WHITE & CASE

May 2009

Japan External Trade Organization

WTO and Regional Trade Agreements Monthly Report

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

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On April 30, 2009, the Office of the United States Trade Representative (USTR) released its "Special 301" annual report on the adequacy and effectiveness of US trading partners' intellectual property rights (IPR) protections. The report identifies governments that "need to take stronger actions to combat piracy and counterfeiting." We review here the main aspects of the "Special 301" annual report.

House Leaders Introduce "American Clean Energy and Security Act of 2009"

On May 15, 2009, House Democratic leaders unveiled an amended version of the American Clean Energy and Security Act of 2009 (ACES; H.R. 2454). Members of the House Energy and Commerce Committee had proposed the draft ACES on March 31, 2009. Since that time, Committee Democrats have been negotiating different provisions within the bill and held a Committee mark-up on May 18, 2009. On May 21, 2009, the Energy and Commerce Committee approved the ACES. We review below developments surrounding the ACES.

United States Highlights

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

- House Working Group Unveils "US – China Competitiveness Agenda"
- Members of Congress Introduce Currency Reform Legislation
- United States and EU Sign Memorandum of Understanding on Beef
- Senate Confirms Marantis as Deputy USTR
- House Energy and Commerce Democrats Announce "Cash for Clunkers" Agreement
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Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

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Free Trade Agreements Highlights

- Senate Finance Committee Explores US-Panama FTA, as Legislators Raise Tax Concerns, AFL-CIO Declares Opposition to Agreement
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Decision: The WTO Appellate Body has affirmed that the United States failed to implement the 2006 rulings of the WTO Dispute Settlement Body (DSB) on the use of "zeroing" in administrative reviews of anti-dumping orders.

Multilateral Highlights

- WTO Schedules Next Ministerial Gathering; Meeting Not to Focus on Doha
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- WTO Secretariat Reports Increase in New Anti-Dumping Investigations, Final Measures; FANs Call for Decreased Use of Such Measures
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Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

Reports in Detail

United States

USTR Releases 2009 "Special 301" Report on IPR Enforcement: Several New Countries Added to Priority Watch List

Summary

On April 30, 2009, the Office of the United States Trade Representative (USTR) released its "Special 301" annual report on the adequacy and effectiveness of US trading partners' intellectual property rights (IPR) protections. The report identifies governments that "need to take stronger actions to combat piracy and counterfeiting." We review here the main aspects of the "Special 301" annual report.

The 2009 "Special 301" annual report can be found at:

http://www.ustr.gov/Document_Library/Press_Releases/2009/April/USTR_Releases_2009_Special_301_Report.html.

Analysis

On April 30, 2009, USTR released its "Special 301" annual report on the adequacy and effectiveness of US trading partners' IPR protections. The report identifies governments that "need to take stronger actions to combat piracy and counterfeiting." China and Russia's IPR enforcement and monitoring feature prominently throughout the report, as they did in the 2007 and 2008 "Special 301" reports, although this year, USTR has added several more countries to its Priority Watch List, including Canada and Indonesia.

I. Background

Pursuant to Section 182 of the Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988 and the Uruguay Round Agreements Act (enacted in 1994) ("Special 301"), USTR must annually identify those countries that deny adequate and effective IPR protections. According to the report, "countries that have the most onerous or egregious acts, policies, or practices and whose acts, policies, or practices have the greatest adverse impact on the relevant US products" are designated as "Priority Foreign Countries." Priority Foreign Countries are potentially subject to an investigation under the Section 301 provisions of the Trade Act of 1974, under which the United States

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

may impose trade sanctions against foreign countries that maintain acts, policies and practices that violate, or deny US rights or benefits under, trade agreements, or are unjustifiable, unreasonable or discriminatory and burden or restrict US commerce.

As part of its Special 301 duties, USTR has created a "Priority Watch List" and "Watch List." Placement of a trading partner on either list indicates that particular IPR-related problems – including protection, enforcement and market access – exist in that country. Countries that have been placed on the Priority Watch List are "the focus of increased bilateral attention concerning the problem areas." Additionally, under Section 306, USTR monitors a country's compliance with bilateral intellectual property agreements that are the basis for resolving an investigation under Section 301. USTR may apply sanctions if a country fails to "satisfactorily" implement an agreement.

II. 2009 "Special 301" Report

The 2009 Special 301 annual review examines the adequacy and effectiveness of IPR protection by US trading partners. USTR listed 46 countries on the 2009 report's Priority Watch List, Watch List or Section 306 Monitoring list, the exact same number of countries included in the 2008 Special 301 report:

- There are twelve countries on 2009's Priority Watch List (an increase from the nine countries included in the 2008 report): China, Russia, Algeria, Argentina, Canada, Chile, India, Indonesia, Israel, Pakistan, Thailand, and Venezuela;
- USTR included 33 trading partners on its Watch List[1] (a decrease from the 36 included in last year's report); and
- Paraguay will continue to be subject to Section 306 monitoring under a bilateral Memorandum of Understanding (MoU) that establishes objectives and actions for addressing IPR concerns in that country.

A. Positive Progress

USTR notes that there has been some progress by US trading partners to address IPR concerns. In the 2009 report, USTR removed **Korea** and **Taiwan** from the Watch List for progress made to their IPR monitoring and enforcement regimes. USTR also cited progress by **China** (for its coordinated crackdown

[1] The 33 Watch List countries include: Belarus, Bolivia, Brazil, Brunei, Colombia, Costa Rica, Czech Republic, Dominican Republic, Ecuador, Egypt, Finland, Greece, Guatemala, Hungary, Italy, Jamaica, Kuwait, Lebanon, Malaysia, Mexico, Norway, Peru, Philippines, Poland, Romania, Saudi Arabia, Spain, Tajikistan, Turkey, Turkmenistan, Ukraine, Uzbekistan, and Vietnam.

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

on the unauthorized retransmission of sporting events as well as online activities related to the Olympic Games); **Russia** (for progress in combating software piracy and banning DVD/CD kiosks in the public transport system and pedestrian spaces); **Chile** (for its accession to the Patent Cooperation Treaty); **Egypt** (for issuing the first jail sentences for IPR, in several criminal cases against defendants for software piracy); **India** (for passing the Drugs and Cosmetics (Amendment) Act 2008); **Indonesia** (for resolving a longstanding trademark dispute in 2008 after years of litigation); **Lebanon** (for making progress on the long-standing problem of cable signal piracy); **Saudi Arabia** (for establishing a website for its Violations Review Committee that provides information about copyright prosecutions and court cases and increases transparency for rights holders); **Sweden** (for convicting four defendants in connection with the PirateBay website); and **Vietnam** (for meeting its obligations under the Trade–Related Aspects of Intellectual Property Rights (TRIPs) Agreement).

B. Priority Watch List Country: China

USTR states that China will remain on the Priority Watch List in 2009. USTR recognizes the Chinese government's enhanced efforts to protecting IPR but notes that "the shared goal of significantly reducing IPR infringement throughout China has not yet been achieved." According to USTR, China's IPR enforcement regime remains largely ineffective and non-deterrent. The report also notes that there have been reports that officials, apparently motivated by the financial crisis and the need to maintain jobs, are urging more lenient enforcement of IPR laws.

The 2009 Special 301 report notes particular concern with the rise of Internet piracy in China, and recommends "strong action to curb trademark counterfeiting and copyright piracy." Other policy recommendations from USTR for China include increasing criminal prosecutions and other enforcement actions against Internet-based piracy and counterfeiting operations through a coordinated, national effort backed by appropriate resources and effectively exercising political will to deal with an IPR problem. The report also notes that retail and wholesale trademark counterfeiting in China remains problematic, and in spite of significant attention and resources from brand owners, administrative supervision, civil lawsuits, agreements with landlords, and attention from China's central Government and foreign governments, counterfeiting remains pervasive in many retail and wholesale markets. Consequently, USTR urges appropriate authorities to take the actions necessary to ensure proper enforcement of retail and wholesale IPR.

