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Japan External Trade Organization
WTO and Regional Trade Agreements Monthly Report

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United States

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Summary

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Analysis

Congress is currently considering a number of bills that would strengthen US trade remedy and other laws to address China's allegedly unfair currency and trade practices. In the Senate, on July 26 the Finance Committee approved a bill (**S. 1607**) that would require the Treasury Department to identify "fundamentally misaligned" currencies. It would also require the government to take a series of specific remedial measures against countries that fail to take action to correct the misalignment within a designated time frame. On August 1, the Banking, Housing and Urban Affairs Committee approved a similar bill (**S. 1677**) that would remove the requirement of "intent" from the Treasury Department's determination of whether a country manipulates its currency to gain an unfair trade advantage, prevent balance of payments adjustments or accumulate dollar reserves. The bill would also require Treasury to request International Monetary Fund (IMF) or World Trade Organization (WTO) action to address the manipulation if subject countries fail to take action within a designated period after Treasury's determination.

The House is also considering a number of similar bills. The "Currency Reform for Fair Trade Act of 2007" (**H.R. 2942**) would allow the application of countervailing duties (CVDs) to non-market economies (NMEs) such as China and would also define currency manipulation as an illegal trade subsidy under US trade remedy law. Another House bill under consideration, the "Nonmarket Economic Trade Remedy Act

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of 2007" (**H.R. 1229**), would also amend US trade remedy law to allow the application of CVDs to NMEs would also require Congressional approval of the Department of Commerce's revocation of a country's NME status. A third bill (**H.R. 708**) would amend US trade remedy law to make it less burdensome for companies to utilize AD/CVD and safeguard measures under US law.

Participants in a September 26 Consumers for World Trade-sponsored panel discussion provided an overview and evaluation of pending bills. We summarize below the key points of their statements.

- **Stephen Claeys, Deputy Assistant Secretary for the Department of Commerce Import Administration**, reviewed the Bush Administration's position on pending China legislation. Claeys stated that the Administration shares Congress' concern that China's reform efforts and movement towards a market-based exchange rate have progressed slowly; however, he added that continued bilateral and multilateral dialogue with China combined with reliance upon existing US and WTO trade remedy mechanisms remains the most effective means of persuading China to adopt currency and other reforms more swiftly. He reiterated the Administration's concern that passage of pending bills could prompt US trading partners to adopt "mirror legislation" and might violate the United States' WTO commitments. Three cabinet-level officials voiced similar concerns in a June 30 letter to key Members of the Senate stating the Administration's opposition to S. 1607 and S. 1677. Regarding S. 1607, Claeys suggested that its provision to adjust a product's export price to reflect the a currency's fundamental misalignment when making a comparison with a product's normal value would be unfairly applied only to currencies found to be misaligned downward (i.e., undervalued). Regarding China's request for WTO consultations with the United States on Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China (D.S. 368), Claeys opined that should consultations fail to resolve the matter, a WTO Panel would likely rule in favor of the United States.

- **Skip Hartquist, Counsel for the China Currency Coalition**, rejected Administration claims that its dialogue-centered approach has produced substantive results. He noted, for example, that although the RMB has appreciated by approximately 10 percent since July 2005—when the Chinese government moved from a dollar-peg to mixed basket of currencies—this appreciation is only nominal. According to Hartquist, the RMB remains undervalued by as much as 40 percent in real terms. Hartquist welcomed the Senate's efforts to pass legislation aimed at targeting China's trade and currency practices and indicated that the China Currency Coalition would likely seek amendments to strengthen any bill that moved to a floor vote in the Senate. He opined, however, that given the jurisdictional wrangling between the Senate Banking and Finance Committees over which proposed

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bill the Senate should consider, the Senate Majority Leader would likely determine which bill would proceed to the floor. Hartquist also welcomed the House's efforts to pass similar legislation and noted that the House Ways and Means Committee is moving closer to a mark-up of H.R. 782. He also suggested that the Senate would likely wait for the House to act first in passing China legislation, as the contents of a House bill might help resolve debate in the Senate over which of the two competing bills it will adopt. Hartquist opined that passage of a China trade remedy bill would send a strong message to the Chinese government and that it was unlikely to lead to a significant increase in AD/CVD cases in the United States.

- **Daniel Ikenson, Associate Director for the CATO Institute's Center for Trade Policy Studies**, opined that the recent increase in currency and trade remedy bills targeting China and other countries reflects an underlying fear that trade liberalization is harmful and that the US trade balance with China is a scorecard that tallies US losses. Ikenson added, however, that the bilateral trade balance more accurately reflects not losses, but US and Chinese consumption and savings habits. He argued, therefore, that a structural approach to change these habits would be more effective than legislation in addressing problems in the US-China bilateral economic relationship. Regarding specific legislative proposals, Ikenson faulted S. 1607 for presuming that it is possible to value the RMB accurately and faulted H.R. 782 as WTO inconsistent. He also criticized Congress' inconsistency in demanding that China adhere to its WTO commitments while also proposing legislation that would likely violate the United States' commitments. Ikenson also downplayed the potential impact of a bill's passage. He noted that the President would likely veto any such bill and that even if Congress overturned the veto, by the time its provisions could take effect, they may no longer apply to China's economic or currency policies.

