WHITE & CASE

December 2009

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

The Heritage Foundation Explores Upcoming Copenhagen Climate Change Conference Issues

On December 2, 2009, The Heritage Foundation hosted a panel discussion titled "Wonderful Copenhagen? A Preview of the Upcoming Climate Change Conference." Delegates from the United States and other countries will gather in Copenhagen, Denmark for the December 7-18, 2009 United Nations Climate Change Conference and will work on a successor treaty to the 1997 Kyoto Protocol, whose provisions expire in 2012. We review The Heritage Foundation panelists' views on the upcoming Copenhagen conference.

Mandatory Reporting of Greenhouse Gases Rule to Enter Into Effect December 29, 2009

On December 29, 2009, a final rule promulgated by the US Environmental Protection Agency (EPA) requiring mandatory reporting of greenhouse gas (GHG) emissions will enter into effect. The "Mandatory Reporting of Greenhouse Gases Rule" applies to fossil fuel suppliers and industrial gas suppliers (including importers and exporters of these products), direct greenhouse gas emitters and manufacturers of heavy-duty and off-road vehicles and engines. The rule requires that these sources monitor and report annual emissions of carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), sulfur hexafluoride (SF_6), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and other fluorinated gases. The Administrator of the EPA issued the final rule on September 22, 2009. We review below the general requirements of the final rule.

UN Climate Change Conference in Copenhagen Results in Limited, Non-Binding Political Agreement

From December 7-19, 2009, the Parties to the United Nations Framework Convention on Climate Change (UNFCCC) met in Copenhagen, Denmark for the 15th annual UN Climate Change Conference (COP15), which aimed to conclude a new global climate agreement for the period after 2012 when the current Kyoto Protocol will expire. The conference was characterized by disagreements between developed and developing countries, and resulted in a limited, non-binding political agreement (the "Copenhagen Accord") which must now be transformed into a legally binding treaty in the course of 2010. We highlight:

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

(i) the key controversial issues that emerged during the conference, (ii) the main contents of the new agreement, and (iii) the immediate outlook for the global efforts to combat climate change through international mechanisms.

USTR Releases 2009 Report to Congress on China's WTO Compliance

In December 2009, the Office of the United States Trade Representative (USTR) released its annual "Report to Congress on China's WTO Compliance." This is the eighth report prepared pursuant to section 421 of the US-China Relations Act of 2000 (P.L. 106-286), 22 U.S.C. § 6951, which requires USTR to report annually to Congress on compliance by China with commitments made in connection with its accession to the World Trade Organization (WTO), including both multilateral commitments and any bilateral commitments made to the United States. The focus of the report's analysis continues to be on trade concerns raised by US stakeholders that, in the view of the US Government, merit attention within the WTO context. We review below the 2009 report.

United States Highlights

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

- Congress Extends Expiring GSP, ATPA Preference Programs for Additional Year
- House of Representatives Passes Bill Containing Tightened "Buy American" Waiver Requirements
- EPA Issues "Endangerment Finding" for Greenhouse Gas Emissions
- Senate Confirms First Intellectual Property Enforcement Coordinator
- Senators Reintroduce Trade Reform, Accountability, Development and Employment Act

Free Trade Agreements

Free Trade Agreements Highlights

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

- USTR Requests Public Comments on TPP FTA Negotiations
- Administration Submits to Congress Notice of Intent to Join TPP FTA Negotiations

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

Customs

Customs Highlights

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

- Secretary of Homeland Security Announces Two-Year Delay in "100 Percent Cargo Scanning" Initiative
- Mexico and the United States Sign Declaration of Principles on Customs Matters

Multilateral

Geneva Gathering of Trade Ministers Yields Little Movement in Stalled Doha Talks

From November 30 – December 2, 2009, trade officials convened in Geneva for a World Trade Organization (WTO) Doha Development Agenda Ministerial Conference. Although officials repeated their political will to complete a Doha Agreement as soon as possible, the gathering, as expected, yielded little concrete forward movement in the stalled multilateral negotiations. We review below several of the developments to come out of the Ministerial Conference.

Multilateral Highlights

- WTO AB Rules Against China in Audiovisual Dispute with United States
- China Requests Dispute Settlement Panel on US Section 421 Tires Decision
- USTR Announces US-China Agreement Resolving "Famous Brands" Dispute
- Korea Requests Consultations with US Over "Zeroing" Used in Antidumping Duty Calculations

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

The Heritage Foundation Explores Upcoming Copenhagen Climate Change Conference Issues

Summary

On December 2, 2009, The Heritage Foundation hosted a panel discussion titled "Wonderful Copenhagen? A Preview of the Upcoming Climate Change Conference." Delegates from the United States and other countries will gather in Copenhagen, Denmark for the December 7-18, 2009 United Nations Climate Change Conference and will work on a successor treaty to the 1997 Kyoto Protocol, whose provisions expire in 2012. We review The Heritage Foundation panelists‟ views on the upcoming Copenhagen conference.

Analysis

On December 2, 2009, The Heritage Foundation hosted a discussion with a panel of speakers on the upcoming Copenhagen climate change conference and the issues that delegates from the Unites States and other countries will likely face at the conference. Ben Lieberman from The Heritage Foundation served as panel moderator.

Harlan Watson, Distinguished Professional Staff for the Minority at the House Select Committee on Global Warming, stated that international climate change negotiations are ongoing and that talks on a new international climate change agreement began shortly after the Kyoto Protocol was implemented. He noted that the United States has not ratified the Kyoto Protocol and consequently, the United States only serves as an observer in talks related to the Kyoto Protocol. According to Watson, the issues facing countries in Copenhagen are numerous and include:

- **Legal form of agreement.** Watson opined that there is disagreement between countries on the legal form that a possible Copenhagen agreement or agreements would take. According to Watson, developed countries want a new agreement to emerge from Copenhagen whereas developing countries want the current Kyoto Protocol to be extended. In addition, the United States and Japan

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

want a "bottom-up" approach to an international climate change agreement whereas the EU is pushing for Kyoto-like aspects to be included in the agreement.

- **Country roles.** Watson stated that there is also disagreement on the roles that developed and developing countries will assume under an international climate change agreement, and disagreement on the level of climate change cooperation expected between the two groups of countries.
- **Emissions reduction commitments.** Watson stated that there is a long-standing disagreement among countries on emissions reductions commitments. The EU, so far, has proposed a commitment of a 20 percent reduction in emissions from 1990 levels by 2020. Developing countries are seeking similar commitments from other developed countries. Watson noted, however, that not many countries have stepped forward with proposed emissions reduction commitments. Watson stated that Copenhagen delegates will also likely discuss the "shared vision" for an international climate change agreement and attempt to narrow differences on global emissions reduction goals.
- **Technology use.** Watson stated that another issue that Copenhagen delegates will likely face is the transfer between developed and developing countries of climate change technology under an international climate change agreement. He noted that developing countries argue that developed countries should provide climate change technology to developing countries "for free or at discounted rates."
- **Measuring emissions reductions.** Watson stated that Copenhagen delegates will face many questions on emissions reduction commitments, including questions on how to measure emissions reductions and who will measure the reductions. He also opined that countries will discuss the use of country registries of emissions reductions and the implementation of a review/verification scheme to measure such reductions.

Watson noted that the United States will focus on four main issues in Copenhagen, as outlined by Secretary of State Hillary Clinton in remarks delivered in Singapore on November 11, 2009:

1. An international climate change agreement that "must involve immediate global action in which all nations do their fair share;"
2. An international climate change agreement that addresses all relevant issues such as adaptation, financing, technology cooperation, dissemination of technology, forest preservation, and commitments to strong mitigation actions;

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

3. A commitment by all countries to a system that will ensure transparency and accountability with regard to the implementation of domestic actions; and

4. An international agreement that endorses funding facilities to assist developing countries.

Marlo Lewis, Senior Fellow at the Competitive Enterprise Institute, stated that the Obama Administration"s initial strategy and approach to Copenhagen was to seek a domestic commitment on climate change (*i.e.*, the creation of a US cap-and-trade system) that President Obama could then use as leverage in Copenhagen to get other countries to adopt similar measures. He noted, however, that the US Congress did not succeed in approving a climate change bill before the Copenhagen conference and he opined that it may be more difficult for Congress to approve any proposed climate change bills in 2010 because it is an election year. With little movement on the US climate change bill, Lewis stated that the Obama Administration consequently retreated on its initial Copenhagen approach and has instead stated that it is "politically committed" to the creation of an international climate change agreement. Lewis opined that this US "political commitment" will do little in fostering an international agreement on climate change and he stated that "legal commitments" from the Obama Administration are needed if the United States is serious and willing to negotiate an international climate change agreement. Lewis opined that the Copenhagen negotiations are "likely to go nowhere" because of the "weak" US position on the talks. He also stated that the Copenhagen talks are likely to be limited because of the scope of the discussion. For example, Lewis stated that cap-and-trade programs are very expensive for developing countries and are not easy to maintain, consequently making the inclusion of cap-and-trade provisions in a final international climate change agreement a contentious and difficult proposition.

Sallie James, Trade Policy Analyst at the Cato Institute, opined that global emissions are a "global issue, not a domestic issue;" consequently, the problem of global emissions will not be answered by "domestic proposals" that some countries, including the United States, are exploring. She stated that there is concern over the inclusion of trade provisions to domestic climate change initiatives as proposed by various countries. According to James, these trade provisions are meant to address the "fear" of a loss of competitiveness stemming from the introduction of climate change measures. She opined, however, that if countries include such trade provisions in an international climate change agreement, they will effectively put a "halt" to any forward movement on an international agreement. She noted that some countries recognize the contentious nature of trade provisions in climate change proposals and are exploring inserting language in a final international climate change agreement that would prevent the introduction of trade provisions to the agreement"s text. James discussed US proposals for the implementation of a "carbon tariff" as an example of a trade provision introduced in climate change

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

proposals. She stated that "carbon tariffs are frightening for developing countries" and while the implementation of carbon tariffs for imported products might mitigate "some competitiveness fears for the United States," such tariffs would wreak damage to the global economy. James stated that an even more difficult question is at what level the United States would set carbon tariffs and opined that this is a contentious issue that US lawmakers have not yet addressed. She also opined that the implementation of a US carbon tariff also might attract attention by the World Trade Organization (WTO) on whether such a measure is compliant with US international obligations.

Steven Groves from The Heritage Foundation stated that he was "dubious" that the various proposals to address global emissions would offer an effective solution and he expressed concern that such proposals could negatively affect US sovereignty. He opined that the completion of a final international climate change agreement would create a "new global bureaucracy" that would dictate new climate change enforcement guidelines for the United States. According to Groves, an international climate change agreement would also create new committees that would ultimately decide if the United States has met its international climate change obligations. He also opined that under an international agreement, the United States would be required to transfer technology to developing countries, adding that an international compliance and enforcement body would be the ultimate decider on whether the United States has complied satisfactorily on these transfers. Groves opined that there are no discussions or proposals on the negotiating table that would afford the United States a way to participate in an international climate change agreement without giving up its sovereignty, and he proposed that a final climate change agreement should have language that states that the United States (as opposed to an international body) should be able to decide whether it has complied with any treaty obligations.

Outlook

Although expectations for the Copenhagen climate change conference were initially high at the beginning of 2009, those expectations have since plummeted, especially after the US Congress" work on a climate change bill was stalled in light of other domestic legislative issues. As noted, President Obama had hoped to bring a completed climate change bill with him to Copenhagen but it now appears that without such a bill, the Administration has had to rework its approach to the climate change conference. Although Administration officials have indicated that the United States is interested and "politically willing" to move on the issue of an international climate change agreement, it is unlikely that President Obama will make any major ground-breaking climate change proposals or announcements while in Copenhagen.

