefits. USTR will host the seminars before the January 2007 fourth round of formal talks and will conduct them in Malaysia to encourage private sector participation. It remains unclear, however, if such public sector engagement will help negotiators reach a breakthrough on services and convince Malaysia to accept a negative list approach.

Neither party has committed to a firm deadline for the agreement's completion, although USTR has stated that it must have all FTAs completed before April 1, 2007, in order to notify Congress of the President's intent to sign the agreement before TPA expires. Malaysia has acknowledged USTR's self-imposed deadline but views TPA expiry as a U.S. problem unrelated to the FTA negotiations. If negotiators can complete the FTA before the TPA-imposed deadline, Democratic control of both chambers of Congress is unlikely to affect the Agreement's passage: although Democrats traditionally oppose free trade agreements on the basis of their objection to the agreements' treatment of labor and environmental issues, the Malaysia FTA is unlikely to encounter such objections due to Malaysia's relatively high labor and environmental standards.

If negotiators fail to complete the agreement before the deadline, however, the FTA's future would become uncertain. Malaysian negotiators apparent unconcern with completing the talks before the deadline and their resistance to agree to a negative list approach to services, despite USTR's insistence that all recent U.S. FTAs have included such an approach without exception, suggests that the deadline may indeed pass with no agreement. Strong U.S. business community support coupled with lobbying efforts by USTR to convince Congress of the agreement's economic and strategic importance could, however, result in a limited TPA-extension that would allow USTR to complete negotiations for the

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Malaysia or U.S.-Korea FTA. On the other hand, Congressional Democrats could oppose any form of TPA renewal as a means of denying the Bush Administration what might be perceived as a political victory.

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Free Trade Agreements Highlights

United States Signs TIFA With Lebanon

On November 30, 2006, the United States and Lebanon signed a Trade and Investment Framework Agreement (TIFA). Assistant United States Trade Representative (AUSTR) for Europe and the Middle East Shaun Donnelly and Lebanese Minister of Economy and Trade Sami Haddad signed the TIFA in Beirut, and U.S. officials stated that the agreement will provide a forum for expanding and strengthening bilateral trade and investment relations between the United States and Lebanon.

AUSTR Donnelly stated that through the TIFA, the United States will help Lebanon promote democracy and expand trade and investment with the United States. TIFAs are limited trade agreements that establish joint councils of trade and economic officials to discuss trade issues; under the U.S.-Lebanon TIFA, the council will establish a permanent dialogue with the expectation of expanding trade and investment between the United States and Lebanon and resolving trade issues and deepening the bilateral trade relationship. Under U.S. trade policy, TIFAs are usually the first step towards the initiation of formal bilateral or regional FTA negotiations. The next step in the process would be for the countries to enter into a Bilateral Investment Treaty (BIT), which protects the rights of foreign subsidiaries and investors in the countries' home markets.

AUSTR Donnelly added that the TIFA demonstrates the Bush Administration's continued progress in its U.S.-Middle East Free Trade Area (USMEFTA) initiative. In May 2003, President Bush proposed a USMEFTA with 18 Middle Eastern countries "to increase trade and investment with the United States and others in the world economy." Lebanon falls under the USMEFTA initiative, which the Administration hopes to complete by 2013. To date, the United States has completed TIFAs with Algeria, Egypt, Kuwait, Qatar, Saudi Arabia, Tunisia, United Arab Emirates (UAE), and Yemen and has completed Free Trade Agreements (FTAs) with Jordan, Oman, Israel, and Bahrain. The United States is also undergoing FTA negotiations with the UAE.

The TIFA signals the Bush Administration's desire and commitment to complete the USMEFTA by its 2013 target date. Lebanon is the latest in a long line of Middle East TIFAs. Although the mid-2007 expiry of Presidential Trade Promotion Authority (TPA) prevents USTR from pursuing formal FTA negotiations with Lebanon in the short term, the newly-signed TIFA allows the United States to begin FTA talks when the U.S. political climate again allows for them. With TPA renewal unlikely in 2007, a U.S. FTA with Lebanon is likely a long-term goal.

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U.S. and Colombia Sign FTA While Democrats Urge Renegotiation of Labor Provisions in Peru and Colombia Agreements

On November 22, 2006, the United States and Colombia signed the U.S.-Colombia Free Trade Agreement (FTA). Deputy United States Trade Representative (DUSTR) John Veroneau and Colombian Minister of Trade, Industry, and Tourism Jorge Humberto Botero signed the bilateral agreement that will eliminate tariffs and other barriers to trade in goods and services between the two countries. Veroneau stated that the FTA "will deepen and strengthen [U.S.] trade ties by providing new opportunities for U.S. businesses, manufacturers, farmers and ranchers to export their goods and services to one of Latin America's most robust economies." He added that USTR is looking forward "to working with members of Congress to ensure bipartisan support for the agreement."

According to USTR, upon implementation of the agreement, over eighty percent of U.S. exports of consumer and industrial products to Colombia will immediately become duty-free. U.S. farm exports to Colombia such as beef, cotton, wheat, soybeans and soybean products, fruits and vegetables will receive immediate duty-free treatment. The agreement will also remove barriers to U.S. service providers in Colombia and provide a secure, predictable legal framework for U.S. investors.

Separately, members of Congress sent a letter to United States Trade Representative (USTR) Susan Schwab on November 21 urging the Administration to renegotiate labor provisions under the Peru Trade Promotion Agreement (PTPA). In the letter, Sens. Jeff Bingaman (D-NM), James Jeffords (I-VT), Richard Durbin (D-IL), and Jay Rockefeller (D-WV), and Reps. Charles Rangel (D-NY), Sherrod Brown (D-OH), Benjamin Cardin (D-MD), Sander Levin (D-MI), and John Lewis (D-GA), among others, state that labor provisions under the Colombia FTA are also problematic and should also be amended. The letter states that the Administration's willingness to sign the Colombia FTA with faulty labor provisions would "send [Democrats] the wrong message" about its willingness to work with them on labor issues and adds that the Congressmen are "dismayed" that the Bush Administration has not taken steps to address Democrats' concerns on labor standards.

The letter specifically states that Peru amended its labor laws in July 2006 but that the laws do not meet International Labor Organization (ILO) standards. The Congressmen opine that USTR should renegotiate the labor provisions of the FTA and accept former Peruvian President Alejandro Toledo's offer to put core ILO standards in the text of the PTPA, noting that the provisions would be subject to a reasonable transition period and Peru could benefit from substantial technical assistance in order to ensure

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compliance. The letter adds that reconsidering Toledo's offer and addressing the labor concerns would "ensure broad, bipartisan support for the Agreement in both the House and the Senate."

It is unlikely that Congress will consider the Peru or Colombia FTAs during its lame-duck session. The lame-duck agenda is already packed with appropriations and other trade-related concerns, including the renewal of U.S. preference programs and granting Vietnam Permanent Normal Trade Relations (PNTR). The 110th Congress will likely explore the agreements once it convenes in January 2007. The letter on labor concerns, however, does not bode well for the agreements. The Democrats' push to address labor concerns and renegotiate both agreements on this issue could drag out consideration of both agreements even longer and if USTR refuses to reconsider the labor issue, it could signal doom for both FTAs.

U.S.-Uruguay BIT Enters Into Force

On November 1, 2006, United States Trade Representative (USTR) Susan Schwab announced the entry into force of the U.S.-Uruguay Bilateral Investment Treaty (BIT). Schwab stated that the BIT will strengthen commercial ties between Uruguay and the United States as well as strengthen Uruguay's economy and provide protection for U.S. investors. Schwab added that the BIT "represents a concrete and important demonstration of [U.S.] willingness to strengthen trade and investment ties with reform-oriented countries in Latin America."

The United States and Uruguay signed the BIT on November 4, 2005. Uruguay completed its domestic ratification procedures in late 2005, and the U.S. Senate approved a resolution granting its advice and consent for the treaty on September 12, 2006. The U.S.-Uruguay BIT serves as the first BIT that the United States has completed since 1999. The Office of the USTR noted that the BIT will offer investment protections for current and future U.S. investors in Uruguay and will provide a more stable and predictable legal and regulatory investment environment. Officials also stated that the BIT could promote increased investment in Uruguay. Both USTR and the U.S. Department of State share responsibility for BIT policy and negotiations.

