WHITE & CASE

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Japan External Trade Organization

WTO and Regional Trade Agreements Monthly Report

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Reports in Detail

United States

United States Highlights

President Obama Nominates Sen. Judd Gregg (R-NH) for Secretary of Commerce Post

On February 3, 2009, President Obama formally nominated Sen. Judd Gregg (R-NH) for Secretary of Commerce. The nomination comes one month after New Mexico Governor Bill Richardson, President Obama"s first pick for the position, withdrew his name for Secretary of Commerce citing a corruption investigation into a company that has done business with his state. The Administration"s pick of Sen. Gregg also completes the Cabinet appointments. If he is confirmed by the Senate, Sen. Gregg would be the third Republican in the Cabinet, following Defense Secretary Robert Gates and Transportation Secretary Ray LaHood.

Sen. Gregg has been in the Senate since 1993 and is serving his third term. He currently serves as Ranking Member of the Senate Budget Committee and as Ranking Member of the Senate Appropriations Subcommittee on State, Foreign Operations and Related Agencies. Prior to these roles, Sen. Gregg also served as Chairman of the Homeland Security Appropriations Subcommittee, Chairman of the Senate HELP Committee, and Chairman of the Senate Education Committee. He served two terms as Governor of New Hampshire from 1989-1993, four terms as United States Representative for New Hampshire"s Second Congressional District from 1981-1989, and one term as Executive Councilor for New Hampshire"s District 5 from 1979-1981. Prior to his public service, Sen. Gregg was a partner in the law firm of Sullivan, Gregg and Horton. He received his B.A. from Columbia University in 1969, his J.D. in 1972 from Boston University Law School, and his L.L.M. in tax law in 1975.

Sen. Gregg's nomination and pending Senate vacancy means that New Hampshire Governor John Lynch will appoint a Senate successor. Although Senate Republicans expressed concern that Sen. Gregg's departure would put a Democrat into the New Hampshire seat (thus giving Senate Democrats a filibuster-proof majority), Gov. Lynch confirmed that an “understanding” has been reached wherein he will likely appoint a Republican or an independent to serve out the remaining two years of Sen. Gregg's term. Several news reports have stated that Bonnie Newman, who served as Sen. Gregg's chief of staff during his time in the House of Representatives, is the likely candidate to fill Sen. Gregg"s pending vacant seat.

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Several observers have opined that the incoming Secretary"s outlook on trade may influence how he manages the Department of Commerce. According to several reports, Sen. Gregg is free-trade oriented. The Cato Institute, for example, labels Sen. Gregg a free-trader and their matrix of "trade votes" throughout Sen. Gregg"s Congressional career shows that, among other things, the legislator voted against agricultural trade subsidies; supported US Free Trade Agreements (FTAs) with Peru, Oman, the Dominican Republic and Central American countries (DR-CAFTA), Morocco, Australia, Chile, and Singapore, among others; and supported Trade Promotion Authority (TPA). Some observers, however, have noted that the Department of Commerce"s domestic focus and tenured bureaucracy could counterbalance any possible free trade impulses. Indeed, the primary tools available to the Department of Commerce are trade remedy actions – antidumping, countervailing, and safeguard actions – and export/import control measures, which some consider to be antithetical to free trade. Whether the incoming Secretary can succeed in rebranding the Department seems unlikely, but the trade community will be watching Sen. Gregg closely during his first several months as Commerce Secretary in order to understand how the Department of Commerce could affect the US trade environment.

"Buy American" Provision in US Stimulus Package May Limit Purchases of Non-US Iron, Steel, or Manufactured Goods

Congress is currently formulating a stimulus package (known as the "American Recovery and Reinvestment Act of 2009") in an effort to jumpstart the United States economy. Estimates are that the stimulus measures will appropriate over USD 800 billion dollars for a variety of public works projects. Congress, however, appears ready to pass legislation that will include a "Buy American" provision which may limit or preclude offshore sources of supply from being purchased and used from the soon-to-be appropriated funds.

I. House Version of American Recovery and Reinvestment Act of 2009 (H.R. 1)

On January 28, 2009, the House of Representatives passed legislation (by a 244-188 vote) which contained a provision restricting purchases of non-US iron and steel unless one of the following three exceptions applied: (i) not doing so would be inconsistent with the public interest; (ii) US material is not available in sufficient quantity or quality; or (iii) using US steel would increase the total cost of the project by 25 percent.

II. Senate Version of American Recovery and Reinvestment Act of 2009 (S. 1)

Starting the week of February 2, 2009, the full Senate will be considering legislation that contains an even broader Buy American provision. In the Senate version "American Recovery and Reinvestment Act,"

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appropriated funds could not be used to purchase any non-US iron, steel, or manufactured good. The current Senate provision contains the same three exceptions as the House legislation.

III. Outlook

It appears likely that the eventual US stimulus package will contain a Buy American provision which is similar or identical to those contained in the Senate version. The degree to which this affects offshore suppliers will depend on how the United States applies the "public interest" exception. US law already contains Buy American requirements for public works projects, although the current legislation appears to be more restrictive.

Nevertheless, the President may waive Buy American requirements when the United States has an agreement with a country that provides reciprocal government procurement opportunities (or a country without an agreement that is willing to assume the same obligations) to US suppliers. In addition, the President may waive Buy American requirements for least developed countries. Heads of the US agencies have similar authority when accepting bids for projects.

The EU and Canada already have denounced the new Buy American provision as a protectionist measure. US business groups, including the Chamber of Commerce, also have come out against it. To date, however, the President"s ability to grant exceptions has not attracted much attention. Governments may find that the quiet diplomacy of seeking an exception may work equally well or better in terms of securing opportunities for their industries.

Senate Finance Committee Finalizes Roster for 111th Congress

The Senate Finance Committee has finalized its roster for the 111th Congress and has added five new legislators to its ranks. The three new Democrats joining the Committee are Sens. Bill Nelson (FL), Robert Menendez (NJ) and Thomas Carper (DE). The two new Republicans are Mike Enzi (WY) and John Cornyn (TX). Sen. Max Baucus (D-MT) remains the Committee"s Chairman and Sen. Charles Grassley (R-IA) remains the Committee"s Ranking Member.

We list below the Members of the 111th Congress" Senate Finance Committee and International Trade and Global Competitiveness Subcommittee:

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DEMOCRATS	REPUBLICANS
Senate Finance Committee	
Max Baucus (MT) – Chairman	***Chuck Grassley (IA) – Ranking Member***
John D. Rockefeller IV(WV)	Orrin Hatch (UT)
Kent Conrad (ND)	Olympia Snowe (ME)
Jeff Bingaman (NM)	Jon Kyl (AZ)
John Kerry (MA)	Jim Bunning (KY)
Blanche Lincoln (AR)	Mike Crapo (ID)
Ron Wyden (OR)	Pat Roberts (KS)
Charles Schumer (NY)	John Ensign (NV)
Debbie Stabenow (MI)	Mike Enzi (WY)
Maria Cantwell (WA)	John Cornyn (TX)
Bill Nelson (FL)	
Robert Menendez (NJ)	
Thomas Carper (DE)	
International Trade and Global Competitiveness Subcommittee	
Blanche Lincoln (AK) – Chairman	***Gordon Smith (OR) – Ranking Member***
Max Baucus (MT)	Mike Crapo (ID)
John Rockefeller, IV (WV)	Olympia J. Snowe (ME)
Jeff Bingaman (NM)	Pat Roberts (KS)
Debbie Stabenow (MI)	Jim Bunning (KY)
Charles Schumer (NY)	

Department of Commerce Headed by Acting Secretary While Obama Administration Ponders Cabinet Appointment

In lieu of a definitive pick for the Secretary of Commerce nomination following Governor Bill Richardson"s withdrawal of his name from consideration, Department of Commerce (DOC) Chief Financial Officer Otto Wolff will serve as Acting Secretary of Commerce, until the Senate confirms a new Secretary. Wolff, who has served as Chief Financial Officer since 2001 and as Assistant Secretary for Administration, will count on the support of Acting Undersecretary for International Trade Michelle O'Neill, Acting Assistant

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Secretary for Import Administration Ronald Lorentzen, Acting Undersecretary for Industry and Security Daniel Hill, and Acting Assistant Secretary for Export Administration Matthew Borman.

The Obama Administration, meanwhile, has yet to formally announce a nominee for the Secretary of Commerce position. In early January, Governor Richardson withdrew himself from the nomination because he is undergoing a corruption investigation. Industry sources opine that President Obama may nominate John Thompson, who serves as Chairman of the board of directors and Chief Executive Officer of Symantec Corporation, or former Representative Harold Ford, currently Chairman of the Democratic Leadership Council, for the position.