According to the report, "inadequate IPR enforcement is a key factor contributing to [China's IPR] shortcomings, and there are a number of legal obstacles to effective enforcement that result in limited deterrence provided by Chinese law." These impediments include high value and volume thresholds that

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

must be met before criminal prosecution of IPR infringement is possible and difficulties in initiating or transferring cases to the criminal authorities that do meet China's thresholds for criminal prosecution. USTR also notes that IPR enforcement at the local level suffers from poor coordination among Chinese Government ministries and agencies, local protectionism and corruption, high thresholds for initiating investigations and prosecuting criminal cases, lack of training, and inadequate and non-transparent processes. The 2009 Special 301 review of China cites some positive developments in China's IPR regime but adds that "continued bilateral dialogue and cooperation can lead to further progress in these and other areas."

C. Priority Watch List Country: Russia

Russia remains on USTR's Priority Watch List in 2009. According to the Special 301 report, although Russia has made some progress in improving IPR protection and enacting necessary legislation, the United States remains concerned with Russia's slow implementation of its commitments in the November 2006 bilateral agreement on IPR. USTR urges Russia to provide stronger enforcement against piracy and counterfeiting, as well as fight optical disc and Internet piracy, protect against unfair commercial use of undisclosed test or other data generated to obtain marketing approval for pharmaceutical products, deter piracy and counterfeiting through criminal penalties, strengthen border enforcement, and bring its laws into compliance with World Trade Organization (WTO) and international IPR norms. USTR also urges Russia to make further progress by ensuring that the Russian Customs Code, Civil Code and Law on Medicines comply with the US-Russia IPR Bilateral Agreement and the relevant TRIPs Agreement obligations that will take effect upon Russia's WTO accession.

D. Priority Watch List Country: Canada

USTR has added Canada to its Priority Watch List in 2009. Canada appeared on the Watch List in the 2008 report, and according to USTR, although the United States appreciates the cooperation between the United States and Canada in several bilateral and multilateral IPR initiatives, Canada has not delivered on its 2007 and 2008 commitments to improve IPR protection and enforcement. Specifically, the United States continues to have serious concerns with Canada's failure to accede to and implement the World Intellectual Property Organization (WIPO) Internet Treaties, which Canada signed in 1997. USTR urges Canada to enact legislation to strengthen its copyright laws, implement the WIPO treaties, and improve its IPR enforcement system to enable authorities to take effective action against the trade in counterfeit and pirated products within Canada, as well as curb the volume of infringing products transshipped and transiting through Canada. The report also cites concern with "Canada's weak border measures" and the lack of resources and training to customs officers and domestic law enforcement personnel.

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

E. Other Priority Watch List Countries

USTR also placed nine other countries on its 2009 Priority Watch List. We highlight USTR's assessment of several of these countries' IPR regimes below:

- **Argentina**. The report states that although cooperation between Argentina's enforcement authorities and US copyright industries remains positive, and Argentina has taken steps to improve enforcement at the border, stronger IPR enforcement actions are required to combat the widespread availability of pirated and counterfeit products. Specifically, copyright piracy remains a significant problem and USTR notes that "civil damages are ineffective and the judiciary is apparently reluctant to impose deterrent-level penalties in criminal cases." USTR urges Argentina to strengthen its judiciary efforts on IPR enforcement and implement an effective system to prevent the issuance of marketing approvals for unauthorized copies of patented pharmaceutical products.
- **Chile.** The 2009 Special 301 Report lists several achievements that Chile secured in 2008 that has strengthened its IPR regime, but notes that "Chile's IPR performance continues to fall well below expectations of a US free trade agreement partner." The United States remains concerned about inadequate enforcement against copyright piracy and trademark counterfeiting, and USTR believes that the Chilean government should make changes to pending IPR legislation in order to bring Chile's IPR regime into line with its multilateral and bilateral commitments. The United States also remains concerned with Chile's inadequate protection against unfair commercial use of undisclosed test and other data generated to obtain marketing approval for pharmaceutical products; USTR urges Chile to provide an effective system to prevent the issuance of marketing approvals for unauthorized copies of patented pharmaceutical products.
- **India.** USTR remains concerned about inadequate IPR protection and enforcement in India. The report states that although India has made progress on improving its IPR infrastructure (including through the modernization of its IP offices and the introduction of an e-filing system for trademark and patent applications), there appears to be weak protection for copyrights and patents, as well as ineffective protection against unfair commercial use of undisclosed test and other data generated to obtain marketing approval for pharmaceutical and agrochemical products. The United States encourages India to enact legislation to strengthen its copyright laws and implement the provisions of the WIPO Internet Treaties.
- **Indonesia.** Like Canada, Indonesia was elevated to the Priority Watch List in 2009 from its Watch List position in last year's report. The 2009 Special 301 Report notes that "there has been little

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

progress on IPR protection and enforcement since 2006, when Indonesia's status in the Special 301 report improved following promising steps taken by the Government." USTR opines that "the Government appears to be moving backward from some previous advances" and notes that Indonesia's Optical Disc Regulations are not being implemented effectively. Other IPR-related problems include the issuance of licenses for suspect production lines and failure to permanently revoke licenses and seize equipment and materials after convictions; the lack of prosecution of IPR crimes; the decreased number of IPR raids; and the weak protection afforded to unfair commercial use of undisclosed test or other data generated to obtain marketing approval for pharmaceutical products.

- **Thailand.** USTR will maintain Thailand on its Priority Watch List in 2009. In its report, USTR notes that "the Thai Government made little progress over the past year in addressing the widespread problems of piracy and counterfeiting." Although the United States is encouraged by the positive statements made by senior Thai officials in Prime Minister Abhisit's Administration on the new Government's intentions to make IPR protection and enforcement a higher priority, the United States continues to be concerned with large-scale entertainment and business software piracy, cable and signal theft, organized book piracy, and delays in granting patents. The United States is encouraged by Thailand's expressed intentions to reduce the uncertainty created by the previous Government's policies concerning the issuance of compulsory licenses on patented pharmaceutical products, and encourages Thailand to ensure that the patent system promotes the development and creation of new lifesaving drugs. The 2009 Special 301 Report specifically states that "as affirmed in the 2001 WTO Doha Declaration on the TRIPs Agreement and Public Health, the United States respects a country's right to protect public health and, in particular, to promote access to medicines for all [and] in this regard, the United States respects a country's right to grant compulsory licenses in a manner consistent with the provisions of the TRIPs Agreement."

F. Watch List Countries

USTR placed 33 countries on its 2009 Watch List. We highlight USTR's assessment of several of these countries' IPR regimes below:

- **Brazil.** Brazil remains on the Watch List in 2009. USTR notes that Brazil has strengthened its IPR enforcement over the past year, but that problems remain in patent protection for pharmaceuticals and medical devices, the patent application process, and in providing protection against unfair commercial use of undisclosed test and other data generated to obtain marketing approval for pharmaceutical products.

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

- **Colombia.** Although the United States and Colombia have completed an FTA, Colombia will remain on the Watch List in 2009. USTR believes that although Colombia has made some progress in IPR enforcement and monitoring over the past year, further IPR improvements are needed, including actions to reduce book and optical media piracy and the development of an effective system to prevent the issuance of marketing approvals for unauthorized copies of patented pharmaceutical products.
- **Malaysia.** USTR will maintain Malaysia on its Watch List in 2009 even though Malaysia has strengthened some aspects of its IPR protection and enforcement over the past year. USTR notes that Malaysia's reluctance to initiate ex officio IPR raids and "step up enforcement actions against piracy and counterfeiting" have proven problematic. USTR encourages the Malaysian Government to provide the requisite training and resources to its prosecutors and judges to enable these courts to adjudicate IPR cases effectively and efficiently. USTR also urges Malaysia to continue its efforts to update its IPR laws, including by acceding to and fully implementing the WIPO Internet Treaties.
- **Mexico.** Mexico will remain on the Watch List in 2009. According to USTR, although some improvements have been made, overall IPR enforcement efforts remained weak in Mexico in 2008. USTR urges Mexico to devote greater resources to its enforcement agencies, enhance coordination among enforcement agencies and "continue to build a consistent record of aggressive prosecutions and deterrent-level penalties imposed by courts." USTR also urges Mexico to strengthen its IPR regime by enacting legislation to: provide ex officio authority to law enforcement and customs authorities; criminalize camcording in theaters; and implement fully the WIPO Internet Treaties.
- **Peru.** USTR will maintain Peru on its Watch List in 2009. Although the US-Peru FTA has enhanced Peru's IPR legal framework significantly, "there is inadequate enforcement carried out by enforcement agencies, due in part to the lack of resources provided to agencies." USTR remains concerned with high piracy and counterfeiting rates in Peru. The report notes that United States will work closely with Peru to ensure the effective enforcement of its obligations under the FTA.
- **Saudi Arabia.** Saudi Arabia will remain on the Watch List in 2009, and USTR will conduct an out-of-cycle (OCR) to monitor further progress on IPR enforcement. The report highlights the first United States – Saudi Arabia Intellectual Property Rights Working Group meeting held in March 2009, which resulted in progress on certain IPR issues and facilitated improved cooperation between the governments and the private sector. The report notes that although Saudi Arabia has made progress in IPR enforcement, "Saudi Arabia needs to make further IPR improvements to its IPR enforcement system by sustaining raids and inspections to combat piracy and counterfeiting; encouraging courts to

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

impose deterrent-level sentences, including jail sentences for serious IPR offenses; completing its efforts on the Ministry of Culture and Information website; ensuring that Saudi Government ministries are utilizing legal software; and improving border enforcement."