BITs have three main purposes: (i) to protect investment abroad in countries where investor rights are not already protected through existing agreements; (ii) to encourage the adoption of market-oriented domestic policies that treat private investment in an open, transparent, and non-discriminatory way; and (iii) to support the development of international law standards consistent with these objectives. USTR notes that BITs also provide investors six core benefits: (i) requiring that investors and their "covered investments" be treated as favorably as the host party treats its own investors and their investments or investors and investments from any third country (non-discrimination); (ii) establishing clear limits on the

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expropriation of investments and provide for payment of prompt, adequate, and effective compensation when expropriation takes place; (iii) providing for the transferability of investment-related funds into and out of a host country without delay, using a market rate of exchange; (iv) restricting the imposition of performance requirements as a condition for the establishment, acquisition, expansion, management, conduct, or operation of an investment; (v) giving covered investments the right to engage the top managerial personnel of their choice, regardless of nationality; and (vi) giving investors from each party the right to submit to international arbitration an investment dispute with the other party's government .

The U.S.- Uruguay BIT indicates that although the United States is not yet ready to begin Free Trade Agreement (FTA) talks with Uruguay, it views Uruguay as a viable FTA partner if the countries can resolve outstanding trade issues. BITs protect the rights of the participating countries' foreign subsidiaries and investors in their BIT partner's home market and typically precede formal FTA negotiations. At the October 2-3, 2006 U.S.-Uruguay Joint Commission on Trade and Investment (JCTI) meetings, Uruguay and the United States agreed to negotiate a Trade and Investment Framework Agreement (TIFA) to facilitate bilateral trade and investment "as soon as possible." A TIFA is usually the next step towards formal FTA negotiations. However, the United States and Uruguay will not pursue an FTA at this time because of the July 2007 expiration of Presidential Trade Promotion Authority (TPA), USTR's self-imposed deadline to complete all FTAs before TPA expires (a March 30, 2007 deadline for Congressional notification), and the United States' current FTA docket.

Costa Rica To Implement DR-CAFTA in Early 2007

At a November 1, 2006 panel organized by the District of Columbia Bar, Costa Rican Ambassador to the United States Tomas Dueñas discussed the prospects for Costa Rica's approval and implementation of the Dominican Republic-Central American Free Trade Agreement (DR-CAFTA). Dueñas stated that the International Affairs Commission of the Costa Rican Legislative Assembly will conclude its review of DR-CAFTA by December 12, 2006. After that date, the Assembly will vote on the agreement. If approved, the Assembly would still have to pass legislation that conforms with the agreement, therefore, the entry into force of DR-CAFTA is likely to take place sometime in the first quarter of 2007. Dueñas reiterated Costa Rica's commitment to implement the agreement as soon as possible. However, the agreement continues to be very contentious among several sectors of society, including farmers, workers unions, and grass-roots organizations. Dueñas highlighted that one of the most contentious issues of the FTA is the opening of the telecommunications and insurance sectors, where the Costa Rican Electricity Institute and the National Insurance Institute have monopolies. Dueñas also praised the agreement's uniform set of rules for foreign investors.

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The U.S. Trade Representative (USTR) has not provided a timetable for when the remaining DR-CAFTA countries (*i.e.,* Costa Rica and Dominican Republic) will be ready for implementation but has stated that Dominican Republic still needs to work on intellectual property rights (IPR). Sources indicate that the Dominican Republic has already introduced legislation to implement DR-CAFTA. The proposed legislation would modify various articles of the Dominican Republic Intellectual Property Law in order to address U.S. concerns. The DR, however, has not provided a timeframe of when its Congress will approve the legislation, but has stated that it intends to do so "as soon as possible."

Dueñas, along with Salvadorian Ambassador Rene Leon and Guatemalan Ambassador Guillermo Castillo agreed that trade volume increased in the Central American region since DR-CAFTA was signed. Leon stated that DR-CAFTA exports have increased considerably and the agreement has almost eliminated the negative trend of DR-CAFTA textile exports to the United States. Leon also opined that Nicaragua was the country that has benefited the most from the agreement, registering a 38 percent increase in its exports. Castillo concluded that the agreement has allowed Central American nations to become more integrated. For instance, Guatemala and El Salvador are exploring ways to facilitate cross-border movement of goods and harmonize their customs procedures to provide a better business environment.

El Salvador was the first country to implement DR-CAFTA on March 1, 2006, while Nicaragua and Honduras were second and third to implement fully the agreement on April 1. Guatemala was the latest Central American country to implement the agreement on July 1, 2006.

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Multilateral

United States Lists Areas of Concern During China TRM Process

Summary

On October 16, 2006, the United States circulated a communication to World Trade Organization (WTO) Members as part of the WTO's "transitional review" of China's adherence to its WTO accession commitments. As part of its WTO accession package that it signed in 2001, China agreed to undergo annual reviews of its compliance efforts through 2009, with a final review in 2011. In its communication, the United States outlined several areas of concern, including automobiles, textiles and state-owned enterprises (SOEs). The United States' primary focus in most of these areas was potential Chinese subsidization in violation of China's accession commitments and the WTO's Agreement on Subsidies and Countervailing Measures (the Subsidies Agreement). WTO officials noted that China did not provide written responses to WTO Members' concerns as it had done in previous annual reviews. China argued that has limited administrative resources to respond in writing to all the questions and thus responded to Members' concerns during a meeting of the WTO Subsidy Committee. We review these concerns herein and China's response.

Analysis

I. Background

As part of its WTO accession package that it signed in 2001, China agreed to undergo annual reviews of its compliance efforts through 2009, with a final review in 2011. The transitional review mechanism (TRM) allows the United States and other WTO Members to gauge China's WTO accession commitments and provides a forum for Members to express their concerns on market access issues that they feel China has not yet addressed. The United States discussed what it views as contentious areas related to China's WTO obligations. The sectors that the United States described in its communication have appeared in past U.S. communications related to China's WTO obligations. On October 20, 2006, the European Communities (EC) also released their list of concerns with China, as part of the TRM process. The EC list mirrors the U.S. list and includes the EC's request for clarification and further information of China's subsidies notification (or lack thereof), auto trade regulations, export credits, and China's improvement on its transparency. Both lists heavily focus on Chinese subsidies in industrial sectors that are import-sensitive in the U.S. and EC home markets.

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The U.S. and EU communications also focused on China's April 13, 2006 subsidy notification to the WTO, a first for China. China was originally scheduled to deliver its subsidy notification in April 2002 but delayed the delivery for four years. The notification provides information on 78 subsidy programs for China's industrial and agricultural sectors as well as rural development initiatives. After its April notification, WTO Members alleged that China provided complete information for only 29 of the subsidy programs notified and that there was information missing from the report.

China responded to the United States' and other WTO Members' questions on price controls in a short communication on October 23 and provided general responses to WTO Members' concerns at an October 26 meeting of the WTO Subsidy Committee.

II. Areas of U.S. Concern

The United States' communication targeted nine areas of concern regarding China's market access commitments and WTO obligations: (i) transparency and subsidies notification; (ii) textiles; (iii) automobiles; (iv) semiconductors; (v) agriculture; (vi) banking; (vii) export credits; (viii) SOEs; and (ix) price controls. Several areas focused on potential Chinese subsidization of domestic industries.

