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Japan External Trade Organization

WTO and Regional Trade Agreements Monthly Report

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US unilateral, bilateral, and multilateral trade policy is likely to follow the same pattern as in 2008 and remain "on hold" in 2009. The new Democratic Administration – and its Cabinet appointments – combined with a Democratic majority in Congress will likely direct US trade policy on a course that shuns a "proactive" trade agenda that would seek new trade agreements and favors instead stronger enforcement and monitoring of existing trade agreements. The year will likely feature standard trade themes, including but not limited to: (i) possible Congressional approval of pending bilateral Free Trade Agreements (FTAs); (ii) US efforts to make significant progress in the stalled "Doha Round" of World Trade Organization (WTO) negotiations; (iii) US involvement in several WTO dispute settlement proceedings; and (iv) Congress' and the Administration's attempts to address US-China trade relations in light of the dismal financial climate.

United States Highlights

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

- Former Washington Governor Is Obama Administration's Next Pick for Commerce Secretary
- Mandatory COOL To Take Effect Mid-March
- USTR Nomination Hearing Pushed to March While Agency Fills Other Posts
- President Signs Stimulus Package Containing "Buy American" Provisions, Byrd Repayment Prohibition, and TAA Expansion
- Senators Introduce "Trade Compliant and Litigation Accountability Improvement Measures Act of 2009"

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Free Trade Agreements Highlights

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

- US Requests Delay in TPP FTA and ACTA Negotiations, Keeps Quiet on US-China BIT

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

- APHIS Publishes Revised Schedule for Lacey Act Implementation

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WTO Appellate Body Releases Report on US – Continued Existence and Application of Zeroing Methodology (DS350)

The World Trade Organization (WTO) Appellate Body has affirmed that the continued use of the ~~"z~~eroing" methodology in reviews of anti-dumping orders is inconsistent with the obligations of the United States under the Anti-Dumping Agreement and the General Agreement on Tariffs and Trade (GATT).

Multilateral Highlights

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

- Doha Rules Chair Issues New Draft Text, Faces US Calls for Inclusion of ~~"Z~~eroing"

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Reports in Detail

United States

Forecast 2009: US Trade Policy "On the Backburner"

Summary

US unilateral, bilateral, and multilateral trade policy is likely to follow the same pattern as in 2008 and remain "on hold" in 2009. The new Democratic Administration – and its Cabinet appointments – combined with a Democratic majority in Congress will likely direct US trade policy on a course that shuns a "proactive" trade agenda that would seek new trade agreements and favors instead stronger enforcement and monitoring of existing trade agreements. The year will likely feature standard trade themes, including but not limited to: (i) possible Congressional approval of pending bilateral Free Trade Agreements (FTAs); (ii) US efforts to make significant progress in the stalled "Doha Round" of World Trade Organization (WTO) negotiations; (iii) US involvement in several WTO dispute settlement proceedings; and (iv) Congress' and the Administration's attempts to address US-China trade relations in light of the dismal financial climate.

Analysis

I. The New Administration

On November 4, 2008, Sen. Barack Obama (D-IL) was elected to serve as the 44th President of the United States. As we have previously reported, President Obama has appointed several members of his Cabinet, including United States Trade Representative (USTR), Secretary of the Treasury, Secretary of State, and Secretary of Agriculture, among others. Each of these Cabinet positions helps the President craft US international trade policy.

In December 2008, President Obama tapped former Dallas Mayor Ron Kirk to serve as USTR under the Obama Administration. Little is known within Washington circles of Kirk and his stance on US trade policy, and though journalists and trade policy experts appeared determined to label Kirk a "free trader," they offered little substantive proof of that stance beyond Kirk's overseas actions as Mayor on behalf of his Dallas constituents. Free-trade advocates are hopeful that Kirk's prior work as Mayor of Dallas, an international business center, will push him to support a free trade agenda. Given the US and global financial climate, however, it is likely that trade will not be a priority item for the Obama Administration

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during the first half of 2009 because President Obama and his Cabinet will be too focused on remedying the US economy and will not have enough political capital to spend on other issues, including ~~"p~~roactive" trade initiatives. Kirk's selection as USTR certainly indicates that trade will take a backseat to other issues within the Obama Administration: the selection of a relatively unknown personality with no formal trade background likely means that the Obama Administration will not focus on trade. As we have forecasted, the Office of the USTR under an Obama Administration will likely shift focus from a more proactive trade agenda to one centered on trade enforcement and monitoring, based on Democratic concerns with labor and the environment, among other issues. The key question is *how* Kirk will prioritize these issues, and how much political capital President Obama will be willing to expend to accomplish these goals, in light of the growing protectionist sentiment in the US Congress. Given the little attention the Obama officials will pay to trade it is unlikely that USTR will have enough authority to move the US trade agenda forward.

Other Cabinet positions will also likely take away any political capital that USTR could use to pursue a free trade agenda. President Obama's nomination of two strong political figures (Gov. Bill Richardson and Sen. Judd Gregg (R-NH)) for Secretary of Commerce shows that the Administration would like a ~~"h~~eavy-hitter" heading the Department of Commerce, one who has Congressional experience and respect from legislators. Because US trade policy is likely to be secondary to domestic economic concerns, the Department of Commerce may overshadow USTR with respect to counseling President Obama on economic issues. If this is the case, the role of Commerce Secretary, although yet to be filled, may be relatively more important than Kirk's role as USTR, and the Obama Administration could look more to the Department of Commerce to provide an informal lead on the direction US trade policy should take because of its work on domestic economic issues. The business community lauded President Obama's selection of Timothy Geithner to serve as Secretary of the Treasury because he is known as a free-trade advocate, although trade observers note that the incoming Secretary of Treasury will be concerned with the US response to the current global financial crisis, and will likely focus on an agenda to stimulate the US economy. Consequently, Treasury's focus on the domestic economy will likely cut into its work on the international economy, and international efforts spearheaded by Treasury may become secondary to Treasury's domestic work. Secretary of State Hillary Clinton may also attempt to exert a larger influence on trade policy in her posting, and may seek to enhance the Department of State's involvement in trade policymaking, as part of a broader move to expand the agency's policy jurisdiction. If Secretary Clinton attempts to enlarge the Department of State's policymaking role, then her views on trade could spill over and affect US trade policymaking. Secretary of Agriculture Tom Vilsack is a strong advocate of ethanol

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as an energy source and would like to enact a greenhouse gas cap-and-trade system to combat global warming. That said, trade will not be a priority for the Department of Agriculture (as in other agencies). Vilsack and the Department of Agriculture will likely seek to address the pressing domestic concerns of US agriculture producers with respect to the financial crisis, including volatility in food and commodity prices. This focus, however, could affect US trade initiatives, such as the US stance in the WTO Doha Round Agriculture negotiations.

Consequently, the general view is that US trade policy will not be a top issue for President Obama. President Obama's selection of Cabinet members with jurisdiction over trade reinforces the view that trade will not be a priority in his Administration, and his selection of Kirk for USTR shows that trade will take a backseat to the domestic economy. Other Cabinet appointments likely will have more important roles because of the state of the US economy.

II. Absence of Trade Promotion Authority

Trade Promotion Authority (TPA) expired in mid-2007 and the US Congress did not renew the "fast-track" authority for the remainder of President Bush's term. At this stage, it is unclear if the new Obama Administration will request TPA and if Congress will grant the President TPA. Nonetheless, the lack of TPA renewal will continue to affect US trade policy for the rest of 2009 and beyond. The United States' international trading partners view TPA as a US commitment to liberalized trade and a necessary tool for trade negotiations with the United States. US trading partners could view the absence of TPA as an indication that the United States is not committed to free trade. Some observers question whether TPA has any relevance anymore, in light of the Democratic Congress' actions in 2008 that eliminated the TPA-mandated timetable for consideration of the pending US-Colombia FTA. These skeptics argue that TPA used to provide a US FTA partner with an assurance that the final agreement that it signed would remain intact after Congressional review and approval, and that Congress would consider the agreement under a strict schedule. The actions on the Colombia agreement, however, have made some trading partners wary of the effectiveness of TPA. This "wariness" combined with the general lack of TPA could spell out several policy-wide effects, including: (i) US trading partners distancing themselves from negotiating with the United States because they have no guarantee that Congress will not alter the agreement once completed; and (ii) a disincentive for USTR to commence any new formal FTA negotiations and complete any pending FTAs, regional or multilateral negotiations with trading partners. Of course, these effects hinge on whether the Administration will be granted TPA, but nonetheless, these are some of the scenarios that trading partners and members of the US business community have considered.

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III. Limited Activity on Bilateral and Regional Trade Agreements

Although TPA expired in mid-2007, USTR seems to be moving ahead on FTA negotiations with several US trading partners (such as countries within the Trans-Pacific Strategic Economic Partnership Agreement). As noted, however, TPA expiry has limited USTR's ability to negotiate and complete FTAs; thus, it remains unclear if USTR will complete any FTA negotiations this year, given the lack of TPA and the relatively secondary role that USTR will play relative to the roles of other government agencies. Besides FTA negotiations, the new Administration and Congress will also have to consider the completed yet pending Colombia, Panama and Korea FTAs.

A. Asian Agreements: Korea, Malaysia, Thailand, and the TPP

Korea. The fate of the US-Korea (KORUS) FTA remains uncertain. The Bush Administration did not submit implementing legislation for the agreement to Congress, despite the FTA negotiations' completion in June 2007, and it is unclear if the Obama Administration will submit the FTA to Congress in 2009. Congressional sources have opined that Congress may not consider the KORUS FTA this year. Besides questionable timing, the agreement does not enjoy firm Congressional support. Several US automakers have complained that the KORUS FTA does not sufficiently address non-tariff barriers (NTBs) to auto trade in the Korean market, and they likely will continue to lobby Members to oppose the agreement. US labor unions have also indicated opposition to the agreement because they feel that the KORUS FTA offers weak protections for workers' rights and the environment, and that the preliminary negotiation process occurred without an adequate consultation process with civil society, including labor unions. If Congressional momentum on the KORUS FTA picks up, then labor unions will likely focus their energies in opposing the agreement and lobbying US legislators to do the same if and when the Obama Administration submits the KORUS FTA's implementing legislation to Congress. Until that time, however, it is unclear what exactly will happen to the KORUS FTA in 2009.