- **Gary Hufbauer, Reginald Jones Senior Fellow at the Peterson Institute for International Economics**, noted disagreement among observers regarding the nature of US-China trade relations and the appropriate roles of market forces, Congress, currency policy, and savings and consumption in shaping these relations. Hufbauer opined that recent Congressional activity on China trade remedy legislation suggests a possible shift in US trade policy making. According to Hufbauer, Congress' perceived failure of the Treasury Department in its recent reports to Congress on exchange rates has led Congress to seek a greater role in US trade policy through proposed legislation targeting China. Hufbauer cited, for example, the proposed bills' removal of the requirement for "intent" as a prerequisite for Treasury's citing a country for currency manipulation as

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an example of Congress attempting to limit Treasury's authority.[1] Regarding the likelihood of a bill's passage, he suggested that China will watch Congress' movements very closely and will likely wait for an opportune time to stall a bill's movement through Congress or seek to change its tenor.

Outlook

Notably, the Administration has already accepted in practice certain of the measures sought by proposed legislation. On March 30, 2007, the Department of Commerce (DOC) preliminarily reversed a two decade-old policy of not applying CVDs to NME imports by imposing preliminary CVDs on allegedly subsidized imports of coated free sheet (CFS) paper from China. DOC has subsequently accepted CVD petitions against six additional Chinese products, each of which the petitioner alleges have benefited from Chinese government subsides. A majority of the subsidy programs alleged in the new petitions are the same alleged in the CFS paper petition. Two of these petitions—the March 2007 request targeting CFS and a September 2007 request targeting raw flexible magnets—have also attempted to list China's allegedly undervalued currency as a countervailable subsidy. Although the DOC rejected the petitioner's claim that currency qualified as a subsidy in the CFS case, it has yet to rule on a similar claim based on different reasoning in the magnet petition. It is unlikely that DOC will accept the claim, however, as the Administration views currency as an issue under the authority of the Treasury Department.

Congressional passage of a pending bill appears unlikely in the near future. Although the Senate has approved in committee two proposed bills (S. 1607 and S. 1677), neither chamber of Congress has scheduled a floor vote on any bill nor indicated plans to do so. Moreover, jurisdictional questions over which Senate committee (Finance or Banking) possesses the authority to draft and approve such a bill will likely delay a full Senate vote on a bill until the legislative body can agree on a single draft. Given the number of bills under consideration in the House, none of which have yet passed in Committee, full passage of a House bill is also likely to face delays as the chamber debates which bill best addresses its concerns. A full legislative agenda for the remainder of 2007 also makes a House vote on a bill unlikely. In an October 2 speech, House Majority Leader Steny Hoyer (D-MD) expressed doubts that China legislation would feature on the House agenda in 2007. Observers, including one of the panelists above, note that the Senate is likely to wait until the House decides upon and passes a single bill before moving forward with a decision of their own. Also, a recent series of recalls of Chinese-made products have

[1] Hufbauer cited a recent report by Peterson Institute colleague Randall Henning which notes that the Exchange Rates and International Economic Policy Coordination Act of 1988—which established the requirement that the Treasury Department report to Congress regarding exchange rates—lists no requirement for intent.

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focused Congress' attention on Chinese product and food safety standards and away from currency and other related trade issues.

The timing of Congressional consideration of a bill targeting China's trade and currency practices might also be influenced by other factors including Administration actions related to US-China trade relations. In December, US and Chinese government officials will meet for the latest rounds of the US-China Joint Commission on Commerce and Trade (JCCT) and the Strategic Economic Dialogue (SED). If these meetings fail to yield outcomes that demonstrate to Congress that China is taking specific and effective actions to address their concerns, Congress might refocus attention on legislation to compel China to take such actions. Congress might also be influenced by actions of the US business community, a large part of which has recently expressed opposition to legislation targeting China and other US trading partners. In a September 26 letter to all Members of Congress, more than 150 businesses and industry associations urged Members to reject the adoption of "policies that single out individual countries as responsible for the United States' broader concerns." The letter warned that such policies would undermine the United States' international credibility and could provoke retaliatory actions that would threaten US exports access to international markets.

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United States Highlights

President Bush Increases Sanctions Against Burma as Congressional Committee Approves Burma Bill

In an October 23, 2007 Federal Register (FR) notice (72 FR 60221-60226), the White House published "Executive Order 13448 - Blocking Property and Prohibiting Certain Transactions Related to Burma." The Executive Order was effective October 19, 2007. Executive Order 13448 designates an additional 12 Burmese individuals and entities for sanctions, and grants the Department of Treasury expanded authority to designate for sanctions individuals responsible for human rights abuses as well as public corruption, and those who provide material and financial backing to these individuals or to the government of Burma.

Separately on October 23, 2007, the House Foreign Affairs Committee approved by voice vote the Block Burmese JADE (Junta's Anti-Democratic Efforts) Act of 2007 (H.R. 3890). The bill tightens existing sanctions on Burma. Specifically, the bill would bar the importation to the United States of any gemstones extracted from Burma. Chairman of the Foreign Affairs Committee Tom Lantos (D-CA) introduced the bill and stated that the legislation is meant to prevent the trafficking of Burmese gems through third countries as a way to circumvent the ban on Burmese imports that the United States imposed in 2003 (PL 108-61). H.R. 3890 also freezes the assets of political and military leaders in Burma held by US financial institutions and would prohibit those leaders from using US financial institutions via third countries. In addition, the bill includes a ban on visas for political and military leaders from Burma. The bill has been sent to the House Judiciary Committee for its review and it is unclear when H.R. 3890 will move to the House floor for a vote.