III. Transparency and Subsidies Notification

As an initial matter, the United States expressed concerns with the transparency of China's international trade regime and the effects of a lack of transparency on China's accountability. The United States stated that transparency is a "fundamental principle underlying the WTO Agreement" and that without sufficient transparency, WTO Members find it difficult to assess China's compliance with its obligations under the WTO agreements, particularly the Subsidies Agreement. The United States claimed that China's April 2006 subsidies notification to the WTO (its first subsidies notification since its accession in December 2001) was incomplete and omits substantial subsidies that China maintains. The United States noted that "China also failed to notify other subsidies that might be prohibited under WTO rules or has made no further commitment to eliminate them. "

IV. Semiconductor Subsidies

In its communication, the United States stated that China is developing a new aid policy for semiconductors that includes income tax reductions and exemptions, research loans and using research expenditures to offset taxes, and proposed tax reductions on imported equipment. The United States asked China when it will announce the new aid policy for the Chinese semiconductor industry and sought clarification on the incentives to be included in this new policy. The United States also asked China to provide information on how the central, provincial and local governments have coordinated development

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plans for the semiconductor industry as well on the Wuhan city government's plans to spend between $1.5- 3 billion in building a semiconductor plant that will make 12-inch wafers. According to the U.S. communication, on May 16, 2006, the International Herald Tribune reported on the Wuhan city government's plans for the semiconductor plant that will make 12-inch wafers that the Semiconductor Manufacturing International Corp (SMIC) will design, build and manage. Specifically, the United States asked China on the specific ownership and investment role of the Wuhan city government in the project and what the specific terms and conditions are of SMIC's participation in the project.

V. Textile Subsidies

According to the communication, the United States has specific information on sub-central government subsidy programs that appear to be export-contingent and only available to Chinese textile and apparel exporters. The United States asked China how its central government monitors provincial and local government policies for textiles and apparel exporters to ensure compliance with China's WTO obligations. The United States also asked China to provide more information on its recently-issued government "Notice of Relevant Policies to Promote Chinese Textile Enterprises to Shift to New Ways of Growth and Support Them to Go Global." Among other purposes, this measure is designed to support technology innovation and development of core technologies and equipment in the textiles sector. This measure is also designed to provide funds to textiles companies that set up distribution channels in overseas markets.

VI. Automobile Subsidies

On automobiles, the United States noted in its communication that in order to become a bigger exporter of cars and parts, the Chinese government announced that eight cities have been designated as special zones for sales overseas of automobiles and auto components. The United States asked which eight cities have been designated as special zones for overseas sales and sought clarification on what incentives were being offered to auto manufacturers and exporters and what eligibility criteria must be met in order for companies to qualify for these incentives.

VII. Agriculture Subsidies

On agriculture, the United States noted that China's Ministry of Commerce (MOFCOM) released its first agricultural export five-year plan on August 24, 2006, which includes six measures to support agriculture exports, including expanding agricultural export support systems and increasing diplomatic representations. The United States asked China for more information on the program and how the proposed support is consistent with China's WTO obligations under Article 3 of the Subsidies Agreement

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and paragraph 12.1 of China's Protocol of Accession. The United States also noted that China has not yet responded to a 2005 U.S. request for information on export support programs in Jiangxi Province and Henan Province.

VIII. Banking and Financial Sector

The United States continued to seek information about the Chinese government's efforts related to the "Big Four" state-owned commercial banks: (i) the Industrial and Commercial Bank of China; (ii) the China Construction Bank; (iii) the Bank of China; and (iv) the Agricultural Bank of China. Specifically, the United States asked China for more information on its progress in running these banks on a more commercial basis. The United States also pointed out that China has improved corporate governance, loan classification standards and banking rules and regulations but added that more fundamental reforms and stronger enforcement are needed.

IX. Export Credits as Possible Subsidies

The United States noted that the China Exim Bank offers loans at low interest rates to finance manufacturing projects tied to Chinese exports of mechanical and electronic products and complete sets of equipment. The United States alleged that these loans could be considered official development assistance because the Chinese companies implementing these projects should be medium-sized and large SOEs and the loans have "advantageous terms" and conditions. The United States asked China if this program is consistent with the disciplines of the WTO Subsidies Agreement. In its request, the United States also alleged that the China Exim Bank provides loans on advantageous terms and conditions to selected SOEs in certain selected sectors (*i.e.*, construction, electronics, mechanical, technology products, capital goods, and telecommunications and power equipment) to support their international strategies. The United States requested that China provide it with more information on these loans.

X. State-Owned Enterprises (SOEs)

The United States asked China if in the future if it will implement a formal privatization program to sell majority ownership in large SOEs to private entities. The United States also asked for details on China's planned improvements on corporate governance and accountability issues related to SOEs. In its communication, the United States also stated that SOEs in China are exempt from paying any dividends to the state and noted that this exemption remains in place even though a number of large SOEs in China are highly profitable. Thus, the United States asked China to address "the clear link established between the exemption of dividend payments and continued overinvestment by SOEs, as well as the documented link between dividend pay-outs and good corporate governance." The United States also asked about

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the government's plans to revitalize northeast China, a process that could include maintaining ownership of SOEs in the region.

XI. Price Controls

The United States requested that China provide it with information on any new laws, regulations or measures meant to eliminate or reduce Chinese price controls. The United States also asked China if it has recently implemented any new price controls or other regulatory measures.

XII. China's Response

On October 23, 2006, China responded to Members' concerns in a short communication circulated throughout the WTO. In its communication, China stated that it has eliminated the practice of multiple pricing for one product or service in China and that prices for most goods and services "are adjusted solely by market forces, while only a very small number of important products and services are subject to state pricing and state guidance pricing." China noted that this "small number of products" subject to state pricing is published in its government Pricing Catalogue, in the China Economic Herald and on the National Development and Reform Commission's official website. China added that "state pricing and state guidance pricing will not limit or impair the market access of imported goods and services . . . [and] neither will it jeopardize the interests of other WTO Members." China responded to WTO Members' concerns on China's SOE's pricing mechanism for export products and stated that there are no special price control measures or pricing mechanisms in China that apply to SOEs. China noted that SOEs independently determine the prices of goods they export and base these prices on a variety of factors, including market conditions and production costs.

China also responded to WTO Members' concerns on its trade practices and subsidies notification at the October 26 meeting of the WTO Subsidy Committee. China stated that it had completely eliminated all subsidy programs that are WTO-prohibited or altered them enough that they now obey WTO rules. China also alleged that WTO Members – especially the United States and the EU – overstated the amount of Chinese government subsidization to Chinese enterprises, noting that its subsidy notification covered central government subsidies but not subsidies at the sub-federal level because the government was still working on collecting information on those subsidies and because resources at the local level are limited.

On semiconductors, China stated that all its programs meant to assist the Chinese semiconductor industry would be consistent with WTO rules. On textiles, China stated that its government was providing assistance to the textiles sector so as to foster "technology innovation and development of core technologies and equipment in the textiles sector." China added that its textile assistance program was

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necessary because Chinese textile exporters were facing increased competition from other WTO Members. On auto trade, China responded to U.S. and EU concerns that the MOC had designated eight cities as special zones for overseas sales of cars and components. China stated that under this planned program, auto companies within the eight cities would not receive preferential loans or export tax rebates. On banking, China stated that the government does not participate or interfere in Chinese state-owned banks' operations and added that the state-owned banks now operate on market-driven commercial terms. China also noted that these banks do not provide loans to Chinese industry at non-commercial rates.

Outlook

Through the TRM, WTO Members such as the EC and the United States have voiced their concern that China is not complying with its WTO commitments. Several U.S. government bodies, however, feel that China has ignored complaints raised during the TRM process and are unsure of the effectiveness of the process. In its November 2005 report, for example, the U.S.-China Economic and Security Review Commission (USCC) stated that "China has effectively marginalized the WTO's annual review of its progress in meeting its WTO accession commitments." The Office of the United States Trade Representative (USTR) has also stated that China is not doing enough related to its WTO accession commitments and often ignores the TRM. To date, there does not seem to be a direct correlation between U.S. complaints brought through the TRM and Chinese actions to address them. It is unlikely that China will directly address the problems that the United States raised in the most recent TRM meeting, but instead will address them gradually through changes that are part of broader institutional reform.

