



March 2009

Japan External Trade Organization WTO and Regional Trade Agreements Monthly Report

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Summary of Reports

United States

USTR Presents 2009 Trade Agenda to Congress

On March 2, 2009, the Office of the United States Trade Representative (USTR) delivered to Congress the “2009 Trade Policy Agenda and 2008 Annual Report of the President of the United States on the Trade Agreements Program.” We review below the Administration’s 2009 trade agenda and those trade issues that it considers to be a priority.

House Leaders Unveil “American Clean Energy and Security Act of 2009” Establishing Cap-and-Trade Program, Rebates for Domestic Producers

On March 31, 2009, House Energy and Commerce Committee Chairman Henry Waxman (D-CA) and Subcommittee on Energy and Environment Chairman Edward Markey (D-MA) unveiled draft climate change legislation titled the “American Clean Energy and Security Act of 2009” (ACES). Among the bill’s contents are provisions that establish a cap-and-trade system for emissions allowances and provisions that provide domestic producers with rebates for their compliance with the ACES. We review below the draft bill, the timeline for Congressional consideration of the bill, and the general outlook for Congressional passage of the bill.

DoD, GSA, and NASA Publish Interim Rule Implementing “Buy American” Provisions from Stimulus Package

In a March 31, 2009 Federal Register (FR) notice, the Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) published interim rules implementing Buy American provisions that were a part of the American Recovery and Reinvestment Act of 2009 (P.L. 111-5), an economic stimulus package meant to jumpstart the United States economy (74 FR 14623-14633). The interim rules amend the Federal Acquisition Circular, the contracting rules controlling US government procurement, by incorporating the Buy America provisions as included in stimulus package. We review below the interim rule.

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United States Highlights

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

- Senate Approves Commerce Secretary Nominee Locke
- Senate Approves USTR Nominee Kirk
- Mexico Increases Tariffs on USD 2.4 Billion Worth of Trade in Retaliation to US Termination of Cross-Border Truck Program
- DOC Extends Steel Import Monitoring and Analysis System to 2013
- Omnibus Bill Contains Termination of US-MX Trucking Program, Ban on Poultry Imports from China, New Cuba Language
- LCIA Issues Remedy in US-Canada Softwood Lumber Dispute
- Obama Administration Aims to Cut Down Farm Subsidies

Free Trade Agreements

Free Trade Agreements Highlights

- Newly-Confirmed USTR Meets with Mozambique Officials Under TIFA
- House Members Call For Resumption of US-TPP FTA Talks, Closer Ties to Asia
- Ways and Means Trade Subcommittee Chairman Levin: Pending FTAs Face Obstacles
- USTR Holds Hearing on US-TPP FTA In Order to Hear Support, Opposition

Customs

Customs Highlights

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

- EU Imposes Provisional Anti-Dumping and Countervailing Duties on Imports of US Biodiesel

Petitions and Investigations

Petitions and Investigations Highlights

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

- 701 and 731 Petition on Polyethylene Retail Carrier Bags from Indonesia, Taiwan, and Vietnam
- 337 Complaint on Wireless Communications Devices
- 337 Complaint on Light Emitting Diode Chips

Multilateral

Multilateral Highlights

- Current Doha Agriculture Chair Falconer to Leave Geneva, Leaving Chair Position Open
- United States Blocks Mexico's Request for WTO Panel on US Dolphin-Safe Labeling Requirements for Tuna
- WTO DSB Agrees to Thai Request for Panel Over US "Zeroing" in AD Investigation of Polyethylene Retail Carrier Bags
- United States Criticizes Compensation Request by Brazil in Cotton Dispute
- United States Contests "Zeroing" Panel Decision in US-EU Conflict

Reports in Detail

United States

USTR Presents 2009 Trade Agenda to Congress

Summary

On March 2, 2009, the Office of the United States Trade Representative (USTR) delivered to Congress the “2009 Trade Policy Agenda and 2008 Annual Report of the President of the United States on the Trade Agreements Program.” We review below the Administration’s 2009 trade agenda and those trade issues that it considers to be a priority.

Analysis

On March 2, 2009, USTR delivered to Congress the “2009 Trade Policy Agenda and 2008 Annual Report of the President of the United States on the Trade Agreements Program.” The report discusses the Obama Administration’s trade priorities for 2009 and presents an overview of 2008 trade activities and USTR initiatives.¹

According to the report, President Obama’s 2009 trade agenda will focus on “improvements in the living standards of American families” with a special emphasis on entrepreneurship and market competition, the environment, and labor rights as they relate to US trade policy. The 2009 agenda also addresses the underlying goals and priorities for the Obama Administration’s trade policy within the context of the financial crisis, and the report states that the Administration “will use all available tools to address this economic crisis including achieving access to new markets for American businesses large and small.”

The priority trade items that the Obama Administration will focus on in 2009 include:

- **General Trade Policy.** According to the report, the Administration will promote adherence to the rules-based international trading system in order to promote economic stability. The Administration will also promote the importance of continuing education and development of new skills, the

¹ The full report is available at:

http://www.ustr.gov/assets/Document_Library/Reports_Publications/2009/2009_Trade_Policy_Agenda/asset_upload_file86_15410.pdf.

importance of new technologies, and the necessity of pursuing energy and environmental policies that ensure sustainability. The Administration will work with foreign trading partners in ensuring improved transparency and due process in their trade practices and policies, securing open markets and secure fair treatment for American services, protecting “American innovations and creativity by negotiating and enforcing strong and effective intellectual property protections,” and implementing policies that address heightened security threats.

- **Trade Promotion Authority.** The 2009 trade agenda includes mention of Trade Promotion Authority (TPA). According to the report, the Administration will only ask for renewed TPA² after engaging in extensive consultation with Congress to establish “the proper constraints on that authority and after we have assessed our priorities and made clear. . . what we intend to do with it.”
- **Free Trade Agreements.** With regards to US Free Trade Agreements (FTAs), both pending and prospective new ones, the Obama Administration notes that it is in the process of developing a plan of action to address the pending trade agreements in consultation with Congress. The Administration indicated its hope to move on the pending US-Panama FTA “relatively quickly.” With regards to the pending Colombia and Korea agreements, the Administration plans to establish benchmarks for progress on both agreements; the report did not contain specific details as to how the Administration intends to broach these issues. The agenda also discussed the US-Trans-Pacific Strategic Economic Partnership (TPP) FTA, and noted that the agreement is a “high standard, comprehensive regional trade agreement intended to serve as a pathway to broader Asia-Pacific trade integration.” The report notes that in addition, the FTA will strengthen US trade and investment ties to the Trans-Pacific region, and serve as a vehicle for achieving a Free Trade Area of the Asia-Pacific (FTAAP). On the North American Free Trade Agreement (NAFTA), the report states that the United States will work with Canada and Mexico to identify “ways in which NAFTA could be improved without having an adverse effect on trade.” On pending FTA negotiations with other trading partners, such as Thailand and Malaysia, the Administration notes that several challenges remain to be negotiated with these trading partners, although US officials will continue to monitor these countries closely to determine the best method of moving bilateral discussions forward. Regarding new FTAs, the Obama Administration will consider proposals for new bilateral and regional agreements “when they promise to deliver significant benefits consistent with [the Administration’s] national economic policies.”

² TPA expired in mid-2007, and to date, the Obama Administration has not requested a renewal.

- **World Trade Organization.** According to the report, the Administration continues to express its support for the United States' commitment to the World Trade Organization's (WTO) system of multilateral trading rules and dispute settlement. The Administration also supports a "strong, market-opening agreement for both goods and services" in the multilateral Doha Round negotiations, although the agenda notes that "it will be necessary to correct the imbalance in the current negotiations in which the value of what the United States would be expected to give is well-known and easily calculable, whereas the broad flexibilities available to others leaves unclear the value of new opportunities for our workers, farmers, ranchers, and businesses."
- **US Preference Programs.** The agenda states that US trade preference programs – including the Generalized System of Preferences (GSP) and the Andean Trade Promotion Act (ATPA) – help entrepreneurs in developing countries compete effectively in the world trading system. The Administration will work with the Congress and public stakeholders on the renewal³ and reform of these programs in 2009 so as "to concentrate benefits more effectively on the poorest countries and those that need the margin of preference to compete."

Outlook

Initial reaction to the 2009 trade agenda was mixed, although many observers stated that they were not surprised by the contents of USTR's report as delivered to Congress. Some observers and members of the US business community expressed their optimism with the Administration's push to move on the US-Panama FTA "relatively quickly" and the Administration's willingness to continue Doha negotiations and US-TPP FTA negotiations. Others adopted a more hard-lined view and noted that although the Administration indicated its political willingness to move forward on these initiatives, it included language in the agenda that tempered just how far such initiatives could travel. For example, on the Panama FTA, although the Administration would like to move on the agreement quickly, it will only do so after consultation with US legislators. On the pending Colombia and Korea agreements, the Administration is willing to create benchmarks for progress for both agreements, although it does not specify what such benchmarks are and when the Administration plans to establish them. On the Doha Round, although the Administration continues to support a final multilateral agreement, it believes that current negotiating texts are flawed and must be re-assessed. On TPA, although the Administration believes "fast-track" authority to be a useful tool, it will only ask for a renewal if and when it feels that TPA (and the trade agreements

³ Both the GSP and ATPA programs are scheduled to expire on December 31, 2009.

negotiated under it) will support the Administration's economic policy; the Administration does not specify if and when it plans to request TPA renewal.