- **Vietnam.** USTR will maintain Vietnam on its Watch List in 2009. The Special 301 Report states that Vietnam's piracy rates remain high and appear to be increasing. The report also noted that "growing Internet penetration has been accompanied by greater online piracy [and although] Vietnamese enforcement authorities have achieved some success in increasing enforcement capacity over the past year . . . in some areas, particularly with respect to copyright enforcement, additional enforcement efforts have not kept pace with rising piracy levels." USTR commends Vietnam for some of the IPR improvements it made in 2008, and it will continue to "watch with interest the positive developments in Vietnam, in particular, improvements in enforcement for copyrighted products in both physical and digital form, and the revisions under consideration on the Criminal Code with respect to remedies for copyright piracy and trademark infringement."

Outlook

Similar to other recent 2009 USTR publications – including the 2009 Trade Policy Agenda, the 2009 National Trade Estimate of Foreign Trade Barriers Report, and the 2009 Section 1377 Report on Telecommunication Agreements – the 2009 Special 301 Report does not differ greatly from the 2008 report. Notable differences between the 2008 and 2009 versions of the report include the downgrade of several countries from the Watch List to the Priority Watch List – such as Canada and Indonesia – and the removal of countries such as Korea and Taiwan from the Watch List. Apart from this shifting of countries, the language in the 2009 Special 301 Report largely reflects the language in the 2008 version of the report, and the majority of the country reports in the 2009 report include the same IPR-related concerns and observations that USTR made in its 2008 report. Some observers had expressed hope that the 2009 Special 301 Report would provide a clearer picture of the direction USTR's IPR policy would take in 2009 and beyond, but the broad language in the report and the similarities to the 2008 report make it difficult to solidify what USTR's IPR strategy is for the next year. Observers opine that the Obama Administration's promises to enhance monitoring and enforcement would dovetail nicely with any USTR initiative to increase IPR enforcement and monitoring, although at this stage, it is too early tell how USTR will proceed with any IPR initiatives.

China and Russia continue to top the list of countries that, according to USTR, require strengthened IPR regimes. As in last year's report, USTR's assessment of China's regime was the longest and the most comprehensive. USTR's assessment of Russia – though not nearly as long as that of China – was also

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

more comprehensive than the assessments of the other US trading partners on the Priority Watch and Watch Lists. USTR's move to downgrade Canada from last year's Watch List to this year's Priority Watch List came as a surprise to some members of the trade community, and trade observers opine that it will be interesting to see if and how Canada responds to the US allegations that Canada's IPR regime has weakened over the past year.

The 2009 Special 301 Report highlighted positive IPR developments made by several US trading partners, and included several mentions that USTR would continue to work bilaterally and multilaterally with US trading partners in order to continue improving IPR regimes. Nonetheless, the report listed several areas of concern for USTR and US businesses, including numerous counterfeiting and piracy problems. As in the 2008 Special 301 report, this year's report also placed special emphasis on IPR violations related to pharmaceutical products, especially problems associated with inadequate protection against unfair commercial use of undisclosed test or other data generated to obtain marketing approval for pharmaceutical products.

House Leaders Introduce "American Clean Energy and Security Act of 2009"

Summary

On May 15, 2009, House Democratic leaders unveiled an amended version of the American Clean Energy and Security Act of 2009 (ACES; H.R. 2454). Members of the House Energy and Commerce Committee had proposed the draft ACES on March 31, 2009. Since that time, Committee Democrats have been negotiating different provisions within the bill and held a Committee mark-up on May 18, 2009. On May 21, 2009, the Energy and Commerce Committee approved the ACES. We review below developments surrounding the ACES.

The full text of the ACES can be found at:
http://energycommerce.house.gov/Press_111/20090515/hr2454.pdf.

Analysis

I. Background

On May 15, 2009, House Democratic leaders unveiled an amended version of the ACES. House Energy and Commerce Committee Chairman Henry Waxman (D-CA) and Subcommittee on Energy and Environment Chairman Edward Markey (D-MA) proposed the draft ACES climate change legislation on

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

March 31, 2009 (*please see our April 2, 2009 report for the full details of the original language included in the first draft of the ACES*).

The ACES contains 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 meant to address consumers and industrial sectors as they transition to a "clean energy economy."

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

II. Title III: Reducing Global Warming Pollution

A. Emission Cuts

Title III of the bill proposes cuts in emissions from "specified sources" from 2005 levels, beginning with a three percent cut in emissions from 2005 levels by 2012, a 17 percent cut in emissions by 2020, a 42 percent cut in emissions by 2030, and an 83 percent cut in emissions by 2050. The 17 percent target is a reduction from the 20 percent target Reps. Waxman and Markey had suggested in the earlier version of the ACES. However, the longer-term reduction goals that Reps. Waxman and Markey initially proposed are unchanged.

B. Emission Allowances

The emission cuts listed above would be accomplished through the creation of a cap-and-trade program under which covered industries must 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. The government will allocate emission allowances to covered industries for specified time periods. The ACES reduces the number of available allowances issued each year in most instances. Allowances are tradable, and the bill mandates the creation of a "system for issuing, recording, holding, and tracking allowances and offset credits that shall specify all necessary procedures and requirements for an orderly and competitive functioning of the allowance and offset credit market."

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

Under the ACES, emission allowances will be allocated to covered industries to accomplish three primary goals: (i) to protect consumers from energy price increases; (ii) to assist industry in the transition to a clean energy economy; and (ii) to spur energy efficiency and the development and deployment of clean energy technology. A small amount of allowances will be allocated to prevent deforestation and support national and international adaptation efforts and for other purposes.

1. Consumer Protection

Electricity Price Increases. The electricity sector will receive 35 percent of the allowances, representing 90 percent of current utility emissions. Local electric distribution companies, whose rates are regulated by the states, will receive 30 percent of the allowances, which they must use to protect consumers from electricity price increases. Merchant coal and long-term power purchase agreements will receive five percent of the allowances. These allowances will be distributed according to a formula recommended by the utility industry and will phase out over a five-year period from 2026 through 2030.

Natural Gas Price Increases. Local natural gas distribution companies, whose rates are regulated by the states, will receive nine percent of allowances, which they must use to protect consumers from natural gas price increases. These allowances will phase out over a five-year period from 2026 through 2030.

Home Heating Oil Price Increases. States will receive 1.5 percent of allowances for programs to benefit users of home heating oil and propane. These allowances will phase out over a five-year period from 2026 through 2030.

Low- and Moderate-Income Households. Fifteen percent of allowances will be auctioned each year and the proceeds of these allowances will be distributed to low- and moderate-income families to protect them from other energy cost increases. These allowances will be distributed through tax credits, direct payments, and electronic benefit payments and will not phase out.

2. Transition Assistance for Industry

Energy-Intensive, Trade-Exposed Industries. "Energy-intensive, trade-exposed industries" will receive allowances to cover their increased costs from the global warming protection program. The number of allowances set aside for this program will equal 15 percent of the allowances in 2014 and then decrease based on the percent reductions in the emissions targets. These allowances will phase out after 2025 unless the President decides the program is still needed.