WTO officials have also pointed out that China did not provide written responses to all of the WTO Members' concerns as it had done in previous annual reviews. China argued that has limited administrative resources to respond in writing to all the questions and thus responded to Members' concerns during the October meeting of the WTO Subsidy Committee. WTO Members will likely continue to press China to respond to their concerns. For example, on November 6, the United States circulated a communication to the WTO in which it stated that it will continue to request that China provide it with answers to its concerns. The United States, an other WTO Members, will likely use the upcoming November 20 meeting of the WTO Goods Council to continue pressing China for answers to their questions. Whether China will provide further answers or act on those concerns is another story.

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WTO Appellate Body Issues Report on U.S.- EC Customs Dispute

Summary

The World Trade Organization (WTO) Appellate Body (AB) has rendered a mixed ruling in a U.S. challenge to the European Community's system of customs administration (DS315). While the Appellate Body ruled in favor of the United States on a number of threshold procedural issues, it declined to "complete the analysis" by adjudicating the substantive aspects of the major U.S. claims. The decision leaves the door open to a new challenge by the United States.

Analysis

I. Background: Applicable Disciplines

GATT Article X:3(a) provides that:

> Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

The "laws, regulations, decisions and rulings" referred to in Article X:1 include those "pertaining to the classification or the valuation of products for customs purposes…."

GATT Article X:3(b) provides in part as follows:

> Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters.

The United States argued that the EC's system of customs administration was inconsistent with both Articles X:3(a) and X:3(b), as described below.

II. Panel's Terms of Reference

A. The "measures at issue" cannot be interpreted in light of the WTO obligation

Article 6.2 of the Dispute Settlement Understanding sets out the requirements that must be met by a complaining party in its request for the establishment of a WTO Panel, including the need to identify the "specific measures at issue."

In the present case, the Appellate Body reversed the finding of the Panel that the "measure at issue" for the purposes of a claim under Article X:3(a) must be the "manner of administration" that was allegedly

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non-uniform, partial, or unreasonable. The Panel had interpreted the "measure at issue" for the purposes of DSU Article 6.2 in the light of the specific WTO obligation that was allegedly being violated.

The Appellate Body rejected the notion that the "measure at issue" in DSU Article 6.2 should be interpreted in light of the specific WTO obligation raised in a particular claim. The Appellate Body said the Panel's reasoning was "flawed" and would "introduce uncertainty because the identification of the measure would vary depending on the substance of the legal provision invoked by a complainant and the interpretation that a panel might give to that provision." According to the Appellate Body, the Panel "blurred the distinction between *measures* and *claims* [original emphasis]."

B. U.S. challenge to collective administration of EC customs laws: complainant can "foreshadow its arguments"

The Appellate Body similarly overturned the Panel's finding that the specific measure at issue in this dispute was the "manner of administration" of certain EC customs laws identified by the United States in its Panel Request.

The Appellate Body recalled its ruling in an earlier dispute that "[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings." It added that under DSU Article 6.2, a complaining Member enjoys a certain discretion in identifying the specific measure at issue. The Appellate Body found that the U.S. Panel Request in the current dispute did not challenge the substantive content of the EC legal instruments listed in the Request, but rather "their administration collectively." It considered the list of EC laws cited in the Panel Request as "illustrative" of areas where the United States considered that EC customs law was not administered in a uniform way. The Appellate Body concluded that "nothing in Article 6.2 prevents a complainant from making statements in the panel request that foreshadow its arguments in substantiating the claim. If the complainant chooses to do so, these arguments should not be interpreted to narrow the scope of the measures or the claims."

C. The United States may challenge the EC system "as a whole or overall"

The Appellate Body also reversed the Panel's finding that, due to the wording and content of the U.S. Panel Request, the United States was precluded from challenging the EC's system of customs administration "as a whole or overall."

The Appellate Body agreed with the Panel that, in principle, there was nothing in the DSU or other WTO agreements that would prevent a complaining Member from challenging a responding Member's system "as a whole or overall." However, it added that in any such challenge, the Panel Request "must identify,

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with a sufficient degree of specificity, the measures that constitute or underlie the legal system challenged 'as a whole or overall', and must also provide the legal basis of the complaint (or the claims) so as to present the problem clearly."

The Appellate Body found that the U.S. Panel Request met the specificity requirement. It said that it recognized, as the Panel did, that in this case the legal instruments referred to in the U.S. Panel Request cumulatively contained "a vast number of provisions that relate to a variety of customs areas and that 'entail administration in ... diverse ways'." However, the Appellate Body concluded that "the essence" of the U.S. claim "was not the administration or application of individual provisions of these legal instruments, but the absence of any mechanism or procedure at the European Communities level to reconcile divergences in the administration of these instruments by the member States of the European Communities."

The Appellate Body found that the wording and content of the U.S. Panel Request showed that the U.S. challenge under Article X:3(a) concerned "the manner of administration of [the EC] measures *collectively* or *as a whole* [original emphasis]." Although the Appellate Body found that the U.S. Panel Request "could have been drafted with more precision", it concluded that "by highlighting the nature and extent of the differences that exist in the administration of European Communities customs law by the member States, the panel request presents with sufficient clarity, as required by Article 6.2 of the DSU, that the claim made under Article X:3(a) concerned the European Communities' system of customs administration as a whole or overall." For the same reason, the Appellate Body overturned the finding of the Panel that it was precluded from considering the U.S. claim against the "design and structure" of the EC's system of customs administration.

D. "Temporal limitations" on a panel's terms of reference applies to "measures" but not "evidence"

The EC argued that the Panel in this case "took an excessively wide approach in interpreting the temporal limitations on its terms of reference" by considering "steps and acts of administration that pre-date or post-date the establishment of a panel."

The Appellate Body recalled its statement in *EC – Chicken Cuts* (2005) that, as a "general rule", the measures included in a panel's terms of reference "must be measures that are in existence at the time of the establishment of the panel." However, it added that this general rule is "qualified by at least two exceptions." First, as the Appellate Body found in *Chile – Price Band System* (2002), a panel has the authority to examine a legal instrument enacted after the establishment of the panel that amends a measure identified in the panel request, provided that the amendment "does not change the essence" of

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the identified measure. Second, in *US – Upland Cotton* (2005), the Appellate Body held that panels are allowed to examine a measure "whose legislative basis has expired, but whose effects are alleged to be impairing the benefits accruing to the requesting Member under a covered agreement" at the time of panel establishment.

In the context of the present case, the Appellate Body faulted the Panel for failing to distinguish between "measures" and "pieces of evidence." It said that while there are temporal limitations on measures that may be within a panel's terms of reference, "[e]vidence in support of a claim challenging measures that are within a panel's terms of reference may pre-date or post-date the establishment of the panel." Thus, the United States was not precluded from presenting evidence relating to acts of administration before and after the date of Panel establishment.

III. Claims regarding Article X:3(a): administration in a uniform, impartial and reasonable manner

A. Scope of Article X:3(a): challenging the substantive content of a "legal instrument that regulates administration"

Turning to the substance of the U.S. claims, the Appellate Body first considered the scope of the requirement under GATT Article X:3(a) to administer laws in a uniform, impartial and reasonable manner. The Panel, applying earlier jurisprudence under Article X:3(a), ruled that the term "administer" related to the *application* of the laws and regulations, but not to the laws and regulations themselves.

The Appellate Body, summarizing its rulings in *EC – Bananas III* (1997) and *EC – Poultry* (1998), recalled that "as Article X:3(a) establishes disciplines on the *administration* of the legal instruments of the kind described in Article X:1, claims concerning the *substantive content* of these Article X:1 legal instruments fall outside the scope of Article X:3(a) [original emphasis]." Going further, the Appellate Body added that these earlier rulings:

> …do not exclude, however, the possibility of challenging under Article X:3(a) the substantive content of a legal instrument that regulates the administration of a legal instrument of the kind described in Article X:1. Under Article X:3(a), a distinction must be made between the legal instrument being administered and the legal instrument that regulates the application or implementation of that instrument. While the substantive content of the legal instrument being administered is not challengeable under Article X:3(a), we see no reason why a legal instrument that regulates the application or implementation of that instrument cannot be examined under Article X:3(a) if it is alleged

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> to lead to a lack of uniform, impartial, or reasonable administration of that legal instrument.