During the House Foreign Affairs Committee's mark up of H.R. 3890, Committee members adopted a substitute amendment to authorize USD 20 million annually in fiscal 2008 and fiscal 2009 to provide aid to democracy and human rights activists and organizations inside and outside Burma. The amendment also requires the Secretary of State to submit a report to Congress within six months on countries and companies that provide military or intelligence aid to the Burma Junta.

Executive Order 13448 and H.R. 3890 are the latest measures the United States has taken against Burma. On July 23, 2007, the House of Representatives approved by voice vote H. J. Res. 44, which extends restrictions on imports from Burma for an additional year. On July 24, the Senate approved H. J. Res 44 by a margin of 93 to 1. President Bush signed the bill into law on August 1, 2007. The import restrictions were set to expire on July 27, 2007; the one-year extension will continue the sanctions

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included in the Burmese Freedom and Democracy Act (PL 108-61), a law enacted in 2003 to protest Burma's anti-democratic regime, the State Peace and Development Council. H. J. Res. 44 also requires reporting of any assets of Burma's government officials held by US financial institutions and gives the President the power to freeze those assets.

Political analysts opine that the Bush Administration and Congress' actions against Burma are intended to exploit fissures within the Burmese leadership and divide the Junta from the ruling class. These analysts believe that sanctions against Burma will not change the political landscape in Burma but instead serve to maintain global focus on Burma. Regardless of the motives behind the sanctions, it seems that the Administration's actions against Burma enjoy bipartisan support in Congress. Senate Majority Whip Richard Durbin (D-IL), for example, stated that he was pleased with the Administration's stance on Burma. Senate Foreign Relations Committee Chairman Joseph Biden (D-DL) also offered support for the latest sanctions President Bush imposed on Burma. With such support for action against Burma, it thus seems likely that the members of Congress will approve H.R. 3890 when it moves to the House floor for a vote.

DOC Issues Affirmative Final Determination in CFS Case

On October 18, 2007, the Department of Commerce (DOC) announced its affirmative final determinations in the countervailing (CVD) and antidumping (AD) duty investigations on coated free sheet (CFS) paper from China, Indonesia and South Korea. DOC concluded that imports of CFS paper from these three countries are being subsidized and sold in the US market at less-than-fair value. DOC found dumping margins of 21.12-99.65 percent for imports from China, 8.63 percent for imports from Indonesia and 0.47-31.55 percent for imports from Korea. DOC also determined that Chinese, Indonesian and Korean CFS paper producers and exporters received countervailable subsidies ranging from 7.4- 44.25 percent on Chinese products, 22.48 percent on Indonesian products and 0-1.46 percent for Korean products. DOC will next instruct US Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise and to collect a cash deposit or bond based on the dumping and CVD final rates.

In making its affirmative final determination, DOC reversed a decades-old policy of not applying CVD law to non-market economies (NMEs) such as China. Assistant Secretary for Import Administration David Spooner stated that "the Administration will continue to vigorously enforce our countervailing duty and antidumping laws, and will take appropriate remedies based on the facts presented in each case." According to Spooner, "China's economy has evolved in recent years and with this change comes the responsibility to play by the rules of the global marketplace." Spooner stated that DOC determined that subsidies to the Chinese CFS paper industry violate those rules. According to DOC, the Department has the legal authority to apply the CVD law to NMEs. In 1984, DOC adopted a rule of not applying the US

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CVD law to NMEs because it reasoned that subsidies had no measurable economic impact for NMEs at that time. The Court of Appeals for the Federal Circuit upheld this policy in the 1986 Georgetown Steel case. In October 2006, however, a US manufacturer of CFS paper, NewPage Corporation, requested the DOC to reconsider its longstanding rule of not applying the anti-subsidy law to China. In its petition, NewPage alleged that several Chinese companies were recipients of subsidies such as tax breaks, debt forgiveness and preferential loans.

The US International Trade Commission (ITC) held a hearing on the CFS investigations on October 18, 2007, and is expected to issue its final injury determination by November 30, 2007.

President Signs Sanctions Bill Into Law as Senate Banking Committee Approves Sudan Divestment Draft Legislation

On October 16, 2007, President Bush signed into law the International Emergency Economic Powers Enhancement Act (S. 1612 - PL 110-96). Sen. Christopher Dodd (D-CT) introduced S. 1612 in June 2007 and on June 26, 2007, the Senate passed the legislation unanimously followed by House approval of the legislation by voice vote on October 2, 2007. The legislation increases penalties on companies doing business with countries that the President has deemed a threat to US national security, including Sudan.

Separately, on October 18, 2007, the Senate Banking Housing and Urban Affairs Committee unanimously approved a draft bill that promotes divestment from companies doing business with Sudan. According to Congressional sources, 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 energy and military 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 bill will next move to the Senate floor for a vote.