USTR Requests Public Comments on Foreign Countries' IPR Practices for 2009 Special 301 Report

In a January 23, 2009 Federal Register (FR) notice the Office of the United States Trade Representative (USTR) requested written submissions from the public for its annual "Special 301" annual report on the adequacy and effectiveness of US trading partners" intellectual property rights (IPR) protections (74 FR 4263-4264). The deadline for submissions from the public is **February 17, 2009**, but the deadline for written submissions from foreign governments is **March 2, 2009**.

Pursuant to Section 182 of the Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988 and the Uruguay Round Agreements Act (enacted in 1994) ("Special 301"), USTR must annually identify those countries that deny adequate and effective IPR protections. According to the report, "countries that have the most onerous or egregious acts, policies, or practices and whose acts, policies, or practices have the greatest adverse impact on the relevant US products" are designated as "Priority Foreign Countries." Priority Foreign Countries are potentially subject to an investigation under the Section 301 provisions of the Trade Act of 1974, under which the United States may impose trade sanctions against foreign countries that maintain acts, policies and practices that violate, or deny US rights or benefits under, trade agreements, or are unjustifiable, unreasonable or discriminatory and burden or restrict US commerce. As part of its Special 301 duties, USTR has created a "Priority Watch List" and "Watch List." Placement of a trading partner on either list indicates that particular IPR-related problems – including protection, enforcement and market access – exist in that country. Countries that have been placed on the Priority Watch List are "the focus of increased bilateral attention concerning the problem areas." Additionally, under Section 306, USTR monitors a country's compliance with bilateral intellectual property agreements that are the basis for resolving an investigation under Section 301. USTR may apply sanctions if a country fails to "satisfactorily" implement an agreement.

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USTR requests written submissions from the public concerning foreign countries' acts, policies, and practices that are relevant to the decision whether particular trading partners should be identified under section 182 of the Trade Act. USTR will use submitted comments to help it identify countries that deny adequate and effective protection of IPR or deny fair and equitable market access to US persons who rely on IP protection. Comments should include a description of the problems experienced and the effect of the foreign acts, policies, and practices on US industry. The comments should also provide all necessary information for assessing the effect of the acts, policies, and practices. Any comments that include quantitative loss claims should be accompanied by the methodology used in calculating such estimated losses. All comments should be sent electronically to http://www.regulations.gov, docket number USTR-2009-0001.

Deputy USTR Allgeier to Serve as Acting USTR Until Nominee Kirk is Confirmed

Following the January 20, 2009 inauguration of Barack Obama as President, the Office of the United States Trade Representative (USTR) will be headed by a temporary USTR until President Obama"s nominee for the position – Ron Kirk – is confirmed by the Senate. Deputy USTR Peter Allgeier has become Acting USTR for the time being and may serve in that position until Kirk is confirmed, or even longer than that, according to some sources. The Senate Finance Committee has not yet scheduled Kirk's confirmation hearing, although sources opine that it may occur after the Committee has completed its consideration of Timothy Geithner for the Secretary of Treasury post and Tom Daschle for the Secretary of Health and Human Services post.

In other USTR news, several sources have opined that Senate Finance Committee Democratic Chief International Trade Counsel Demetrios Marantis may be in the running for the Deputy USTR for Asia and Africa position. Marantis, who joined the Senate Finance Committee in February 2005 after serving as issues director for former Sen. John Edwards on the Kerry-Edwards 2004 Presidential campaign, served as Associate General Counsel at USTR prior to his Congressional work. Possible contenders for other top USTR positions include former Federal Communications Commission Chairman Reed Hundt, who worked on the Obama transition process at USTR and who has expressed an interest in a Deputy USTR position, and Daniel Sepulveda, a former legislative assistant to President-elect Obama and a member of the Obama transition"s agency review team for USTR, who is reportedly in the running to be Assistant USTR for Congressional Affairs.

Regardless of the final make-up of USTR, the incoming USTR team will face several pending trade issues. Sources have stated that the Office of the USTR under an Obama Administration will likely shift focus

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from a more proactive trade agenda to one centered on trade enforcement and monitoring, and must now contend with several trade issues vying for the Administration"s attention, including: (i) increased importance on labor and environmental aspects of any future US free trade agreements (FTAs); (ii) efforts to renew Presidential Trade Promotion Authority (TPA); (iii) trade enforcement of existing FTAs; (iv) efforts to resuscitate the World Trade Organization (WTO) Doha Development Agenda negotiations; (v) passage of pending FTAs with Colombia, Korea and Panama, and continuation of pending FTA negotiations with members of the Trans-Pacific Partnership Agreement (TPPA); and (vi) trade with China, among other matters.

In addition to these issues, the Obama USTR team will also have to deal with several trade policy decisions that the Bush Administration implemented in its final days in office. These include the January 16, 2009 US request for formal consultations with the EU under the WTO regarding the EU"s ban on poultry treated with antimicrobial washes, and the January 16, 2009 proclamation by President Bush that the US-Peru FTA will go into effect on February 1, 2009, even in light of inquiries by Democratic Congressional leaders – including House Ways and Means Committee Chairman Charles Rangel (D-NY) and Trade Subcommittee Chairman Sander Levin (D-MI) – on Peru"s implementation of the labor provisions of the agreement.

USTR Removes Taiwan from Special 301 Watch List After Successful Completion of Out-of-Cycle Review of IPR Enforcement

On January 16, 2009, the Office of the United States Trade Representative (USTR) recognized Taiwan"s progress on protection and enforcement of intellectual property rights (IPR), and removed Taiwan from its Special 301 Watch List. In announcing Taiwan"s removal from the Watch List, USTR Spokesperson Sean Spicer noted that Taiwan has "strengthened its enforcement, strengthened its laws, and demonstrated a commitment to becoming a haven for innovation and creativity."

USTR"s decision to remove Taiwan from the Special 301 Watch List resulted from an "Out-of-Cycle Review" (OCR) of Taiwan that USTR announced in its annual 2008 Special 301 report. The OCR examined the adequacy and effectiveness of Taiwan"s IPR protection and enforcement. Specifically, the OCR focused on three specific issues identified in the April 2008 Special 301 Report: (i) establishment of a Special IPR Court; (ii) continuing efforts to improve implementation of the Action Plan for Protecting Intellectual Property Rights on School Campuses; and (iii) progress toward passage of amendments to the Copyright Law that provide incentives for Internet service providers (ISPs) to cooperate in addressing infringing activities by users on their networks. The OCR concluded that Taiwan has made further

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progress on improving its overall IPR enforcement climate, especially in the three specific areas identified in the 2008 Special 301 Report, by:

- establishing a Specialized IPR Court in July 2008 and an IPR branch in the High Prosecutor"s Office to concentrate on IPR enforcement;
- improving "respect for IPR on campuses and fighting both internet and textbook piracy" through the launch of a Campus IPR Action Plan that provides specific guidelines to universities for combating IPR violations and by reducing the prevalence of illegal textbook copying by on-campus copy shops; and
- passing amendments to the Copyright Law aimed at assisting right holders in their efforts to stop copyright infringement on the Internet.

According to USTR, the United States will continue to monitor Taiwan"s progress in improving its IPR regime, including enactment of pending laws to fight Internet piracy, efforts to improve customs enforcement to prevent the import and export of IPR infringing goods, implementation of effective policies to reduce IPR theft on school campuses and over the Internet, and continued progress to ensure the protection and enforcement of IPR for pharmaceutical products and medical devices.

ITC Amends Rules of Practice, Shortens Deadline for Responses to Notices of Institution

In a January 16, 2009 Federal Register (FR) notice, the International Trade Commission (ITC) announced an amendment to its rules of practice to require that responses to notices of institution of sunset reviews be filed within 30 days of publication instead of the current 50 days (74 FR 2847-2849). Specifically, the ITC is amending Commission Rule 207.61(a) to require that responses to the notice of institution be submitted within 30 days after publication of the notice so that ITC staff has additional time to engage in any additional information collection and analysis. This amended regulation will apply to all reviews instituted on or after March 1, 2009.

In addition, the ITC announced its decision to seek additional information from interested parties at the institution of five-year reviews, and to seek information from purchasers during the adequacy phase of five-year reviews in certain circumstances by issuing short questionnaires. According to the ITC, these decisions do not require a change in rules. The ITC noted that it plans to review its new information requests and changes to its procedures once it has had sufficient experience.

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Ways and Means Committee Members Introduce "Trade Enforcement Act of 2009"

On January 15, 2009, Chairman of the House Ways and Means Committee Charles Rangel (D-NY) and Trade Subcommittee Chariman Sander Levin (D-MI) introduced "The Trade Enforcement Act of 2009" (H.R. 496). The bill is similar to the "Trade Enforcement Act of 2008" (H.R. 6530) which the Ways and Means Committee Members introduced in July 2008. H.R. 496 addresses, among other things, market access for US exports, intellectual property rights (IPR) enforcement, import safety, and trade remedies such as countervailing duty law and China-specific 421-safeguards.