Malaysia. The United States and Malaysia launched formal FTA negotiations in March 2006 and held their last formal negotiating round in July 2008 in Washington, DC. Since this last round, however, USTR has remained relatively quiet on the status of the talks. Certain contentious agenda items still dominate the talks, including Malaysia's *bumiputra* policy (which grants preferential treatment to ethnic Malaysian companies) as well as financial services and government procurement, among other issues. Several reports indicate that the US-Malaysia FTA talks may rest on the back-burner for the short-term (at a minimum), while the new Obama Administration settles into its various roles. In January 2009, Malaysian Minister of International Trade and Industry Tan Sri Muhyiddin Yassin announced that the negotiations

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between Malaysia and the United States had been postponed on request from Washington. Although Minister Yassin declined to give specifics on the reasoning behind the postponement, he hinted that it may be connected to the entry into office of new Administration officials who will need additional time to review the status of the talks and decide on an appropriate course of action in moving the negotiations forward. Thus, it seems that the pending US-Malaysia FTA negotiations will not be a major trade initiative in the short-term during the first half of 2009. US officials may continue a dialogue with their Malaysian counterparts, but it is unlikely, at this stage, that there will be major movement on the negotiations.

Thailand. A similar scenario applies to US-Thailand FTA negotiations. In October 2003, President Bush announced his intent to enter into FTA negotiations with Thailand. Both sides held two rounds of FTA negotiations in 2004 and four rounds in 2005. However, political uncertainty since former Thai Prime Minister Thaksin Shinawatra's February 24, 2006 dissolution of Thailand's Parliament has stalled the FTA indefinitely, and since that time, the US government has been hesitant to resume the talks. According to some government officials, USTR will be ready to engage with Thai officials once a new Thai administration is settled in place and remains there long enough to ensure continuity in the talks moving forward. Although USTR seems to possess the political will to negotiate an FTA with Thailand, US negotiators are unlikely to formally continue the FTA negotiations in the shot-term. US negotiators may meet with their Thai counterparts in informal negotiating rounds, similar to US-Malaysia FTA talks, but given the lack of TPA and the presence of political factors surrounding the talks, it is unlikely that the United States and Thailand will formally resume FTA negotiations until later in the year, if even then. Until that formal resumption, USTR will stick strongly to its message that ~~t~~the United States will continue to monitor and evaluate developments in Thailand . . . and will determine appropriate next steps for the economic relationship."

Trans-Pacific Strategic Economic Partnership Agreement. In the meantime, the United States has continued to assert its interest in building stronger trade ties with its Asian trading partners and will begin formal FTA negotiations in March 2009 with the members of the Trans-Pacific Strategic Economic Partnership Agreement (~~t~~the TPP Agreement" – comprised of Singapore, Brunei, New Zealand and Chile) in addition to Australia and Peru on a larger FTA. US officials have opined that the TPP Agreement could serve as a building block for a longer-term Free Trade Area of the Asia-Pacific (FTAAP) between the United States and other Pacific economies. Asia-Pacific Economic Cooperation (APEC) members formally agreed to consider the FTAAP as a long-term proposal during the 2006 APEC Summit in Hanoi, Vietnam. Members instructed their respective ministers to prepare a report on the proposal, and the ministers presented the report to the Leaders during the 2007 Summit in Sydney, Australia. Although the

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2007 Ministerial Statement emphasized APEC members' commitment to a successful conclusion of the Doha Round, it also noted members' agreement to "examine the options and prospects" for the FTAAP going forward. US officials, however, have noted that the creation of an FTAAP would be challenging because APEC consists of twenty-one economies at differing levels of development with different types of barriers. US officials feel, however, that a TPP Agreement – in addition to the pending US-Korea FTA – would make it easier for Pacific economies to agree to common standards and regulations under the proposed FTAAP. Thus, the US strategy towards the TPP countries seems to build on existing agreements and strong ties with these countries to simplify the process of creating a TPP Agreement which in the longer-term can help build an FTAAP. To date, however, USTR has kept very quiet on the negotiations, likely because Obama officials are still settling into their respective positions within the Administration. Thus, it is unclear if USTR (under the Obama Administration) will continue with the FTA negotiations – in light of a lack of TPA – and unclear how much political capital it will provide to US negotiators participating in the talks, *i.e.*, how much the United States is willing to negotiate with TPP economies. Negotiations will likely start in March 2009, but after that, it is unclear how (and if) they will progress.

B. Latin American Agreements: Colombia and Panama

Colombia. Congressional Democrats cite Colombia's record of human rights violations and violence against labor leaders as a major stumbling block for ultimate passage of the agreement, and the Obama Administration has also vocalized similar concerns. Proponents of the US-Colombia FTA continue to lobby Congress and the Administration to support the agreement, and they point to the Uribe Administration's work in recent years to decrease the assassinations of Colombian labor leaders. The issue, however, does not appear ready to be easily resolved. Democratic leadership in Congress will likely continue to focus on Colombia's labor issues in 2009, as evident in the February 12, 2009 House Education and Labor Committee hearing on workers' rights and violence against labor union leaders in Colombia, although to date, they have not indicated what additional steps Colombia should take in order to address their concerns. Further, it remains unclear if TPA will apply to the Colombia FTA if and when Congress decides to consider the agreement: then-USTR Susan Schwab indicated in late 2008 that TPA would "die" for Colombia if the 110th Congress ended its session without considering the agreement, but to date, neither USTR nor Congress has offered any insight as to whether "fast-track" rules will or will not apply to the agreement. Given these negative factors, it is likely that the US Congress will not consider the US-Colombia FTA in the short- or medium-term. Some observers have even opined that the Congress may not consider the agreement at all in 2009.

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Panama. The US-Panama FTA was initially held hostage by political situations in Panama that raised alarm among some US legislators. The September 1, 2007 election of Pedro Miguel Gonzalez Pinzon as President of Panama's National Assembly altered the FTA's support in Congress in 2008 because Gonzalez Pinzon has an outstanding warrant for his arrest in the United States for the June 1992 slaying of US Army Sgt. Zak Hernandez Laporte and the attempted murder of Sgt. Ronald Marshall outside Panama City. The political issue was sensitive enough that it garnered statements from key members of the US Congress, such as Senate Finance Committee Chairman Max Baucus (D-MT), that until the Panamanian government addressed the issue, the agreement stood little chance of passage in the US Congress. Gonzalez Pinzon, however, completed his term of office in September 2008, and his departure from the National Assembly cleared the way for Congressional consideration of the FTA. The US-Panama FTA is considered by many a small, commercially insignificant trade agreement (especially because a majority of products from Panama already enter the United States duty-free) with big geopolitical linkages (*i.e.*, the Panama Canal is an important sea route). Consequently, many observers opine that when Congress considers the agreement, it should easily pass the FTA. The US-Panama FTA, however, may now be held hostage for other reasons, namely the Administration's and the Congress' focus on remedying the domestic economy. Because domestic economic concerns will take center stage for most of 2009 (and beyond), the US-Panama FTA could be overshadowed by these other issues. The Obama Administration is unlikely to submit implementing legislation on the Panama agreement to Congress in the short-term, and even if it did, Congress may not be able to consider the agreement until after clearing several other items from its busy legislative agenda.

C. Middle Eastern Agreements: UAE

UAE. Similar to last year, little movement in 2009 is expected for US-UAE FTA negotiations. USTR has been relatively quiet on its FTA negotiations with the UAE, though sources note that political will still exists on both sides to continue FTA negotiations. Negotiators from both countries have held several inter-sessional and informal meetings throughout the past two years, but investment remains a contentious issue in the talks, specifically restrictions that the UAE places on foreign investment. Without TPA in place, however, USTR is unlikely to formally complete the US-UAE FTA negotiations in the short- and medium-terms. Furthermore, with the majority of FTA attention focused on the three pending FTAs (with Korea, Colombia and Panama), it seems unlikely that the United States and the UAE will make significant progress in FTA talks this year.

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D. Other Agreements

Because of the lack of TPA, USTR is unlikely to commence other formal FTA negotiations with any trading partners during the first half of 2009 (apart from the TPP). USTR does have the option to pursue Trade and Investment Framework Agreements (TIFAs) and Bilateral Investment Treaties (BITs) with viable US trading partners, such as China (in fact, government sources rumor that US-China BIT negotiations will pick up again over the next several months) but at this stage, it is unclear if the Obama Administration will grant USTR the necessary political capital to initiate and complete talks on such agreements. Given the tremendous focus on the domestic economy and the general opinion that trade will be placed on the back-burner in 2009, it is uncertain whether USTR will formally initiate any new TIFA and BIT negotiations in 2009.

IV. US-China Relations

The US Congress will likely continue to focus on US-China trade relations in 2009. As in 2008, and in light of the financial crisis, lawmakers will look closely at China and its currency practices as well as its compliance with multilateral obligations. Members of Congress could once again broach legislation targeting Chinese currency practices under the argument that such bills would help stimulate US economic activity and address the trade imbalance between the two countries. Congressional sentiment has shifted over the last several years as the Yuan has appreciated against the dollar since 2005, but because legislators are looking out for the interests of the US economy, these domestic concerns could trump all other approaches to China, and thus spur legislators to address China. Other matters that will form a part of the Congress' 2009 China legislative agenda include trade enforcement, import safely and intellectual property protection.

Congress' approach to China could depend on how the Obama Administration addresses the Sino-US relationship. Although President Obama has continued to state that he will ~~"t~~take a vigorous and pragmatic approach to address" key trade-related issues, his Administration has not provided clear details regarding specific policy positions it might adopt. President Obama has recognized the Sino-US economic relationship as one of the most important bilateral relationships in the world, but he has also has criticized many Chinese government policies including the management of its ~~"a~~rtificially low" currency and its discrimination against foreign investment.[1] Consequently, the Congress will be looking

[1] Barack Obama. —US-China Policy Under an Obama Administration." *American Chamber of Commerce in China's China Brief* (October 2008), *available at* www.amcham-china.org.cn/amcham/upload/wysiwyg/CB2008October/3-US-China_Policy_Under_a_Obama_Administration.pdf.