Thus, although the agenda notes the Obama Administration's political willingness to progress on some trade initiatives, it also notes the limits and constraints that the Administration is willing to lay down. These limits and constraints have done nothing to assuage the fears of US trading partners and the US business community that the Obama Administration does not consider trade a priority in 2009 (and beyond), and will likely make observers more nervous as to the direction US trade policy will take this year. It should be noted the 2009 trade agenda was crafted without an Obama Administration USTR in place,⁴ and the language in the report may have been deliberately left open-ended enough so that USTR officials can later reconcile the 2009 trade agenda with the views of the incoming USTR. Some observers point out, however, that even if the incoming USTR displays more of a willingness to embrace and pursue free trade initiatives, he will be limited by whatever course of action President Obama decides to pursue. If such a course of action ultimately reflects the one included in the 2009 trade agenda, then US trade will likely remain on the "back-burner" for the remainder of 2009, if not beyond.

⁴ President Obama's pick for USTR – former Dallas Mayor Ron Kirk – is scheduled for a Senate Finance Committee hearing on March 9, 2009, with Senate confirmation to be held shortly after that.

House Leaders Unveil “American Clean Energy and Security Act of 2009” Establishing Cap-and-Trade Program, Rebates for Domestic Producers

Summary

On March 31, 2009, House Energy and Commerce Committee Chairman Henry Waxman (D-CA) and Subcommittee on Energy and Environment Chairman Edward Markey (D-MA) unveiled draft climate change legislation titled the “American Clean Energy and Security Act of 2009” (ACES). Among the bill’s contents are provisions that establish a cap-and-trade system for emissions allowances and provisions that provide domestic producers with rebates for their compliance with the ACES. We review below the draft bill, the timeline for Congressional consideration of the bill, and the general outlook for Congressional passage of the bill.

The full text of the ACES can be found at:

http://energycommerce.house.gov/Press_111/20090331/acesa_discussiondraft.pdf.

Analysis

I. Background

On March 31, 2009, House Energy and Commerce Committee Chairman Henry Waxman (D-CA) and Subcommittee on Energy and Environment Chairman Edward Markey (D-MA) unveiled draft climate change legislation titled the “American Clean Energy and Security Act of 2009” (ACES). The draft legislation has four titles:

- a “clean energy” title that promotes renewable sources of energy and carbon capture and sequestration technologies, low-carbon transportation fuels, clean electric vehicles, and the smart grid and electricity transmission;
- an “energy efficiency” title that increases energy efficiency across all sectors of the economy, including buildings, appliances, transportation, and industry;
- a “global warming” title that places limits on the emissions of heat-trapping pollutants; and
- a “transitioning” title that “protects US consumers and industry and promotes green jobs during the transition to a clean energy economy.”

We review below some of the trade-related provisions included in these titles.

II. Title III: Emission Cuts and Allowances, Cap-and-Trade System

Title III of the bill proposes cuts in emissions from 2005 levels, beginning with a three percent cut in emissions from 2005 levels by 2012, a 20 percent cut in emissions by 2020, a 42 percent cut in emissions by 2030, and an 83 percent cut in emissions by 2050. These emissions cuts would be accomplished through the implementation of a cap-and-trade system that would require covered industries to hold allowances for each ton of greenhouse gases they emit, although entities that emit less than 25,000 tons per year of CO₂ equivalent are not covered by this program. Allowances are tradable (*i.e.*, “the lawful holder of an emission allowance may, without restriction, sell, exchange, transfer, hold for compliance or request that the Administrator retire the emission allowance”) although the draft bill does not address how the government will allocate these emissions allowances to covered industries. According to legislators, the division of allowances “will be addressed through discussions among Committee members” in the following weeks. The program reduces the number of available allowances issued each year. Covered entities can increase their emissions above their allowances if they can obtain “offsetting” reductions at lower cost from other sources, although under the bill, the total quantity of offsets allowed in any year cannot exceed two billion tons, split evenly between domestic and international offsets. The bill also directs the Environmental Protection Agency (EPA) to create a “strategic reserve” of about 2.5 billion allowances by setting aside a small number of allowances authorized to be issued each year; allowances from the reserve will be made available through an auction when allowance prices rise to “unexpectedly high levels.” Under the bill, the Federal Energy Regulatory Commission is charged with regulating the cash market in emission allowances and offsets.

III. Title IV: Rebates to Domestic Producers

Title IV of the bill (on “preserving domestic competitiveness”) proposes the distribution of “rebates . . . to the owners and operators of [US] entities in eligible industrial sectors and subsectors” that that use large amounts of energy, and produce commodities that are traded globally. According to legislators, the rebates are meant to compensate for additional costs that US industry might face in order to comply with the ACES. Rebates will equal “a percentage multiplied by the sum of the entity’s direct compliance factor [the total output of the covered entity multiplied by 85 percent of the average greenhouse gas emissions per unit of output] and the entity’s indirect carbon factor [the product obtained by multiplying the output by the emissions intensity factor and the electricity efficiency factor].” Under the bill, if the President, determines that other countries have not taken actions that have “substantially mitigated” the risk that domestic companies in a particular sector or subsector will reduce existing, or not initiate new, production in the United States due to the costs of complying with the provisions of the ACES, then the

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Administration can reduce or eliminate the emissions reductions as proposed in the bill. If the President finds that the rebate provisions do not sufficiently correct competitive imbalances, the President is directed to establish an "International Reserve Allowance Program" under which foreign manufacturers and importers would be required to pay for and hold special allowances to "cover" the carbon contained in their products as imported into the United States. Foreign countries that the United Nations has identified as among the least developed of developing countries or foreign countries that the President has determined to be responsible for less than 0.5 percent of total global greenhouse gas emissions would be exempt from this program. The bill states that the Administration will establish the program "in a manner that addresses, consistent with international agreements to which the United States is a party, the competitive imbalance in the costs of producing or manufacturing covered goods in affected sectors or subsectors."

IV. Other Provisions

Other provisions of the draft bill would:

- create a renewable energy mandate that would require electricity suppliers to obtain 25 percent of their power from wind, solar, geothermal, or other renewable sources by 2025;
- mandate EPA to achieve additional reductions in global warming pollution by entering into agreements to prevent international deforestation;
- authorize the Secretary of Education to award grants to universities and colleges to develop curriculum and training programs that prepare students for careers in renewable energy, energy efficiency, and other forms of climate change mitigation;
- provide US assistance to encourage widespread deployment of clean technologies to developing countries;
- establish an interagency council to ensure an integrated federal response to the effects of global warming;
- create an International Climate Change Adaptation Program to provide US assistance to the most vulnerable developing countries for adaptation to climate change;
- create a carbon capture-and-storage demonstration program;
- create incentives for commercial-scale deployment of the technologies to sequester carbon dioxide emitted at coal-fired power plants;

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- create new low-carbon standard for transportation fuels;
- improve appliance and building efficiency standards; and
- harmonize possible conflicts between federal fuel economy standards and the greenhouse gas emissions standards for vehicles promulgated by California and under consideration by EPA.

V. Timeframe for Consideration

Chairman Waxman is scheduled to meet with Committee Democrats this week to discuss the climate change aspects of the bill. After the April 6-17 Congressional recess, Committee Members will meet with other Congressional panels, including the House Ways and Means Committee, to discuss the bill. A House Energy and Commerce Committee hearing is scheduled for the week of April 20. The Subcommittee on Energy and Environment is expected to mark-up the bill the week of April 27, and the full Energy and Commerce Committee will begin marking up the bill on May 11 with the goal of sending a final version of the bill to the House floor for a vote by Memorial Day. Congressional sources note that the climate change aspects of the ACES bill appear to match President Obama's call for deep cuts in US greenhouse gas emissions. According to some reports, members of the Obama Administration, including Secretary of Agriculture Steven Chu, have already vocally supported the draft bill's provisions.

Outlook

The sheer length of the draft ACES bill and its numerous provisions as well as the ambitious timetable that Chairman Waxman has established for Congressional consideration of the bill indicate that House leaders are making good on their promise to consider climate change legislation by the end of 2009. In 2008, Speaker of the House Nancy Pelosi (D-CA) and other House leaders promised to tackle climate change in the 111th Congress, and the ACES bill appears to be the Democrats' main piece of climate legislation (for the time being) that they intend to push forward. The bill, however, will likely spur heated debate between Democrats and Republicans, especially on how the government will allocate emissions allowances to covered industries. Congressional sources opine that the government could sell the allowances at an auction, distribute some of these allowances for free to covered industries to offset the costs of compliance, or combine the two options. Any of these proposals, however, will stir up debate, which likely explains why Chairman Waxman is meeting with Democrats on other Congressional committees over the next several days in an effort to secure as much Democratic support for the bill as possible. Several reports note that support from Democrats for the ACES will be necessary because it is widely viewed that not many Republicans will vote on the bill. Even then, moderate Democrats, Democrats on Congressional committees who support an "emissions tax" in place of a cap-and-trade

program, and Democrats who represent manufacturing states or states that have coal-intensive industries, will likely express some hesitation with the bill, especially if it directly affects their constituents. Regardless of the debate surrounding the bill, Chairman Waxman will likely attempt to stick to the timetable he has created in an effort to send the completed bill for consideration to the House floor by Memorial Day. Following House consideration, the Senate will review the bill, although at this stage, it is unclear how Senators will react to the provisions of the ACES.

