WHITE & CASE

October 2008

Japan External Trade Organization

WTO and Regional Trade Agreements Monthly Report

IN THIS ISSUE

Table of Contents

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

Summary of Reports

United States

AEI Hosts Panel Discussion on US Trade Policy Under New Administration

On October 23, 2008, the American Enterprise Institute (AEI) hosted a panel discussion titled "Beyond November: Trade Policy." Invited panelists discussed US trade policy under a new Presidential Administration and the Presidential candidates' stances on trade, in addition to the role the global financial crisis plays in affecting US trade policy. We review herein their discussion.

WIIT Explores Presidential Candidates' Trade Policies with Campaign Advisors

On October 27, 2008, Women in International Trade (WIIT) held an **on-the-record** discussion on "US Trade Policy Under a New Administration" with trade policy advisors to the Presidential candidates' campaigns. The invited speakers included **Scott Lincicome**, Trade Policy Advisor to Sen. John McCain (R-AZ) and an International Trade Attorney at White & Case LLP, and **Dr. Lael Brainard**, Trade Policy Advisor to Sen. Barack Obama (D-IL) and vice president and director of Global Economy and Development at the Brookings Institution. Both speakers discussed the Presidential candidates' trade policy and stances with respect to the World Trade Organization (WTO), free trade agreements (FTAs) and other US trade initiatives. We review herein their discussion.

United States Highlights

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

- President Signs GSP, ATPA Extension But Provides Shorter Extension, Conditions for Bolivia, Ecuador
- CAFC Limits/Clarifies ITC's Downstream Remedies
- House Energy and Commerce Committee Unveils Draft Climate Change Legislation; Bill to Provide Starting Point for Debate in 2009

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701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

Free Trade Agreements

Free Trade Agreements Highlights

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

- US Officials Signal That More Countries Might Join Trans-Pacific FTA Negotiations
- Presidential Candidates Discuss Pending US-Colombia FTA, NAFTA During Debate
- Officials Meet Under US-Singapore FTA Review
- US, Brazil Trade Officials Discuss Bilateral Agenda

Customs

Lacey Act Amendments Require New Importer Declaration, Compliance with New Regulations

This report reviews amendments to the Lacey Act as implemented through the passage of the Food, Conservation, and Energy Act of 2008 (P.L. 110-246). In general, the Lacey Act makes it unlawful to import, export, transport, sell, receive, acquire or purchase any fish, wildlife or wild plants taken, possessed, transported, or sold in violation of state, federal, Native American tribal, or foreign laws or regulations that are related to fish, wildlife, or wild plants. Recent amendments to the Lacey Act, however, could have an impact on companies involved in the commerce of plants and other materials covered by the Lacey Act. We analyze herein those potential impacts.

Customs Highlights

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

- CBP Unveils Trade Facilitation Strategy for 2009-2013
- CBP Reopens Comment Period on Proposed Rule Regarding "Codified" Method to Determine Country of Origin of Imported Goods; Comments Due December

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

Multilateral

US Chamber of Commerce Explores Future of WTO, Doha Round

On October 6, 2008, the US Chamber of Commerce hosted a public conference exploring the future of the World Trade Organization (WTO) and the WTO Doha Round. Invited panelists – including government officials and representatives from the private sector – provided their views on whether WTO Members remain committed to concluding the Doha Development Round in the short term, and on the future of the WTO as a multilateral organization. We review below the panel discussions.

WTO to Discuss Impact of Global Credit Crisis on Trade Finance

The Director General of the World Trade Organization (WTO) has convened a meeting of major non-governmental and private sector financial institutions on November 12, 2008 to discuss the effects of the financial crisis on the availability and cost of trade finance. The WTO has no direct regulatory authority over trade finance, and the meeting is unlikely to result in any immediate action. Nonetheless, the Director General's action illustrates the concern that the financial crisis could affect trade flows and disproportionately harm developing countries.

WTO Appellate Body Releases Decision in United States-Continued Suspension of Obligations in the EC-Hormones Dispute (DS320)

Decision: The World Trade Organization (WTO) Appellate Body has largely overturned the findings of a Panel in an EC challenge to the application of retaliatory trade sanctions by the United States. The sanctions were imposed in 1999 after the WTO ruled that an EC ban on imported-treated beef violated the Agreement on the Application of Sanitary and Phytosanitary Measures (the "SPS Agreement"). On March 31, 2008, the Panel had ruled that the United States violated its procedural obligations under the WTO Dispute Settlement Understanding (DSU) by continuing to impose sanctions after the EC claimed to have complied with its WTO obligations, a finding reversed by the Appellate Body. The Panel had also found that the new EC measures did not meet the requirements of the SPS Agreement. The Appellate Body similarly overturned that finding, but then declined to make any findings itself whether or not the EC ban was WTO-consistent.

Multilateral Highlights

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

- Mexico Requests WTO Consultations with the United States Regarding US Dolphin Safe Labeling Requirements

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

Reports in Detail

United States

AEI Hosts Panel Discussion on US Trade Policy Under New Administration

Summary

On October 23, 2008, the American Enterprise Institute (AEI) hosted a panel discussion titled "Beyond November: Trade Policy." Invited panelists discussed US trade policy under a new Presidential Administration and the Presidential candidates' stances on trade, in addition to the role the global financial crisis plays in affecting US trade policy. We review herein their discussion.

Analysis

On October 23, 2008, AEI hosted a panel discussion on US trade policy under a new Presidential Administration and the Presidential candidates' stances on trade. **AEI resident scholar Claude Barfield** served as the moderator for the panel discussion, and in introducing the panelists, asked each participant to discuss their views on the direction US trade policy will take in the next four years, and whether the next Administration can accomplish new trade initiatives.

- **National Journal columnist Bruce Stokes** provided an overview of the trade issues that have risen during the Presidential race, and he stated that the next President will "inherit . . . Americans that are in a sour mood about trade." He opined that although trade is an important issue, the Presidential candidates only devoted one percent of their advertisements during the primaries to trade and globalization issues, and he noted that trade did not emerge as a major topic during the Presidential debates. According to Stokes, Sen. John McCain (R-AZ) is an "unabashed free-trader" and under a President McCain, the Office of the United States Trade Representative (USTR) would have more freedom to pursue new trade initiatives. Stokes opined that although Sen. Barack Obama (D-IL) has made several "protectionist" statements regarding US trade, he may not be as anti-trade and protectionist as he is perceived. According to Stokes, there will likely be a "time-out" on trade under either Presidential Administration because of several different circumstances, including a Congressional agenda that is "too full for trade issues"; a Democratic majority in Congress that will

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

"prove difficult for a President McCain and tricky for a President Obama"; a World Trade Organization (WTO) Doha Round that will likely "drag" into 2010; and the lack of Trade Promotion Authority (TPA).

- **AEI resident scholar Philip Levy** (who also serves as an advisor on trade issues for the McCain campaign) posed the question whether trade still matters and he opined that trade remains an important issue because the international trade support system "is not as strong as people believe." He stated that the global trade system is riddled with competing tensions, and he noted that the current state of global finances could increase the risk of protectionist policy responses, which in turn could negatively affect global trade even more. When asked if the next President can achieve anything new with US trade policy, Levy opined that the next President could shift focus to a new direction, and explore new trade initiatives, such as creating "safety nets" to respond to the effects of globalization or exploring trade-environmental linkages and initiatives. In closing, Levy opined that the next Administration will increasingly find itself under pressure to use trade as an effective policy tool.

- **Former USTR General Counsel Ira Shapiro** (currently at Greenberg Traurig LLP) stated that US trade policy is operating under the shadow of a serious economic crisis and he opined that US trade is at a critical juncture. According to Shapiro, "the crisis in trade" began occurring before the global financial crisis, and he noted that although there was a good continuity of US trade policy initiatives between the Clinton Administration and the Bush Administration, there are now more negative views on trade. Shapiro stated that the new President must balance US economic interests with the competitive trade strategies of other countries, and in doing so, must no longer use the US "free trade template" and instead act more proactively in searching for new trade opportunities. He stated that the next President must also rebuild the US economy in order to successfully use free trade initiatives as a complement to the US economy. Shapiro opined that the next President will undergo a necessary and "lengthy consultation process" with the Democratic-led Congress on trade issues because Congress' support and approval of trade initiatives will be necessary for the Administration. He added that US trade policy may undergo a thorough review over the next several years. According to Shapiro, the next President must place a new emphasis on US-Asian trade relations, must consider free trade agreements (FTAs) with other high-wage countries, must "take a new look at the Doha Round," and must consider climate-change issues and trade rules.

- **Cato Institute Trade Analyst Sallie James** stated that the media is partly to blame for current "trade antipathy." She opined that although Sen. McCain is considered a free-trader, he has had a "slight wavering" recently on trade and has slightly shifted to statements that indicate that protection of US

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

manufacturers is important. She added that Sen. Obama, however, rarely votes to reduce or eliminate subsidies and trade tariffs. James stated that the Democratic Congress will influence the next Administration's trade decisions and she noted that a policy of "getting tough on China" may not play as large a role during the next Administration because of other concerns that may supersede it, including responses to the financial crisis. She opined that over the next four years, not much "good" will come out of US trade policy because US trade policy will likely be at a standstill. She added, however, that the make-up and composition of the Office of the USTR may be different under the next Administration because there may be more of a focus on trade enforcement and litigation.

- **American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) Trade Specialist Thea Lee** stated that the big issue is how unpopular trade policy has become, and she opined that US trade policy is not working for a majority of Americans. She pointed to the US deficit and stated that the United States cannot rebuild its economy under this scenario. Lee stated that the United States is experiencing "steadily eroding real wages" which translates to a loss of benefits for US workers. She opined that she is enthusiastic with a Obama Administration because he will likely address all the issues she described above. According to Lee, under a President Obama, there will be a "change in course" and he will receive support from the Democratic Congress. She stated that Sen. Obama's vision encompasses domestic and international policy responses, and she opined that he will likely begin with domestic policy prescriptions in addressing the current state of the US economy which can then "unlock any movement on the international front." She opined that a President McCain would be unable to achieve any forward movement on trade because he will not receive support from the Democratic Congress and would not be able to rely on TPA; thus, a President McCain would be unlikely to move the pending US FTAs with Colombia, Korea and Panama forward, and would be unlikely to initiate any new FTA negotiations. In closing, Lee stated that the new President must also focus on China and the US trade deficit with China, labor and environmental rights, climate change issues, other countries' currency policies, and the demands of US workers.

Outlook

Although the panelists offered different predictions for the direction US trade policy would take over the next several years, they seemed to agree on several common themes, among them that: (i) the global financial crisis will affect US trade policy; (ii) the Democratic-led Congress will play a large role in the direction of US trade policy over the next several years; and (iii) US trade policy will likely be at a "standstill" or will move forward at a slow pace over the next several years. These three factors will

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

certainly influence the trade decisions of the next President, albeit in different ways. On the financial crisis, Sens. McCain and Obama offer differing solutions (domestic and international); their responses to the economic situation will affect how much focus and political capital they can devote to new trade initiatives. On the Democratic majority in Congress, a President McCain may find it more difficult to obtain support from legislators for new trade initiatives, and his free-trade stance may be tempered by the Democrats' focus on other issues and by the lack of TPA. President Obama may also find it difficult to achieve any new trade initiatives with the Democratic Congress because he has to balance his "internationalist" attitude with Democratic concerns. In either scenario, the Democratic Congress will play a large role in how the next US President will move on US trade policy, and how much he can achieve, given the various constraints that limit forward movement on trade. All these factors point to an uncertain future for US trade policy, although it seems that in the short-term, there will be little movement on trade issues. Congressional approval of the pending US FTAs with Colombia, Korea and Panama remains up in the air, and it is unclear if TPA rules will fully apply to these agreements if the 110th Congress does not decide on them before the end of the year. It seems likely that apart from the US FTA negotiations with the Trans-Pacific Strategic Economic Partnership countries and continued meetings on the US-Malaysia FTA and the Anti-Counterfeiting Trade Agreement (ACTA), the next Administration will not announce any major new FTA negotiations, especially without TPA present. The WTO Doha Round remains stalled and although the United States has indicated its political will to achieve modalities by the end of 2008, WTO Members still cannot agree on paper to major concessions and proposals. The next Administration will likely inherit the Doha Round, which means that the new composition of USTR will require a transition phase in order to accustom itself to the issues on the negotiating table. Thus, it seems that when the new Administration begins its term of office, the US trade environment – and the direction in which it will move – will, in the short-term, be the same as it is now: uncertain and questionable.

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
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WIIT Explores Presidential Candidates' Trade Policies with Campaign Advisors

Summary

On October 27, 2008, Women in International Trade (WIIT) held an **on-the-record** discussion on "US Trade Policy Under a New Administration" with trade policy advisors to the Presidential candidates' campaigns. The invited speakers included **Scott Lincicome**, Trade Policy Advisor to Sen. John McCain (R-AZ) and an International Trade Attorney at White & Case LLP, and **Dr. Lael Brainard**, Trade Policy Advisor to Sen. Barack Obama (D-IL) and vice president and director of Global Economy and Development at the Brookings Institution. Both speakers discussed the Presidential candidates' trade policy and stances with respect to the World Trade Organization (WTO), free trade agreements (FTAs) and other US trade initiatives. We review herein their discussion.

Analysis

On October 27, 2008, WIIT held a discussion with campaign advisors to Sen. Obama and Sen. McCain on the Presidential candidates' trade policy and stances with respect to the WTO, US FTAs and other US trade initiatives.