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to the Obama Administration closely during the first half of 2009 as President Obama clarifies his Administration's stance on China. If Congress feels that the Obama Administration has developed a China policy that adequately reflects Congressional concerns, then Congress could drop some of its scrutiny on China. However, if Congress feels that the President is not addressing contentious issues strongly enough with China, than US legislators may increase their own actions towards China vis-à-vis the introduction of more anti-China bills.

Under such Congressional scrutiny, the Obama Administration will have to carefully select the policy tools it will use to address China. President Obama may opt to continue the Bush Administration's strategy of responding to Congress' China concerns through the WTO. Since China's accession to the WTO in 2001, the United States has filed seven complaints against China to the WTO Dispute Settlement Body (DSB). President Obama could choose to continue this policy because, to date, the DSB has for the most part sided with the United States in these disputes. Thus, 2009 may see USTR filing other WTO disputes in order to assuage Congressional rancor over China trade. Secretary of State Hillary Clinton is also scheduled to meet with China's leadership on February 21, 2009, with the outlines for a proposed set of high-level bilateral dialogues possibly part of the agenda. This indicates that the Obama Administration may also want to continue the bilateral dialogue that the Bush Administration vigorously pursued with China, perhaps through the US–China Joint Commission on Commerce and Trade (JCCT) or the US-China Strategic Economic Dialogue (SED, although the future of this Bush era initiative is unclear). On the flip side, President Obama has indicated support for more enforcement against China and the use of trade measures, and he has noted that he would base his support for trade measures against China, such as China-specific safeguards, on their merits, which include an analysis of the impact that such protection would have on the broader US economy. All this is to say that the Obama Administration certainly has options to choose from in working with and on China, and that it could choose a policy path that combines all three elements: multilateral engagement, bilateral dialogue, and some unilateral actions. A clearer picture on the Obama China policy will likely emerge over the coming months, especially after Secretary Clinton's visit to China.

V. US Preference Programs

The US Congress may explore amendments to US preference programs in 2008. The Generalized System of Preferences (GSP) program and the Andean Trade Promotion Act (ATPA) are set to expire on December 31, 2009. For the past two years, Congress has granted these preference programs short-term extensions, much to the consternation of preference program participating governments and US and

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international businesses. Indeed, Congressional sources have signaled that key Members of Congress – including Senate Finance Committee Chairman Max Baucus (D-MT) and Ranking Member Charles Grassley (R-IA) – would like to use 2009 to ~~"r~~ebuild" these preference programs and make the largest participants in each program more accountable while at the same time encouraging more participation and involvement from least-developed economies. Congressional sources expect the Senate Finance and House Ways and Means Committees to begin holding hearings on the preference programs in mid-2009. At these hearings, legislators will likely ask themselves if US preference programs are effectively encouraging the market participation of least-developed economies or whether they have encouraged increased participation by richer economies that are still considered ~~"d~~eveloping." Congress will also likely consider increasing Congressional oversight for these programs, and Democratic leadership, under pressure from labor unions and groups, may explore strengthening labor provisions and requirements under these programs. Thus, 2009 could prove to be a year of change for several US preference programs. One word of caution, however: Members of Congress have made similar statements and promises of change and expansion of these programs over the past two years, and these promises have resulted in little change and more short-term extensions. Thus, Congress could simply choose to provide more short-term extensions for these programs if the legislative agenda gets too crowded for them to consider larger overhauls to the program. With this in mind, the question changes from ~~"W~~ill Congress renew these programs?" to "How serious is Congress about renewing and expanding these programs?"

VI. Doha Negotiations

Completion of a final WTO Doha Round agreement has been delayed several times over the past several years, and it seems likely that 2009 will not witness any drastic changes to the negotiations or any concrete movement forward. The new Obama Administration has not yet outlined its policy regarding the Doha talks, and WTO Members have begun questioning whether the United States remains committed to the multilateral negotiations. On the outset, President Obama has stated that achieving a final Doha Agreement remains important, although recent statements from some members of his Cabinet indicate that the Administration is considering its approach to the negotiations given the current economic crisis. Secretary of Agriculture Tom Vilsack has opined that the Obama Administration is unlikely to shift much focus to the Doha Round until its has resolved some of the United States' domestic economic concerns. Secretary of State Hillary Clinton has opined that although the Doha Agreement is important, it should perhaps reflect labor and environmental concerns. Assistant USTR Christine Bliss has indicated that US negotiators are waiting to hear from the Obama Administration on how they should proceed with Services negotiations. All these comments indicate that although the Administration has expressed its political

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willingness to complete the negotiations, it remains to be seen how much political capital the Administration will set aside for the WTO negotiations.

Agriculture negotiations continue to stall over several issues, including the reductions in agricultural support programs that WTO Members are willing to make and an agriculture special safeguard mechanism (SSM). Several iterations of the Agriculture draft text (the latest of which was issued in December 2008) show that there has been some turnaround in Doha agriculture proceedings, but to date, developed and developing countries continue to argue over the final contents of an Agriculture agreement, with the United States and India taking center-stage in their debate over the SSM. Regardless, to date, the United States and other WTO Members have not indicated that they are willing to issue revised offers, and at this stage, seem to be waiting for one another to make the first move in the stalled agriculture talks. Thus, it remains questionable if Members can achieve forward movement in the Agriculture negotiations given the stand-off between developed and developing countries and the "sideline stance" that the United States has adopted for the time being while the Obama Administration gets settled.

The non-agricultural market access (NAMA) negotiations also remain entrenched on several issues, including tariff coefficients WTO Members must agree on to the "Swiss formula" of tariff cuts. Chairman of the Doha Committee on NAMA Luzius Wasescha released the last draft in December 2008, and although this latest text seems to have solidified some of the previously bracketed text and figures, there was overall a lack of substantive change in text, which indicates that significant differences still remain between WTO Members. It seems possible that, similar to the Agriculture talks, NAMA negotiations will continue throughout 2009 without any significant forward movement for the first part (if not the majority) of the year.

There has been some movement in the Rules negotiations, although many observers opine that this movement is still not substantive enough to elicit a positive reaction. On February 4, 2009, Chair for the Rules Negotiations Guillermo Valles issued a new draft Rules text. Officials from different countries have already responded to the new language. Chief among the responses was a positive reception from several WTO Members that the newest draft text did not include reference to "zeroing" methodology. The United States, on the other hand, continued to warn WTO Members that any final Doha Rules agreement must include the "zeroing" methodology. Although US officials have acknowledged that the Rules negotiations have been contentious and that the "zeroing" argument has polarized the talks, they continue to insist "that any final rules agreement must address the critical issue of zeroing." The latest Rules text also watered down language from previous drafts with regards to: (i) automatic termination of

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antidumping measures; (ii) "public interest" provisions; and (iii) anti-circumvention. The Chair is now consulting with WTO Members as to how to proceed on any next steps. Zeroing will likely continue to remain the most contentious and debatable issue in 2009 (and beyond) within the Rules negotiations. Proponents of "zeroing" – such as the United States – find themselves squaring off against equally ardent critics of the methodology – including Japan, Brazil and India – and it is unlikely that these WTO Members will demonstrate the necessary "flexibility" in the short- and medium-terms in order to achieve a final Rules agreement.

Lack of TPA also affects the successful conclusion of the Doha Round. The United States and its trading partners are unlikely to formally complete a Doha Agreement without TPA in place. TPA assures US trading partners that once the United States completes a trade agreement, Congress cannot amend it. Although it remains uncertain if WTO Members will complete a final Doha Agreement by the end of the year, should they reach such an agreement, Congress might have to consider TPA renewal, even if it is a limited one that only applies to the Doha Agreement.

VII. WTO Dispute Settlement Proceedings

The United States Department of Commerce's (DOC) practice of "zeroing" in antidumping investigations and administrative reviews has been one of the most extensively-litigated measures in the WTO, and in 2009, the United States could see more dispute settlement activity regarding this methodology. Even with the various DSB panel and Appellate Body rulings against the United States' use of "zeroing," the United States will likely continue to face challenges from various WTO trading partners as long as it continues to defend (and use) "zeroing."

The completion of the 2008 Farm Bill has implications for US involvement in WTO disputes, especially disputes brought by other WTO Members regarding US agricultural support. Brazil and Canada initiated dispute settlement proceedings against the United States regarding US agricultural support provided under the 2002 Farm Bill. Brazil and Canada argue that the United States has provided trade-distorting agricultural subsidies in excess of its WTO commitments in 1999, 2000, 2001, 2002, 2004 and 2005. Under its Total Aggregate Measurement of Support (Total AMS) commitments under the WTO Agreement on Agriculture, the United States agreed that its level of trade-distorting domestic support would not exceed USD 19.9 billion for 1999 and USD 19.1 billion for each subsequent year. In October 2007, the United States notified the WTO of what it considers to be its trade-distorting subsidies for the years 2002-2005. The United States claims that these notifications, along with its earlier WTO notifications, show that its annual levels of trade-distorting support have been within its WTO commitments. However, Brazil

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and Canada argue that when these programs are properly accounted for under the WTO Agreement on Agriculture, the level of US trade-distorting agricultural subsidies exceeded US WTO commitments in 1999-2002 and in 2004 and 2005. The US-Brazil dispute could lead to additional WTO disputes against the United States. Because the 2008 Farm Bill is almost identical to the 2002 Farm Bill and continues the agricultural support programs included in the 2002 legislation, it is almost certain that the 2008 Farm Bill will not resolve current WTO dispute settlement cases regarding US farm subsidies and indeed could lead to more WTO disputes over US agricultural support.

As noted, the United States will continue to closely scrutinize China's actions on its WTO obligations in 2009. USTR under the Bush Administration actively pursued more direct and public means to ensure China's WTO compliance, and initiated several WTO cases against China. It remains to be seen if the Obama Administration will continue the same policy and if threat of WTO action will pressure China into addressing US concerns regarding China's compliance with its WTO obligations, although if the indications from the Obama Administration that it will push for a stronger ~~"e~~nforcement" agenda hold true, then the United States may initiate several more WTO proceedings against China.