DoD, GSA, and NASA Publish Interim Rule Implementing “Buy American” Provisions from Stimulus Package

Summary

In a March 31, 2009 Federal Register (FR) notice, the Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) published interim rules implementing Buy American provisions that were a part of the American Recovery and Reinvestment Act of 2009 (P.L. 111-5), an economic stimulus package meant to jumpstart the United States economy (74 FR 14623-14633). The interim rules amend the Federal Acquisition Circular, the contracting rules controlling US government procurement, by incorporating the Buy America provisions as included in stimulus package. We review below the interim rule.

Please note that this interim rule **does not** cover procurements funded with Federal financial assistance such as Federal grants. The FR notice states that additional guidance will be provided by the Office of Management and Budget with respect to procurements funded with Federal financial assistance.

We attach the FR notice to this report for your reference.

Analysis

I. Background

On February 17, 2009, President Obama signed the American Recovery and Reinvestment Act of 2009 (P.L. 111-5), which includes Buy American provisions that prohibit the use of funds appropriated or otherwise made available by the Act for any project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States. The law requires that this prohibition be applied in a manner consistent with US obligations under international agreements, and it provides for waiver under three circumstances:

- Iron, steel, or manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality;
- Inclusion of iron, steel, or manufactured goods produced in the United States will increase the cost of the contract by more than 25 percent; or
- Applying the domestic preference would be inconsistent with the public interest.

II. Interim Rule

According to the FR notice, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (“Councils”) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement the American Recovery and Reinvestment Act of 2009 (P.L. 111–5) with respect to the Buy American provision as included Section 1605 in Division A.

As noted, this interim rule does not cover procurements funded with Federal financial assistance such as Federal grants. Additional guidance will be provided by the Office of Management and Budget (OMB) with respect to procurements funded with Federal financial assistance. It is unclear at this stage when OMB will publish this guidance.

A. General Rule

The interim rule establishes that none of the funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009 may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless:

- the public building or public work is located in the United States; and
- all of the iron, steel, and other manufactured goods used as construction material in the project are produced or manufactured in the United States.

Production in the United States of the iron or steel used as construction material requires that all manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives. These requirements do not apply to steel or iron used as components or subcomponents of other manufactured construction material.

The rule also states that there is no requirement with regard to the origin of components or subcomponents in other manufactured construction material, as long as the manufacture of the construction material occurs in the United States.

B. Exemptions

The interim rule exempts from the Buy American provision certain countries labeled as “Recovery Act designated countries.” All 38 countries that have signed the World Trade Organization (WTO)

Government Procurement Agreement (GPA) are exempted from the Buy American provision.⁵ In addition, countries that have implemented Free Trade Agreements (FTAs) with the United States are exempted from the provision.⁶ The interim rule also lists least developed countries that are exempt from the Buy American provision.⁷ Specifically, the rule states that the Buy America restrictions do not apply to Recovery Act Designated country construction material.⁸ The rule also defines “free trade agreement country construction material” as construction material wholly the growth, product, or manufacture, or is substantially transformed by a US FTA partner. Similar definitions apply for GPA construction material and construction material from the least developed countries as included in the Act. Each of these terms (WTO GPA country, FTA country and least developed country construction material) is further defined in the provision by using the substantial transformation test to determine the country of origin.

The rule, however, states that under trade agreement acquisitions, “for construction contracts with an estimated acquisition value of USD 7,443,000 or more, “offers of products determined to be eligible products “shall receive equal consideration with domestic offers.” Please note that USD 7,443,000 is the minimum value for construction contracts under the WTO GPA.

The interim rule also has a separate definition for “Bahrainian, Mexican, or Omani construction material” because the minimum values for construction contracts under the North American Free Trade Agreement (NAFTA)⁹, the US-Oman FTA and the US-Bahrain FTA are higher than the WTO GPA threshold.

The rule states that the contracting officer of a project may use materials from a foreign country that has not been designated a Recovery Act country if the US Government determines that:

⁵ Including Aruba, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak

Republic, Slovenia, Spain, Sweden, Switzerland, or United Kingdom.

⁶ Including Australia, Bahrain, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Mexico, Morocco, Nicaragua, Oman, Peru, or Singapore.

⁷ Including Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Tanzania, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia.

⁸ Defined as a construction material that is a WTO GPA country construction material, an FTA country construction material, or a least developed country construction material.

⁹ Because Canada is a WTO GPA country, as well as a NAFTA country, the lower GPA threshold applies to Canadian products as opposed to the higher NAFTA threshold.

- the cost of domestic construction material would be unreasonable;
- the cost of domestic iron, steel, or other manufactured goods used as construction material is unreasonable when the cumulative cost of such material will increase the overall cost of the contract by more than 25 percent;
- the cost of unmanufactured construction material is unreasonable when the cost of such material exceeds the cost of foreign material by more than six percent;
- the construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality; or
- the application of the Buy American provisions to a particular construction material would be inconsistent with the public interest.

Any Contractor request to use foreign construction material from countries not designated as Recovery Act countries must submit a request to the Government that includes: a description of the foreign and domestic construction materials; unit of measure; quantity; cost; time of delivery or availability; location of the construction project; name and address of the proposed supplier; and a detailed justification of the reason for use of foreign construction materials.

III. Comments

According to the FR notice, the Secretary of Defense, the Administrator of General Services, and the Administrator of the National Aeronautics and Space Administration decided that “urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment.” The notice states that the implementation of the interim rule without prior comment was necessary because the American Recovery and Reinvestment Act of 2009 became effective upon enactment, and contracts using funds appropriated by the American Recovery and Reinvestment Act of 2009 will soon be ready to award. The Administration, however, encourages interested parties to submit comments that the Councils will then take into consideration. Comments are due to the FAR Secretariat on or before **June 1, 2009** to be considered in the formulation of a final rule, and can be submitted in a variety of methods, as detailed in the FR notice.

Outlook

Reaction to the publication of the interim rule was not as surprising as when Congress initially debated the inclusion of the Buy American provision in the stimulus package. At that early stage, US trading partners immediately criticized the provision as protectionist. The interim rule, however, seems to

respond to these trading partners' concerns by exempting from the provisions WTO GPA, US FTA, and certain least-developed countries, an apparent nod from the Obama Administration that it understands its partners' criticisms. The interim rule came on the eve of the April 2 G-20 summit in London where world economies discussed the current financial state and what countries have done in response to the downturn in the global economy. G-20 participants have continued their message that they will not impose trade barriers in the face of the economic crisis, and President Obama could use the interim rule on the Buy American provision as proof that the United States is on board with this message. It should be noted, however, that this interim rule does not address procurements funded with Federal financial assistance such as Federal grants, and it remains to be seen how the OMB will address such procurement and how trading partners will react to that announcement.

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United States Highlights

Senate Approves Commerce Secretary Nominee Locke

On March 24, 2009, the Senate approved President Obama's pick for Secretary of Commerce, former Washington state Governor Gary Locke, by voice vote without any formal debate. Locke's Senate confirmation came after the March 19, 2009 approval by the Senate Committee on Commerce, Science and Transportation. The full Committee held a confirmation hearing for Locke on March 18, 2009, where Senators raised several issues, including Locke's stance on global trade, Department of Commerce programs, fisheries management, Internet deployment, and the 2010 Census. Locke is considered a free-trader, and during his hearing he stated that as Secretary of Commerce, he would "work to open markets for American-made goods." He noted, however, that he would also adopt a tough stance on enforcement of US trade laws and that he "believes in fair trade . . . [and] will not only help negotiate complex free trade agreements, but I will help enforce them."

Senate Approves USTR Nominee Kirk

On March 18, 2009, the Senate approved former Dallas Mayor Ron Kirk to be United States Trade Representative (USTR) by a vote of 92-5. The five Senators that opposed Kirk's nomination were Sens. Robert Byrd (D-WV), Jim Bunning (R-KY), Kit Bond (R-MO), Johnny Isakson (R-GA), and Bernie Sanders (I-VT). Sens. Dick Durbin (D-IL) and Edward Kennedy (D-MA) did not vote. The Senate approval came after the March 12th Senate Finance Committee's voice vote approval of Kirk's nomination.