Even more unlikely is the expectation that Copenhagen delegates will reach consensus and complete a comprehensive international climate change agreement that contains global commitments for emissions

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

reductions, among other things. As The Heritage Foundation panelists indicated, the issues that delegates will confront in Copenhagen are numerous and contentious – the scope of the agreement, the form of the agreement, measuring emissions reductions, addressing domestic climate change programs and their compliance with an international agreement, the role that trade provisions such as carbon tariffs will play in an international agreement, to name just a few. All the participants noted that countries participating in the climate change conference do not appear to be in agreement on many of these issues, and it is unlikely that in the span of eleven days, leaders will reach consensus on these contentious matters.

Leaders, however, may agree to some elements of an international agreement, a general framework or a political agreement. Indeed, some observers opine that leaders may reach a political agreement that broadly outlines an international agreement that countries can then integrate in 2010 or beyond into a legal agreement that can later be ratified by countries. Based on statements made by United Nations Framework Convention on Climate Change (UNFCCC) Secretariat Yvo de Boer, such a political agreement could contain broad provisions on emissions reduction targets for developed countries and developing countries, funding for clean energy, deforestation reduction, and adaptation assistance in developing countries, and "key architectural elements" of an international legally-binding climate change agreement.

We will continue to monitor the Copenhagen conference and will update you on any developments. Please let us know if you have any questions.

Mandatory Reporting of Greenhouse Gases Rule to Enter Into Effect December 29, 2009

Summary

On December 29, 2009, a final rule promulgated by the US Environmental Protection Agency (EPA) requiring mandatory reporting of greenhouse gas (GHG) emissions will enter into effect. The "Mandatory Reporting of Greenhouse Gases Rule" applies to fossil fuel suppliers and industrial gas suppliers (including importers and exporters of these products), direct greenhouse gas emitters and manufacturers of heavy-duty and off-road vehicles and engines. The rule requires that these sources monitor and report annual emissions of carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), sulfur hexafluoride (SF_6), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and other fluorinated gases. The Administrator of

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

the EPA issued the final rule on September 22, 2009. We review below the general requirements of the final rule.

Analysis

I. Applicability

The final rule lists the facilities and supply operations that must submit annual GHG reports ("Reporters"), as set forth below. For the purposes of the final rule, a facility is defined as "any physical property, plant, building, structure, source, or stationary equipment located on one or more contiguous or adjacent properties in actual physical contact or separated solely by a public roadway or other public right-of-way and under common ownership or common control, that emits or may emit any greenhouse gas." **Suppliers include producers, importers, and exporters of covered fuels and industrial gases.**

- Any facility that contains any source category that is listed below:
  - Electricity generating facilities that are subject to the Acid Rain Program (ARP) or otherwise report CO_2 mass emissions year-round;
  - Adipic acid production;
  - Aluminum production;
  - Ammonia manufacturing;
  - Cement production;
  - HCFC–22 production;
  - HFC–23 destruction processes that are not co-located with a HCFC–22 production facility and that destroy more than 2.14 metric tons of HFC– 23 per year;
  - Lime manufacturing;
  - Nitric acid production;
  - Petrochemical production (This source category consists of all processes that produce acrylonitrile, carbon black, ethylene, ethylene dichloride, ethylene oxide, or methanol, with certain exceptions. Exceptions include processes that produce a petrochemical as a byproduct, processes that produce methanol from synthesis gas when the annual mass production of hydrogen or ammonia exceeds the annual mass of methanol produced, direct chlorination processes operated independently of oxychlorination processes to produce ethylene dichloride,

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

processes that produce bone black, and processes that produce a petrochemical from bio-based feedstock.);

- Petroleum refineries (Petroleum refineries are facilities that produce gasoline, gasoline blending stocks, naphtha, kerosene, distillate fuel oils, residual fuel oils, lubricants, or asphalt (bitumen) by the distillation of petroleum or the redistillation, cracking, or reforming of petroleum derivatives. The definition of petroleum refineries excludes facilities that distill only pipeline transmix (off-spec material created when different specification products mix during pipeline transportation), regardless of the products produced.);
- Phosphoric acid production;
- Silicon carbide production;
- Soda ash production;
- Titanium dioxide production;
- Municipal solid waste (MSW) landfills that generate CH4 in amounts equivalent to 25,000 metric tons CO2e or more per year; and
- Manure management systems that emit CH4 and N20 (combined) in amounts equivalent to 25,000 metric tons CO2e or more per year.

- Any facility that contains any source category that is listed below and that emits 25,000 metric tons CO_2 equivalent (CO_2e) or more per year in combined emissions from stationary fuel combustion units, miscellaneous uses of carbonates and all below-listed source categories:
  - Ferroalloy Production;
  - Glass Production;
  - Hydrogen Production;
  - Iron and Steel Production;
  - Lead Production;
  - Pulp and Paper Manufacturing; and
  - Zinc Production.
- Any facility that meets the following conditions:

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

- The facility does not meet the requirements as described above;
- The aggregate maximum rated heat input capacity of the stationary fuel combustion units at the facility is 30 million British thermal units per hour (mmBtu/hr) or greater; and
- The facility emits 25,000 metric tons CO2e or more per year from all stationary fuel combustion sources.

- Any supplier of any of the products listed below:
  - All producers of coal-to-liquid fuels; importers and exporters of coal-to-liquid fuels with annual imports or annual exports that are equivalent to 25,000 metric tons CO2e or more per year. A producer of coal-to-liquid products is any owner or operator who converts coal into liquid products (e.g., gasoline, diesel) using the Fischer-Tropsch or an alternative process.
  - All petroleum refineries that distill crude oil (excluding facilities that only handle intermediary petroleum products); importers and exporters of petroleum products with annual imports or annual exports that are equivalent to 25,000 metric tons CO_2e or more per year.
- Petroleum products are defined as all refined and semi-refined products that are produced at a refinery by processing crude oil and other petroleum-based feedstocks, including petroleum products derived from co-processing biomass and petroleum feedstock together. They include basic petrochemicals (e.g. ethylene and propylene), but not plastics or plastic products (e.g., polyethylene or polypropylene). Petroleum products may be combusted for energy use, or they may be used either for non-energy processes or as non-energy products. **The definition of petroleum product for importers and exporters excludes waxes.**
- Any blender or refiner of refined or semi-refined petroleum products shall be considered an importer.
  - All natural gas fractionators and all local natural gas distribution companies (LDCs). Fractionators include plants that produce fractionated natural gas liquids (NGLs) extracted from produced natural gas and separate the NGLs individual component products (ethane, propane, butanes and pentane-plus (C5+)) for supply to downstream facilities. Plants that only process natural gas but do not fractionate NGLs further into component products are not considered fractionators. LDCs include those that own or operate distribution pipelines that deliver natural gas to end users, but companies that operate interstate pipelines transmission or intrastate transmission pipelines are not covered by this source category.

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

- All producers of industrial GHGs; importers and exporters of industrial GHGs with annual bulk imports or exports of N2O, fluorinated GHGs, and CO2 that in combination are equivalent to 25,000 metric tons CO2e or more per year.
- All producers of CO2; importers and exporters of CO2 with annual bulk imports or exports of N2O, fluorinated GHGs, and CO2 that in combination are equivalent to 25,000 metric tons CO_2e or more per year.

The final rule excludes several sectors from reporting at this time, including:

- Research and development of any covered source category;
- Electronics manufacturing;
- Oil and natural gas systems;
- Ethanol production;
- SF_6 from electrical equipment;
- Fluorinated GHG production;
- Underground coal mines;
- Food processing;
- Wastewater treatment;
- Industrial landfills;
- Suppliers of coal; and
- Magnesium production.

To assist facilities in determining applicability, the EPA plans to provide implementation guidance with simplified means to determine applicability. For combustion sources, EPA plans to publish tables that will specify by fuel type both an annual fuel consumption level and maximum heat input capacity that correlates with emissions of 25,000 metric tons per year of CO_2e. For non-combustion source categories with a 25,000 metric ton CO_2e threshold, EPA plans to publish guidance, as feasible, on equipment capacities, production levels, or other parameters that correlate with emissions of 25,000 metric tons per year of CO_2e. The capacity and production levels provided in these tables would be based on worst-case assumptions, but would allow facilities to quickly and easily determine if they need to develop more precise estimates or plan to implement monitoring in 2010.

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

II. Schedule for Reporting

Reports are submitted annually no later than March 31 of each calendar year for GHG emissions in the previous calendar year. Once subject to the reporting rule, reporters must continue to submit GHG reports annually. **Reporters must begin collecting data on January 1, 2010. The first annual GHG report is due on March 31, 2011 for GHGs emitted or products supplied during 2010.**

The EPA will allow facilities to exit the reporting program if they:

- Report emissions below 25,000 metric tons CO_2e/year for five consecutive years;
- Report emissions below 15,000 metric tons CO_2e/year for three consecutive years; or

Shut down GHG-emitting processes or operations.

In these instances, the reporter must notify the EPA that they intend to cease reporting and explain the reasons for the reduction in emissions. The final rule also contains record-keeping requirements for those reporters that have exited the reporting program.

III. Scope of Information Included in GHG Report

Reporters must include the following information in each annual GHG report:

- Facility name or supplier name and physical street address (city, state, and zip code);
- Year and months covered by the report, and date of report submittal;
- A written explanation if the reporter changes GHG calculation methodologies during the reporting period;
- If best available monitoring methods were used for part of calendar year 2010, a brief description of the methods used;
- Each data element for which a missing data procedure was used according to the procedures applicable to a particular source category and the total number of hours in the year that a missing data procedure was used for each data element; and
- A signed and dated certification statement provided by the Designated Representative of the owner or operator.

Facilities that directly emit GHG must include the following information in each annual GHG report:

- Annual facility emissions (excluding biogenic CO_2), expressed in metric tons of CO_2e per year, aggregated for all GHG from all source categories that are located at the facility;

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

- Annual emissions of biogenic CO_2 (*i.e.*, CO_2 from combustion of biomass) aggregated for all applicable source categories located at the facility;
- Annual GHG emissions for each of the source categories located at the facility, by gas; Gases are CO_2 (excluding biogenic CO_2), biogenic CO_2, CH_4, N_2O, and each fluorinated GHG
    - For petrochemical production facilities, reports should include CO_2, CH_4, and N_2O process emissions from each petrochemical production unit. Process emissions include CO_2 generated by reaction in the process. Process emissions also include CO_2, CH_4, and N_2O emissions generated by combustion of off-gas from the process in stationary combustion units and flares.
    - For petroleum refineries, reports should include CO_2, CH_4, and N_2O emissions from the following processes: flares, catalytic cracking, traditional fluid coking, fluid coking with flexicoking design, delayed coking (CH_4), catalytic reforming, onsite and offsite sulfur recovery (CO_2), coke calcining, asphalt blowing (CO_2 and CH_4), equipment leaks (CH_4), storage tanks (CH_4), other process vents, uncontrolled blowdown systems (CH_4), loading operations (CH_4).
- Within each source category, emissions broken out at the level specified for that source category;
- Additional data as specified for each source category, including activity data (*e.g.*, fuel use, feedstock inputs) that were used to generate the emissions data; and
- Total pounds of synthetic fertilizer produced through nitric acid or ammonia production and total nitrogen contained in that fertilizer.

