December 2007

Japan External Trade Organization
WTO and Regional Trade Agreements Monthly Report

IN THIS ISSUE

Table of Contents

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

Summary of Reports

United States

United States Highlights

We would like to alert you to the following United States highlights:

- Treasury Report Does Not Label China a "Currency Manipulator"
- Senate Approves Padilla as Under Secretary of Commerce for Trade
- President Bush Nominates ITC Member Deanna Tanner Okun as Deputy USTR
- Congress Approves Block Burmese JADE Act as President Signs Sudan Divestment Bill
- Senate Approves Farm Bill; Legislation Now Moves to Conference
- ITC Releases Public Report on Negative Determination in CFS Paper Case
- SED III Preview: US to Focus on Product Safety, Balanced Economic Development

Free Trade Agreements

United States Considers Strengthening Trade Partnerships in Asia through FTAs, BITs

US trade policy under the Bush Administration is at a crossroads. Presidential Trade Promotion Authority (TPA) expired on June 30, 2007, and without TPA in place, the United States is unlikely to complete any new bilateral trade negotiations with US trading partners in the short-term. The Administration, however, is under pressure from US businesses to strengthen commercial and trade linkages with trading partners so as not to be locked out of the numerous bilateral trade negotiations occurring in Asia and the rest of the world. Consequently, the United States is exploring potential Free Trade Agreements (FTAs) and Bilateral Investment Treaties (BITs) with several of its Asian trading partners in an effort to solidify commercial ties that can be used to build more comprehensive agreements in the long-term. We review this recent US FTA and BIT activity below.

Free Trade Agreements Highlights

We would like to alert you to the following Free Trade Agreements highlights:

- United States and Vietnam Meet for First TIFA Meeting

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

- President Bush Signs US-Peru FTA, Pushes for Approval of US-Colombia FTA

Multilateral

WTO Rules Negotiating Group Chair Releases Draft Rules Text; WTO Members Criticize Zeroing Provisions Included Within

On November 30, 2007, Chairman of the World Trade Organization (WTO) Doha Negotiating Group on Rules Guillermo Valles released draft text that proposes changes to the WTO Antidumping Agreement and Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). The draft text also proposes new provisions prohibiting and restricting certain subsidies in the fisheries sector. Valles stated that the draft text does not reflect a consensus of the Rules negotiating group but instead is meant to stimulate discussion among WTO Members.

WTO Issues Compliance Panel Report in United States – Brazil Cotton Dispute

Decision: A World Trade Organization (WTO) "compliance Panel" (DS267) has ruled that US cotton subsidies continue to violate the obligations of the United States under the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") and the Agreement on Agriculture. It found that the United States had failed to implement the original (2005) WTO rulings on cotton.

Multilateral Highlights

We would like to alert you to the following multilateral highlights:

- Doha Agriculture Chair Releases Agriculture Working Papers in Effort to Move Talks Forward
- Arbitration Panel Authorizes Antigua and Barbuda to Impose USD 21 Million in Annual WTO Sanctions Against United States

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

Reports in Detail

United States

United States Highlights

Treasury Report Does Not Label China a "Currency Manipulator"

On December 19, 2007, the Department of Treasury released its *Semiannual Report on International Economic and Exchange Rate Policies to Congress* in which it did not label China or any other US trading partner a "currency manipulator." To date, Treasury has not labeled China a currency manipulator. The report notes, however, that China should accelerate the appreciation of the renminbi (RMB) exchange rate to minimize the risks created for the world economy and China, and that the RMB's undervaluation is a contributing factor to China's growing trade surplus.

The 1988 Omnibus Trade and Competitiveness Act requires the Department of Treasury to report to Congress on "whether countries manipulate the rate of exchange between their currency and the United States dollar for purposes of preventing effective balance of payments adjustment or gaining unfair competitive advantage in international trade." The most recent report states that no major US trading partner, including China, is a currency manipulator. According to the report, the RMB appreciated against the US dollar by 2.5 percent in the first half of 2007, and by 3.2 percent during June 30-December 11, 2007. Since the beginning of China's new currency regime in July 2005, the RMB has appreciated against the dollar by 12.1 percent.

In its most recent report, Treasury urged China to accelerate the appreciation of the RMB's effective exchange rate in order to minimize the risks that the undervalued currency creates for China and the world economy. The report also urged China to rebalance its growth by reforming its exchange rate regime. According to the report, multilateral concern over China's exchange rate regime featured heavily in discussions within the US-China Strategic Economic Dialogue (SED)[1], the G-7, the G-20, and the International Monetary Fund (IMF).

---

[1] US and Chinese officials discussed China's currency practices during the December 12-13, 2007 SED meeting in Langfang, Hebei Province, China. During the meeting, Treasury Secretary Paulson and other US officials reiterated that China's introduction of greater exchange rate flexibility remains "the most pressing and important" issue for China, the United States and the global economy.

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

Reaction to the release of Treasury's report was mixed. Treasury Secretary Henry Paulson stated that he has resisted pressure from members of Congress to take direct action against China's alleged undervalued currency, and that he prefers to use diplomacy to address US concerns. In Congress, however, key lawmakers remain frustrated with the Bush Administration's refusal to brand China as a currency manipulator. Senator Charles Schumer (D-NY) opined that the Bush Administration has been slow in acting against alleged Chinese unfair trade practices. Senate Finance Committee Chairman Max Baucus (D-MT) stated that he was disappointed with Treasury's "continued timidity on this issue." Chairman Baucus is the author of pending legislation (S.1607) that aims to adjust the "fundamental misalignment" of foreign currencies with the US dollar.

The Administration's refusal to label China a currency manipulator will likely continue to anger other US lawmakers as well. During its first session, the 110th Congress introduced more than 100 China-related bills, a large number of them focused on China's alleged currency manipulation. The Bush Administration may be purposefully refusing to label China a currency manipulator in order to ease political and economic dialogue between the United States and China, but in doing so, is drawing the ire of many US lawmakers that are intent on addressing China's currency and its effects on US competitiveness and the US dollar. Members of Congress, like Chairman Baucus, seem to be getting impatient with China's refusal to undertake a more drastic currency revaluation, as well as Treasury's repeated aversion to labeling China a currency manipulator. Despite protests from Congress, the Bush Administration is unlikely to change its stance on China's currency policies in the near future. Thus, Treasury's latest assessment may provide more fuel to members of Congress to introduce more China currency legislation when both chambers of Congress return to session in January 2008.

The "Report to Congress on International Economic and Exchange Rate Policies" is available at: http://www.treasury.gov/offices/international-affairs/economic-exchange-rates/.

Senate Approves Padilla as Under Secretary of Commerce for Trade

On December 20, 2007, the Senate confirmed Christopher Padilla to be Under Secretary of Commerce for International Trade. On December 13, 2007, the Senate Finance Committee unanimously approved Padilla nomination. Padilla, former Assistant Secretary of Commerce for Export Administration, replaces Frank Lavin who resigned from the position on July 13, 2007 to become Managing Director and Chief Operating Officer of Cushman & Wakefield Investors Asia. President Bush nominated Padilla in September 2007 and since that time, Padilla has served as Acting Under Secretary of Commerce for International Trade. As Under Secretary, Padilla is charged with heading the International Trade

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

Administration (ITA), which oversees trade remedy cases and monitors US trading partners' adherence to international trade obligations.

The Senate confirmed Padilla as Assistant Secretary for Export Administration in September 2006. Prior to joining the Department of Commerce, Padilla served as Chief of Staff and Senior Advisor to Deputy Secretary of State Robert Zoellick in the Department of State. Padilla joined the Bush Administration in 2002 as Assistant United States Trade Representative for Intergovernmental Affairs and Public Liaison. Prior to his work in the government, he worked in a number of international positions at AT&T and Lucent Technologies, including marketing, business development, and government affairs. He has also served as Director of International Trade Relations at Eastman Kodak Company.

President Bush Nominates ITC Member Deanna Tanner Okun as Deputy USTR

On December 19, 2007, President Bush nominated Commissioner Deanna Tanner Okun of the US International Trade Commission (ITC) to serve as Deputy United States Trade Representative (DUSTR). If the Senate confirms her nomination, Commissioner Okun will assume the DUSTR position left vacant by Karan Bhatia. Bhatia departed USTR in October to return to the private sector.

As Deputy USTR, Commissioner Okun will oversee US trade relations with East Asia (including China and Japan), South Asia (including India), Southeast Asia, and Africa. Her responsibilities will also include supervising USTR's functional offices, handling environmental, labor, pharmaceutical, and trade capacity building issues, and serving as USTR's designee on the boards of the Overseas Private Investment Corporation and the Millennium Challenge Corporation.