The Appellate Body added that "[i]f a WTO Member challenges under Article X:3(a) the substantive content of a legal instrument that regulates the administration of a legal instrument of the kind described in Article X:1, it will have to prove that this instrument necessarily leads to a lack of uniform, impartial, or reasonable administration. It is not sufficient for the complainant merely to cite the provisions of that legal instrument. The complainant must discharge the burden of substantiating how and why those provisions necessarily lead to impermissible administration of the legal instrument of the kind described in Article X:1."

B. U.S. claims rejected

Applying these principles to the specific measures challenged by the United States, the Appellate Body found that differences in penalty laws and audit procedures among the EU member States did not, in and of themselves, constitute a violation of Article X:3(a). It stated that in order to establish a violation, the United States would have had to show that such differences necessarily led to the non-uniform application of EC customs laws in particular cases, something the United States did not demonstrate to the Panel under this claim.

The Appellate Body reversed the finding of the Panel that the administrative process leading to the tariff classification of "blackout drapery lining" amounted to non-uniform administration within the meaning of Article X:3(a). The Panel had found a violation of this provision, mainly because German customs authorities may rely on an interpretative aid in deciding how to classify the product for tariff purposes, while customs authorities in other EU member States do not. The Appellate Body said that although the term "administer" could include administrative processes, this did not mean that Article X:3(a) *required* uniformity of administrative processes. It added that in order to find that an administrative process led to non-uniform administration of a measure, a panel could not merely identify the features of an administrative process that it may view as non-uniform. Instead, a panel "must go further and undertake an analysis to determine whether those features of the administrative process necessarily lead to non-uniform administration of a legal instrument…." The Panel did not explain how the different administrative process between Germany and the other EU member States would necessarily lead to non-uniform classification of this product. Therefore, the Appellate Body overturned the Panel's finding of violation of Article X:3(a) with respect to blackout drapery lining.

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The Appellate Body also found that the United States failed to establish a *prima facie* case of violation with respect to the administration of the "successive sales provision", i.e., the practice of the customs authorities in some EU member States of imposing a form of prior approval for the use of certain sales for valuation purposes.

C. One U.S. claim accepted: differential customs classification for LCD monitors

The Appellate Body affirmed the Panel's ruling that the EC violated Article X:3(a) with respect to the tariff classification of LCD monitors for computers. Where these products were classified as computer monitors, they entered the EC duty-free under the terms of the WTO Information Technology Agreement. However, if they were classified as video monitors, they were subject to a duty of 14 per cent. Before the Panel, the EC had not disputed the divergence of classification of this product among some of the EU member States, and the Panel ruled that the EC had breached Article X:3(a).

At the Interim Review stage, the EC sought to introduce new exhibits to demonstrate that the lack of uniform classification among the EU member States for LCD monitors had been remedied. The Appellate Body ruled that the Interim Review stage was not the time of an assessment of "new and unanswered evidence" and affirmed the Panel's finding that the tariff classification of LCD monitors was not uniform at the time of the establishment of the panel.

D. U.S. claim against the EC's customs system "as a whole": Appellate Body declines to "complete the analysis"

Although the Appellate Body reversed the Panel's ruling that the United States could not challenge the EC's customs system "as a whole", it nevertheless refused to go on and complete the analysis of this U.S. claim under Article X:3(a). The Appellate Body noted that it could complete the analysis only if there were sufficient factual findings by the panel, or undisputed facts on the record. In the present case, the Panel did not examine the U.S. claim that the measures at issue, collectively, were administered in a non-uniform manner. Although the Panel did make some general observations about the EC customs system, the Appellate Body said that these "were made in the context of an analysis based on the Panel's narrow interpretation of the measure at issue and the claim set out in the panel request." The Appellate Body concluded that the Panel's general observations "do not provide a sufficient foundation for us to complete the analysis."

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IV. Article X:3(b): review need not apply to "all" agencies "throughout the territory" of a WTO Member

As noted above, Article X:3(b) requires each WTO Member to maintain tribunals for the "prompt review and correction of administrative action relating to customs matters." The Panel stated that the decisions of tribunals or procedures established or maintained pursuant to Article X:3(b) "need not necessarily govern the practice of all the agencies entrusted with administrative enforcement throughout the territory of a particular Member, as has been asserted by the United States." The Panel ruled that the EC therefore did not violate Article X:3(b) on the basis that the decision of the review tribunals "do not have effect throughout the territory of the European Communities." Therefore, the Panel dismissed the U.S. claim under Article X:3(b).

The Appellate Body affirmed the ruling of the Panel on this issue, stating that "[w]e are of the view that Article X:3(b) of the GATT 1994 requires a WTO Member to establish and maintain independent mechanisms for prompt review and correction of administrative action in the area of customs administration. However, neither text nor context nor the object and purpose of this Article require that the decisions emanating from such first instance review must govern the practice of *all* agencies entrusted with administrative enforcement *throughout the territory* of a particular WTO Member [original emphasis]."

Outlook

The United States has long complained about what it considers to be the inconsistent application of customs laws by some of the member States of the European Union. EU customs laws are enacted at the level of the Community, but are implemented by the member States. In theory, an imported good should be classified and treated identically by all of the EU member States, so that the point of entry into the EU should be irrelevant. In practice, however, some differences exist. One example cited by the United States related to liquid crystal display (LCD) monitors. Some EU member states classified this product as a "computer monitor", which enters the EU duty free. Other EU members considered the same product to be a "video monitor", which is subject to a duty of 14 per cent.

To challenge such practices, the United States invoked Article X:3(a) of the GATT 1947, a provision that requires each WTO Member to administer its customs law in a "uniform, impartial and reasonable manner." The Panel dismissed most of the U.S. claims, in part because of its preliminary ruling that the U.S. challenge to the EC customs system "as a whole or overall" was outside its terms of reference.

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The Appellate Body found that the Panel erred in interpreting its terms of reference, and that the United States was indeed entitled to challenge the EC customs system "as a whole or overall." However, the Appellate Body declined the U.S. request to conduct a substantive assessment of the WTO-consistency of the EC customs system on this basis, as it said it lacked the factual basis to do so. It also found that certain U.S. claims of violation had not been established.

Thus, the U.S. victory on the threshold issues yielded little in the way of concrete results for the United States in this dispute. The only claim ultimately accepted by the Appellate Body related to the differential classification of LCD monitors, something that the EC did not contest before the Panel, and which the EC claims has since been rectified.

At the same time, the Appellate Body's acceptance of the U.S. position that it was entitled to challenge the EC customs system "as a whole or overall" would permit the United States to initiate a new dispute against the EC on this basis. To do so, it would need to marshal sufficient evidentiary support for the U.S. claims, something often lacking in the original proceedings.

A final noteworthy aspect of this Report is the Appellate Body's new interpretation of the scope of GATT Article X:3(a). The jurisprudence of the Appellate Body had long since established that this provision can be used only to challenge the application of another Member's laws, but not the substance of the laws themselves. However, in yesterday's decision, the Appellate Body made clear that its earlier rulings on Article X:3(a) did not exclude the possibility of using this provision to challenge "the substantive content of a legal instrument that regulates the administration" of customs and other related laws. The Appellate Body hastened to add that a complainant seeking to establish such a violation would bear the burden to demonstrate "how and why those provisions necessarily lead to impermissible administration of the legal instrument." Nonetheless, this interpretation by the Appellate Body essentially opens up a new category of measures that can be challenged under GATT Article X:3(a).

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WTO Compliance Panel Releases Decision in United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina

Summary

A WTO "compliance" Panel has ruled that the United States failed to implement the 2004 rulings of the WTO in a dispute over the imposition of U.S. anti-dumping duties on steel pipe from Argentina. The Panel found that the measures challenged by Argentina remained in breach of U.S. obligations under the Anti-Dumping Agreement, both "as such" and "as applied." The decision of the Panel in *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina: Recourse to Article 21.5 of the DSU by Argentina* (DS268) was released on November 30, 2006.