Suppliers must include the annual quantities of each GHG that would be emitted from combustion or use of the products supplied, imported, or exported during the year in each annual GHG report at the following levels:

- Total quantity of aggregated GHG from all applicable supply categories expressed in metric tons of CO_2e;
- Quantity of GHG from each applicable supply category expressed in metric tons of each GHG;
- Other data as specified for each source category, including:
    - Suppliers of coal-to-liquid products must report the CO_2 emissions that would result from the complete combustion or oxidation of the coal-to-liquid products.
    - Suppliers of petroleum products must report: (1) CO_2 emissions that would result from the complete combustion or oxidation of each petroleum product and NGL produced, used as

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

feedstock, imported, or exported during the calendar year, and (2) CO_2 emissions that would result from the complete combustion or oxidation of any biomass co-processed with petroleum feedstocks at a refinery.

- Natural gas fractionators must report CO2 emissions that would result from the complete combustion or oxidation of the annual quantities of propane, butane, ethane, isobutene, and pentanes plus supplied.
- LDCs must report CO2 emissions that would result from the complete combustion or oxidation of the annual volume of natural gas distributed to their customers.

Suppliers of coal-to-liquid, petroleum products, natural gas and NGLs are not required to report data on emissions of other GHGs that would result from the complete combustion or oxidation of their products, such as CH_4 or N_2O.

Please note that from January 1, 2010 - March 31, 2010, reporters may use best available monitoring methods for any parameter (*e.g.*, fuel use, daily carbon content of feedstock by process line) that cannot reasonably be measured according to the monitoring and quality assurance/quality control (QA/QC) requirements applicable to a particular source category. **Starting April 1, 2010, the reporter must begin following all applicable monitoring and QA/QC requirements unless they submit a request to the EPA showing that it is not reasonably feasible to acquire and/or install necessary monitoring equipment.** Best available monitoring methods include:

- Monitoring methods currently used by the facility that do not meet the specifications set forth for a particular source category;
- Supplier data;
- Engineering calculations;
- Other company data; and
- Abbreviated GHG Reports.

IV. Report Submission

Annual reports will be submitted electronically through the EPA. The EPA will specify the format of the report shortly and intends to have the electronic reporting system operational in January 2011. The EPA is also developing a new electronic data reporting system for source categories or suppliers for which it is not feasible to use existing EPA reporting mechanisms.

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

V. Recordkeeping

Each reporter must also retain for three years in an electronic or hard-copy format, and make available to the EPA upon request, the following records:

- A list of all units, operations, processes and activities for which GHG emissions are calculated;
- The data used to calculate the GHG emissions for each unit, operation, process, and activity, categorized by fuel or material type;
- The annual GHG reports;
- Missing data computations;
- A written GHG monitoring plan;
- The results of all required certification and quality assurance tests, fuel flow meters, and other instrumentation used to provide data for the GHGs reported;
- Maintenance records for all flow meters and other instrumentation used to provide data for the GHGs reported; and
- Any other data required for a particular source category, including the results of sampling and analysis procedures (*e.g.*, fuel heat content, carbon content of raw materials, and flow rate) and other data used to calculate emissions.

Please let us know if you have any questions.

UN Climate Change Conference in Copenhagen Results in Limited, Non-Binding Political Agreement

Summary

From December 7-19, 2009, the Parties to the United Nations Framework Convention on Climate Change (UNFCCC) met in Copenhagen, Denmark for the 15th annual UN Climate Change Conference (COP15), which aimed to conclude a new global climate agreement for the period after 2012 when the current Kyoto Protocol will expire. The conference was characterized by disagreements between developed and developing countries, and resulted in a limited, non-binding political agreement (the "Copenhagen Accord") which must now be transformed into a legally binding treaty in the course of 2010. We highlight: (i) the key controversial issues that emerged during the conference, (ii) the main contents of the new

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

agreement, and (iii) the immediate outlook for the global efforts to combat climate change through international mechanisms.

Analysis

I. Key Controversial Issues

In general, the original objective for the Copenhagen conference was to conclude a full-fledged, legally binding post-2012 agreement, but slow progress in the preparatory negotiations led to the more modest expectation of delivering a binding political agreement that could be transformed into a legally binding treaty in the course of 2010. However, due to persisting disagreements between developed and developing countries, and in particular between China and the United States, the conference eventually resulted in the Parties to the UNFCCC "taking note" of the limited, non-binding "Copenhagen Accord."[1] Among other things, the following emerged at the conference as key controversial issues that hampered further progress:

Structure of the new climate agreement. Australia, Canada, the European Union, Japan, and Russia proposed to replace the Kyoto Protocol, which only limits the greenhouse gas (GHG) emissions of all the industrialized countries with the exception of the United States, with a new treaty that includes commitments for all countries. The Group of 77 (G77) developing countries insisted, however, on updating the Kyoto Protocol with more ambitious emissions reductions targets for industrialized countries, while adding a separate agreement that includes binding commitments for the United States.

GHG emissions reductions targets. Developing countries remained opposed to setting a long-term emissions reductions target for 2050 until the developed countries commit to more ambitious targets for reducing their emissions by 2020. A key opponent, however, was the United States, which refused to go beyond its offer of committing to a reduction of 17 percent by 2020 as compared to 2005 levels. In addition, parties continued to disagree on whether to use the annual emission levels of 1990 or 2005 as a baseline for comparison for emissions reductions targets.

Financial assistance. Discussions also stalled over the amount of funding that developed countries were willing to provide in the short or medium term to assist developing countries in their adaptation and mitigation efforts. For example, developed countries opposed an initial demand by China for USD 200

[1] The full text of the "Copenhagen Accord" is available at: http://en.cop15.dk/files/pdf/copenhagen_accord.pdf.

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

billion a year by 2020, while the United States refused to specify or go beyond its offer of contributing a "fair share" of USD 10 billion in "fast-start funding" for the period 2010-2012.

Monitoring, reporting, and verification (MRV). The European Union, Japan, and the United States insisted on the imposition of international MRV requirements on large developing countries such as China and India in order to ensure that they also meet the commitments that they agree to. China and others resisted the option of international inspections, however, on the grounds that they are intrusive and violate their sovereignty.

Forestry. In addition, the negotiating parties disagreed on questions such as how to generate funds or whether to include benchmarks to reduce deforestation under a UN financing Program to reduce emissions from deforestation and forest degradation (REDD-plus) in developing countries.

II. Contents of the "Copenhagen Accord"

As for the specific contents of the Copenhagen Accord, the agreement recognizes the scientific view that the increase in global temperature should be below 2° Celsius and provides, *inter alia*, for the following with regard to the issues that the UNFCCC had highlighted as "essential" for an eventual legally binding treaty:

Emissions reductions targets for developed countries. Parties to Annex I [2] will commit to implementing quantified emissions targets for 2020 that they will submit to the Secretariat of the UNFCCC by January 31, 2010. The agreement adds that these targets will "further strengthen" the reductions under the Kyoto Protocol.

Mitigation commitments by developing countries. Non-Annex I Parties[3] will implement mitigation actions that they will submit to the UNFCCC by January 31, 2010. In addition, the agreement notes that least developed countries (LDCs) and small island developing countries may undertake actions voluntarily and on the basis of support.

Financial assistance for developing countries. Developed countries assume the commitment to collectively provide "fast-start funding" of up to USD 30 billion for the period 2010-2012, with funding for

[2] Parties to Annex I include the following developed countries: Australia, Austria, Belarus, Belgium, Bulgaria, Canada, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Poland, Portugal, Romania, the Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, the United Kingdom, the United States (and the European Union).

[3] Non-Annex I Parties include most developing countries.

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

adaptation prioritized for the most vulnerable developing countries. In addition, developed countries commit to mobilizing jointly USD 100 billion a year by 2020. As part of this funding the parties will, among other things, establish a Copenhagen Green Climate Fund to support immediate action in developing countries.

MRV. The agreement provides for MRV of reduction and financing efforts of developed countries in accordance with guidelines adopted by the UNFCCC. Mitigation actions by Non-Annex I Parties will be subject to domestic MRV, except when these actions enjoy international support, in which case they will be subject to international MRV in accordance with guidelines adopted by the UNFCCC.

In addition, other key elements of the accord that the UNFCCC highlights are: (i) the establishment of a Technology Mechanism to accelerate technology development and transfer in support of mitigation and adaptation efforts of developing countries; and (ii) the launch of REDD-plus. It is also worth noting that because the offers of the developed and developing countries may prove insufficient to prevent the global temperature from rising below 2° Celsius, the accord provides that an assessment of its implementation should be completed by 2015. The agreement stipulates that such an assessment would include a consideration of the long-term goal to limit the increase in global average temperature to 1.5° Celsius. This was the result of a plea from the most vulnerable island nations at highest risk from rising water levels.

Outlook

Whereas countries such as China and Japan reportedly lauded the agreement, UNFCCC officials cautioned in a first reaction that although the accord is "an essential beginning," it is mainly a "letter of intent" that is "not precise about what needs to be done in legal terms."[4] They therefore underlined that the next challenge will be to turn the accord into "something real, measurable and verifiable," and that is more ambitious in terms of efforts to reduce emissions. UN Secretary General Ban Ki-moon noted that while the Copenhagen accord is not the ideal outcome, "it is a beginning, an essential beginning," adding that "it will take more than this to successfully tackle climate change." This assessment was acknowledged by European Commission President José Manuel Barroso, who stated that the agreement is "clearly below our objective" but nonetheless "a first step in a very important process."[5] The EU also

[4] The UNFCCC press release on the accord is available at: http://unfccc.int/files/press/news_room/press_releases_and_advisories/application/pdf/pr_cop15_20091219.pdf.

[5] Barroso"s comments are available at: http://www.se2009.eu/en/meetings_news/2009/12/19/cautious_step_forward_in_copenhagen.

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

indicated that its policy on the issue will not change and that it will maintain the binding objective of reducing its overall emissions to at least 20 percent below 1990 levels by 2020, with a possible increase to a 30 percent reduction if further talks lead to a satisfactory international agreement. As for the United States, President Obama reportedly made a similar statement that although the accord would be a foundation for global action there was "much further to go."[6] However, the outcome of the conference is likely to have a more significant effect on US policies as the lack of commitments of countries such as China and India could make the adoption of national legislation on emission reductions even more difficult than before.

As a first next step, the Parties to the UNFCCC will need to sign the agreement, which will then have "immediate operational effect." Following this, the next objective will be to transform the accord into a legally binding treaty, which will require that the negotiating parties reach a consensus on, *inter alia*, the key outstanding issues of: (i) structure of the agreement; (ii) baseline for comparison for emissions reductions targets (1990 or 2005 levels); (iii) specific emissions reductions targets; and (iv) exact financial contributions of the developed countries. Although this is not specified in the Copenhagen Accord, UNFCCC officials have indicated that the aim is to conclude a legally binding treaty at the next annual UN Climate Change Conference (COP16), which will take place in Mexico City, Mexico towards the end of 2010. Prior to this, a key event will be the preparatory negotiations that will take place in Bonn, Germany from May 31 to June 11, 2010.

We will continue to monitor this issue and will update you on any further developments. Please let us know if you have any questions.

USTR Releases 2009 Report to Congress on China's WTO Compliance

Summary

In December 2009, the Office of the United States Trade Representative (USTR) released its annual "Report to Congress on China's WTO Compliance." This is the eighth report prepared pursuant to section 421 of the US-China Relations Act of 2000 (P.L. 106-286), 22 U.S.C. § 6951, which requires USTR to report annually to Congress on compliance by China with commitments made in connection with its accession to the World Trade Organization (WTO), including both multilateral commitments and any bilateral commitments made to the United States. The focus of the report's analysis continues to be on

[6] Obama's remarks are available at: http://en.cop15.dk/news/view+news?newsid=3068.

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

trade concerns raised by US stakeholders that, in the view of the US Government, merit attention within the WTO context. We review below the 2009 report.

The 2009 "Report to Congress on China"s WTO Compliance" is available at: http://www.ustr.gov/webfm_send/1572.

