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Japan External Trade Organization
WTO and Regional Trade Agreements Monthly Report

IN THIS ISSUE

Table of Contents

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Summary of Reports

United States

USTR Presents 2008 Trade Agenda to Congress

On March 4, 2008, the Office of the United States Trade Representative (USTR) delivered to Congress the "2008 Trade Policy Agenda and 2007 Annual Report of the President of the United States on the Trade Agreements Program." On March 6, 2008, USTR Susan Schwab presented the Administration's 2008 trade agenda to the Senate Finance Committee and provided her **on-the record** testimony on those trade issues on which the Administration will focus for the year. We review below the Administration's trade agenda and the hearing.

United States Highlights

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

- Ways and Means Democrats Push Bush Administration to Adopt New China Policy
- President Bush Nominates New USTR Agriculture Negotiator as Sen. Snowe Blocks Deputy USTR Nomination
- LCIA Issues Decision in US-Canada Softwood Lumber Dispute; USTR "Respectfully Disagrees" with Result
- Congress Extends 2002 Farm Bill Until April as Farm Bill Talks Continue and Administration, Legislators Discuss Offset Proposals

Petitions and Investigations

Petitions and Investigations Highlights

We would like to alert you to the following Petitions and Investigations highlights:

- 337 Complaint on Composite Wear Components
- 731 Petition on 1-Hydroxyethylidene-1, 1-diphosphonic Acid from China and India
- 731 Petition on Frontseating Service Valves from China
- 337 Complaint on Cigarettes and Packaging

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- 731 Petition on Steel Thread Rod from China

Multilateral

WTO Panel Report: United States - Shrimp from Thailand (DS343)

Decision: A WTO Panel has ruled that the United States breached the Anti-Dumping Agreement when it applied a bond requirement in the anti-dumping investigation on shrimp from Thailand. The Panel similarly ruled against the use of "zeroing," although this latter claim was uncontested by the United States.

Multilateral Highlights

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

- United States, Japan Agree to DSB Procedures in "Zeroing" Dispute
- United States, EU File Separate Consultation Requests with China on Financial Information Services

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Reports in Detail

United States

USTR Presents 2008 Trade Agenda to Congress

Summary

On March 4, 2008, the Office of the United States Trade Representative (USTR) delivered to Congress the "2008 Trade Policy Agenda and 2007 Annual Report of the President of the United States on the Trade Agreements Program." On March 6, 2008, USTR Susan Schwab presented the Administration's 2008 trade agenda to the Senate Finance Committee and provided her **on-the record** testimony on those trade issues on which the Administration will focus for the year. We review below the Administration's trade agenda and the hearing.

Analysis

I. 2008 Trade Policy Agenda

On March 4, 2008, USTR delivered to Congress the "2008 Trade Policy Agenda and 2007 Annual Report of the President of the United States on the Trade Agreements Program." The report discusses the Administration's trade priorities for 2008 and presents an overview of 2007 trade activities and USTR initiatives. We discuss herein the 2008 trade policy agenda.

The full report is available at: http://www.ustr.gov/Document_Library/Press_Releases/2008/March/Bush_Administration_Delivers_Annual_Trade_Report_To_Congress.html.

A. Bilateral Initiatives

According to USTR's report, in 2008, the Administration will "build on the passage of the Peru Free Trade Agreement (FTA)" by working with Congress to advance other pending FTAs with Colombia, Panama and South Korea. The report notes that passing and implementing the US-Colombia FTA will solidify relations with a strong US ally in South America. On the US-Panama FTA, the report states that foreign investment and US exports flow into Panama at a rapid pace, and that implementation of the FTA would open more markets for US producers. The report states that Congressional approval of the Colombia and Panama FTAs is among the Administration's top priorities for 2008, and that implementing these

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agreements "provide equally compelling foreign policy benefits . . . these nations lead by example as their success demonstrates to others in the region that market-oriented economies, political freedom, transparency, and respect for the rule of law will help create a better life for their people." The report also notes that the US-Korea (KORUS) FTA is the most commercially significant FTA the United States has concluded in 15 years, and when implemented "will offer immense opportunities to US business and agriculture in a rapidly growing and sophisticated market." Specifically, the report states that the KORUS FTA will serve the United States' "vital interest in maintaining and expanding [US] partnerships in Asia."

The report states that in 2008, USTR will also continue to strengthen bilateral relations with US trading partners through other agreements, including Trade and Investment Framework Agreements (TIFAs) and Bilateral Investment Treaties (BITs), especially in Africa and Asia. USTR concluded a BIT with Rwanda in February 2008, and is near completion of BIT negotiations with Pakistan. USTR will also continue exploratory BIT discussions with China, India, and other countries, and seek to engage countries such as Brazil, Russia, Indonesia, Vietnam, and Egypt to engage in exploratory BIT discussions. The report highlights that in 2008, "the Administration will continue its efforts to build and strengthen trade relations worldwide . . . [i]n particular, the Administration will pursue Asia-Pacific regional economic integration through the Asia Pacific Economic Cooperation forum." The report notes that for these bilateral initiatives to succeed "they must coincide with technical assistance in building the infrastructure of commerce" and the report states that USTR will continue to expand its trade capacity building activities.

Regarding US-China bilateral relations, the report states that "persistent and significant challenges" have accompanied the United States' deeper economic engagement with China. The United States will continue to press for more progress by China in fully implementing its multilateral obligations in areas such as intellectual property rights enforcement, barriers to market access, persistent government intervention in the economy, and lack of transparency in its legal and commercial procedures. To this end, the report notes that the United States will continue to use dialogue – through the US-China Joint Commission on Commerce and Trade (JCCT) meetings and US-China Strategic Economic Dialogue (SED) meetings – to work with China in addressing US concerns. The United States will also use the World Trade Organization (WTO) Dispute Settlement Body (DSB) to engage China on US concerns at the multilateral level. The report states that since March 2006, the United States has brought five formal WTO cases related to China's trade practices, and that the United States views the DSB as an effective forum for addressing trade issues with China. In addition, the report notes that the United States has expressed disappointment that China has not yet made a meaningful contribution to the successful conclusion of the WTO Doha Round.

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B. Multilateral Initiatives

In 2008, on the multilateral front, the report states that the United States will continue to lead efforts towards concluding the WTO Doha Development Round. According to the report, concluding the Doha Round is President Bush's top trade negotiating priority because completion of the agreement will "generate economic growth through new trade flows in agriculture, industrial goods and services." USTR recognizes that a "small window of opportunity" exists to conclude the Doha Round by the end of 2008, but the report states that USTR will devote significant resources towards conclusion of the round. The report also states that the Administration will continue to combat intellectual property rights (IPR) violations through various means, including the negotiation of an Anti-Counterfeiting Trade Agreement (ACTA) with other trading partners. In addition, the Administration will continue to use the WTO DSB as a forum to ensure that US trading partners "are abiding by global trade rules."

C. Other Initiatives

The report states that with regards to beef, the United States will continue to urge Japan and other countries in Asia, notably China and Korea, to fully re-open their markets to US beef. According to USTR, the World Organization for Animal Health (OIE), the international scientific body that evaluates these concerns and sets international standards, has provided the clear science-based view that US beef is safe, and the Administration will continue working with its trading partners to open closed markets to US beef products.