Scott Lincicome (White & Case LLP), Trade Policy Advisor to Sen. McCain stated that trade has become a front-line issue in the Presidential campaign, and he noted that Sen. McCain "is a vigorous and unflinching supporter of open markets and free trade" and has consistently opposed domestic farm subsidies. According to Lincicome, "economic isolationism hurts in the good times but can be truly disastrous in the not-so-good times . . . [and] this is why trade has, until very recently, never been a partisan issue." He added that Sen. McCain respects this history and seeks to continue the United States' free trade tradition. According to Lincicome, Senator McCain's trade policies are based on "principles and pragmatism." Lincicome stated that Sen. McCain has "championed free trade . . . because he knows it's the right thing to do, and particularly in these tough economic times." He noted that according to almost all economists, free trade and open markets mean economic growth, better jobs, and rising living standards, and he added that there are foreign policy benefits that come from using US trade agreements and global integration, chiefly spreading US influence and strengthening ties with allies.

Lincicome stated that the successful completion of the WTO's Doha Round and the ongoing health of the multilateral trading system will be the top negotiating priority of a McCain Administration. He opined that Sen. McCain's "strong free trade record and longstanding opposition to bloated and inefficient farm subsidies places him in a unique position to reignite the Doha talks and reassert US leadership in the

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

Round." On US FTAs, Lincicome stated that under a McCain Administration, FTAs will serve a secondary role that can provide "WTO-plus" access and protections for US companies doing business overseas, and can "nurture important relationships with critical allies in important regions." Lincicome noted that Sen. McCain supports approval of pending agreements with Colombia, Panama, and South Korea whereas Sen. Obama opposes them. Regarding US preference programs, Lincicome stated that Sen. McCain supports preference programs as a way to assist developing countries and to help US businesses and consumers, but he cautioned that graduating some beneficiary countries from these programs may only increase market share of China and other ineligible countries. According to Lincicome, Sen. McCain will also enforce US trade laws, as well as countries' obligations under WTO rules and US FTAs, but he cautioned that international trade negotiations often require consultation before confrontation, and that "rampant unilateralism must be tempered by international rules and economic realities."

Regarding manufacturing and jobs, Lincicome stated that "American manufacturing jobs continue to disappear . . . not because of trade, but because of productivity gains, changing consumer tastes and domestic competition." He noted, however, that "Sen. McCain understands that trade can and does cause lost jobs, and that, despite its significant limits, this creates fear among many Americans – a fear that will undermine public support for, and embolden unprincipled opposition to, free trade policies that are overwhelmingly beneficial to almost all Americans." He advocated policies that seek to ease public anxieties over trade by guaranteeing retraining and employment assistance to Americans who lose their jobs because of import competition. Regarding the US Trade Adjustment Assistance (TAA) program, Lincicome stated that Sen. McCain will "replace [the] archaic, inefficient system of trade adjustment assistance with a modern system that provides all dislocated workers with access to high-quality training and education, regardless of the cause of the dislocation."

Dr. Lael Brainard (Brookings Institution), Trade Policy Advisor to Sen. Obama stated that "Americans are facing a moment of unparalleled complexity and challenge, and they are asking which candidate will restore economic soundness." She stated that Sen. Obama has a measured approach to the international economy and noted that his fist consideration is always whether the international economy will benefit American workers. According to Dr. Brainard, "the United States must chart a different [trade and economic] course than the one it has charted in the past eight years" and she opined that Sen. McCain seems to want to continue the trade policy of the past eight years. She stated that President Bush's trade policy for the past eight years included, among others: (i) "lots of little trade agreements with negative effects;" (ii) little trade enforcement, especially at the WTO; and (iii) a lack of enforcement for the Office of the United States Trade Representative (USTR).

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

Regarding US FTAs, Dr. Brainard stated that Sen. Obama believes US trade agreements should not be "lopsided" and should address basic labor and environmental rights, which – according to Dr. Brainard – many Americans believe are important. She also opined that trade agreements must be strongly enforced and that USTR must be able to enforce the provisions of agreements effectively. She noted that Sen. Obama's opposition to the pending US-Colombia FTA reflects his concern with problems that labor unions face in Colombia, and that his opposition to the pending US-Korea FTA centers on the "lopsided market access" the agreement provides to Korean automakers.

Dr. Brainard opined that the next President must re-connect US trade policy and US economic policy, and in doing so, must create an "integrated and competitive US trade policy." Regarding TAA, Dr. Brainard stated that Sen. Obama supports trade adjustment assistance for American workers in addition to the inclusion of services workers in the TAA program. In closing, Dr. Brainard stated that "championing the same trade and economic policy from the past eight years may not be the best course of action moving forward" and she added that Sen. Obama will provide a new direction for US trade policy.

Outlook

Although the campaign advisors adopted different approaches in describing the Presidential candidates' trade stances, they both seemed to agree on the major trade issues that require responses from the new President, chief among them the direction US trade policy will take, completion of the WTO Doha Round, and US bilateral and regional FTAs. And although both advisors offered different policy prescriptions under their respective candidates, the campaign advisors seemed to agree that the public is displaying a sour attitude towards trade, especially in light of the global financial crisis. When asked how the candidates would address this current attitude towards trade, both advisors opined that a "re-education" of the benefits of trade could help ease the public's negative perception of US trade policy.

Regardless of what tools the next President could use to alleviate the public's concern with trade, observers seem to feel that the future of US trade policy remains uncertain. As noted, Congressional approval of the pending US FTAs with Colombia, Korea and Panama has not yet occurred and many have questioned if and when Congress will consider these agreements. The WTO Doha Round remains stalled, and it becomes more and more likely that the next Administration will inherit the Round. Added to the mix is a Democratically-controlled Congress that is hesitant to act on free trade initiatives. Observers opine that a McCain Administration will likely be more open to all forms of trade liberalization, including the reduction of domestic supports. They also opine that Sen. Obama has supported free trade in principle but with certain limitations, consequently indicating that an Obama Administration may be less willing than a McCain Administration to support a free trade policy. It remains to be seen if Sen. Obama's

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

rhetoric on “free trade with limitations” is meant to attract more votes or whether he will follow through on his words if elected President. In any case, the next President will certainly have to contend with a Democratic majority in Congress which could temper any free trade initiatives from a President McCain or pressure a President Obama to address Democratic concerns and be more unreceptive to free trade.

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

United States Highlights

President Signs GSP, ATPA Extension But Provides Shorter Extension, Conditions for Bolivia, Ecuador

On October 3, 2008, the House of Representatives approved by voice vote a bill (H.R. 7222) that would, among other things, extend the Generalized System of Preferences (GSP) program and the Andean Trade Preferences Act (ATPA) for an additional year. The Senate unanimously approved H.R. 7222 on October 2, 2008. Both GSP and ATPA are set to expire on December 31, 2008, and the House of Representatives had approved an earlier version of H.R. 7222 by unanimous consent on September 29, 2008; that version provided a straightforward year extension for the GSP and ATPA programs. The Senate, however, made amendments to H.R. 7222 that affect ATPA renewal for two of the preference program's participants – Bolivia and Ecuador. This latest incarnation of H.R. 7222 is the version of the bill that both chambers of Congress have approved. On October 16, 2008, President Bush signed into law H.R. 7222. In signing the bill, President Bush also announced that he would suspend trade preferences for Bolivia until that country improves its anti-drug cooperation. The suspension takes effect October 31, 2008.

Specifically, H.R. 7222 would, among other things:

- Extend the GSP program for one additional year (*i.e.*, until December 31, 2009);
- Extend the ATPA program with respect to Colombia and Peru for one additional year (*i.e.*, until December 31, 2009);
- Extend the ATPA program with respect to Ecuador for six months (*i.e.*, until June 30, 2009), followed by an automatic extension of ATPA benefits for the period July 1 – December 31, 2009 unless the President, in reviewing Ecuador's ATPA participation, determines by June 30, 2009 that Ecuador is not satisfying ATPA requirements as a beneficiary country;
- Extend the ATPA program with respect to Bolivia for six months (*i.e.*, until June 30, 2009), after which preferences will expire unless the President determines that Bolivia satisfies ATPA requirements as a beneficiary country. The President will make his decision on the extension of ATPA benefits for Bolivia for the period July 1 – December 31, 2009 by June 30, 2009 and will report his decision to Congress;
- Make changes to the African Growth and Opportunity Act (AGOA), including a repeal of an "abundant supply" requirement that restricts least-developed AGOA countries' ability to use AGOA's flexible

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

"third country fabric" rule (which provides duty-free treatment to apparel assembled in a least-developed AGOA country regardless of the source of the fabric), and a reinstatement of Mauritius' eligibility to use AGOA's "third-country fabric" provisions;

- Establish a "2 for 1" textile and apparel allowance program to be developed and administered by the US Secretary of Commerce under which producers who purchase a certain quantity of qualifying US fabric for apparel production in the Dominican Republic will receive a credit that can be used to ship a corresponding quantity of eligible apparel from the Dominican Republic to the United States duty-free regardless of the origin of the fabric from which the apparel product is made; and
- Make several technical corrections to AGOA and the Haitian Hemispheric Opportunity through Partnership Encouragement Act of 2008 (HOPE).

The amendments to H.R. 7222 that affect ATPA came out of a compromise between Senate Finance Committee Ranking Member Charles Grassley (R-IA) and Democratic Majority Leader Harry Reid (D-NV). Sen. Grassley has consistently criticized the participation of Bolivia and Ecuador in the ATPA program, and has expressed his dissatisfaction with the two countries' anti-drug efforts. According to Sen. Grassley, "Peru and Colombia have pursued a strong reciprocal trading relationship with the United States and are being treated accordingly [whereas] Bolivia and Ecuador have taken different paths."

The year-long extension of ATPA for Colombia and Peru assures that both countries receive duty-free benefits for an additional length of time as officials from both economies continue to work on their respective Free Trade Agreements (FTAs) with the United States. Peruvian officials have been working over the past year to implement the completed US-Peru FTA, and although earlier reports suggested that Peru may approve all necessary laws and regulations in order to implement the FTA by the end of 2008, recent reports suggest that Peru may need additional time to make the proper changes to assure full implementation. The fate of the US-Colombia FTA, meanwhile, remains uncertain as members of Congress wrap up work for the 110th session without the possibility of considering the agreement. Although the chances of a Congressional "lame-duck" session after the November election have increased, Congressional sources note that legislators have already indicated that they may not consider the Colombia agreement (in addition to the other pending FTAs with Korea and Panama) during that lame-duck session. Observers opine, however, that the ATPA extension likely alleviates some of the concerns raised by Colombian officials regarding the loss of duty-free benefits at the end of 2008.

Regarding GSP, this is the second time this year that the House has voted to extend the GSP program. On July 29, 2008, the House of Representatives approved a bill (H.R. 6560) that extended the GSP

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

program to December 2009. H.R. 6560, however, did not address the ATPA. That initial extension of the GSP program caught many observers off-guard because observers opined that Congress would be too focused on other pending legislative issues prior to GSP's expiry to vote on an extension, and that it would not turn to GSP and other preference programs until later in the year. Although some observers may again point to the "early" date by which the House and the Senate voted on GSP and ATPA extension (*i.e.*, a September vote as opposed to a December vote closer to the date of expiry of these programs), the upcoming November election and Congress' impending adjournment for the year may have driven legislators to once again consider and approve legislation (*i.e.*, H.R. 7222) that extends the GSP and ATPA programs. Congressional sources opine that during this year-long extension, members of Congress – including House Ways and Means Committee Chairman Charles Rangel (D-NY), Senate Finance Committee Chairman Max Baucus (D-MT) and Sen. Grassley – may seek to re-vamp and amend the preferences programs, although if past years serve as a model, members of Congress may find themselves too busy in working with a new Administration and considering other larger pieces of legislation to afford themselves time to introduce large and long-standing changes to these preference programs.

CAFC Limits/Clarifies ITC's Downstream Remedies

The Court of Appeals for the Federal Circuit (CAFC) held today that the ITC's authority to issue a limited exclusion order is restricted to products of named parties. The CAFC stated that unambiguously, the ITC lacks statutory authority to issue a limited exclusion order covering non-respondents' downstream products, and it vacated the June 7, 2007 limited exclusion order in the Broadcom v. Qualcomm Section 337 proceeding. The Court in essence ruled that the ITC cannot cover cell phones and PDAs manufactured by non-respondents that incorporated chips produced by Qualcomm. Because the Qualcomm chips are not imported in commercial volume to the U.S., Broadcom is effectively left without a remedy.

Per this opinion (attached), in order to obtain a remedy excluding non-respondents' downstream products, a complainant must seek and satisfy the heightened burdens for a general exclusion order set forth in 19 U.S.C. § 1337(d)(2)(A) and (B). The alternative is to name the downstream companies as respondents in an action seeking a limited exclusion order.

The CAFC further held that the exclusion of the downstream products in this particular proceeding was ultra vires. The Broadcom patent in question pertained to a chip programmed to perform certain functions. The chip manufactured by Qualcomm did not contain such programming, and therefore, the ITC found Qualcomm induced infringement as opposed to directly infringing the Broadcom patent. The CAFC noted

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

that even if a limited exclusion order could extend to non-respondents, only products of persons found to be infringing are eligible for exclusion. Since the only finding of infringement was Qualcomm's induced infringement, the exclusion of products of downstream manufactures that were not determined to be infringing was beyond the powers of the ITC.

Finally, as to Qualcomm, the CAFC vacated and remanded the finding of induced infringement to the ITC for further proceedings. As noted, these further proceedings, along with a pending enforcement action at the ITC, may be of dubious impact now that downstream products are ruled outside the scope of any order. Broadcom may appeal to the Supreme Court.