Analysis

I. 2009 Developments

According to USTR, in 2009, the Obama Administration maintained an intensive dialogue with China that "generated positive outcomes on a number of contentious issues." On the bilateral front, the United States and China successfully convened the US-China Strategic and Economic Dialogue (S&ED) and the US-China Joint Commission on Commerce and Trade (JCCT) in July 2009 and October 2009, respectively. The report notes several commitments that China made over the past year, including, among others:

- Lifting unscientific bans on imports of US pork and pork products and live swine;
- Removing local content requirements on wind turbines;
- Committing to strengthened enforcement against Internet infringers, pirated academic and medical journals, bulk chemicals used as active pharmaceutical ingredients and counterfeit pharmaceuticals; and
- Resuming issuing licenses for qualified direct selling services companies.

The United States also pursued WTO dispute settlement on issues left unresolved by dialogue, and in 2009, brought one new WTO case against China challenging export quotas, export duties and other restraints maintained by China on the export of several raw material inputs. The WTO Dispute Settlement Body (DSB) formed a WTO panel to hear on the case in December 2009. The United States also continued to pursue five other WTO cases with China in 2009.

II. Trends

According to USTR, "China has taken many impressive steps over the last eight years to reform its economy, while implementing a set of sweeping WTO accession commitments that required it to reduce tariff rates, to eliminate non-tariff barriers, to provide national treatment and improved market access for goods and services imported from the United States and other WTO Members, to protect intellectual property rights and to improve transparency." USTR notes that although it still does not appear to be

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

complete in every respect, China"s implementation of its WTO commitments has led to increases in US exports to China and has "deepened" China"s integration into the international trading system.

Nonetheless, USTR notes that "evidence of a possible trend toward a more restrictive trade regime appeared most visibly in an array of Chinese measures," including, but not limited to:

- the continued and incrementally more restrictive use of export quotas and export duties on a large number of raw material inputs;
- the selective use of other border measures such as value-added tax rebates to encourage or discourage exports of particular products;
- the setting and enforcement of unique Chinese national standards;
- government procurement practices, including "Buy China" policies;
- a new Postal Law that excludes foreign suppliers from a major segment of the domestic express delivery market;
- an informal ban on new entrants in China"s basic telecommunications sector and impediments to the foreign supply of value-added services; and
- significant restrictions on foreign investment in China.

III. Priority Issues

In its report, USTR presented a list of "specific areas [of] particular concern for the United States and US industry" that serves as USTR"s "priority issues" for 2010 and beyond, incuding:

A. Intellectual Property Rights (IPR)

USTR notes that some critical reforms are still needed in a few IPR areas, such as further improvement of China"s measures for copyright protection on the Internet following China"s accession to the World Intellectual Property Rights Organization (WIPO) Internet treaties, and correction of continuing deficiencies in China"s criminal IPR enforcement measures. USTR also notes that "effective enforcement of China"s IPR laws and regulations remains a significant challenge." The report notes that the United States remains committed to working with China on a bilateral basis to reduce IPR infringement levels in China but adds that when "bilateral discussions prove unable to resolve key issues, the United States remains prepared to take other types of action on these issues, including WTO dispute settlement where appropriate."

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

B. Industrial Policies

According to USTR, in 2009, China continued to pursue industrial policies that seek to limit market access for non-Chinese origin goods and foreign service suppliers while offering substantial government resources to support Chinese industries and increase exports. The report states that in 2009, China continued to deploy export quotas, export license fees, minimum export prices, export duties and other export restraints on a number of raw material inputs; the US response, as noted, was the filing of a WTO case. The report states that "China has also sought to protect many domestic industries through an increasingly restrictive investment regime," and that since 2006, China has pursued more restrictive foreign investment screening processes. USTR also highlights in its report several positive developments. The report states that the United States was able to bring about the elimination of a Chinese industrial policy designed to expand the market share of famous Chinese brands of merchandise through the use of prohibited forms of financial support and that the United States was also able to work with China in having it repeal measures that had imposed discriminatory charges and other burdens on imported auto parts whenever they were used in the assembly of motor vehicles that failed to meet certain local content requirements.

C. Trading Rights and Distribution Services

USTR reports that China refuses to remove import and distribution restrictions on copyright-intensive products such as books, newspapers, journals, theatrical films, DVDs and music, in apparent contravention of China"s trading rights and distribution services commitments. Consequently, in April 2007, the United States initiated WTO dispute settlement proceedings which led to an August 2009 WTO panel ruling in favor of the United States, and a December 2009 WTO Appellate Body ruling rejecting China"s appeal on all counts. In the area of retail services, the United States began to see incremental progress in 2009, including an announcement by China that it was delegating authority for foreign retail outlet license approvals to the provincial government level.

D. Agriculture

The report states that "while US exports of agricultural commodities to China continue to perform strongly . . . China remains among the least transparent and predictable of the world"s major markets for agricultural products, largely because of selective intervention in the market by China"s regulatory authorities." The report states that "capricious practices by Chinese customs and quarantine agencies" can delay or halt shipments of agricultural products into China and sanitary and phytosanitary (SPS) measures have questionable scientific bases and belong to a "generally opaque regulatory regime." In

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

2009, USTR notes that the principal targets of "questionable practices" by China's regulatory authorities were raw poultry and pork products.

E. Services

The report states that "Chinese regulators continue to use an opaque regulatory process, overly burdensome licensing and operating requirements and other means to frustrate efforts of US suppliers of banking, insurance, express delivery, telecommunications and legal services to achieve their full market potential in China." In addition, China has not fully opened up its market to foreign companies that supply electronic payment and related services to banks and other companies that issue credit and debit cards, and China recently excluded foreign suppliers from a major segment of the domestic express delivery market.

IV. USTR'S Focus on China in 2010

The report states that in 2010, the Obama Administration will focus on "productive, outcome-oriented dialogue at all levels of engagement, while also taking further steps to enforce China's adherence to its international trade obligations, including both full implementation of China's WTO accession commitments and full adherence to the fundamental obligations that China has taken on as a WTO Member." In order to achieve these objectives, the United States will:

- continue to pursue formal and informal meetings and dialogues with China, including high-level meetings under the S&ED and the JCCT;
- invoke the dispute settlement mechanism at the WTO where appropriate; and
- "continue to rigorously enforce US trade remedy laws, in accordance with WTO rules, including China's WTO accession commitments" when US interests are being harmed by unfairly traded or surging imports from China.

Outlook

USTR's 2009 report on China's WTO compliance is similar to past reports. IPR monitoring and enforcement and China's industrial policies remain top priority issues for USTR and US stakeholders, and it appears that USTR will continue to focus on these areas in 2010 and beyond. USTR is likely to continue engaging with China on the bilateral and multilateral fronts, although given recent developments, USTR may now find it more effective to engage with China in multilateral fora, such as the WTO. In December 2009 alone, USTR announced two key "wins" for the United States achieved in the multilateral arena: (i) the WTO Appellate Body's announcement that China lost its appeal of a dispute settlement

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

ruling that its restrictions on the importation and distribution of certain copyright- intensive products are inconsistent with its WTO obligations (DS363), and (ii) USTR's announcement that the United States and China reached an agreement confirming China's termination of export subsidies for Chinese "famous brands." USTR added these two key developments in its 2009 report, and given the "success" that USTR has reported on these two issues, US trade officials may shift their attention to addressing issues with China at the DSB or other multilateral fora.

USTR is unlikely to address *all* China-related issues at the WTO, however, because it also feels that it has a constructive bilateral dialogue with China at the S&ED and JCCT levels. Indeed, at the last 20th session of the JCCT, held in China from October 28-29, 2009, China made several commitments (as noted in the report), including commitments to remove a 70 percent local content requirement on wind turbines and announcing its intent to reopen the Chinese market to US pork products and live swine after imposing restrictions on these products in May 2009 due to the outbreak of the H1N1 flu virus. USTR considers these commitments "success stories" as well, and consequently, will continue to pursue further commitments from China through these bilateral dialogues in addition to its work with China at the multilateral level.

United States Highlights

Congress Extends Expiring GSP, ATPA Preference Programs for Additional Year

The US Congress has approved a bill extending expiring US preference programs to 2010 (H.R. 4284). H.R. 4284 extends the Generalized System of Preferences (GSP) program and the Andean Trade Preferences Act (ATPA) to December 31, 2010. Both programs were scheduled to expire on December 31, 2009. The House of Representatives approved H.R. 4284 on December 14, 2009 by voice vote, under suspension of the rules. The Senate approved the legislation on December 22, 2009 by unanimous consent.

House Ways and Means Committee Chairman Charles Rangel (D-NY) and Trade Subcommittee Chairman Sander Levin (D-MI) introduced H.R. 4284 on December 11, 2009. Before introducing the bill, Members of Congress were locked in debate on how long such an extension should last and when Congress would be able to explore introducing major reforms to the programs. It was reported, for example, that Senate Finance Committee Ranking Member Charles Grassley (R-IA) advocated a shorter extension of the preference programs (*i.e.*, extending the programs to June 2010 as opposed to

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

December 2010) so that Members of Congress could look at preference program reform in early 2010. Chairman Rangel and Rep. Levin have stated that the year-long extension affords lawmakers more time in 2010 to introduce major changes to the programs, a statement that legislators have repeated over the past several years whenever the preference programs are up for expiry.

Although the House of Representatives quickly passed the bill, H.R. 4284 faced some difficulties in the Senate. The bill was reportedly held up in the Senate by Sen. Jeff Sessions (R-AL), who placed a hold on the bill on behalf of Exxel Outdoors, Inc., which manufactures sleeping bags and other camping products in Haleyville, Alabama. According to reports, Exxel wanted to add language to the bill revoking eligibility for sleeping bags to enter the United States duty-free under the Generalized System of Preferences, after imports of the product from Bangladesh increased in 2008. On December 16, 2009, however, Sen. Sessions lifted his hold in exchange for a commitment by United States Trade Representative (USTR) Ron Kirk to re-evaluate the eligibility of sleeping bag imports to come in duty-free under the GSP program. Sen. Frank Lautenberg (D-NJ) had also placed a hold on the bill on December 17, 2009 over a child custody case; Sen. Lautenberg and the State Department want Brazil to return 9-year-old Sean Goldman to his father, David Goldman, in New Jersey after his Brazilian mother moved him to Rio de Janeiro several years ago without the father's consent. A federal appeals court in Brazil ruled the boy should be returned to the United States, but the country's Supreme Court stayed that ruling, prompting Sen. Lautenberg's hold. In addition, Sen. Olympia Snowe (R-ME) had raised objections to the bill in seeking assurances that there would be movement on her own legislation that would create an office within USTR to focus exclusively on small-business issues.

US businesses and business groups have been urging lawmakers to provide a short extension to the expiring programs before the end of 2009 and to use 2010 to explore major reforms to the programs. In a September 28, 2009 letter to the House Ways and Means and Senate Finance Committees, 49 companies and associations along with several non-governmental groups urged Congressional leadership to quickly renew the GSP program. According to the groups signing the letter, “American companies and families . . . have come to depend on the duty savings granted through the preference programs, [as do] the producers in developing countries that rely on the programs to support export-related jobs.” The groups noted that they “understand the desire of Members of Congress to take a close look at existing US preference programs to ensure they are working, particularly for least-developed countries,” but adds that “it is not realistic to expect that this effort could be completed before GSP expires on December 31.” The groups therefore asked the lawmakers to move on GSP renewal early in the Fall, while also continuing “in earnest the important discussions on preference improvements, with a

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

goal of enacting preference improvement legislation next year." Groups signing the letter include, among others, the Association of American Chambers of Commerce in Latin America, the Coalition for GSP, the Emergency Committee for American Trade (ECAT), the Grocery Manufacturers Association, the National Foreign Trade Council, the National Retail Federation, the US Association of Importers of Textiles and Apparel, and the US Chamber of Commerce.