Kirk's assumption of his duties as USTR comes at a difficult time for US trade policy. Several developments are likely to top USTR's agenda in the short term, such as provisions included in the recently-passed omnibus spending bill that terminate the US-Mexico cross-border motor carrier demonstration program and continue a ban on poultry imported from China, among other things. Mexico and China have both retaliated against the bill – Mexico by raising tariffs on certain US products and China by threatening to request a World Trade Organization (WTO) dispute settlement panel to rule on the poultry ban – and the Obama Administration has responded by tasking USTR and other government agencies with addressing both these bilateral irritants. In addition, Kirk and his team will have to contend with the pending US Free Trade Agreements with Panama, Colombia, and Korea; the stalled WTO Doha Round of multilateral trade negotiations and the upcoming April G-20 meeting in London; and the December 2009 expiry of several US preference programs, among other things.

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In other USTR news, President Obama has nominated Senate Finance Committee Chief International Counsel Demetrios Marantis as Deputy USTR. As Chief International Trade Counsel (Majority), Marantis advises Senate Finance Committee Chairman Max Baucus (D-MT) and members and staff of the Finance Committee and Democratic Caucus on trade and economic issues. He joined the Committee in February 2005 after serving as Issues Director for Sen. John Edwards (D-MA) on the Kerry-Edwards 2004 Presidential campaign. Prior to that, Marantis served as Chief Legal Advisor for the US-Vietnam Trade Council, and between 1998 and 2002, Marantis served as Associate General Counsel in USTR. Marantis also worked for Akin, Gump, Strauss, Hauer & Feld. He holds a J.D. from Harvard Law School and B.A. in Public and International Affairs from Princeton University. Marantis' nomination requires Senate confirmation, and it is unclear at this stage when the Senate will consider his nomination. According to Congressional sources, if confirmed, Marantis could take over the duties left by former Deputy USTR Karan Bhatia, who left the Office of the USTR under the Bush Administration in mid-2007. These duties would include, among other things (i) leading trade efforts with China; (ii) strengthening trade relations with the Asia-Pacific Economic Cooperation (APEC) forum; and (iii) supervising USTR negotiations on pharmaceuticals, labor, and environment.

Mexico Increases Tariffs on USD 2.4 Billion Worth of Trade in Retaliation to US Termination of Cross-Border Truck Program

On March 18, 2009, the Mexican Ministry of Economy (SE) announced retaliatory import tariffs on 89 US agricultural and industrial products. These retaliatory duties are in response to the United States' failure to comply with its commitments under the North America Free Trade Agreement (NAFTA) on cross-border trucking services. The higher tariffs will take effect on March 19, 2009.

The products targeted by these retaliatory duties include: Christmas trees, onions, pears, grapes, cherries, fruit mixtures, potatoes, almonds, juice concentrates, certain red wines, mineral water, strawberries, peas, soy sauce, shampoo, dog and cat food, toilet paper, lottery and gaming tickets, and pencils, among other things. The retaliatory tariffs generally range from ten to 20 percent. According to Mexican officials, the government chose the products based on several factors, including whether they would adversely affect Mexican supply chains, whether they would impact prices for staple agricultural products, and whether they came from a US states whose exports to Mexico represent an "important percentage" with respect to how much these states export to the world. The covered products represent approximately USD 2.4 billion in US exports.

Mexico's decision to adopt retaliatory measures against the United States was taken after President Barack Obama signed into law an omnibus spending bill on March 11, 2009 that, among other things,

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prohibits the use of any funds appropriated under the legislation to establish, implement, continue, promote, or in any way permit a cross-border program that allowed Mexican trucks to operate beyond a narrow “commercial zone” on the US-Mexico border.

On February 23, 2007, then Mexican Minister of Communications and Transportation (SCT) Luis Tellez and then US Secretary of Transportation Mary Peters launched the Cross Border Motor Carrier Demonstration Program (Demonstration Program), which entered into force on September 2007. The Demonstration Program allowed up to 100 motor carriers from each country to operate in the territory of the other country beyond the commercial zones on the US-Mexico border. Under the NAFTA, the United States should have granted Mexican motor carriers’ access to its border states by December 18, 1995 and full access to its territory by 2000. On November 22, 1998, Mexico initiated dispute settlement proceedings under Chapter XX of the NAFTA to challenge the United States alleged failure to abide by these commitments. In 2001, the panel found the United States has not complied with its NAFTA obligations. The panel authorized Mexico to retaliate against the United States.

The Mexican Government sees these retaliatory duties as a way to pressure the US authorities to comply with the United States’ commitments under the NAFTA. According to US sources, President Obama is currently working with the Office of the United States Trade Representative (USTR), the Department of Transportation, the Department of State, Members of Congress, and the Mexican government to propose legislation creating a new trucking project.

As of March 19, 2009, the following US products will face a Most Favored Nation (MFN) tariff when imported into Mexico (previously, these products benefited from duty-free treatment under the NAFTA):

US Products Affected by Retaliatory Measure

HTS	Description	MFN Tariff %	MX Imports from US (in USD 1000)
0604.91.02	Arboles de navidad.	20	20,229
0703.10.01	Cebollas frescas o refrigeradas.	10	37,782
0705.11.01	Lechugas repolladas.	10	22,558
0802.12.01	Almendras, sin cáscara.	20	26,635
0804.10.01	Dátiles Frescos.	20	313
0804.10.99	Dátiles secos.	20	222
0806.10.01	Uvas frescas.	45	69,910
0808.20.01	Peras frescas.	20	79,768
0809.10.01	Chabacanos, frescos.	20	3,911
0809.20.01	Cerezas, frescas.	20	3,957

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HTS	Description	MFN Tariff %	MX Imports from US (in USD 1000)
0810.10.01	Fresas frescas.	20	30,960
0813.50.01	Mezclas de frutas secas.	20	5,975
1902.19.99	Pastas alimenticias sin cocer.	10	2,115
2004.10.01	Papas.	20	83,976
2005.40.01	Chícharos sin congelar.	20	374
2008.11.01	Cacahuates sin cáscara.	20	5,519
2008.11.99	Cacahuates preparados.	20	2,152
2008.19.01	Almendras preparadas.	20	2,938
2008.19.99	Frutas y partes comestibles de plantas.	20	60,705
2008.60.01	Cerezas preparadas.	20	6,649
2009.80.01	Jugo de cualquier otra fruta.	20	8,134
2009.90.01	Mezclas de jugo de hortaliza.	20	205
2009.90.99	Las demás mezclas de jugos.	20	19,148
2103.10.01	Salsa de soya.	20	5,529
2103.90.99	Preparaciones para salsas, condimentos y sazonadores.	20	112,937
2104.10.01	Preparaciones para sopas.	10	178,183
2106.90.06	Concentrados de jugos de una sola fruta, legumbre u hortaliza.	15	202
2106.90.07	Mezclas de jugos con vitaminas.	15	1,908
2106.90.08	Preparaciones con un contenido de sólidos lácteos superior al 10%, en peso.	15	17,182
2201.10.01	Agua mineral.	20	4,004
2204.10.99	Los demás vinos espumosos.	20	1,377
2204.21.02	Vino tinto, rosado, clarete o blanco	20	6,522
2206.00.99	Bebidas fermentadas y no bebidas no alcohólicas.	20	13,022
2306.30.01	Tortas y residuos sólidos de semillas de girasol.	15	991
2306.49.99	Tortas y residuos sólidos de vegetales.	15	196
2309.10.01	Alimentos para perros o gatos.	10	83,220
3213.10.01	Colores para pintura artística.	15	373
3304.30.01	Preparaciones para manicuras y pedicuros.	15	9,183
3304.99.99	Preparaciones para maquillaje	15	92,354

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HTS	Description	MFN Tariff %	MX Imports from US (in USD 1000)
	y cuidado de la piel.		
3305.10.01	Champúes.	15	10,715
3305.30.01	Lacas para el cabello.	15	2,058
3305.90.99	Otras preparaciones capilares.	15	44,588
3306.10.01	Dentífricos.	15	4,526
3306.20.01	Hilo dental de nailon.	15	51
3306.20.99	Hilo dental de otros materiales.	15	1,113
3306.90.99	Otras preparaciones para higiene bucal o dental.	15	12,309
3307.10.01	Preparaciones para afeitar o para antes o después del afeitado.	15	4,419
3307.20.01	Desodorantes.	15	31,264
3924.10.01	Vajillas y demás artículos de plástico.	20	63,706
3924.90.99	Otros artículos de higiene o de tocador, de plástico.	20	31,611
3926.40.01	Estatuillas y otros adornos.	20	2,773
4816.20.01	Papel autocopia.	10	58,503
4818.10.01	Papel higiénico.	10	7,561
4820.20.01	Cuadernos.	10	1,272
4901.99.99	Libros, folletos e impresos.	20	53,123
4911.10.99	Impresos publicitarios.	20	74,313
4911.99.02	Boletos o billetes de rifas.	20	5,689
4911.99.03	Impresos con claros para escribir.	20	7,016
4911.99.05	Tarjetas plásticas para identificación y para crédito, sin cinta magnética.	20	2,874
4911.99.99	Los demás impresos.	20	96,318
5511.10.01	Hilados de fibras sintéticas discontinuas.	15	961
5511.30.01	Hilados de fibras artificiales discontinuas.	15	778
5704.90.99	Alfombras y revestimientos para el suelo de fieltro	20	14,419
5705.00.99	Alfombras y revestimientos.	20	27,887
7013.49.03	Artículos para servicio de mesa.	20	6,459
7113.19.99	Artículos de joyería y sus partes.	20	195,844
8302.41.01	Herrajes para cortinas	20	1,225