House Energy and Commerce Committee Unveils Draft Climate Change Legislation; Bill to Provide Starting Point for Debate in 2009

On October 7, 2008, members of the House Energy and Commerce Committee released draft legislation to cap greenhouse gas emissions. Committee Chairman John Dingell (D-MI) and Rep. Rick Boucher (D-VA) are co-sponsors of the draft legislation that would amend the Clean Air Act to establish an economy-wide cap-and-trade program in an effort to reduce greenhouse gas emissions. Although the House of Representatives adjourned its 110th session on October 3, 2008, Committee members note that the draft legislation will provide a starting point for debate on climate change in the House of Representatives in 2009. The Committee had been under increasing pressure to release proposed legislation after the House of Representatives decided not to take up and consider climate change legislation in the 110th Congress.

Among other things, the draft legislation proposes to:

- Reduce covered emissions to six percent below 2005 levels by 2020, 44 percent below 2005 levels by 2030, and 80 percent below 2005 levels by 2050. Sources covered by this cap include power plants, producers and importers of petroleum and other fossil-based fuels, large industrial facilities, producers and importers of other bulk gases, natural gas local distribution companies, and geologic sequestration sites;
- Provide the Environmental Protection Agency (EPA) with authority to establish industry-specific emission standards;
- Establish performance standards for new coal-fired plants, requiring the capture and sequestration of a portion of their carbon dioxide emissions within a set timeframe (once carbon capture and sequestration technologies become available);

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

- Establish a cap-and-trade system wherein entities covered by the cap could bank and borrow "emission allowances." The draft legislation establishes the number of emission allowances for the years 2012 to 2050, and beyond, and establishes the number of emission allowances a covered entity must hold per calendar year. If allowance prices reach a predetermined level, emitters would have access to a "strategic reserve" of allowances that would be auctioned periodically. Covered entities would also be able to purchase EPA-approved domestic and international offset credits to meet a portion of their compliance obligation (although all offset projects will be subject to strict quality criteria) – "as the cap gets tighter, covered entities could meet a greater percentage of their allowance obligation with offsets." The proposal presents four options for allocating allowance value:

    1. Allocate allowances without charge;
    2. Provide fewer allowances to entities in covered sectors and direct more allowance value towards complementary programs that would help reduce greenhouse gas emissions;
    3. Direct allowance value to adaptation programs and international programs; and
    4. Use the majority of allowance value for a rebate to consumers.

- Establish a "bonus" allowance system in which power plants and other large emitters would be rewarded for carbon capture and storage. Generators of electricity from renewable energy sources would also be rewarded through a separate bonus allowance pool;
- Establish and allocate allowances to State Energy Efficiency Development (SEED) Funds through which individual and businesses could obtain low, or no, interest loans to upgrade the efficiency of buildings, appliances, industrial processes, or vehicles;
- Increase building code energy efficiency standards by 30 percent by 2010 and 50 percent by 2020;
- Establish a program under which the EPA will offer for sale to United States importers international reserve allowances that are issued from a special reserve of allowances separate from other reserves created under this draft legislation; and
- Bar the EPA and US states from setting fuel economy standards for vehicles different from those put forth by the Department of Transportation.

Although the House of Representatives adjourned its 110th session on October 3, 2008, legislators seem aware that the draft legislation will serve as a place-marker for Congress' continuing climate change debate in 2009. According to Drew Hammill, a spokesman for Speaker of the House Nancy Pelosi (D-CA), the draft legislation will "move the debate forward and guide us on how to proceed." Chairman of

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

the House Select Committee on Energy Independence and Global Warming Edward Markey (D-MA) welcomed the draft legislation, and noted that in 2009 he looks forward "to working with Chairmen Dingell and Boucher, our Energy and Commerce colleagues, and a new, climate-friendly administration as we put the American economy on a green road to recovery and finally solve the greatest challenge the planet has ever faced." Environmental groups – such as the Environmental Defense Fund – also lauded the draft proposal because it "shows that the climate change issue is still alive even during an economic crisis."

The Energy and Commerce Committee draft bill differs somewhat from a bill that the Senate debated but failed to complete this year (the Lieberman-Warner Climate Security Act of 2008, S. 3036). Similar to S. 3036, the Energy and Commerce Committee bill would cap emissions of greenhouse gases and set up a market-based program for businesses to trade emissions credits; observers note, however, that "the early years of the House panel's proposal would be less aggressive than in the Senate bill." According to the co-sponsors of the proposed House bill, "in the early years of the program, caps would be set at a level that is realistically achievable to ensure that firms are able to adjust gradually" thus allowing time for the deployment of clean energy technology, such as carbon capture and sequestration from coal-fired power plants.

The draft House Commerce and Energy Committee proposal has not yet been formally introduced in the House of Representatives, but Congressional observers expect the bill to be introduced during Congress' 111th session.

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

Free Trade Agreements

Free Trade Agreements Highlights

US Officials Signal That More Countries Might Join Trans-Pacific FTA Negotiations

On October 17, Assistant United States Trade Representative (AUSTR) Barbara Weisel and Deputy AUSTR (DAUSTR) Doug Bell briefed members of the American Chamber of Commerce on the recent US decision to begin negotiations to join the Trans-Pacific Partnership Agreement (the "TPP" - formerly known as the P4 Agreement) and the implications for regional trade. The first official round of TPP negotiations will take place in March 2009 in Singapore. Besides the United States, three more countries will join the TPP negotiations as part of a first round of expansion, namely Australia, Peru and Vietnam. The United States held bilateral meetings with Australia and Peru the week of October 6, 2008. According to AUSTR Weisel, both countries have a clear understanding of the contents of the existing agreement as well as the chapters that will likely need improvement. The domestic procedures necessary for Australia and Peru to join the TPP negotiations are currently in progress. According to USTR, the Vietnamese government still needs more time to reach internal consensus on joining the TPP; however, the Vietnamese reportedly have a clear understanding of the benefits to join and will most likely do so. According to USTR officials, it is likely that Vietnam will join the March 2009 TPP negotiations in Singapore.

Both AUSTR Weisel and DAUSTR Bell noted that other Association of South East Asian Nations (ASEAN) Members have not signaled very much interest in joining the TPP at this time. They attributed this partly to internal political and economic situations affecting individual countries: (i) Malaysia's focus remains on elections in March 2009 and the bilateral US-Malaysia free trade agreement (FTA); (ii) Indonesia has had slow progress on the Bilateral Investment Treaty (BIT) with the United States; (iii) Thailand is experiencing current political upheaval; and (iv) the Philippines' focus is on internal matters, although Filipino officials met with US officials the week of October 27, 2008 for a full Trade and Investment Framework Agreement (TIFA) meeting in Washington, DC wherein US officials gauged the Philippines' interest in joining TPP. US officials, however, do not expect the Philippines to join the negotiations during the first round of expansion.

Both AUSTR Weisel and DAUSTR Bell did not rule out the possibility of other countries joining the TPP during a second tranche. Countries in this "second" group include Japan, Korea, Mexico, and Canada,

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

among others. AUSTR Weisel shared that Korea was "told to wait" for now in light of the status of the Korea-US FTA (KORUS) and the negative attitudes in the US Congress regarding trade in general. A similar explanation was provided for Canada and Mexico joining at this time, i.e. North American Free Trade Agreement (NAFTA) issues are very sensitive in Congress and the involvement of Canada and Mexico in the TPP at this time would further exacerbate an already sensitive issue. AUSTR Weisel noted that this latter group of countries could potentially join once the first group (Brunei, Chile, New Zealand, Singapore, United States, Australia, Peru and Vietnam) has made solid progress. In 2009, she expects the parties to meet four times; however, a formal schedule has not yet been set.

AUSTR Weisel stressed that the United States would like to leave the TPP intact as much as possible, but noted that the parties have agreed to review existing chapters and to amend certain areas, including rules of origin, tariff reduction/elimination schedules, and other market access and textual issues. She also noted that the "one size fits all" template endorsed by the United States for bilateral agreements may not work for regional agreements. Thus, the United States will aim to maintain a high degree of flexibility in the TPP negotiations, while at the same time ensuring that key issues of interest to the United States (e.g. labor, environment, intellectual property) will be addressed.

Presidential Candidates Discuss Pending US-Colombia FTA, NAFTA During Debate

During the third and final Presidential debate on October 15, 2008, Sen. Barack Obama (D-IL) and Sen. John McCain (R-AZ) briefly discussed US trade policy and the pending US-Colombia FTA, among other issues. Sen. Obama stated that he continues to oppose the bilateral agreement because Colombian labor leaders have been targeted for assassination “on a fairly consistent basis” and because the Colombian government has not accomplished enough to prosecute those responsible for the violence. Sen. Obama stated that the United States “[has] to stand for human rights, and we have to make sure that violence isn't being perpetrated against workers who are just trying to organize for their rights.” Sen. McCain, meanwhile, criticized Sen. Obama’s opposition to the Colombia FTA, labeling passage of the US-Colombia agreement a “no-brainer” because it will “level the playing field and reward an ally that is helping the United States combat drug trafficking.”

Both candidates also discussed the North American Free Trade Agreement (NAFTA) during the debate. Sen. McCain raised the issue that Sen. Obama has called for a renegotiation of the agreement, and he criticized his opponent, stating that the United States cannot “tell countries [that it is] going to unilaterally renegotiate agreements with them.” Sen. Obama responded that although he believes in free trade,

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

"NAFTA doesn't have, did not have enforceable labor agreements and environmental agreements [and] we should include those and make them enforceable."

The remarks on the Colombia FTA preceded President Bush's call to Congress to approve the pending US-Colombia FTA following the November election. During an October 16, 2008 signing ceremony for a bill extending several US preference programs, President Bush again urged Congress to pass the Colombia FTA, as well as the pending FTAs with Panama and South Korea. He stated that "one of [Congress'] top priorities should be to approve this vital agreement with Colombia, as well as with Panama and South Korea [because] these free trade agreements will reassure our trading partners that America will not give in to pessimism or protectionism." Despite these calls from the Administration, Congressional leaders have not indicated whether they will consider any of the agreements during a lame-duck session. The Senate is expected to convene a lame-duck session around mid-November, but Senate leaders have indicated that they will concentrate on other pending issues, including the global financial crisis and another possible bail-out package. Speaker of the House Nancy Pelosi (D-CA), meanwhile, has not yet confirmed if House Members will meet for a session in November much less consider the pending FTAs. Thus, despite continued dialogue on the FTAs, it remains unclear if and when Congress will consider and vote on these agreements.

Officials Meet Under US-Singapore FTA Review

On October 10, 2008, US and Singaporean trade officials met for the Fourth Annual US-Singapore Free Trade Agreement (FTA) Review. The US-Singapore FTA entered into force on January 1, 2004, and the two sides have held regular annual meetings in order to discuss trade and investment relations. At the October 10 meeting, Assistant United States Trade Representative (AUSTR) for Southeast Asia and the Pacific Barbara Weisel led the US delegation, and Deputy Secretary (Trade) Koh Lin-Net of the Ministry of Trade and Industry led the Singapore delegation.

During the meeting, officials lauded the continued growth in bilateral trade and investment relations, and also discussed issues pertaining to market access for agricultural and textile products, intellectual property rights (IPR), telecommunications, environmental cooperation, and both countries' participation in multilateral forums, including the Association of Southeast Asian Nations (ASEAN), the Asia-Pacific Economic Cooperation (APEC), and the World Trade Organization (WTO). Officials also discussed the United States' decision to join the Trans-Pacific Strategic Economic Partnership Agreement ("P4 Agreement"), a trade agreement between Brunei Darussalam, Chile, New Zealand, and Singapore. On September 22, 2008, USTR Susan Schwab announced the launch of negotiations for the United States to join the P4 Agreement. Brunei, Chile, New Zealand and Singapore concluded the P4 Agreement in 2005,

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

and the Agreement went into effect in late 2006. In March 2008, P4 countries began work on the outstanding Financial Services and Investment chapters; the United States joined the P4 countries in these talks.

According to USTR, Singapore is the United States' 15th largest goods trading partner. Two-way trade in goods between the United States and Singapore totaled USD 44.7 billion in 2007, and the United States exported close to USD 6.7 billion in services to Singapore in 2006.

US, Brazil Trade Officials Discuss Bilateral Agenda

From October 9-10, 2008, the US-Brazil Commercial Dialogue Ministerial Meeting and the third meeting of the US-Brazil CEO Forum took place in Sao Paulo, Brazil. US Commerce Secretary Carlos Gutierrez and Assistant to the President for International Economic Affairs Dan Price discussed with Brazilian Minister of Development, Industry and Foreign Trade (MDIFT) Miguel Jorge and Minister Dilma Russeff ways to strengthen US-Brazil economic and trade ties. The parties discussed the following issues: (i) the negotiation of a bilateral double taxation treaty; (ii) possible elimination of existing US and Brazilian trade barriers (including the US 54-cent-per gallon tariff on imported ethanol); (iii) mechanisms to expedite the issuance of business visas; (iv) ways to increase and streamline bilateral trade and investment; and (v) the WTO Doha Round negotiations.