Commissioner Okun was sworn in as a member of the ITC on January 3, 2000, for a term expiring on June 16, 2008. She served as Chairman of the ITC from June 2002 - June 2004, and served two separate terms as Vice Chairman of the ITC: from June 2000 - June 2002, and from June 2004 - June 2006. Prior to her appointment to the ITC, Commissioner Okun served as counsel for international affairs to Senator Frank Murkowski (R-AK) from 1993-1999, where she was responsible for the international trade issues with which the Senator was involved as a member of the Senate Finance Committee. She also handled international energy and foreign relations issues for the Senator in his position as Chairman of the Senate Energy and Natural Resources Committee. Commissioner Okun has also worked as an associate attorney of the International Trade Group at Hogan & Hartson, and a research associate specializing in trade at the Competitive Enterprise Institute. She holds a Bachelor of Arts degree in

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

political science with honors from Utah State University and received her J.D. with honors from the Duke University School of Law.

Congress Approves Block Burmese JADE Act as President Signs Sudan Divestment Bill

Members of Congress have approved separate pieces of legislation that tighten existing sanctions against Burma and Sudan. On December 11, the House of Representatives unanimously approved the Block Burmese JADE (Junta's Anti-Democratic Efforts) Act of 2007 (H.R. 3890). On December 20, 2007, the Senate approved H.R. 3890 by voice vote and with amendments; the bill now goes back to the House for its consideration. House Foreign Affairs Committee Chairman Tom Lantos (D-CA) introduced the bill that would bar the importation of any gemstone extracted from Burma and would prevent the importation of Burmese gems via third countries. Under H.R. 3890, the importation of Burmese jade and rubies into the United States is banned. The legislation also freezes the assets of Burmese political and military leaders, prevents Burma from using US financial institutions via third countries to launder the funds of those leaders or their immediate families, and prevents Burmese officials involved in the violent suppression of protesters from receiving visas to the United States. The legislation also ends tax deductions and credits for the Yadana gas field or pipeline (which is partly owned by Chevron) and authorizes USD 20 million for FY 2008 and 2009 to provide aid to democracy and human rights activists and organizations inside and outside Burma.

Separately, on December 31, 2007, President Bush signed into law the Sudan Accountability and Divestment Act of 2007 (S. 2271). The Senate and the House of Representatives approved S. 2271 on December 12 and December 18, 2007, respectively. The Sudan Accountability and Divestment Act of 2007 is meant to pressure Sudan's government to address the genocide in Sudan's Darfur region. The bill requires federal contractors to certify that they are not involved in key sectors of Sudan's economy (i.e., Sudan's power production, mineral extraction, oil, and military equipment sectors). The President can waive the requirement, however, if it is in the national interest to do so. The bill also authorizes states and localities to divest from companies involved in key Sudan business sectors and allows mutual fund managers and pension managers to cut ties with companies involved in key Sudan business sectors; the bill protects mutual fund and pension managers from lawsuits over profits lost as a result of divestment. The legislation further requires the Secretaries of Treasury and State to report to Congress on the effectiveness of US sanctions against Sudan.

The Departments of State and Justice had complained that S. 2271 would infringe on the President's ability to conduct foreign policy with Sudan. Consequently, President Bush issued a signing statement at

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

the time of the signature that contained a reservation. The signing statement notes that the Sudan Accountability and Divestment Act of 2007 “purports to authorize State and local governments to divest from companies doing business in named sectors in Sudan” and thus “risks being interpreted as insulating” state and local divestment actions from federal oversight that could interfere with implementation of national foreign policy." According to the statement, because foreign policy is exclusively the federal government's role, “the executive branch shall construe and enforce this legislation in a manner that does not conflict with that authority."

Senate Approves Farm Bill; Legislation Now Moves to Conference

On December 14, 2007, the Senate passed the Farm, Nutrition and Bioenergy Act of 2007 (H.R. 2419) by a vote of 79 to 14. The House of Representatives had approved its version of the 2007 Farm Bill on July 27, 2007. The two versions will now go into conference where House and Senate negotiators will work on reconciling differences between the bills over the next several weeks. Once Senate and House negotiators have completed conference, Congress will send the 2007 Farm Bill to the President for his signature. Chairman of the House Agriculture Committee Colin Peterson (D-MN) has stated that January is a feasible timeline for getting a completed 2007 Farm Bill to President Bush; according to Chairman Peterson, a January timeline allows legislative staff to reconcile the differing House and Senate versions of the Farm Bill during the December recess. Chairman Peterson also opined that “75 percent” of the House and Senate versions of the bill are similar, and that legislative staff would probably need one to two weeks to reconcile the remaining differences in the two bills.

Major provisions of the Senate-passed USD 280 billion Farm Bill include a USD 40,000 cap on direct annual payments and a USD 60,000 cap on annual counter-cyclical payments. H.R. 2419 does not place caps on the annual amount of marketing loan payments US agricultural producers can collect. H.R. 2419 increases authorized funding for conservation programs by USD 4.8 billion and increases enrollment in the Wetland Reserve Program, the Environmental Quality Incentives Program, and the Grassland Reserve Program. The bill also increases annual payments for sugar producers by 1 cent per pound, and extends the tariff on imported ethanol for two years (through December 31, 2010).

The Senate Farm Bill debate had been stalled because of disagreement among Senators as to what amendments they could add to the bill. On December 13, however, Senate Majority Leader Harry Reid (D-NV) made a decision to invoke cloture on the bill; Senators agreed to the cloture by a vote of 78 to 12, and as a result, only amendments ruled germane by the Parliamentarian could be added to the bill on December 14. Sen. Reid and other Senate leaders were able to agree on the amendments they would

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

consider for debate just before consideration of H.R. 2419 began. Senators considered several amendments including:

- an amendment from Ranking Member of the Senate Finance Committee Charles Grassley (R-IA) and Chairman of the Senate Democratic Policy Committee Byron Dorgan (D-ND) that would have capped annual farm payments at USD 250,000 per couple, a decrease from the USD 360,000 included in the bill. Senators rejected the amendment by a vote of 56 to 43;
- an amendment by Senate Agriculture Committee Chairman Tom Harkin (D-IA) that reauthorizes the Commodity Futures Trading Commission through 2013 and gives it more powers to fight fraud. Senators adopted the amendment by voice vote; and
- an amendment by Sen. Tom Coburn (R-OK) that limits the distribution of farm payments to deceased individuals and their estates. Senators adopted the amendment by voice vote.

Reaction to Senate passage of the Farm Bill was mixed. Ranking Member of the Senate Agriculture Committee Saxby Chambliss (R-GA) stated that Senate passage of the Farm Bill "will strengthen the nation's food security, protect the livelihood of our farmers and ranchers, preserve our efforts to remain good stewards of the environment, and enhance our nation's energy security efforts." House Agriculture Committee Chairman Collin Peterson (D-IA) stated that he looks forward to working with the Senate to come to an agreement in conference and send "a strong and forward-looking Farm Bill" to the President for signature in early 2008. Acting Secretary of Agriculture Chuck Conner, however, stated that "the farm bill just passed by the Senate fails to strengthen the safety net [for US farmers] and increases taxes to generate USD 15 billion in revenue used to grow the size and scope of government." According to Secretary Connor, the bill increases price supports, includes USD 22 billion in "unfunded commitments and budget gimmicks," includes USD 15 billion in new taxes, and "continues to send farm subsidies to people who are among the wealthiest 2 percent of Americans." He urged members of Congress to revise the Farm Bill during conference.

Although the Bush Administration has not yet issued a veto threat on the Senate's version of the Farm Bill, Secretary Connor's statement indicates that President Bush is unlikely to accept the 2007 Farm Bill as is. House and Senate negotiators will have to keep the Administration's views in mind when they reconcile the differing versions of the Farm Bill during the remainder of December and the beginning of January. If a Farm Bill emerging from conference does not address the Administration's views, the President could veto the bill, thus delaying completion of the 2007 Farm Bill even further. US agriculture groups and farm lobbies have increased their pressure on Congress to finish the 2007 Farm Bill as soon as possible so

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

that they can lock in the increased support for certain commodities that is included in the bill and so that they can reassure US agricultural producers that their demands have been met and will be implemented; a veto from President Bush could anger these groups and delay what they consider an important measure to be signed into law. In addition to these factors, Brazil and Canada have requested World Trade Organization (WTO) dispute settlement proceedings over alleged WTO-inconsistent US agriculture support; the two US trading partners allege that agricultural support included in the 2002 Farm Bill violated the amount the United States could claim as non-trade distorting support. The House and Senate versions of the 2007 Farm Bill do not seem to address US trading partners' concerns on farm support, and in fact increase support for certain commodities. Other WTO Members may follow Brazil and Canada's actions depending on the final version of the 2007 Farm Bill. Thus, House and Senate negotiators will face increased pressure from all sides when they meet to resolve differences between the two versions of the 2007 Farm Bill. Although it will be relatively quiet during the weeks the bill is in conference, January 2008 should provide increased activity as members of Congress, the Administration and US trading partners shift their focus to the agricultural support included under the 2007 Farm Bill.