VIII. Other Issues

In 2009, the US Congress will likely continue to explore the issue of climate change and the establishment of a ~~"c~~ap-and-trade" program. A standard cap-and-trade program establishes an economy-wide or sectoral ~~"c~~ap" on emissions, and allocates or auctions tradable ~~"a~~llowances" (the right to emit a ton of greenhouse gases) to greenhouse gas emission sources or fuel distributors. The total number of allowances is equal to the cap. The primary focus of a cap-and-trade program would be on sources of emissions that can be measured and monitored; these include almost all sources of carbon dioxide (CO2) emissions from fossil-fuel combustion as well as many sources of other greenhouse gas emissions. The EU has already implemented a cap-and-trade scheme: the European Union Emission Trading Scheme (EU ETS). The ETS currently covers more than 10,000 installations in the energy and industrial sectors which are collectively responsible for close to half of the EU's emissions of CO2 and 40 percent of its total greenhouse gas emissions. Under the EU ETS, large emitters of carbon dioxide within the EU must monitor and annually report their CO2 emissions, and they are obliged every year to surrender (*i.e.*, give back) an amount of emission allowances to the government that is equivalent to their CO2 emissions in that year. The installations may get the allowances for free from the government or may purchase them from others (*i.e.*, installations, traders, the government). If an installation has received more free allowances than it needs, it may sell them to anybody.

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Previous Senate bills proposed a US program similar to the EU program, and legislators will likely reintroduce such measures and continue to debate this issue during 2009. Although debate on climate change and a cap-and-trade program will likely last through the year, it remains to be seen if Congress would approve such proposed measures and if the President would sign them into law. Critics of cap-and-trade programs have noted that if the United States does not implement a cap-and-trade program correctly, it will encourage heavy industry to move offshore to a country that does not have as strict environmental standards as those in the United States. Congressional opponents of a cap-and-trade program may use this argument to defeat any suggested legislation. Opponents may also raise the issue of whether advanced developing countries – including Brazil, India and China – will accept caps and limit their carbon emissions. Opponents to a cap-and-trade program may argue that without assurances that these economies will accept caps, it may be harmful to US industry if the United States accepts caps first because, as noted, industry can relocate from the United States to economies with less stringent standards.

Outlook

Several factors have pushed US trade policy onto the ~~b~~backburner" in 2009, making it secondary to other issues. The new Democratic Administration and the continued Democratic leadership in the Congress, along with the global economic crisis, will largely dictate how much political capital the US government can spend on trade. Other factors, including the lack of TPA, have also caused many of the typical vehicles for US trade policy to stall, and, as noted, many members of Congress and the US public have shifted their attention away from trade towards domestic issues. Consequently, at this stage, it seems likely that similar to 2008, US trade policy will be stagnant in 2009.

On the bilateral front, US trade policy will likely remain ~~o~~n hold" in 2009. Uncertainty still surrounds the timing of a Congressional vote on pending FTAs with Colombia, Panama and Korea. The Obama Administration has not yet solidified its trade agenda, although such an agenda is unlikely to include completion of any pending FTA negotiations in the short-term or the initiation of any formal new FTA discussions (apart from the TPP). It is also unclear if the Obama Administration will look to other bilateral initiatives – like TIFAs and BITs – as part of its trade strategy, although for many observers, these seem to be more likely policy options that President Obama will explore relative to FTAs and other formal agreements.

On the multilateral front, the United States will certainly keep a close eye on the Doha Round in 2009 but will unlikely be active in the negotiations, at least in the short-term, while the Obama Administration

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develops a Doha strategy. Although the United States – and other WTO Members – continue to indicate their political willingness to complete a final Doha Agreement as soon as possible, similar statements in 2007 and 2008 proved hollow, and stand-offs continue to prevent substantive forward movement in the negotiations. The United States is unlikely to offer any new concessions in the Agriculture and NAMA negotiations, and will likely face increased criticism from other WTO Members for its continued push to include ~~z~~eroing" in the draft Rules text: as long as the United States continues to defend the inclusion of these provisions in the draft text, it will certainly face hostility (and potentially more disputes) from WTO Members that oppose all forms of ~~z~~eroing."

Consequently, 2009 looks to be another challenging year for trade, and is likely to spur more questions on the direction of US trade policy in place of answers.

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United States Highlights

Former Washington Governor Is Obama Administration's Next Pick for Commerce Secretary

On February 25, 2009, President Obama nominated former Washington State Governor Gary Locke as Secretary of Commerce. Locke, who is a Democrat, served as Governor of Washington for two terms from 1996 through 2004. Prior to being Governor, Locke served as chief executive in King County (Seattle) and in the Washington State House. During the 2008 Presidential primary season, Locke served as co-chair of then Senator Hillary Clinton's Presidential campaign. He is currently a Partner at the law firm of Davis Wright Tremaine LLP as part of its in China and government relations groups.

Locke is the third candidate to be appointed to the Commerce Secretary position. President Obama's first pick for Commerce Secretary, New Mexico Governor Bill Richardson, withdrew his name from consideration citing an investigation into a company that has done business with his state. Sen. Judd Gregg (R-NH), the Obama Administration's second pick for Commerce Secretary, withdrew his name from consideration, citing ~~"ir~~resolvable conflicts" between himself and the Obama Administration on a number of key policy issues including the economic stimulus package.

Mandatory COOL To Take Effect Mid-March

On February 20, 2009, the Department of Agriculture (USDA) announced that the final rule for new country-of-origin labeling (COOL) requirements will go into effect on March 16, 2009. USDA had published a final rule on COOL on January 15, 2009, just prior to President Bush's departure. Since that time, the regulations have been put on hold pending review by the Obama Administration. The new COOL regulation requires origin labeling for muscle cuts and ground beef, pork, lamb, goat and chicken; wild and farm-raised fish and shellfish; fresh and frozen fruits and vegetables; peanuts, pecans, macadamia nuts and ginseng sold by designated retailers. The commodities must be labeled at retail to indicate the country of origin.

Under the 2002 and 2008 Farm Bills, the 1946 Agricultural Marketing Act was amended to require retailers to notify their customers of the country of origin of beef, lamb, pork, chicken, goat, fish and shellfish, perishable agricultural commodities (*i.e.*, fresh and frozen fruits and vegetables), peanuts, pecans, ginseng, and macadamia nuts. USDA's final rule requires these covered commodities to be labeled at retail to indicate the country of origin. In addition, the method of production (*i.e.*, wild or farm-raised) must be specified for fish and shellfish. The final rule prescribes specific criteria that must be met

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for a covered commodity to bear a "United States country-of-origin" declaration, and contains provisions for labeling covered commodities of foreign origin, meat products from multiple origins and ground meat products as well as commingled covered commodities.

The final rule excludes items derived from a covered commodity that has undergone a physical or chemical change (*e.g.*, cooking, curing, or smoking) or that has been combined with other covered commodities or other substantive food components, and food service establishments (*e.g.*, restaurants, lunchrooms, cafeterias, food stands, bars, lounges, and similar enterprises). The final rule also outlines requirements for recordkeeping by retailers and suppliers, and provides for penalties of up to USD 1,000 per violation for both retailers and suppliers not complying with the law. Under the rule, USDA will make funding available to expand training of state cooperator employees, initiate development of an automated review tracking system, conduct a retailer survey, and conduct audits of the retail supply chain, among other activities.

On the same day as the implementation announcement, Secretary of Agriculture Tom Vilsack released a letter to industry representatives wherein he noted that although the COOL final rule will go into effect March 16, 2009, "there are certain components of the Final Rule promulgated by the previous Administration that raise legitimate concerns [and] in particular, I am concerned about the regulation's treatment of product from multiple countries, exemptions provided to processed food, and time allowances provided to manufacturers for labeling ground meat products." In light of these concerns, Secretary Vilsack suggested that the industry voluntarily adopt several practices – that some observers opine are more stringent than the provisions of the final rule – to ensure that consumers are adequately informed about the source of food products:

- **Labeling of product from multiple countries of origin.** Secretary Vilsack urges US processors to voluntarily include information about what production step occurred in each country when multiple countries appear on the label.
- **Processed Foods.** Secretary Vilsack noted that the definition of processed foods contained in the final rule may be too broadly drafted, and he opined that even if products are subject to curing, smoking, broiling, grilling, or steaming, voluntary labeling would be appropriate.
- **Inventory Allowance.** Secretary Vilsack noted that the language in the final rule allows a label for ground meat product to bear the name of a country, even if product from that country was not present in a processor's inventory, for up to 60 days, and he urged processors to reduce the time allowance to ten days in order to enhance the credibility of the label.

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Response to Secretary Vilsack's announcement of the mid-March COOL implementation date and his letter was mixed. American Meat Institute President J. Patrick Boyle opined that ~~a~~almost 95 percent of beef and pork products eligible to bear a 'Product of the USA' label will bear such labeling," although in response to Secretary Vilsack's letter, he added that ~~t~~to the extent that companies are able and elect to go beyond these federal labeling requirements . . . is an individual company decision, which will have to be made in collaboration with a company's retail grocery customers, which ultimately are the entities that provide country of origin information to their consumers." Canadian cattlemen, meanwhile, gave a cool reception to the announcement; Director of International Relations for the Canadian Cattlemen's Association John Masswohl stated that the association is ~~n~~not very impressed with the Secretary's approach" and opined that the new COOL regulations can be viewed as protectionist.