Secretary Gutierrez stated "the United States enjoys a strong commercial relationship with Brazil, representing more than USD 50 billion in bilateral trade in 2007. Furthermore, the Commercial Dialogue and CEO Forum allow both nations to work together on expanding trade, increasing investment flows and delivering opportunities for US and Brazilian entrepreneurs." In 2007, US exports to Brazil totaled USD 24.6 billion, whereas Brazilian exports to the United States totaled USD 25.6 billion. In 2007, Brazil was the 13th largest export market for the United States. According to Secretary Gutierrez, the CEO Forum has produced tangible results. For instance, the parties recently concluded a bilateral aviation agreement, which will increase the number of passenger flights by nearly 50 percent over the next four years. Other areas of progress that Secretary Gutierrez highlighted are the reduced wait time for the issuance of US visas to Brazilian citizens (the United states will invest USD 7 million to double the capacity for processing visa requests) and discussions on a double taxation treaty.

According to the Brazilian Export Agency (APEX), which hosted the Forum, Brazil and the United States also agreed to develop joint energy projects in the Dominican Republic and Jamaica. The Brazilian and US industrial standards agencies (INMETRO and NIST respectively) also agreed to collaborate to adopt common standards for biofuels. Brazilian officials highlighted that it will conduct trips to Atlanta, San

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

Francisco and New York City to promote investment opportunities under the Brazilian Growth Acceleration Plan (PAC).

The US-Brazil CEO Forum was created in 2007 to promote collaboration between US and Brazilian business leaders and identify ways to strengthen economic ties between the two countries. Brazilian CEOs participating in the Forum included: Josué Gomes da Silva (Coteminas), Carlos Ermírio de Moraes (Votorantim Participações), Carlos Alberto Vieira (Banco Safra), Jorge Gerdau Johannpeter (Gerdau), José Luís Cutrale (Sucocítrico Cutrale), Luiz Roberto Nascimento (Camargo Corrêa), Marcelo Bahia Odebrecht (Odebrecht), Marco Antônio Stefanini (Stefanini IT Solutions), Maurício Novis Botelho (Embraer) and Roger Agnelli (Vale). US CEOs participating in the Forum include: Tim Solso (Cummins Inc.), Alain Belda (Alcoa), Gregory Page (Cargill), Craig Barrett (Intel), Neville Isdell (Coca-Cola), Bill Rhodes (Citibank, N.A.), Greg Brown (Motorola), David Speer (Illinois Tool Works), John Faraci (International Paper) and Richard Wagoner (GM).

Coteminas' CEO Josué Gomes da Silva, Brazil's largest home textiles maker, stated that despite de the deadlock at the WTO Doha Round negotiations, Brazil and the United States are still committed to conclude the Round and have common positions on many issues in the negotiations. According to Gomez da Silva, this collaboration could create the potential to move forward in the negotiation of bilateral agreements to foster trade and investment. Analysts in Brazil predict that the current financial global crisis will encourage US officials to seek enhanced market access opportunities and strategic partnerships with key emerging countries, including Brazil.

The next US-Brazil CEO Forum will take place on April 29, 2009 in Washington.

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

Customs

Lacey Act Amendments Require New Importer Declaration, Compliance with New Regulations

Summary

This report reviews amendments to the Lacey Act as implemented through the passage of the Food, Conservation, and Energy Act of 2008 (P.L. 110-246). In general, the Lacey Act makes it unlawful to import, export, transport, sell, receive, acquire or purchase any fish, wildlife or wild plants taken, possessed, transported, or sold in violation of state, federal, Native American tribal, or foreign laws or regulations that are related to fish, wildlife, or wild plants. Recent amendments to the Lacey Act, however, could have an impact on companies involved in the commerce of plants and other materials covered by the Lacey Act. We analyze herein those potential impacts.

Analysis

I. Background

The Lacey Act, enacted in 1900, serves as an anti-trafficking statute protecting a broad range of wildlife and wild plants. In general, the Lacey Act makes it unlawful to import, export, transport, sell, receive, acquire or purchase any fish, wildlife or wild plants taken, possessed transported, or sold in violation of state, federal, Native American tribal, or foreign laws or regulations that are related to fish, wildlife, or wild plants. The Lacey Act applies to "wild" animals, whether alive or dead, and wild plants excepting common food crops and common cultivars. The Lacey Act also makes it illegal under US law for persons to import wildlife, wildlife parts, or products thereof into the United States that have been taken, possessed, transported, or sold in violation of a foreign law or regulation. In addition, the Lacey Act prohibits the making or submitting of any false record, account, label for, or identification of any wildlife transported or intended to be transported in interstate or foreign commerce, or imported, exported, transported, sold, purchased, or received from any foreign country.

On May 22, 2008, the US Congress approved amendments to the Lacey Act banning commerce in illegally sourced plants and their products through the Food, Conservation, and Energy Act of 2008 (P.L. 110-246 or "the 2008 Farm Bill"). Prior to these amendments, the Lacey Act did not apply to all international traffickers of plants; the Lacey Act previously covered only plants native to the United States which are listed in one of the three appendices to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) or protected by the law of a US state that conserves species

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

threatened with extinction. The amendments to the Lacey Act extend the statute's reach to encompass products, including timber, that derive from plants illegally harvested in the country of origin and brought into the United States, either directly or through manufactured products, including products manufactured in countries other than the country where the illegal harvesting took place.

Senator Ron Wyden (D-OR) proposed the Lacey Act amendments to the 2008 Farm Bill. Senator Wyden had previously proposed similar language in a piece of legislation entitled the "Combat Illegal Logging Act of 2007" (S. 1930). In proposing such provisions, Senator Wyden cited a desire to assist US manufacturers of wood and wood products against less expensive foreign goods produced from illegal lumber sources, and the need to reduce environmental damage due to illegal logging. According to a press release, supporters of the 2007 legislation (S. 1930) included:

- American Forest and Paper Association;
- Center for International Environmental Law;
- Conservation International;
- Defenders of Wildlife;
- Dogwood Alliance;
- Environmental Investigation Agency;
- ForestEthics;
- Friends of the Earth;
- From the Mountain Sources, LLC;
- Global Witness;
- Greenpeace;
- Hardwood Federation;
- International Brotherhood of Carpenters and Joiners of America;
- International Brotherhood of Teamsters;
- Natural Resources Defense Council;
- Rainforest Action Network;
- Rainforest Alliance;

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

- Sierra Club;
- Society of American Foresters;
- South Cone Trading Company;
- Sustainable Furniture Company;
- The Nature Conservancy;
- Tropical Forest Trust;
- United Steelworkers;
- Wildlife Conservation Society;
- Wood Flooring International, Inc.; and
- World Wildlife Fund.

II. Amendments to the Lacey Act

A. Provisions

The amendments to the Lacey Act address illegal logging and other illegal plant trade by: (i) prohibiting all trade in plant and plant products that are illegally sourced from any US state or any foreign country; (ii) requiring importers to declare the country of origin of harvest and species name of all plants contained in their products; and (iii) establishing penalties for violation of the Lacey Act, including forfeiture of goods and vessels, fines and jail time.

The US Department of Agriculture's Animal Plant Health and Inspection Service (APHIS) is the lead federal agency working on implementation of the amendments to the Lacey Act. The US Customs and Border Protection (CBP), the Office of the United States Trade Representative (USTR), the Department of Justice, and the US Fish and Wildlife Service (Department of the Interior) are cooperating with APHIS in implementing these new requirements.

1. Definition of "Plant"

The Lacey Act defines a "plant" to include "any wild member of the plant kingdom, including roots, seeds, parts, and products thereof, and including trees from either natural or planted forest stands." Exceptions include:

- Live trees or other live plants intended for replanting, unless they are listed on the CITES, the Endangered Species Act (ESA) or a state endangered species list;

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

- Scientific specimens to be used only for research, unless they are listed on CITES, the ESA or a state endangered species list; and
- Common food crops and common cultivars (other than trees). APHIS expects to have defined these terms with more precision by April 1, 2009.

2. Importer Declaration

The amended Lacey Act requires importers to provide a basic declaration to accompany every shipment of plants or plant products beginning on December 15, 2008. However, the agencies enforcing the Act have extended the deadline so that declarations will not become mandatory until April 1, 2009 at the earliest. The purpose of the declarations will be to increase transparency about the plant trade and enable the US government to better enforce the law. The declaration must contain: (i) the scientific name of any species used; (ii) the country of harvest; (iii) the quantity and measure; and (iv) the value. The declaration requirements do not apply to all plant products. The Lacey Act contains several special clauses for complex products which commonly utilize material from a variety of countries or species. If either the specific country or the specific species are unknown for a given shipment, the law allows declarations to contain the name of each likely species of plant, and/or each possible country of origin which must include the correct country. Declarations for paper products made with recycled fibers do not need to name the species and source for the recycled material but must instead list the percent of the recycled content, as well as species and origin information for any non-recycled plant material also contained in the products. Importers do not need to declare plant-based packaging material unless the packaging itself is the product undergoing importation. The government must review the implementation of the declaration requirement and the effect of the exclusion of packaging material after two years. Based on this review, the government may issue regulations adjusting the scope of these three categories.

3. Implementation of Declaration Requirements

CBP is currently developing an electronic system that will collect the data required to be declared through the import declaration, and intends to begin enforcement of the declaration requirements upon completion of the electronic system. CBP anticipates completing the electronic system by April 1, 2009. Once the electronic system is completed, all agencies with Lacey Act enforcement authority will employ a phase-in approach to enforcement of the Lacey Act declaration requirements. From December 15, 2008, to April 1, 2009, or as soon thereafter as the electronic system is available, a paper declaration form will be made available for voluntary submission. No agencies with Lacey Act enforcement authority will bring

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

prosecutions or forfeiture actions for failing to complete the paper declaration form before the electronic system for data collection is available (April 1, 2009, or after); *however, any person who submits a form containing false information may be prosecuted*. On April 1, 2009, or as soon thereafter as the electronic system for collecting the declaration is available, enforcement of the declaration for wood and certain wood products and certain live plants and related products will begin, under the following phase-in schedule (note: this proposed phase-in enforcement schedule is through September 30, 2009):

Phase-in Period	Products Affected
Phase I: Beginning April 1, 2009 (or as soon thereafter as an electronic system is available)	HTS Ch. 6 (live trees, plants, bulbs, cut flowers, ornamental foliage, etc.); and HTS Ch. 44 (wood and articles of wood)
Phase II: Beginning July 1, 2009 (approximate)	HTS Ch. 47 (wood pulp); HTS Ch. 48 (paper and articles of); HTS Ch. 92 (musical instruments); and HTS Ch. 94 (furniture). Plus chapters included in **Phase I**.

After September 30, 2009, based on experience with the implementation of the electronic system for declaration data collection, enforcement of the declaration requirements for additional chapters containing plants and plant products covered by the Lacey Act will be phased in, including (but not limited to) HTS Ch. 12 (oil seeds, misc. grain, seed, fruit, plant, etc.), HTS Ch. 13 (gums, lacs, resins, vegetable saps, extracts, etc.), HTS Ch. 14 (vegetable plaiting materials and products not elsewhere specified or included), HTS Ch. 45 (cork and articles of), HTS Ch. 46 (basket ware and wickerwork), HTS Ch. 66 (umbrellas, walking sticks, riding crops), HTS Ch. 82 (tools), HTS Ch. 93 (guns), HTS Ch. 95 (toys, games and sporting equipment), HTS Ch. 96 (brooms, pencils, and buttons), and HTS Ch. 97 (works of art).

APHIS has indicated the following as examples of covered products:

- Lumber, wood pulp, paper and paperboard;
- Furniture, tools, umbrellas, sporting goods;
- Printed matter;
- Musical instruments;
- Products manufactured from plant-based resins;
- Boats, cars, trains, planes;
- Pharmaceuticals; and

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

- Textiles.

4. Violations

There are two components to a violation of the Lacey Act: (i) a plant must be taken, harvested, possessed, transported, sold or exported in violation of an underlying law in any foreign country or the United States (*i.e.*, this constitutes an "illegally sourced plant); and (ii) any party must "import, export, transport, sell, receive, acquire, or purchase" this illegally sourced plant. The term "illegally sourced" is defined by the content of sovereign nations' own laws. The law applies equally to plants taken, harvested, transported, or exported in violation of the relevant laws of any of the 50 US states. Examples of violations include:

- theft of plants;
- taking plants from an officially protected area, such as a park or reserve;
- taking plants from other types of "officially designated areas" that are recognized by a country's laws and regulations;
- harvesting without permission;
- failure to comply with harvesting regulations; and
- failure to pay royalties, taxes or fees.

Violations of Lacey Act provisions for timber and other plant products, as well as fish and wildlife, may be prosecuted through either civil or criminal enforcement actions. Regardless of any prosecution, the tainted plants may be seized and forfeited.

5. Penalties

Violations of the Lacey Act may be prosecuted through civil or criminal enforcement actions, and can be regarded as either a misdemeanor or a felony offense (distinguished by a defendant's knowledge of the underlying violation). For a Lacey Act violation to be a misdemeanor, it must be proved that the defendant "in the exercise of due care" should have known the fish or wildlife or plants were taken, possessed, transported, or sold in violation of an underlying law or regulation. For a Lacey Act violation to be a felony, the defendant must have knowingly imported or exported fish or wildlife or plants in violation an underlying law or regulation, or knowingly engaged in conduct during the offense that involved the sale or purchase of, the offer for sale or purchase of, or the intent to sell or purchase plants

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

or wildlife with a market value of over USD 350 knowing that the fish or wildlife or plants were taken, possessed, transported or sold in violation of an underlying law or regulation.

The Lacey Act also allows for the imposition of civil administrative monetary penalties against a party who in the exercise of due care should have known of the illegal nature of the plant or wildlife in question. Civil penalties of up to USD 10,000 may be imposed, with the size of the penalty depending on the nature, circumstances, extent, and gravity of the prohibited act committed and the violator's culpability, ability to pay, and such other matters as justice may require.