Domestic Energy Production. Oil refiners will receive two percent of allowances starting in 2014 and ending in 2026.

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

3. Energy Efficiency and Clean Energy Technology

Carbon Capture and Sequestration. Two percent of allowances from 2014 through 2017 and five percent of allowances in 2018 and subsequent years will be allocated to help electric utilities cover the costs of installing and operating carbon capture and sequestration technologies.

Renewable Energy and Energy Efficiency. States will receive 10 percent of allowances from 2012 through 2015; 7.5 percent of allowances in 2016 and 2017; 6.5 percent of allowances from 2018 through 2021; and five percent of allowances thereafter for investments in renewable energy and energy efficiency.

Advanced Automobile Technology. Three percent of allowances through 2017 and one percent from 2018 through 2025 will be allocated for investments in electric vehicles and other advanced automobile technology and deployment.

Research and Development. One percent of allowances will be allocated to "Clean Energy Innovation Centers" at research universities and institutions for applied research and development on clean energy technologies.

4. Other Public Purposes

Tropical Deforestation. Five percent of allowances will be allocated from 2012 through 2025 to prevent tropical deforestation and build capacity to generate international deforestation offsets. From 2026 through 2030, three percent of allowances will be allocated to this program. In 2031 and thereafter, two percent will be allocated to this program.

Domestic Adaptation. From 2012 through 2021, two percent of allowances will be allocated for domestic adaptation purposes. The amount of allowances allocated for domestic adaptation will increase to 4 percent from 2022 through 2026 and to eight percent in 2027 and thereafter.

International Adaptation and Clean Technology Transfer. From 2012 through 2021, two percent of allowances will be allocated for international adaptation and clean technology transfer. The amount of allowances allocated for these purposes will increase to four percent from 2022 through 2026 and to eight percent in 2027 and thereafter. Half of these allowances will be used for adaptation and half for clean technology transfer.

Worker Assistance and Job Training. 0.5 percent of allowances will be allocated for worker assistance and job training from 2012 through 2021. This amount will increase to one percent thereafter.

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

C. Strategic Reserve and Offset Credits

The bill directs the Environmental Protection Agency (EPA) to create a "strategic reserve" of allowances that can be auctioned off. The ACES also contains provisions on the distribtion of offset credits to entities that reduce greenhouse gas emissions.

III. Title IV: Transitioning to a Clean Energy Economy

A. Emission Allowance Rebate Program

Title IV of the bill establishes an "Emission Allowance Rebate Program" under which eligible industrial sectors will receive an emission allowance rebate per unit of production. According to legislators, the rebates are meant to compensate for additional costs that US industry might face in order to comply with the ACES. The ACES specifies the factors that make an industrial sector eligible to receive the rebate. The amount of rebate an entity receives will be based on several different factors, including but not limited to the total output of the covered entity, the average greenhouse gas emissions per unit of output and the entity's indirect and direct carbon factor.

B. International Reserve Allowance Program

If the President finds that the rebate provisions do not sufficiently correct competitive imbalances, the ACES mandates the establishment of 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 primary products in industrial sectors resulting from the difference between the direct and indirect costs of complying with this title; and the direct and indirect costs, if any, of complying in other countries with greenhouse gas regulatory programs, requirements, export tariffs, or other measures adopted or imposed to reduce greenhouse gas emissions."

IV. Other Provisions

Among other things, the additional provisions of the ACES would:

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

- create a renewable energy mandate that would require electricity suppliers to obtain a percentage of their power from wind, solar, geothermal, or other renewable sources;
- create a National Climate Change Adaptation Program;
- mandate additional provisions 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; and
- create an International Climate Change Adaptation Program to provide US assistance to the most vulnerable developing countries for adaptation to climate change.

V. May 21 Energy and Commerce Committee Mark-Up

On May 21, 2009, the House Energy and Commerce Committee approved the American Clean Energy and Security Act of 2009 (ACES; H.R. 2454) by a margin of 33 to 25. Votes were split on party lines with the majority of Democrats favoring the bill and Committee Republicans opposing it Four Democrats voted against the bill (Reps. Jim Matheson (UT), Mike Ross (AR), Charlie Melancon (LA), and John Barrow (GA)), and one Republican voted in favor (Rep. Mary Bono Mack (CA)). The House Energy and Commerce Committee's mark-up of H.R. 2454 lasted four days. The marked-up version of H.R. 2454 maintains the majority of the same provisions as included in the May 15, 2009 version of the bill. The bill continues to propose cuts in emissions from "specified sources" from 2005 levels, beginning with a three percent cut in emissions from 2005 levels by 2012, a 17 percent cut in emissions by 2020, a 42 percent cut in emissions by 2030, and an 83 percent cut in emissions by 2050. The bill also maintains the provision stating that the government will allocate emission allowances to covered industries for specified time periods; allowances are tradable. The government would sell about 15 percent of these allowances at an auction and distribute the rest to covered industries for free. The marked-up version of H.R. 2454 continues to maintain the "Emission Allowance Rebate Program" under which eligible industrial sectors will receive an emission allowance rebate per unit of production. According to legislators, the rebates are meant to compensate for additional costs that US industry might face in order to comply with the ACES.

During the mark-up, Committee Republicans offered a substitute amendment that would have replaced the cap-and-trade program with a requirement for utilities to lower greenhouse gas emissions relative to

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

the amount of electricity generated. Committee Members rejected the amendment by a vote of 19 to 35. Committee Republicans also offered an amendment that would have terminated the proposed cap-and-trade program if it led to a loss of jobs in manufacturing industries (the Committee rejected the amendment by a vote of 22 to 32) and another amendment that would place a cap on the price of emissions allowances that would increase over time (the Committee rejected the amendment by a vote of 20 to 35). Committee Members did approve several amendments to the ACES by voice vote, including:

- An amendment to provide loan guarantees for pipelines that transport renewable fuels;
- An amendment that clarified that the value of pollution credits allocated to electric utilities would be used to benefit ratepayers;
- An amendment that would direct utilities to make "net metering" available to federal agencies, allowing them to receive credit for energy they generate;
- An amendment that would adjust a requirement for the Environmental Protection Agency (EPA) to set emissions standards for new vehicles and construction equipment; and
- An amendment that would authorize grants and a loan guarantee program for the adoption of high-capacity transmission technology.

Reaction to the Committee's passage of the ACES was mostly positive. Committee Chairman Waxman and Subcommittee Chairman Markey lauded passage of the bill, and President Obama opined that the ACES was a "historic" piece of legislation. Committee Ranking Member Joe Barton (R-TX) noted to Chairman Waxman that although he "does not agree with the work product [he does] agree and is very much impressed with your ability in your first major test as Chairman to keep the committee functioning in a collegial way, which is no trivial accomplishment."

Outlook

Although the Energy and Commerce Committee has approved the ACES, eight other House Committees that share jurisdiction over the legislation – including the powerful House Ways and Means Committee and the House Agriculture Committee – still have to review the bill and work out the details of a final bill with Chairman Waxman. Chairman Waxman has also agreed to hold one day of hearings after the Memorial Day recess on the ACES' emissions caps and pollution credit provisions. Some Congressional sources opine that if the other House Committees move as quickly as the House Energy and Commerce Committee did on the bill, then Democrats could send the bill to the House floor for a vote in June or July,

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

although others argue that Committee consideration of the bill coupled with Republican opposition to the ACES could delay House consideration of the bill to the Fall.

On the Senate side, Senate Environment and Public Works Chairwoman Barbara Boxer (D-CA) has stated that she will likely hold workshops that will explore the final version of the House ACES bill, and will use the workshops to review whether the language in the ACES matches with the language in a cap-and-trade bill her the Senate Committee approved in 2008. She added, however, that the Senate will likely take up its own cap-and-trade bill later this year. Apart from Chairwoman Boxer's statement, the rest of the Senate seems to have adopted a wait-and-see attitude where they will wait to see how the House handles climate legislation, and act at a later stage based on the House decision.