Analysis

A. U.S. "waiver" provisions breach Article 11.3 "as such"

During the original proceedings, Argentina challenged the "waiver" provisions of U.S. law and regulations. In its analysis, the Panel and the Appellate Body distinguished between "affirmative waivers" and "deemed waivers." The statute provided that once a waiver occurred ("affirmative" or "deemed"), the USDOC must conclude that revocation of the order would be likely to lead to continuation or recurrence of dumping with respect to the waiving party. The original panel found that the affirmative and deemed waiver provisions were inconsistent with U.S. obligations under Article 11.3, a conclusion affirmed by the Appellate Body.

In implementing the consequent rulings of the Dispute Settlement Body (DSB), the United States left the statute unamended, but it made certain changes to the USDOC Regulations. Under the revised Regulations, the deemed waiver regulation was eliminated, and an affirmative waiver had to be accompanied by a written statement by the exporter that it was likely to continue or resume dumping if the order were revoked. According to the United States, this meant that any company-specific determination of likely dumping based on a waiver would now be based on affirmative evidence.

The compliance Panel considered that, in some situations, the waiver provisions might not necessarily preclude the USDOC from arriving at reasoned conclusions of likelihood of continuation or recurrence of dumping. For example, in a sunset review where all exporters explicitly and affirmatively waived their right to participate, and acknowledged that they were likely to continue or resume dumping if the measure were revoked, the Panel said that it "may well be reasonable for the USDOC to find likelihood for these

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exporters individually and arguably also on an order-wide basis." The Panel stated that in the circumstances of a given review, such a signed statement by one or several exporters could constitute "at least part of the evidentiary basis" on which an authority could base its sunset determinations.

However, the Panel found that there may be other situations in which the waiver provisions may preclude the USDOC from reaching reasoned conclusions on an adequate factual basis. The Panel concluded that following the USDOC regulatory amendments, the deemed waiver regulation had been removed and waiver provisions of the Act now addressed only affirmative waivers. The Panel similarly recalled that the U.S. Statement of Administrative Action that accompanied the U.S. Uruguay Round implementing legislation requires the USDOC to make its sunset determinations on an order-wide basis. Accordingly, the Panel found that in a sunset review involving multiple exporters from one country, where some of the exporters simply remained silent, while other exporters affirmatively waived their right to participate, the USDOC "may have to find likelihood on an order-wide basis because of the company-specific determinations" under the Act. Thus, the Panel concluded that "in every sunset review involving multiple exporters the USDOC will have to find likelihood on an order-wide basis if one exporter waives its right to participate, because otherwise the USDOC would have found no likelihood with respect to the exporters who waive their right to participate."

The Panel found that making such an affirmative likelihood determination without considering the information submitted by non-waiving exporters "would not, in our view, be a reasoned determination premised on an adequate factual basis." The Act "would preclude the USDOC from taking into consideration evidence submitted by cooperating exporters or evidence otherwise collected by the USDOC in sunset reviews where there is at least one other exporter who waives its right to participate." In such cases, the USDOC's order-wide determination would be based on the assumption that "because one exporter waived its right to participate and acknowledged to be likely to continue or resume dumping, other exporters are also likely to continue or resume dumping." In the view of the Panel, the USDOC would thus ignore relevant information and "would fail to observe the obligation of the investigating authorities to make reasoned determinations of likelihood of continuation or recurrence of dumping based on a sufficient factual premise in accordance with Article 11.3 of the Agreement."

B. United States can develop a new factual basis in its re-determination

The United States implements certain adverse WTO rulings through proceedings under Section 129 of the Uruguay Round Agreements Act. In conducting its Section 129 Determination in the present case, the USDOC sought new information from the Argentine exporters. The information sought by the Department related to the original sunset review period (i.e., 1995-2000). Argentina argued that the

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United States was not allowed to collect certain new facts in its re-determination, i.e., those facts that the authority could have developed at the time of its review, but did not.

The Panel rejected this argument, stating that the relevant provisions of the Agreement did not preclude an investigating authority from "developing a *new* factual basis pertaining to the original review period in the course of implementing the DSB recommendations and rulings pertaining to the original determination [original emphasis]." In the view of the Panel, to preclude the United States from developing a new factual basis in its sunset redetermination would be "counter to the overall operation of the WTO dispute settlement system, and, in particular, the notion of *implementation* of the DSB recommendations and rulings…[original emphasis].

C. USDOC likelihood determination in this case "lacked a sufficient factual basis"

The Section 129 Determination was based on two findings: (i) likely past dumping; and (ii) the USDOC's volume analysis, which had been incorporated from the original sunset review. Argentina argued that both of these findings were devoid of a sufficient factual basis under Article 11.3. The Panel ruled in favour of Argentina on both points.

1. Likely past dumping: the USDOC did not take into account "elementary aspects of the concept of dumping"

In its Section 129 Determination, the USDOC found that dumping likely had occurred during the original sunset review period based solely on a comparison of the export prices of a minor Argentine exporter with the prevailing prices in the U.S. market during the period of review. The Department did not ask the company to provide information regarding its normal value and its export price, and there was no other evidence or previous finding that the company had "dumped" within the meaning of the Agreement. The Panel found that the USDOC "made a finding of likely dumping without making any effort to obtain information that is essential to the core principle of dumping as a price-to-price comparison." The Panel said that it did not see how a finding of likely past dumping could have a sufficient factual basis "if it did not take into account at a bare minimum these elementary aspects of the concept of *dumping* as that term is used in the Anti-dumping Agreement."

The United States had argued that it did not seek Argentine producers' export prices because it was "aware of the brevity of the time available to conduct the proceeding." The Panel dismissed this defence, reasoning that "[w]e do not consider the allegedly limited amount of time the USDOC had in order to complete the Section 129 proceedings at issue could absolve the USDOC from any of its obligations

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under the Anti-dumping Agreement, let alone an obligation as fundamental as observing the definition of dumping set out under…the Agreement [original emphasis].”

2. USDOC’s volume analysis: “not the kind of determination that would be made by an unbiased and objective investigating authority”

Panels established under DSU Article 21.5 adjudicate the WTO-consistency of “measures taken to comply” with the DSB rulings. In the present case, the compliance Panel made a threshold determination on whether the USDOC's analysis on the volume of imports was part of the U.S. “measure taken to comply” with the DSB rulings.

In the original proceedings, Argentina raised a claim against the Department’s volume analysis. However, the original panel exercised “judicial economy”, i.e., it declined to rule on this claim. The United States argued that as the original panel made no findings with respect to the volume analysis, and as this analysis was incorporated without change into the U.S. implementing measure, it was not part of the “measure taken to comply.”

The Panel rejected this argument, reasoning that the volume analysis was an integral part of the Section 129 Determination, and was therefore part of the “measures taken to comply” by the United States. It underlined that:

The fact that a panel, in an original dispute settlement proceeding, did not make findings regarding certain issues relating to the investigating authorities' determination that were raised and argued before the panel, can not preclude a compliance panel, in its assessment under Article 21.5 of the DSU of the measures taken to comply with the DSB recommendations and rulings, from reviewing those aspects which have been incorporated by the authorities in the measure taken to comply.

Turning to the substance of Argentina’s claim, the Panel found that the volume analysis breached Article 11.3. The USDOC analysis found that the volume of dumped imports declined following the imposition of the order. The Department concluded that “[d]eclining import volumes after, and apparently resulting from, imposition of [the] antidumping order indicate that exporters would need to dump to sell at pre-order levels.” However, the Panel found that “there may be other possible explanations for such decline, depending on the circumstances of each review.” It said that the Department’s finding was “not based on a thorough evaluation of the possible causes” of a decline and was “not, in our view, the kind of determination that would be made by an unbiased and objective investigating authority.” Thus, it concluded that the USDOC's determination regarding the decline in the volume of imports “lacks a sufficient factual basis” under Article 11.3.

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D. Procedural Violations

Argentina argued that the Section 129 Determination violated a number of procedural obligations of the United States under Article 6 of the Anti-Dumping Agreement. While a number of these claims were dismissed, the Panel ruled that the United States breached two procedural provisions.