III. Reaction

At an October 14, 2008 public meeting organized by APHIS and CBP, interested parties were given the opportunity to comment on the amendments to the Lacey Act and pose questions on its implementation. Several groups, including ForestEthics, the Hardwood Federation, and the Rainforest Alliance, indicated their support for the amendments. Others, however, such as the National Retail Federation and Wal-Mart, indicated their concern with the amendments and what they felt was a short implementation period for the new declaration system and its rules and regulations. They called APHIS and CBP to implement a longer implementation period and to narrow the list of products covered by the amendments to the Lacey Act. They also pointed to an October 10, 2008 letter from several members of Congress who are pushing for a two-year exclusion from the declaration requirement for such major product categories as footwear, apparel and textiles, a longer phase-in period for the obligations in six-month stages, and a narrower scope of products in each phase. Signatories to the letter include Senate Agriculture Committee Chairman Tom Harkin (D-IA), Senate Finance Committee Chairman Max Baucus (D-MT), House Ways and Means Committee Chairman Charles Rangel (D-NY), House Natural Resources Committee Chairman Nick Rahall (D-WV), Rep. Earl Blumenauer (D-OR) and the author of the Lacey Act amendments, Sen. Wyden.

IV. Potential Effects of Lacey Act Amendments on Importers

A. Importer Declaration

Companies importing goods that use components that are or are drawn from what are considered "plants" under the Lacey Act (*i.e.*, "any wild member of the plant kingdom, including roots, seeds, parts, and products thereof, and including trees from either natural or planted forest stands") in the manufacture of their products must follow the import declaration regulations under the Lacey Act:

- **December 15, 2008 through March 31, 2009** Declarations are voluntary but persons submitting false information in a declaration can be prosecuted.

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

- **Starting April 1, 2009** (or any point thereafter once an electronic system for data collection is available), importers will need to make an import declaration of products covered by the Lacey Act on the electronic system that CBP and APHIS are currently developing but only for goods that a company imports that fall under HTS Ch. 6 (live trees, plants, bulbs, cut flowers, ornamental foliage, etc.) or HTS Ch. 44 (wood and articles of wood). For all other goods, declarations remain voluntary.
- **Starting July 1, 2009** (approximately), importers will need to complete electronic import declarations for imports of goods that fall under HTS Ch. 47 (wood pulp) and HTS Ch. 48 (paper and articles of). For all other goods, declarations remain voluntary.
- **After September 30, 2009**, based on the success of the implementation of the electronic system for declaration data collection, importers may be required to complete electronic import declarations for goods if they fall under HTS Ch. 12 (oil seeds, misc. grain, seed, fruit, plant, etc.), HTS Ch. 13 (gums, lacs, resins, vegetable saps, extracts, etc.), HTS Ch. 14 (vegetable plaiting materials and products not elsewhere specified or included), HTS Ch. 45 (cork and articles of), HTS Ch. 46 (basket ware and wickerwork), HTS Ch. 66 (umbrellas, walking sticks, riding crops), HTS Ch. 82 (tools), HTS Ch. 93 (guns), HTS Ch. 95 (toys, games and sporting equipment), HTS Ch. 96 (brooms, pencils, and buttons), and HTS Ch. 97 (works of art). Therefore, an importer may not have to complete importer declaration forms until after September 30, 2009, or until APHIS and CBP publish a notice of such a requirement, for products that fall under these HTS Chapters.

B. Recordkeeping

The amendments to the Lacey Act will likely directly impact recordkeeping and the amount of data and information importers are required to maintain to prove the country of origin of the product, in addition to the country of harvest for any component made from a plant or plant product as defined under the Lacey Act. An importer will need to engage any vendors, suppliers and third parties with which it works in order to collect the scientific name and country of harvest information from suppliers of components made from a plant material, or acquire the scientific names and country of harvest information from suppliers of raw materials or ingredients made from plants or plant products covered under the Lacey Act.

C. Third-Party Involvement

With regards to third-party certification, according to APHIS, if an importer uses a third party to certify the origin of the plant and timber products that it has declared, that certification does not guarantee that CBP cannot hold the declared products cannot based on suspicion of illegality. According to APHIS, although most certification systems for forest products include legality of harvest among their criteria, these are

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

private sector systems, the accuracy of which cannot be readily determined by the government. Such certification systems, however, may provide an importer with the proper information in order to strengthen its efforts to exercise due diligence regarding sources and species of plant and plant products.

Outlook

The Lacey Act amendments require close attention by importers, especially those that import products that are or are made of plant products covered by the Lacey Act. The amendments also require importers to properly comply with new rules and regulations. Starting April 1, 2009 (or any point thereafter once an electronic system for data collection is available), an importer will need to make an import declaration of products covered by the Lacey Act on the electronic system that CBP and APHIS have developed. Starting July 1, 2009 (approximately), an importer may also be required to complete electronic import declarations for goods that fall under certain other HTS chapters covered by the Lacey Act that it uses in the production of a good. After September 30, 2009, an importer may be required to complete electronic import declarations for goods that it uses in the production of a good if they fall under HTS Ch. 12 (oil seeds, misc. grain, seed, fruit, plant, etc.), HTS Ch. 13 (gums, lacs, resins, vegetable saps, extracts, etc.), HTS Ch. 14 (vegetable plaiting materials and products not elsewhere specified or included), HTS Ch. 45 (cork and articles of), HTS Ch. 46 (basket ware and wickerwork), HTS Ch. 66 (umbrellas, walking sticks, riding crops), HTS Ch. 82 (tools), HTS Ch. 93 (guns), HTS Ch. 95 (toys, games and sporting equipment), HTS Ch. 96 (brooms, pencils, and buttons), and HTS Ch. 97 (works of art).

Importers must also ensure that all parties involved in the import of a good being declared understand the implications of the Lacey Act (and violations of Lacey Act regulations). This could mean implementing a system wherein an importer receives from its suppliers documented assurance that potentially illegal plant and tree products are not being received and used.

Importers must also ensure proper business recordkeeping in compliance with the Lacey Act, and must ensure that it can accurately prove the country of origin of the products it imports and uses in the creation of a good, in addition to the country of harvest for any component made from a plant or plant product. Importers can ensure proper records by engaging vendors and suppliers to solicit the scientific name and country of harvest information from suppliers of components made from a plant material, or acquire the scientific names and country of harvest information from suppliers of raw materials or ingredients made from plants or plant products.

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

Customs Highlights

CBP Unveils Trade Facilitation Strategy for 2009-2013

On October 30, 2008, US Customs and Border Protection (CBP) Commissioner W. Ralph Basham unveiled CBP's "Trade Strategy for Fiscal Years 2009-2013." The new strategic vision focuses on CBP's mission of facilitating legitimate trade while protecting the U.S. from terrorists and criminals, unsafe imports, and unfair trade practices. According to Basham, the strategy "will guide efforts toward a system that is swift, safe, and secure for legitimate imports entering the US marketplace."

The new strategy states that the increased volume and value of US imports in recent years calls for effective trade facilitation and enforcement. CBP acknowledges that it faces several challenges in the current environment, including performing quality risk analysis to target illicit activity, poor allocation of resources, insufficient infrastructure, conflicting priorities and requirements of other government agencies, and lack of effective communication with interested parties. Consequently, CBP is focusing its actions and resources on several priority trade issues, including:

1. **Antidumping and countervailing duty (AD/CVD).** CBP intends to facilitate the lawful importation of merchandise subject to AD/CVD law in addition to effectively enforcing AD/CVD law and requirements and accurately collecting AD/CVD duties without placing further burdens on importers and international trade.
2. **Agriculture.** CBP intends to detect and prevent the contamination of an agricultural product or food before it enters the US market.
3. **Intellectual property rights (IPR).** CBP will facilitate the lawful importation of IPR-protected products and improve its IPR enforcement "by ensuring a single, uniform approach and focusing on known or alleged violators . . ."
4. **Textiles and Wearing Apparel.** CBP intends to ensure the effective enforcement of anti-circumvention laws, trade agreements and trade legislation regarding the importation of textiles and wearing apparel.
5. **Penalties.** CBP intends to improve the effectiveness of trade fraud remedies and promote the facilitation of compliant imports.
6. **Revenue.** CBP will maximize its collection efforts and strengthen its controls over the revenue process.

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

7. **Import safety.** CBP will develop import safety strategies that are cost-efficient and risk-based.

The CBP trade strategy also defines "the strategic vision and goals for the CBP import facilitation function" for the next five years (i.e., 2009-2013), which include:

1. **Facilitating legitimate trade into the United States and ensuring compliance.** Under this goal, CBP will employ risk management principles and advance targeting to facilitate imports in addition to strengthening partnerships with the trade community, other government agencies, and international organizations, and expanding pre-entry and post entry verification programs in order to reduce cargo delays at the border.

2. **Enforcing US trade laws and collecting accurate revenue.** According to CBP, it will improve risk analysis and targeting by strengthening its information-sharing capabilities with the trade community, other government agencies and international organizations in addition to applying enforcement actions to address trade law violations, and "employing trade expertise to set priorities, direct policy, enforce compliance, and collect proper duty."

3. **Advancing national and economic security.** The objectives under this goal include protecting US consumers through the secure and trusted import of safe agriculture and goods, protecting domestic industry from unfair trade practices in a wide array of areas, advancing Department of Homeland Security and CBP security priorities', and influencing the development of actionable trade laws and regulations in order to better enable CBP to more effectively administer trade policy.

4. **Intensifying modernization of CBP's trade processes.** Under this goal, CBP will streamline trade processes and enhance delivery of services through "automated, account-based and paperless processes and technology" in addition to strengthening trade expertise and capacity within its workforce.

According to CBP, the trade strategy will "enhance the safety and security for imports of American industry and consumers, foster economic security, and enhance US competitiveness." The new strategy is a blueprint for areas of heightened focus and potential new initiatives over the next few years.

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

CBP Reopens Comment Period on Proposed Rule Regarding "Codified" Method to Determine Country of Origin of Imported Goods; Comments Due December

In a July 25, 2008 Federal Register (FR) notice, the Bureau of Customs and Border Protection (CBP) published a notice of proposed rulemaking regarding CBP determinations of country of origin of imported merchandise (73 FR 43385-43394). The proposal would extend application of the country of origin rules codified in 19 CFR Part 102 which CBP states "have proven to be more objective and transparent and provide greater predictability in determining the country of origin of imported merchandise than the system of case-by-case adjudication they would replace." The proposed change also will amend the country of origin rules applicable to pipe fittings and flanges, printed greeting cards, glass optical fiber, and rice preparations. CBP requested comments on the proposed rule from all interested parties by September 23, 2008. CBP then extended the comment period to October 23, 2008 (73 FR 51962).

However, as a result of modifications to the Harmonized Tariff Schedule of the United States (HTSUS) in 2007, certain tariff provisions have been added or removed, and certain goods have been transferred, for tariff classification purposes, to different or newly-created provisions. CBP published a document in the October 30, 3008 Federal Register which sets forth the technical corrections to Sections 102.20 and 102.21 of the CBP regulations (19 CFR 102.20 and 102.21) in order to align the regulations with the current version of the HTSUS (73 FR 64518-64539).

Consequently, in order to afford parties the opportunity to enhance their review of the proposed rule and provide meaningful comment in light of the technical corrections to Sections 102.20 and 102.21, CBP has reopened the comment period on the proposed rule (73 FR 64575-64576). **Comments are now due on or before December 1, 2008.**

We include below our original analysis of the proposed rule:

I. Codified Rules in Determining Country of Origin

A. Background

According to the FR notice, all merchandise imported into the United States is subject to a country of origin determination. The origin of imported goods is determined for various purposes, including admissibility into the United States, eligibility for preferential trade programs, country of origin marking requirements, and administration of the US textile import program. Under current regulations, there are two primary methods that CBP uses to determine the country of origin of imported goods: (i) employing a case-by-case adjudication to determine whether goods have been "substantially transformed" in a

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

particular country, and (ii) employing codified rules – found in 19 CFR Part 102 ("Part 102 rules") – also used to determine whether a good has been "substantially transformed," primarily expressed through changes in tariff classification (the substantial transformation standard has developed from a series of federal court decisions issued over many years). The "codified" method uses specified changes in tariff classification (tariff shifts) and other rules to express the substantial transformation concept. Under this codified method, the substantial transformation that an imported good must undergo in order to be deemed a good of the country where the change occurred is usually expressed in terms of a specified tariff shift as a result of further processing.

CBP originally proposed simplified and standardized rules for determining a product's country of origin in a document published in the Federal Register on September 25, 1991 (56 FR 48448), proposing to amend the CBP Regulations to establish in Part 102, uniform rules governing the determination of the country of origin of imported merchandise. However, CBP announced in 1996 its decision not to apply the Part 102 rules more broadly than to trade among North American Free Trade Agreement (NAFTA) countries, at that time. CBP noted, however, that "the proposal to extend section 102 to all trade should remain under consideration for implementation at a later date." Since 1996, the Part 102 rules (i.e., the "codified" method of determining country of origin) have applied to all imports from Canada and Mexico, and nearly all imports of textile products, accounting for approximately 40 percent of total US imports.

B. Proposal

CBP is now proposing to extend application of the Part 102 rules of origin to **all** country of origin determinations made under the customs and related laws and the navigation laws of the United States, unless otherwise specified.