According to Chairman Rangel and Rep. Levin, the goal of the bill is "to promote a trade agenda that reflects American values, ensures that US workers, farmers, and businesses are getting a fair share in the global marketplace and [that] US consumers have confidence that the products they buy are safe." The bill's provisions address:

- **Non-tariff barriers.** H.R. 496 requires the Office of the United States Trade Representative (USTR) to identify annually "priority foreign countries" with unfair non-tariff trade barriers and take action.
- **Trade enforcement.** The bill restores the "Super 301" provision and requires USTR to prioritize annually the most significant barriers to US exports and work to eliminate them. Under Super 301, USTR is required to identify priority foreign country practices, the elimination of which are likely to have the most significant potential to increase US exports. Within 90 days after identification of priority foreign practices, USTR would be required to initiate Section 301 investigations of any identified priority practices.
- **Non-market economies (NMEs).** The bill would "lock in" the US Department of Commerce's application of countervailing duties (CVDs) to "unfairly subsidized and injurious imports" from NMEs, such as China. The bill also ensures that Congress has a role in determining when an NME should be treated as a market economy country.
- **421 Safeguards.** H.R. 496 would limit Presidential discretion to reject Section 421 safeguards (under Section 421, the United States is allowed to impose duties or quotas to prevent "market disruption" caused by increased imports from China; China agreed to the safeguards as part of its accession to the World Trade Organization (WTO)). Current law states that US parties may petition the International Trade Commission (ITC) to investigate imports from China under Section 421. The ITC can then recommend that the President impose duties or quotas if it finds that imports from China cause or threaten to cause market disruption. The President can reject the ITC recommendations if

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relief would have an "adverse impact" on the US economy or cause "serious harm" to national security. H.R. 496 would specifically limit the ability of the President to waive the relief by raising economic interests to the same "serious harm" level as national security.

- **Zeroing.** H.R. 496 states that the WTO Appellate Body has imposed a new requirement not contained in WTO agreements by mandating that the United States offset dumped sales with non-dumped sales. H.R. 496 contains "sense of Congress" language that the Appellate Body "should adhere to the WTO's strict requirement that the AB not create new rights or obligations." The Department of Commerce has stated that the WTO AB decisions that have declared the US application of the "zeroing" methodology in antidumping investigations inconsistent with US WTO obligations are "devoid of legal merit." The Department of Commerce has nonetheless implemented the decisions. H.R. 496 would require the Department of Commerce to halt its current decision to comply with the AB's ruling and "come up with an approach that captures fully the unfair trade practice."
- **Bratsk.** In addition, the bill would "correct" the US Court of Appeals for the Federal Circuit's (CAFC) decision in *Bratsk Aluminum Smelter v. United States* wherein the CAFC ruled that, for the ITC to reach an affirmative determination in a case involving a commodity product, it must show that non-subject imports will not replace the subject imports, with no beneficial effect for the US industry if subject imports were excluded from the market.
- **IPR Enforcement.** H.R. 496 would create a Director of IPR Enforcement and an inter-agency IPR enforcement advisory committee in addition to promoting the use of new technology to fight IPR infringement, creating a watch list for suspected IPR violators and barring the Bureau of Customs and Border Protection (CBP) from waiving fines assessed for illegal imports.
- **Import Safety.** H.R. 496 would authorize increases in resources, staffing, and support for CBP and Immigration and Customs Enforcement (ICE). In addition, the bill would create a voluntary government-private sector import safety program, require the use of "unique identifiers" to facilitate identifying the source of goods that pose health and safety threats, and establish new sanctions for repeated noncompliance with US health and safety laws.
- **Congressional Trade Enforcer.** The bill would create an Office of Congressional Trade Enforcer that would investigate barriers to US exports, develop complaints against foreign countries, and call on USTR to file cases.
- **USTR General Counsel.** The bill would elevate USTR's General Counsel to Ambassadorial rank.

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Although the language in H.R. 496 mirrors the language of the Trade Enforcement Act of 2008, the circumstances surrounding the introduction of H.R. 496 are far different then when Chairman Rangel and Rep. Levin introduced the same bill in the previous Congressional session. For one, Reps. Rangel and Levin have introduced the bill on the eve of the new Obama Administration. The bill is an early indication that optimists who felt that Congressional Democrat leaders would ease their "protectionist" rhetoric once Democrats assumed control of the Executive and Legislative branches are wrong. In fact, the bill, when coupled with other recent developments – such as the statements from incoming Secretary of State Hillary Clinton at her confirmation hearing that the pending US-Korea Free Trade Agreement (FTA) should be renegotiated, and USTR's disengagement from the ongoing US-Malaysia FTA negotiations (until late 2009) – points to a bleak trade forecast far different than what some optimists had predicted would happen once Democrats assumed control. The timing of the bill's introduction is also indicative of this stark trade reality: although trade may be a back-burner and secondary issue for the Obama Administration, it seems that it will continue to be a front-burner issue for Congressional Democrats intent on ensuring that US "trade policies . . . enable US workers farmers and businesses to compete on a level playing field" with US trading partners.

DOC Extends Deadline for Public Comments on Proposed Withdrawal of Targeted Dumping Methodology

In a May 9, 2008 Federal Register (FR) notice, the Department of Commerce (DOC) requested public comments on proposed changes to its targeted dumping methodology and related issues (73 FR 26371-26372). On December 10, 2008, DOC published the interim final rule (which proposed the withdrawal of the regulatory provisions governing targeted dumping in antidumping duty investigations), and requested comments on the interim final rule by January 9, 2009 (73 FR 74930-74932). DOC extended that deadline and comments from interested parties were due by January 23, 2009.

According to the December 10 FR notice, DOC will normally calculate dumping margins in investigations by comparing (i) weighted-average export prices to weighted-average normal values or (ii) transaction-specific export prices to transaction-specific normal values. DOC will, under certain circumstances, use an alternative methodology for determining the extent of dumping in an investigation through a comparison of transaction-specific export prices to weighted-average normal values. To use this alternative methodology, DOC must by law find "targeted dumping" – a pattern of export prices (or constructed export prices) that differs significantly among purchasers, regions, or periods of time. In addition, DOC must explain why the differences cannot be taken into account using one of the normal calculation methodologies. Sections 19 CFR 351.414(f), (g), and 351.301(d)(5) of DOC's regulations

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establish the criteria for analyzing allegations and making targeted dumping determinations in antidumping duty investigations ("targeted dumping provisions").

The December 10 FR notice stated that DOC's experience with targeted dumping claims is limited, and that "until recently, there have been very few allegations or findings of targeted dumping." According to the FR notice, this has caused DOC to question whether, in the absence of any practical experience, it established an appropriate balance of interests in its targeted dumping provisions. DOC now believes that the "withdrawal of the [targeted dumping] provisions will provide the agency with an opportunity to analyze extensively the concept of targeted dumping and develop a meaningful practice in this area as it gains experience in evaluating such allegations." DOC also believes that it may have established thresholds or other criteria within its targeted dumping provisions that have "prevented the use of this methodology to unmask dumping, contrary to the Congressional intent." DOC believes that immediate revocation of the targeted dumping provisions will facilitate the proper and efficient operation of the antidumping law. In addition, DOC believes that the withdrawal of this rule is not significant, and that withdrawal will allow DOC to develop a practice that will allow interested parties to pursue all statutory avenues of relief in this area. Please note that DOC is proposing full withdrawal of the targeted dumping provisions and is not replacing them with new provisions. Instead, DOC is returning to a case-by-case adjudication, "until additional experience allows the Department to gain a greater understanding of the issue."

House Ways and Means Committee Increases Democratic Margin with Addition of New Legislators

On January 5, 2009, House Democrats filled House Committee slots for the 111th Congress. New Democrats joining the Ways and Means Committee include Reps. Linda Sanchez (CA), Danny Davis (IL), Bob Etheridge (NC), John Yarmuth (KY), and Brian Higgins (NY). On January 7, 2009, the House Republican Steering Committee appointed six GOP members to join the Ways and Means Committee including Reps. Ginny Brown-Waite (FL), Geoff Davis (KY), Dave Reichert (WA), Charles Boustany (LA), Dean Heller (NV), and Peter Roskam (IL). Rep. Dave Camp (R-MI) is also the new Ranking Member of the Committee.