1. Providing information to interested parties: "WTO obligations apply concurrently and cumulatively"

Argentina established a violation of Article 6.4, which provides that investigating authorities "shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential…and that is used by the authorities in an anti-dumping investigation…." Argentina pointed to certain memoranda that had been prepared by the USDOC, but that were only released to the interested parties with the issuance of the Section 129 Determination itself – that is, when the USDOC released its final determination on the day that the compliance period expired. The Panel found that the United States violated Article 6.4 with respect to two of the five memoranda challenged by Argentina. The Panel said that under Article 6.4, these documents should have been made available to the interested parties prior to the final decision.

The Panel rejected the U.S. argument that because certain challenged documents were taken from the file of the original sunset review, Argentine exporters had access to them since that time. The Panel found that Article 6.4 required the investigating authorities to allow interested parties to see the information they use in their determinations "irrespective of whether that same information may have been used in a previous proceeding and may have been made available to the same interested parties in connection with that past proceeding."

The Panel similarly rejected the U.S. argument that whether it was "practicable" under Article 6.4 to allow interested parties to see the information had to be determined in light of the limited amount of time that the United States had to implement the DSB rulings. Argentina argued that the United States had to comply with the ruling of the arbitrator on "reasonable period of time" to implement the DSB rulings at the same time that it complied with the procedural obligations of Article 6. The Panel said that it "agree[d] with Argentina that the WTO obligations apply concurrently and cumulatively" and that the fact that the United States spent most of the implementation period on the amendment to the Regulations "can not be an excuse for the United States' failure to meet its obligations under the Agreement."

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2. Provision of non-confidential summaries: access by counsel to the confidential record is not sufficient

The Panel also found that the United States breached Article 6.5.1 of the Agreement, which states investigating authorities "shall require interested parties providing confidential information to furnish non-confidential summaries…." Argentina argued that the United States failed to require a U.S. petitioner to submit a non-confidential summary of its information. The United States argued that there could be no violation of Article 6.5.1 because U.S. law permitted the lawyers for the Argentine exporters to have access to all confidential information on the record. The Panel dismissed this defense, reasoning that "[w]hat matters for purposes of Article 6.5.1 is whether the interested parties themselves receive non-confidential summaries of the confidential information submitted to the investigating authorities."

E. Panel Recommendations

For the reasons noted above, the Panel found that the United States acted inconsistently with Articles 11.3, 6.4 and 6.5.1 of the Anti-Dumping Agreement.

As in the original dispute, Argentina asked the Panel to make a formal "suggestion" to the United States under Article 19.1 of the Dispute Settlement Understanding to revoke the WTO-inconsistent order. However, the Panel once again declined, as it saw "no particular reason" to make such a suggestion.

The Panel noted that the original DSB rulings "remain operative."

Outlook

There is a certain incongruity in the way the compliance Panel interpreted the rules applicable to importing Members that seek to extend an anti-dumping duty beyond the five-year limit set by the WTO Anti-Dumping Agreement for the expiration (or "sunset") of such orders. (Under Article 11.3 of the Anti-Dumping Agreement, anti-dumping duties must terminate within five years, unless the investigating authority of the importing country determines that the continuation or recurrence of dumping and injury would be "likely" if the order were to expire. The Appellate Body has interpreted "likely" in this context to mean "probable.") The compliance Panel based its findings of U.S. non-compliance on the well-established principle that the continuation of an anti-dumping order must be supported by a substantive review and a reasoned determination by the investigating authority. At the same time, however, the Panel found that a WTO Member can bring itself into compliance with the sunset rules by developing the evidence to do so essentially at any time, which undermines the time-bound nature of these disciplines.

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The U.S. government divides sunset review proceedings between two agencies (as it does in original investigations). The U.S. Department of Commerce (USDOC) determines whether there would be "likely dumping" if the duty were to expire, while the U.S. International Trade Commission (USITC) determines "likely injury."

There is no suspense associated with the outcome of USDOC sunset review proceedings. In every sunset review in which the affected U.S. industry has participated since entry into force of the WTO Agreement, the USDOC has found "likely dumping." Given these virtually insurmountable odds, some companies choose not to participate in the proceedings before the USDOC and concentrate instead on the injury proceedings before the USITC, a route permitted through the so-called "waiver" provisions of U.S. law.

In the original WTO dispute, Argentina successfully challenged the "waiver" provisions of the U.S. Tariff Act and the implementing Regulations, under which the USDOC was mandated to find "likely dumping" for an exporter that waived, or was deemed to have waived, its participation in the USDOC proceedings. The Appellate Body ruled that these "statutorily-mandated *assumptions* about a company's likelihood of dumping" breached the obligation of an investigating authority under Article 11.3 to arrive at a "reasoned conclusion" on the basis of "positive evidence" [original emphasis].

In implementing the WTO rulings arising from the original dispute, the USDOC changed its Regulations to provide that an exporter waiving its participation was required to file an express statement that it was "likely to dump" if the order were revoked. According to the United States, such a statement would constitute positive evidence of likely dumping, thereby obviating the need to rely on "assumptions" in waiver cases. The compliance Panel rejected this argument, and found the U.S. waiver provisions continue to violate Article 11.3. It based its decision on the fact that the USDOC makes its sunset determinations on an order-wide basis, i.e., it makes its likelihood determination with respect to all exporters from the country subject to the anti-dumping order. Thus, in the case of a sunset review involving multiple exporters from one country, the USDOC would find that the statutorily-mandated "likely dumping" determination with respect to one or more "waiving" exporters would affect the country-wide determination. In such cases, the compliance Panel found that the USDOC would fail to observe the obligation to make a reasoned determination of likely dumping based on a "sufficient factual premise." Therefore, it concluded that U.S. waiver provisions remained in breach of Article 11.3.

The decision of this Panel on this issue is consistent with the well-established line of authoritative WTO jurisprudence on the scope of the sunset review disciplines of the Agreement. As the Appellate Body has found, Article 11.3 requires investigating authorities to act with an "appropriate degree of diligence" in

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making reasoned conclusions based on positive evidence. Assumptions mandated by law, or speculation regarding possible dumping in the past, fall far short of these strict standards, and cannot be the basis to continue an anti-dumping order.

The Panel also ruled that the USDOC likelihood determination in this case “lacked a sufficient factual basis” under Article 11.3. The Panel found that the USDOC determination “did not take into account...elementary aspects of the concept of dumping” and was not “the kind of determination that would be made by an unbiased and objective investigating authority.” This “as applied” violation was based in part on the Department's assumption that declining import volumes after the imposition of the order “indicate that exporters would need to dump to sell at pre-order levels.”

The “as applied” finding in this case may be more significant than the Panel’s “as such” ruling. In sunset reviews, the USDOC often relies on a decrease in the volume of imports as indicative of “likely dumping.” The Panel ruled that such an inference in this case lacked objectivity, a finding that could have implications for other cases in which USDOC relied on a decrease in volume exported to the United States as the basis for its likelihood determination. The ruling on the U.S. “waiver” provisions will probably have less of an impact, as it is doubtful that any exporter would ever file the “confession” provided for under the Regulations, i.e., the express statement that it was likely to dump if the order were revoked. The USDOC “confession” requirement may therefore operate as a *de facto* repeal of the statutory “waiver” requirement.

Another noteworthy aspect of this case was the Panel’s ruling that the United States could develop new information relating to the original sunset review period. The United States argued that it needed this information for a determination based on the slightly surreal concept of “likely past dumping”, i.e., that dumping would have been likely if the order had been revoked following the original sunset review. The Panel agreed that, in principle, the United States could develop a new factual basis for its redetermination. However, it found that the actual redetermination made by the USDOC in this case nevertheless lacked a sufficient factual basis under Article 11.3.