The House has already passed a bill similar to the Senate's Sudan Accountability and Divestment Act of 2007. On July 31, 2007, the House of Representatives passed the Darfur Accountability and Divestment Act (H.R. 180) by a margin of 418 to 1. H.R. 180 would bar federal contracts with companies doing

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business with the government of Sudan and would authorize states to divest assets from Sudan and protect fund managers from legal action for doing so. H.R. 180 would also require the Department of Treasury to publish a list of companies doing business in Sudan. Rep. Barbara Lee (D-CA) introduced the legislation. Unlike the House version of the bill, the Senate's Sudan Accountability Act does not include a requirement that the Treasury Department develop a list of companies doing business in Sudan.

House passage of H.R. 180 was met with criticism in July. National Foreign Trade Council (NFTC) President William Reinsch and USA*Engage Director Jake Colvin argued that H.R. 180 attempts to penalize companies located in the countries of US allies and partners. Reinsch and Colvin noted, however, that the Senate's Sudan Accountability and Divestment Act represents an improvement over the House-passed version of the bill because it does not require the Treasury Department to develop a list of companies doing business in Sudan. Reinsch urged members of Congress to "thoroughly examine the bill's provisions to ensure that they are in line with US foreign policy objectives."

Congressional sources have not provided a timeframe for the Senate's formal consideration of the Sudan Accountability and Divestment Act, but they have indicated that members of the Senate Banking Committee would like to see the Senate vote on the legislation over the next several weeks. Congress adjourns for its Thanksgiving recess in mid-November and between now and that time, the Senate must tackle several other contentious issues such as appropriations, the 2007 Farm Bill, and pending Free Trade Agreements (FTAs), among other bills. The President's signing of S. 1612 into law and the Senate's recent focus on Sudan, however, mean that the Sudan Accountability and Divestment Act might see floor action before the Thanksgiving recess.

The text of the Senate version of the Sudan Accountability and Divestment Act is available at: http://banking.senate.gov/docs/2007/101707/sudan_billl.pdf.

DOJ Announces New Initiative Meant to Deter Foreign Acquisition of Sensitive US Technology

On October 11, 2007, the Department of Justice (DOJ) and several partner agencies launched a national "export enforcement" initiative meant to prevent foreign nations and organizations from acquiring sensitive US technologies – such as controlled US military items and dual-use technology products – that could later be used to threaten US national security. Kenneth Wainstein, Assistant Attorney General for National Security, announced the new initiative along with officials from other agencies, including: Julie Myers, Homeland Security Assistant Secretary for US Immigration and Customs Enforcement (ICE); Timothy Bereznay, Assistant Director for the Federal Bureau of Investigation (FBI) Counterintelligence

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Division; Darryl Jackson, Assistant Secretary of Commerce for Export Enforcement; Charles Beardall, Director of the Defense Criminal Investigative Service (DCIS); and Stephen Mull, Acting Assistant Secretary of State for Political Military Affairs.

According to the DOJ, the threat posed by illegal foreign acquisition of restricted US technology is growing, and the majority of US criminal export prosecutions in recent years have involved restricted US technology bound for China and Iran. The DOJ reports that recent prosecutions have highlighted illegal exports of stealth missile technology, military aircraft components, naval warship data, night vision equipment, and other restricted technology destined for China or Iran. According to Wainstein, foreign states and terrorist organizations are actively seeking to acquire US data, technological knowledge and equipment that will advance their military capacity, their weapons systems and their weapons of mass destruction programs. The new initiative is meant to address these issues and is a "coordinated campaign to keep sensitive US technology from falling into the wrong hands and from being used against our allies, against our troops overseas or against Americans at home."

Under the new initiative, DOJ and other government agencies will form Counter-Proliferation Task Forces in appropriate US Attorney's offices around the United States. These multi-agency task forces will focus on counter-proliferation efforts and are designed to enhance cooperation among all agencies involved in export control, create relationships with affected industries, and facilitate information-sharing to prevent illegal foreign acquisition of US technology. Under the initiative, DOJ will also provide specialized training on counter-proliferation to field prosecutors so that they can handle cases that involve sensitive international issues, classified information and complex regulatory schemes. The initiative is also meant to spur greater coordination between the DOJ and export licensing agencies, such as the State Department's Directorate of Defense Trade Controls and the Commerce Department's Bureau of Industry and Security (BIS).

DOJ has already appointed its first National Export Control Coordinator to implement the new initiative and foster coordination among the agencies involved in export control; the National Export Control Coordinator is based in the Counterespionage Section of the National Security Division and is responsible for managing the nationwide training of prosecutors and monitoring progress on export control prosecutions around the country.

According to DOJ and other intelligence agencies, private-sector businessmen, scientists, students, and academics from overseas are among the most active collectors of sensitive US technology. DOJ also notes that foreign government organizations remain aggressive in illegally acquiring sensitive US technology. In an effort to prevent foreign acquisition of sensitive US technology, law enforcement

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agencies and federal prosecutors have increased their enforcement activity in recent years. For example, ICE has doubled the number of agents assigned to export control cases and in FY 2006, made 149 export-related arrests. The FBI reports that it is investigating 125 economic espionage cases and has increased counterintelligence instruction for new agents by 240 percent. DOJ officials believe that the new national "export enforcement" initiative will serve to strengthen these agencies' export control capabilities and enhance counter-proliferation efforts.