The addition of Rep. Sanchez solidifies the Committee ratio for Ways and Means, with Democrats in 26 seats and Republicans in 15 seats. Democrats were able to achieve a net gain of two seats on the Committee. Congressional sources note that the selection of Rep. Sanchez brings a tough critic of free-trade policies to the Committee. Rep. Sanchez co-founded the House Trade Working Group with Rep. Michael Michaud (D-ME) which has led the charge against pending Free Trade Agreements (FTAs) with

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Colombia and Korea, and pushed for a renegotiation of the North American Free Trade Agreement (NAFTA). Rep. Sanchez became a candidate for a Ways and Means seat after Rep. Raul Grijalva (D-AZ) withdrew his name from consideration in December 2008, citing his duties as a House Natural Resources Subcommittee Chairman.

On January 8, 2009, House Ways and Means Committee Chairman Charles Rangel (D-NY) announced the Democratic members for the Ways and Means Trade Subcommittee. Michigan Democrat Sander Levin will continue to serve as Trade Subcommittee Chairman. The other trade subcommittee Democrats include Reps. John Tanner (TN), Chris Van Hollen (MD), Jim McDermott (WA), Richard Neal (MS), Lloyd Doggett (TX), Earl Pomeroy (ND) and new committee members Reps. Etheridge and Sanchez. Meanwhile, on January 9, 2008, Republicans named Rep. Kevin Brady (R-TX) as the new ranking Republican on the Trade Subcommittee. Rep. Brady replaces Rep. Wally Herger (R-CA) who will stay on the trade subcommittee but has opted to take up the ranking slot on the Health Subcommittee.

We list below the Members of the 111th Congress" House Ways and Means Committee and Trade Subcommittee:

DEMOCRATS	REPUBLICANS
House Ways and Means Committee	
Charles Rangel (NY) – Chairman	***Dave Camp (MI) – Ranking Member***
Pete Stark (CA)	Wally Herger (CA)
Sander Levin (MI)	Sam Johnson (TX)
Jim McDermott (WA)	Kevin Brady (TX)
John Lewis (GA)	Paul Ryan (WI)
Richard Neal (MA)	Eric Cantor (VA)
John Tanner (TN)	John Linder (GA)
Xavier Becerra (CA)	Devin Nunes (CA)
Lloyd Doggett (TX)	Pat Tiberi (OH)
Earl Pomeroy (ND)	Ginny Brown-Waite (FL)
John Larson (CT)	Geoff Davis (KY)
Mike Thompson (CA)	Dave Reichert (WA)
Earl Blumenauer (OR)	Charles Boustany (LA)
Ron Kind (WI)	Dean Heller (NV)

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DEMOCRATS	REPUBLICANS
Bill Pascrell Jr. (NJ)	Peter Roskam (IL)
Shelley Berkley (NV)	
Joseph Crowley (NY)	
Kendrick Meek (FL)	
Chris Van Hollen (MD)	
Allyson Schwartz (PA)	
Artur Davis (AL)	
Danny Davis (IL)	
Bob Etheridge (NC)	
Loretta Sanchez (CA)	
Brian Higgins (NY)	
John Yarmuth (KY)	
Trade Subcommittee	
Sander Levin (MI) – Chairman	***Kevin Brady (TX) – Ranking Member***
John Tanner (TN)	Geoff Davis (KY)
Chris Van Hollen (MD)	Dave Reichert (WA)
Jim McDermott (WA)	Wally Herger (CA)
Richard Neal (MA)	Devin Nunes (CA)
Lloyd Doggett (TX)	
Earl Pomeroy (ND)	
Bob Etheridge (NC)	
Linda Sanchez (CA)	

New Mexico Governor Richardson Withdraws Name for Secretary of Commerce Appointment

On January 2, 2008, New Mexico Governor Bill Richardson withdrew his name for Secretary of Commerce, citing an investigation into a company that has done business with his state. In announcing his withdrawal from the Cabinet appointment, Gov. Richardson stated that he and his Administration "have acted properly in all matters . . . [but] that the ongoing investigation also would have forced an untenable delay in the confirmation process." He also stated that he will continue to serve as Governor of

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New Mexico. In accepting Gov. Richardson"s withdrawal, President-elect Obama stated that "Governor Richardson is an outstanding public servant and would have brought to the job of Commerce Secretary and our economic team great insights accumulated through an extraordinary career in federal and state office." He noted that he and his transition team will now "move quickly to fill the void left by Governor Richardson's decision."

The investigation to which Gov. Richardson referred when announcing his withdrawal decision is a federal grand jury investigation on how a California company that contributed to Gov. Richardson's political activities won a lucrative New Mexico state contract. The New Mexico investigation began in the summer of 2008 and focuses on whether Gov. Richardson's office urged a state agency to hire a California firm as a result of generous contributions from the company and its president to political action committees established by Gov. Richardson.

President-elect Obama appointed Gov. Richardson as Secretary of Commerce on December 3, 2008. Gov. Richardson is serving his second term as Governor after being re-elected in 2006. Prior to being elected Governor, Richardson worked in the public sector. In 2001, Richardson assumed the chairmanship of Freedom House, a private, non-partisan organization that promotes democracy worldwide. In 1998, Richardson was unanimously confirmed by the United States Senate as Secretary of Energy. In 1997, Richardson was nominated to be the US Ambassador to the United Nations. Prior to that, he served for fifteen years in northern New Mexico representing the 3rd Congressional District.

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Free Trade Agreements

Free Trade Agreements Highlights

USTR Requests Comments on Proposed Trans-Pacific Partnership FTA With Singapore, Chile, New Zealand, Brunei Darussalam, Australia, Peru, and Vietnam

In a January 26, 2009 Federal Register (FR) notice, the Office of the United States Trade Representative (USTR) announced its intent to initiate negotiations on a Trans-Pacific Partnership (TPP) Free Trade Agreement (FTA) with Singapore, Chile, New Zealand, Brunei Darussalam, Australia, Peru and Vietnam (74 FR 4480-4482). The interagency Trade Policy Staff Committee (TPSC) will convene a public hearing in March, and seeks public comment to assist USTR in amplifying and clarifying negotiating objectives for the proposed agreements and to provide advice on how specific goods and services and other matters should be treated under the proposed agreement.

Parties interested in testifying orally at the hearing must provide written notification of their intent to testify, as well as their testimony, by **February 25, 2009**. The TPSC will hold a hearing on **March 4, 2009**. Written comments on the proposed FTA are due **March 11, 2009**. Notices of intent to testify, testimony and/or written comments should be submitted electronically at http://www.regulations.gov. Comments and testimony may address the reduction or elimination of tariffs or non-tariff barriers on any articles provided for in the Harmonized Tariff Schedule of the United States (HTSUS) that are products of the participating Trans-Pacific countries, any concession that should be sought by the United States, or any other matter relevant to the proposed agreement. The TPSC in particular seeks comments and testimony on:

- General and commodity-specific negotiating objectives for the proposed plurilateral agreement;
- Economic costs and benefits to U.S. producers and consumers of removal of tariffs and non-tariff barriers on articles traded with the seven Trans-Pacific countries;
- Treatment of specific goods (described by HTSUS numbers) under the proposed agreement;
- In the case of articles for which immediate elimination of tariffs is not appropriate, a recommended staging schedule for such elimination;

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- Adequacy of existing customs measures to ensure that imported goods originate from the seven Trans-Pacific countries, and appropriate rules of origin for goods entering the United States under the proposed agreement;
- Existing sanitary and phytosanitary measures and technical barriers to trade imposed by the seven Trans-Pacific countries that should be addressed in the negotiations;
- Existing barriers to trade in services between the United States and the Trans-Pacific countries that should be addressed in the negotiations;
- Relevant electronic commerce issues that should be addressed in the negotiations;
- Relevant trade-related intellectual property rights issues that should be addressed in the negotiations;
- Relevant investment issues that should be addressed in the negotiations;
- Relevant competition-related matters that should be addressed in the negotiations;
- Relevant government procurement issues that should be addressed in the negotiations;
- Relevant environmental issues that should be addressed in the negotiations; and
- Relevant labor issues that should be addressed in the negotiations.

US-Peru FTA to Enter into Force on February 1, 2009

On January 16, 2009, President Bush issued a proclamation to implement the US-Peru Free Trade Agreement (FTA) on February 1, 2009. United States Trade Representative (USTR) Susan Schwab welcomed the President"s proclamation and stated that the United States "has worked closely with the Government of Peru to ensure that the obligations and responsibilities of each party have been met under this Agreement." According to USTR, on the first day the FTA enters into force, 80 percent of US industrial and consumer products and more than two-thirds of current US farm exports will enter Peru duty-free. In addition, the FTA will remove barriers to US services; provide a secure, predictable legal framework for investors; and provide strong protection for intellectual property, labor rights and the environment.

The United States and Peru signed the FTA on April 12, 2006. The House of Representatives approved the bilateral trade agreement on November 8, 2007, and the Senate on December 4, 2007. President Bush signed the legislation implementing the US-Peru FTA on December 14, 2007. Entry into force of the agreement was initially held up because Peru had to implement several new laws and regulations so as to comply with the bilateral agreement.