ITC Releases Public Report on Negative Determination in CFS Paper Case

On December 12, 2007, the United States International Trade Commission (ITC) released the public report on its negative final determination in the antidumping (AD) and countervailing duty (CVD) investigations of coated free sheet (CFS) paper from China, Indonesia and Korea (*Coated Free Sheet Paper from China, Indonesia, and Korea,* Investigation Nos. 701-TA-444-446 and 731-TA-1105-1107 (Final), USITC Publication 3965). The ITC's report provided a detailed analysis of the Commission's negative determination. In a 5-1 vote, the ITC on November 20, 2007, determined that the US industry is neither materially injured nor threatened with material injury by reason of imports of CFS paper from China, Indonesia, and Korea. ITC Chairman Daniel Pearson, Vice Chairman Shara Aranoff, and Commissioners Deanna Tanner Okun, Irving Williamson, and Dean Pinkert voted in the negative. Commissioner Charlotte Lane voted in the affirmative. As a result of the ITC's negative determinations, no AD or CVD duties will be imposed on imports of CFS paper from China, Indonesia, and Korea.[2]

The CFS paper case was the first US investigation of Chinese subsidies since China's accession to the WTO and the first to apply the US CVD law to imports from a country deemed a "non-market economy"

---

[2] White & Case attorneys represented major Chinese and Indonesian producers and the Indonesian Government, as well as Unisource Worldwide Inc., the second largest paper distributor in the United States.

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

(NME) for antidumping purposes. Prior to the decision, the United States adhered to a longstanding rule that it would not apply the CVD law to imports from China or other NME countries. The case thus drew the attention of not only the US international trade bar, but also Congress, US consumer groups, and other domestic industries potentially interested in filing a CVD case of their own. Key aspects of the ITC's report include:

- **No Threat of Injury.** The ITC found that neither cumulated imports from Indonesia and China, nor imports from Korea, threatened the domestic industry based on: (i) little or no future capacity or inventory increases in the countries; (ii) continued attenuated competition between subject imports (sheets) and domestic shipments (rolls); and (ii) the continued health of the industry.
- **Insignificant Import Volumes.** According to the ITC, neither the volume of subject imports nor the increase in that volume (in absolute or relative terms) during the period of investigation (2004-2006) was significant.
- **Little Impact on Domestic Prices.** The ITC determined that the prices of virtually all the domestic products were steadily rising during the period thus negating any claims that subject imports were depressing US prices.
- **No Adverse Impact on the Domestic Industry's Financial Condition.** The overall financial condition of the domestic industry improved over the period, and domestic companies blamed imports for mill closures and layoffs only after the AD/CVD investigation began. Furthermore, there was no correlation between subject import volume levels and the industry's performance because the industry's condition improved while subject imports increased. Thus, subject imports did not have an adverse impact on the condition of the domestic industry during the period examined.
- **Attenuated Competition between Imported and Domestic CFS Paper.** The ITC determined that the overall degree of competition between subject imports and the domestic like product is limited because: (i) almost all subject imports are in the smaller sheet segment of the market, while a large majority of domestic shipments are in the larger "web roll" segment, and the substitutability of web roll for sheet is limited; and (ii) there is limited competition between subject imports and the domestic like product in the Western region of the United States.

The ITC's notice of termination of the investigation was published in the Federal Register on December 13, 2007, giving the domestic industry until January 13, 2007 to file an appeal with the United States Court of International Trade (CIT). The termination of the CFS paper case marks an important victory for Chinese exporters, the Chinese government, and the US importers, businesses and consumers who rely

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

on imports from China, because it reassures those groups that the United States' application of the CVD law to NME imports will not automatically result in duties against those imports without concurrent findings of subsidization and injury.

SED III Preview: US to Focus on Product Safety, Balanced Economic Development

On December 12 and 13, 2007, US and Chinese government officials will convene the third meeting of the US-China Strategic Economic Dialogue (SED) in Langfang, Hebei Province. In a December 5 speech, US Treasury Secretary Henry Paulson, who will lead the US delegation to the SED, provided a preview of the issues that the United States and China will address during the dialogue. Paulson stated that the United States will focus on product safety, balanced economic development, energy efficiency and security, environmental sustainability, and bilateral investment. Regarding product safety, Paulson opined that China's commitment to ensuring food and product safety is critical to continued strong bilateral economic relations and to China's continued growth and integration into the global economy. On balanced economic growth, Paulson opined that China's introduction of greater exchange rate flexibility remained "the most pressing and important" issue for China, the United States and the global economy. He added that although China has accelerated reforms towards the introduction of a market-determined exchange rate, these reforms have been too slow to reduce China's external and internal imbalances and ease pressure on its currency. Paulson noted that a lack of greater exchange rate flexibility limited the Chinese government's ability to use domestic monetary policy to relieve inflationary pressures. He opined that the United States' and China's shared interest in energy security and efficiency presented "some of the best areas of ongoing cooperation" on technologies such as nuclear energy and clean coal; however, he added that achieving these shared goals required reliance on market-determined prices, innovation and diversification of energy sources. Paulson also cautioned against a rise in economic nationalism and protectionist sentiment in both the United States and China. He opined that the United States should view China's growth as an economic opportunity, and that fears of China's rise "reflect a fundamental lack of confidence in the American worker." Paulson dismissed speculation within China that US concerns regarding the RMB's value and product safety were motivated by a desire to keep Chinese products out of the US market. He added that other of China's trading partners, including the European Union (EU), also share these concerns. Paulson emphasized the importance of greater foreign participation in China's domestic financial services sector as a means to transfer to China US expertise to help develop and improve the sector's efficiency in allocating China's savings.

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

Although the SED's critics allege that it has produced few concrete outcomes, the Bush Administration defends the dialogue as an integral part of its China policy—which combines dialogue and action through existing US and international trade rules—and notes that the Administration and China created the dialogue in September 2006 to focus on the bilateral relation's "broader context," rather than on specific issues. The December SED meeting therefore is unlikely to produce any significant breakthroughs. However, because the SED provides the Administration the opportunity to voice its concerns at a senior level, it sends a strong message to the Chinese government regarding areas in which the United States views reform as critical to the continuation of positive bilateral relations. Although the Chinese government has rarely responded immediately to past US requests for reform, it has taken seriously US concerns and addressed many of them at a later date. Despite the SED's focus on long-term results, the Administration will likely seek to achieve a number of more immediate results to demonstrate the effectiveness of its China policy to Congress and other domestic critics. Sources indicate that part of the US delegation will focus on achieving short-term outcomes in certain politically sensitive issues such as food safety. This bifurcation is aimed at allowing other delegates to focus on longer term, strategic issues such as currency, financial sector reform and the bilateral trade balance.

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

Free Trade Agreements

United States Considers Strengthening Trade Partnerships in Asia through FTAs, BITs

Summary

US trade policy under the Bush Administration is at a crossroads. Presidential Trade Promotion Authority (TPA) expired on June 30, 2007, and without TPA in place, the United States is unlikely to complete any new bilateral trade negotiations with US trading partners in the short-term. The Administration, however, is under pressure from US businesses to strengthen commercial and trade linkages with trading partners so as not to be locked out of the numerous bilateral trade negotiations occurring in Asia and the rest of the world. Consequently, the United States is exploring potential Free Trade Agreements (FTAs) and Bilateral Investment Treaties (BITs) with several of its Asian trading partners in an effort to solidify commercial ties that can be used to build more comprehensive agreements in the long-term. We review this recent US FTA and BIT activity below.

Analysis

I. US-P4 FTA

The United States is in exploratory talks with the members of the Trans-Pacific Strategic Economic Partnership Agreement (Singapore, Brunei, New Zealand and Chile – also known as the "P4 Agreement") on a possible FTA. US officials have opined that a US-P4 FTA could serve as a building block for a longer-term Free Trade Area of the Asia-Pacific (FTAAP) between the United States and other Pacific economies.