BIS Adds India as Eligible Export Destination Under Authorization VEU Program

The Commerce Department's Bureau of Industry and Security (BIS) announced on October 2, 2007 that it had added India to the list of countries eligible as destinations for exports, re-exports and transfers of sensitive US products and technologies under the Authorized Validated End User (VEU) program. The program allows a multi-agency End-User Review Committee (ERC), chaired by Commerce, to grant companies from eligible countries VEU status. VEU status allows US companies to export, re-export or transfer eligible items to these companies without an export license that would otherwise be required. In evaluating whether or not to certify a company for VEU status, the ERC must consider a range of factors, including, but not limited to the company's exclusive engagement in civil end-use activities; its record of compliance with US export controls; its ability to comply with VEU requirements upon approval; the need for an on-site inspection prior to approval; and the company's willingness to agree to such an inspection. The VEU program does not cover export, re-export, or transfer of items controlled under the US Export Administration Regulations for missile technology and crime control reasons. The ERC must grant unanimous approval for a company to be added to the list of validated end users or for a new item to be added to a pre-existing list of approved items. The ERC may also remove companies or items from the list or otherwise amend the list as necessary. BIS published the VEU announcement in an October 2 *Federal Register* notice (72 FR 56010).

According to a Commerce Department press release issued the same day, the VEU program will help facilitate and increase high-technology trade between the United States and India and will maintain a secure export control system for sensitive US products and technologies. The Commerce Department first announced the Authorized VEU program in July 2006 (71 FR 38313), with China being the first eligible destination. Although a number of Chinese companies are currently undergoing the VEU certification procedure, the ERC has yet to issue certifications, and the BIS has already postponed a number of times the publishing of a list of the first companies certified as VEUs. Government sources indicate that the BIS is likely to publish the list in coming weeks.

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Free Trade Agreements

Free Trade Agreements Highlights

United States Meets with Tunisia Under TIFA

The United States continues to meet with its Trade and Investment Framework Agreement (TIFA) trading partners in an effort to deepen economic ties and strengthen trade linkages in the absence of formal Free Trade Agreement (FTA) negotiations. On October 18, 2007, officials from the United States and Tunisia met under the US-Tunisia TIFA and agreed to strengthen their economic ties as well as enhance bilateral dialogue on issues such as market access and Tunisia's linkages to African and Middle Eastern economies. At the TIFA meeting, United States Trade Representative (USTR) Susan Schwab met with Tunisian Minister of Development and International Cooperation Nouri Jouini and both sides agreed to convene the next TIFA Council meeting in early 2008. Both sides also discussed Tunisia's FTA with the EU, which will take effect on January 1, 2008.

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 FTA negotiations. The next step in the process would be for countries that have a TIFA with the United States to enter into a Bilateral Investment Treaty (BIT), which protects the rights of foreign subsidiaries and investors in the countries' home markets. The United States and Tunisia signed their TIFA in 2002. Tunisia also falls under the Bush Administration's US-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." The Administration hopes to complete the USMEFTA 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 US-Tunisia TIFA meeting signals the Bush Administration's desire and commitment to complete the USMEFTA by its 2013 target date. Although the mid-2007 expiry of Presidential Trade Promotion Authority (TPA) prevents USTR from pursuing formal FTA negotiations with Tunisia in the short term, the TIFA allows the United States to begin FTA talks when the US political climate again allows for them. With TPA renewal unlikely by the end of 2007, a US FTA with Tunisia is likely a long-term goal, one reinforced by US officials' statements that there are no immediate plans to begin FTA negotiations with Tunisia.

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Senate Finance Committee Approves Peru FTA Implementing Legislation, 20 to 1

On October 4, 2007, the Senate Finance Committee approved implementing legislation for the US-Peru FTA by a 20 to 1 vote. Although the Senate has not scheduled a date for a full floor vote on the legislation, it is likely to hold a vote later this month. However, because the Constitution requires that all revenue bills originate in the House (FTAs are considered revenue bills under US law) the Senate must wait for House approval of the legislation before it can vote. The House Ways and Means Committee will consider the FTA's implementing legislation in the coming weeks. On September 25, 2007, the Committee approved the legislation by a unanimous vote in a "mock" mark-up and is therefore likely to approve a final draft of the legislation.

Peru FTA Faces Off With Trade Adjustment Assistance for House Vote as Business Groups Urge Passage of Peru Agreement

House consideration of the US-Peru Free Trade Agreement (FTA) may have to wait until House members consider legislation extending the US Trade Adjustment Assistance (TAA) program. House Speaker Nancy Pelosi (D-CA) has indicated that she will bring up legislation reauthorizing and expanding TAA before she brings up legislation on the US-Peru FTA for a House vote. Congressional sources expect, however, that the House will vote on both TAA reauthorization and the Peru agreement by the end of October. Reaction to Speaker Pelosi's announcement was mixed. House Ways and Means Committee Chairman Charles Rangel (D-NY) indicated that he will work with Speaker Pelosi in bringing the TAA and Peru FTA bills to the House floor for a vote before end-October. Secretary of Commerce Carlos Gutierrez called on the House of Representatives to approve the Peru agreement and indicated the Bush Administration's preference that the House vote on both TAA and the Peru agreement in tandem.