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HTS	Description	MFN Tariff %	MX Imports from US (in USD 1000)
	venecianas.		
8302.41.02	Cortineros.	20	698
8302.41.04	Cerraduras sin llave, picaportes o pasadores, de metales comunes.	20	5,089
8302.41.99	Guarniciones, herrajes.	20	57,684
8304.00.99	Clasificadores.	20	133
8418.10.99	Combinaciones de refrigerador y congelador.	15	3,557
8418.21.01	Refrigeradores domésticos, de compresión.	20	10,706
8419.81.01	Cafeteras.	20	5,957
8421.39.99	Aparatos para filtrar o depurar gases.	10	124,773
8422.11.01	Máquinas para lavar vajilla.	15	4,894
8450.12.01	Máquinas para lavar ropa con secadora incorporada, de uso doméstico.	20	1,802
8450.12.99	Otras máquinas para lavar ropa, con secadora centrifuga incorporada.	20	74
8516.79.99	Aparatos electrotérmicos.	20	2,619
8517.11.01	Teléfonos inalámbricos combinado con micrófono.	20	1,242
8548.10.01	Desechos de pilas, baterías o acumuladores.	20	170,217
9004.10.01	Gafas de sol.	15	1,938
9403.20.99	Muebles de metal.	15	96,371
9504.30.99	Juegos activados con monedas, billetes de banco o fichas.	15	39,938
9608.10.01	Bolígrafos de metal común.	20	240
9608.10.99	Los demás bolígrafos.	20	4,474
9608.20.01	Rotuladores y marcadores.	20	14,997
9608.99.99	Demás estiletes o punzones para clisés de mimeógrafo.	20	29,345
9609.10.01	Lápices.	20	6,575
	Total	-	2,368,014

Source: ProMexico.

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DOC Extends Steel Import Monitoring and Analysis System to 2013

In a March 18, 2009 Federal Register (FR) notice, the Department of Commerce (DOC) announced the extension of the Steel Import Monitoring and Analysis (SIMA) System to March 21, 2013 (74 FR 11474). The SIMA system was scheduled to expire on March 21, 2009. According to DOC, the purpose of the SIMA system is to provide steel producers, steel consumers, importers, and the general public with accurate and timely information on anticipated imports of certain steel products. Import licenses, obtained through the Internet-based SIMA licensing system (<http://ia.ita.doc.gov/steel/license/>), are required on US imports of basic steel mill products. DOC's Chief Counsel for Regulation has stated that the extension will not have a significant economic impact on a substantial number of companies because companies are already familiar with the licensing of certain steel products under the current system, and because "the Web-based nature of this simple license application should not be a significant obstacle to any firm in completing this requirement."

Omnibus Bill Contains Termination of US-MX Trucking Program, Ban on Poultry Imports from China, New Cuba Language

On March 11, 2009, President Obama signed into law a USD 410 billion dollar omnibus spending bill (H.R. 1105) that would keep the federal government operating until fiscal year 2010 begins, on October 1, 2009. The legislation includes several trade-related provisions that, among other things, prohibit the use of any funds appropriated under the legislation to continue the US-Mexico cross-border motor carrier demonstration program, and prohibit the use of any funds appropriated under the legislation to implement a rule allowing poultry products to be imported into the United States from the China. Passage of H.R. 1105 has led to sharp criticism from several US trading partners. The House of Representatives approved H.R. 1105 on February 25, 2009 by a vote of 245 to 278, and the Senate approved the legislation by voice vote on March 10, 2009.

I. US-Mexico Cross-Border Trucking Program

H.R. 1105 (Section 136) prohibits the use of any funds appropriated under the legislation to continue the US-Mexico cross-border motor carrier demonstration program. On February 23, 2007, former Mexican Minister of Communications and Transportation (SCT) Luis Tellez and former US Secretary of Transportation Mary Peters launched the Cross Border Motor Carrier Demonstration Program ("Demonstration Program"), which entered into force on September 2007. The Program allowed up to 100 motor carriers from each country to operate in the territory of the other country beyond the commercial zones on the US-Mexico border. The United States and Mexico established the program as

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a result of years of talks to resolve a longstanding trucking dispute between the two countries. Under the North America Free Trade Agreement (NAFTA), the United States should have granted Mexican motor carriers' access to its border states by December 18, 1995 and full access to its territory by 2000. However, according to the Mexican government, as of this date the United States has failed to comply with these NAFTA obligations.

On November 22, 1998, Mexico initiated dispute settlement proceedings under Chapter XX of the NAFTA to challenge US barriers to Mexican motor carriers into US territory. In 2001, the panel found the United States at fault in failing to comply with its NAFTA obligations by denying the entry of Mexican trucks into US territory. The panel authorized Mexico to retaliate against the United States. To this date, Mexican authorities have refrained from retaliation. However, the *de facto* termination of the cross-border trucking program following approval of H.R. 1105, places the United States in a continued alleged violation of its commitments under the NAFTA.

Reaction from Mexico to the termination of the program was negative. In retaliation, Mexico will increase duties on USD 2.4 billion of US exports of commodities. The tariffs cover 90 agricultural and industrial products from 40 states according to the Mexican Embassy. Some US legislators also criticized the omnibus bill. Sen. Christopher Bond (R-MO) stated that "this was the worst idea Congress has ever come up with." Meanwhile, Congressional sources note that some legislators are meeting with officials at the State Department and the Office of the United States Trade Representative in order to try to devise a new program for Mexican truckers that would address Congressional concerns while meeting NAFTA requirements.

II. Ban on Imports of Poultry from China

H.R. 1105 (Section 727) also continues the US ban on Chinese poultry and states that none of the funds made available in the legislation may be used to establish or implement a rule allowing poultry products to be imported into the United States from China. At a March 12, 2009 World Trade Organization (WTO) Agriculture Committee meeting, China criticized the Obama Administration for signing the omnibus appropriations bill that continues the current US ban against imports of poultry from China. Chinese officials opined that "any trainee with a preliminary knowledge of the WTO disciplines will tell you that this section violates the basic rules of the WTO including the MFN. Chinese officials also noted that the US action "flies in the face of a Group-of-20 directive to nations issued last year to refrain from establishing new protectionist actions during the current economic crisis." China argues that its poultry industry meets international sanitation and safety standards and that its producers currently export poultry to leading

markets, including the EU and Japan. According to officials, China has raised the issue bilaterally with the United States on several occasions, including at the last WTO trade policy review of the United States.

III. US Sales of Food, Medicine to Cuba

H.R. 1105 (Section 620) contains provisions overturning Bush Administration restrictions on US sales of food and medicines to Cuba. The legislation bars any funding for the Department of Treasury to carry out regulations implemented during the Bush Administration that restrict the sale of agricultural goods and medicines to Cuba. H.R. 1105 also instructs the Department of Treasury to promulgate rules allowing travel to Cuba in order to sell agricultural and medical products.

Although the language in H.R. 1105 is meant to ease sales of food and medicine to Cuba, Congressional sources note that Treasury has been hesitant to implement the provision. In response, a bipartisan group of 15 senators led by Senate Finance Committee Chairman Max Baucus (D-MT) sent a March 16, 2009 letter to Treasury Secretary Geithner noting their concern with his resistance to easing agricultural sales to Cuba.

IV. Other Provisions

Other trade-related provisions in H.R. 1105 include increased funding for the Department of Agriculture's Foreign Agricultural Service and the Department of Commerce's Bureau of Industry and Security (BIS) and USD 9.6 million to implement "country-of-origin" labeling requirements for meat and other agricultural products.

Trade observers opine that US trading partners may (and do) view some of the measures included in the omnibus appropriations package as evidence that protectionist sentiment is growing in the United States. And while the Cuba provisions appear to open US relations with Cuba, some Congressional observers note that the inclusion of such language in the final bill may have been spurred more by politics as opposed to free-trade ideology. Mexico and China's reactions to the respective provisions in the bill that touch upon their relations with the United States were unsurprising, and both countries will likely continue to push the Obama Administration to address their concerns, both through bilateral and multilateral (*i.e.*, WTO) channels. Passage and implementation of H.R. 1105 will also attract attention from other US trading partners who will likely look to the omnibus bill (and how the Administration will implement it) and closely scrutinize future legislative bills that may affect US trade relations.

LCIA Issues Remedy in US-Canada Softwood Lumber Dispute

On February 26, 2009, Acting United States Trade Representative (USTR) Peter Allegeier announced that a London Court of International Arbitration (LCIA) tribunal decided on a remedy in arbitration in which Canada was found to have breached the US-Canada Softwood Lumber Agreement (SLA) by failing to calculate quotas properly in the first half of 2007. The LCIA tribunal determined that Canada must provide a compensatory remedy for violating the SLA's terms within 30 days. The LCIA decided that the appropriate adjustment to compensate for the breach is for Canada to collect an additional 10 percent ad valorem export charge on softwood lumber shipments from Eastern Canadian provinces until USD 54.8 million has been collected. Canada must now either implement the compensatory adjustments determined by the tribunal within 30 days or "cure the breach" in some other way, under the terms of the SLA. If Canada does not take any action within 30 days, the United States is authorized by the SLA to impose the additional charges itself in the form and amount suggested by the SLA panel. Acting USTR Allegeier noted that the United States is pleased with the tribunal's decision and that the decision "confirms the view of the United States that the SLA is an enforceable agreement."