Singapore, Brunei, New Zealand and Chile signed the P4 Agreement in 2005, and the agreement entered into force in November 2006, eliminating 90 percent of tariff lines among the four countries upon implementation. Although the United States has implemented FTAs with Singapore and Chile, along with a TIFA with Brunei, it does not yet have an FTA with New Zealand, even though New Zealand has suggested the bilateral treaty to US officials for the past several years. Relations between New Zealand and the United States have been strained since the 1980s by New Zealand's ban on nuclear-armed and powered warships. More recently, New Zealand's opposition to the Iraq War created tension between the two countries. There has, however, been a conscious effort by both sides to improve relations in the last several years.

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

US officials opine that a US-P4 FTA would provide Pacific economies with a stepping stone in creating the FTAAP. Asia-Pacific Economic Cooperation (APEC)[3] members formally agreed to consider the FTAAP as a long-term proposal during the 2006 APEC Summit in Hanoi, Vietnam. Members instructed their respective ministers to prepare a report on the proposal, and the ministers presented the report to the Leaders during the 2007 Summit in Sydney, Australia. Although the 2007 Ministerial Statement emphasized APEC members' commitment to a successful conclusion of the Doha Round, it also noted members' agreement to "examine the options and prospects" for the FTAAP going forward. US officials have noted that the creation of an FTAAP would be challenging because APEC consists of "twenty-one economies at differing levels of development with different types of barriers." US officials feel, however, that a US-P4 FTA – in addition to the pending US-Korea FTA – would make it easier for Pacific economies to agree to common standards and regulations (in areas such as express delivery, insurance and telecommunications) under the proposed FTAAP. If the United States and the P4 complete an FTA, then they may consider adding other Asian or Pacific nations, such as Vietnam, Peru or Korea, to the agreement, thus creating a larger trading bloc.

II. US – Malaysia FTA

The United States and Malaysia will meet for the next US-Malaysia FTA negotiating round the week of January 14, 2007. The United States and Malaysia launched formal FTA negotiations in March 2006 and held their last formal negotiating round in February 2007. The June 30, 2007 expiry of Presidential Trade Promotion Authority (TPA), however, effectively placed a halt on the formal talks, although USTR officials noted that they would continue to meet with their Malaysian counterparts informally to complete as much of the agreement as possible so that if and when Congress renews TPA, the two sides would be close to completing a comprehensive FTA. Contentious agenda items in the FTA talks include Malaysia's *bumiputra* policy, which grants preferential treatment to ethnic Malaysian companies, as well as financial services and government procurement.

Without the presence of TPA, however, US officials have opined that it may be difficult to formally complete the bilateral negotiations with Malaysia and submit a completed agreement to Congress. Given the lack of TPA, the current political climate in Washington and the upcoming campaign and election season, government sources have stated that it is likely that the United States and Malaysia will complete the FTA after the November 2008 US Presidential elections.

[3] The 21 APEC members are Australia, Brunei, Canada, Indonesia, Japan, Malaysia, the Philippines, New Zealand, Singapore, Korea, Thailand, United States, Taiwan, Hong Kong, China, Mexico, Papua New Guinea, Chile, Peru, Russia, and Vietnam.

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

In the meantime, US and Malaysian businesses have reignited lobbying efforts to garner support for the agreement. The US-ASEAN Business Council (USABC) participated in a November 2007 mission at which time USABC delegates met with Malaysian government and business leaders in Johor, Kuala Lumpur and Putrajaya to reiterate the US business community's support for the successful conclusion of the FTA. The delegation also met with Malaysia's Prime Minister H.E. Dato Seri Abdullah Badawi, Minister of International Trade and Industry H.E. Dato Seri Rafidah Aziz, and Second Finance Minister H.E. Tan Sri Nor Yakcop. USABC urged the completion of a US – Malaysia FTA before the November 2008 US Presidential elections. The American Malaysian Chamber of Commerce (AMCHAM), whose members include US, Malaysian, and other international companies, has also urged the United States and Malaysian governments to complete FTA negotiations sooner rather than later. According to December 5, 2007 AMCHAM statement, both countries stand to gain from higher levels of foreign investments, increased trade activity and greater market access that stem from the FTA. AMCHAM officials also believe that a US-Malaysia FTA will make Malaysian products more competitive in the global marketplace.

III. US BITs with China, India

In a December 4, 2007 letter to President Bush, the President's Export Council (PEC) recommended that the United States negotiate comprehensive and binding BITs with China, India, Brazil, and Russia. According to the PEC, China, India, Brazil, and Russia have untapped domestic markets where US service suppliers have a significant comparative advantage. The letter states that US companies "cannot make the most of these opportunities unless, first, all of these countries give the United States' companies the right to invest in these countries on an equal footing with their domestic and foreign competitors, and, second, they can operate in a stable, fair and transparent regulatory environment." According to the PEC, high standard BITs with each of these countries would provide for market entry, national treatment and most favored nation status, as well as ensure fair administrative and judicial processes, permit the free transfer of capital, protect against uncompensated expropriations, and put in place an arbitration mechanism for enforcing obligations.

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. BITs protect the rights of the participating countries' foreign subsidiaries and investors in their BIT partner's home market and, under US trade policy, typically precede formal FTA negotiations. Whereas the United

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

States has not yet formally indicated its interest in exploring an FTA with China or India, US officials opine that BITs with both these countries could serve as a first step for consideration of longer-term FTAs, and solidify the US trade relationship with China and India in the meanwhile.

Outlook

Negotiators at the January round of US-Malaysia FTA talks are unlikely to make any groundbreaking achievements, and will likely remain focused on the issues of government procurement and financial services, as well as the "path forward" for US-Malaysia FTA negotiations now that TPA is expired. The scheduled negotiating round, however, serves as an advertisement for USTR in Asia that the United States remains interested in achieving a comprehensive agreement with Malaysia and other trading partners in the region. The June 30, 2007 expiry of TPA limits USTR's ability to formally pursue any new FTA negotiations in the short-term, but that has not stopped USTR from exploring an FTA with the P4 economies. Although the United States is unlikely to complete an FTA with the P4 without TPA in place, its exploration of a comprehensive FTA with these countries enables the United States to maintain its presence – and interest – in the region and continue FTAAP discussions with Asian trading partners, under the assumption that a US-P4 FTA would serve as a "stepping stone" for the FTAAP. Although prospects for an FTAAP are less promising, USTR has indicated that it views an FTAAP as a feasible longer-term objective. The P4 discussions and the expectation that the United States will discuss the FTAAP when it hosts the APEC Summit in 2011 would only strengthen USTR's assertions that it is seriously pursuing an FTAAP. As for the BITs with China and India, it is unlikely that the United States would complete such agreements with these two countries in the short-term. The PEC's recommendation that the United States pursue BITS with these economies, however, reflects growing concern within the US trade community that the United States could be left out of the increasing number of bilateral agreements achieved between Asian economies and the rest of the world.

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

Free Trade Agreements Highlights

United States Meets with Tunisia Under TIFA

On December 17, 2007, officials from the United States and Vietnam met in Washington for the first ministerial meeting under the US-Vietnam Trade and Investment Framework Agreement (TIFA). United States Trade Representative (USTR) Susan Schwab led the US delegation, and Minister Nguyen Xuan Phuc, Chairman of Vietnam's Office of Government, led the Vietnamese delegation. At the meeting, the officials focused on Vietnam's implementation of its World Trade Organization (WTO) commitments, and also discussed ways to strengthen trade and investment linkages between the two countries. In addition, officials discussed agriculture, telecommunications, textiles, and other trade and investment issues, as well as Vietnam's requests for further technical assistance to support its reform efforts.

According to government sources, during the TIFA meeting, Vietnam requested that the United States consider the eligibility of Vietnamese agricultural and processed goods for the preferential treatment provided under the US Generalized System of Preferences (GSP) program. Vietnamese officials also requested consultations with the United States to discuss US recognition of Vietnam as a market economy; the United States Department of Commerce still designates Vietnam a "non-market economy" under US trade laws. The two sides also discussed US beef exports to Vietnam and intellectual property rights (IPR) enforcement and monitoring.

The United States and Vietnam signed the TIFA on June 21, 2007. The US-Vietnam TIFA is meant to expand and deepen bilateral trade and investment ties between the two countries. TIFAs are limited trade agreements that establish joint councils of trade and economic officials to discuss trade issues. Under US trade policy, TIFAs are usually the first step towards the initiation of formal bilateral or regional Free Trade Agreement (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. According to USTR, US exports to Vietnam totaled USD 1.4 billion between January and October 2007, an increase of 62 percent over the same period in 2006.