United States Highlights

House Working Group Unveils "US – China Competitiveness Agenda"

On May 14, 2009, Reps. Mark Kirk (R-IL) and Rick Larsen (D-WA), co-chairs of the House of Representatives' US-China Working Group, introduced legislation labeled the "US-China Competitiveness Agenda." The Competitiveness Agenda consists of four separate bills: "The US-China Market Engagement and Export Promotion Act" (H.R. 2310); "The US-China Diplomatic Expansion Act" (H.R. 2311); "The US-China Energy Cooperation Act" (H.R. 2312); and "The US-Chinese Language Engagement Act" (H.R. 2313). According to a press release, the Competitiveness Agenda recognizes that although China is the world's second largest economy when measured by domestic purchasing power, US businesses continue to face obstacles, including "financial roadblocks, conflicting information, intellectual property rights issues and cultural differences." Each of the four bills is intended to address a particular set of challenges. We review below the main provisions of each of the four bills that make up the Competitiveness Agenda.

I. The US-China Market Engagement and Export Promotion Act (H.R. 2310)

As the title of the legislation suggests, H.R. 2310 is designed to advance US exporters' interests. The proposed legislation seeks to accomplish its objective by:

- Providing grants to US States for establishing and operating offices in China to promote exports;
- Implementing a program to create China market advocates in US export assistance centers to assist small and medium sized US businesses;
- Funding business expenses for small and medium sized businesses for trade missions to China;

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

- Consolidating fees charged to small and medium sized businesses who export to more than one market in China for "gold key" matching services (Gold Key matching services is a program administered by the Department of Commerce which is designed to pair US exporters with prospective offshore business partners and to assist the exporter with market intelligence, travel, accommodations, interpretation, and clerical support); and
- Providing grants through the Small Business Administration to undergraduate and graduate institutions that offer Chinese business education programs.

II. The US-China Diplomatic Expansion Act (H.R. 2311)

H.R. 2311 is intended to increase the diplomatic presence and capability of the United States in China through the following mechanisms:

- Hiring local public diplomacy personnel and increasing the amount of public diplomacy programming and improving the information technology infrastructure;
- Constructing one additional consulate in China;
- Establishing ten additional diplomatic posts in China;
- Funding Chinese language exchange programs;
- Funding for rule of law initiatives; and
- Funding for contributions to Asia-Pacific Economic Cooperation.

III. The US-China Energy Cooperation Act (H.R. 2312)

H.R. 2312 seeks to encourage cooperation between the United States and China on energy initiatives by:

- Providing grants to joint ventures of US and China private businesses, academic persons or government entities that encourage cooperation between the two countries on joint energy and climate change policy education programs; and
- Providing grants to joint ventures of US and China private businesses, academic persons or government entities that conduct joint research, development, or commercialization of carbon capture and sequestration technology, improved energy efficiency, or renewable energy sources.

IV. The US-Chinese Language Engagement Act (H.R. 2313)

The objective of H.R. 2313 is to improve US understanding of the language and culture of China by:

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

- Providing grants through the Department of Education to educational agencies to design and implement programs that establish, improve, or expand Chinese language and cultural instruction for elementary and secondary school students; and
- Providing grants to educational agencies to improve Chinese language instruction through computer-assisted instruction, distance learning, and virtual exchanges.

- The bills have been referred to the Committee or Committees with jurisdiction over the subject matter. The Committees, in turn, are likely to refer the bills to appropriate Subcommittees for hearings and markups. No timetable has been established for further consideration of the US-China Competitiveness Agenda and at this stage, it is difficult to predict a schedule for Congressional consideration of these bills, as legislators are attempting to address numerous other priority issues.

Members of Congress Introduce Currency Reform Legislation

Members of Congress have reintroduced legislation to address foreign countries' currency policies that are alleged to benefit their domestic exporters. On May 13, 2009, Representatives Tim Ryan (D-OH) and Tim Murphy (R-PA) introduced the "Currency Reform for Fair Trade Act of 2009" (CRFTA, H.R. 2378) in the House of Representatives, and Senators Jim Bunning (R-KY) and Debbie Stabenow (D-MI) introduced companion legislation in the US Senate (S. 1027). The House and Senate versions of the bill, which are identical, seek to amend US trade law to clarify that fundamental exchange-rate misalignment by any foreign nation is actionable under United States countervailing (CVD) and antidumping duty (AD) laws. CRFTA is similar to bills that were introduced in the prior two sessions of Congress. H.R. 2378 has 39 co-sponsors and was last referred to the House Ways and Means Committee. S. 1027 has four co-sponsors and was last referred to the Senate Finance Committee.

CRFTA seeks to amend title VII of the Tariff Act of 1930 "to clarify that fundamental exchange-rate misalignment by any foreign nation is actionable under United States countervailing and antidumping duty laws, and for other purposes." Unlike prior legislation, which specifically named China, the new bill does not identify any specific country. Instead, CRFTA addresses currency misalignment "by any foreign nation." The bill defines "fundamental and actionable misalignment of a currency" as "fundamental and actionable undervaluation of a currency" or "fundamental and actionable overvaluation of a currency." This standard does not require any finding with regard to the intent of the foreign government to manipulate its currency, unlike previous legislation. In addition, prior bills addressed only the undervaluation of currencies.

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

The Department of Commerce (DOC) is the agency that would determine whether a country's currency is misaligned based on findings during an 18-month period of: (i) under- or over-valuation of the real effective exchange rate of the currency; (ii) intervention in foreign exchange markets; (iii) a global current account surplus or deficit; (iv) a significant and prolonged bilateral account surplus or deficit with the United States; and (v) foreign exchange reserves that exceed or are insufficient relative to the amount necessary to repay external debt obligations, unless restrictions have been permitted under the WTO. DOC would rely upon publicly-available data from the International Monetary Fund (IMF), the World Bank, other international organizations or national governments. In addition, unlike previous bills, CRFTA requires the use of IMF methodologies and guidelines for computing the magnitude of misalignment.

If DOC identifies undervaluation or overvaluation of a currency, it must calculate the level and apply it in CVD and AD proceedings. For a currency that is undervalued, in a CVD proceeding DOC must include in the net countervailable subsidy the amount that reflects the level of undervaluation in the bilateral real exchange rate between the currency of the exporting country and the United States dollar. In an AD proceeding, if the currency is undervalued, DOC must adjust the export price (EP) and constructed export price (CEP) downward by the amount that reflects the level of undervaluation in the bilateral exchange rate. If the currency is overvalued, in an AD proceeding, DOC must make an upward adjustment to the EP and CEP by the amount that reflects the level of overvaluation.

Unlike previous legislation, CRFTA does not expressly provide for application of the CVD law to imports from non-market-economy (NME) countries. This change is due to DOC's decision in 2007 to start conducting CVD investigations involving NME countries. CRFTA provides that any determination with respect to the currency of an exporting country by DOC shall be made regardless of whether the exporting country has a market economy, a non-market economy, or a combination of both.

The bill clarifies the definition of "countervailable subsidy" in Section 771(5) (D), (E) and (5A) (B) of the Tariff Act of 1930 to state that a "fundamentally and actionably undervalued currency" constitutes a financial contribution, a conferred benefit and an export subsidy. Classification of an undervalued currency as an export subsidy would eliminate the need in CVD investigations for DOC to find that the currency policy was intended to benefit a specific domestic company or industry, or group of companies or industries, as required for domestic subsidies under the Act. In addition, the bill clarifies Section 772(c) by including the level of overvaluation or undervaluation as an adjustment to export price and constructed export price.

Finally, CRFTA expressly states that it would apply with respect to goods from Canada and Mexico in order to comply with the North American Free Trade Agreement (NAFTA).

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

Although the current bill, unlike the prior bills, does not reference China, public statements by the bill's sponsors confirm that China's currency practices remain their primary target. The introduction of the bill at this time also may reflect concerns among some Members of Congress on the Obama Administration's recent decision, in the Treasury Department's April 15, 2009 semi-annual report on international economic and exchange rate policies, to decline to name China as a "currency manipulator." At this early stage, it is difficult to tell how quickly the bills will move through their respective chambers in Congress. Congressional response to the April 2009 Treasury Report was more muted in comparison to that for past reports by the Bush Administration which offered similar conclusions. Moreover, the current economic crisis has caused many Members of Congress – even some traditionally supportive of trade enforcement measures – to shy away from such legislation to avoid international rebuke of "American protectionism." To date, the Obama Administration has not offered its views on the bill.