House of Representatives Passes Bill Containing Tightened "Buy American" Waiver Requirements

On December 16, 2009, the House of Representatives approved a USD 154 billion economic-aid measure (H.R. 2847) that extends and strengthens "Buy American" provisions included in an economic stimulus law passed earlier this year. The House of Representatives approved H.R. 2847 by a vote of 217 to 212. The bill next moves to the Senate for consideration although Congressional observers do not expect the Senate to act on any job creation-focused legislation until 2010.

Section 2013 of H.R. 2847 ("Buy America Requirements for Highway and Public Transportation Projects") would require "that American-made materials be used for construction, alteration, maintenance or repair of transportation and infrastructure projects funded in the bill." The bill also contains language making it more difficult for the Secretary of Transportation to waive the requirement that US materials be used for construction projects funded under the bill. Specifically, H.R. 2847 requires the Secretary of Transportation to publish all waiver requests on the Internet for five days after receiving them and, if a waiver is given, post a written justification within 30 days. If the Secretary of Transportation decides to grant a waiver to certain domestic sourcing rules, the Secretary of Transportation would have to put a notice of the impending waiver on the Internet for five days. The bill states that the waiver could be granted only if a qualified US supplier did not come forward during that time, challenging the waiver. The bill also requires the Government Accountability Office (GAO) to submit a semiannual report to various Congressional Committees on the number of waivers issued by the Secretary of Transportation, the reasons for issuing the waivers, and the amount of Federal funds associated with each waiver.

The Buy American language included in H.R. 2847 expands and strengthens procurement language that President Obama signed into law earlier this year. On February 17, 2009, President Obama signed the American Recovery and Reinvestment Act of 2009 (P.L. 111-5), an economic stimulus package meant to jumpstart the United States economy. P.L. 111-5 contained new "Buy American" provisions that restrict purchases, pursuant to funds appropriated under the law, of non-US iron, steel and manufactured products unless one of the following three exceptions applied: (i) not doing so would be inconsistent with

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

the public interest; (ii) iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or (iii) inclusion of iron, steel, and manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent.

Separately, on December 16, 2009, Representative Dan Lipinski (D-IL) and Senator Russ Feingold (D-WI) simultaneously introduced the "Buy American Improvement Act of 2009" in the House and the Senate meant to "eliminate loopholes in existing domestic sourcing laws and ensure that taxpayer money is used to purchase American-made products and support American jobs whenever possible." The House bill is H.R. 4351 and the Senate bill is S. 2890. Although the texts of the bills have not been made available yet, according to several reports, the companion bills require federal agencies to publicly publish all Buy American waiver requests, waiver decisions, and justifications for waivers granted, not just those for transportation. In addition, government agencies would be required to consider the short-term and long-term effect on domestic employment prior to issuing waivers. According to a press release, "domestic bidders would be given priority when their bids are substantially the same as those of foreign competitors [and] before invoking a waiver, federal agencies would have to consider the total cost of goods obtained from foreign sources, inclusive of shipping costs and the impact on domestic employment." The bills state that "establishing that no domestic alternative is „reasonably available" would entail a more thorough search and analysis." Federal agencies would also be prohibited from segmenting projects to avoid Buy American requirements, and products would have to be 75 percent "American-made" to be considered "American-made." The bills also require the GAO to provide recommendations to Congress for defining the term "inconsistent with the public interest;" currently, Buy American rules can be waived if it is determined that applying the rules would be "inconsistent with the public interest."

US trading partners opposed the inclusion of the Buy American provisions in the Stimulus bill and are likely to negatively react to the tightening of those provisions in H.R. 2847 and in the newly-introduced stand-alone Buy American bills. US business groups have already complained that the provisions could result in "fewer projects funded, and fewer Americans put back to work." The US Chamber of Commerce sent a letter to Speaker of the House Nancy Pelosi (D-CA) that the Buy American restrictions "may backfire by slowing the spending on government projects and risking an escalation of limits on government contracting by other nations, hurting US companies." Members of Congress and the Obama Administration do not appear to be overly-concerned with the potential backlash that the legislation could incur; when asked about the House-passed bill, President Obama did not offer specific comment on the Buy American provisions and simply noted that the bill included "some productive ideas."

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

EPA Issues "Endangerment Finding" for Greenhouse Gas Emissions

On December 7, 2009, the US Environmental Protection Agency (EPA) issued its final findings regarding greenhouse gas emissions (GHGs) under Section 202(a) of the Clean Air Act (*see* http://www.epa.gov/climatechange/endangerment.html). The EPA issued the findings in response to the Supreme Court's decision in Massachusetts v. EPA (549 US 497 (2007)). In Massachusetts v. EPA, the Supreme Court determined that greenhouse gases are "air pollutants" covered by the Clean Air Act. The Court held that the EPA must determine, under Section 202(a) of the Clean Air Act, whether greenhouse gas emissions from new motor vehicles cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare.

In its final findings, the EPA determined that: (i) six greenhouse gases endanger the public health and public welfare of current and future generations; and (ii) the emissions of these six greenhouse gases from new motor vehicles and new motor vehicle engines contribute to the greenhouse gas pollution that endangers the public health and welfare.

Endangerment Finding. The EPA made an "endangerment" finding and determined that "greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare." The EPA identified six greenhouse gases, which it referred to as "well-mixed greenhouse gases" that meet the definition of air pollution under the Clean Air Act: carbon dioxide (CO_2); methane (CH_4); nitrous oxide (N_2O); hydrofluorocarbons (HFCs); perfluorocrbons (PFCs); and sulfur hexafluoride (SF_6). The EPA concluded that "air pollution is the combined mix of [these] six key directly-emitted, long-lived and well-mixed greenhouse gases, which together, constitute the root cause of human-induced climate change and the resulting impacts on public health and welfare." The EPA considered how elevated concentrations of these six gases and associated climate change affect public health "by evaluating the risks associated with changes in air quality, increases in temperature, changes in extreme weather events, increases in food- and water-borne pathogens, and changes in aeroallergens." The EPA also considered the effect of elevated concentrations of these gases and associated climate change on public welfare "by evaluating numerous and far-ranging risks to food production and agriculture, forestry, water resources, sea level rise and coastal areas, energy, infrastructure and settlements, and ecosystems and wildlife." The primary scientific evidence relied on by the EPA included major assessments by the US Global Climate Research Program (USGCRP), the Intergovernmental Panel on Climate Change (IPCC), and the National Research Council (NRC).

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

Cause or Contribute Finding. In addition, the EPA made a "cause or contribute" finding. The EPA determined that "emissions of well-mixed greenhouse gases from the transportation sources covered under CAA section 202(a) contribute to the total greenhouse gas air pollution, and thus to the climate change problem, which is reasonably anticipated to endanger public health and welfare." These transportation sources include: passenger cars; heavy-, medium- and light-duty trucks; motorcycles; and buses.

According to the EPA, its findings do not impose any requirements on industry. The EPA stated, however, that its issuance of the final findings is a prerequisite to finalizing the EPA's proposed greenhouse gas emission standards for light-duty vehicles, which were jointly proposed by EPA and the Department of Transportation's National Highway Safety Administration on September 15, 2009.

The timing of the release of the findings, at the start of the United Nations Climate Change Conference in Copenhagen, appears intended to demonstrate the Obama Administration's commitment to reach an agreement at the conference. President Obama had wanted to bring with him to Copenhagen a Congressionally-approved climate change bill containing a US cap-and-trade program. The Senate and the House of Representatives, however, were unable to complete consideration of the two versions of the climate change bills in Congress ("Clean Energy Jobs and America Power Act" - S. 1733 and "American Clean Energy and Security Act of 2009" - H.R. 2454) before the conference, and at this stage, it is unlikely that Congress will approve the bills as they stand. If Congress does not approve pending climate legislation, US businesses are concerned that, based on its findings, the EPA could propose regulations to reduce greenhouse gases by large emitters, such as cement plants, power and chemical plants and oil refineries. The Obama Administration already has told Congress that it will regulate greenhouse gases unless lawmakers approve a climate change bill. As noted, the EPA's findings do not impose any requirements on industry, but they provide a basis for EPA to introduce regulations in the future that could restrict emissions.

Senate Confirms First Intellectual Property Enforcement Coordinator

On December 3, 2009, the Senate confirmed the nomination of Victoria Espinel to serve as the United States' first Intellectual Property Enforcement Coordinator. The position was created by the Prioritizing Resources and Organization for Intellectual Property Act (P.L. 110-403). President Obama nominated Espinel in September 2009. Espinel previously served in the Office of the United States Trade Representative (USTR) as Assistant USTR for Intellectual Property. She has also served as a visiting scholar of law and international trade at George Mason University, as Congressional staff in various

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

offices and has practiced law with Covington & Burling and with Sidley, Austin, Brown & Wood. She holds a B.A. from Georgetown University and an M.A. from the London School of Economics.

Senators Reintroduce Trade Reform, Accountability, Development and Employment Act

On December 1, 2009, Sens. Sherrod Brown (D-OH) and Byron Dorgan (D-ND) reintroduced the Trade Reform, Accountability, Development and Employment Act ("TRADE Act of 2009," S. 2821), a bill that, among other things, would require the President to submit renegotiation plans for existing free trade agreements (FTAs) before the United States could negotiate new FTAs or before Congress could consider pending FTAs. S. 2821 is similar to legislation that the lawmakers introduced in 2008. Co-sponsors include Sens. Robert Casey Jr. (D-PA), Russell Feingold (D-WI), Jeff Merkley (D-OR), Bernard Sanders (I-VT), and Sheldon Whitehouse (D-RI).

The bill contains provisions that address the following:

- **Report to Congress.** The bill states that no later than June 30, 2011, the Comptroller General of the United States must submit to the Senate Finance Committee and the House of Representative Ways and Means Committee a report evaluating the economic, employment, environmental, national security, health, safety, and other effects of the following trade agreements:
  - The North American Free Trade Agreement (NAFTA);
  - The US-Jordan FTA;
  - The Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA;
  - The General Agreement on Tariffs and Trade (GATT 1994) and other Uruguay Round Agreements; and
  - Any multilateral agreement entered into under the auspices of the World Trade Organization (WTO) dealing with information technology, telecommunications, or financial services.
- **New Requirements for Trade Agreements.** The bill states that each trade agreement between the United States and another country with respect to which an implementing bill is introduced on or after the date of the enactment of the TRADE Act must meet the following requirements:
  - ***Labor Standards.*** Among other things, the bill states that labor provisions in any US trade agreement must be included in the core text of the agreement and must require the adoption of core labor rights and the effective enforcement of laws relating to core labor rights and acceptable

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

conditions of work. The bill states that "failures to meet the labor requirements of the agreement, regardless of the effect that failure has on trade, shall be subject to the dispute resolution and enforcement mechanisms and penalties of the agreement."