The United States and Vietnam negotiated the TIFA under the Enterprise for ASEAN Initiative (EAI); President Bush launched the EAI to further strengthen ties with countries in Southeast Asia. Under the EAI, the United States has also signed TIFAs with Brunei, Cambodia, Indonesia, Malaysia, Philippines, and Thailand, and an FTA with Singapore. Although the June 30, 2007 expiry of Presidential Trade Promotion Authority (TPA) prevents USTR from formally pursuing an FTA with Vietnam in the short-term, the TIFA indicates that United States favors exploring a future FTA with Vietnam. Under the EAI, the

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

United States has taken steps to increase its economic presence in the growing Southeast Asian region, and Vietnam would serve as a commercially-viable trading partner. The United States and Vietnam have already laid a firm foundation for a future FTA: the two countries enjoy a strong economic relationship and the United States has praised Vietnam for the "substantial progress" that Vietnam has made to implement its bilateral and WTO commitments and to reform and open its economy. A BIT with Vietnam followed by an FTA are likely longer-term USTR initiatives. Government sources opine that BIT negotiations could begin in 2008, but it is too early to tell at this stage if and when the United States will initiate BIT talks with Vietnam.

President Bush Signs US-Peru FTA, Pushes for Approval of US-Colombia FTA

On December 14, 2007, President Bush signed the US-Peru Free Trade Agreement (FTA). The FTA now awaits implementation from both Peru and the United States. In the coming months, Peru must bring its legislation in conformity with the US-Peru FTA and will make amendments to at least 70 laws and regulations prior to implementing the FTA. President Garcia is confident that Peru will complete this process by July 2008, but US officials have warned that the process will likely take a year.

Upon the agreement's entry into force, more than 99 percent of US industrial and textiles tariff lines and 80 percent of Peruvian industrial and textiles tariff lines will be duty free.[4] More than 89 percent of US agricultural tariff lines and 56 percent of Peruvian agricultural tariff lines will also be duty free immediately upon the FTA's entry into force.[5] The parties will phase out remaining tariffs over transitional periods of up to 17 years. Under the FTA, Peru will remove its market access barriers to services trade as well. The agreement also contains provisions for five years of "data protection" on goods including pharmaceuticals, as well as provisions protecting US investors.

Leading Members of Congress and the Bush Administration welcomed approval of the Peru FTA. United States Trade Representative (USTR) Susan Schwab and Secretary of Commerce Carlos Gutierrez noted that the agreement could serve as a springboard in strengthening commercial and political ties between the United States and other Latin American economies. Private sector groups also lauded the agreement. According to National Association of Manufacturers (NAM) President John Engler, the US-Peru FTA will lift the 12 percent average tariff that small and medium-size US manufacturers face on products entering

[4] US International Trade Commission, "US-Peru Trade Promotion Agreement: Potential Economy-wide and Selected Sectoral Effects," Investigation No. TA-2104-20, June 2006, p. iii

[5] Ibid., p. iii

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

Peru. Engler also urged Congress to use the momentum from the Peru FTA to approve the other three pending FTAs.

The US-Peru FTA is the first and only agreement that the US Congress considered in 2007. The Administration and members of Congress will now shift their attention to the other pending FTAs (with Panama, Colombia and Korea) in early 2008. It appears likely that the US Congress will consider the Colombia FTA first. US legislators are concerned with Colombia's record of human rights violations and violence against labor leaders. The Bush Administration is aware of these concerns and in recent months, has sought to drum up support for the agreement through Congressional delegation visits to Colombia throughout October and November. Congressional sources indicate that these visits have convinced several members of Congress that Colombia has made labor reforms and decreased its levels of violence against labor unions. However, the majority of members of Congress remain skeptical; House Ways and Means Committee Chairman Charles Rangel (D-NY) has stated that if Congress were to consider the Colombia agreement today, members of Congress likely would not approve the agreement. Thus, the Administration will likely continue its campaign to garner support for the Colombia agreement as well as the other pending FTAs in 2008. Election year politics in 2008, however, could detract Congress' attention from trade and shift it to other matters (*e.g.*, the war in Iraq) that will become key topics of discussion in the US presidential race.

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

Multilateral

WTO Rules Negotiating Group Chair Releases Draft Rules Text; WTO Members Criticize Zeroing Provisions Included Within

Summary

On November 30, 2007, Chairman of the World Trade Organization (WTO) Doha Negotiating Group on Rules Guillermo Valles released draft text that proposes changes to the WTO Antidumping Agreement and Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). The draft text also proposes new provisions prohibiting and restricting certain subsidies in the fisheries sector. Valles stated that the draft text does not reflect a consensus of the Rules negotiating group but instead is meant to stimulate discussion among WTO Members.

WTO Director-General Pascal Lamy described the draft texts as "ambitious and balanced in all areas they cover" and opined that the texts will "enable negotiators to work in a more intensive manner in the coming weeks." Several WTO Members, however, were quick to criticize the draft text for its permissive approach to "zeroing" in anti-dumping investigations and reviews, as well as other provisions that strongly favor traditional users of national trade remedies laws. In the text, Chairman Valles incorporated amendments to the Anti-dumping Agreement that would allow "zeroing" in some situations, despite opposition from many WTO Members to discuss zeroing at all in the Rules negotiations. WTO Members expressed their formal reactions to the draft text at a Doha Negotiating Group on Rules meeting from December 12-14, 2007. Following that meeting, Chairman Valles will convene two other meetings scheduled for the weeks of January 21 and February 11, 2008 to discuss the draft text and the process of drafting a revised text.

Analysis

I. Background

Zeroing refers to the practice whereby an investigating authority discounts so-called "negative dumping margins" to zero. When the export price of a product is lower than the price in the exporting country, the difference between the two is a positive dumping margin. However, when zeroing is used, investigating authorities do not give any credit for negative dumping margins, *i.e.*, when the export price of the product is higher than the price in the exporting country. The investigating authority does not average positive and negative dumping margins together – instead, it considers all negative dumping margins to be zero. This has the effect of inflating the overall average dumping margin, and can lead to the imposition or

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

maintenance of antidumping duties which may not otherwise apply at all. Under "model" zeroing, or weighted average comparisons, the US Department of Commerce (DOC) made average-to-average comparisons of export price and normal value within individual "averaging groups" based on the product's physical characteristics. Under "simple" zeroing, DOC determines a weighted average margin of dumping based on average-to-transaction or transaction-to-transaction comparisons of export and home market prices for an individual product.

The WTO Appellate Body (AB) has ruled that the United States' use of simple and model zeroing in original investigations and reviews is WTO-inconsistent. On January 9, 2007, the WTO Appellate Body in *US - Zeroing (Japan)* (DS322) determined that the US practice of zeroing in original investigations and subsequent reviews violates Articles 2.4, 2.4.2, 9.3, 9.5 and 11.3 of the Antidumping Agreement. On August 15, 2006, a compliance panel found that the United States failed to comply with previous Dispute Settlement Body (DSB) rulings (adopted August 31, 2004) on the WTO-inconsistency of the use of zeroing under the transaction-to-transaction methodology (*United States—Final Dumping Determination on Softwood Lumber from Canada* - DS264). On April 18, 2006, the AB affirmed a previous panel's ruling that zeroing in original investigations is WTO-inconsistent but also overturned the Panel's decision on annual reviews, finding that zeroing in administrative reviews is also prohibited (*United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")* (DS294)). The draft rules text, however, appears to overturn these WTO decisions by allowing "simple" zeroing in original investigations and all forms of zeroing in sunset, administrative and periodic reviews.

II. Draft Rules Text

The draft rules text addresses several key issues, including:

- **Zeroing.** The draft text addresses the United States' use of the "zeroing" methodology in antidumping investigations, and it is likely that the zeroing provisions of the draft text will serve as the most contentious point of debate among WTO Members. The draft text appears to prohibit "model" zeroing (i.e., zeroing in weighted average to weighted average comparisons) in original investigations, although the text is somewhat vague. The United States abandoned officially "model" zeroing in initial investigations in February 2007. The draft text, however, allows "simple" zeroing in original investigations; specifically, the draft text allows the use of zeroing in original investigations if a WTO Member uses either a transaction-to-transaction or weighted average-to-transaction methodology to calculate dumping margins in original investigations. The draft text also allows all forms of zeroing in sunset, administrative and periodic reviews and allows zeroing in an authorities' determination of final

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

liability for payment of antidumping duties, or whether duties in excess of the margin of dumping has been paid.