United States and EU Sign Memorandum of Understanding on Beef

On May 13, 2009, the United States and the EU signed a Memorandum of Understanding (MoU) meant to resolve the beef hormones dispute between the two trading partners. The MoU will provide US beef producers additional access, at zero duty, to the EU market for high-quality beef produced from cattle that have not been treated with growth-promoting hormones. The MoU is the result of negotiations between the United States and the EU over the import ban that the EU began imposing on hormone-treated beef in the late 1980s.

In 1988, the EU introduced import restrictions on beef treated with different growth-promoting hormones and banned the use of the hormones. In 1998, the World Trade Organization (WTO) Appellate Body upheld a complaint by the United States that the EU ban on the importation of hormone-treated beef violated the Sanitary and Phytosanitary (SPS) Agreement. The Appellate Body ruled, among other things, that the EU import prohibition was not "based on" a risk assessment, in breach of Article 5.1 of the SPS Agreement. In 1999, following the expiration of the compliance period, the WTO Dispute Settlement Body (DSB) authorized the United States to impose retaliatory trade sanctions on EC imports up to the level of USD 116.8 million per year. The United States immediately implemented this authorization through 100 percent additional tariffs on certain EU imported products. In 2003, the EU adopted a new measure (the "2003 Directive"), which it argued brought the EU into compliance with the DSB rulings. While it kept the import prohibition in place, the EU argued that the 2003 Directive was "based on a comprehensive risk assessment" that justified the ban. However, the United States did not agree that the 2003 Directive constituted compliance, and it therefore refused to remove the sanctions against EU imports. On March 31, 2008, a WTO Panel ruled that the United States violated its procedural obligations

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

under the Dispute Settlement Understanding (DSU) by not having recourse to multilateral procedures to determine whether the new EU measure was WTO-consistent. It also ruled that the 2003 Directive still did not meet the requirements of the SPS Agreement, and so it rejected the EU claim that its illegal measure had been "removed." In October 2008, the WTO Appellate Body gave the United States the right to continue imposing sanctions until the dispute has been resolved.

The newly-signed MOU provides for three phases:

- **Phase 1.** The first phase will last three years and during this time, the EU will open an annual tariff rate quota (TRQ) of 20,000 tons, at zero duty, for beef produced without growth-promoting hormones. The United States may maintain the additional import duties currently applied to certain EU products, and will not impose new duties on EU products that were announced in January 2009.
- **Phase 2.** Under this second phase, which will last one year, the EU will further expand the TRQ to 45,000 tons. During this phase, the United States would suspend the application of all additional import duties imposed on EU products. For the United States, a decision on whether to move to Phase 2 would depend on the existence of conditions at the end of Phase 1 that would allow the US beef industry to make full use of the additional quota.
- **Phase 3.** In the final phase, the EU would maintain the 45,000-ton TRQ and the United States would continue not to apply any increased import duties. A decision on whether to move to Phase 3 would be made following negotiations on several issues, including duration, withdrawal, and the status of WTO litigation on the EU's compliance with the WTO ruling in the Beef Hormones dispute (*please refer to our October 20, 2008 report for further details on the WTO dispute)*.

Under the MoU, neither the United States nor the EU will move forward with WTO litigation on the EU's compliance with the WTO's ruling in the Beef Hormones dispute for at least the first 18 months. After 18 months, either or both parties would be free to request a WTO panel. If either party makes this request, compliance litigation would commence and move forward until the panel is ready to issue its interim report. At that point, the parties would instruct the panel not to issue the interim report to the parties and request that the panel suspend its work until at least the end of the fourth year. The status of any such interim report, including whether it would ever be disclosed, and the status of the panel would be the subject of the consultations that occur at the end of Phase 2.

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

Senate Confirms Marantis as Deputy USTR

On May 6, 2009, the Senate unanimously confirmed Demetrios Marantis to be Deputy United States Trade Representative (DUSTR). The Senate Finance Committee had unanimously approved Marantis as DUSTR on May 5, 2009 at a Senate confirmation hearing. Marantis served as majority international trade counsel for the Senate Finance Committee. He became a member of the Democratic staff of the Senate Finance Committee in February 2005 after serving as issues director for then-Sen. John Edwards (D-NC) on the Kerry-Edwards 2004 Presidential campaign. Prior to that, he served as Associate General Counsel at USTR between 1998 and 2002.

Prior to the Senate Finance Committee hearing, Committee Members posed questions on US trade policy to Marantis that he addressed in written responses to the Committee. Committee Chairman Max Baucus (D-MT) questioned whether Marantis, as DUSTR, would make the pending **US-Panama Free Trade Agreement (FTA)** "a top priority [that he] will send to Congress as soon as possible" and Marantis noted that the Panama FTA is a top priority and that USTR is working closely with the Government of Panama to address concerns regarding Panama's labor laws and international tax policies. On the pending **US-Korea FTA**, Marantis stated that concerns remain with respect to autos and Korea's market to US beef. On the pending **US-Colombia FTA**, Marantis assured the Committee that USTR will work with Colombia, key stakeholders and Congress to identify the further steps that Colombia needs to address violence against labor unions. As DUSTR, Marantis' portfolio would include US trade relations with Asia and consequently, Chairman Baucus also asked for Marantis' views on **US engagement with Asia**, to which Marantis responded that "active US engagement in the Asia-Pacific region is critical given that region's present and future economic significance." Marantis stated that the United States is committed and willing to play a leadership role on trade in the region. Chairman Baucus specifically asked for Marantis' views on the **US-China relationship**, and Marantis responded that the Obama Administration "needs to be as vigilant as possible in addressing the range of enforcement problems we face in China, which include concerns that they are raising unscientific sanitary and phytosanitary barriers, deficiencies in enforcement of US intellectual property rights, market access barriers to US services exports, and the increasing use of regulatory barriers that impede trade." He added that if confirmed, he will use "every tool available in US law, in the World Trade Organization [WTO], and through bilateral engagement to address enforcement concerns with China."

Chairman Baucus also raised the issue of **US preference programs**, noting that he plans to introduce legislation in the coming months to address preference programs and how they can help less-developed economies. He asked for Marantis' recommendations to make US preferences work better, and Marantis

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

noted that if confirmed, he would first examine whether the programs are meeting US objectives, including reducing poverty and bringing developing countries, particularly the least-trade active, into the global trading system. He added that he would also consider the programs' current and potential impact on US importers and consumers of beneficiary-supplied products, "explore fully the other elements of our preference programs, such as product coverage and operation of the Generalized System of Preferences [GSP] competitive need limitation provisions," and work closely with the Senate Finance Committee and solicit advice from international and domestic stakeholders to help craft improvements to these programs.

Senate Finance Committee Ranking Member Charles Grassley (R-IA) posed similar questions to Marantis. On the **pending FTAs with Panama, Colombia and Korea**, Marantis assured Sen. Grassley that USTR will work closely with Members of Congress and other key stakeholders to address any and all contentious areas in these FTAs. Regarding the negotiation of a **Trans-Pacific Partnership Agreement**, Marantis stated that he will take a close look at US participation in the Trans-Pacific Partnership. Sen. Grassley also asked how Marantis anticipates splitting the **China portfolio** with the Treasury and State Departments, to which Marantis responded that the Joint Commission on Commerce and Trade (JCCT), chaired by USTR and the Department of Commerce, will remain the primary forum to address trade and commercial issues, and that "USTR will have a central role in those efforts, and will continue to have primary responsibility for developing, and for coordinating the implementation of, United States international trade policy." Regarding the enactment of a **cap-and-trade system to address carbon emissions**, Marantis opined that it is "critical to get countries like India and China to take strong action to limit emissions, including through a global climate change agreement, and I understand that USTR is working closely with the State Department and other agencies in pursuing this objective." Sen. Grassley also asked for Marantis' views on reforming eligibility criteria in **US preference programs**, and Marantis noted that one area that he would like to see improved is the coordination of US foreign assistance with the needs of developing countries to meet preference program eligibility criteria and to assist the least-trade active countries benefit more from the programs. He also stated that eliminating preferences for current beneficiaries under the GSP and Andean Trade Promotion Act (ATPA) programs could adversely affect US businesses.