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

The US-Canada SLA entered into force on October 12, 2006. Under the SLA, the United States and Canada committed not to take any action that circumvents the SLA, including actions that reduce or offset the Agreement's export measures, such as providing new subsidies to producers or exporters of Canadian softwood lumber products. The SLA also includes a surge adjustment mechanism. Under the SLA, Canada agreed to impose export measures on Canadian exports of softwood lumber products to the United States. When the prevailing monthly price of lumber, determined per the Agreement, is above USD 355 per thousand board feet (MBF), Canadian lumber exports are unrestricted. When prices are lower than USD 355 MBF, each Canadian exporting region has chosen to be subject to either an export tax with a soft volume cap or a lower export tax with a hard volume cap or "volume restraint." The measures become more stringent as the market price of lumber declines. Regions with a soft volume cap such as British Columbia and Alberta are subject to a "surge" mechanism. If a region's exports of

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softwood lumber products to the United States exceed the soft volume cap, known as the “trigger volume,” by more than 1 percent in a particular month, Canada must retroactively collect an additional export tax, equal to 50 percent of the primary export tax, on all softwood lumber products from that region that entered the United States during the month in question. According to USTR, the SLA’s adjustment mechanism ensures that the export volume caps that apply to Canadian softwood shipped to the United States are calculated properly during periods of rapidly changing market conditions. The United States contended, however, that Canada violated the SLA’s terms by waiting until July 2007 to implement the adjustment mechanism, as opposed to applying the mechanism on January 1, 2007. The United States also argued that Canada violated the SLA by not applying the adjustment mechanism to the western provinces of British Columbia and Alberta.

Obama Administration Aims to Cut Down Farm Subsidies

On February 26, 2009, President Obama proposed a budget for FY 2010 which includes suggested phase-outs of direct payments to US agricultural producers and changes to the US cotton support program. Specifically, President Obama proposed a phase-out over three years of direct payments to agricultural producers with annual sales of more than USD 500,000 and restrictions of commodity program payments to USD 250,000. President Obama also proposed the elimination of the requirement for the federal government to pay the storage costs of cotton under loan to the US Department of Agriculture. Other agricultural provisions of the proposed budget for FY 2010 would reduce crop insurance premium subsidies and reform the Department of Agriculture’s Market Access Program (MAP) by reducing by 20 percent a year funding for overseas brand promotion and placing greater emphasis on promoting generic American products overseas. According to government sources, the proposed elimination of payments to agricultural producers with sales revenue exceeding USD 500,000 a year would save the government about USD 9.8 billion over 10 years, and eliminating subsidies for cotton storage would save USD 570 million over the same period.

Congressional reaction to the proposed cuts was negative. Chairman of the Senate Finance Committee Max Baucus (D-MT) noted his concern with the proposed cuts in agriculture programs. Senate Agriculture Committee Ranking Member Saxby Chambliss (R-GA) stated that “efforts to cut direct payments and make other sweeping changes to current farm policy will only inject additional uncertainty into the farm economy and will be met with my strong opposition.” House Agriculture Committee Ranking Member Frank Lucas (R-OK) opined that that Agriculture Secretary Tom Vilsack and President Obama “don’t understand the problems facing our agriculture community.”

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Although Congressional reaction was negative, trade observers opine that the proposals to cut US farm support are a victory for “pro-traders” and could reinvigorate WTO Doha Round Agriculture negotiations. The multilateral Agriculture talks have been stalled on several contentious issues, including developed countries’ farm support (including that of the United States). Several analysts opine that President Obama’s proposals could send positive signal to WTO Members that the United States might be willing to introduce new agriculture offers and concessions. Others are quick to caution, however, that the Administration’s “2009 Trade Policy Agenda,” released on March 2, 2009, clearly states that the Obama Administration, although supportive of the Doha Round, feels that “it will be necessary to correct the imbalance in the current negotiations in which the value of what the United States would be expected to give is well-known and easily calculable, whereas the broad flexibilities available to others leaves unclear the value of new opportunities for our workers, farmers, ranchers, and businesses.” Such a statement may dampen any enthusiasm that the Administration may provide broad new concessions in an effort to move the Doha Agriculture talks forward.

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Free Trade Agreements

Free Trade Agreements Highlights

Newly-Confirmed USTR Meets with Mozambique Officials Under TIFA

On March 24, 2009, newly-confirmed United States Trade Representative (USTR) Ron Kirk met with Mozambican Commerce and Industry Minister Antonio Fernando under the US-Mozambique Trade and Investment Framework Agreement (TIFA). The TIFA Council meeting, involving over a dozen US government agencies, included discussions on US-Mozambican trade, African Growth and Opportunity Act (AGOA) implementation, the World Trade Organization's (WTO) Doha negotiations, trade capacity-building activities, and ways to improve the environment for trade. USTR Kirk stated that "the Obama administration is committed to a strong partnership with African countries on trade [and] expanded trade can make an important contribution to boosting growth and reducing poverty in Africa." He also noted that USTR will continue to use the TIFA process and its trade capacity building assistance to support Mozambique's efforts to improve its business environment and use trade to advance economic development.

House Members Call For Resumption of US-TPP FTA Talks, Closer Ties to Asia

In a March 10, 2009 letter to President Obama, a bipartisan group of 47 House Members, led by Co-Chair of the New Democrat Coalition Ellen Tauscher (D-CA) and House Ways and Means Trade Subcommittee Ranking Member Kevin Brady (R-TX), urged the Administration to continue negotiating the US-Trans-Pacific Strategic Economic Partnership (TPP) Free Trade Agreement (FTA). In the letter, the House Members expressed hope that US officials can begin the first round of comprehensive negotiations with TPP partners this Spring. 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, but the Office of the United States Trade Representative (USTR) requested a postponement of this first round. 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 USTR nominee Ron Kirk and other senior USTR officials, and because the Administration is still filling posts at the Office of the USTR.

The March 10 letter notes that the Asia-Pacific region accounts for 60 percent of global economic output and almost half of all global trade, and that “engagement in the TPP process will strengthen US ties with key allies, increase market access for US industries, and spur domestic growth.” The House Members also opined that the US-TPP FTA would provide strong protections for labor, the environment, investment, and intellectual property.

Separately, on March 10, 2009, Reps. Brady, Rick Larsen (D-WA), Joseph Crowley (D-NY), and Wally Herger (R-CA) re-launched the House Caucus for Asia-Pacific Economic Cooperation (APEC) for the 111th Congress. APEC members will meet in the United States in 2011, and the House legislators that form the APEC Caucus expressed their hope that ties between the United States and the Asia-Pacific region will be stronger by that point and that US-TPP FTA negotiations will be completed by that date. The Caucus members’ statements on the US-TPP FTA and US-Asia relations reflected the March 9 statements from Senate Finance Committee Chairman Max Baucus (D-MT) who, speaking at the confirmation hearing for USTR nominee Kirk, opined that negotiating the US-TPP FTA would make the 2011 APEC meeting “meaningful” and could lay the foundation for a larger Free Trade Area of the Asia-Pacific (FTAAP).

The House letter and the re-launch of the House APEC Caucus come several weeks after a bipartisan group of 54 House Members, led by a co-founder of the House Trade Working Group Rep. Mike Michaud (D-ME), sent a letter to President Obama calling for reforms to US trade policy. The February 26, 2009 letter noted that a “unique opportunity now exists” for the legislative and executive branches to work to reform US trade policies “to ensure that Americans enjoy the benefits of expanded trade,” and urged the Administration to take several actions including engaging China to ensure compliance with US and multilateral trade obligations, halting negotiations on a US-China Bilateral Investment Treaty (BIT), reviewing and renegotiating the North American Free Trade Agreement (NAFTA) and other FTAs, and creating a new World Trade Organization (WTO) Doha negotiating agenda, among other recommendations.

The two letters – the “trade reform” February 26 letter and the “pro-TPP” March 10 letter – indicate that trade will certainly be a contentious issue for the 111th Congress. Both letters have been released at a time when the Obama Administration seems to still be crafting its trade policy, and although it appears that US trade will not be a front-and-center issue for the Administration, it will continue to stir up debate among legislators. The latest calls for a resumption of the US-TPP FTA talks – and a strengthening of US-Asia relations – will likely continue through the Spring, especially if key legislators such as Sen. Baucus and Rep. Brady vocalize support for such initiatives. Whether the Obama Administration heeds

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these pro-trade calls is still in question, and US officials are unlikely to directly act on these legislators' recommendations until the Senate has confirmed Kirk and until several other top seats at USTR have been filled.