- **Circumvention.** Among its other provisions, the draft text also contains specific provisions allowing WTO Members to impose measures in order to prevent exporters from circumventing antidumping duty orders. Specifically, the draft text employs a methodology similar to that of United States which would allow WTO Members to extend the scope of an antidumping duty order if it is found that an exporter targeted by the duty order is attempting to avoid the duties through various means such as shipping the good in parts or unfinished forms or shipping parts to a third country for assembly and then having the final product shipped from the third country to the member's market. The draft text proposes that under these circumstances WTO Members be allowed to extend the duty order to the parts or unfinished forms, or to imports from the third country where the product is assembled provided that the imports are being dumped. However, the text appears to limit the application of circumvention measures to only those parts and assemblies found to be sold at LTFV (i.e., “dumped”).
- **Mandatory Sunset.** The draft text also prohibits WTO Members from maintaining any antidumping duty orders beyond ten years. Under the provisions of the draft text, antidumping duty orders would be automatically terminated after ten years. Automatic sunsetting, however, would occur only ten years after the date of implementation of the Doha Agreement, not the imposition date of the original AD order. Furthermore, the draft text is unclear when outstanding cases’ next sunset review would occur after the Doha Agreement is implemented.
- **Third Country Dumping.** The draft text includes an amendment on third country dumping that would allow an importing Member to impose an antidumping duty on behalf of a third country without the approval of WTO Members, including the exporting country.
- **Public Views.** The text requires that investigating authorities take account of the views of the public, consumer and private groups before assessing and implementing a dumping measure. Specifically, the draft text proposes that any WTO Member with antidumping legislation in place establish procedures in its laws or regulations to enable its authorities “to take due account of representations made by domestic interested parties whose interests might be affected by the imposition of an antidumping duty.”
- **Review of AD Policies.** The draft text proposes the establishment of a review mechanism under which the WTO would periodically review WTO Members' antidumping policies and practices.

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

- **SCM Disciplines on Price Controls and Subsidies Valuation.** The SCM Agreement draft text includes several provisions aimed at government price controls and other regulations on goods and services, as well as goods' inputs, which may act as actionable subsidies. Specifically, the draft SCM agreement contains language aimed at guiding administering authorities' determinations of the benefit conferred by the provision of a price-regulated good or service, as well as the specificity of that provision. The text also includes explicit provisions on the expensing or allocation of benefits derived from recurring or non-recurring subsidies.
- **Fisheries Subsidies.** The draft SCM text also proposes the addition of an annex to the SCM Agreement that prohibits eight categories of fishing-related subsidies including subsidies used to purchase, construct, repair, or renovate fishing vessels and subsidies used to transfer fishing vessels to third countries. The draft text does include certain exceptions for developing countries, such as the right to provide income support and price support for fishermen and fish products and the right to provide subsidies for small-scale fishermen working within the country's territorial waters.

III. Reaction from US Trading Partners

Brazil, Chile, Costa Rica, Hong Kong, China, India, Japan, South Korea, Mexico, Norway, Taiwan, Singapore, Switzerland, and Thailand released a joint statement on December 7, 2007 expressing concern with Chairman Valles' inclusion of zeroing provisions in the draft text (these countries, with the exception of China and India, form the "'Friends of Anti-dumping Negotiations" [FANs] group). According to the joint statement, "the Chair's text must serve the spirit of the Doha Development Agenda, which we understand to be to increase trade flows, enhance predictability, and provide more transparency." The WTO Members state, however, that "the vast majority of proposals made by the co-sponsors of this statement have been neglected [and] we are obliged to say that the Chair's text lacks balance." The joint statement notes that "if the use of [zeroing] prevails in the future, it could nullify the results of trade liberalization efforts." It concludes with a "call upon all Members to ensure that the Multilateral Trading System is not undermined through zeroing." South Africa, Colombia, Pakistan, the EU, Argentina, Canada, and Ecuador have also reportedly endorsed the joint statement.

WTO Members also criticized the text at the December 12 Negotiating Group on Rules meeting. Japan called zeroing a "biased and partial method for calculating the margin of dumping [that] inflates antidumping duties." The EU stated that the draft text "not only rolls back the Appellate Body reports in this area, but goes further and brings us back to the pre-Uruguay Round practices on this topic." India stated that "we find it frankly amazing that [the] proposals on zeroing seek to multilateralize the practices of one Member against the overwhelming view of the membership and contrary to the clear jurisprudence

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

that has emerged on this issue." China stated that the proposed zeroing disciplines would see "the level of protectionism. . . increase, which is clearly not the objective of this organization." Brazil indicated that the zeroing debate would lower the level of expectations in the Doha Round negotiations, particularly with respect to the agriculture and non-agriculture market access (NAMA) negotiations.

IV. Domestic Pressures

Meanwhile, the United States Trade Representative (USTR) and the Bush Administration are under growing pressure from Congress to negotiate the full permissibility of zeroing in original investigations and reviews into the final consolidated texts of the Doha Negotiating Group on Rules. In a December 12, 2007 letter to USTR Susan Schwab and Secretary of Commerce Carlos Gutierrez, Senate Finance Committee Chairman Max Baucus (D-MT), Senior Senate Finance Committee Member Jay Rockefeller (D-WV), House Ways and Means Committee Chairman Charles Rangel (D-NY), and House Trade Subcommittee Chairman Sander Levin (D-MI) expressed concern that the draft text would "weaken existing trade remedy laws in an number of crucial areas and take a major step backward from the status quo reached at the end of the Uruguay Round." Within the letter, the Congressmen indicated that acceptance of the draft text would violate aspects of the Trade Act of 2002 that established as a "principal negotiating objective" for the Doha Round negotiations the need to "avoid agreements that lessen the effectiveness of domestic and international disciplines on unfair trade, especially dumping and subsidies." According to the letter, although the "Chairman's text includes welcome language correcting some aspects of deeply flawed Appellate Body decisions that sought to impose a requirement to offset positive dumping margins, the text also retains and codifies aspects of the flawed decisions relating to the dumping methodology used in [original] investigations." In a separate November 16, 2007 letter to USTR Schwab and Secretary of Commerce Carlos Gutierrez, Reps. Rangel and Levin expressed "serious concern" with the zeroing issue, and indicated that it would be "hard to imagine" Congress approving a consolidated Doha Development Round text that did not include the "essential clarification" that zeroing is fully permitted in original investigations and reviews. In an October 11, 2007 letter to USTR Schwab and Secretary Gutierrez, thirteen Senators led by Sens. Elizabeth Dole (R-NC) and Rockefeller indicated that the inclusion of text permitting zeroing in the final consolidated Rules texts was "particularly critical" to the outcome of the Doha Development Round talks as a whole. Both the House and Senate Letters direct US negotiators not to treat zeroing as a "trade-off."

The inclusion of zeroing in the draft rules text reflects months of US insistence that a final Doha accord include zeroing provisions. On June 27, 2007, the United States proposed that WTO Members include legal language in the WTO Antidumping Agreement that allows the use of DOC's zeroing methodology,

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

specifically proposing that Article 2.4.3 to the Antidumping Agreement on dumping determinations state: "when aggregating the results of comparisons of normal value and export price to determine any margin of dumping, authorities are not required to offset the results of any comparison in which the export price is greater than the normal value against the results of any comparison in which the normal value is greater than the export price." The United States also proposed that language be included in the agreement that allows authorities to "calculate the margin of dumping on the basis of an individual export transaction or multiple export transactions" and states that authorities "are not required to offset the results of a comparison for any transaction for which the export price is greater than the normal value against the results of a comparison for any transaction for which the export price is less than the normal value." On July 11, 2007, Deputy USTR Peter Allgeier informed the negotiating group on rules that the United States would not agree to a comprehensive Doha agreement on "tighter antidumping disciplines" unless WTO Members respond to the US proposal to allow its "zeroing" methodology in antidumping investigations. Allgeier stated that the DOC's use of zeroing in antidumping investigations "is a very important issue" for the United States in the Doha Round talks," and that the United States "cannot envisage an outcome to the negotiations without addressing zeroing." According to Allgeier, the US proposal to allow zeroing is an important issue for any WTO Member that has implemented an antidumping regime.

Outlook

Based on the predominantly negative reaction to the Chair's draft Rules text, it seems likely that the United States will continue to face opposition to its effort to make zeroing WTO-consistent. The inclusion of the zeroing language in the Rules text, however, is a victory for the United States: the starting point for further rules negotiations now includes zeroing, rather than its strict prohibition as WTO panels and the Appellate Body have ruled. Protests on zeroing will likely intensify within the Doha Negotiating Group on Rules in the coming weeks. Many WTO Members, especially those that have initiated WTO dispute settlement proceedings with the United States on its use of zeroing, will continue to oppose new rules which reverse established dispute settlement precedent prohibiting zeroing. China will also likely oppose the inclusion of zeroing disciplines that will predominantly prejudice Chinese imports to the United States. As such, the revised draft Rules text due in early 2008 may differ from Chairman Valles' original draft, but it might still include provisions that allow zeroing in limited situations. The outcome of the zeroing issue will likely depend upon what the United States will offer dissenting WTO Members in other Doha Round negotiations. Brazil hinted that it was concerned with the outcome of the agriculture and NAMA negotiations. The EU reportedly indicated that it would support the US proposals on zeroing if the United States supported EU proposals on increased protection for products with geographic names in the

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

agriculture negotiations. Thus, the final Rules text might include limited, but permissive, rules on zeroing despite the intense opposition of some WTO Members, including the FANs.