Congress is under tight deadlines to vote on the TAA and the US-Peru FTA. On September 25, 2007, the House of Representatives approved legislation (H.R. 3375) that extends the TAA program for three months (i.e., until December 31, 2007). House Members passed H.R. 3375 by voice vote. That same day, the Senate also approved H.R. 3375 without amendment by unanimous consent. On September 27, 2007, President Bush delivered the implementing legislation for the US-Peru FTA to Congress. Upon submission of the implementing legislation, the House has 45 legislative days (in which Congress is in session) to move the implementing legislation through committee, or it will move to the floor automatically. The bill must then come before the full House for a vote within 15 session days. Within 15 days of the

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House action, the Senate Finance Committee must report the implementing legislation or it is automatically discharged. The Senate must then vote on the bill within 15 days.

In the meantime, US businesses have called on Congress to quickly approve the Peru FTA as well as other pending US FTAs with Colombia, Panama and South Korea. On September 28, 2007, business representatives, speaking at a National Foreign Trade Council event, stated that Congressional approval of the pending FTAs will provide US businesses with increased market access in foreign countries and will translate to decreased tariffs and trade barriers. The business representatives also indicated their confusion with Congress' "slow approach" in approving the agreements. They opined that Congressional action on the Peru FTA will serve as a bell-weather for consideration of the other FTAs.

Congressional sources believe that passage of the Peru FTA is all but assured, and as indicated, Congress will likely vote on the Peru agreement by mid-November at the latest.

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Multilateral

Multilateral Highlights

DSB Adopts Panel Report in US-Turkey Rice Dispute, While China Blocks First US Request for Panel on Audiovisual Products

Recent World Trade Organization (WTO) Dispute Settlement Body (DSB) activity touched upon two US disputes. One dispute came to an end on October 22, 2007 when the WTO DSB adopted the Panel report in the dispute between the United States and Turkey over Turkish measures affecting the importation of rice, *Turkey – Measures Affecting the Importation of Rise* (DS334). In another dispute, opposing the United States and China over Chinese measures relating to the importation and distribution of films and other audiovisual entertainment products, the United States for the first time requested the establishment of a Panel, indicating its commitment to pursue through litigation this dispute with China. As allowed for under the relevant WTO rules, and as is customary in the WTO, China blocked this first request for the establishment of a panel in China – *Measures Affecting Trading Rights and Distribution for Certain Publications and Audiovisual Entertainment Products* (DS363). However, the rules provide that China will not be able to block the establishment of a Panel in the event the United States reiterates its request to the DSB. If the United States does so, the DSB will automatically form a panel to rule on the dispute at its next meeting on November 19, 2007.

The United States initiated WTO dispute proceedings against Turkey on November 2, 2005, alleging that Turkey was violating its WTO obligations by denying or failing to grant certificates of control required for being able to import rice into Turkey. According to the United States, this denial or failure to grant such certificates in effect imposed a quantitative restriction on imports of rice and constituted a discretionary import licensing scheme. The Agreement on Agriculture outlaws both quantitative restrictions on imports and discretionary import licensing schemes. In addition, the United States challenged Turkey's domestic purchase requirement which is imposed on importers as a condition for importing rice at preferential tariff rates. The United States submitted that such a requirement distorted the conditions of competition in favor of domestic rice and was therefore inconsistent with the national treatment obligation of Article III:4 of the General Agreement on Tariffs and Trade (GATT 1994).

In its report, circulated on September 21, 2007, the Panel agreed with the United States on both counts. The Panel found that the denial or failure to grant the Certificates of Control to import rice constituted a

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quantitative import restriction and a discretionary import license. Because Article 4.2 of the Agreement on Agriculture prohibits such measures and provides that such measures should have been converted into ordinary customs duties, the Panel considered that Turkey had violated the Agreement on Agriculture. In addition, the Panel found that by requiring that importers purchase a certain amount of domestic rice in order to be allowed to import rice at reduced tariff levels under the quotas, Turkey accorded less favorable treatment to imported rice than that accorded to like domestic rice. Therefore, the Panel determined that this Turkish measure was inconsistent with GATT Article III:4. However, the Panel did not consider it necessary to make a recommendation to the DSB that Turkey bring its measure into conformity, as Turkey had explained that the measure had been terminated soon after establishment of the Panel, such that there was no measure to bring into conformity any more. In addition, Turkey stated that it had no intention of reintroducing a similar measure in the future. The Panel thus made a finding of violation, without the usual recommendation to correct this violation.

Because neither Party decided to appeal the Panel's findings, the WTO adopted the Panel report at the October 22, 2007 meeting. Turkey now has a reasonable period of time to bring the challenged measures into conformity with the Agreement on Agriculture.

As stated above, at its October 22, 2007 meeting, the DSB discussed the United States' first request for establishment of a Panel in relation to its dispute with China over importation and distribution of audiovisual products (DS363). China blocked this first request for establishment of a panel. However, China will not be able to block such a request the next time it is put on the DSB agenda. Therefore, the DSB will automatically form a panel to rule on the dispute once the United States reiterates its panel request at the next meeting of the DSB on November 19, 2007.