The new COOL regulations have sparked criticism from some US trading partners. Canada and Mexico, for example, asked the United States for World Trade Organization (WTO) consultations on US COOL requirements in December 2008. Canada argued that US COOL requirements discriminate against Canadian exporters because the regulations, among other things, make it mandatory to inform consumers at the retail level of the country of origin of COOL-covered commodities, including beef, pork, lamb, chicken, and goat meat, as well as certain perishable commodities. Mexico's complaint against the United States echoed the Canadian argument, and in its request to join consultations, Mexico stated ~~a~~an increased interest on this dispute due to increased trade flows between Mexico and the United States." Although Canada agreed to hold the its dispute against the United States in abeyance for at least eight months due to some concessions the Bush Administration made in the final rule, government sources note that Secretary Vilsack's letter – which some observers opine urges US meat packers to adopt stricter labeling requirements for meat than required in the 2008 Farm Bill – could spur Canadian cattlemen and meat processors to push the Canadian government to re-initiate Canada's WTO case against the United States.

USTR Nomination Hearing Pushed to March While Agency Fills Other Posts

Congressional sources report that the Senate Finance Committee will likely push the hearing on the nomination of Ron Kirk to be United States Trade Representative (USTR) to the beginning of March. Observers had expected a hearing the week of February 23, but legislators on the Finance Committee did not make any scheduling announcements during the week, consequently further delaying the confirmation of one of President Obama's last Cabinet appointments.

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In the meantime, the Office of the USTR continues to fill other high-level positions. Timothy Reif, former Chief Majority Trade Counsel at the House Ways and Means Committee, has assumed his duties as USTR General Counsel, a post that does not require Senate confirmation. Daniel Sepulveda, a former legislative aide to President Obama when he was a Democratic Senator from Illinois, has also begun his work in heading USTR's Office of Legislative Affairs, and Peter Cowhey, Dean of the School of International Relations and Pacific Studies at the University of California, San Diego, will serve as a Senior Policy Adviser to USTR once Kirk has been confirmed.

Although Kirk remains unconfirmed, several names for potential Deputy USTRs have also been tossed around. Observers opine that Demetrios Marantis, Majority International Trade Counsel for the Senate Finance Committee, is in the running to be one Deputy USTR. Marantis joined the Democratic staff of the Senate Finance Committee in February 2005 after serving as issues director for then-Senator John Edwards (D-NC) on the Kerry-Edwards 2004 Presidential campaign. Prior to that, he served as Associate General Counsel at USTR between 1998 and 2002. Observers also opine that Miriam Sapiro, a lawyer who heads the Summit Strategies International consulting firm, could be considered for a Deputy USTR posting. Sapiro was a top fundraiser for the Obama Presidential campaign and represented the District of Columbia at the Democratic Convention in Denver in August 2008 as a member of the Credentials Committee. Prior to that, she served in the federal government, as the director of European Affairs at the National Security Council, and as a special assistant to President Clinton for Southeast European Stabilization. It is unclear at this stage if Deputy USTR Peter Allgeier, who currently serves as Acting USTR, will remain at USTR after Kirk's nomination.

Some members of the business community lauded Reif's move to USTR, and opined that as General Counsel, Reif, who worked on trade issues in Congress, could push the US trade agenda forward. According to several reports, Reif has indicated that he could urge USTR and members of Congress to quickly resolve any pending trade agenda items carried over from the Bush Administration – such as the pending Free Trade Agreements (FTAs) with Colombia, Panama and Korea – so that USTR can start with a ~~"b~~blank slate" and formulate a new US trade policy at a later point. Some observers are quick to point out, however, that even if Reif adopts such an approach, he will still have to work with incoming USTR Kirk, who may not adopt as proactive an attitude as Reif, and who may choose to endorse whatever approach to trade President Obama adopts. At this stage, the general opinion is that trade is a secondary ~~"b~~back-burner" issue for the Obama Administration, and that President Obama may be unwilling to spend much political capital on trade initiatives because of a host of factors, including pressure from a Democratic-led Congress to ~~"r~~reign in" a proactive trade agenda in favor of increased enforcement and

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monitoring, and pressure from key Obama constituents, such as labor unions, not to move forward on the US trade agenda until it further addresses labor and environmental concerns. Thus, it is unclear at this early stage if Reif and others will be able to push the stalled US trade agenda forward, although many signs indicate that such a push may be difficult to accomplish.

President Signs Stimulus Package Containing "Buy American" Provisions, Byrd Repayment Prohibition, and TAA Expansion

On February 17, 2009, President Obama signed the American Recovery and Reinvestment Act of 2009 (H.R. 1), an economic stimulus package meant to jumpstart the United States economy. The House of Representatives and the Senate approved H.R. 1 on February 13, 2009 by a vote of 246 to 183 in the House and 60 to 38 in the Senate. We analyze below the provisions of H.R. 1 specific to: (i) new "Buy American" requirements; (ii) Continued Dumping and Subsidy Offset Act payments (CDSOA, also known as the "Byrd Amendment"); and (iii) Trade Adjustment Assistance (TAA) program expansion.

I. "Buy American" Provisions

H.R. 1 contains "Buy American" provisions that would 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 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. The stimulus bill also states that the "Buy American" provisions will "be applied in a manner consistent with United States obligations under international agreements."

The "Buy American" provisions have generated intense criticism both internationally and with certain domestic constituencies, and some have argued that such requirements would be inconsistent with US international trade obligations.

"Buy American" laws have existed in the United States since the 1930s. The 1933 Buy America Act (BAA) requires federal government departments and agencies to buy US goods when they are acquired for public use unless a public interest, insufficient supply, or unreasonable cost exception applies. The BAA requirements can also be waived for countries that assume reciprocal government procurement obligations under the WTO Government Procurement Agreement (GPA) or a Free Trade Agreement (FTA) with the United States. BAA waivers can also be applied to least developed countries. Separate

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and apart from the BAA, however, other provisions of US law contain "Buy American" type requirements for certain types of purchases, such as those related to federally funded highway and transit projects. For example, federal law requires that steel, iron, cement and manufactured products purchased for federal aid highway projects be produced in the United States. Exceptions similar to those applicable to the BAA exist, although the threshold for the unreasonable cost exception is much higher.

The new "Buy American" provisions do not affect the BAA requirements related to federal government procurements, nor do they change existing "waivers" of BAA requirements. Moreover, even if a BAA waiver may be applicable because a country is, for example, a signatory to the GPA, a producer from such country could still be subject to other existing "Buy American" provisions that are separate from the BAA (*e.g.*, "Buy American" requirements associated with federally funded highway projects administered by the Federal Highway Administration). Again, in such cases, the new "Buy American" provisions would not alter these existing "Buy American" requirements.

The new "Buy American" provisions thus appear to be aimed at new projects contemplated under the legislation for which the BAA would be inapplicable, for which existing Buy American laws do not reach, and for which federal funds will be appropriated or federal grants provided to pay for such projects.

II. Prohibitions on Byrd Repayments

H.R. 1 bars the Bureau of Customs and Border Protection (CBP) from demanding repayment of distributions that certain firms received under the Continued Dumping and Subsidy Offset Act (known as the "Byrd Amendment"). The issue arose because the US courts ruled that the North American Free Trade Agreement (NAFTA) prohibited CBP from collecting and distributing antidumping and countervailing duties assessed on goods imported from Canada and Mexico. To comply with the ruling, CBP sent notices to US companies that received such distributions calling for the return of the money.

H.R. 1 overturns CBP's decision and allows all companies who received distributions to keep the money. The bill also requires CBP to refund any Byrd repayments that a company may have made, and to distribute any antidumping or countervailing duties that CBP withheld as an offset against money that CBP believed was owed. Further litigation by Canadian or Mexican interested parties may occur because their position has been that allowing US companies to retain Byrd distributions provided an unfair competitive advantage, and US courts already have ruled that such a practice violates NAFTA.

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III. Trade Adjustment Assistance Expansion

H.R. 1 significantly expands the federal Trade Adjustment Assistance (TAA) program, which is designed to assist workers who are adversely affected by increased trade. TAA, unlike unemployment insurance, is wholly federally funded and provides eligible workers with career counseling, up to two years of training, income support during training, job search assistance, and relocation allowances, among other things.

H.R. 1 expands upon the existing program as follows:

- **Workers in service provider firms are eligible.** H.R. 1 extends TAA to workers in firms that are service providers. The prior program only covered workers who produced goods. In addition, H.R. extends eligibility to secondary workers, including those supplying transportation, finishing, testing, packaging, and maintenance services to a service provider firm whose workers are eligible to receive TAA.
- **Service provider firms are eligible.** H.R. 1 extends TAA to firms that are service providers. The prior program limited TAA to firms that produced goods. H.R. 1 also makes it easier for firms providing goods or services to obtain TAA.
- **Shifts in production.** H.R. 1 extends TAA to workers who lose their jobs because their firm shifts production to another country resulting in an increase in imports into the U.S. of the good or service. The prior program limited coverage to workers whose firm shifted goods to a country with which the US has a free trade agreement.
- **Workers in an industry that has been financially injured or threatened with injury from imports.** H.R. 1 extends automatic TAA eligibility to workers in an industry that imports have injured or threatened with financial injury. The US International Trade Commission conducts these investigations in the area of antidumping and countervailing duties and global and bilateral safeguard investigations.
- **Public sector employees are eligible.** H.R. 1 extends TAA to workers in the public sector when jobs are outsourced or lost due to import competition.
- **Military provisions.** H.R. 1 provides active duty military personnel with the ability to restart TAA enrollment upon returning to the workforce.

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- **Office of Trade Adjustment Assistance.** H.R. 1 establishes an Office of Trade Adjustment Assistance in the Department of Labor which reflects Congress' desire to ensure benefits are distributed more promptly than in the past and with the utmost regard for the workers' interests.
- **Increased funding.** H.R. 1 increases the amount of TAA funding and authorizes additional funding for communities affected by trade.

Senators Introduce "Trade Compliant and Litigation Accountability Improvement Measures Act of 2009"

On February 2, 2009, Sen. Olympia Snowe (R-ME) introduced the "Trade Compliant and Litigation Accountability Improvement Measures Act of 2009" ("the Trade CLAIM Act") (S. 363). Sens. Jay Rockefeller (D-WV) and Kent Conrad (D-ND) are co-sponsors to the legislation. The Trade CLAIM Act would amend Section 301 of the Trade Act of 1974 to limit the Office of the United States Trade Representative's (USTR) ability to decline an interested party's petition to take formal action in cases where a US trade right has been violated except when:

- the matter has already been addressed by the relevant trade dispute settlement body;
- the foreign country is taking imminent steps to end to ameliorate the effects of the practice;
- taking action would do more harm than good to the US economy; or
- taking action would cause serious harm to the national security of the United States.