The draft rules text can be found at:
http://www.wto.org/english/news_e/news07_e/rules_draft_text_nov07_e.htm.

WTO Issues Compliance Panel Report in United States – Brazil Cotton Dispute

Summary

Decision: A World Trade Organization (WTO) "compliance Panel" (DS267) has ruled that US cotton subsidies continue to violate the obligations of the United States under the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") and the Agreement on Agriculture. It found that the United States had failed to implement the original (2005) WTO rulings on cotton.

Significance of Decision / Commentary: Few WTO disputes have been as difficult or contentious as the fight over US cotton subsidies. While Brazil is the complainant in this case, US subsidies have impacted cotton producers around the world, including in sub-Saharan Africa (the subsidies paid by the United States to its 25,000 cotton farmers exceed the entire gross national income of virtually every cotton-exporting country in West and Central Africa). Despite several rounds of litigation and Ministerial-level negotiations, this issue remains unresolved.

The cotton sectors in many exporting countries, particularly in the developing world, underwent a series of painful reforms in recent years to reduce costs and increase efficiency. The benefits of many of these reforms have been negated by large US subsidies, which have had the effect of increasing US production and lowering the world market price for cotton. The original panel concluded that "[t]he further the adjusted world price drops, the greater the extent to which United States upland cotton producers' revenue is insulated from the decline, numbing United States production decisions from world market signals."

While the compliance Panel ruled in favor of the United States on a couple of claims, it agreed with Brazil that US subsidies continued to cause "significant price suppression" in the world market for cotton. It also found that US export credit guarantees for cotton breached the SCM Agreement and the Agreement on Agriculture.

Brazil had earlier sought to retaliate against the United States, and the arbitration on the level of authorized countermeasures had been suspended pending the compliance Panel process. Brazil sought

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

not only to impose higher tariffs on US imports, but also to "cross-retaliate" by suspending obligations owed to the United States under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and the General Agreement on Trade in Services (GATS). However, given the probability of a US appeal of the compliance Panel decision, and the need to complete the arbitration on the proposed countermeasures, any Brazilian retaliation against the United States is unlikely before the Fall of 2008 at the earliest.

Analysis

Price suppression claim upheld: Panel applies a "but for" test

Article 5 of the SCM Agreement provides that no Member should cause, through the use of a subsidy, "adverse effects" to the interests of other Members, including "serious prejudice" to the interests of another Member. Article 6.3(c) sets out when serious prejudice may arise, including where there is "significant price suppression, price depression or lost sales in the same market." The compliance Panel endorsed its ruling in the original proceeding that the term "same market" encompassed the world market.

The original Panel had found that certain price-contingent US cotton subsidies resulted in significant price suppression in the world market for upland cotton, thereby causing serious prejudice to Brazil. Before the compliance Panel, Brazil argued that two of the US subsidies to cotton producers - marketing loan and counter-cyclical payments - caused "present" serious prejudice to Brazil.

As it did during the original proceeding, the compliance Panel considered the world market to be the "same market" for the purpose of assessing whether there had been significant price suppression. The Panel applied a "but for" test: it said it would examine whether the world market price for cotton would have increased significantly, "but for these subsidies."

The Panel upheld Brazil's claim. The factors relied upon by the Panel in reaching this conclusion included the following:

- The Panel considered that in view of the magnitude of US shares of world production and exports, the United States "exerts a substantial proportionate influence on the world market for upland cotton", even allowing for projected declines in these shares.
- The subsidies affect the level of US cotton acreage and production as a result of their "mandatory and price-contingent nature and their revenue-stabilizing effect." The compliance Panel affirmed the view of the original Panel that "these subsidies protect or 'insulate' revenues of US upland cotton producers when prices are low."

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

- The "order of magnitude" of the challenged subsidies supported a finding of significant price suppression, even when account was taken of the projected decline in marketing loan payments.
- There was a "significant gap" between the total costs of production of US cotton producers and their market revenue, which suggested to the compliance Panel that "the subsidies at issue are a key factor affecting the economic viability" of US cotton farming.
- Although the United States had eliminated the "Step 2" subsidies (which provided for cash payments to eligible domestic users and exporters of US cotton), the Panel found that "the elimination of this subsidy does not affect the price suppressing effects of the marketing loan payments and counter-cyclical payments in the world market for upland cotton."
- The Panel found that without the payments to US cotton producers, the level of US cotton acreage and production would be "significantly lower" and that, as a consequence, "the world market price for upland cotton would be higher", so that "the effect of the subsidies at issue is significant price suppression…."

The compliance Panel therefore concluded that the United States was acting inconsistently with its obligations under Articles 5(c) and 6.3(c) of the SCM Agreement, and that the United States had failed to comply with the original recommendations and rulings of the Dispute Settlement Body (DSB) to "take appropriate steps to remove the adverse effects or…withdraw the subsidy."

World market share claim dismissed: "ordinary fluctuations"

Article 6.3(d) of the Agreement provides that serious prejudice will also exist where "the effect of the subsidy is an increase in the world market share of the subsidizing Member…." Brazil argued that the marketing loan and counter-cyclical payment subsidies resulted in an increase in the US share of the world market for upland cotton. The compliance Panel dismissed this claim, ruling that Brazil had failed to establish a prima facie case of violation. Brazil provided data showing that the US share of world production increased by 0.46 per cent over the average for the 2002-2004 marketing years, and the US share of world production increased by 1.53 per cent over the average for those years. The Panel stated that it was "not unreasonable to interpret such a small increase to be part of the ordinary fluctuations" in the US market share.

Export Credit Guarantees

The Agreement on Agriculture sets out disciplines on the use of export subsidies for agricultural products. Article 8 of the Agreement provides that each WTO Member must ensure that any export subsidies

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

comply with both the general obligations set out in the Agreement, as well as the specific reduction commitments enumerated in each Member's Schedule. The specific reduction commitments describe, for each agricultural product or group of products, the maximum quantities for which export subsidies may be provided, as well as the maximum levels of permitted budgetary outlays. The products subject to reduction commitments, and in respect of which export subsidies may be used within the specified limits, are known as “scheduled products.” The remaining products are referred to as “unscheduled products.”

The original Panel concluded that, for upland cotton and other unscheduled commodities, the United States applied export credit guarantees in a manner that resulted in the circumvention of its export subsidy commitments, inconsistently with Article 10.1 and 8 of the Agreement. These export credit guarantees similarly breached the prohibited subsidies disciplines of the SCM Agreement. The original Panel called on the United States to “withdraw the subsidy” by July 1, 2005. At the compliance Panel stage, Brazil brought two claims related to export guarantees.

Claims for outstanding guarantees dismissed: no “retroactive remedy”

Brazil argued that the United States had taken no measures to comply with the DSB's recommendations to “withdraw the subsidy” with respect to “outstanding” guarantees, i.e., export credit guarantees for unscheduled products issued prior to July 1, 2005, and that were still outstanding on that date.

The compliance Panel rejected this claim. It stated that the requirement to “withdraw the subsidy” did not include “a general obligation to cease making payments or otherwise performing under outstanding or prior commitments under a measure found to constitute a prohibited export subsidy.” Consequently, it ruled that Brazil had not established that the United States had failed to “withdraw the subsidy.” The Panel said that the obligation to withdraw the subsidy did not extend to “individual subsidies that were granted under a program found to confer prohibited export subsidies prior to the end of the implementation period.” The Panel did not accept the notion that the United States should be required, in effect, to eliminate subsidies previously granted “and therefore take action with respect to acts which took place before the end of the time-period within which the United States had to ‘withdraw the subsidy’.” Such a result, in the view of the Panel, “would…amount to a retroactive remedy, similar to a finding that a Member must demand repayment, from the recipient, of a subsidy in the form of a direct transfer of funds.”