House Energy and Commerce Democrats Announce "Cash for Clunkers" Agreement

On May 5, 2009, Democratic Members of the House Energy and Commerce Committee announced that they had reached an agreement on a "Cash for Clunkers" program. Committee Chairman Henry Waxman (D-CA), Subcommittee Chairman Edward Markey (D-MA), Chairman Emeritus John Dingell (D-MI), and

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

Reps. Betty Sutton (D-OH), Jay Inslee (D-WA), and Bart Stupak (D-MI) announced their agreement on a "Cash for Clunkers" program meant to "help the auto industry while cleaning our air." The proposed legislation would apply to the trade-in and purchase of passenger cars, light duty trucks, large light duty trucks and work trucks, with varying requirements for each type of vehicle.

Under the plan, if a consumer trades in a passenger car that gets fewer than 18 miles per gallon (mpg), they would receive a voucher that can be used towards the purchase of a new car that gets at least 22 mpg. If the new car gets at least four more mpg than the old car, the voucher would be worth USD 3,500; if it gets at least 10 mpg more, the voucher would be worth USD 4,500. A consumer would receive a USD 3,500 voucher for trading in a pre-2002 work truck. The program will be authorized for up to one year and provide for approximately one million new car or truck purchases. Specifically, the agreement divides eligible new cars and trucks into four categories:

- **Passenger Cars.** The old vehicle must get less than 18 mpg. New passenger cars with mileage of at least 22 mpg are eligible for vouchers. If the mileage of the new car is at least 4 mpg higher than the old vehicle, the voucher will be worth USD 3,500. If the mileage of the new car is at least 10 mpg higher than the old vehicle, the voucher will be worth USD 4,500.
- **Light-Duty Trucks.** The old vehicle must get less than 18 mpg. New light trucks or SUVs with mileage of at least 18 mpg are eligible for vouchers. If the mileage of the new truck or SUV is at least 2 mpg higher than the old truck, the voucher will be worth USD 3,500. If the mileage of the new truck or SUV is at least 5 mpg higher than the old truck, the voucher will be worth USD 4,500.
- **Large Light-Duty Trucks.** New large trucks (pick-up trucks and vans weighing between 6,000 and 8,500 pounds) with mileage of at least 15 mpg are eligible for vouchers. If the mileage of the new truck is at least 1 mpg higher than the old truck, the voucher will be worth USD 3,500. If the mileage of the new truck is at least 2 mpg higher than the old truck, the voucher will be worth USD 4,500.
- **Work Trucks.** Under the agreement, consumers can trade in a pre-2002 work truck (defined as a pick-up truck or cargo van weighing from 8,500-10,000 pounds) and receive a voucher worth USD 3,500 for a new work truck in the same or smaller weight class. There will be a finite number of these vouchers, based on this vehicle class's market share. Consumers can also "trade down," receiving a USD 3,500 voucher for trading in an older work truck and purchasing a smaller light-duty truck weighing from 6,000 – 8,500 pounds.

Congressional sources note that the agreement is based primarily on H.R. 1550, introduced by Rep. Sutton, and H.R. 520, introduced by Rep. Inslee. The provisions of H.R. 1550 applied only to cars made

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

in North America and had the backing of the domestic auto industry. These sources could not confirm, however, whether the newly-announced "Cash for Clunkers" agreement still maintains the "made in North America" provisions found in H.R. 1550 and H.R. 520. They noted, however, that exact details on the agreement would come out over the next several weeks. It also remains unclear how the agreement would be funded, how it would move through Congress, or how much support it had in Congress and among domestic interest groups.

President Obama Budget Contains Spending Increases for USTR, DOC and TAA

President Obama's USD 3.5 trillion fiscal year 2010 budget request of Congress increases spending for trade-related programs. In early May, the Obama Administration released details of its budget request for the next fiscal year that begins October 1, 2009. Under the budget request, the Office of the United States Trade Representative (USTR) would receive USD 48 million for fiscal year 2010, an increase from the current USD 47 million it receives. The Department of Commerce (DOC) would receive USD 64 billion, with increases for the DOC's trade enforcement and promotion efforts. DOC's International Trade Administration (ITA) would receive USD 440 million, an increase from the current amount of USD 420 million: USD 50 million of that amount would go to manufacturing and services, USD 43 million to market access and compliance, USD 68 million to import administration, and USD 253 million to the US and Foreign Commercial Service. The budget request also includes USD 1.8 billion for the Trade Adjustment Assistance (TAA) program, an increase from the current amount of USD 796 million. The US International Trade Commission (ITC) also receives an increase in its current budget of USD 75 million to USD 83 million for the next fiscal year.

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

Free Trade Agreements

Free Trade Agreements Highlights

Senate Finance Committee Explores US-Panama FTA, as Legislators Raise Tax Concerns, AFL-CIO Declares Opposition to Agreement

On May 21, 2009, the Senate Finance Committee held a hearing on the pending US-Panama Free Trade Agreement (FTA). Senate Finance Committee Chairman Max Baucus (D-MT) invited Assistant United States Trade Representative (AUSTR) for Western Hemisphere Affairs Everett Eissenstat and representatives from the business and labor communities to testify at the hearing. **Chairman Baucus** urged the Administration to act quickly on the FTA because of the impending departure of the current Panamanian Administration, and he opined that outstanding tax evasion issues should be considered separately. **Ranking Member Charles Grassley (R-IA)** acknowledged that some Members of Congress remained concerned with outstanding tax and labor issues in Panama, but he urged Congressional passage of the FTA, noting that the US government could address both the FTA and contentious issues surrounding it simultaneously. **AUSTR Eissenstat** touted the benefits of the FTA and stated in his testimony that the Administration has been working with Panama to address labor law concerns and Panama's tax policies, noting that passage of the FTA "will enable us to progress much more quickly in addressing these concerns than we could otherwise." In closing, AUSTR Eissenstat noted that the US-Panama FTA "provides an excellent opportunity to raise working standards and enhance environmental protections in Panama, gain fair access for US workers, farmers, ranchers, and businesses to one of the fastest growing markets in the Western Hemisphere, and enhance our bilateral relationship with one of our strongest allies in the region." Private sector representatives, including from **Caterpillar** and the **National Pork Producers Council**, echoed AUSTR Eissenstat's testimony and urged quick and smooth passage of the agreement. **American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) Policy Director Thea Lee**, however, stated that her organization "believes it is premature for Congress to consider" the US-Panama FTA "and will oppose passage if it is brought to a vote before outstanding and pressing concerns are adequately addressed." According to Lee, "labor law and tax policy reforms in Panama must be fully adopted and implemented before the agreement is considered by Congress," and the Administration and Congress should "address concerns that have been raised with respect to the investment, procurement, and services provisions in the Panama and other pending trade agreements."

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

Separately, in a May 20, 2009 letter to President Obama, Sen. Carl Levin (D-MI) and Rep. Lloyd Doggett (D-TX) stated that approval of the US-Panama FTA should be contingent on Panama's cooperation with efforts to combat international tax evasion. The legislators stated that the Government of Panama should have to sign a tax information exchange agreement (TIEA) with the United States and pass legislation changing Panamanian law to "allow for sufficient transparency and access to financial and corporate information." According to the legislators, a TIEA would help the US Internal Revenue Service (IRS) enforce tax laws on US companies operating in Panama. Sen. Levin and Rep. Doggett have introduced legislation in their respective chambers (S. 506, H.R. 1265) on offshore tax evasion that would treat foreign corporations managed and controlled in the United States as domestic companies for tax purposes. The legislators stated in their May 20 letter that "implementing an agreement on trade while ignoring Panama's status as one of the world's recognized tax havens would not only undermine your efforts to address offshore tax evasion, but would also thwart the best opportunity our nation will have to obtain cooperation from a country that has resisted for years American efforts to encourage changes to its secretive banking and regulatory practices." The legislators note that having Panama sign a TIEA and change its bank secrecy laws before the FTA can go into effect are prerequisites for the Administration to "secure our support of the FTA." The May 20 letter does not come as a surprise, as Democrats have been increasingly vocal in their concerns with Panama's tax and banking secrecy laws in recent months. According to USTR Ron Kirk, the US and Panamanian governments have made progress on tax issues, as well as on outstanding disagreements over Panama's labor laws.