The United States initiated dispute settlement proceedings against China on April 10, 2007, alleging that Chinese restrictions on foreign distributors of books, music and videos violated China's WTO Accession Agreement, the WTO General Agreement on Trade in Services (GATS) and the GATT. Consultations between the United States and China to find a mutually acceptable solution to this dispute broke down in July 2007.

The United States' WTO disputes with China come at a time when China is undergoing increased criticism in the US Congress. Members of the US Congress have pressured the Bush Administration to address the alleged failure of China to abide by the WTO rules and the commitments undertaken by China at the time of its accession to the WTO in 2001. The United States' WTO disputes with China likely reflect the Bush Administration's attempts to respond to these Congressional concerns. The United

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States has initiated a total of four disputes against China at the WTO.[2] It remains to be seen whether members of the US Congress view this as sufficient action in addressing their China concerns or whether they will continue to pressure the Administration for even more action against China at the WTO. Regardless, it seems that the Bush Administration is intent on using the WTO's dispute settlement mechanism to remedy what it perceives are problems in its trade relationship with China.

Compliance Panel Finds United States Still at Fault in Upland Cotton Dispute with Brazil

On October 15, 2007, a World Trade Organization (WTO) compliance panel (DS267) issued its final decision in the US-Brazil cotton dispute. While the report has not yet been released to the public, media stories have indicated that the Panel concluded that the United States failed to comply with an earlier panel ruling regarding the WTO-inconsistency of US support for cotton products, and determined that US domestic support programs for upland cotton continue to violate provisions of the WTO Agreement on Agriculture ("Agricultural Agreement") and the WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). Officials familiar with the dispute indicated that the final ruling incorporated many of the Panel's findings released in its earlier interim report on July 27, 2007.

Brazil initiated WTO compliance proceedings against the United States on August 18, 2006, alleging that the United States had failed to comply with a June 18, 2004 WTO panel ruling that held certain US domestic support programs to violate the Agriculture Agreement and the SCM Agreement. Both WTO Agreements prohibit or restrict export subsidies depending in part upon the measure of harm or "serious prejudice" that these subsidies create to other WTO Member States. The 2004 Panel found that price-contingent US domestic support measures paid out to US cotton producers between 1999-2002 had caused serious prejudice to Brazil's upland cotton industry and "significant" price suppressions in the world market for upland cotton. The Panel also rejected submissions by the United States that its domestic support measures were justified under the (now expired) "Peace Clause", which temporarily exempted certain types of domestic support measures within the Agriculture Agreement. On March 3, 2005, the WTO Appellate Body upheld most of the Panel's findings following an appeal by the United States. The WTO Dispute Settlement Body (DSB) adopted both reports on March 21, 2005. Brazil and the United States agreed that the United States would remove the prejudicial effects of the programs

[2] The four active disputes that the United States has with China include: (i) China — Measures Affecting Imports of Automobile Parts (DS340); (ii) China — Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments (DS358); (iii) China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights (DS362); and (iv) China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (DS363).

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referenced in the dispute on Brazil's trade no later than September 21, 2005. The United States and Brazil also agreed that the United States would remove the prohibited export subsidies by July 1, 2005. The harmful aspects of the domestic support measures that the Panel had deemed WTO-inconsistent included:

- countercyclical payments and market loan assistance introduced under the Farm Security and Rural Investment (FSRI) Act of 2002-2007;
- three export guarantee programs, namely the General Sales Manager 102 ("GSM 102"), the General Sales Manager 103 ("GSM 103") and the Supplier Credit Guarantee ("SCGP"); and
- the "Step 2" program, that offered compensation to US exporters who purchased higher-priced US cotton.

By August 1, 2006, the United States had removed its Step 2 program, announced that it would no longer accept applications under GSM 103 and amended the fee schedules under GSM 102. US officials argued that the repeal of the Step 2 program addressed both sets of recommendations and rulings made by the WTO regarding both prohibited subsidies and actionable subsidies; US officials thus felt that the United States had brought its domestic support measures into conformity with the June 18, 2004 Panel ruling. A spokesperson for the Office of the United States Trade Representative (USTR) expressed disappointment with the compliance Panel's final ruling, stating that "[the United States] continues to believe that payments and export credit guarantees under [US] programs are now fully consistent with [US] WTO obligations." The spokesperson also indicated that the United States had not yet reached a decision on whether to file an appeal with the Appellate Body. The United States has sixty days from the date of circulation of the compliance report to file such an appeal. Should the United States either choose not to appeal the compliance Panel's ruling or lose in its appeal, a WTO Arbitrator will proceed to review Brazil's request for authorization to impose sanctions on US imports. Brazil had indicated prior to the release of the compliance panel ruling that it intended to seek permission from the DSB to impose USD 1.037 billion in annual sanctions on US imports. Brazil had initially requested the WTO for authorization to impose USD 3 billion in annual retaliation on US imports due to the United States' failure to remove cotton support deemed by the WTO to constitute prohibited subsidies. Brazil and the United States, however, agreed to suspend WTO arbitration proceedings on the request after the US Department of Agriculture announced proposed reforms to remove the illegal subsidies at issue. Brazil will also likely seek to impose sanctions in the form of suspended intellectual property rights (IPR) to non-specified US IPR holders, which it previously indicated as necessary given the counterproductive effects of imposing retaliatory duties against critical US inputs for the Brazilian industry.