The Trade CLAIM Act would also grant the US Court of International Trade (CIT) jurisdiction to review *de novo* (*i.e.*, without deference to USTR's decisions) USTR's denials of Section 301 industry petitions to investigate and take enforcement action against unfair foreign trade laws or practices. The bill would enable the CIT to review: (i) USTR determinations that US trade rights have not been violated as alleged in industry petitions, and (ii) formal actions taken by USTR in response to foreign trade laws or practices determined to violate US trade rights.

In announcing the proposed legislation, Sen. Snowe stated that "without the proper and aggressive enforcement of US trade rights, we are failing to provide employers with the tools they need to combat unfair trading practices [but] by providing the USTR with third party oversight of its rulings, we can ensure political and diplomatic pressures do not effect the decision to investigate or pursue trade violation claims." S. 363 was last referred to the Senate Finance Committee for review.

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Free Trade Agreements

Free Trade Agreements Highlights

US Requests Delay in TPP FTA and ACTA Negotiations, Keeps Quiet on US-China BIT

The Obama Administration has requested delays in the negotiation of two possible trade agreements, the Trans-Pacific Strategic Economic Partnership Agreement (~~U~~S-TPP FTA") and the Anti-Counterfeiting Trade Agreement (ACTA). The move comes several weeks before US trading partners were scheduled to meet with US officials under separate negotiating rounds for both agreements. Separately, observers note that during Secretary of State Hillary Clinton's recent trip to Asia, she limited discussion on a potential Bilateral Investment Treaty (BIT) with China. According to some members of the business community, the delays in the FTA negotiations indicate that the Obama Administration is not yet ready to move forward on the US trade agenda, especially because Ron Kirk, President Obama's pick for United States Trade Representative (USTR), has not yet been approved by the Senate.

US officials were scheduled to meet with their foreign counterparts the week of March 30, 2009 for the first round of US-TPP FTA negotiations. Besides current members of the Trans-Pacific Strategic Economic Partnership Agreement – Singapore, Chile, Brunei, and New Zealand – the United States was also scheduled to meet with Australia, Peru and Vietnam. According to several reports, US officials requested the delay because the Senate has not yet confirmed Kirk and other senior USTR officials, and because the Administration is still filling posts at the Office of the USTR. USTR will hold a March 4 interagency hearing on the FTA, but at this stage, it is unclear if the United States and the other participants in the negotiations have agreed to a rescheduled date for the first round.

The United States also requested a delay in the late March ACTA negotiating round, scheduled to take place in Morocco. Participants in the ACTA negotiations include Australia, Canada, the EU, Japan, Jordan, South Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland, the United Arab Emirates, and the United States. During the cancelled March round, participants were scheduled to review the overall ACTA draft proposals. No new date for the round has been set. According to US officials, the delay had been requested to give incoming senior officials at USTR time to review the ACTA. They noted that the timing of the next round would depend on how long the Senate confirmation process for senior USTR officials would take. According to several reports, ACTA participants are currently focused on

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whether the agreement should include its own dispute settlement mechanism with binding judgments or reviews that would be advisory by nature.

During Secretary Clinton's February 21 meeting with Chinese officials in Beijing, both sides agreed to begin high-level consultations on combating the global economic crisis, among other issues. Absent from the discussions, however, was mention of the potential US-China BIT. To date, the United States and China have held three rounds of BIT negotiations, and although the United States has not postponed the talks with China on the potential agreement, some members of the business community expressed concern that because Secretary Clinton did not bring up the negotiations during her trip, the agreement may not be a priority for the Obama Administration.

The postponement of the negotiating rounds for the US-TPP FTA and the ACTA confirm for some that the Obama Administration considers US trade policy less of a priority than other issues, such as the domestic economy. Certainly the long overdue confirmation of Kirk as USTR and the empty senior-level posts at the Office of the USTR play a part in the US request to delay these negotiations; absent senior US trade officials, the Obama Administration is unlikely to begin or continue trade agreement discussions with trading partners until it feels that USTR officials are completely settled in their new positions and have caught up on the current state of US trade policy. However, some observers believe that the Obama Administration's ~~"w~~wait-and-see" strategy on these negotiations could extend beyond the confirmation of Kirk, and could spell out the general approach the Administration will adopt when it comes to US trade policy. These observers opine that the delays in the two trade agreement negotiations and the lack of discussion on the US-China BIT confirm what many consider to be a ~~"b~~back-burner" placement for US trade policy, *i.e.*, prioritizing other issues of concern ahead of US trade policy. Although at this stage it is unclear when the next negotiating rounds for these agreements will occur, a better picture of how the Obama Administration will approach these agreements – and US trade policy in general – should emerge once Kirk and other senior USTR officials have been confirmed and once the United States agrees to reschedule dates for negotiations.

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Customs

Customs Highlights

APHIS Publishes Revised Schedule for Lacey Act Implementation

In a February 3, 2009 Federal Register (FR) notice, the US Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) announced revisions to its plan to enforce the declaration requirement of the amended Lacey Act (74 FR 5911-5913). The Lacey Act, enacted in 1900, serves as an anti-trafficking statute protecting a broad range of wildlife and wild plants. In general, the Lacey Act makes it unlawful to import, export, transport, sell, receive, acquire or purchase any fish, wildlife or wild plants taken, possessed transported, or sold in violation of state, federal, Native American tribal, or foreign laws or regulations that are related to fish, wildlife, or wild plants. On May 22, 2008, the US Congress approved amendments to the Lacey Act banning commerce in illegally sourced plants and their products through the Food, Conservation, and Energy Act of 2008 (P.L. 110-246 or ~~the~~ 2008 Farm Bill"). The amendments to the Lacey Act extend the statute's reach to encompass products, including timber, that derive from plants illegally harvested in the country of origin and brought into the United States, either directly or through manufactured products, including products manufactured in countries other than the country where the illegal harvesting took place. The amendments also require importers to declare the country of origin of harvest and species name of all plants contained in their products and establishes penalties for violations of the Lacey Act, including forfeiture of goods and vessels, fines and jail time, among other provisions:

I. Revised Schedule of Enforcement Phases

Under the revised schedule, APHIS is extending the length of each enforcement period from three months to six months. Consequently, the entire enforcement period is now December 15, 2008 - September 30, 2010.

- **Phase I.** During the first period of enforcement (December 15, 2008 – April 1, 2009) parties importing certain plants and plant products may voluntarily submit the declaration form to APHIS.
- **Phase II.** The second phase (April 1, 2009 – September 30, 2009) will include products that are minimally processed and/or of less complicated composition, such as wood in the rough or sheets for veneering. The declaration will only be required for the product itself and not the sundries that ordinarily accompany the product (*e.g.*, tags, labels, manuals and warranty cards).

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- **Phase III.** The third phase (October 1, 2009 – March 31, 2010) will include those products that are more processed and of more complex composition, such as wood pulp and particle board.
- **Phase IV.** Phase four (April 1, 2010 – September 30, 2010) includes highly processed products, such as paper or furniture.

II. Affirmative List of Products

APHIS also provided an affirmative list of products that are part of each phase of enforcement. The proposed phased enforcement schedule through September 30, 2010, is described below:

Phase	HTS Products
Phase I (December 15, 2008 – April 1, 2009)	PPQ Plant Import Declaration Form accepted after December 15, 2008.
Phase II (April 1, 2009 – September 30, 2009)	Ch. 44 Headings (wood & articles of wood): 4401—(Fuel wood) 4403—(Wood in the rough) 4404—(Hoopwood; poles, piles, stakes) 4406—(Railway or tramway sleepers) 4407—(Wood sawn or chipped lengthwise) 4408—(Sheets for veneering) 4409—(Wood continuously shaped) 4417—(Tools, tool handles, broom handles) 4418—(Builders' joinery and carpentry of wood).
Phase III (October 1, 2009 – March 31, 2010)	Ch. 44 Headings (wood & articles of wood). 4402—(Wood charcoal) 4405—(Wood wool [excel-sior]) 4410—(Particle board) 4411—(Fiberboard of wood) 4412—(Plywood, veneered panels) 4413—(Densified wood) 4414—(Wooden frames) 4415—(Packing cases, boxes, crates, drums)

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Phase	HTS Products
	4416—(Casks, barrels, vats, tubs) 4419—(Tableware & kitchen-ware, of wood) 4420—(Wood marquetry; caskets; statuettes) Ch. 47 Headings (wood pulp) 4701—(Mechanical wood pulp) 4702—(Chemical wood pulp, dissolving) 4703—(Chemical wood pulp, sulfate). 4704—(Chemical wood pulp, sulfite) 4705—(Combination me-chanical and chemical) **Plus all products listed under Phase II**
Phase IV (April 1, 2010 – September 30, 2010)	Ch. 44 Headings (wood & articles of wood) 4421—(Articles of wood, nesoi) Ch. 48 Headings (paper & articles of) 4801—(Newsprint) 4802—(Uncoated writing paper) 4803—(Toilet or facial tissue stock) 4804—(Uncoated kraft paper) 4805—(Other uncoated paper and board) 4806—(Vegetable parch-ment, etc.) 4807—(Composite paper and board) 4808—(Corrugated paper and board) 4809—(Carbon paper) 4810—(Coated paper and board) 4811—(paper coated, etc., other than 4803, 4809, or 4810) Ch. 94 Headings (furniture, etc.) 940169 (seats with wooden frames). 940330 (wooden office furniture) 940340 (wooden kitchen furniture) 940350 (wooden bedroom furniture) 940360 (other wooden furniture)94039070 (wooden furniture parts) **Plus all products listed under Phases II and III**

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Please note that while enforcement of the declaration requirement will be phased-in beginning on April 1, 2009, the other Lacey Act amendments are in effect and action to enforce those requirements may be taken at any time.