Specifically with regard to determining origin for purposes of applying preferential trade agreements, the Part 102 rules will not be used where agreements specify another origin test for that purpose. In addition, Part 102 rules will not be used for making preference determinations for goods other than textile and apparel goods under the United States-Israel and United States-Jordan Free Trade Agreements because it has been the understanding of US negotiators and trade officials of those governments that the case-by-case method would be used for making origin determinations for preference purposes under those agreements. The Part 102 rules of origin will be used to administer those free trade agreements already negotiated that use the substantial transformation standard as part of the test to determine whether products qualify for reduced tariffs where under these agreements the trade negotiators had reached an understanding that the codified rules under Part 102 should guide those determinations, to date, the United States-Bahrain and United States-Morocco Free Trade Agreements. It is also CBP's intent to

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

apply the Part 102 rules to any FTA negotiated in the future using the substantial transformation standard, unless otherwise specified.

CBP believes that the proposed extension of the Part 102 country of origin rules to all trade will result in determinations that are more objective, transparent, and predictable and will therefore facilitate the exercise of reasonable care by importers with respect to their obligations regarding the identification of the proper country of origin of imported merchandise.

II. Tariff Shift Rules for Certain Products

CBP has also identified five specific product areas in which the outcomes of the two country of origin determination systems have been inconsistent and for which it believes the codified rules in Part 102 should be altered: (i) pipe fittings and flanges; (ii) greeting cards; (iii) glass optical fiber; (iv) rice preparations; and (v) certain textile products.

III. Comments

CBP invites interested parties to participate in this rulemaking by submitting written data, views, or arguments on all aspects of the proposed rule. CBP also invites comments that relate to the economic, environmental, or federalism effects that might result from this proposed rule. Comments that will provide the most assistance to CBP will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

Comments must be received on or before **December 1, 2008**. Parties may submit comments, identified by docket number, through the Federal eRulemaking Portal (**http://www.regulations.gov**) or via postal mail. Please refer to the FR notice for full details on how to submit comments.

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

Multilateral

US Chamber of Commerce Explores Future of WTO, Doha Round

Summary

On October 6, 2008, the US Chamber of Commerce hosted a public conference exploring the future of the World Trade Organization (WTO) and the WTO Doha Round. Invited panelists – including government officials and representatives from the private sector – provided their views on whether WTO Members remain committed to concluding the Doha Development Round in the short term, and on the future of the WTO as a multilateral organization. We review below the panel discussions.

Analysis

I. Background

On October 6, 2008, the US Chamber of Commerce hosted two panel discussions exploring the future of the WTO Doha Round and the WTO, respectively. For the first panel on the WTO Doha Round, invited guest speakers, comprised of government officials, provided their views on whether WTO Members remain committed to concluding the Doha Development Round in the short term. The second panel, comprised of representatives from the private sectors, shared their views on the future of the WTO

II. Future of Doha Round

Bruce Stokes from *The National Journal* moderated the panel discussion on the future of the WTO Doha Round and stated that the July 2008 collapse of Ministerial-level Doha talks in Geneva has led many observers to question the status of the Doha negotiations and whether WTO Members remain committed to completing the multilateral talks. Stokes opined that the potential for making progress on the stalled Doha Round in the short term is diminished "if not dead." Following a quick introduction, panelists provided their views on the Doha Round:

- **Deputy United States Trade Representative (DUSTR) John Veroneau** stated that the "prospects for a breakthrough in the Doha Round still strongly exist" and he opined that the progress on the Agriculture and Non-Agricultural Market Access (NAMA) negotiations during the July Ministerial meeting showed how close WTO Members were to achieving a breakthrough. He also noted that the United States' actions during the July negotiations broke the "myth" that US agricultural subsidies served as the main stumbling block for the negotiations in light of the United States' new and improved offers on lowering agricultural tariffs and subsidies. DUSTR Veroneau opined that a Doha

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

breakthrough "is possible during this calendar year." He stated that in light of global financial conditions, the need for a completion of the Doha Round has become even more apparent, and he added that the United States remains committed to achieving a Doha breakthrough "within the balance of this Bush Administration." DUSTR Veroneau stated, however, that more political will from other WTO Members is needed in order to reach agreement on Agriculture, NAMA and other pending issues. According to DUSTR Veroneau, WTO Members continued to meet during the month of September in an effort to "pick up" from the July meeting. Regarding the sensitive issue of the agricultural special safeguard mechanism (SSM) that many observers opine led to the collapse of the July talks, DUSTR Veroneau noted that two proposed solutions had been raised in recent months but India and China objected to the proposals. He added, however, that even with all these problems, the United States would continue to press WTO Members on the SSM issue. When asked what would happen to USTR's work on the Doha Round once a new Presidential Administration assumes office in January 2009, DUSTR Vernoeau stated that the current USTR team will work with the transition team to ensure proper continuity and focus on the Doha Round.

- **Head of the European Commission's Trade Section Nikos Zaimis** discussed the October 3, 2008 resignation of EU Trade Commissioner Peter Mandelson and the United Kingdom's appointment of a new EU Trade Commissioner, Catherine Margaret Ashton, the Baroness Ashton of Upholland. According to Zaimis, Baroness Ashton has served as a leader in the United Kingdom's House of Lords and counts on "Brussels experience" to help her in her new position. She is slated to begin her duties as Trade Commissioner on October 7, 2008, although according to Zaimis, technically, the EU's Council of Ministers must formally appoint her and present her to the European Parliament, at which point the European Parliament will express its opinion on Baroness Ashton's appointment. Zaimis stated that the presentation to the European Parliament will likely take place in late October or early November. Regarding the Doha negotiations, Zaimis stated that Mandelson's resignation is not related to the status of the Doha negotiations, adding that even though a new Trade Commissioner will be appointed, the EU's chief negotiators will not change their mandate and will continue to work on the Doha negotiations. He opined that the July Ministerial meeting proved that "victory was close" and he noted that technical engagement and discussions continue in an effort to build upon and add to the July package. Regarding the agriculture SSM, Zaimis opined that the stand-off on the matter can be resolved, and he noted that WTO Members could also improve other aspects of the July package, including the NAMA modalities, specifically on the horizontal mechanism, sectorals and export taxes.

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

- **Minister-Counselor for Trade Policy at the Embassy of Australia Elizabeth Ward** stated that the Doha Round has been "a hard undertaking" and that Australia has been "pushing extremely hard to see a conclusion of the Round." She expressed disappointment with the collapse of the July talks but opined that the July meetings served as a "stepping stone" towards an ultimate conclusion of the Round. According to Ward, there are "no excuses" to delay the completion of the Doha Round in light of global financial turmoil. Ward stated that Australia is urging WTO Members to complete modalities by the end of 2008.

III. Future of WTO

Jim Mendenhall (former General Counsel for USTR) moderated the panel on the future of the WTO and noted that the state of the Doha negotiations has led observers to question the future direction of the WTO in general. Panelists expressed their views on the WTO and the direction in which they see the multilateral institution headed:

- **Global Practice Chair for Greenberg Traurig Jim Bacchus** urged WTO Members to conclude the Doha Round quickly because a Doha Agreement will provide the global economy with "the shot in the arm it needs." Bacchus equated "tariff cuts to tax cuts." He opined that although the conclusion of the Doha Round seems logical to many WTO Members, the impasse is politically-driven. Bacchus stated that WTO Members must avoid "unraveling the WTO." Regarding other functions of the WTO, Bacchus opined that although the WTO's Dispute Settlement Body is useful, the "danger in dispute settlement is that too many contentious issues between WTO Members may be relegated to dispute settlement." Regarding the new US Presidential Administration, Bacchus stated that the new President will embrace completion of the Doha Round, although he opined that "more accountability must be placed on those regulating trade [in the new Administration]."
- **Senior Advisor at the Center for Strategic and International Studies (CSIS) Grant Aldonas** opined that "the Doha process has gone off the rails." He stated that the United States and others must recognize that a large number of WTO Members are unprepared to move ahead on the Doha Round without further technical engagement and preparation. Regarding other functions of the WTO, Aldonas opined that the WTO dispute settlement process is "in a good place" because its legitimacy has been approved by a US Congress that accepts and implements DSB rulings (*e.g.*, zeroing). According to Aldonas, in order to solidify the future of the WTO, Members must ensure that WTO work is relevant to the international political agenda and relevant to businesses.

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

- **Senior Fellow at the Peterson Institute for International Economics Jeff Schott** opined that WTO Members will be unable to conclude the Doha Round by the end of 2008, but he added that it is still important that negotiators make progress on contentious issues by the end of the year. According to Schott, no substantial progress means that it will be more difficult to convince the next generation of negotiators that the WTO and the Doha Round are valuable to the global economy. Schott stated that the successful conclusion of the Doha Round does not only translate to lowered tariffs and subsidies but also serves as a key to upholding WTO rules and the institutional framework of the multilateral body. Regarding the WTO's future, Schott stated that Members must work to achieve three ideals: (i) "multilateralize multilateralization" by ensuring that all WTO Members adhere to WTO rules; (ii) "multilateralize regionalism" by making free trade agreements (FTAs) and regional trade agreements (RTAs) more WTO-friendly; and (iii) "modernize multilateralism" by ensuring that the WTO remains relevant to global politics, including adopting a consensus rule for WTO decisions, implementing new regulations and ensuring a strong linkage between trade and security.
- **Partner at WilmerHale Gary Horlick** stated that it is imperative that the United States and other countries complete the Doha Round. He opined, however, that the WTO "cannot seem to get a lot of things done" and listed several issues that he felt the WTO has not adequately addressed, including rules of origin (ROO), tariffs that fall below two percent, food safety concerns, investment issues, and climate change matters. Horlick stated that WTO Members must thus "find someplace else [other than the WTO] that can take care of some of these issues." When asked if Russia will accede to the WTO in the short-term, Horlick opined that there is little chance that Russia will complete its WTO accession in the short-term, even though accession would provide "huge benefits" to Russia.

Outlook

The Doha and WTO panel discussions at the Chamber of Commerce conference provided an interesting juxtaposition of views between government officials and private sector representatives. Government representatives – such as DUSTR Veroneau and the EU's Zaimis – continue to champion the Doha Round and its benefits, and continue to believe (or at least continue to publicly announce) that WTO Members can complete the Doha negotiations by the end of 2008. Business groups and private sector representatives, meanwhile, have adopted a more pessimistic outlook of the Doha Round and while they too believe that a final Doha Agreement will benefit everyone, they no longer believe that WTO Members can complete the modalities by the end of the year, much less the beginning of 2009 when a new US Administration assumes office (which could mean a new USTR and a lengthy transition period for a new USTR staff). Government representatives will undoubtedly continue to assume an optimistic tone with

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

regards to the Doha negotiations, although more and more voices seem to be joining the chorus that for the time being, Doha negotiations are stalled and intractable.

One factor likely adding to the increased pessimism surrounding the Doha Round is the sudden resignation of Peter Mandelson as EU Trade Commissioner, and his quick replacement by Baroness Ashton. Many observers have likened Mandelson's departure during a "crucial time" in the Doha talks to the 2006 resignation of then-USTR Rob Portman and his replacement by current USTR Susan Schwab. At that time, observers heralded Portman's departure during "crucial negotiations" as a sign that the Doha negotiations were going nowhere, and they expressed skepticism that USTR Schwab – who did not enjoy the same Congressional pedigree as Portman, a former Member of Congress – could effectively continue the Doha negotiations. The scenario seems to be repeating itself with some observers quietly opining that Mandelson's departure may be linked to discontent with the multilateral trade environment. Within the EU, several undisclosed sources have stated that Baroness Ashton is not known for having much of an expertise in international trade matters. It remains to be seen whether Baroness Ashton will secure the EU's continued work and momentum on the Doha Round but many believe that Mandelson's departure means that there is no chance that there will be any deal on modalities by the end of 2008. Add to this an incoming new US Presidential Administration at the beginning of 2009, and the future of the Doha Round continues to remain uncertain, as it has been over the past several years.

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

WTO to Discuss Impact of Global Credit Crisis on Trade Finance

Summary

The Director General of the World Trade Organization (WTO) has convened a meeting of major non-governmental and private sector financial institutions on November 12, 2008 to discuss the effects of the financial crisis on the availability and cost of trade finance. The WTO has no direct regulatory authority over trade finance, and the meeting is unlikely to result in any immediate action. Nonetheless, the Director General's action illustrates the concern that the financial crisis could affect trade flows and disproportionately harm developing countries.

Analysis

On October 10, 2008, WTO Director General Pascal Lamy announced that he had invited major trade finance providers, including the heads of key international finance agencies and representatives from five private sector banks, to a November 12 meeting of the Director General's Trade Finance Expert Group ("the Expert Group"). The purpose of the meeting is to discuss the availability and cost of trade finance for developing countries and to consider how to alleviate any future deterioration of the trade credit market in light of the global financial crisis. Mr. Lamy stated that the WTO Working Group on Trade Debt and Finance (WGTDF) would conduct a follow-up discussion on the outcomes of the Expert Group's meeting in late November.

The Expert Group meeting had been scheduled for the Spring 2009, but was advanced in response to the concerns of developing countries about the availability and cost of trade finance. On October 6, the Government of Brazil circulated a paper to WTO Members in which it proposed that the WTO examine the impact of the global credit crisis on the availability of trade finance to developing countries. Brazil also proposed that the WTO examine the impact that institutional arrangements, such as the Basel II Accord, have on the operation of trade finance in developing countries. The Basel II Accord comprises a set of recommendations on banking laws and regulations issued by the Basel Committee on Banking Supervision in June 2004. The Accord aims to establish an international standard for banks' minimum capital requirements that closely matches the underlying risks that the banks face. National regulatory agencies may then use this standard and the Committee's recommendations to implement and adopt domestic banking laws and regulations to govern the capital adequacy requirements of internationally active banks. The Expert Group will consider Brazil's paper during its November 12 meeting.