- ***Environmental Standards.*** The bill requires every US trade agreement to include environmental provisions that, among other things, prohibit each country that is a party to the agreement from weakening, eliminating, or failing to enforce domestic environmental or other public interest standards to promote trade or attract investment; require full implementation and enforcement of multilateral environmental agreements; prohibit the trade of products that are illegally harvested or extracted and the trade of goods derived from illegally harvested or extracted natural resources; and provide that the failure to meet the environmental standards required by the agreement be subject to dispute resolution and enforcement mechanisms and penalties that are "at least as effective as the mechanisms and penalties that apply to the commercial provisions of the agreement."
- ***Food and Product Health and Safety Standards.*** The bill notes that if a US trade agreement contains health and safety laws and regulations for food and other products, the agreement must establish that food, feed, food ingredients, and other products relating to food may be imported into the United States from a country that is a party to the agreement only if the imported food and related products meet or exceed US laws and regulations on food safety, pesticides, inspections, packaging, and labeling. The bill would also authorize the Commissioner of the US Food and Drug Administration (FDA) and the Consumer Product Safety Commission (CPSC) to assess the regulatory system of each country that is party to a US trade agreement to determine whether the regulatory system of that country provides the same or better protection of health and safety for food and other products as provided under the US regulatory system.
- ***Services Provisions.*** The bill states that if a US trade agreement contains services provisions, the provisions must preserve the right of Federal, State, and local governments to maintain essential public services and to regulate services provided to consumers. The bill also states that every US trade agreement must "establish a general exception to the market access obligations contained in the agreement by allowing a country that is a party to the agreement to maintain or establish a ban on services that the country considers harmful to public health or safety, the environment, or public morals if the ban is applied to domestic and foreign services and service providers equally."

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

- ***Trade Remedies and Safeguards.*** Under the bill any US trade agreement containing trade remedy provisions must "preserve fully the ability of the United States to enforce the trade laws of the United States, including antidumping and countervailing duty laws and safeguard laws," and must establish mechanisms to examine the trade consequences of significant currency movements. The bill states that if the currency of a country that is a party to the agreement is "deliberately misaligned," the United States may establish safeguard remedies that apply automatically to offset substantial and sustained currency movements.

- **Existing Trade Agreement Renegotiation.** The bill states that the President must submit to Congress a plan for renegotiating each trade agreement that is in effect on the date of the enactment of the TRADE Act "to bring the trade agreement into compliance" with the "new trade agreement requirements" (as outlined above).

S. 2821 is similar to legislation that Rep. Mike Michaud (D-ME) introduced in the House of Representatives in June 2009. On June 24, 2009, Rep. Michaud introduced the Trade Reform, Accountability, Development and Employment (TRADE) Act (H.R. 3012) with a total of 106 cosponsors. The House bill sets out detailed criteria regarding the provisions that new and pending trade agreements must include. To the extent that existing trade agreements do not meet these requirements, the bill provides for renegotiation of these agreements. The bill also would replace the President's fast track authority with a new process. The House's TRADE Act bill requires that, no later than 270 days after enactment and every two years thereafter, the Government Accountability Office (GAO) must conduct a comprehensive review of all trade agreements in force at the time of the review and submit a report to a Congressional Trade Agreement Review Committee that would be established under the bill. The report must assess the economic, environmental national security, health, safety and other effects of the trade agreements, and must include information regarding the countries that are parties to the trade agreements (*e.g.*, form of government, respect for labor rights and human rights, laws regarding environment, labor and intellectual property). The bill also requires that the GAO include recommendations for renegotiating trade agreements that fail to meet the bill's requirements and for negotiations with respect to new agreements. The legislation also sets forth the provisions that must be included in trade agreements similar to those in the Senate version of the bill.

Sen. Brown's reintroduction of the TRADE Act is not surprising for many trade observers given his track record of introducing, co-sponsoring or supporting legislation containing provisions meant to address what he perceives to be "skewed US trade policy." If passed by Congress, the bill would provide an additional obstacle that US negotiators would have to overcome when drafting trade agreements with US

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

trading partners that might find the language of the bill aggressive and clearly biased to US interests. Nonetheless, many observers are skeptical that the Senate would pass the TRADE Act of 2009, given that it would mandate the renegotiation of all implemented US FTAs, a time-consuming activity to which US FTA partners would certainly object. In addition, lawmakers may find the provisions of the House and Senate versions of the TRADE Act of 2009 too demanding, and may be too focused on domestic issues including health care and climate change to really shift any serious attention to these bills. S. 2821 was last referred to the Senate Finance Committee on December 1, 2009 and it is unlikely that the Committee will have enough time before the end of 2009 to review and mark-up the legislation. The House TRADE Act was last referred to the House Ways and Means Committee in June 2009 and has not seen any forward movement since. This may serve as the best indicator that S. 2821 will face a similar lack of movement on the Senate side.

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

USTR Requests Public Comments on TPP FTA Negotiations

In a December 16, 2009 Federal Register (FR) notice, the Office of the United States Trade Representative (USTR) announced the United States‟ intent to enter into negotiations on a Trans-Pacific Partnership (TPP) Free Trade Agreement (FTA), and requested public comments on all elements of the agreement in order to develop the United States‟ negotiating positions (74 FR 66720-66722). On December 14, 2009, the Obama Administration submitted to Congress a formal notification that it intends to commence negotiations on a TPP FTA. The first round of TPP FTA negotiations is expected to be held in March 2010 in Australia. According to the United States Trade Representative (USTR), the United States‟ TPP negotiating partners currently include Australia, Brunei Darussalam, Chile, New Zealand, Peru, Singapore, and Vietnam.

In its FR notice, USTR invited interested parties to submit written comments to “assist USTR as it develops its negotiating objectives for the proposed regional agreement.” The FR notice states that comments may address the reduction or elimination of tariffs or non-tariff barriers on any articles provided for in the Harmonized Tariff Schedule of the United States (HTSUS) that are products of a TPP country, any concession that should be sought by the United States, or any other matter relevant to the proposed agreement. USTR, in particular, seeks comments addressed to:

- General and product-specific negotiating objectives for the proposed regional agreement;
- Economic costs and benefits to US producers and consumers of removal of tariffs and removal or reduction in non-tariff barriers on articles traded with the seven TPP countries;
- Treatment of specific goods under the proposed regional agreement, including comments on product-specific import or export interests or barriers, experience with particular measures that should be addressed in the negotiations, and approach to tariff negotiations, including recommended staging and ways to address export priorities and import sensitivities in the context of this regional agreement;
- Adequacy of existing customs measures to ensure that imported goods originate from the TPP countries, and appropriate rules of origin for goods entering the United States under the proposed regional agreement;

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

- Existing sanitary and phytosanitary measures and technical barriers to trade imposed by any of the TPP countries that should be addressed in the negotiations;
- Existing barriers to trade in services between the United States and any of the TPP countries that should be addressed in the negotiations;
- Relevant electronic commerce issues that should be addressed in the negotiations;
- Relevant trade-related intellectual property rights issues that should be addressed in the negotiations;
- Relevant investment issues that should be addressed in the negotiations;
- Relevant competition-related matters that should be addressed in the negotiations;
- Relevant government procurement issues that should be addressed in the negotiations;
- Relevant environmental issues that should be addressed in the negotiations; and
- Relevant labor issues that should be addressed in the negotiations.

USTR also invites comments on "approaches that would promote innovation and competitiveness, encourage new technologies and emerging economic sectors, increase the participation of small- and medium-sized businesses in trade, and support the development of efficient production and supply chains that include US firms in order to encourage firms to invest and produce in the United States."

Comments are due by January 25, 2010.

Administration Submits to Congress Notice of Intent to Join TPP FTA Negotiations

On December 14, 2009, the Obama Administration submitted to Congress a formal notification that it intends to commence negotiations on a Trans-Pacific Partnership (TPP) Free Trade Agreement (FTA). The first round of TPP FTA negotiations is expected to be held in March 2010 in Australia. United States Trade Representative (USTR) Ron Kirk submitted the notification letters to Speaker of the House Nancy Pelosi (D-CA) and President Pro Tempore of the Senate Robert Byrd (D-WV).

The letters of notification to the Congressional leaders note that the United States" TPP negotiating partners currently include Australia, Brunei Darussalam, Chile, New Zealand, Peru, Singapore, and Vietnam. Brunei, Chile, New Zealand and Singapore concluded the TPP FTA in 2005, and the agreement went into effect in 2006. In March 2008, TPP countries began work on the outstanding Financial Services and Investment chapters; the United States joined the TPP countries in these talks.

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

On September 22, 2008, former USTR Susan Schwab announced the launch of negotiations for the United States to join the TPP. Vietnam is an observer to the TPP, and Australia and Peru announced their interest in participating in the negotiations. Of the countries participating in the TPP FTA negotiations, the United States has implemented FTAs with four of them: Chile, Singapore, Australia, and Peru.

USTR will next publish in the Federal Register a notice requesting public input on the direction, focus, and content of the TPP FTA negotiations. USTR has also created a new webpage (www.ustr.gov/tpp) "to centralize Trans‐Pacific Partnership information for the public."

The TPP FTA notification has provided some relief to a US trade community that has become increasingly nervous that the Obama Administration has placed trade on the "backburner." Members of the US trade community have been urging the Administration to move forward on pending US trade issues since President Obama assumed office in January 2009, including resumption of the TPP FTA, action on the pending FTAs with Colombia, Panama and Korea, and proactive participation in the stalled Doha Round of multilateral negotiations. The Administration"s announcement on the TPP FTA has provided trade observers with some hope that the Administration is ready to move forward on US trade policy and initiatives.

Nonetheless, it should be noted that the Administration has not yet detailed how it will approach the TPP FTA process. Observers point to one possible contentious issue that will likely emerge if the United States formally engages in the TPP FTA negotiations: Vietnam"s participation. Some Members of Congress have already expressed reservations with Vietnam"s involvement. House Ways and Means Committee Chairman Charles Rangel (D-NY) and Trade Subcommittee Chairman Sander Levin (D-MI) have noted that the US participation in the TPP FTA negotiations presents "the challenge within a new trade policy of grappling with the inclusion of a country, Vietnam, transitioning from a non-market economy with government control of key sectors, restrictions in the Vietnamese labor market, and absence of worker rights" and they urged the Administration to continue active consultations with Congress on that and other TPP FTA-related matters.

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

Customs

Customs Highlights

Secretary of Homeland Security Announces Two-Year Delay in "100 Percent Cargo Scanning" Initiative

On December 2, 2009, the Senate Committee on Commerce, Science and Transportation held a hearing on "Transportation Security Challenges Post 9/11." Department of Homeland Security (DHS) Secretary Janet Napolitano testified at the hearing and announced that she has formally decided to delay for at least two years a Congressional mandate to scan 100 percent of US-bound container cargo by 2012. Under the Security and Accountability for Every (SAFE) Port Act of 2006, DHS is required to scan 100 percent of all maritime containers entering the United States by 2012, with scanning to take place at foreign ports of departure. The Implementing Recommendations of the 9/11 Commission Act of 2007 (P.L. 110–53, Title XVII), however, allows extensions to the 2012 deadline (in two-year increments) if the Secretary of Homeland Security certifies to Congress that at least two of the following conditions exist:

- Systems to scan containers are not available for purchase and installation;
- Systems to scan containers do not have a sufficiently low false alarm rate for use in the supply chain;
- Systems to scan containers cannot be purchased, deployed, or operated at ports overseas, including, if applicable, because a port does not have the physical characteristics to install such a system;
- Systems to scan containers cannot be integrated, as necessary, with existing systems;
- Use of systems that are available to scan containers will significantly impact trade capacity and the flow of cargo; and
- Systems to scan containers do not adequately provide an automated notification of questionable or high-risk cargo as a trigger for further inspection by appropriately trained personnel.

In listing the reasons why the 100 percent scanning initiative would be delayed, Secretary Napolitano stated the 100 percent scanning mandate would impede the flow of cargo and that there are currently too many physical limitations at foreign ports that make the requirement hard to fulfill. She noted that 100 percent of US bound cargo at many foreign ports is "currently unworkable without seriously hindering the flow of shipments or redesigning the ports themselves, which would require huge capital investment."