III. Declaration Requirements

At present, APHIS will be enforcing the declaration requirement only as to formal consumption entries (*i.e.*, most commercial shipments). APHIS also does not intend to enforce the declaration requirement for informal entries (*i.e.*, most personal shipments), personal importations, or mail (unless subject to formal entry), transportation and exportation entries, in-transit movements, carnet importations (*i.e.*, merchandise or equipment that will be re-exported within a year), and foreign trade zone and warehouse entries, at this time. As noted, APHIS will only enforce a declaration for the product being imported and not for sundries that ordinarily accompany the product (*e.g.*, tags, labels, manuals, and warranty cards). The declaration must contain, among other things, the scientific name of the plant, value of the importation, quantity of the plant and name of the country where the plant was harvested. For paper and paperboard products containing recycled content, the declaration also must include the average percent of recycled content without regard for species or country of harvest. The declaration form is available on the APHIS Web site: www.aphis.usda.gov.

IV. Comments

APHIS invites public comment particularly on the products covered under Phases III and IV of the revised plan, as well as on whether any additional Harmonized Tariff Schedule (HTS) chapters should be included in the current phase-in schedule. APHIS is also seeking public input as to how the declaration requirement should be enforced with regard to articles included under each Phase. APHIS will consider any comments on the Lacey Act implementation received on or before April 6, 2009.

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Multilateral

WTO Appellate Body Releases Report on US – Continued Existence and Application of Zeroing Methodology (DS350)

Summary

Decision: The World Trade Organization (WTO) Appellate Body has affirmed that the continued use of the ―zeroing" methodology in reviews of anti-dumping orders is inconsistent with the obligations of the United States under the Anti-Dumping Agreement and the General Agreement on Tariffs and Trade (GATT).

Significance of Decision / Commentary: There was never any doubt that the Appellate Body was going to rule once again against the use of zeroing in reviews. However, the current decision is both interesting and noteworthy for reasons other than the Appellate Body's brief affirmation of the WTO-inconsistency of zeroing. We would highlight three points in particular:

(1) New type of measure: "ongoing conduct"

The Appellate Body decision marks a departure from the traditional types of measures that can be challenged in WTO dispute settlement. Until now, a complaining party would challenge a measure ―as such" (*i.e.*, the law itself, such as a statute or regulation), or ―as applied" (*i.e.*, the use of the law in a particular circumstance), or both. In addition to these two traditional categories, the Appellate Body has opened the door a third type of justifiable measure: the ―ongoing conduct" of another WTO Member.

The EC claim in this case related to the ―continued" application of zeroing in a series of reviews of anti-dumping orders conducted by the US Department of Commerce (DOC). The EC indicated that it was not making an ―as such" claim against zeroing in this case. At the same time, it argued that its challenge was broader than the use of zeroing in specific reviews. Instead, it claimed against ―continued" zeroing in successive reviews of anti-dumping orders. The United States vigorously contested the EC claim against ―continued" zeroing, asserting that ―for any given importation, the antidumping duty imposed or assessed depends on a particular administrative determination." It complained that the EC could not seek a ruling against ―some type of free-standing measure that had a life of its own beyond the…particular determinations identified in its panel request."

However, the Appellate Body overruled these US objections, stating that it saw ―no reason to exclude ongoing conduct that consists of the use of the zeroing methodology from challenge in WTO dispute

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settlement." It concluded that "the continued use of the zeroing methodology in successive proceedings in which duties resulting from the…anti-dumping duty orders are maintained, constitute 'measures' that can be challenged in WTO dispute settlement."

It remains to be seen how broad a departure this will be from the conventional understanding of measures that may be challenged. Clearly, this ruling was driven by the facts of this case pertaining to the operation of the US anti-dumping system - the Appellate Body focused in particular on the "string of connected and sequential determinations" through which anti-dumping duties are maintained under US law. Thus, the "continued conduct" category of measures may be confined to dumping and countervailing duty cases. Yet even that is an important development, as it provides new leverage for WTO Members to challenge the ongoing conduct of US investigating authorities in successive reviews. The full scope of the "ongoing conduct" category of measures will nonetheless need to be determined in future disputes.

(2) Standard of review in anti-dumping cases: "permissible" interpretations

The Appellate Body elaborated on the standard of review for anti-dumping cases, as set out in Article 17.6(ii) of the Anti-Dumping Agreement.

Article 17.6(ii), the so-called "deference" standard, is unique in the WTO Agreements. It requires panels to "interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law" and adds that "*[w]here the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations*." This language was inserted in the Agreement during the final days of the Uruguay Round, at the strong insistence of the United States. The inclusion of some kind of deference standard was a walk-away issue for the United States during the Round, and the compromise language finally adopted was weaker than that initially proposed by US officials. However, in the end, the United States considered that it had secured a clear injunction to panels to accord deference to domestic investigating authorities.

In the present case, the United States pointed to the unmistakable reluctance of the Panel to find zeroing during reviews to be WTO-inconsistent (please see below). In the US view, this indicated that the WTO-consistency of zeroing during reviews was a "permissible" interpretation.

The Appellate Body rejected the US position, and elucidated how Article 17.6(ii) should be interpreted. It mandated a "sequential" analysis, in which a panel must first apply the customary rules of treaty interpretation "to see what is yielded by a conscientious application of such rules", before moving on to

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examine what constitutes a ~~p~~permissible interpretation." It stressed that the interpretation must be ~~h~~armonious and coherent" and that multiple meanings of a word or a term do not ~~a~~utomatically constitute ‗permissible' interpretations within the meaning of Article 17.6(ii)."

The guidelines set out by the Appellate Body were stated in rather general terms that may be difficult for panels to apply in practice. However, the approach of the Appellate Body affirms that actual deference accorded by panels to investigating authorities under this provision will indeed be rare. The decision will add to the concerns of many in the US government and Congress that Article 17.6(ii) has fallen far short of US expectations.

(3) Concurring Opinion: "there must be an end to every great debate"

In a well-written Concurring Opinion, one unnamed Appellate Body member took the unusual step of emphasizing that the ongoing disagreement between WTO Panels and the Appellate Body on zeroing must now end.

Three prior panels – in *US – Zeroing (EC)*, *US – Zeroing (Japan)* and *US – Stainless Steel (Mexico)* - all found zeroing during reviews to be permissible under the Anti-Dumping Agreement. All three Panels were overturned on appeal on this issue. In the present case, the Panel ruled against zeroing in reviews, but did so with a demonstrable lack of enthusiasm. It characterized the decisions of the three prior panels to be ~~p~~ersuasive", although it decided it had to apply the prior Appellate Body rulings to the contrary.

The Appellate Body member who drafted the Concurring Opinion stressed that this ongoing disagreement should stop:

> In matters of adjudication, there must be an end to every great debate. The Appellate Body exists to clarify the meaning of the covered agreements. On the question of zeroing it has spoken definitively. Its decisions have been adopted by the DSB. The membership of the WTO is entitled to rely upon these outcomes….The range of meanings that may constitute a permissible interpretation does not encompass meanings of such wide variability, and even contradiction, so as to accommodate the two rival interpretations. One must prevail. The Appellate Body has decided the matter. At a point in every debate, there comes a time when it is more important for the system of dispute resolution to have a definitive outcome, than further to pick over the entrails of battles past. With respect to zeroing, that time has come.

In light of this clear admonition, it is highly unlikely that future panels will ~~p~~ick over the entrails of battles past" and find that zeroing during reviews is permitted under the Anti-Dumping Agreement.

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Analysis

"Continued" application of zeroing a "measure" in WTO Dispute Settlement

At the Panel stage, the United States successfully argued that the EC claims against the ~~-c~~ontinued" application of 18 anti-dumping duties fell short of the ~~-s~~pecificity" standard set out in Article 6.2 of the WTO Dispute Settlement Understanding (DSU). DSU Article 6.2 provides in part that a panel request must ~~-p~~rovide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." The Panel upheld the US preliminary challenge, reasoning that the EC had failed to demonstrate ~~-th~~e existence and the precise content of the purported measure." It also found that ~~-th~~e continued application of the 18 duties" did not ~~-r~~epresent a measure in and of itself."

The Appellate Body reversed the Panel on this issue, stating that DSU Article 6.2 did not require ~~-a~~ substantive inquiry as to the existence and precise content of the measure." The Appellate Body found that the EC Panel request identified the specific measures at issue with respect to the continued application of the 18 anti-dumping duties that were calculated with the use of zeroing.

The Appellate Body stated that the measures consisted of ~~-th~~e use of the zeroing methodology in successive proceedings, in each of the 18 cases, by which the anti-dumping duties are maintained." It noted that the EC complaint was ~~-n~~ot an ‗as such' claim, in that its scope is narrower than a challenge to the zeroing methodology as a rule or norm of general and prospective application", but that at the same time it was ~~-b~~roader than specific instances in which the zeroing methodology was applied, such as a periodic review or sunset review determination." In other words, the measures consisted of the use of zeroing ~~-in~~ a string of connected and sequential determinations, in each of the 18 cases, by which the duties are maintained."

The United States argued that the EC claims ~~-s~~eemed directed at free-floating, indefinite ‗measures,' disconnected from any specific determinations giving rise to a duty rate." The Appellate Body disagreed, stating that ~~-[w~~]e see no reason to exclude ongoing conduct that consists of the use of the zeroing methodology from challenge in WTO dispute settlement." It reasoned that the ~~-s~~uccessive determinations by which duties are maintained are connected stages in each of the 18 cases involving imposition, assessment, and collection of duties under the same anti-dumping duty order" and that the use of zeroing ~~-in~~ a string of these stages is the allegedly unchanged component of each of the 18 measures at issue."

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It concluded that ‘the continued use of the zeroing methodology in successive proceedings in which duties resulting from the 18 anti-dumping duty orders are maintained, constitute ‘measures‘ that can be challenged in WTO dispute settlement.”