Regarding investment, the report states that USTR will continue to play an active role as a member of the Committee on Foreign Investment in the United States (CFIUS), both in CFIUS case reviews and in securing successful implementation of the Foreign Investment and National Security Act of 2007 (FINSA). The report also states that the Administration is working closely with other countries to anticipate and manage challenges associated with sovereign wealth funds (SWFs) and SWF investments. Specifically, the report notes that the United States has called on the International Monetary Fund (IMF) and World Bank to develop "best practices" for SWFs, to highlight sovereign investors' own responsibilities and promote strong international standards of transparency and corporate governance. The United States is also working bilaterally and through the Organization for Economic Cooperation and Development (OECD) to encourage countries that receive significant sovereign investment to maintain open, transparent, and non-discriminatory investment policies.

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II. Senate Finance Committee Hearing

On March 6, 2008, USTR Susan Schwab presented the "2008 Trade Policy Agenda and 2007 Annual Report of the President of the United States on the Trade Agreements Program" to members of the Senate Finance Committee, including Committee Chairman Max Baucus (D-MT) and Ranking Member Charles Grassley (R-IA).

In his opening statement, Chairman Baucus urged Congress to shift its attention to reform, expansion and implementation of the now-expired Trade Adjustment Assistance (TAA) program. He noted that Congress must put a better TAA program in place before it can move to other trade priorities, including consideration of the pending FTAs with Colombia, Panama and Korea. Chairman Baucus stated that Congress also has an opportunity to help US consumers by safeguarding US borders and ensuring that US imports of food and consumer goods are safe and healthy. He opined that the Administration's 2008 trade agenda promises the opportunity to implement good economic and foreign policy, and he called on the Administration to pay special attention to items of importance to Congress, such as the TAA program.

In his opening statement, Sen. Grassley opined that the pending FTA with Colombia is "overdue for consideration" and stated that Congress' recently enacted legislation extending the Andean Trade Preferences Act (ATPA) through December 31, 2008 should provide legislators with additional time to consider the US-Colombia FTA. He also noted that the pending trade agreements with Korea and Panama may be slightly delayed. Like Chairman Baucus, Sen. Grassley urged Congress to reauthorize and improve the TAA program.

During her testimony, USTR Schwab discussed four aspects of the Administration's 2008 trade agenda: (i) approval of pending FTAs; (ii) completion of the WTO Doha Round; (iii) proper trade enforcement; and (iv) climate and environmental initiatives.

- **Pending FTAs.** USTR Schwab testified that the Administration will continue to work with Congress to secure prompt consideration of the pending trade agreements with Colombia, Panama and Korea in 2008. She noted that these pending agreements offer substantial opportunities for US farmers, ranchers, workers, manufacturers, and service providers. She also opined that if Congress fails to approve these agreements, it would "discredit and undermine staunch allies in Latin America and Asia which are two regions of national security and economic interest to the United States." USTR Schwab stated that Colombia has taken steps to eliminate the power of drug cartels and terrorists as well as decrease violence throughout the country. Regarding the KORUS FTA, USTR Schwab testified that approval of the agreement will provide the United States with preferential access to the

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eleventh largest economy in the world and will strengthen US bilateral linkages with Korea. She also stated that the KORUS FTA will give meaningful market access to US service providers and provide strong protections for investors and intellectual property rights. She called on Congress to consider and approve the pending FTAs before the end of the year.

- **WTO Doha Round.** According to USTR Schwab, the Administration has actively led efforts towards concluding the Doha Development Round. She noted that the Doha agreement remains a top Administration priority, and that in order to accomplish a final agreement by year's end, the United States engaged US trading partners in proactive negotiations regarding agriculture, industrial goods, and services. USTR Schwab stated that the Administration is ready to conclude the Doha Round in 2008.
- **Enforcement.** According to USTR Schwab, the Administration will continue to defend US interests at the WTO in 2008. She noted that proper enforcement of international trading rules remains a top priority for the Bush Administration, and she stated that the WTO DSB is an effective mechanism and tool that enables the United States to address its trade priority concerns with US trading partners.
- **Climate and Environment.** USTR Schwab testified that trade and environmental policy are linked and that the May 2007 Administration-Congressional Bipartisan Agreement on Trade Policy establishes a stronger connection between US trade policy and environmental issues. USTR Schwab stated that the United States worked with trading partners such as Peru, Colombia, Panama, and Korea to include in these respective FTAs provisions that require each country to adopt, maintain and implement laws, regulations and all other measures to fulfill obligations covered under multilateral environmental agreements (MEAs).

Following USTR Schwab's presentation of the 2008 trade agenda, Committee members posed several questions. Chairman Baucus raised concerns about the enforcement of the US-Canadian Softwood Lumber Agreement (SLA), specifically a recent arbitration decision that failed to hold Canada accountable for exceeding its allowable exports.[1] USTR Schwab responded that the Administration was disappointed

[1] On March 4, 2008, the London Court of International Arbitration (LCIA) tribunal issued its decision in a dispute under the 2006 SLA between the United States and Canada. The arbitration concerns Canada's implementation of the SLA's surge mechanism and calculation of quota volumes. The LCIA tribunal agreed with the United States that Canada violated the SLA by failing to properly adjust the quota volumes of the Eastern Canadian provinces in the first six months of 2007 to account for rapidly changing market conditions. The tribunal, however, disagreed with the US assertion that Canada violated the SLA by failing to properly adjust the quota volumes of Western Canadian provinces during the same period; the LCIA found that the same adjustment is not required for Canada's Western provinces. The March 4

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with the arbitration panel's mixed decision and opined that the outcome did not accurately reflect the provisions of the SLA with Canada. Chairman Baucus also noted that TAA will take precedence in the Senate Finance Committee over all pending FTAs and that the renewal of TAA will represent the first step toward "constructing a trade agenda that is good for our workers and good for our economy." USTR Schwab responded that TAA renewal is also a high priority for the Administration and that the Administration will continue working with the Senate Finance Committee in renewing the program. Chairman Baucus also criticized Korea's continued failure to lift its ban on US beef. USTR Schwab responded that US officials are working with Korean officials on opening Korea's market to US beef products and that new market access for American beef is another priority for the Administration.

Outlook

In its last year in office, the Bush Administration is limited in what it can achieve with regards to its trade priorities. The absence of Trade Promotion Authority (TPA) – which expired on June 30, 2007 – and the presence of a Democratic-led Congress that is unwilling to renew TPA for the remainder of President Bush's term effectively halt any new or pending FTA negotiations that the Administration would like to complete in 2008. Consequently, USTR has thrown its weight behind the pending Colombia, Panama and Korea FTAs, the US-Colombia FTA seemingly at the top of that list. The Bush Administration has led a concerted effort since the end of 2007 to address legislators' concerns with Colombia's record on human rights and violence against labor leaders, and has organized several delegation trips (composed of Administration officials and members of Congress) to Colombia where US officials have met with their Colombian counterparts to address concerns with the pending agreement. The Administration has even indicated that it may consider sending implementing legislation for the US-Colombia FTA to Congress without prior clearance from the Democratic leadership. USTR Schwab has tempered such statements by adding that the Administration's preferred option is to continue to work with Congressional leadership to find a way to bring the FTA to Congress for its consideration. The Administration has also called on Congress to approve the Panama and Korea agreements, although even USTR may realize that Congressional consideration of these two agreements will not happen until: (i) the United States and Panama figure out a way to address the issue of Panamanian National Assembly President Miguel Gonzalez Pinzon[2]; and (ii) Korea lifts its ban on US beef products, as reflected in Senate Finance

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LCIA decision is the first step in the arbitration process under the SLA. During the next stage, the LCIA will determine whether any remedy should be applied.