Brazil has long been concerned about the effects of the Basel II rules, which it alleges unfairly place developing countries in a much higher risk category than developed countries for trade financing. At the

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

last meeting of the Expert Group in April 2008, the group noted that Basel II rules appeared to militate against trade financing for developing countries, at least to the extent that balance sheet exposure to least-developed countries cost three times as much as exposure to developed countries. Brazil suggests that the rules might also have "pro-cyclical impacts" that effectively intensify cyclical movements rather than smoothing them. The ongoing debate about the review of the Basel II rules appears to have influenced Brazil's decision to highlight the issue of trade finance at this juncture.

The WTO's focus on these issues reflects concerns that the current crisis will restrict the availability of reasonably-priced trade financing, and that developing countries will be disproportionately harmed. Concerns about the availability and cost of trade financing have been a consistent theme of the Brazilian Government over the years, and it is not surprising that Brazil was among the first to express concern that recent events could adversely affect developing country exporters.

In recent years some banks have moved away from the trade credit business, which is labor intensive and low margin, and some have begun to refuse financing for contracts worth less than USD 10 million. Further, because trade credit is typically a short-term business and easily relinquished, the market can be volatile. This poses a risk for low income countries that trade in relatively small volumes and makes it more difficult for them to finance imports and exports. As the price for such financing has risen in recent weeks, banks have begun to offer credit at 300 basis points (*i.e.*, 3 percent) above the London Interbank Offered Rate (LIBOR); this is a threefold increase over the going rate one year ago. Until alternative lending opportunities dried up in recent weeks, the demand for trade financing was larger than the private sector could meet at the current cost, and greater co-financing by public and private agencies was seen as essential.

There is no evidence as yet, however, that the shortage of trade credit poses a threat to world trade as a whole. Rather, the trade credit business appears strong as banks shun more risky lending to focus on the traditional low-risk, low-margin but high-volume trade finance market. This is a large market that is worth some USD 14 trillion, and more than 90 percent of all transactions involve credit, insurance or guarantees in some form. Private sector agents, such as the large American and European banks Citigroup, J.P. Morgan and HSBC, conduct more than 90 percent of this business; however, the role of public sector agents, such as the World Bank's International Finance Corporation (IFC), Export-Import Banks and regional development banks is expanding. On October 9, the IFC announced that it would increase its trade financing program by USD 500 million. Notably, WTO Director General Lamy welcomed this announcement.

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

Outlook

While trade finance is not a common topic in the WTO, it is not out of place. The availability of reasonably-priced trade financing has a direct link to world trade, and is an issue of concern for WTO Members, especially developing country Members. The WGTDF lacks a negotiating or rule-making function, but has a mandate to produce recommendations on how to strengthen the coherence of international trade and finance policies.

Brazil and like-minded countries are not seeking any direct action by the WTO on the Basel II rules; it has only proposed that a "a better understanding of the operation of trade finance in developing countries, as well as the impact of institutional arrangements, such as Basel II, could be part of the work program of the WGTDF in the second semester of 2008." Recommendations by the working group or the Director General's Trade Finance Expert Group could, however, influence the thinking of the Bank of International Settlements' Basel Committee on Banking Supervision, which established the Basel II rules. These developments should be seen in the light of Mr. Lamy's strong conviction that the international trade and finance institutions must cooperate to meet the current crisis and the calls of some Governments for a new "Bretton Woods" to reform the governance of the global financial system.

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

WTO Appellate Body Releases Decision in *United States-Continued Suspension of Obligations in the EC-Hormones Dispute* (DS320)

Summary

Decision: The World Trade Organization (WTO) Appellate Body has largely overturned the findings of a Panel in an EC challenge to the application of retaliatory trade sanctions by the United States. The sanctions were imposed in 1999 after the WTO ruled that an EC ban on imported-treated beef violated the Agreement on the Application of Sanitary and Phytosanitary Measures (the "SPS Agreement"). On March 31, 2008, the Panel had ruled that the United States violated its procedural obligations under the WTO Dispute Settlement Understanding (DSU) by continuing to impose sanctions after the EC claimed to have complied with its WTO obligations, a finding reversed by the Appellate Body. The Panel had also found that the new EC measures did not meet the requirements of the SPS Agreement. The Appellate Body similarly overturned that finding, but then declined to make any findings itself whether or not the EC ban was WTO-consistent.

Significance of Decision / Commentary: This decision dealt with two critical WTO issues: when retaliatory trade sanctions must be lifted, and the role of WTO Panels in reviewing SPS measures taken by governments. The second issue is particularly important. We discuss the implications of each of these two rulings below.

(i) Lifting retaliation: a "unilateral declaration of compliance" is insufficient

DSU Article 23 requires Members to use the multilateral procedures of the DSU to "seek…redress" for the violation of WTO rules. The adoption of this provision was seen by many countries as a major achievement of the Uruguay Round, as they regarded it as a key tool to prevent US unilateralism, particularly the use of the US "Section 301" procedure. After protracted negotiations, the United States agreed to Article 23 in exchange for a significantly strengthened dispute settlement system. While Article 23 is a key provision governing the imposition of retaliation, the text provides little guidance on how it applies to the termination of retaliation.

In the present case, the United States was found to be in breach of its obligation to use the DSU to "make a determination" that "a violation has occurred." Yet the United States had received authorization from the Dispute Settlement Body (DSB) to retaliate against the EC because of the EC import prohibition on hormone-treated beef. In 2003, the EC claimed to have brought itself into compliance – not by removing the ban, but by informing the WTO of a new risk assessment which the EC considered provided sufficient

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

justification for it. The Panel found that by continuing its retaliation subsequent to the EC notification, the United States was in violation of its obligations under DSU Article 23.

Our April 3, 2008 commentary on the Panel decision stated that the Panel's ruling on this issue was troubling. We stated that "[t]he implication of the Panel's decision is that a unilateral assertion of compliance by the defending party – not a DSB decision – is to be considered as the triggering event for the termination of sanctions or additional proceedings." The Appellate Body rightly ruled that "[w]here parties disagree as to whether there is substantive compliance, the duty to cease the suspension of concessions is not triggered until substantive compliance is determined through multilateral dispute settlement proceedings. A unilateral declaration of compliance cannot have the same effect."

The Appellate Body decision thus reverses a highly anomalous Panel decision on an important systemic issue.

(ii) Measures to protect human life and health: deference to regulators

The single most important aspect of this decision is likely the Appellate Body's explanation of the standard of review applicable to WTO Panels when they review SPS measures.

The Panel's approach in this case was sharply criticized by the Appellate Body. It found that the Panel "reviewed the scientific experts' opinions and somewhat peremptorily decided what it considered to be the best science, rather than following the more limited exercise that its mandate required." Under this "more limited exercise", the role of a Panel is "not to determine whether the risk assessment undertaken by a WTO Member is correct, but rather to determine whether that risk assessment is supported by coherent reasoning and respectable scientific evidence and is, in this sense, objectively justifiable." It stressed that a Panel cannot "substitute its own scientific judgement for that of the risk assessor."

This standard accords considerable deference to national authorities when they adopt SPS measures, including regulations to protect human life or health. Moreover, the Appellate Body reiterated that the scientific basis for the measure "need not reflect the majority view within the scientific community but may reflect divergent or minority views" provided that it "comes from a respected and qualified source."

Thus, any national SPS measure that is supported by "respectable scientific evidence" should meet WTO risk assessment standards, even where the evidence is based on a minority of scientific views. A Panel draw cannot upon its expert advisors to "substitute its own scientific judgement" for that of the government that adopted the measure.

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

The Appellate Body has articulated the standard of review in earlier disputes, but this decision is both clear and forceful about the limited role that should be assumed by Panels. The reasoning used by the Appellate Body could readily apply to other provisions of the SPS Agreement, and even to the Agreement on Technical Barriers to Trade. The decision thus has potentially far-reaching implications for the regulatory flexibility of all WTO governments. The Appellate Body has sent a strong signal that WTO Panels should not second-guess national governments on health and safety measures that have a "respectable" scientific basis. Moreover, assuming that the present case is re-litigated under this standard of review, a "hands off" Panel, now duly instructed by the Appellate Body on its limited role, may well reach a different result on the consistency of the new EC measures with the SPS Agreement.

Analysis

Background

In 1998, the WTO Appellate Body upheld a complaint by the United States that an EC ban on the importation of hormone-treated beef violated the SPS Agreement. The Appellate Body ruled, among other things, that the EC import prohibition was not "based on" a risk assessment, in breach of Article 5.1 of the SPS Agreement. In 1999, following the expiration of the compliance period, the DSB authorized the United States to impose retaliatory trade sanctions on EC imports up to the level of USD 116.8 million per year. The US Government immediately implemented this authorization through 100% additional tariffs on certain EC imported products.

In 2003, the EC adopted a new measure (the "2003 Directive"), which it argued brought the EC into compliance with the DSB rulings. While it kept the import prohibition in place, the EC argued that the 2003 Directive was "based on a comprehensive risk assessment" that justified the ban. The EC also invoked Article 5.7 of the SPS Agreement, which provides that where "relevant scientific evidence is insufficient", a Member may "provisionally adopt" SPS measures.

However, the United States did not agree that the 2003 Directive constituted compliance, and it therefore refused to remove the sanctions against EC imports. On March 31, 2008, a Panel ruled that the United States violated its procedural obligations under the DSU by not having recourse to multilateral procedures to determine whether the new EC measure was WTO-consistent. However, it also ruled that the 2003 Directive still did not meet the requirements of the SPS Agreement, and so it rejected the EC claim that its illegal measure had been "removed." The main findings of the October 16, 2008 decision of the Appellate Body are summarized below.

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

Cessation of retaliation: DSU Article 22.8 requires "nothing less than substantive removal of the inconsistent measure"

DSU Article 22.8 provides in part that "[t]he suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed…." The EC argued that the measure that had been originally found to be WTO-inconsistent was "removed" when it was replaced by the 2003 Directive, and that therefore the United States violated DSU Article 22.8 by continuing to apply sanctions.

The Appellate Body rejected what it called the EC's "formalistic" interpretation of DSU Article 22.8, and stressed that "the 'removal' of 'the measure found to be inconsistent' should be properly understood to require nothing less than substantive removal of the inconsistent measure." The Appellate Body stated that the EC's position "requires the termination of the suspension of concessions whenever an implementing measure is notified", which "undermines the effectiveness of the suspension of concessions in inducing full compliance." The Appellate Body found this position to be "difficult to reconcile with the DSU's objective of providing security and predictability to the multilateral trading system."

The Appellate Body stated that the suspension of concessions was an "an abnormal state of affairs that is not meant to remain indefinitely." It added that Members must act in a "cooperative manner" so that the "normal state of affairs, that is, compliance with the covered agreements and absence of the suspension of concessions, may be restored as quickly as possible." It considered that both the suspending Member and the implementing Member "share the responsibility to ensure that the application of the suspension of concessions is 'temporary'." Where the Parties disagree as to whether an implementing measure achieves substantive compliance, "both Members have a duty to engage in WTO dispute settlement in order to establish whether the conditions in Article 22.8 have been met and whether, as a consequence, the suspension of concessions must be terminated." It added that "[o]nce substantive compliance has been confirmed through WTO dispute settlement procedures, the authorization to suspend concessions lapses by operation of law…."

The Appellate Body accepted that the EC "should be presumed to have acted in good faith when adopting the implementing measure", but stressed that "this did not mean that the taking of such measure in itself establishes that the measure achieves substantive compliance."

The Appellate Body agreed with the EC that recourse to the "compliance" panel procedure in DSU Article 21.5 was "the proper course of action within the procedural structure of the DSU" to resolve disagreements as to whether a WTO-inconsistent measure has been removed. However, it rejected the

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

EC argument that an original respondent in the post-suspension stage of a dispute was precluded from initiating Article 21.5 proceedings. It ruled that "proceedings under Article 21.5 of the DSU may be initiated not only by the complainant, but also by the respondent in the original proceedings."

No obligation to lift sanctions until "substantive compliance is determined through multilateral dispute settlement proceedings"

DSU Article 23, by its own terms, seeks the "strengthening of the multilateral system." Article 23.1 provides that when Members "seek the redress of a violation of obligations", they are required to "have recourse to, and abide by", the multilateral procedures of the DSU. Article 23.2(a) specifies that Members shall "not make a determination to the effect that a violation has occurred" except through recourse to the DSU. In the present case, the Panel found that the United States, by continuing its retaliation subsequent to the EC notification of the 2003 Directive, was "seeking the redress of a violation" without having recourse to the DSU, in violation of Article 23.1.

The Appellate Body reversed the findings of the Panel on this issue. It emphasized that "[w]here parties disagree as to whether there is substantive compliance, the duty to cease the suspension of concessions is not triggered until substantive compliance is determined through multilateral dispute settlement proceedings. A unilateral declaration of compliance cannot have the same effect."

The Appellate Body similarly overturned the finding of the Panel that by continuing the application of sanctions, the United States was "seeking the redress of a violation" in breach of DSU Article 23.1. It stated that the Panel's finding of a procedural violation "appears to presuppose what is yet to be established", i.e., that the WTO-inconsistent EC measure was "removed" by the 2003 Directive.