Ways and Means Trade Subcommittee Chairman Levin: Pending FTAs Face Obstacles

House Ways and Means Trade Subcommittee Chairman Sander Levin (D-MI) has stated that the pending US Free Trade Agreements (FTAs) with Panama, Colombia and Korea face obstacles that must be addressed before the Congress can consider the agreements. In remarks made on March 10, 2009, Chairman Levin opined that the US-Panama FTA is a good agreement because "Panama is a country of small size but an important [US] ally." He noted, however, that Panama must first improve its labor standards and address tax-haven abuses and Panamanian banking laws. Chairman Levin noted that he may schedule a fact-finding trip to Panama shortly.

Regarding the US-Colombia FTA, Chairman Levin stated that he would also like to visit Colombia in order to witness the Colombian government's efforts in addressing Congressional Democrats' concerns about labor violence in that country; he added that until those concerns are adequately addressed, the Colombia agreement would face continued opposition by legislators. On the US-Korea FTA, Chairman Levin stated that he continues to oppose the agreement because it does not address the market access problems that US automakers and industrial goods producers face in Korea. Chairman Levin stated that Democrats "made it clear to the Office of the United States Trade Representative [USTR] before they started the negotiations that they had to effectively address the issue of one-way trade with Korea . . . they failed to do it [and] unless that's remedied, the Korea FTA cannot proceed."

Chairman Levin also discussed the general direction of US trade policy and urged the Obama Administration to focus its trade efforts on enforcing international trade rules. According to Congressional sources, several House Democrats, including Chairman Levin, would like to act quickly on trade enforcement legislation but will closely observe the Obama Administration to see which actions it is willing to take to address legislators' calls for increased enforcement and monitoring. Chairman Levin referenced the January 15, 2009 bill that he and Chairman of the House Ways and Means Committee Charles Rangel (D-NY) introduced. "The Trade Enforcement Act of 2009" (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. Chairman Levin opined that that the provisions in H.R. 496 will likely change as the House focuses more attention on the bill. Congressional observers opine that there could be further movement on H.R. 496 and other trade

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enforcement bills after March 31, 2009, the date that USTR is expected to release its annual National Trade Estimate (NTE) report of foreign trade barriers.

Chairman Levin noted that the state of the domestic economy is the 111th Congress' main focus at this time, but he noted that even in the face of the economy, he expects the Trade Subcommittee to increase its oversight of existing FTAs and turn its attention to other matters related to trade, such as food and product import safety and labor and environmental provisions in trade agreements.

Chairman Levin's remarks indicate that House Democrats are aligning their trade policy closely to that of the Obama Administration, and increasing their monitoring and enforcement efforts. His remarks also show that he and other legislators would like to move as quickly as possible on a trade enforcement bill (or several). The Ways and Means Trade Subcommittee, headed by Rep. Levin, will certainly be a strong "enforcement" voice and will likely continue to urge Administration officials to address Democrats' trade concerns. Similar to the last Congress and under the Bush Administration, however, is the "wait-and-see" attitude that some legislators will adopt with regards to their trade bills. Under President Bush, several (mostly Democratic) legislators held off from introducing further trade enforcement bills because they wanted to first see how the Bush Administration would unilaterally address their concerns. When the Bush Administration increased the number of World Trade Organization (WTO) disputes with China, for example, several Democrats laid to rest their anti-China trade enforcement bills because they felt that the Administration was addressing their concerns in an adequate fashion. Legislators seem to be following the same methodology under the Obama Administration, and it seems likely that Democrats can expect the Administration to respond to their concerns directly. USTR nominee Ron Kirk, for example, has already promised that under his leadership, the Office of the USTR will shift its mandate to increased enforcement and monitoring of current and future trade agreements.

USTR Holds Hearing on US-TPP FTA In Order to Hear Support, Opposition

On March 4, 2009, the inter-agency Trade Policy Staff Committee (TPSC) at the Office of the United States Trade Representative (USTR) held a public hearing regarding the proposed US-Trans-Pacific Partnership Free Trade Agreement (FTA) in order to obtain public comments from interested parties to assist USTR in amplifying and clarifying negotiating objectives for the proposed agreement and to provide advice on how specific goods and services and other matters should be treated under the proposed agreement.

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At the March 4 hearing, Assistant USTR for Southeast Asia and the Pacific Barbara Weisel noted that the United States has delayed the first round of FTA negotiations because there is no USTR in place. She added, however, that USTR decided to move forward with the public hearing on the US-TPP FTA despite the postponement in order to obtain greater information on how regional agreements such as the US-TPP FTA could fit into the US trade agenda. According to Weisel, the US-TPP FTA can be used as a vehicle to create a larger free trade area that would include members of the Asia Pacific Economic Cooperation (APEC). Regarding countries negotiating the US-TPP FTA, Weisel stated that USTR perceived countries being added to the agreement in tranches. To date, eight countries have announced their participation in the trade negotiations: New Zealand, Singapore, Chile, Brunei, the United States, Vietnam, Australia, and Peru.

Participants to the hearing that supported the proposed FTA included the US Chamber of Commerce, the Coalition of Service Industries (CSI), the National Foreign Trade Council (NFTC), and the US-ASEAN Business Council, among others. Senior Vice President of International Affairs at the Chamber of Commerce Myron Brilliant stated that the United States' involvement in the US-TPP negotiations would indicate to trading partners that the United States continues to promote free trade. He encouraged USTR to proceed with the negotiations in a regional rather than bilateral fashion and opined that such an approach would make addressing problematic issues easier to handle with a group of countries rather than in a bilateral fashion. CSI noted that the FTA negotiations provide an opportunity to achieve greater market access for services "by maintaining and building on the high standards of previous US free trade agreements" and that the agreement "will catalyze interest on the part of other countries, as demonstrated by the intentions of Australia, Peru and Vietnam to join the negotiations [consequently providing] the core for building a larger trade bloc in the Asia Pacific region." The US-ASEAN Business Council and NFTC also urged USTR to participate in the US-TPP negotiations in a multilateral fashion, although the NFTC noted that intellectual property rights (IPR), agriculture, pharmaceuticals, and government procurement are sensitive issues that should be addressed thoroughly in the negotiations. The International Intellectual Property Alliance (IIPA) also supported the initiation of FTA negotiations and opined that "enhancement of copyright standards and enforcement consistent with those agreed to by current FTA partners, Australia, Singapore, Chile and Peru, would greatly benefit the creative and business communities in the United States and in the new FTA partners." The Pharmaceutical Research and Manufacturers of America (PhRMA) welcomed the launch of the US-TPP FTA negotiations "provided that the agreement is commercially significant and that it builds upon the high level of commitments in existing FTAs" because through the FTA, the United States can reaffirm US leadership in innovation in

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the Asia-Pacific region and “ensure that US industries, farmers, and workers can gain significantly by ensuring that foreign markets are as open to US goods and services as ours is to theirs.”

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), meanwhile, expressed its opposition to the United States joining the negotiations. AFL-CIO Global Economic Policy Specialist Jeff Vogt opined that US trade negotiating efforts should be focused on improving and reforming multilateral trade rules, rather than on “a partial and unfocused regional agreement,” and he stated that USTR has not adequately justified the proposed FTA and how it would contribute to substantial economic growth and job creation in the United States.

As noted, the Obama Administration has requested a postponement in the US-TPP FTA negotiations. The move comes several weeks before US trading partners were scheduled to meet with US officials for the first negotiating round. 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 but the lack of a USTR in place (and several high-ranking USTR officials) made the March negotiations impossible. USTR has not clarified when it will pick up the negotiations again, although it is unlikely that the FTA negotiations will be restarted in the short-run, given the confirmation process USTR nominee Ron Kirk and other USTR officials must undergo, and the “catch-up” period they will likely require once they have assumed office. In addition, it is unclear how the US-TPP FTA fits into the Obama Administration’s March 2 “2009 Trade Policy Agenda” and the Administration will likely require some more time to explore the proposed agreement and how it might affect US trade policy. Consequently, FTA negotiations could pick up again in mid- to late Spring (*i.e.*, several months from now). Once the Senate confirms Kirk and other USTR officials, a clearer picture of US trade policy – and how the US-TPP FTA fits into it – should emerge.

Customs

Customs Highlights

EU Imposes Provisional Anti-Dumping and Countervailing Duties on Imports of US Biodiesel

On March 12, 2009, the European Commission published in the Official Journal of the EU Regulations No. 193/2009 and 194/2009, imposing provisional anti-dumping (AD) and countervailing (CV) duties on imports of biodiesel from the United States. The measures range between €23.60 and €208.20 per ton (0.8 and 28.9%) for the AD and €211.20 and €237.00 per ton (29.1 and 41.1) for the CV duties, and will apply to imports of pure biodiesel or blends containing by weight more than 20 percent of biodiesel that fall within the following CN codes:

- ex 1516 20 98;
- ex 1518 00 91;
- ex 1518 00 99;
- ex 2710 19 41;
- ex 3824 90 91;
- ex 3824 90 97.