[2] On September 1, 2007, Pedro Miguel Gonzalez Pinzon was elected President of Panama's National Assembly. Gonzalez Pinzon has an outstanding warrant for his arrest in the United States for the June 1992 slaying of US Army Sgt. Zak Hernandez Laporte and the attempted murder of Sgt. Ronald Marshall outside Panama City. Gonzalez

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Committee Chairman Baucus' statements during the March 6 hearing. Thus, until these pending items are cleared from the table, it remains unclear when Congress will consider these FTAs. What *is* clear is that the Bush Administration will continue its strong lobbying efforts through the remainder of 2008 in getting Congress to approve all three pending FTAs before the end of the year.

As for the Administration's other trade priorities for 2008, they seem to reflect the priorities the Administration raised in its 2007 trade agenda. Conclusion of the WTO Doha Round is again a "top priority" for the Administration and USTR has indicated that the United States will "continue its leadership" in efforts to reach a final agreement by the end of the year. To date, however, the United States and other WTO Members – including the EU, Brazil, China and India – have not made any new major concessions in the Doha Round or introduced revised offers in the agriculture, non-agricultural market access (NAMA) and services negotiations that would move the multilateral negotiations forward. Thus, it is unclear if the Administration's political will to complete Doha by December 2008 will translate into concrete action and new offers or if it is simply an echo of similar statements USTR made in 2007. As for trade enforcement, the United States will certainly maintain its focus on China, as it did in 2007. The recent US WTO request for consultations with China regarding financial services indicates that USTR may continue its approach to address any trade-related concerns it has with China through bilateral and multilateral channels, a similar methodology it may follow with other trading partners as it has done in the past. Along with trade enforcement, the Administration is also likely to keep a close watch on SWF activities and investments in the United States, as well as international " best practices" models for SWFs, a topic that has increased in popularity recently within the United States and elsewhere.

Pinzon has denied any involvement in the crimes and was acquitted in a trial in Panama in 1997. Members of Congress have raised Gonzalez Pinzon's outstanding warrant as an issue of concern in the US-Panama FTA. Gonzalez Pinzon's term of office ends in September 2008 and Congressional and Administration sources have noted that Congress may consider the Panama FTA after Gonzalez Pinzon finishes his term of office. Under Panamanian law, Gonzalez Pinzon, however, may be elected for a second term. Consequently, it is unclear when Congress will consider the US-Panama agreement in light of this sensitive political issue.

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United States Highlights

Ways and Means Democrats Push Bush Administration to Adopt New China Policy

In a March 27, 2008 letter to President Bush, House Ways and Means Committee Chairman Charles Rangel (D-NY) and 14 of the 24 Democratic Members on the Ways and Means Committee urged the Bush Administration to adopt and implement a new strategy regarding China's alleged currency manipulation and other trade issues.[3] The letter states that China's currency manipulation is having an adverse effect on US-China trade relations, "specifically on the US trade deficit, retention of American jobs and suppression of US economic growth." The Members urge the Administration to "use all available tools at its disposal to address China's protracted, large-scale intervention in the foreign exchange markets to maintain an undervalued currency." According to the Members, the growth in China's global trade surplus and its foreign exchange reserves demonstrates "adds further urgency to a new trade policy vis-à-vis China."

In their letter, the Committee Democrats urge the Bush Administration to move away from its "quiet diplomacy" approach and to implement a new China strategy that incorporates the following components:

- **Strengthen US leadership in the International Monetary Fund (IMF).** The letter states that the United States should work through the IMF and support IMF resolutions that pressure China to refrain from undervaluing the yuan. Specifically, the Democratic members want to see the Administration restrict China's voting power in the IMF unless it commits to refrain from currency manipulation.
- **Take action in the World Trade Organization (WTO).** The Members allege that China's currency policies violate WTO rules and recommend that the United States and other WTO Members address these policies at the WTO.
- **Initiate special negotiations with key countries.** According to the letter, the United States should work "with other countries that have a strong interest in pressing China to end its currency manipulation practices." The Members urge the Administration to invite major industrial and emerging-market economies to a special meeting to address currency misalignment and global economic imbalances.

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[3] Ways and Means Democrats that did not sign the letter are Reps. Jim McDermott (D-WA), John Tanner (D-TN), Lloyd Doggett (D-TX), Earl Pomeroy (D-ND), Rahm Emanuel (D-IL), Earl Blumenauer (D-OR), Joseph Crowley (D-NY), Kendrick Meek (D-FL), and Artur Davis (D-AL).

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- **Enforce existing US trade and exchange rate laws.** The letter states that the Bush Administration should enforce existing US trade and exchange rate laws that address currency manipulation and its effects, including the Exchange Rates and International Economic Policy Coordination Act of 1988.

The letter does not rule out the possibility of legislative action by Congress; indeed, the Members note that "if the Administration is unable or unwilling to do so, Congress will take action, if necessary, to ensure the integrity of the international economic system and to guard against international economic instability."

The Democrats' letter indicates a renewed interest by some Members of Congress on the state of US-China trade relations, specifically China's alleged currency misalignment. For the past several months, Congressional anger over Chinese trade practices has abated, perhaps due to the Administration's assurances to Congress that it is working with China to address trade concerns and the successful WTO disputes the United States has brought against China over the last 18 months. Since 2006, the United States has filed five WTO complaints against China, two of which have already been resolved in the United States' favor. On March 20, a WTO dispute panel issued a final ruling upholding complaints filed by the United States, the European Union and Canada against China's discriminatory tariff treatment of imported automobile parts. The panel rejected China's arguments in defense of regulations that the United States, the EU, and Canada said resulted in illegal duties being imposed on imported auto parts. Earlier, on November 29, 2007, China and the United States signed a memorandum of understanding (MOU) that ended a WTO dispute (DS358) regarding Chinese measures granting enterprises in China refunds, reductions or exemptions from taxes and other payments owed to the Chinese government. Under the MOU, China pledged to eliminate by January 1, 2008, and not to reintroduce in the future, all of the programs that the United States included in its request for dispute settlement proceedings and alleged are inconsistent with WTO anti-subsidy rules. The Administration has repeatedly told members of Congress that the disputes combined with enhanced bilateral engagement efforts with China through regular dialogues and summits suggest a maturation of US-China trade relations and a greater normalization of China's role as a responsible WTO Member.

Democratic Members of Congress, for their part, have also been hesitant over the past several months to introduce legislation unilaterally penalizing China because of the weakened state of the US economy. Congressional insiders opine that Democratic leaders had eased anti-China rhetoric because they feared being perceived as "protectionists" during a time of economic difficulty in the United States. The Ways and Means Democrats' letter indicates that Members of Congress remain unsatisfied with the Administration actions, and/or that the Democratic leadership's political apprehensions have subsided. Indeed, some observers have asserted that the letter may be a purely political maneuver by Democrats to

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spur the Administration and Republican Presidential candidate John McCain into denouncing the letter's policies and thus appear "pro-China" to an American public that has grown increasingly skeptical of open trade.

Regardless of the reasons for the letter, the Democratic threat to introduce unilateral legislation against China is unlikely to spur any major movement from China to address the Democrats' concerns. To date, the 110th Congress has introduced over one hundred China-related bills (though not all are trade-related); the majority of these bills do not make it past Committee stage and they have not pressured China into addressing its alleged currency manipulation or other Congressional concerns. Rather, bilateral and multilateral negotiations between the United States and China seem to have produced results (*e.g.*, the successful WTO disputes and recent appreciation of the Yuan). China is thus unlikely to make any major policy changes based on further threats of additional unilateral legislation in Congress.