The Appellate Body also rejected the EC argument that the United States had made a "determination" that the 2003 Directive violated the EC's obligations. The EC had pointed to US statements in the DSB as evidence of such a determination of WTO-inconsistency. The Appellate Body did not consider that such statements had "the degree of firmness or immutability necessary in order to constitute a 'determination' within the meaning of Article 23 of the DSU." It also expressed concern that imputing legal effect to DSB statements "would result in a 'chilling' effect on those statements, because Members would refrain from expressing their views at DSB meetings regarding the WTO-inconsistency of other Members' measures lest such statements be found to constitute a violation of Article 23."

Panel's selection of experts violated EC's due process rights

The Appellate Body upheld an EC claim that the Panel violated the due process rights of the EC through its selection of two particular scientific experts. These individuals had an institutional affiliation with an

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

expert committee on food additives. According to the EC, there was an inherent conflict of interest because the experts were being asked to evaluate certain reports that were directly critical of studies that had been prepared earlier by this committee. The Appellate Body agreed with the EC position, finding that the appointment of these two experts "compromised the adjudicative independence and impartiality of the Panel" in violation of the due process rights of the EC and DSU Article 11.

Risk assessment must include risks arising from "abuse or misuse"

Article 5.1 of the SPS Agreement provides that Members must ensure that their SPS measures are "based on" a risk assessment. After reviewing the technical evidence, the Panel concluded that the EC had not satisfied the requirements of the definition of a "risk assessment" contained in Annex of the SPS Agreement.

The Appellate Body began its analysis of this issue by recalling that SPS measures must be "based on" a risk assessment. It affirmed an earlier ruling that "there must be a 'rational relationship' between the SPS measure and the risk assessment." It also recalled that the risk assessment need not "embody only the view of a majority of the relevant scientific community." It reiterated that "responsible and representative governments may act in good faith on the basis of what, at a given time, may be a divergent opinion coming from qualified and respected sources." The risk assessment must also be "sufficiently specific" in terms of "the harm concerned and the precise agent that may possibly cause the harm." The Appellate Body also stressed that "[w]hile use of international standards is encouraged, the SPS Agreement recognizes the right of WTO Members to introduce or maintain an SPS measure which results in a higher level of protection than would be achieved by measures based on such international standards."

Turning to the facts of this case, the Appellate Body found that the Panel erred in its interpretation and application of Article 5.1 with respect to the risks of misuse and abuse in the administration of hormones to cattle for growth-promotion purposes. The Panel had excluded such risks from its analysis, as it considered this to be a "risk management" issue rather than a risk assessment matter. However, the Appellate Body made clear that "the risks arising from the abuse or misuse in the administration of hormones can properly be considered as part of a risk assessment" and that "[a]ny suggestion that such risks cannot form part of a risk assessment would constitute legal error." The Appellate Body therefore ruled that the Panel incorrectly applied Article 5.1 by "summarily dismissing" the evidence on misuse or abuse in the administration of hormones.

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

The Appellate Body also dismissed the EC's claims with respect to the Panel's treatment of the specificity and the quantification of the risks. It upheld the EC argument that the Panel had incorrectly allocated the burden of proof to the EC when it assessed the consistency of the 2003 Directive with Article 5.1.

Standard of review: Panel's "limited mandate" is to review risk assessment and not choose the "best science"

The Appellate Body found that the Panel applied an incorrect standard of review in examining whether the EC's risk assessment satisfied the requirements of Article 5.1. The Panel found that this also breached the Panel's obligations under DSU Article 11 to conduct an "objective assessment."

The Appellate Body began by stressing the proper standard of review:

> A panel reviewing the consistency of an SPS measure with Article 5.1 must determine whether that SPS measure is 'based on' a risk assessment. It is the WTO Member's task to perform the risk assessment. The panel's task is to review that risk assessment. Where a panel goes beyond this limited mandate and acts as a risk assessor, it would be substituting its own scientific judgement for that of the risk assessor and making a de novo review and, consequently, would exceed its functions under Article 11 of the DSU. Therefore, the review power of a panel is not to determine whether the risk assessment undertaken by a WTO Member is correct, but rather to determine whether that risk assessment is supported by coherent reasoning and respectable scientific evidence and is, in this sense, objectively justifiable.

The Appellate Body recalled that "a WTO Member may properly base an SPS measure on divergent or minority views, as long as these views are from qualified and respected sources", and that "[t]his must be taken into account in defining a panel's standard of review." It stated that a panel reviewing the WTO-consistency of an SPS measure with Article 5.1 must first identify the scientific basis for the measure. According to the Appellate Body, this scientific basis "need not reflect the majority view within the scientific community but may reflect divergent or minority views" provided that it "comes from a respected and qualified source" and has "the necessary scientific and methodological rigour to be considered reputable science." It added that "while the correctness of the views need not have been accepted by the broader scientific community, the views must be considered to be legitimate science according to the standards of the relevant scientific community."

The Appellate Body indicated that a WTO Panel "should also assess whether the reasoning articulated on the basis of the scientific evidence is objective and coherent." The panel must "review whether the particular conclusions drawn by the Member assessing the risk find sufficient support in the scientific

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

evidence relied upon" and whether the results of the risk assessment "sufficiently warrant" the SPS measure.

The Appellate Body ruled that the Panel in this case did not follow these principles in assessing the EC's risk assessment under Article 5.1. Instead, according to the Appellate Body, the Panel "seems to have conducted a survey of the advice presented by the scientific experts and based its decisions on whether the majority of the experts, or the opinion that was most thoroughly reasoned or specific to the question at issue, agreed with the conclusion drawn in the European Communities' risk assessment."

The Appellate Body stressed that "under the applicable standard of review, neither the Panel nor the experts it consulted were called upon to evaluate the correctness of the European Communities' risk assessment." Instead, the Panel's role was "more limited", consisting of "identifying the scientific basis and evidence relied upon in the risk assessment; verifying that the scientific evidence comes from respected and qualified sources; and determining whether the reasoning articulated by the European Communities on the basis of the scientific evidence is objective and coherent."

The Appellate Body concluded that "[u]ltimately, the Panel reviewed the scientific experts' opinions and somewhat peremptorily decided what it considered to be the best science, rather than following the more limited exercise that its mandate required." It stressed that it was "not the Panel's task" to "determine whether there is an appreciable risk of cancer" arising from the consumption of meat treated with hormones. Instead, the Panel was "called upon to review the European Communities' risk assessment." Therefore, the Appellate Body found that the Panel failed to conduct an objective assessment of the facts of the case under DSU Article 11 in determining whether the EC's risk assessment satisfied the requirements of Article 5.1 of the SPS Agreement.

The Appellate Body accordingly reversed the Panel's finding that the 2003 Directive was not based on a risk assessment within the meaning of Article 5.1. However, the Appellate Body said that it could not "complete the analysis" and make a ruling itself under Article 5.1, given "the numerous flaws" in the Panel's analysis and the "highly contested nature of the facts." Therefore, it made "no findings on the consistency or inconsistency" of the EC's import ban.

Recourse to provisional measures not limited to "paradigm shifts"

Article 5.7 of the SPS Agreement provides in part that "where relevant scientific evidence is insufficient", a Member may "provisionally adopt" SPS measures on the basis of "available pertinent information." The Panel had concluded that it had not been demonstrated that the relevant scientific evidence for the EC ban was "insufficient."

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

The Appellate Body first examined the relationship between the existence of international standards and the right of Members to adopt provisional measures under Article 5.7. It noted that Article 3.2 provides that SPS measures that conformed to international standards were presumed to be WTO-consistent. However, it stressed that this presumption was inapplicable "where a Member chooses a level of protection that is higher than would be achieved by a measure based on an international standard."

The Appellate Body recalled its earlier jurisprudence that "relevant scientific evidence" will be considered as "insufficient" within the meaning of Article 5.7 "if the body of available scientific evidence does not allow, in quantitative or qualitative terms, the performance of an adequate assessment of risks" as required under the Agreement. It stressed that:

> [S]cience continuously evolves. It may be useful to think of the degree of change as a spectrum. On one extreme of this spectrum lies the incremental advance of science. Where these scientific advances are at the margins, they would not support the conclusion that previously sufficient evidence has become insufficient. At the other extreme lie the more radical scientific changes that lead to a paradigm shift. Such radical change is not frequent. Limiting the application of Article 5.7 to situations where scientific advances lead to a paradigm shift would be too inflexible an approach. WTO Members should be permitted to take a provisional measure where new evidence from a qualified and respected source puts into question the relationship between the pre-existing body of scientific evidence and the conclusions regarding the risks. We are referring to circumstances where new scientific evidence casts doubts as to whether the previously existing body of scientific evidence still permits of a sufficiently objective assessment of risk.

In the present case, the Panel had ruled that "there must be a critical mass of new evidence and/or information that calls into question the fundamental precepts of previous knowledge and evidence so as to make relevant, previously sufficient, evidence now insufficient [original emphasis]." The Appellate Body found this to be "too inflexible" and imposed "an excessively high threshold." In the view of the Appellate Body, the "insufficiency" requirement in Article 5.7 did not imply that new scientific evidence "must entirely displace the scientific evidence upon which an international standard relies." Instead, it would be sufficient for new scientific developments to "call into question whether the body of scientific evidence still permits…a sufficiently objective assessment of risk."

The Appellate Body therefore reversed the Panel's finding that it had not been demonstrated that relevant scientific evidence was insufficient within the meaning of Article 5.7. However, as with Article 5.1, the Appellate Body found it was unable to "complete the analysis" and to make any findings on the consistency or inconsistency of the EC's provisional SPS measure.

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

The Appellate Body concluded with a recommendation that the DSB "request the United States and the European Communities to initiate Article 21.5 proceedings without delay in order to resolve their disagreement as to whether the European Communities has removed the measure found to be inconsistent in EC – Hormones and whether the application of the suspension of concessions by the United States remains legally valid."

The decision of the WTO Appellate Body in *United States – Continued Suspension of Obligations in the EC – Hormones Dispute* (DS320) was released on October 16, 2008.

Note: Canada was a co-complainant in this dispute. On October 16, the Appellate Body issued a parallel ruling in the Canadian case.

Multilateral Highlights

Mexico Requests WTO Consultations with the United States Regarding US Dolphin Safe Labeling Requirements

Press sources indicate that on October 24, 2008, Mexico formally requested World Trade Organization (WTO) dispute settlement consultations with the United States regarding US "dolphin safe" labeling requirements for tuna, which Mexico contends prevent the labeling of Mexican tuna as dolphin safe. If consultations fail to resolve the dispute within 60 days, Mexico may request that the WTO Dispute Settlement Body (DSB) establish a panel to determine whether the United States is acting consistently with its WTO obligations.

In January 2003, the Bush Administration sought to ease labeling restrictions on imports of dolphin safe tuna from Mexico and other countries, as long as their fishing methods (*i.e.,* dolphin-encircling nets) did not kill or harm dolphins. In April 2003, a federal judge blocked the Administration's attempt to ease labeling standards for dolphin safe tuna and left the dolphin safe tuna labeling intact to ensure that tuna sold in the United States was caught by nets that did not kill or harm dolphins. In 2007, a US court ruled that dolphin-safe means "no tuna were caught on the trip in which such tuna were harvested using a purse seine net intentionally deployed on or to encircle dolphins, and that no dolphins were killed or seriously injured in the sets in which the tuna were caught."

According to the US International Dolphin Conservation Program Act (P.L. 105-42, which amended the Marine Mammal Protection Act-MMPA of 1972), the National Oceanic and Atmospheric Administration (NOAA) collects data in order to track and verify "dolphin safe" and "non-dolphin safe" tuna products through a variety of means and measures. According to NOAA, the legal definition of the term "dolphin-

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

safe" is that no dolphins were killed or injured in the set in which the tuna was harvested; purse seine vessels are allowed to set their nets on dolphins - however, if any dolphins are killed or seriously injured, that set may not be designated as "dolphin-safe." Mexico has been unable to obtain the US dolphin safe labeling for its tuna products because its fishing methods allegedly do not comply with US dolphin safe standards. The Mexican government argues that the US dolphin safe labeling requirements constitute a trade barrier that in practice prevents the entry of Mexican tuna to the US market even if Mexico's harvest procedures are in compliance with multilaterally-agreed dolphin-safe standards under the Inter-American Tropical Tuna Commission.

Mexico has long sought to eliminate US import restrictions on its tuna exports. The contentious tuna dolphin dispute is a long-standing trade irritant between Mexico and the United States that dates to 1990, when the United States first imposed an embargo on Mexican imports of commercial yellowfin tuna harvested with purse-seine nets, pursuant to court order under the MMPA. In February 1991, Mexico filed a complaint under the General Agreement on Tariffs and Trade (GATT) dispute settlement procedures, stating that the US embargo on Mexican yellowfin tuna was inconsistent with GATT rules. The panel ruled that the US import ban was inconsistent with GATT rules but Mexico and the United States rejected the adoption of the final GATT panel report and reached an agreement through bilateral negotiations.

Although Mexico would be agreeable to reach a "negotiated solution" as in the prior GATT tuna dolphin dispute, Mexican officials are ready to further challenge the US dolphin safe labeling requirements at the WTO. According to the Mexican Ministry of Economy, Mexico has lost more than one third of its tuna fleets as a result of the US dolphin safe labeling requirements. A renewed US-Mexico tuna dolphin dispute is expected to cause friction among US and Mexican environmental interests as well. Similar to the US-Mexico trucking dispute, the tuna dolphin dispute is highly sensitive due to US industry groups' concerns regarding the Mexican tuna fishing industry methods, which allegedly fail to meet US environmental requirements. US trade officials did not issue any comments regarding Mexico's decision to seek dispute settlement consultations at the WTO.

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