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Recently, Members of the House Ways and Means Committee had questioned whether Peru had correctly implemented the labor rights provisions within the US-Peru FTA, and staff of the Ways and Means Committee discussed with Bush Administration officials whether Peru"s labor laws reflect the obligations of the May 10, 2007 agreement between the Bush Administration and Congressional Democrats (under the May 2007 agreement, future FTAs would include core international labor and environmental protection standards, and trade partners that intentionally lower their standards to gain an unfair competitive advantage would be subject to trade sanctions). Other issues that the Ways and Means Committee raised included whether Peru"s micro-enterprise law provides an effective remedy for unlawful dismissal of workers for union activity in accordance with International Labor Organization (ILO) standards, and whether Peru"s recently-passed labor laws ensure that employers will not be able to use subcontracts to circumvent labor rights obligations and the right to unionize. The questions from Ways and Means, however, did not seem to stop USTR from announcing that the US-Peru FTA would enter into force in mid-January or early February, even after USTR Susan Schwab received stern warnings from Ways and Means Committee Chairman Charles Rangel (D-NY) and Trade Subcommittee Chairman Sander Levin (D-MI) not to set "an artificial deadline" for the agreement"s entry into force. In response to this warning, USTR Schwab stated that "the Peru pact was enacted with the strong labor protections enshrined in the May 10, 2007, bipartisan agreement on standards for trade deals" and that the Government of Peru has cooperated with the United States to ensure that the agreement benefits all parties.

United States, Iceland Sign Trade and Investment Cooperation Forum Agreement

On January 15, 2009, the United States and Iceland signed a Trade and Investment Cooperation Forum Agreement. According to the Office of the United States Trade Representative (USTR), the agreement is similar to other US Trade and Investment Framework Agreements (TIFAs). Assistant USTR for Europe and the Middle East Chris Wilson and Icelandic Minister of Industry and Energy Össur Skarpheðinsson signed the agreement in Reykjavik, Iceland. The agreement is intended to provide a forum for expanding and strengthening bilateral trade and investment relations between the United States and Iceland. USTR notes that in 2007, two-way trade in goods between the United States and Iceland totaled USD 835 million, with the United States exporting goods to Iceland totaling USD 630 million, including aircraft, inorganic chemicals, vehicles, machinery, and agricultural products.

TIFAs are limited trade agreements that establish joint councils of trade and economic officials to discuss trade issues. Under US trade policy, TIFAs are usually the first step towards the initiation of formal

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bilateral or regional Free Trade Agreement (FTA) negotiations. The next step in the process would be for the countries to enter into a Bilateral Investment Treaty (BIT), which protects the rights of foreign subsidiaries and investors in the countries" home markets. The US-Iceland Trade and Investment Cooperation Forum Agreement is likely the last TIFA completed under the Bush Administration, and it is unclear at this stage how the incoming Obama Administration will view TIFAs. Observers have questioned whether USTR under President Obama will proactively pursue TIFAs the same way the Bush Administration did, or whether an Obama USTR will be more selective with possible TIFA partners, especially if under US policy, a TIFA serves as a precursor for a potential BIT and FTA. Some observers have speculated that because the Obama Administration will be less proactive in pursuing FTAs, it may be as equally hesitant in pursuing TIFAs, whereas others argue that because the Obama Administration will likely limit its pursuit of FTAs, it may use other resources – such as TIFAs – to maintain ties with trading partners.

AFL-CIO Urges Obama Administration to Focus on China, Place Moratorium on New FTAs

According to several reports, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is urging the incoming Obama Administration to adopt a national economic strategy that includes reforms in international economic policy. The policy recommendations – laid out in a "white paper" to the Obama Transition Team – include suggestions for trade policy reform, and prioritize what the AFL-CIO feels are the main issues on which the Obama Administration should concentrate. These include:

- prioritizing "the large and unsustainable US current account deficit;"
- a strengthened focus on bilateral issues with China such as "the Chinese government"s unfair trade practices," its alleged currency manipulation, subsidies, possible worker rights violations, and enforcement of environmental and consumer safety standards;
- a moratorium on new Free Trade Agreements (FTAs) and a review of pending and existing FTAs that includes an examination of these agreements" impact on domestic employment and wages, bilateral trade and investment flows, worker rights, environmental standards and practices, and consumer safety;
- "a renewed focus" on the enforcement of current FTAs that includes a review of "existing unfair trade practices and an assessment of where possible [World Trade Organization] WTO or other trade action is indicated;"

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- Congressional passage and Presidential approval of a bill to reauthorize and expand the Trade Adjustment Assistance (TAA) program;
- a shift in the direction of US participation in the WTO Doha Round of multilateral negotiations, and the inclusion of worker rights, currency manipulation, and other issues in the talks; and
- strengthened US trade remedy practices.

The "white paper" also explores other trade policy matters, including the pending US-Korea FTA – which the AFL-CIO believes should be renegotiated to include stronger auto-related provisions beneficial to US manufacturers and "improvements" in Korea"s labor laws and practices – and the pending US-Colombia FTA, which the AFL-CIO continues to oppose because of problems with violence against trade unionists in Colombia. The paper urges the Obama Administration to oppose these two pending agreements until both have been renegotiated. With regards to US preference programs, the AFL-CIO urges a review of the Generalized System of Preferences (GSP), the African Growth and Opportunity Act (AGOA), the Andean Trade Promotion and Drug Eradication Act (ATPDEA), and the Caribbean Basin Initiative (CBI) in order to determine how these programs "can be strengthened, improved, and made more consistent with respect to development objectives and worker rights criteria." The "white paper" also states that President Obama should "review and substantially revise the model Bilateral Investment Treaty (BIT) and postpone BIT negotiations with China and Vietnam until the model BIT has been revised."

Much of the "white paper"s" focus was on China, and the AFL-CIO offered specific policy prescriptions for the Obama Administration, including, but not limited to:

- strengthening the US position on currency and trade remedy policy as applied to China;
- accepting a Section 301 petition against China for deficient labor practices;
- banning Chinese companies from government procurement programs if China does not address US concerns with alleged currency manipulation;
- passing legislation that would allow companies to treat foreign currency manipulation as a countervailable subsidy in a CVD case;
- enabling the Department of Commerce to accept CVD cases concerning subsidies provided prior to China"s 2001 WTO accession and apply CVD law to non-market economies;
- reinstating Section 421 safeguard cases focusing on "destabilizing import surges" from China; and
- directing US banks to limit loans to China.

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There has been no response to the "white paper" from the Obama Transition Team. Some free-trade advocates are worried that in an effort to "repay" the AFL-CIO and other labor groups for campaign support, President-elect Obama may choose to follow some of the recommendations included in the "white paper." Others, however, argue that it is too early to tell what direction US trade policy will take under an Obama Administration, especially with regards to some of the more contentious issues included in the AFL-CIO"s policy paper.

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Customs

Customs Highlights

New Secretary of Homeland Security: "100 Percent Cargo Scanning Initiative Could See Delay"

Newly-confirmed Secretary of Homeland Security Janet Napolitano has stated that the mandate by Congress to scan 100 percent of all US-bound cargo by 2012 may be delayed because of increased costs and other limitations. In responses to a questionnaire from the Senate Committee on Homeland Security, Secretary Napolitano stated that although the Department of Homeland Security (DHS) is working toward the 2012 deadline, "it is going to be difficult to achieve." Under the Security and Accountability for Every (SAFE) Port Act of 2006, DHS is required to scan 100 percent of all maritime containers entering the United States by 2012, with scanning to take place at foreign ports of departure. DHS has not yet issued detailed information concerning full implementation of the SAFE Port Act requirements, though DHS has introduced a voluntary pilot program, the Customs-Trade Partnership Against Terrorism (C-TPAT), which provides benefits including expedited customs clearance for importers, carriers, consolidators, licensed customs brokers, and manufacturers that agree to heightened security measures for their supply chains.

In listing the reasons why the 100 percent scanning initiative may be delayed, Secretary Napolitano stated that DHS will have to implement the program without severely disrupting port operations. DHS has already conducted several trial runs of the program, and Secretary Napolitano noted that these trials have led to delays at ports, certain technical problems, and increased tensions with trading partners that have agreed to implement the program. She also stated that the costs of implementing the system have increased significantly, and noted that DHS has proposed other less costly options for cargo security in place of 100 percent cargo scanning. Consequently, Secretary Napolitano announced that she may delay the 2012 implementation, under Section 1701 of the 9/11 Recommendations Act, which gives the Secretary of Homeland Security authority to extend the deadline. She added that she would only do so after careful consideration and consultation with Congress.