Appellate Body “completes the analysis” and rules against continued zeroing

The EC asked the Appellate Body to ‘complete the analysis” and rule that the continued application of zeroing in the 18 cases was WTO-inconsistent. As the Panel had placed these claims outside of its terms of reference, it had made no findings on them. For 4 of the 18 cases, the Appellate Body stated that ‘the Panel‘s findings indicate that the zeroing methodology was repeatedly used in a string of determinations, made sequentially in periodic reviews and sunset reviews over an extended period of time.” In the view of the Appellate Body, the ‘density of factual findings in these cases” regarding the continued use of the zeroing provided ‘a sufficient basis for us to conclude that the zeroing methodology would likely continue to be applied in successive proceedings whereby the duties in these four cases are maintained.”

The Appellate Body stated that it had adopted ‘a cautious approach”, in that ‘only where the Panel has made clear findings of fact concerning the use of the zeroing methodology, without interruption, in different types of proceedings over an extended period of time, have we considered these findings sufficient for us to complete the analysis and to make findings regarding the continued application of zeroing in these cases.” In the view of the Appellate Body, this standard had been met in 4 of the 18 cases, and it ruled that the continued use of zeroing in those cases was WTO-inconsistent.

Panel request did not expand the “scope of the dispute”

The Appellate Body rejected a US claim that 14 additional measures should be considered as outside the Panel‘s terms of reference because they were not included the EC request for consultations. The Appellate Body recalled its earlier jurisprudence that the DSU did not require ‘a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel [original emphasis].”

The disputing parties agreed that the 14 anti-dumping review determinations (10 sunset reviews and 4 periodic reviews) were ‘not specifically identified by name or case number in the European Communities‘ consultations request.” However, the Appellate Body stressed that the ‘scope of the dispute” was not expanded as a result of their addition. It found that the 14 additional measures identified in the panel request ‘pertain to the same anti-dumping duties that are included in the consultations request” and were

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successive stages subsequent to the issuance of the same anti-dumping duty orders." It therefore concluded that the 14 additional measures were within the Panel's terms of reference.

Standard of review under the Anti-Dumping Agreement: "treaty interpretation is an integrated operation"

The Panel in this case had noted that three prior panels [*US – Zeroing (EC)*, *US – Zeroing (Japan)* and *US – Stainless Steel (Mexico)*] all found simple zeroing in periodic reviews to be permissible under the Anti-Dumping Agreement. All three Panels were reversed on appeal on this issue. The Panel in the present case stated that we have generally found the reasoning of earlier panels on these issues to be persuasive." However, given what the Panel called the consistent line of reasoning underlying the Appellate Body's conclusion regarding simple zeroing in periodic reviews", it found that the United States acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and GATT Article VI:2 and by applying simple zeroing in the periodic reviews at issue.

On appeal, the United States argued that the Panel had misapplied the standard of review set out in Article 17.6(ii) of the Anti-Dumping Agreement. The United States argued that the Panel in the present case viewed the Agreement as admitting of more than one permissible interpretation" and therefore should have upheld the WTO-consistency of simple zeroing in the 29 periodic reviews at issue.

The Appellate Body rejected the US position. It began by setting out the interpretive principles that should apply under Article 17.6(ii). It stressed that the interpretation must be harmonious and coherent" and fit comfortably in the treaty as a whole so as to render the treaty provision legally effective." It stated that multiple meanings of a word or a term do not automatically constitute permissible' interpretations within the meaning of Article 17.6(ii)." Instead, a treaty interpreter must have recourse to context and object and purpose to elucidate the relevant meaning of the word or term" and that this logical progression provides a framework for proper interpretative analysis." It stressed that treaty interpretation is an integrated operation, where interpretative rules or principles must be understood and applied as connected and mutually reinforcing components of a holistic exercise."

The Appellate Body stated that the special standard of review set out in Article 17.6(ii) contemplates a sequential analysis." A panel must first apply the customary rules of interpretation to the treaty to see what is yielded by a conscientious application of such rules", including those codified in the *Vienna Convention on the Law of Treaties*. It added that [o]nly *after* engaging [in] this exercise will a panel be able to determine whether the second sentence of Article 17.6(ii) applies [original emphasis]." It indicated that the structure and logic of Article 17.6(ii) therefore do not permit a panel to determine first whether an

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interpretation is permissible under the second sentence and then to seek validation of that permissibility by recourse to the first sentence." Moreover, the Appellate Body stated that the interpretation of Article 17.6(ii) must itself be consistent with the rules and principles set out in the *Vienna Convention*.

The Appellate Body acknowledged that Article 17.6(ii) ~~-m~~ay give rise to an interpretative range and, if it does, an interpretation falling within that range is permissible and must be given effect by holding the measure to be in conformity with the covered agreement." The function of this special standard of review is thus ~~-to~~ give effect to the interpretative range rather than to require the interpreter to pursue further the interpretative exercise to the point where only one interpretation within that range may prevail." Moreover, the purpose of the interpretive exercise is therefore ~~-to~~ narrow the range of interpretations, not to generate conflicting, competing interpretations."

Appellate Body affirms WTO-inconsistency of zeroing in reviews

Turning to substance, the Appellate Body recalled that Article 9.3 of the Anti-Dumping Agreement provides that the amount of the anti-dumping duty ~~-s~~hall not exceed the margin of dumping", and it stressed that ~~-t~~he margin of dumping established for an exporter in accordance with Article 2 operates as a *ceiling* for the total amount of anti-dumping duties that can be levied on the entries of the subject merchandise from that exporter [original emphasis]." Applying its earlier jurisprudence, it upheld the Panel's finding that the United States acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and GATT Article VI:2 of the GATT 1994 by using zeroing in 29 periodic reviews. Referring to Article 17.6(ii), the Appellate Body added that ~~-[t]~~he analysis offered above, applying the customary rules of interpretation of public international law, does not allow for conflicting interpretations."

One Appellate Body member added a separate concurring opinion that addressed the split between Panel and Appellate Body rulings on the WTO-consistency of zeroing, as noted above.

With respect to seven of the periodic reviews at issue, the EC argued that the Panel had acted inconsistently with its obligations under DSU Article 11 to make ~~-a~~n objective assessment of the matter" because it had ruled that the EC had not shown that simple zeroing was used in those reviews. The Appellate Body agreed that the Panel acted inconsistently with DSU Article 11 by ~~-f~~ailing to examine the European Communities' evidence in its totality, and requiring, instead, that specific types of evidence, in and of themselves, are necessary in order to establish that simple zeroing was used by the DOC in specific periodic reviews."

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The Appellate Body then went on to ~~c~~complete the analysis." On the basis of the factual findings and uncontested facts, it found that the EC had shown that simple zeroing was used in five of these reviews, and that the United States acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and GATT Article VI:2.

The Appellate Body also dismissed a US claim that the Panel acted inconsistently with DSU Article 11 when it found that the United States acted inconsistently with Article 11.3 of the Anti-Dumping Agreement with respect to eight sunset reviews.

The Appellate Body declined an EC request that it make a ~~s~~uggestion" to the United States on how it should implement the rulings in this case.

The decision of the Panel in *United States – Continued Existence and Application of Zeroing Methodology* (DS350) was released on February 4, 2009.

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Multilateral Highlights

Doha Rules Chair Issues New Draft Text, Faces US Calls for Inclusion of "Zeroing"

According to several different reports, on February 4, 2009, Chair for the World Trade Organization (WTO) Doha Rules Negotiations Guillermo Valles issued a new draft Rules text. Although the draft text has not yet been made publicly available, officials from different countries have already responded to the new language. Chief among the responses was a positive reception from several WTO Members that the newest draft text did not include reference to "zeroing" methodology. The Friends of Antidumping Negotiations (FANs) group of countries, comprised of Brazil, Chile, Colombia, Costa Rica, Hong Kong, Japan, Mexico, Norway, Singapore, South Korea, Switzerland, Taiwan, Thailand, and Turkey, welcomed the revised text and noted that it was a "move in the right direction and a necessary step to resume the antidumping negotiations." The FANs group invited WTO Members "to fully engage in discussion" based on this latest draft text. The United States, on the other hand, continued to warn WTO Members that any final Doha Rules agreement must include the zeroing methodology. Although US officials have acknowledged that the Rules negotiations have been contentious and that the zeroing argument has polarized the talks, they continue to insist "that any final rules agreement must address the critical issue of zeroing."

Zeroing provisions had been included in the November 2007 original draft Rules text; these provisions allowed for some forms of zeroing, specifically "simple" zeroing and all forms of zeroing in sunset, administrative and periodic reviews. Reaction to this first draft was negative, with countries such as Japan, India, and South Korea, among others, criticizing the inclusion of the provisions. The December 2008 text contained bracketed language that stated that WTO Members "remain profoundly divided on this issue [and] positions range from insistence on a total prohibition of zeroing irrespective of the comparison methodology used and in respect of all proceedings to a demand that zeroing be specifically authorized in all contexts."

Sources note that the latest Rules text also waters down language from previous drafts with regards to: (i) automatic termination of antidumping measures (previous drafts proposed that antidumping duties not be allowed to remain in place for more than ten years, whereas the latest text states that there is "sharp disagreement as to whether there should be any automatic termination of measures after a given period of time and, if so, after how long"); (ii) "public interest" provisions (previous drafts required WTO Members with antidumping legislation to establish procedures enabling authorities to consider the concerns raised

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by domestic interested parties whose interests might be affected by the imposition of an antidumping duty, whereas the new text states that Members ~~a~~are sharply divided on the desirability of a procedure to take account of the representations of domestic interested parties when deciding whether to impose a duty"); and (iii) anti-circumvention (the latest text states that WTO Members ~~d~~isagree as to whether there should be specific rules on anti-circumvention").

Chairman Valles will next consult with WTO Members as to how to proceed on any next steps. In releasing the latest version of the text, he acknowledged that it has been difficult to foster compromise between WTO Members on a final agreement, but he continued to urge WTO Members to demonstrate flexibility in their negotiating positions. Zeroing will likely continue to remain the most contentious and debatable issue in 2009 (and beyond) within the Rules negotiations. Proponents of zeroing – such as the United States – find themselves squaring off against equally ardent critics of the methodology – including Japan, Brazil and India – and it is unlikely that these WTO Members will demonstrate the necessary ~~fl~~exibility" in the short- and medium-term in order to achieve a final Rules agreement.

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