The duties will enter into force the day after the publication for a period of four months, by which time the Commission will recommend to EU governments whether or not to impose definitive duties for a period of 5 years. Interested parties can apply for an oral hearing by the Commission within 16 days of the date of entry into force of this Regulation. The parties concerned may comment on the application of the duties within one month of the date of their entry into force.

The duties are the result of a complaint by the European Biodiesel Board (EBB) – which represents more than 25% of the EU biodiesel production – that unfair support in the US was causing “substantial adverse effects” (*Please see W&C June 2008 EU Report*). In a statement that was issued after the publication, EU Spokesperson for Trade Lutz Guellner noted that a thorough investigation had now confirmed evidence that US producers exported biodiesel to the EU at dumped prices and received Federal and State subsidies that caused material injury to the EU biodiesel industry. Guellner also underlined that the measures are “not about protectionism” but “about fighting unfair trade”.

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Sources indicate that the EU's action could spark a new transatlantic trade row and the first real fight over the issue of biofuels, as US officials have previously noted their disagreement with the allegations while the National Biodiesel Board (NBB) – which represents the US biodiesel industry – has described the EU's action as “a protectionist ploy”. The NBB has also indicated that the US biodiesel industry may lodge a counter-complaint against existing EU trade barriers and urge the US government to launch a legal case at the World Trade Organization (WTO). US producers argue in particular that the EU's measures are an attempt to hide its inability to deal with real challenges such as high feedstock prices, changing government policies, and “poor business practices.”

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Multilateral

Multilateral Highlights

Current Doha Agriculture Chair Falconer to Leave Geneva, Leaving Chair Position Open

Current Chair of the World Trade Organization (WTO) Doha Agriculture Negotiations New Zealand envoy Ambassador Crawford Falconer will leave Geneva soon, and some observers have opined that his departure will serve as a “severe blow to the stalled Agriculture negotiations. Falconer has served as Agriculture Negotiations Chair since 2005 when he became New Zealand’s Ambassador to the WTO. According to EU Ambassador Eckart Gluth, Falconer’s departure will “leave a big gap which will be difficult to fulfill for his successor.” According to some reports, New Zealand’s new WTO Ambassador David Walker and Uruguayan Ambassador Guillermo Valles Gaimas are in the running for the post.

United States Blocks Mexico’s Request for WTO Panel on US Dolphin-Safe Labeling Requirements for Tuna

On March 20, 2009, the United States blocked Mexico’s request to the World Trade Organization’s (WTO) Dispute Settlement Body (DSB) to establish a dispute panel to rule on whether the US “dolphin-safe” labeling requirements for tuna unfairly block Mexican tuna exports to the US market. The US maneuver follows unsuccessful efforts by the two countries to resolve their differences talks held on December 17, 2008. In accordance with the provisions of the WTO Dispute Settlement Mechanism (DSM), the US Government can block Mexico’s request the first time it is presented, but any subsequent request from the Mexican government to establish a dispute settlement panel at a future DSB meeting would automatically be accepted. According to several reports, Mexico will likely request the establishment of a panel again at the April 20 DSB meeting.

At issue is the 1990 US Dolphin Protection Consumer Information Act, which sets out labeling standards for tuna products that are exported from or offered for sale in the United States. The act bans the use of the “dolphin-safe” label for tuna harvested with purse-seine nets because of dolphins trapped in the nets. The adoption of the act led to an immediate drop in US imports of tuna from Mexico, where the fishing fleet uses purse-seine nets. In 1997, the legislation was amended by the International Dolphin Conservation Program Act, which allowed the importation into the United States of tuna caught using purse-seine nets if no observed mortality occurred. The modifications to this legislation took place after Mexico convinced US authorities that new fishing methods adopted by Mexican fishing fleets have

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substantially reduced the number of dolphins killed each year with purse-seine nets. However, in 2007, a US court ruled that “dolphin-safe” labeling requirements must be interpreted as meaning that the tuna was not harvested with purse-seine nets, and that no dolphins were killed or seriously injured when the tuna were caught.

Mexico charges that US “dolphin-safe” labeling measures block its access to the US market and discriminate against Mexican tuna in favor of US tuna producers and other tuna competitors in violation of the national treatment and most favored nation (MFN) obligations under the General Agreement on Tariffs and Trade (GATT 1994). In addition, Mexico considers that US “dolphin-safe” labeling regulations have the effect of creating unnecessary obstacles to trade in violation of the WTO Agreement on Technical Barriers to Trade (“TBT Agreement”). The TBT Agreement provides that measures should not be more trade restrictive than necessary to fulfill a legitimate objective and not create unnecessary obstacles to trade.

WTO DSB Agrees to Thai Request for Panel Over US “Zeroing” in AD Investigation of Polyethylene Retail Carrier Bags

On March 20, 2009, Thailand requested the establishment of a World Trade Organization (WTO) dispute panel to challenge the US Department of Commerce’s (DOC) use of its “zeroing” methodology in a dumping investigation involving imports of polyethylene retail carrier (PRC) bags from Thailand. The WTO Dispute Settlement Body (DSB) agreed to form the panel. According to US officials, the United States did not block the Thai request for the panel because they had reached a prior procedural agreement with Thailand allowing the panel to be established on first request.

In November 2008, Thailand sent a notification to the WTO requesting consultations with the United States over DOC’s use of its “zeroing” methodology in the dumping investigation involving imports of PRC bags from Thailand. In its consultation request, Thailand alleged that the DOC used zeroing in determining a final antidumping order on PRC bags from Thailand in June 2004, and that the use of zeroing violates the WTO Agreement on Anti-Dumping Measures. In its most recent panel request, Thailand noted that consultations between the two countries held on January 28, 2009 failed to resolve the dispute.

Zeroing refers to the practice whereby an investigating authority discounts the so-called “negative dumping margins” to zero. Where the export price of a product is lower than the price in the exporting country, the difference between the two is a positive dumping margin. However, when the export price of the product is higher than the price in the exporting country and zeroing is used, investigating authorities

do not give any credit for negative dumping margins. The investigating authority does not average positive and negative dumping margins together – instead, it considers all negative dumping margins to be zero. This has the effect of inflating the overall average dumping margin, and can lead to the imposition or maintenance of antidumping duties which may not otherwise apply.

The Thai panel request is the latest in a series of disputes the United States has had with trading partners over its use of zeroing. To date, there have been more than a dozen disputes regarding the DOC's zeroing methodology. Observers note, however, that the WTO Appellate Body has consistently found that DOC's zeroing in original investigations, periodic reviews, sunset reviews and new shipper reviews does not comply with US WTO obligations.

United States Criticizes Compensation Request by Brazil in Cotton Dispute

On March 2, 2009, in a statement delivered before a WTO arbitration panel, the United States criticized Brazil's claims for compensation in the US-Brazil cotton dispute, and labeled the claims "exaggerated" and "overstated." The arbitration panel was established to hear Brazil's claims for the right to impose approximately USD 2.5 billion in annual trade retaliation on US imports in response to the WTO Appellate Body's decision that US cotton subsidies continue to violate the obligations of the United States under the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and the Agreement on Agriculture. The report of the Appellate Body in *United States – Subsidies on Upland Cotton: Recourse to Article 21.5 of the DSU by Brazil* was released on June 2, 2008.

In its statement to the arbitration panel, the United States criticized Brazil for "overreaching" in its request for the right to impose sanctions in the form of increased tariffs on US imports, restricted US access to the Brazilian services market and suspended intellectual property rights (IPR) protection for US rights holders. Brazil has also asked for a USD 350 million right of retaliation against payments made under the US "Step 2" cotton program before the program was withdrawn. According to the United States, the maximum amount of retaliation should be no more than USD 22.8 million per year, an amount that US officials argue represents the maximum amount of significant price suppression caused by US marketing loan payments and countercyclical payments for cotton. US officials have also argued that Brazil's claims for the right to retaliate against payments under the "Step 2" program are unjustified. The United States urged the WTO arbitration panel to only provide Brazil with the right to retaliate in the form of increased tariffs on US imports. The WTO arbitration panel will issue its ruling on the matter in several months, and its decision will be final; parties to the dispute will be unable to appeal the final decision.

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United States Contests “Zeroing” Panel Decision in US-EU Conflict

In a communication circulated to WTO Members on February 26, 2009, the United States announced that it would challenge four of the Dispute Settlement Body (DSB) compliance panel's findings that went against the United States in *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). The compliance panel released its decision on December 17, 2008 that the United States failed to implement the 2006 rulings of the WTO DSB on the use of “zeroing” in administrative reviews of anti-dumping orders. Specifically, the compliance panel found that the Department of Commerce failed to fully implement the original ruling by using the “zeroing” methodology in several administrative reviews carried out after the deadline for the United States to comply with the original panel ruling.

In its most recent communication, the United States stated that it would appeal the compliance panel's finding that the Department of Commerce violated WTO rules in its administrative reviews and assessment instructions of antidumping duty orders on hot-rolled steel from the Netherlands and stainless steel wire rod from Sweden because the duties were calculated with zeroing. According to the communication, the United States argued that the two reviews were not within the compliance panel's terms of reference, and that the assessment reviews were of entries that were made prior to the end of the implementation deadline.

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