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

Secretary Napolitano announced that DHS would need a two year extension in order to effectively implement the scanning mandate, which would need "significant resources for greater manpower and technology, technologies that do not currently exist, and the redesign of many ports." According to her testimony, "scanning cannot take place at some ports because not all cargo passes through a single area and much cargo is moved from vessel to vessel within a port, keeping it from scanning systems." Deploying scanning equipment to the more than 2,100 shipping lanes at the more than 700 foreign ports from which cargo is shipped to the United States would also cost more than USD 16.8 billion.

Observers note that the Obama Administration's hesitation in implementing the program is the same reaction that Bush Administration officials exhibited towards the Congressional mandate. In June 2008, former Secretary of Homeland Security Michael Chertoff strongly criticized the Congressional requirement for 100 percent scanning of all sea cargo containers entering the United States by 2012. Chertoff opined that the Congressionally-mandated requirement follows an outdated "command and control approach," and he instead endorsed the partnership approach currently used by DHS, one that "attempts to apply risk-based standards to evaluate where the true danger lies with respect to our container supply chain" and that relies on private sector knowledge and cooperation. Other DHS officials have opined that the 100 percent plan would not provide an automated notification of questionable or high-risk cargo as trigger for further inspection and was "not a wise investment of taxpayer dollars." DHS officials have instead proposed a 100 percent scanning at ports designated as "high-risk."

Mexico and the United States Sign Declaration of Principles on Customs Matters

On December 7, 2009, Homeland Security Secretary Janet Napolitano and Former Minister of Finance and Public Credit Agustin Cartens signed and updated a Declaration of Principles (DoP) on customs matters that will streamline customs procedures, facilitate the exchange of information on customs matters, improve border clearing processes, and combat smuggling of prohibited goods at the US-Mexico border. The DoP includes a Bilateral Strategic Plan (BSP) by which Mexico's General Customs Administration (AGA), the US Customs and Border Protection Agency (CBP) and the US Immigration and Customs Enforcement Agency (ICE) will coordinate efforts through an Executive Steering Committee to enhance cooperation and security between both nations.

Under the DOP, the Department of Homeland Security (DHS) and the Mexican Ministry of Finance and Public Credit (SHCP) will continue to:

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

- Advance existing objectives to strengthen cross-border law enforcement by expanding existing institutional collaboration programs to combat trafficking, fraud, and smuggling of prohibited goods.
- Improve customs" personnel professionalism through training programs, sharing of best practices, and increased collaboration on capacity building towards implementing the World Customs Organization"s (WCO) Framework of Standards and any other initiatives.
- Enhance security at the US-Mexico border by collaborating in the prevention and deterrence of terrorism and alignment of security practices and programs for North America bound conveyances, shipments, and travelers.
- Facilitate trade facilitation and compliance by introducing customs clearance procedures into an electronic environment that allows for the rapid collection of data and share of information.
- Support the initiatives and strategic goals outlined by existing working groups: (i) the Capacity Building and Support Working Group; (ii) the Border Management, Customs Procedures and information Technology Working Group; (iii) the Customs Security Working Group; and (iv) the Customs Enforcement Working Group.
- Identify new joint initiatives and long-term programs to augment information-sharing mechanisms and coordinate border management at the US-Mexico border. For instance, the United States and Mexico will establish a Bi-National Port Security Committee to improve communication between ports of entry and Port Directors along the US-Mexico border.

The DoP reiterates the United States" and Mexico"s commitment to improve the efficiency of customs clearance and security at the common ports of entry without hampering the free trade flow of goods and people. The DoP also reflects Mexico"s interest to continue to work with the United States to improve the regulatory burden of its customs procedures and combat piracy and violations to intellectual property rights (IPR). The US government will continue to support Mexico in matters related to law enforcement by expanding institutional cooperation mechanisms and establishing new collaboration programs designed to fight contraband, trafficking, smuggling of prohibited goods. The DoP will allow Mexico and the United States to expand existing cooperation in matters related to law enforcement, trade facilitation, border management, customs-trade partnerships, and security.

According to AGA, the flow of goods and people at the US-Mexico border has increased at a 10 percent annual rate in the last 10 years. On average, 70,000 cargo trucks and 250,000 passenger vehicles cross daily at the US-Mexico border. US Census Bureau statistics report that during January-October 2009, bilateral trade totaled USD 247,544 billion.

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

Multilateral

Geneva Gathering of Trade Ministers Yields Little Movement in Stalled Doha Talks

Summary

From November 30 – December 2, 2009, trade officials convened in Geneva for a World Trade Organization (WTO) Doha Development Agenda Ministerial Conference. Although officials repeated their political will to complete a Doha Agreement as soon as possible, the gathering, as expected, yielded little concrete forward movement in the stalled multilateral negotiations. We review below several of the developments to come out of the Ministerial Conference.

Analysis

I. Difficulties from the Onset

Upon convening for the Ministerial Conference, WTO Members appeared to agree that there were several contentious issues that were impeding forward movement in the talks, including:

- In Agriculture, the special safeguard mechanism (SSM) for developing countries, conflicting proposals over tropical products and products currently enjoying preferences in more developed markets, and the issue of cotton support;
- In Non-Agricultural Market Access (NAMA), bilateral testing of the implications of various flexibilities, and free trade in individual sectors;
- Lack of movement in the Services talks; and
- Lack of movement in the Rules negotiations.

In his opening statement to the trade officials gathered for the Ministerial Conference, WTO Director-General Pascal Lamy called for "concrete and practical action to close the remaining gaps" in the Doha negotiations. DG Lamy noted that "time is running out and it is not credible at this stage to see issues in isolation from the work and the achievements of the past eight years." Although he noted that "the amount of progress that has been made since the last Ministerial Conference, in 2005, is quite impressive," he added that "the longer it takes to conclude the negotiations, the longer the WTO's insurance policy to guarantee stability and predictability of market access to governments and traders alike will remain unsubscribed." Other trade officials echoed DG Lamy's statement, albeit in a harsher

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

tone. Outgoing EU Trade Commissioner Catherine Ashton stated that WTO Members "are progressing too slowly [in the negotiations] – and that is a cause for concern," opining that Members will have to cooperate fully in early 2010 to address gaps in the negotiations.

Trade ministers from countries such as Australia, Switzerland, Brazil and Indonesia called for "a stock-taking exercise" in early 2010, and urged DG Lamy to organize a Ministerial meeting for early 2010. Some Members countries, such as Pakistan, argued that ministers" involvement in early 2010 should include more than a "stock-taking" exercise and they opined that Members should begin to bridge the gaps on outstanding contentious issues that have stalled the Round. Some delegations also noted that a "roadmap" for future work is needed. United States Trade Representative (USTR) Ron Kirk, however, expressed the United States" objection with an early 2010 Ministerial gathering, opining that "progress in the negotiating round cannot be achieved until there is substantial new market access in developing countries." USTR Kirk"s calls for better offers from developing countries was met with sharp criticism by trade officials from Brazil and India who challenged the United States" opinion that developing countries should be asked for more concessions in the Doha Round.

II. Little Movement on Contentious Issues

A. Agriculture

There have been few reports on WTO Members" discussion of the Agriculture negotiations during the Ministerial gathering. As noted, major sticking points in the Agriculture talks include the SSM for developing countries, the treatment of tropical products and products, and the issue of cotton support.

B. NAMA

According to the Doha Chair for the NAMA negotiations Luzius Wasescha, the United States and other proponents of sectoral tariff-cutting initiatives may soon present specific details for what these initiatives would encompass. Wasescha opined that some WTO Members may be close to proposing which tariff lines will be included in their NAMA proposal, what they can offer as special and differential treatment, further details on implementation periods, and how to address exceptions and preference erosion in sectorals." Wasescha noted that WTO Members have been engaged recently on the issue of non-tariff barriers (NTBs), and he noted that he would continue to focus on NTBs until there are at least "preliminary results." Nonetheless, Wasescha opined that "it may take a while for the NAMA talks to resume after such a long period of inactivity," although he expressed his "hope [that NAMA negotiators] . . . will come with a new spirit in the new year."

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

C. Services

On the sidelines of the Ministerial gathering, Australian Trade Minister Simon Crean informally proposed that trade ministers explore a new approach for the Services negotiations, and suggested linking negotiations for services and industrial goods. According to reports, Crean"s proposal is meant to draw more attention to the Services negotiations which have been largely sidelined in light of Members" focus on the Agriculture and NAMA talks. Reports note that the proposal would link goods and services in various areas similar to the linkage between services and environmental as presented in the proposed Environmental Goods and Services Agreement (EGSA). Crean suggested the new approach during a November 30 dinner with officials from the United States, Japan, New Zealand, Singapore, Switzerland, Colombia, the EU, and Chile.

During the three-day talks, Canada also circulated a written proposal that was meant to provide greater clarity on what services market access are currently proposed by the time WTO Members complete the Agriculture and NAMA agreements. Specifically, Canada proposed an "intermediate product" on Services and proposed that WTO Members exchange written clarifications of what services market access concessions are on the negotiating table as early as December 2009. Canada also proposed that countries with offensive interests in services, such as Canada and the United States, make "Member-specific proposals for scheduling outcomes, possibly including the exchange of draft scheduling proposals and/or statements setting out commitments expected as appropriate." According to reports, the United States, Japan and Australia supported the proposal whereas developing countries such as Brazil and China rejected the proposal, reportedly arguing that WTO Members must first complete the Agriculture and NAMA negotiations before shifting attention to the Services talks.

D. Rules

Chair of the Doha Rules negotiations Guillermo Valles Galmés provided a state-of-play in the Rules negotiations, and he noted that WTO Members" focus in the Rules talks has shifted to text-based proposals, with plenary sessions supplemented by bilateral and plurilateral consultations. On his December 2008 Rules draft texts, Valles Galmés opined that these texts "contain extensive proposed changes in the form of un-bracketed text, and . . . reflect substantial progress towards convergence on numerous technical issues." He noted that in the anti-dumping area, the draft text identified eleven issues as lacking convergence, including "zeroing," causation of injury, material retardation, the exclusion of related producers, product under consideration, information requests to affiliated parties, public interest & lesser duty, anti-circumvention, sunset reviews, third country dumping and special and differential treatment/technical assistance. In the subsidies area, there is a fewer number of brackets. He also noted

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

that at present, there are no sector-specific disciplines on fisheries subsidies in the WTO and that WTO Members have made substantial progress towards convergence on some fundamental issues including which subsidies are to be disciplined in respect of marine wild capture fisheries, the core of the disciplines that would be a prohibition, and the special and differential treatment granted to least developed countries.

III. Some Decisions Made . . . and Side-Agreements Reached

WTO Members made several decisions during the Ministerial gathering. WTO Members agreed to hold the next Ministerial Conference in 2011, and instructed the General Council to hold consultations on the election of officers for the 2011 meeting. WTO Members also agreed to complete a status assessment no later than March 2010 to determine if a Doha deal is possible by the end of 2010. In electronic commerce, trade ministers agreed to extend until the next Ministerial in 2011 an agreement to refrain from charging import duties on electronic transmissions. WTO Members also agreed not to bring "non-violation" intellectual property (IP)-related cases to the WTO dispute settlement process.

WTO Members also made several agreements on the sidelines of the Ministerial Conference. Perhaps the biggest of these was a December 2 agreement among more than 20 emerging economies that sets the parameters for tariff cuts on a wide range of goods traded among these countries. The countries, all parties to the Global System of Trade Preferences administered by the United Nations Center for Trade and Development (UNCTAD) (that includes Brazil and India), agreed to cut applied tariffs on at least 70 percent of products by 20 percent. They also set September 2010 as a deadline for reaching a final agreement among each other to implement the cuts. Brazilian Foreign Minister Celso Amorim noted that cutting tariffs among these developing economies is an easier task to accomplish than reaching a deal on tariffs among the wide range of economies represented in the Doha Round. Although the deal would be completed among only the 22 countries involved, officials from these countries expressed hope that such an agreement would provide momentum "for negotiations at the multilateral level in other fora."