Observers note that the Obama Administration"s hesitation in implementing the program is the same reaction that Bush Administration officials exhibited towards the Congressional mandate. In June 2008, former Secretary of Homeland Security Michael Chertoff strongly criticized the Congressional requirement for 100 percent scanning of all sea cargo containers entering the United States by 2012. Chertoff opined

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that the Congressionally-mandated requirement follows an outdated "command and control approach," and he instead endorsed the partnership approach currently used by DHS, one that "attempts to apply risk-based standards to evaluate where the true danger lies with respect to our container supply chain" and that relies on private sector knowledge and cooperation. Other DHS officials have opined that the 100 percent plan would not provide an automated notification of questionable or high-risk cargo as trigger for further inspection and was "not a wise investment of taxpayer dollars." DHS officials have instead proposed a 100 percent scanning at ports designated as "high-risk." Even more telling is that Customs and Border Protection (CBP) – one of the lead agencies involved in the 100 percent scanning mandate – will retain Commissioner W. Ralph Basham for at least the next six months (at the request of the Obama Administration) until President Obama chooses a replacement; Basham is an outspoken critic of the 100 percent scanning initiative, and could bring that viewpoint with him to the table for the remainder of his time at CBP when working with the new Administration and Congress.

Obama Administration Delays Lacey Act Implementation, Will Review Provisions

On January 22, 2009, the US Department of Agriculture (USDA) withdrew a Federal Register (FR) notice on the implementation of amendments to the Lacey Act, announcing that the Obama Administration will review the amendments and decide at a later point how to best proceed with them. USDA officials also noted that removal of the FR notice complied with a January 20, 2009 memorandum from White House Chief of Staff Rahm Emanuel that effectively stopped certain pending rules until incoming political appointees can review them. USDA's move to review the Lacey Act amendments delays the 2009 implementation of the mandatory importer declarations for products that use plant-based materials. The pulled FR notice narrowed the scope of products subject to the declaration requirement on April 1, 2009, phased in the declaration requirement for parts of chapters in the Harmonized Tariff System instead of proceeding on the basis of entire chapters, and extended the timetable for phasing in the declaration requirement.

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

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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.

Industry observers expressed mixed views on USDA"s withdrawal of the FR notice and its review of the Lacey Act amendments. On one hand, they lauded the Administration"s actions because many US businesses have criticized the Lacey Act amendments as creating too many onerous and burdensome requirements that in turn could affect business operations and make importers more liable to violating the requirements because of the extensive breadth of products covered under the amendments. On the other hand, some industry observers indicated that the pulled FR notice – which effectively delayed the timetable for implementation and narrowed the scope of products subject to the declaration requirement – responded positively to importer concerns on the Lacey Act amendments; these industry representatives worry that any future regulations from the Obama Administration may not be as responsive to importer worries as the pulled FR notice.

It is unclear at this stage how Lacey Act implementation will proceed. Government sources note that the Obama Administration and newly-confirmed Secretary of Agriculture Tom Vilsack will review the amendments and will decide how to proceed. USDA"s Animal and Plant Health Inspection Service (APHIS), the lead agency to implement the Lacey Act, has stated that it intends to publish another final rule in the Federal Register shortly that addresses the points raised in the pulled FR notice in addition to defining the terms “common cultivar” and “common food crop” that are exempt from the declaration requirement under Lacey Act amendments. APHIS officials have indicated, however, that the timing of the rule depends on Administration officials and their views on the requirements.

US Customs Requests Repayment of Byrd Money, Extends Deadline for Repayment

On November 28, 2008, US Customs and Border Protection (CBP) contacted US companies in unfair trade cases involving imports from Canada and Mexico and requested that they repay the money they have received under the Continued Dumping and Subsidy Offset Act (CDSOA), also known as the Byrd Amendment. Since then, CBP has extended the deadline for repayment of the Byrd funds. We describe below the request made by CBP and the extension for repayment, the legal basis for this request and the reactions of affected US companies.

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I. CBP Request for Repayment, Extends Deadline for Repayment

On November 28, CBP sent formal notice to companies that received money under the CDSOA in cases involving Canada and Mexico that they must return the money within 30 days of the date of the letter. In these letters, CBP identifies the amount of the distributions received by the company since the CDSOA went into effect (i.e., duties received after October 1, 2000). Next, CBP states that, "your company must promptly return all funds previously received" because "your company's receipt of the stated amount(s)" is "inconsistent with judicial interpretation of the CDSOA."

CBP initially requested payment within 30 days of the date of the letter (*i.e.*, by December 28, 2008), and stated that "any amount not returned within 30 days will begin to accrue interest at the rate indicated in 19 C.F.R. §24.3a(c)." However, according to several reports, in response to pressure from members of Congress and US trade remedy petitioners, CBP extended by 90 days the December 28 deadline by which the petitioners must repay the Byrd funds. The new deadline for repayment is **March 28, 2009**. According to different sources, CBP formalized the extension in a letter to the recipients, accepting the argument from Congress and the private sector that more time was needed for repayment due to several factors (*please see our December 12, 2008 alert for further information)*.

News reports estimate that CBP is requesting the repayment of USD 95 million from producers of lumber and paper products, USD 15 million from steel companies, and USD 35 million from cement producers.

II. Legal Basis for CBP Request

CBP cites as the impetus for requesting return of these CDSOA payments the February 25, 2008 decision by the Court of Appeals for the Federal Circuit ("CAFC") in Canadian Lumber Trade Alliance v. United States.[1] The CAFC affirmed the declaratory judgment of the Court of International Trade ("CIT") that, "pursuant to Section 408 of the NIA, the CDSOA does not apply to antidumping and countervailing duties assessed on imports of goods from Canada or Mexico."[2] The NIA or North American Free Trade Agreement Implementation Act, which was enacted in 1993, provides in Section 408 that "[a]ny amendment enacted after the Agreement [i.e., NAFTA] enters into force with respect to the United States that is made to ...title VII of the Tariff Act of 1930…shall apply to goods from a NAFTA country to the extent specified in that amendment."[3] Because the CDSOA, which was enacted in 2000, amended title

[1] 517 F.3d 1319 (Fed. Cir. 2008), cert. denied sub nom. United States Steel v. Canadian Lumber Trade Alliance, - S. Ct.-, 2008 WL 4454382 (Oct. 6, 2008).

[2] 517 F.3d at 1344.

[3] See id. at 1342 (citing 19 U.S.C. §3438).

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VII, but did not specify that it applied to goods from Canada or Mexico, the CIT ruled that the CDSOA could not be applied to imports from Canada or Mexico. The CIT stated that, "based on Congress" plain language in Section 408 [of the NIA], Customs is not authorized to apply the [CDSOA] to goods from Canada or Mexico.[4]

In its November 28th letter, CBP states that the CAFC decision ruled that, "CBP was not authorized to distribute such duties to the extent they were derived from goods from countries that are parties to the North American Free Trade Agreement." CBP sets out the following legal authority justifying its letter seeking repayment of these duties:

> CBP is obliged to pursue a claim for the immediate return of this overpayment. See 31 U.S.C. §3701(b)(1)(C). By law, an agency shall collect a claim of the United States Government for money arising out of its activities, 31 U.S.C. §3711(a)(1). The Federal Claims Collection Standards (31 C.F.R. Parts 900-904), state that „Federal agencies shall aggressively collect all debts arising out of activities of, or referred for collection services to, that agency. Collection activities shall be undertaken promptly with follow-up action taken as necessary." 31 C.F.R. 901.1(a). In discussing overpayments the General Accounting Office has consistently advised agency officials to recover overpaid amounts without undue delay. Similarly, the Court of Claims has held that the Government has a duty to recover erroneously made payments. Fansteel Metallurgical Corp. v. United States, 172 F. Supp. 268, 270 (Ct. Cl. 1959) (citations omitted). For these reasons, CBP is issuing this demand letter.

The timing of CBP"s request for payment is likely due to the fact that the US Supreme Court recently denied review of the CAFC"s decision. Consequently, the CAFC decision is now final and binding on the US Government and the parties.

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[4] See id. (citing 425 F. Supp.2d, at 1373). We note that the CIT issued two opinions in the underlying case. First, it issued an opinion finding, among other decisions, that CBP"s distribution of duties assessed on imports from Canada was unlawful because the CDSOA must be read in light of section 408 of the NIA not to apply to goods from Canada or Mexico. Canadian Lumber Trade Alliance v. United States, 425 F. Supp. 2d 1321, 1373 (Ct. Int"l Trade 2006). Because the parties were unable to reach agreement on remedies, the CIT issued a second opinion setting out relief. In the second decision, the court declared that, pursuant to section 408 of the NIA, the CDSOA does not apply to antidumping and countervailing duties assessed on imports of goods from Canada or Mexico, and declined to instruct CBP to "collect back" any duties already distributed. Canadian Lumber Trade Alliance v. United States, 441 F. Supp. 2d 1259 (Ct. Int"l Trade 2006).