Claims against new guarantees upheld: US premiums “inadequate”

The SCM Agreement includes an “Illustrative List” of prohibited export subsidies. Item (j) of the list refers to the “provision by governments…of export credit guarantee or insurance programs…at premium rates

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

which are inadequate to cover the long-term operating costs and losses of the programs." The compliance Panel found that Brazil had established that the US export credit guarantee program constituted an export subsidy because it was "provided against premiums which are inadequate to cover its long term operating costs and losses under the terms of item (j) of the Illustrative List." It reaching this conclusion, it relied on a number of evidentiary considerations, including that fact that the export credit guarantees were provided at a net cost to the US government, and that the premiums were "well below" the OECD minimum premium rates. The Panel also found that the US credit guarantees were "not designed to cover the long term operating costs and losses of that program."

Therefore, the Panel concluded that the US export credit guarantees constituted export subsidies under the SCM Agreement and the Agreement on Agriculture. It found that the United States had applied export subsidies in the form of export credit guarantees in a manner that resulted in the circumvention of US export subsidy reduction commitments for certain products. It similarly found that the export credit guarantees were inconsistent with the SCM Agreement. It ruled, in consequence, that the United States had failed to comply with the original DSB recommendations and rulings on this issue.

The decision of the Panel in *United States – Subsidies on Upland Cotton: Recourse to Article 21.5 of the DSU by Brazil* was released on December 18, 2007.

Multilateral Highlights

Doha Agriculture Chair Releases Agriculture Working Papers in Effort to Move Talks Forward

On December 21, 2007, Chairman of the Doha Round negotiations on agriculture Crawford Falconer circulated four additional working documents reflecting the latest progress in the World Trade Organization (WTO) agriculture negotiations. The papers are a result of intensive negotiations among WTO Members regarding the revised draft agriculture modalities paper that Falconer circulated in July. Specifically, the papers include legal language that would be incorporated into a final Doha agreement regarding: (i) Overall Reduction of Trade-Distorting Domestic Support (OTDS); (ii) Final Bound Total Aggregate Measurement of Support (AMS); (iii) De Minimis; and (iv) Blue Box:

- **OTDS.** According to the working document, the base level for reduction in OTDS will be the sum of a WTO Member's Final Bound Total AMS plus 10 percent of the average value of production in the 1995-2000 base period for developed country Members, and 20 percent of the average value of production in the 1995-2000 base period for developing country Members. The text of the working

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

document states that WTO Members will reduce the base level of OTDS in accordance with the following tiered formula: (i) where the base level of OTDS is greater than USD 60 billion, the reduction will be either 75 or 85 percent; (ii) where the base level of OTDS is greater than USD 10 billion and less than or equal to USD 60 billion, the reduction will be either 66 or 73 percent; (iii) where the base level of OTDS is less than or equal to USD 10 billion, the rate of reduction will be either 50 or 60 percent.

- **Final Bound Total AMS.** According to the working document, WTO Members will reduce their Final Bound Total AMS in accordance with the following tiered formula: (i) where the Final Bound Total AMS is greater than USD 40 billion, the reduction will be 70 percent; (ii) where the Final Bound Total AMS is greater than USD 15 billion and less than or equal to USD 40 billion, the reduction will be 60 percent; and (iii) where the Final Bound Total AMS is less than or equal to USD 15 billion, the rate of reduction will be 45 percent.

- **De Minimis.** According to the working document, developed country Members will reduce *de minimis* support by at least 50 or 60 percent. Developing country Members will continue to have the same access as under their existing WTO obligations to the limits provided for product-specific and non-product-specific *de minimis* in Article 6.4(b) of the Uruguay Round Agreement on Agriculture. The working paper states that countries that will not undertake reductions in *de minimis* include recently-acceded WTO Members such as Saudi Arabia, Macedonia and Vietnam.

- **Blue Box.** According to the working document, for the United States, the limits to the value of support will be 110 or 120 percent of the average product-specific amounts that would result from applying proportionately the legislated maximum permissible expenditure under the 2002 Farm Bill for specific products to the overall Blue Box limit of 2.5 percent of the average total value of agricultural production. The paper also states that the product-specific support for other WTO Members should be fixed to the average value of support provided to these products during the 1995-2000 period.

Falconer's working papers provided WTO Members with the first signs of life in weeks in the Doha agriculture negotiations. Falconer's delay of a revised agriculture text (pushed from a mid-November deadline to an undetermined date) and the lack of activity over the past several weeks in the agriculture talks had convinced many that the agriculture talks remain intractable. Falconer's working papers, however, indicate that there may have been some "behind-the-scenes" activity meant to push the stalled talks forward. In any regard, as Falconer noted, the working papers are meant to spur further discussion among WTO Members regarding cuts to agriculture support. The United States, the EU and other WTO Members are unlikely to agree to all the proposed cuts and limits included in the working papers, but the

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

working papers may provide negotiators with a starting point upon which they can continue agriculture talks with the hope of completing a final Doha agreement by the end of 2008.

The agriculture working documents can be found at:
http://www.wto.org/english/tratop_e/agric_e/chair_workdoc_nov07_e.htm.

Arbitration Panel Authorizes Antigua and Barbuda to Impose USD 21 Million in Annual WTO Sanctions Against United States

On December 21, 2007, a World Trade Organization (WTO) arbitration panel authorized Antigua and Barbuda to impose annual trade sanctions totaling USD 21 million against the United States for its failure to observe WTO General Agreement on Trade in Services (GATS) commitments with respect to internet gambling (DS285). The USD 21 million figure is almost 162 times lower than the USD 3.4 billion amount that Antigua announced it was seeking in June 2007. The United States had countered that Antigua and Barbuda was entitled to USD 500,000. The arbitration panel allowed Antigua and Barbuda to apply the trade sanctions in the form of suspended intellectual property rights (IPRs) against US goods. In doing so, the arbitration panel accepted arguments by Antigua and Barbuda that it was not practical for a small country to retaliate in the form of increased tariffs or suspended market access against US goods. On March 30, 2007, a WTO compliance Panel had found the United States in continued violation of WTO obligations with respect to internet gambling services in *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS285)*.

Both sides to the dispute greeted the arbitration panel's findings with mixed feelings. The Office of the United States Trade Representative (USTR) welcomed certain aspects of the arbitration panel ruling but expressed concern regarding the arbitration panel's decision to allow Antigua and Barbuda to suspend IPRs against US goods. USTR officials stated that the suspension of IPRs "would establish a harmful precedent for a WTO Member to affirmatively authorize what would otherwise be considered acts of piracy, counterfeiting, or other forms of IPR infringement." Conversely, Antigua and Barbuda lead counsel Mark Mendel reportedly expressed disappointment with the "low" USD 21 million figure but indicated that he was pleased with the arbitration panel's decision to allow Antigua and Barbuda to suspend IPRs against US goods.

Both sides indicated that they remain amenable to a negotiated compensation agreement for the US withdrawal of its GATS commitments on internet gambling. Mendel reportedly stated that Antigua and Barbuda's objective in seeking authorization to retaliate was not to "negate" US IPRs, but to press the United States into negotiating a "reasonable settlement." USTR Spokesman Sean Spicer noted that

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

because the United States recently announced a compensation agreement with the EU regarding US withdrawal of its GATS commitments on internet gambling and is continuing to negotiate compensation agreements with other affected countries, it "would expect that Antigua would not suspend its WTO commitments to the United States while that process is underway." Spicer also stated that "once the process of clarifying the US schedule of [services] commitments is complete, any issues in our bilateral dispute with Antigua will be moot, and there will no longer be any basis for suspending WTO commitments in accordance with the Arbitrator's award."

Separately, on December 17, 2005, the United States and the EU announced that they had reached a compensation agreement for the US decision to alter its WTO services schedule in order to exclude any market access commitments on cross-border Internet gambling. GATS Article XXI requires WTO Members seeking to withdraw GATS commitments to negotiate compensation agreements with any other Members that claim to be adversely affected by the withdrawal. Under the terms of the agreement with the EU, the United States bound GATS commitments for warehousing services, technical testing services, research and development services, and postal services relating to outbound international letters. In addition to the EU, the United States has completed similar compensation deals with Canada and Japan, and is undergoing compensation negotiations with Antigua, India, Costa Rica, and Macao. Several EU gaming operators expressed disappointment with the terms of the US-EU compensation agreement. On December 20, 2007, the Remote Gambling Associated (RGA) released a statement announcing that it would file a formal complaint under the EU Trade Barriers Regulation against the United States for "violat[ing] "international trade law by threatening and pressing criminal prosecutions, forfeitures and other enforcement actions against foreign online gaming operators while allowing domestic US online gaming operators . . . to flourish." According to the RGA, the compensation agreement "purports to offer compensation for the withdrawal of market access by the United States, [but] it does not address discriminatory and protectionist US practices against European and other foreign online operators."

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com