Other agreements explored on the sidelines of the Ministerial gathering included the launch of feasibility studies on preferential trade agreements between China and Switzerland, and on a possible Trilateral Trade Arrangement between India, Mercosur, and the Southern African Customs Union (SACU).

Outlook

Expectations for the three-day gathering of trade officials were low at the onset of the conference. Even though DG Lamy emphasized the strides and forward movement that the Doha Round has made since its inauguration, by the end of the Ministerial gathering, expectations were even lower. At this stage, WTO Members and trade observers are no longer questioning ***when*** the Doha Round will be completed but

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

instead ***if*** the Round can be resuscitated. The lack of movement at the most recent Ministerial gathering raises many doubts that trade officials will be able to hammer out Agriculture, NAMA and other Doha agreements by the end of 2010, as trade officials pledged at their meeting. The pronunciations of political will to complete the negotiations by the end of 2010 echo similar promises made over the past several years, and there is little reason to believe that 2010 will be any different from years past. In addition, WTO Members likely would have to complete Agriculture and NAMA modalities deal by April 2010 in order to conclude the Doha Round by the end of next year. The contentious issues in these areas, however, are significant and likely require more than four months to resolve. Thus, it is unlikely that WTO Members will be able to complete full Agriculture and NAMA modalities by the end of April 2010, much less make concrete forward progress in the sidelined Services and Rules negotiations, which, in some ways, require even more work then the stalled Agriculture and NAMA talks.

At the Geneva gathering, US officials led by USTR Kirk again refused to provide direction on the US approach to the Doha Round and whether the United States is fully committed to providing fresh momentum to the Round with new offers. Instead, USTR Kirk called on developing countries to provide more market access which in turn might spur new offers from the United States and other developed countries. This approach drew the ire of trade officials from developing countries who used the Ministerial gathering as a public forum to criticize the United States for its lack of proactive participation in the Doha Round under the Obama Administration. USTR Kirk"s resistance to an early 2010 Ministerial gathering also did nothing to alleviate concerns among WTO Members that the United States is committed to completing the Doha Round as soon as possible. Indeed, EU officials commented that "the best thing that the European Union can do is to try to facilitate [the US decision] to come on board to finalize the Doha Round," opining that the United States "is not trying to delay [the talks] . . . [it] just does not have a real clear trade policy yet. … maybe it is priority number four or five [on the Administration's policy agenda]."

DG Lamy will likely focus his efforts on the stock-taking exercise to be completed over the next several months. In the interim, WTO Members will continue to meet behind closed doors to discuss the Geneva ministerial meeting and how they can attempt to "bridge gaps" over the next year. Some observers expect updated status reports from the Negotiating Chairs of the Agriculture, NAMA and other negotiating groups. This activity, however, does not change the Doha negotiations" precarious position, - one that requires far more than "political will" and indications of support in order to be completed. Although trade ministers will begin asking themselves what steps they will have to take to complete the agreement by the

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

end of 2010, it is unlikely that they will complete the Doha Round over the next year. The bigger question now is if the Doha Round can be saved at all.

Multilateral Highlights

WTO AB Rules Against China in Audiovisual Dispute with United States

On December 21, 2009, the World Trade Organization (WTO) Appellate Body (AB) announced that China has lost its appeal of a dispute settlement ruling that its restrictions on the importation and distribution of certain copyright- intensive products are inconsistent with its WTO obligations (DS363). In its report, the WTO AB upheld an earlier ruling that China is unfairly restricting films, DVDs, music, books and journals. The original Panel released its decision in *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* on August 12, 2009. The Panel ruled against the restrictions imposed by China on the importation and distribution of publications, audiovisual products, sound recordings and films and ruled that such measures violated China's commitments under its Protocol of Accession, as well as under the General Agreement on Trade in Services (GATS) and the General Agreement on Tariffs and Trade (GATT).

The AB rejected arguments made by China in its appeal that its restrictions are justified by an exception related to the protection of public morals. In addition, the AB rejected China's claim that commitments it made to allow foreign enterprises to partner in joint distribution ventures with Chinese enterprises did not cover the electronic distribution of music, and its claim that Chinese import restrictions on films for theatrical release and certain types of sound recordings and DVDs were not inconsistent with China's commitments related to the right to import because the products were not goods and therefore were not subject to commitments. The AB maintained the Panel's finding that Chinese restrictions on the distribution of digitalized music over the Internet are covered by China's market access commitments under the GATS. The AB, however, rejected the US claim that China's duopoly for film distribution within China violated WTO rules by discriminating against foreign film imports, and that China's censorship regime for music transmitted over the Internet discriminates against imported hard-copy CDs. The AB urged China to allow US companies to import into China films for theatrical release, audiovisual entertainment products, such as DVDs, music and other sound recordings and reading materials, and urged China to eliminate the discriminatory treatment that US distributors face as well as to allow US companies to partner with Chinese enterprises in joint ventures to distribute music and other sound recordings over the Internet.

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

United States Trade Representative (USTR) Ron Kirk lauded the AB"s decision and stated that the decision is “key to ensuring full market access in China for legitimate, high-quality entertainment products and the exporters and distributors of those products.” He added that “the Panel and Appellate Body findings ensure that legitimate American products are granted market access so that they can get to market and beat out the pirates.” The Motion Picture Association of America (MPAA) echoed USTR Kirk"s statements and noted that “with today's rejection of China's appeal, the WTO has taken a major step forward in leveling the playing field for America's creative industries seeking to do business in China.”

China Requests Dispute Settlement Panel on US Section 421 Tires Decision

On December 9, 2009, China requested the establishment of a World Trade Organization (WTO) dispute settlement panel to examine the United States" imposition of a three-year safeguard import tariff on Chinese tires for light trucks and passenger vehicles that were the subject of a Section 421 investigation (DS399). According to China"s panel request, consultations with the United States held in November 2009 failed to resolve the dispute. The Dispute Settlement Body (DSB) will consider China"s request at its December 21, 2009 meeting. Should the United States block the first panel request, the DSB will automatically establish the panel if and when China makes a second panel request at the next DSB meeting.

Section 421 of the Trade Act of 1974, as amended, permits the United States to impose import relief measures when products from China are imported in increased quantities or under other conditions that cause or threaten to cause “market disruption” to domestic producers of like or directly competitive products. On April 20, 2009, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW) filed a petition under Section 421 alleging that a surge of certain passenger vehicle and light truck tires from China has been a “major factor” in the decline of domestic tire production in the United States and the loss of thousands of US jobs in the industry. On September 11, 2009, President Obama announced that the United States would impose the three-year safeguard import tariff on Chinese tires. Effective September 26, 2009, the United States began to impose a tariff of 35 percent on certain passenger vehicle and light truck tires from China in the first year, to be followed by a 30 percent in the second year and a 25 percent tariff in the third year.

China initially requested consultations with the United States under the WTO dispute settlement mechanism on the US Section 421 decision on September 14, 2009. China argues that the higher tariffs

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

are not justified as an emergency action under relevant WTO rules, and contends that they are inconsistent with: (i) Article I:1 of the GATT 1994 “because the United States does not accord the same treatment it grants to passenger and light truck tires originating in other countries to the like products originating in China”; and (ii) Article II of GATT 1994 “since these higher tariffs consist of unjustified modifications of US concessions thereunder.”

China"s panel request comes as no surprise, especially in light of China"s reaction to the Section 421 decision in September 2009. Chinese officials negatively reacted to President Obama"s decision, and China"s consultation request was issued shortly after the Administration"s Section 421 announcement. The United States is likely to block the first panel request, but China will likely follow with a second panel request, at which time the DSB will automatically form a panel to examine China"s claims. The 421 tires dispute is the latest dispute between the United States and China at the WTO. Other US-China WTO disputes involve restrictions imposed by China on the importation and distribution of publications, audiovisual products, sound recordings and films (DS363), US measures affecting poultry imports from China (DS392), Chinese measures affecting the protection and enforcement of intellectual property rights (DS362), Chinese measures affecting imports of automobile parts (DS339/340/342), and China"s export quotas and duties on certain raw materials used for the production of steel and chemicals (DS394).

USTR Announces US-China Agreement Resolving “Famous Brands” Dispute

On December 18, 2009, United States Trade Representative (USTR) Ron Kirk announced that the United States and China have reached an agreement confirming China's termination of export subsidies for Chinese “famous brands.” According to USTR Kirk, the United States has signed an agreement with China confirming full elimination of the subsidies the United States identified as prohibited under World Trade Organization (WTO) rules.

In December 2008, the United States and Mexico requested consultations with China over certain measures offering grants, loans and other incentives to enterprises in China (DS387). The United States indicated that these grants, loans and other incentives were reflected in a number of measures, including measures relating to the “China World Top Brand Program,” the “China Name Brand Products,” and the “Chinese Famous Export Brand Program.” The United States claimed that enterprises with these designations were entitled to various government preferences, including financial support tied to exports; USTR reported that the United States ultimately identified more than 90 separate official measures,

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

issued and applied by various levels of government in China, "providing what appeared to be WTO-inconsistent financial support." Consultations began in February 2009.

Under the agreement, China confirms that it has taken steps either to eliminate the measures of concern or to modify them to remove any provisions related to export-contingent brand designations and financial benefits. China also agreed to terminate or modify measures that benefit several manufacturing exports, including household electronics, textiles and apparel, light manufacturing, food and agricultural products, metals, chemicals, medicines, and high-tech products.

Korea Requests Consultations with US Over "Zeroing" Used in Antidumping Duty Calculations

On November 24, 2009, Korea requested World Trade Organization (WTO) dispute settlement consultations with the United States on the imposition of antidumping measures on stainless steel plate in coils, stainless steel sheet and strip in coils, and diamond sawblades and parts thereof from Korea (DS402). In its consultation request, Korea notes that the United States used its "zeroing methodology" in calculating the antidumping duty rates for Korean stainless steel plate in coils, stainless steel sheet and strip in coils, and diamond sawblades.

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

Korea argues that "the effect of the [US Department of Commerce's] zeroing practice in the three cases . . . has been either to artificially create margins of dumping where none would otherwise have been found, or to inflate margins of dumping." The consultation request notes that although the United States has announced that it will no longer utilize the practice of zeroing in any investigations that were pending as of February 22, 2007, Korea still considers the Department of Commerce's (DOC) use of its practice of zeroing in its final determinations, amended final determinations, and anti-dumping duty orders in the three listed cases to be inconsistent with the obligations of the United States under Article VI of the GATT 1994 and Articles 1, 2.1, 2.4, 2.4.2, and 5.8 of the Anti-Dumping Agreement.

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

Korea and the United States will now formally consult on the matter. If consultations fail to resolve the dispute within 60 days, Korea may request that the WTO Dispute Settlement Body (DSB) establish a panel to determine whether the United States is in compliance with its WTO obligations. Japan has asked to join Korea"s consultation request because it exports to the United States the same steel products at issue in Korea's request.

Korea"s consultation request is the latest in a series of disputes the United States has had with trading partners over its use of zeroing. To date, there have been more than a dozen disputes regarding the DOC"s zeroing methodology. Observers note, however, that the WTO Appellate Body has consistently found that DOC"s zeroing in original investigations, periodic reviews, sunset reviews and new shipper reviews does not comply with US WTO obligations, and has previously ruled against DOC zeroing methods in disputes such as *United States - Measures Relating to Zeroing and Sunset Reviews* (DS322), *United States - Laws, Regulations and Methodology for Calculating Dumping Margins* (DS294) and *United States - Final Dumping Determination on Softwood Lumber from Canada* (DS264), among others.

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