President Bush Nominates New USTR Agriculture Negotiator as Sen. Snowe Blocks Deputy USTR Nomination

On March 26, 2008, President Bush announced his intention to nominate A. Ellen Terpstra as Chief Agriculture Negotiator at the Office of the United States Trade Representative (USTR). Terpstra would replace former Chief Agriculture Negotiator Richard Crowder, and will be responsible for US agricultural trade negotiations, including agriculture negotiations in the context of the World Trade Organization (WTO) Doha Round talks. Crowder left his position at USTR in May 2007 to return to the private sector. Currently, Terpstra serves as Deputy Undersecretary of Farm and Foreign Agricultural Services at the Department of Agriculture. Prior to that role, she served as administrator of the Department of Agriculture's Foreign Agricultural Service, and previously served as a trade negotiator and policy coordinator at USTR. Before joining the government, Terpstra served as President and Chief Executive Officer of the USA Rice Federation and President of the US Apple Association. USTR Susan Schwab lauded the nomination and stated that Terpstra's previous experience as head of the Department of Agriculture's Foreign Agricultural Service provides her with "the perspective needed to manage several key priorities including pending free trade agreements, and opening additional markets to US agricultural exports and addressing creeping protectionism abroad through use of sanitary and phytosanitary barriers to trade."

Meanwhile, Sen. Olympia Snowe (R-MN) has blocked President Bush's nomination of Commissioner Deanna Tanner Okun of the US International Trade Commission (ITC) as Deputy USTR. President Bush nominated Okun on December 18, 2007. As Deputy USTR, Commissioner Okun would oversee US trade relations with East Asia (including China and Japan), South Asia (including India), Southeast Asia, and

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Africa. Her responsibilities would 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.

According to Congressional sources, Sen. Snowe placed a hold on Okun's nomination in order to press for tougher implementation of the US-Canada Softwood Lumber Agreement (SLA). These sources note that Sen. Snowe has urged USTR over the last several months to strictly enforce the SLA, specifically calling on the Administration to require importers of Canadian lumber to certify that each shipment is in compliance with the SLA. Congressional sources also indicate that her block of Okun's nomination comes in light of the March 4, 2008 London Court of International Arbitration (LCIA) tribunal decision in a dispute under the SLA. In responding to the blocked nomination, a USTR spokesperson stated that USTR will work with legislators on issues like softwood lumber and others so that Okun's nomination can move forward.

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

LCIA Issues Decision in US-Canada Softwood Lumber Dispute; USTR "Respectfully Disagrees" with Result

On March 4, 2008, the London Court of International Arbitration (LCIA) tribunal issued its decision in a dispute under the 2006 Softwood Lumber Agreement (SLA) between the United States and Canada. The arbitration concerns Canada's implementation of the SLA's surge mechanism and calculation of quota volumes. The LCIA tribunal agreed with the United States that Canada violated the SLA by failing to properly adjust the quota volumes of the Eastern Canadian provinces in the first six months of 2007 to

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account for rapidly changing market conditions. The tribunal, however, disagreed with the US assertion that Canada violated the SLA by failing to properly adjust the quota volumes of Western Canadian provinces during the same period; the LCIA found that the same adjustment is not required for Canada's Western provinces. The March 4 LCIA decision is the first step in the arbitration process under the SLA. During the next stage, the LCIA will determine whether any remedy should be applied.

Upon issuance of the LCIA decision, the Office of the United States Trade Representative (USTR) issued a statement in which it respectfully disagreed with the key result. According to USTR, "the SLA brought about an end to more than twenty years of litigation, and it was crafted as a balanced set of rights and obligations for both the United States and Canada . . . the viability of the SLA is dependent on maintaining that balance." The USTR believes that the tribunal's decision regarding the calculation of the trigger volumes for the Western Canadian provinces is not consistent with the "balance negotiated under the SLA." USTR stated that it will be consulting with US stakeholders on options going forward. According to Canadian officials, Canada will continue to defend Canadian interests throughout the remainder of the arbitration process.

The US-Canada SLA entered into force on October 12, 2006. Under the SLA, the United States and Canada committed not to take any action that circumvents the SLA, including actions that reduce or offset the Agreement's export measures, such as providing new subsidies to producers or exporters of Canadian softwood lumber products. The SLA also includes a surge adjustment mechanism. Under the SLA, Canada agreed to impose export measures on Canadian exports of softwood lumber products to the United States. When the prevailing monthly price of lumber, determined per the Agreement, is above USD 355 per thousand board feet (MBF), Canadian lumber exports are unrestricted. When prices are lower than USD 355 MBF, each Canadian exporting region has chosen to be subject to either an export tax with a soft volume cap or a lower export tax with a hard volume cap or "volume restraint." The measures become more stringent as the market price of lumber declines. Regions with a soft volume cap such as British Columbia and Alberta are subject to a "surge" mechanism. If a region's exports of softwood lumber products to the United States exceed the soft volume cap, known as the "trigger volume," by more than 1 percent in a particular month, Canada must retroactively collect an additional export tax, equal to 50 percent of the primary export tax, on all softwood lumber products from that region that entered the United States during the month in question. According to USTR, the SLA's adjustment mechanism ensures that the export volume caps that apply to Canadian softwood shipped to the United States are calculated properly during periods of rapidly changing market conditions. The United States contends, however, that Canada violated the SLA's terms by waiting until July 2007 to implement the

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adjustment mechanism, as opposed to applying the mechanism on January 1, 2007. The United States also argues that Canada violated the SLA by not applying the adjustment mechanism to the western provinces of British Columbia and Alberta.

This is not the United States' only dispute with Canada under the SLA. On January 18, 2008, the United States filed its second request for arbitration under the SLA in which it challenged Canadian provincial subsidy programs. The second request for arbitration came after the Government of Canada announced on January 10, 2008, the proposed creation of a USD 983 million Community Development Trust which, among other provisions, would provide aid to Canada's forestry sector. In response to concerns in the United States about this announcement, USTR Schwab sent a letter on January 15, 2008 to Canadian Trade Minister David Emerson seeking Canada's assurance that any funds disbursed to the forestry sector from the Community Development Trust will be used in a manner consistent with Canada's obligations under the SLA. Following that letter and discussion between the United States and Canada, US officials decided to file a request for arbitration. According to Canadian officials, the proposed Community Development Trust would "assist workers suffering economic hardship caused by the recent volatility in global financial and commodities markets" and would be funded from the Canadian federal government's budgetary surplus for fiscal 2007-2008. Canadian Prime Minister Stephen Harper has stated that the Community Development Trust "will support job training to create opportunities for workers in sectors facing labor shortages and community transition plans that foster economic development and create new jobs, and infrastructure development that stimulates economic diversification." The US Coalition for Fair Lumber Imports, however, believes that the Community Development Trust will serve as a new subsidy for Canadian softwood producers. According to US Coalition for Fair Lumber Imports Chairman Steve Swanson, "the money ostensibly earmarked for workers [under the Community Development Trust] will be used to reduce liabilities of Canadian lumber companies, which would violate the Softwood Lumber Agreement."