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III. US Industry Reaction to CBP Request

US companies have objected to the demand for repayment under the terms set by CBP in its letter. For example, the Coalition for Fair Lumber Imports, which represents US softwood lumber manufacturers, has requested in a December 4th letter that CBP either withdraw the demands or extend the repayment period. Specifically, they stated that, "At a minimum, we request that CBP extend the deadline identified in the letters 90 days to enable the Executive Branch to reconsider the demand for repayment."[5] We understand that the lumber, steel, cement and other industries also are coordinating efforts to protest CBP's request for repayment. This week they are expected to jointly request an extension to respond to CBP's request.

The Coalition for Fair Lumber Imports and other US producers also argue that CBP's demand for repayment is unlawful. They claim that the demand letter is inconsistent with the CIT's decision in the underlying case that US producers would not be required to pay back past distributions, and that CBP supported the CIT's decision in this regard. In its decision, the CIT states that "when the government grants or distributes money to parties, those parties have some right to rely on the money they receive," and "denies Plaintiff's request for an order directing Customs to disgorge any funds already distributed."[6] We note that, although the CIT decided not to order CBP to request repayment, CBP determined that it was required by law to seek repayment.

The US producers also challenge the lawfulness of the law, regulations and cases relied on by CBP in its November 28th letter. They claim that the 1959 Fansteel Metallurgical Corp. case involved unlawful overpayments to a US company. In contrast, they claim that there was no oversight or mistake in the case of the CDSOA payments. Further, they assert that the Federal Claims Collection Act and accompanying regulations "merely confirm that the government is to collect on debts to the government," whereas the US companies that received money under the CDSOA are not indebted to CBP.

Finally, the US producers also intend to challenge the fairness of this action at this time of economic crisis.

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[5] Inside U.S. Trade, "CBP Demands Return of Byrd Money From Canada, Mexico Imports," December 5, 2008.

[6] Canadian Lumber Trade Alliance, 441 F. Supp.2d at 1268.

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Multilateral

WTO Panel Releases Decision in US-EU Zeroing Dispute (DS294)

Summary

Decision: A WTO "compliance" Panel has found that the United States failed to implement the 2006 rulings of the WTO Dispute Settlement Body (DSB) on the use of "zeroing" in administrative reviews of anti-dumping orders.

Significance of Decision / Commentary: This decision deals with important – and previously unlitigated – issues related to the implementation of WTO rulings in the context of the U.S. "retrospective" system for anti-dumping duties.

Virtually every country in the world other than the United States maintains a prospective system for collecting anti-dumping duties, i.e., the duties are assessed at the time of entry of the goods. By contrast, under the U.S. retrospective duty assessment system, definitive anti-dumping duties are not assessed upon the entry of the good. Instead, a cash deposit is required, and the definitive duties are determined during the annual administrative reviews of the order conducted by the U.S. Department of Commerce (USDOC). In some cases, the final anti-dumping duty rate can be significantly higher than the cash deposit.

The U.S. retrospective duty system gives rise to unique "temporal" issues when the United States implements WTO rulings. The following hypothetical timeline is set out for illustrative purposes:

- **December 1, 2007:** DSB rules against a U.S. anti-dumping duty order
- **July 1, 2008:** Importation into the US of goods subject to the anti-dumping order
- **December 1, 2008:** Expiration of the "reasonable period of time" for U.S. compliance with the DSB rulings
- **July 1, 2009:** USDOC administrative review of the anti-dumping duty order

The United States argued before the Panel in the present case that its compliance obligations applied only for imports that occurred after the expiration of the compliance period. Returning to the hypothetical example set out above, the U.S. position would be that the USDOC could continue to use zeroing in an administrative review on July 1, 2009 for all goods that entered before the end of the compliance period on December 1, 2008.

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The Panel rejected the U.S. position. It reasoned that "any definitive duty determination made after the end of the reasonable period of time must be consistent with the provisions of the Anti-Dumping Agreement and with the DSB's recommendations and rulings." It added that "[t]o conclude otherwise would mean that a Member is effectively allowed, after the end of the reasonable period of time, to determine the amount of anti-dumping duties with respect to certain imports in contravention of the provisions of the Anti-Dumping Agreement." The Panel found "no support in either the Anti-Dumping Agreement or the DSU for such a proposition." This means that the United States cannot use zeroing after the expiration of the compliance period, even for goods that entered the United States prior to that date.

However, the Panel dismissed an additional EC argument related to the liquidation (i.e., collection) of the duties. The EC argued that the USDOC could not liquidate duties based on zeroing after the expiration of the compliance period, even if the administrative review had been concluded before that time. The Panel disagreed, reasoning that "the US obligation to implement should not, once the determination of the amount of anti-dumping liability has been made, depend on when the actual collection of the duty takes place."

In its 2007 ruling in US – Zeroing (Japan), the Appellate Body stated that the Anti-Dumping Agreement is "neutral as between different systems" for levying and collecting anti-dumping duties, and that it was therefore "incorrect to say that the Anti-Dumping Agreement favours one system, or places another system at a disadvantage." The United States argued before the Panel in the present case that the position advocated by the EC would breach this principle of neutrality. The U.S. claimed that a Member operating a prospective duty assessment system would not have to reimburse WTO-inconsistent duties on imports made before the expiration of the compliance period, while "a Member operating a retrospective duty assessment system would have to forgo the collection of such duties since the duties are only "collected" at a later point in time." The Panel stated that it was mindful of the Appellate Body"s admonition on neutrality, but concluded that "it should not come as a surprise that the application of the same legal principles to different legal situations can result in different implications."

The retrospective duty system is at the heart of U.S. trade remedies law, and the Panel"s rulings in the present case will have adverse consequences for the ability of the United States to collect both anti-dumping and countervailing duties. The Panel"s decision is important both for the United States and for countries that export to the United States, and it seems highly likely that the Appellate Body will have the final word on these key systemic issues.

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Analysis

I. Background

On April 18, 2006, the WTO Appellate Body ruled that the United States violated its obligations under the Anti-Dumping Agreement when it used "zeroing" in administrative reviews. The Appellate Body found that zeroing was WTO-inconsistent "as applied" during the administrative reviews of the anti-dumping orders on EC products at issue in that case. For a description of the mechanics of zeroing and the basis for the Appellate Body's rulings, please see our report of April 24, 2006 (available upon request). The current Panel was established pursuant to Article 21.5 of the WTO Dispute Settlement Understanding (DSU) to adjudicate the EC claim that the United States failed to implement the 2006 DSB rulings.

II. Preliminary ruling on scope of compliance panel proceedings: establishing a "close nexus" with the original DSB rulings

A compliance Panel established under DSU Article 21.5 has the mandate to rule on the WTO-consistency of the "measures taken to comply" with the DSB rulings. In the present case, the United States argued that the subsequent reviews of the anti-dumping orders on EC products were not "measures taken to comply" with the 2006 DSB rulings, and therefore did not fall within the terms of reference of the compliance Panel.

The EC initially argued that the subsequent reviews were "amendments" to the investigations at issue in the original dispute. The Panel rejected this argument, reasoning that the term "amendment" meant amendments to correct the original investigation for ministerial or similar errors. It also noted that in the EC Panel request in the original dispute, the administrative reviews were "clearly identified as distinct measures." The Panel stated that the EC position on amendments "simply cannot be reconciled with the manner in which the European Communities itself framed the measures at issue in the original dispute."

The EC then argued that the subsequent reviews were nevertheless "measures taken to comply" because they had "a sufficiently close nexus with, or are closely connected to, the DSB's recommendations and rulings, and with the measures at issue in the original proceeding." The Panel agreed that a "nexus-based analysis" was useful in determining which measures fell within the scope of an Article 21.5 proceeding. However, it was careful to stress that "the application of such a test will necessarily be case-specific and depend on the factual circumstances of each dispute."

Turning to the issue of administrative reviews, the Panel emphasized that "[i]t is only where a specific aspect of the "subsequent" determination is closely related to the violation found in the original dispute, and affects the Member's implementation of the DSB's recommendations and rulings in respect of that

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violation, that that specific aspect of the subsequent determination may, under certain circumstances, be subject to review in the context of a compliance proceeding." The Panel agreed with the EC that in the present case, there was indeed a "close nexus between the subsequent reviews and the measures at issue in the original dispute and the DSB's recommendations and rulings in respect thereof in terms of their nature and effects."

However, the Panel distinguished between administrative review determinations made before the date of the adoption of the DSB rulings, and those made after that date. The Panel considered, "as a matter of logic", that "a measure taken before the adoption of the DSB's recommendations and rulings could rarely, if ever, be found to be a measure taken "to comply" with such recommendations and rulings." Therefore, the Panel concluded that "it would normally follow that only those subsequent reviews that were decided after such adoption could be taken into consideration as part of a compliance panel's examination of the implementation of DSB recommendations and rulings."