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The compliance Panel's final ruling could cause more problems for the United States. Brazil's claims that certain US domestic support measures are WTO-inconsistent could expose the United States to future claims by other WTO Members against similar US domestic support measures maintained on other US products. Brazil has another WTO dispute pending against US domestic support and export guarantees for agricultural products (DS365). In a related development, Canada followed Brazil's action on June 20, 2007 by requesting the establishment of a dispute settlement panel (DS357) challenging US domestic support programs for corn totaling USD 9 billion a year. Canada claims that these programs caused serious prejudice to its domestic corn growers. The United States blocked the request but the DSB will automatically form a panel to rule on the dispute if Canada makes a second request. Mexican press sources have also suggested that Mexico may request consultations with the United States regarding US rice subsidies. India is also reportedly assessing whether to request consultations with the United States on the same issues raised by Brazil in DS365. These upcoming and potential WTO disputes have spurred the United States to negotiate a new and more expansive "Peace Clause" into the text of whatever new Agricultural Agreement WTO Members may ultimately agree upon in the Doha Round. However, the United States will face considerable resistance from other WTO Members who have indicated that there is no scope for renegotiating a new Peace Clause, let alone one more expansive than its predecessor.

Senators Urge US Officials to Discuss "Zeroing" in Doha Rules Negotiations

In an October 11, 2007 letter to Secretary of Commerce Carlos Gutierrez and United States Trade Representative (USTR) Susan Schwab, Senator Jay Rockefeller (D-WV) and a bipartisan group of 13 Senators urged the United States to use the World Trade Organization (WTO) Doha Round rules negotiations to rectify two recent WTO Appellate Body decisions that created a new prohibition on the US Department of Commerce's practice of using "zeroing" methodology in antidumping investigations and reviews. According to Sen. Rockefeller, the WTO Appellate Body's decisions in the zeroing disputes "would effectively gut [US] fair trade laws." He noted that the United States would "never agree to such a drastic change, and cannot accept the WTO handing down new obligations that were never agreed to or even negotiated." Co-signers of the letter include Senate Finance Committee Chairman Max Baucus (D-MT) and Sens. Olympia Snowe (R-ME), Robert Byrd (D-WV), Arlen Specter (R-PA), Elizabeth Dole (R-NC), Charles Schumer (D-NY), Harry Reid (D-NV), Evan Bayh (D-IN), Robert Casey (D-PA), Mark Pryor (D-AZ), and Blanche Lincoln (D-AR) among others.

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In the letter, the Senators stated that the Doha rules negotiations must not weaken existing fair trade disciplines and must instead "clarify [US] rights and obligations in the WTO and correct past WTO decisions that have seriously misinterpreted the agreements." According to the letter, the WTO Appellate Body's decisions on the issue of "zeroing" are controversial because the decisions did not change "relevant wording" in WTO agreements. The Senators also note that other WTO Members have a history of employing the "zeroing" antidumping methodology and that there is no agreement among Doha negotiators to make changes in WTO rules regarding "zeroing." The Senators feel that the WTO's prohibition of "zeroing" "threatens to undermine respect for the dispute settlement mechanism . . . and the global trading system."

Regarding other WTO Members that have insisted that Doha rules negotiations not revisit or reverse the Appellate Body decisions on US "zeroing," the Senators state that the Appellate Body "has created new obligations to which the United States and others never agreed." The Senators urged US officials to reject arguments made by other WTO Members that Doha rules negotiations not revisit or reverse the Appellate Body decisions on US "zeroing." According to the Senators, "rectifying the decisions on zeroing would only restore the original intent of the agreements, and therefore should be seen as the starting point for the rules negotiations – not as a trade-off for other changes that weaken the agreements." The Senators also noted that Congress is very concerned with the status of rules negotiations and the inclusion of "zeroing" methodology in the final Doha Round agreement.

The United States has already proposed the inclusion of the "zeroing" methodology in the final Doha agreement. On July 11, 2007, Deputy USTR Peter Allgeier informed members of the WTO negotiating group on rules that the United States will 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 US Department of Commerce'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.

This is not the first time that the United States has requested that zeroing be included in a final Doha agreement. 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, 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

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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." Based on the predominantly negative reaction to US proposals to allow for zeroing within WTO agreements, it seems likely that the United States will continue fighting a hard battle against other WTO Members in an effort to have zeroing approved by the multilateral institution. Analysts opine that US refusal to consider a final Doha agreement that does not address zeroing, however, will only serve to prolong negotiations that are already stalled on other key issues such as agricultural support and non-agricultural market access. The United States has not provided any indication that it is willing to back down from its zeroing requests; thus, Doha negotiations could proceed even slower than usual now that the United States has shifted its focus to zeroing in the rules negotiations. Add to that growing concern among certain US legislators on the rules negotiations and zeroing, and it seems even more likely that rules negotiations will continue to be dragged out in the Doha talks.

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