Congress Extends 2002 Farm Bill Until April as Farm Bill Talks Continue and Administration, Legislators Discuss Offset Proposals

Discussion on the stalled Farm Bill continues as legislators and Administration officials attempt to complete a final package of farm support measures before members of Congress recess for two weeks starting March 15, 2008. The Farm Bill is still in conference where members from the House of Representatives and the Senate are attempting to hammer out differences in the two versions of the bill both chambers passed (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

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the Farm Bill on July 27, 2007). Farm Bill negotiations over the past several weeks have centered on additional spending proposals from the House of Representatives and the Senate.

On February 29, 2008, the Bush Administration sent a letter to the House and Senate Agriculture Committees in which it proposed a list of offsets and policy changes it could accept in return for a House-proposed USD 10 billion increase over the current baseline for the Farm Bill. The Administration's proposals include 13 offsets totaling USD 22 billion, including USD 3.6 billion by recovering unemployment insurance overpayments, USD 3.7 billion by allowing more health plan choices for federal employees, USD 4.3 billion by extending a Web-based Medicaid demonstration project, and USD 6.8 billion by ending overpayments to Medicare recipients who use oxygen. The letter also states that President Bush's approval for the increase in spending is contingent on stricter limits on farm subsidies. According to the letter, the Bush Administration rejects a House provision in the Farm Bill that would end farm subsidies for any agricultural producers who earn more than USD 1 million a year; the Bush Administration would like to see the cap reduced to USD 500,000. The Administration is also demanding that members of Congress include language in the Farm Bill ending planting restrictions (current law prevents farmers who collect government subsidies from also planting fruits and vegetables on their subsidized land, which has the effect of keeping produce prices high) and remove language in the House and Senate versions of the Farm Bill that would allow excess sugar to be used for ethanol.

On March 5, 2008, Democratic and Republican Senate Finance Committee members who also serve as Farm Bill conferees agreed to a USD 12 billion package of offsets to offer the House of Representatives and the Bush Administration. The package would include USD 8 billion in spending cuts and USD 4 billion in revenue raisers. Congressional sources note that it is unclear how the suggested USD 12 billion finance package will fit with the House-proposed USD 10 billion increase. The Senate package includes several of the offsets proposed by the Administration in its February 29 letter except for the USD 6.8 billion offset that would end overpayments to Medicare recipients who use oxygen.

On March 6, Senate Agriculture Committee Chairman Tom Harkin (D-IA), Senate Agriculture Committee Ranking Member Saxby Chambliss (R-GA), House Agriculture Committee Chairman Collin Peterson (D-MN), and House Agriculture Committee Ranking Member Bob Goodlatte (R-VA) met to discuss the Administration and Congressional offset proposals. Congressional sources note that the discussions did not provide any forward movement on the Farm Bill. Following the meeting, Chairman Peterson stated that the Farm Bill conference is "moving forward without a lot of fanfare."

Members of Congress have been working against a mid-March deadline in achieving a final 2008 Farm Bill. The 2002 omnibus Farm Bill (P.L. 107-171) included a wide range of program authorities, both

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mandatory and discretionary. The mandatory commodity support programs authorized in the 2002 Farm Bill cover the 2007 crops. As noted, although though many provisions of the 2002 Farm Bill expired on September 30, 2007, the subsidized crops harvested in calendar year 2007 are still covered by the 2002 Farm Bill and several provisions of the 2002 Farm Bill do not expire until March 15, 2008. If members of Congress do not complete a 2008 Farm Bill (and do not extend the 2002 Farm Bill) before March 15, then the non-expiring provisions of the Agriculture Adjustment Act of 1938 and the Agriculture Act of 1949 take effect. Provisions of these permanent laws are temporarily superseded by each new Farm Bill; absent a Farm Bill, however, provisions under this permanent authority will apply. The commodity support provisions of the Agriculture Adjustment Act of 1938 and the Agriculture Act of 1949 are very different from current agriculture policy. According to the government reports, the Agriculture Adjustment Act of 1938 and the Agriculture Act of 1949 are "inconsistent with today's farming, marketing, and trade practices, as well as costly to the federal government . . . [and] Congress is unlikely to let permanent law take effect." Permanent law provides mandatory support for basic crops through non-recourse loans without the option of settling the loan obligations at posted county prices. Non-recourse loan rates could be as high as 90 percent of parity, and not less than 75 percent of parity for peanuts, 65 percent of parity for cotton, and 50 percent of parity for wheat and corn.[3] The only settlement options would be forfeiture of the commodities used as loan collateral or full repayment of the loans. Permanent law does not authorize counter-cyclical payments or decoupled direct payments. Acreage allotments and marketing quotas under the Agriculture Adjustment Act of 1938 and the Agriculture Act of 1949 could be implemented for wheat and cotton, and dairy support would be between 75 percent and 90 percent of parity. Support for rice and soybeans are not mandatory under the Agriculture Adjustment Act of 1938 and the Agriculture Act of 1949. Consequently, members of Congress have received additional pressure from agricultural producers that would not like to see the Agriculture Adjustment Act of 1938 and the Agriculture Act of 1949 take effect, and are thus working to achieve a final 2008 Farm Bill before the permanent laws take effect.

On March 12, 2008, however, the Senate and the House of Representatives passed a bill (S. 2745) to extend agricultural programs under the 2002 Farm Bill beyond March 15, 2008. S. 2745 extends the 2002 Farm Bill until April 18, 2008. Members of Congress are hoping that the month-long extension provides legislators with enough time to complete conference negotiations on the 2008 Farm Bill. As noted, those talks are stalled over proposed offsets that would allow an additional USD 10 billion in new spending over the current USD 280 billion Farm Bill baseline.

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The March 12 approval of the month-long extension is the second time Congress has enacted an extension it began Farm Bill negotiations in 2007. On December 14, 2007, the Senate passed its version of 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 Farm Bill on July 27, 2007. The majority of the 2002 Farm Bill's provisions expired on September 30, 2007, and in December 2007, Congress renewed provisions of the 2002 Farm Bill for an additional three months (i.e., until March 15, 2008) in order to allow enough time for Senate and House negotiators to hammer out differences between the two versions of the Farm Bill.

On March 13, 2008, President Bush indicated that he would sign S. 2745 into law, thus extending provisions of the 2002 Farm Bill until April 18, 2008. The President noted, however, that if members of Congress cannot achieve a final 2008 Farm Bill by April 18, he will ask Congress to pass a one-year extension of the 2002 Farm Bill. President Bush stated that a one-year extension of the 2002 Farm Bill is not a desirable outcome and he noted that "the government has a responsibility to provide America's farmers and ranchers with a timely and predictable farm program — not multiple short-term extensions of current law."

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Petitions and Investigations

Petitions and Investigations Highlights

337 Complaint on Composite Wear Components

The following 337 Complaint was filed at the International Trade Commission on March 24, 2008:

Docket No: 2609

Document Type: 337 Complaint

Filed By: John J. Gresens

Firm/Org: Vedder Price P.C.

Behalf Of: Magotteaux International S/A and Magotteaux, Inc.