Turning to the facts of this case, the Panel considered that the subsequent administrative reviews "potentially fall within the scope of this compliance proceeding." The Panel reached this "preliminary conclusion" on the basis of "the close nexus that exists in terms of their nature between the subsequent reviews and the measures at issue in the original measure" and "the fact that the subsequent reviews potentially affect or undermine the steps otherwise taken – or the steps that should have been taken – by the United States to comply with the recommendations and rulings of the DSB…." However, the Panel concluded that none of the subsequent reviews that were decided prior to the adoption of the DSB rulings fell within its terms of reference.

III. EC claims with respect to subsequent sunset reviews rejected

The EC claimed that the United States extended the measures challenged in the original dispute with the use of zeroing in sunset review proceedings concluded before and after the date of expiration of the compliance period.

The Panel rejected these claims on the basis that the sunset reviews had not resulted in determinations as of the time the compliance Panel was established. The Panel explained that "any failures by the United States in these sunset reviews had not yet materialized as at the date of the establishment of this Panel, and thus had no effect on the US implementation of the DSB's recommendations and rulings."

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IV. EC claims with respect to subsequent administrative reviews upheld: determinations after the end of the compliance period must be WTO-consistent

The United States argued that its "implementation obligation in an anti-dumping dispute is dependent on the date of importation ("entry") of products subject to the [anti-dumping] duty, and only extends to imports made after the expiry of the reasonable period of time." The Panel rejected this position, stating that "the US arguments disregard the fundamental fact that, in a retrospective duty assessment system, the duties applicable to specific imports of a product are not determined at the time of entry", but are determined later, when an assessment review is conducted. Therefore, according to the Panel, "the relevant date for implementation of DSB recommendations and rulings concerning anti-dumping duties by a Member operating a retrospective duty assessment system is the date of the final determination of liability for anti-dumping duties, i.e., the date of the final determination in the administrative review proceeding or the date on which the right to request such a review has lapsed."

Accordingly, the Panel concluded that "any definitive duty determination made after the end of the reasonable period of time must be consistent with the provisions of the Anti-Dumping Agreement and with the DSB's recommendations and rulings." The Panel stressed that "[t]o conclude otherwise would mean that a Member is effectively allowed, after the end of the reasonable period of time, to determine the amount of anti-dumping duties with respect to certain imports in contravention of the provisions of the Anti-Dumping Agreement. We find no support in either the Anti-Dumping Agreement or the DSU for such a proposition."

The Panel observed that "[o]ur finding has essentially the effect of requiring the United States to cease using zeroing in the calculation of margins of dumping in the measures that were at issue in the original dispute…where the margin of dumping, and the anti-dumping duty liability is determined after the end of the reasonable period of time." It added that the United States was obligated, after the expiration of the compliance period, to stop zeroing "not only with respect to imports entered after the end of the reasonable period of time, but also in the context of decisions involving the calculation of dumping margins made after the end of the reasonable period of time with respect to imports entered before that date." The Panel noted that the fact that the imports pre-dated the expiry of the reasonable period of time "does not excuse the United States acting inconsistently with the provisions of the Anti-Dumping Agreement after the end of the reasonable period of time." The Panel concluded that "the determinations in subsequent assessment reviews decided after the end of the reasonable period of time, and involving the same products from the same countries, must be consistent with those recommendations and rulings,

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regardless of whether the imports in question were made before or after the end of the reasonable period of time."

However, the Panel dismissed the additional EC argument that the U.S. implementation obligation also extended to the liquidation of the duties. It affirmed that "the date that is relevant for the US implementation of the DSB's recommendations and rulings is, as we have found above, that of the final determination of duty liability, and not that of the actual liquidation of the duties." In the Panel's view, "the US obligation to implement should not, once the determination of the amount of anti-dumping liability has been made, depend on when the actual collection of the duty takes place." Consequently, the Panel found that "US actions to collect anti-dumping duties after the end of the reasonable period of time pursuant to final determinations of anti-dumping liability before the end of the reasonable period of time do not constitute a failure to comply with the DSB's recommendations and rulings."

V. EC claims of violations involving U.S. implementing measures – mixed rulings

The Panel rejected an EC claim with respect to an alleged calculation error in the U.S. implementing measure. The Panel ruled that this "constitutes a new claim with respect to an unchanged aspect of the original measure, the determination in the original investigation, which the European Communities could have made, but did not make, in the original dispute [original emphasis]. For this reason, the EC was "precluded from raising this claim in this Article 21.5 proceeding."

Another EC claim against the U.S. implementing measure (related to the U.S. injury finding) was upheld. The EC challenged this aspect of the measure in the original dispute, and the original panel exercised judicial economy on it. The Panel found that the EC was not prevented from pursing this claim during the compliance proceedings, and that the United States acted inconsistently with its obligations under the Anti-Dumping Agreement when it failed to reconsider the injury determination. Finally, the Panel rejected an EC claim related to the establishment of the "all others" duty rate.

The decision of the Panel in United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"): Recourse to Article 21.5 of the DSU by the European Communities (DS294) was released on December 17, 2008.

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Multilateral Highlights

United States Requests Consultations with EU Over Ban on Poultry Imports

On January 16, 2009, United States Trade Representative (USTR) Susan Schwab announced that the United States requested World Trade Organization (WTO) dispute settlement consultations with the EU under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement") and the General Agreement on Tariffs and Trade 1994 (GATT 1994) regarding the EU's ban on the import and marketing of poultry meat and poultry meat products processed with pathogen reduction treatments (PRTs). According to USTR Schwab, the poultry treatments at issue "have been widely and safely used in the United States for many years [and] the EU's own scientists have repeatedly found these treatments not only to be safe, but effective."

According to USTR's description, US companies routinely process poultry with cleansing techniques known as PRTs. In 1997, the EU began prohibiting the use of PRTs to decontaminate poultry carcasses sold in the EU, and stopped shipments of US poultry that underwent PRTs. In 2002, the United States formally requested EU approval of four PRTs: chlorine dioxide, acidified sodium chloride, trisodium phosphate, and peroxyacids. These PRTs had already been approved for use in poultry processing by the US Food and Drug Administration (FDA) and the US Department of Agriculture (USDA), and several EU agencies had also concluded that the importation and consumption of poultry treated with these four specific PRTs posed no risk to human health. The EU, however, rejected the US request for approval in June 2008 and later again in December 2008.

According to the US request for consultations, the EU measures appear to be inconsistent with the EU's WTO obligations, including, but not limited to, the following: (i) SPS Agreement Articles 2.2, 5, and 8, and Annex C(1); (ii) GATT 1994 Articles X:1 and XI:1; (iii) Agriculture Agreement Article 4.2; and (iv) TBT Agreement Article 2. The United States and the EU will now have 60 days to consult on the matter (*i.e.*, until mid-March 2009). If WTO consultations fail to resolve the dispute within 60 days, the United States will be entitled to request that a WTO panel be established to determine whether the EU is acting consistently with its WTO obligations. A spokesman for European Trade Commissioner Catherine Ashton stated that the EU will engage in consultations with the United States "in good faith."

US poultry producers applauded USTR's decision to request consultations, and urged both sides to reach a quick resolution. Other industry groups, such as the National Association of Manufacturers (NAM), also lauded the consultation request because they opine that the poultry ban has prevented the United States

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and the EU from cooperating together effectively on other issues. NAM Senior Director for International Business Policy Shaun Donnelly stated that "the EU's ban has no scientific basis [and although] launching a WTO dispute settlement is never the NAM's preferred option to resolve market barriers, the EU has left the United States no choice."

USTR's request for consultations comes just after a January 15, 2009 announcement from USTR that it is modifying the list of EU products subject to additional duties in connection with a WTO dispute settlement ruling in the *EU – Beef Hormones* dispute (DS26). The modifications make additions to and deletions from the list of the products subject to additional duties, change the EU member States whose products are subject to the duties, and for one product, increase the level of the additional duties. In 1999, the WTO Dispute Settlement Body authorized the United States to impose increased tariffs on EU products with a total annual trade value of USD 116.8 million following a successful challenge by the United States of the EU's ban on beef from animals administered with certain growth-promoting hormones. In 2003, the EU announced that it had amended the ban so that it now complied with the WTO ruling; however, on October 16, 2008, the WTO Appellate Body confirmed that the United States has a continuing right to impose trade measures until the *EU – Beef Hormones* dispute is resolved. Observers opine that the amendments to the list of EU products subject to additional duties will only serve to exacerbate the US-EU relationship, and could spill over into other matters, such as the US-EU poultry ban dispute, consequently making them more difficult to resolve.

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