The Panel’s ruling on the development of new information is extremely problematic. As noted above, anti-dumping orders are supposed to be terminated after five years, unless the importing country adheres to the strict disciplines of the Agreement to allow such measures to be continued. This Panel’s decision would appear to permit the development of new information long after the presumptive expiration date. In other words, the continuation of the order could be based on information that the authority could have developed within the timeframe mandated by the Agreement, but did not. The Panel’s ruling on this issue is not consistent either with the time-bound nature of the obligations imposed by Article 11.3, or with the

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strict conditions that apply to the invocation of the exception to allow the order to continue. The *ex post facto* development of new information to continue an order cannot be reconciled with the intent of the drafters of the Agreement that anti-dumping orders should "sunset" after five years.

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Multilateral Highlights

WTO Director-General Lamy Announces Informal Re-Start to Doha Negotiations

On November 16, 2006, World Trade Organization (WTO) Director-General Pascal Lamy announced what many view as an informal re-start to the WTO's Doha Round of multilateral trade negotiations. Lamy made his announcement at an informal delegation meeting in Geneva and stated that WTO Members supported a re-launch of the talks that collapsed in July 2006. Lamy did not announce a specific course of action for officially restarting the talks but stated that WTO Members should increase the number of contacts in the various negotiating areas, test one another's negotiating positions, and explore possible options to advance the negotiations.

Lamy warned, however, that WTO Members had a "small window of opportunity" to conclude the talks and secure a final agreement by Spring 2007. To that end, he opined that WTO Members would only be able to complete a deal when they are "are ready to put numbers to the flexibilities they have already expressed in general terms on key issues, in particular on agriculture market access and domestic support." Lamy added that the "informal start" would begin with technical work at the expert-level and then evolve into a formal re-launch of the multilateral negotiations at a later stage. Lamy told delegations that the chairs of the Doha negotiating groups would assume the lead in organizing initial discussions at the expert level to "prepare the ground for fully-fledged negotiations to take place when the conditions are right."

Chairman of the agriculture negotiating group Crawford Falconer has already led a November 10 meeting on agricultural issues. Services group chairman Fernando de Mateo plans to hold informal meetings throughout December and to re-launch formal services negotiations in January 2007. The WTO Council for Trade in Services also plans to hold an informal meeting in early December to discuss how to move forward on services negotiations.

WTO Members are working under an unofficial deadline of Spring 2007 to secure a final agreement. U.S. Trade Promotion Authority (TPA) is set to expire on June 30, 2007, and WTO Members must reach an agreement before March 30, which is the final day upon which the President can sign the Agreement and submit it to Congress before TPA expires. Because TPA's renewal prospects have declined considerably with the newly-elected Democrat majority in the 110th Congress, WTO Members cannot prolong negotiations beyond Spring 2007 under the assumption that Congress will renew TPA. However, if Members make great strides an establish a completed Doha framework – but fail to complete a final

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agreement – by the 2007 deadline, there is a slight chance that Congress would be willing to extend TPA for the limited purpose of completing the Doha Agreement. Because TPA approval under even this limited scenario appears unlikely, however, WTO Members must act quickly to complete a final Agreement. Failure could delay the Agreement's completion for several years.

WTO General Council Approves Vietnam's Bid for Membership; House Rejects Initial Vietnam PNTR Vote

On November 7, 2006, the World Trade Organization's (WTO) General Council approved Vietnam's membership to the multilateral organization. Once Vietnam ratifies its WTO accession agreement and informs the WTO, it will become the WTO's 150th Member 30 days later. WTO Director-General Pascal Lamy stated that "the remarkable efforts that Vietnam has put into preparing for membership should be an inspiration" to all WTO Members. He added that "Vietnam has shown how anchoring domestic reforms in the WTO can yield dramatic results," highlighting Vietnam's economic growth in 2005 and its increase in foreign direct investment (FDI). Trade Minister for Vietnam Truong Dinh Tuyen stated that Vietnam's reforms and WTO membership will ensure the country's continued economic growth and create opportunities for trade expansion.

Vietnam's accession protocol includes Vietnam's commitments on goods and services and the WTO Working Party's report describing Vietnam's legal and institutional framework for trade:

- **Vietnam's Schedule of Concessions and Commitments on Goods**. Under its accession package, Vietnam has promised bound tariff rates for a majority of agricultural and non-agricultural goods with duties ranging from 0-35 percent. Vietnam has also reserved the right to charge specific duties instead of ad valorem duties only if the resultant duty stays below the bound rates. Vietnam's package includes a list of products that will be protected with tariff rate quotas (TRQs), including eggs, tobacco, sugar and salt; Vietnam, however, will increase the quotas until they disappear under a phased timeline. Specific to agricultural products, Vietnam has committed to not subsidize exports and will provide Vietnamese farmers with Amber Box support of up to 3,961.5 billion Vietnamese dong. On information technology (IT) products, Vietnam has signed the WTO Information Technology Agreement, under which Vietnam has agreed to allow duty-free entry of IT imports.
- **Vietnam's Schedule of Specific Commitments on Trade in Services**. Under its accession package, Vietnam committed to liberalize its services sector through its schedule of specific commitments. Among the schedule's limitations, Vietnam has reserved the right to limit foreign ownership of domestic telecommunications service providers, allowing between 49- 65 percent

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foreign ownership. In many other sectors, foreign ownership is also limited but will be phased in to reach 100 percent over the next several years.

- **Report of the Working Party on the Accession of Vietnam**. The working party report describes Vietnam's institutional and legal framework and includes Vietnam's commitments to reforms that it has introduced as part of its WTO accession. The report states that Vietnam will grant all foreign individuals and enterprises full trading rights no later than January 1, 2007. Under its terms of accession, all foreign entities must register with Vietnamese authorities to secure these trading rights. The report states that Vietnam has agreed to allow foreign-owned banks to establish in-country operations starting April 1, 2007. These banks, however, must have assets worth more than $10 billion. Foreign banks are already allowed to open branches in Vietnam if they have assets worth more than $20 billion. Within five years of its accession date, Vietnam will also allow foreign non-life insurance providers to open branches; to date, foreign non-life insurance providers are not allowed to open branches in Vietnam. According to the report, Vietnam has also committed to: (i) abide by International Monetary Fund (IMF) and WTO rules on foreign exchange; (ii) privatize state-owned enterprises enterprises; (iii) notify the WTO on its price controls; (iv) abolish quotas, bans and other restrictions on goods; (v) comply with the WTO Agreements on Customs Valuation, Rules of Origin, Pre-shipment Inspection, Anti-dumping, Safeguards, Subsidies and Countervailing Measures, and Trade-Related Investment Measures (TRIMs) within a transition period; (vi) apply the WTO Agreements on Technical Barriers to Trade (TBT), and Sanitary and Phytosanitary (SPS) Measures without a transition period; and (vii) immediately comply with the Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement.

On November 13, 2006, the U.S. House of Representatives failed to pass a bill (H.R. 5602) granting Vietnam Permanent Normal Trade Relations (PNTR) under suspension of rules. The vote was 228 to 161, 32 votes short of the necessary two-thirds majority to pass the bill under suspension. Opponents to the bill included 66 Republicans, 94 Democrats and one Independent. A total of 43 members did not vote, a significant number that Congressional sources opine could have changed the vote's outcome. Most of the Representatives not voting had not yet arrived in Washington D.C. following trips to home states for the November 7 elections. The House will likely re-consider the bill under normal voting procedures in December due to ongoing concerns on Vietnam's human rights and religious freedom record. Outgoing Ways and Means Chairman Bill Thomas (R-CA) stated that "just because [Vietnam] decides to join the World Trade Organization doesn't mean that it has decided in all aspects to join the world's civilized nations, in its behavior not only to its people, and to others." Lawmakers are also still concerned with

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safeguards against potential dumping of textiles on the U.S. market; opponents to the Vietnam PNTR bill feel that the Bush administration did not negotiate a textile surge provision in the bilateral agreement with Vietnam that would protect American textiles from Vietnamese dumping. President Bush had hoped to grant PNTR to Vietnam by the time Vietnam hosted the Asia Pacific Economic Conference (APEC) summit in Hanoi November 13-15. Instead, he will likely have to wait for Congress' December decision, given the continued concerns on human rights, religion and textiles.

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