Date Received: March 24, 2008

Confidential: Yes

Commodity: Composite Wear Components

Country: None

Description: Letter to Marilyn R. Abbott, Secretary, USITC; requesting that the Commission conduct an investigation under section 337 of the Tariff Act of 1930, as amended regarding Certain Composite Wear Components and Products Containing Same. The proposed respondents are: AIA Engineering Limited, Gujarat, India; Vega Industries, Brentwood, Tennessee and F.A.R. Fonderie Acciaierie Roiale S.p.A., Udine, Italy

Status: Pending Institution

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731 Petition on 1-Hydroxyethylidene-1, 1-diphosphonic Acid from China and India

The following 731 Petition was filed at the International Trade Commission on March 19, 2008:

Docket No: 2608

Document Type: 731 Petition

Filed By: Brian K. Failon

Firm/Org: Compass Chemical International LLC

Behalf Of: Compass Chemical International LLC

Date Received: March 19, 2008

Confidential: Yes

Commodity: 1-Hydroxyethylidene-1, 1-diphosphonic acid

Country: People's Republic of China and India

Description: Letter to Marilyn R. Abbott, Secretary, USITC; requesting that the Commission conduct an investigation under section 731 of the Tariff Act of 1930, as amended regarding the antidumping duties being imposed on1-Hydroxyethylidene-1, 1-diphosphonic acid from the People's Republic of China and Republic of India.

Status: Pending Institution

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731 Petition on Frontseating Service Valves from China

The following 731 Petition was filed at the International Trade Commission on March 19, 2008:

Docket No: 2607

Document Type: 731 Petition

Filed By: Donald R. Dinan

Firm/Org: Roetzel & Andress, LPA

Behalf Of: Parker-Hannifin Corporation

Date Received: March 19, 2008

Confidential: Yes

Commodity: Frontseating Service Valves

Country: People's Republic of China

Description: Letter to Marilyn R. Abbott, Secretary, USITC; requesting that the Commission conduct an investigation under section 731 of the Tariff Act of 1930, as amended regarding antidumping duties being imposed on Frontseating Service Valves from the People's Republic of China.

Status: Pending Institution

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337 Complaint on Cigarettes and Packaging

The following 337 Complaint was filed at the International Trade Commission on March 5, 2008:

Docket No: 2606

Document Type: 337 Complaint

Filed By: Kenneth L. Chernof

Firm/Org: Heller, Ehrman LLP

Behalf Of: Philip Morris USA Inc.

Date Received: March 5, 2008

Confidential: Yes

Commodity: Cigarettes and Packaging

Country: None

Description: Letter to Marilyn R. Abbott, Secretary, USITC; requesting that the Commission conduct an investigation under section 337 of the Tariff Act of 1930, as amended regarding certain Cigarettes and Packaging Thereof. The proposed respondents are: All-cigarettes-brands.com, Bahamas; All-discount-cigarettes.com, Russia; Asiadfs.com, Singapore; Cheapcigarettes4all.com, Ukraine; Cigarettesonlineshop.com, Virginia; Cigline.net, Moldova; Cigoutlet.biz, Moldova; Dirtcheapbutts.com, Virginia; Galastore.com, Kyrgyztan; k2smokes.ch, Switzerland; Save-on-cigarettes.com, Ukraine; Shopping-heaven.com, Marshall Islands and Smokerjim.net, Canada.

Status: Pending Institution

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731 Petition on Steel Thread Rod from China

The following 731 Petition was filed at the International Trade Commission on March 5, 2008:

Docket No: 2605

Document Type: 731 Petition

Filed By: Frederick P. Waite

Firm/Org: Vorys, Sater, Seymour and Pease LLP

Behalf Of: Vulcan Threaded Products Inc.

Date Received: March 5, 2008

Confidential: Yes

Commodity: Steel Threaded Rod

Country: People's Republic of China

Description: Letter to Marilyn R. Abbott, Secretary, USITC; requesting that the Commission conduct an investigation under section 731 of the Tariff Act of 1930, as amended regarding the imposition of antidumping duties of certain Steel Threaded Rod from the People's Republic of China.

Status: Pending Institution

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Multilateral

WTO Panel Report: United States - Shrimp from Thailand (DS343)

Summary

Decision: A WTO Panel has ruled that the United States breached the Anti-Dumping Agreement when it applied a bond requirement in the anti-dumping investigation on shrimp from Thailand. The Panel similarly ruled against the use of "zeroing," although this latter claim was uncontested by the United States.

Significance of Decision / Commentary: This Panel in this important case found that the application by the United States of the so-called "enhanced continuous bond requirement" (the "EBR") was WTO-inconsistent. However, the Panel's ruling rests on narrow grounds, and raises the possibility that the United States could try to preserve the EBR by providing better justification for its use.

Under the US retrospective duty assessment system, definitive anti-dumping duties are not assessed at the time of entry into the United States of a good subject to an anti-dumping order. Instead, a cash deposit is required, and the definitive duties are determined during the annual administrative reviews of the order conducted by the US Department of Commerce (USDOC). In some cases, the definitive duties may be significantly higher than the cash deposits. The EBR was adopted in 2004 as a way for the US government to try to ensure that it would receive full payment for the duties in the event that final assessed margins were higher than the deposit rates.

In response to Thailand's challenge to the WTO-consistency of the use of the EBR, the United States invoked a relatively obscure interpretive Note from GATT Article VI that provides that WTO Members "may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization."

Significantly, the Panel rejected a series of arguments raised by Thailand against the US reliance on this interpretive Note. Thailand asserted that the Note could not be applied independently of the Anti-Dumping Agreement, or, if it could, it was limited to provisional measures taken prior to the imposition of the order. The Panel dismissed both of these arguments and ruled that the Note authorized the imposition of security requirements during the period following the imposition of a US anti-dumping order.

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The US defense in this particular case ultimately foundered on the Note's requirement that the security bond had to be "reasonable." The Panel found that there would only be an appropriate basis for increased security if a Member "properly determined" that the rates of dumping were likely to increase, such that the cash deposits would be insufficient. The United States provided no evidence to support such a determination, other than asserting that, historically, "anti-dumping rates increased 33 per cent of the time in agriculture/aquaculture cases." The Panel ruled that such historical and generalized data was not sufficient to demonstrate that all rates for shrimp were likely to increase. Accordingly, the application of the EBR was found to be WTO-inconsistent in this case.

While the application of the EBR in the shrimp investigation breached the Agreement, the narrow basis of this ruling leaves open the possibility that the United States could apply this law in future investigations. Rather than relying on the type of general, historical data found to be insufficient in this case, the USDOC could put forward evidence in future investigations to support a "proper determination" that such a security requirement is reasonable, given the likely increase in dumping margins and the corresponding risk of default. The Panel provided little guidance on the type or weight of evidence that could support such a determination, and so the full parameters of the interpretive Note may have to await a future case.

To date the EBR has only been applied to shrimp, and the United States did not contest Thailand's assertion that the dumping rates "only increased for a very small proportion of shrimp imports from Thailand." Yet, unless reversed on appeal, the EBR might remain a viable option for use by the USDOC in future investigations involving other products.

Analysis

A. Background: the challenged measures

The EBR was adopted by US Customs in 2004 as part of its "continued vigilance…to ensure collection of all appropriate anti-dumping and countervailing duties." In 2005, US Customs implemented the EBR with respect to imports of certain shrimp that were subject to anti-dumping duties. Following the application of the EBR, shrimp importers faced significantly higher security obligations to enter their goods into the United States. Shrimp is the only category of merchandise that has been made subject to the EBR.

The United States argued that the EBR, in conjunction with cash deposits, was necessary to ensure the payment of anti-dumping or countervailing duties under its retrospective duty assessment system. The United States claimed that the EBR attempted to ensure full collection of the anti-dumping duties by securing against the possibility that the margin of dumping could increase from the time of the

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investigation until the calculation of the final duty liability during the administrative review, and that importers could default on payment of the increased duties.

B. Zeroing: Thailand's claims uncontested

The United States did not contest Thailand's zeroing claims. The Panel concluded that the issues raised by Thailand were "identical in all material respects" to those addressed by the Appellate Body in its 2004 ruling in US – Softwood Lumber V (i.e., weighted average to weighted average comparisons in investigations). The Panel ruled that the use of zeroing by the USDOC breached US obligations under Article 2.4.2 of the Anti-Dumping Agreement because the USDOC did not calculate dumping margins on the basis of the "product as a whole."

C. The Enhanced Bond Requirement

EBR constitutes a "specific action against dumping"

Article 18.1 of the Anti-Dumping Agreement provides that "No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement." Thailand argued that the application of the EBR to shrimp from Thailand was a "specific action against dumping" that was not permitted under the GATT and the Anti-Dumping Agreement.

Applying the jurisprudence of the Appellate Body in US – 1916 Act and US – Offset Act (Byrd Amendment), the Panel agreed that the EBR was a "specific action against dumping." It found that the "constituent elements of dumping" were "implicit in the express conditions for the application of the EBR", since the EBR may be applied only to goods subject to a US anti-dumping order. It found that "[e]ven though the application of the EBR might ultimately be triggered by a risk of non-collection, the fact remains that the EBR is only applied in respect of imports subject to anti-dumping (or countervailing duty) orders."

Having determined that the EBR constituted a "specific action against dumping", the Panel next considered whether it was applied "in accordance with" the GATT 1994 and the Anti-Dumping Agreement.

GATT Note authorizes imposition of security requirements

The United States argued that the EBR could be considered to be applied in accordance with the GATT and the Anti-Dumping Agreement because it was consistent with one of the interpretive notes to the GATT, i.e., the so-called Note Ad Article VI. This provision states in part as follows:

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> As in many other cases in customs administration, a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization.

Thailand argued that GATT Article VI, including this Ad Note, could not be applied independently of the Anti-Dumping Agreement, i.e., that it could not provide an independent basis for taking specific action against dumping outside of the provisions of the Anti-Dumping Agreement. The Panel rejected the notion that the Anti-Dumping Agreement had "superseded" or "rendered superfluous" GATT Article VI, including its Ad Note. It concluded that the Ad Note "may permit responses to dumping in the form of particular security requirements" provided that they met the substantive requirements of this provision.

The Panel similarly rejected Thailand's argument regarding the "temporal scope" of the Ad Note. Thailand argued that the posting of a bond or security under this provision "pending final determination of the facts in any case of suspected dumping" meant that the Ad Note was limited to provisional measures taken prior to the imposition of the anti-dumping order. The Panel accepted the US view that under the Ad Note, "suspicion of dumping may last until a final determination of dumping is made in the assessment review…." The Panel reasoned that "the final determination (of the existence and amount) of dumping is only made in respect of imports entering the United States following imposition of the anti-dumping order when an assessment review is undertaken."

As a "contextual consideration", the Panel also indicated that it was not persuaded by Thailand's argument that cash deposits had to be considered as anti-dumping duties. It stated that "the ability of Members to require security such as cash deposits pending final assessment is an essential requirement for the operation of a retrospective assessment system."

The Panel thus concluded that the application of the EBR fell within the temporal scope of the Ad Note, in that the Ad Note "authorizes the imposition of security requirements during the period following the imposition of a US anti-dumping order."

The Panel also said that it saw nothing in the Ad Note to suggest that the form of security had to be either cash deposits or bonds, but not both. Accordingly, it found that "the United States is entitled to impose security requirements combining both cash deposits and bonds."

Application of the EBR did not result in "reasonable" security requirements

The Panel then considered whether the security requirements established by the EBR in this case were "reasonable" within the meaning of the Ad Note.

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The Panel recalled that while the cash deposits were designed to secure the rate of duty established in the anti-dumping order, the EBR was applied to secure against increases in the rate of dumping over and above that established in the order. It said that the application of the EBR increased the level of security beyond the rate of dumping established in the anti-dumping order, and that by virtue of the "reasonableness" requirement in the Ad Note, "such increased security would only be permitted if there were some other basis which renders it reasonable in a particular case."

The Panel considered that "there would only be an appropriate basis for such increased security if a Member properly determined that the rates of dumping provided for in the anti-dumping order were likely to increase (such that the cash deposits provided for in the anti-dumping order would not provide sufficient security for the relevant case of suspected dumping)." It added that the Member would also need to determine the likely amount of such increase, "in order to ensure that the amount of the additional security requirement is not greatly more than the amount by which the final dumping liability would likely exceed the dumping liability established as a result of the anti-dumping order." Only then, in the view of the Panel, could a Member "demonstrate that the additional security properly and reasonably relates to an established case of suspected dumping, consistent with the requirements of the Ad Note."

Applying these principles to the facts of the present case, the Panel noted that the United States asserted that US Customs used historical data to determine that anti-dumping rates increased 33 per cent of the time in agriculture/aquaculture cases. However, the United States did not submit any documentary evidence in support of this assertion. The Panel found that in the absence of such evidence, it was "impossible to assess the rigour of the United States' analysis." In any event, the Panel said that it was "not persuaded that an objective and impartial investigating authority could properly conclude that rates of dumping for subject shrimp were likely to increase on the basis of a finding that, historically, rates only increased in one third of agriculture/aquaculture cases generally." The Panel concluded that a "finding that, historically, rates have increased 33 per cent of the time in respect of agriculture/aquaculture cases generally is not sufficient, in our view, to demonstrate that all rates for subject shrimp (in respect of all imports, from all sources) are likely to increase." The Panel found that Thailand had demonstrated – and the United States did not dispute – that rates "only increased for a very small proportion of shrimp imports from Thailand."

For these reasons, the Panel concluded that the United States failed to demonstrate that the additional security required through the application of the EBR "reasonably correlated to any case of suspected dumping in excess of the margin of dumping provided for in the anti-dumping order." It found that the additional security requirements resulting from the application of the EBR were not "reasonable" within

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the meaning of the Ad Note. It therefore ruled that the application of the EBR breached Article 18.1 of the Anti-Dumping Agreement, as it constituted a specific action against dumping that was not in accordance with the GATT, as interpreted by the Anti-Dumping Agreement.

US "necessity" defense rejected

GATT Article XX(d) permits WTO Members, in certain circumstances, to take measures "necessary to secure compliance" with GATT-consistent laws or regulations. The United States invoked this provision to argue that the EBR was necessary to secure compliance with US laws governing the assessment of anti-dumping duties. The Panel rejected this defense. It recalled that additional security requirements resulting from the application of the EBR were not "reasonable" within the meaning of the Ad Note. The Panel found that "without adequately establishing that anti-dumping duties are likely to increase above the cash deposit rates, it does not logically follow that a security is necessary within the meaning of Article XX(d) of the GATT 1994. Given that the likelihood of increased anti-dumping duties has not been properly established by the United States, we do not see the need to impose the EBR to secure against such an outcome [original emphasis]."

The decision of the WTO Panel in *United States – Measures Relating to Shrimp from Thailand* (DS 343) was released on February 29, 2008.

Note: The same three panelists issued a parallel, although not entirely identical, report in a case brought by India. One difference between the two reports was India's claim that the US laws authorizing the imposition of the EBR were WTO-inconsistent as such. The Panel rejected this claim.

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Multilateral Highlights

United States, Japan Agree to DSB Procedures in "Zeroing" Dispute

On March 12, 2008, the United States and Japan notified World Trade Organization (WTO) Members that they have reached a procedural agreement on how to address Japan's claim that the United States failed to comply with a WTO dispute ruling regarding the use of "zeroing" methodology in antidumping investigations (DS322). Under the agreement, Japan does not need to request consultations with the United States before requesting the establishment of a compliance panel under Article 21.5 of the Dispute Settlement Understanding (DSU). However, if Japan seeks consultations, the parties will hold consultations within 12 days of Japan's request. The United States further agreed to accept Japan's request for the establishment of an Article 21.5 panel at the first WTO Dispute Settlement Body (DSB) meeting for which Japan's request appears on the agenda (the next regularly-scheduled DSB meeting is on April 18, 2008). Once the DSB establishes a compliance panel, the United States and Japan have committed to "cooperate to enable" the panel to circulate its report within 90 days. Either party may then seek DSB adoption of the compliance panel report at least 20 days after its circulation to Members, unless either party appeals the report. In the event of an appeal, the United States and Japan agreed to cooperate to enable an Appellate Body (AB) ruling within 90 from the date the appeal is filed.

On January 9, 2007, the WTO AB released its decision in *United States – Measures Relating to Zeroing and Sunset Reviews* (DS322) and found that the practice of zeroing violates US obligations under the WTO Anti-Dumping Agreement. In 2006, a WTO Panel had decided that certain types of zeroing – including zeroing during administrative reviews – were permitted under the Agreement. The AB reversed these findings by the Panel, ruling that all of the types of US zeroing challenged by Japan were WTO-inconsistent. The AB also ruled that zeroing is illegal whether an average-to-average or transaction-to-transaction comparison is used.

Zeroing refers to the practice whereby an investigating authority discounts the so-called "negative dumping margins" to zero. Where 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 the export price of the product is higher than the price in the exporting country and zeroing is used, investigating authorities do not give any credit for negative dumping margins. 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 maintenance of antidumping duties which may not otherwise apply.

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To date, Japan has requested the WTO for the right to suspend tariff concessions and impose additional import duties above bound custom duties on certain US products for the United States' failure to comply with the January 2007 DSB rulings. Japan stated in its retaliatory request that the additional duties it intends to impose "will be equivalent to the level of the nullification or impairment [in] any given year [wherein] the level of the nullification or impairment is (a) the total amount of the anti-dumping duties illegally determined, and interest thereon ("excess duties"), plus (b) the annual value of Japan's lost exports to the United States ("trade effects")." The United States, meanwhile, argues that it has complied with the AB decision through its elimination of average-to-average zeroing in original investigations. In response to an earlier adverse WTO ruling, on January 23, 2007, the US Department of Commerce (DOC) announced that it would institute a change to its zeroing methodology effective February 22, 2007. The change was necessary to implement the recommendations and rulings of the DSB in connection with the US-EU dispute *US – Zeroing (EC)* (DS294). According to DOC, when calculating the weighted-average dumping margin in antidumping investigations, the Department no longer disregards negative dumping margins in antidumping investigations where it uses weighted average to weighted average comparisons.

United States, EU File Separate Consultation Requests with China on Financial Information Services

On March 3, 2008, the United States and the EU submitted separate requests for consultations to the World Trade Organization (WTO) Dispute Settlement Body (DSB) and to China's WTO delegation regarding a number of measures the Chinese government has enacted to govern the distribution of financial information services. In their requests, the United States and the EU allege that measures governing the distribution and provision of financial information violate China's WTO commitments.

On September 10, 2006, the Chinese government via the state-owned Xinhua News Agency issued the Measures for Administering the Release of News and Information in China by Foreign News Agencies ("the 2006 Measures"). These measures govern the release of text, graphic, photographic and other forms of news or information by foreign news agencies in China, including financial news providers. In combination with other regulations, the 2006 Measures restrict foreign news agencies' business practices by:

- obligating foreign news agencies to meet a series of requirements before they may apply to distribute news and information in China. Upon meeting the requirements, the agencies must submit a written application to Xinhua for approval.

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- prohibiting foreign news agencies from directly soliciting subscriptions of news and information services.
- prohibiting subscribers to foreign news agencies from directly subscribing to, editing or publishing news or information released by a foreign news agency.
- requiring instead that foreign news agencies and their subscribers sign distribution or subscription agreements with a "designated entity", which is subject to Xinhua's approval. Foreign news agencies and the designated entity acting as their agent must submit annual reports to Xinhua detailing their operational activities.
- prohibiting news agencies or designated entities that fail to pass this annual examination and inspection from continuing to release news and information.

As a result, the 2006 Measures established designated entities as intermediaries between foreign news agencies and their subscribers and established Xinhua as the sole regulatory and approval agency for both foreign news agencies and their designated entities. Following the 2006 Measures' release, Xinhua appointed an affiliate, the China Information Economic Service (CIES) as the first, and thus far the only, designated entity.

Although filed separately, the US and EU consultation requests exhibit only minor differences. Both requests allege that the 2006 Measures and a number of other related measures (hereafter, collectively "the subject measures") violate China's commitments under its WTO Accession Protocol and under the General Agreement on Trade in Services (GATS). The EU request further alleges that the subject measures appear to violate a commitment under the Trade-Related Aspects of Intellectual Property Agreement ("TRIPs Agreement"). Key points of the requests include the following assertions:

- According to both requests, because Xinhua is also a provider of news and information services, its designation as a regulator of foreign news services appears to violate China's Accession Protocol, which establishes "independence of the regulatory authorities from the service suppliers."
- Both requests allege that the subject measures violate GATS Article XVII on national treatment. The US request notes that information disclosure requirements under the license renewal process appear to grant less favorable treatment to foreign news services than to their domestic competitors, which are not subject to the requirements.
- Both requests allege that the subject measures appear to violate a "standstill" commitment under China's GATS services schedule. This commitment prohibits China from making more restrictive the

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conditions of ownership, operation, or scope of activities for existing services suppliers than they were at the time of China's WTO accession.

- Both requests allege that China's restriction on foreign financial information providers' ability to establish a legal presence other than a limited representative office violates GATS Article XVI 2(e) that prevents measures "which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service" unless otherwise specified in a Member's services schedule.

Under the WTO's dispute settlement procedure, China, the EU and the United States must first attempt to resolve the matter through consultation and discussion; the parties have 30 days from the date that the requests for consultations were filed. Sixty days after the requests for consultations were filed, the EU and the United States may request that the DSB form a Panel to review the facts of the dispute if they were unable to resolve the matter with China through consultations. WTO rules allow China to block the Panel's formation on the first request; however, the EU and United States may make a second request to the DSB, which China cannot block, during the body's next meeting. Typically within six months of its establishment, the Panel will issue its final determination to the Parties involved in the dispute. If no Party to the dispute appeals the determination within 60 days, the DSB adopts the determination. Should the dispute reach this stage, however, the losing Party or Parties would likely appeal.

The requests mark the sixth dispute filed against China in the WTO since its accession in 2001. The United States has been a complainant in all six cases, and the EU has been a complainant in two. In concert with the increase in WTO activity against China, both Members also have enhanced bilateral engagement efforts with China through regular dialogues and summits. These two trends suggest a maturation of Europe's and the United States' relationships with China and a greater normalization of China's role as a responsible WTO Member.

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