In recent weeks, the buzz surrounding the pending US-Panama FTA has increased, and it appeared that the Administration was working hard to clear the agreement as soon as possible for its presentation to Congress for consideration. As noted, the Administration, Congress and the Government of Panama are still working together to address some contentious issues that government officials and Members of Congress have highlighted, including Panama's tax laws (*i.e.*, issues related to tax havens and bank secrecy laws) and Panamanian labor standards. Of the three pending FTAs (Colombia, Korea and Panama), the US-Panama FTA is the agreement that has the highest chances of Congressional passage by the end of 2009. However, legislators' views on Panama's tax and banking secrecy laws could complicate the agreement's movement through Congress and stifle the recent momentum that the agreement has attained. Whether the legislators will drop their concerns on Panama's banking laws (and instead swing their support to the agreement) depends on the results of the work between the Obama Administration and the Panamanian government and whether this cooperation is enough for US legislators to support the agreement. On the other hand, some observers opine that the group of Democrats voicing their concerns over US-Panama tax issues does not contain key Democratic leaders

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

in Congress, which in turn could signify that opposition to the pending agreement is not as large-scale as some make it out to be.

Even if the Administration and Panama work out a tax arrangement that has the support of legislators, the pending agreement must still contend with the opposition from the AFL-CIO and the pressure the labor organization is likely going to put on Members of Congress to oppose the agreement. How (and if) the Obama Administration addresses the AFL-CIO's opposition and lobbying efforts will be interesting to watch, as President Obama counted largely on the support of organized labor during his Presidential campaign. Observers opine that the Administration's response to organized labor's opposition to the Panama agreement could set a precedent on how the Administration will contend with opposition to other pending FTAs with Colombia and Korea. Any response on the Panama FTA will have to be quick, however, as observers point out that USTR has been working under an unofficial timeline to present the FTA to Congress before a new Panamanian Administration is inaugurated in July.

State Department Forms Panel To Review US Model BIT, FTA Chapters on Investment

The State Department has created a panel to conduct a formal review of investment provisions in US Free Trade Agreements (FTAs) and the US model bilateral investment treaty (BIT). According to several reports, the panel's recommendations will "feed into an interagency review of investment issues conducted by the Obama Administration" and managed by the United States Trade Representative (USTR) and the State Department. The subcommittee will make its recommendations directly to the State Department's Advisory Committee on International Economic Policy (ACIEP) and will hold hearings to develop the recommendations. The formal review of BITs and FTA investment chapters will include a formal notice and comment procedure. According to US officials, "during the review, the United States will continue technical discussions in the BIT negotiations and informal discussions that have already begun, including those with China, India and Vietnam."

Details of the panel composition and its work have not been released, although several reports note that American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) Policy Director Thea Lee and Covington & Burling Senior Adviser Alan Larson will serve as co-chairs of the panel. Full membership of the panel has not yet been formed and the panel has not yet begun its work. Membership will likely comprise of representatives from the US business community and other organizations, including labor, environmental, academia, and policy groups, reflective of the membership of the ACIEP (which also consists of representatives of US organizations and institutions, including from business, labor,

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

environment, academia, legal consultancies, and other public interest groups). No timeline has been established for the recommendations to be issued.

The formation of the investment panel follows a May 14, 2009 House Ways Means Trade Subcommittee hearing on "Investment Protections in US Trade and Investment Agreements" at which both Lee and Larson testified. In her testimony, Lee stated that investment provisions in FTAs "give greater substantive and procedural rights to foreign investors than to domestic investors," and she noted that the AFL-CIO wants to see stronger labor and environmental obligations inserted into the investment chapters of FTAs and wants to further limit the rights of investors to challenge US laws and regulations. Other criticisms that the AFL-CIO has with investment provisions in US FTAs include issues with the investor-state dispute settlement mechanism, the concept of "indirect expropriation," and limits on the ability of countries to restrict the flow of capital in a financial crisis. In his testimony, Larson stated that the new investment review panel should look at "whether investment provisions need to be adapted to a new need for financial regulation in light of the global financial crisis" and whether "investment provisions in FTAs and the model BIT afford sufficient protections for nations seeking access to shrinking natural resources, and how they will accommodate coming climate change regulations."

The lack of detail surrounding the investment review panel and the review of FTA and BIT investment provisions makes it difficult to forecast how the review will affect any BIT or FTA negotiations in which the Administration is involved. US officials have stated that the United States will continue technical discussions in the BIT negotiations and informal discussions that have already begun with China, India and Vietnam, but some observers question how the results of the panel review and the panel's recommendations will affect these talks. On FTAs, as it stands, the only negotiations in which the Administration is (possibly) involved is the negotiation for the Trans Pacific Partnership FTA, although the Administration is also reviewing that agreement and has not yet made a formal announcement that it intends to continue those negotiations. Observers opine that it is not clear if the investment panel review would have to be completed before USTR would decide whether to move forward with the TPP negotiations. If such a scenario were to occur, given the lack of panel membership and the lack a clear timeframe for the panel's recommendations, resumption of the TPP FTA talks could effectively remain stalled in the short-term and could drag into late 2009 or even beyond.

According to some observers, the investment panel's review and its inclusion of the AFL-CIO in the panel's membership shows that the Obama Administration is holding true to some of its campaign promises to undergo a review of US trade and investment agreements, and to involve organized labor in such reviews. AFL-CIO's Lee's comments on the connection between labor, environment and investment

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

are not surprising (as she has stated this message repeatedly in the past), and indicate that the AFL-CIO and other groups involved in the investment review will likely and strongly push forward their views on investment as they relate to trade, labor and the environment. How much of an influence these voices will have in the panel and its ultimate recommendations – and how much the Administration will be influenced by the panel's recommendations – depend on the remainder of the members that compose the panel (as noted, government agencies are working on forming the members that will make up the panel) and how loudly they voice their own interests, concerns and observations.

United States and Angola Sign TIFA

On May 19, 2009, United States Trade Representative (USTR) Ron Kirk and Angola Minister of External Affairs Assunção Afonso de Sousa dos Anjos signed a US-Angola Trade and Investment Framework Agreement (TIFA). The agreement is meant to provide a forum to address trade issues and help enhance trade and investment relations between the United States and Angola. Under the TIFA, both parties will form a United States-Angolan Council on Trade and Investment that will address trade and investment issues including, but not limited to, trade capacity building, intellectual property rights (IPR), labor, environmental issues, and enhancing the participation of small- and medium-sized enterprises in trade and investment.

The US-Angola TIFA is the latest TIFA that the United States has completed in sub-Saharan Africa. According to USTR, in sub-Saharan Africa, the United States has signed TIFAs with Ghana, Liberia, Mauritius, Mozambique, Nigeria, Rwanda, South Africa, the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), and the West African Economic Monetary Union (UEMOA). The United States has also signed a Trade, Investment, and Development Cooperative Agreement (TIDCA) with the Southern African Customs Union (SACU). US exports to Angola in 2008 totaled USD 400 million, and US imports from Angola totaled 4 billion; more than 95 percent of US-Angola trade is related to the oil and gas sector.

US, Indonesian Officials Discuss Contentious Bilateral Issues at TIFA Meetings

On May 15, 2009, United States Trade Representative (USTR) Ron Kirk and Indonesian Minister of Trade Mari Pangestu met under the auspices of the US-Indonesia Trade and Investment Framework Agreement (TIFA). The TIFA meeting was USTR Kirk's first meeting with his Indonesian counterpart. According to sources, the two officials discussed a wide range of bilateral, regional and multilateral trade issues, including the prospective Comprehensive Partnership between the United States and Indonesia,

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

the World Trade Organization (WTO) Doha Round, and the two countries' participation in the Asia-Pacific Economic Cooperation (APEC) forum and under the US-Association of Southeast Asian Nations TIFA.

Prior to the meeting, from May 13-15, the US and Indonesian delegations held detailed discussions on several different bilateral trade and investment issues. At these meetings, US officials raised concerns about Indonesia's imposition of import licensing requirements on a wide array of goods, its new restrictions on trade in pharmaceutical products, new import restrictions on pork products, local content requirements in the telecommunications sector, burdensome new registration requirements for imported food products, and the lack of proper intellectual property right (IPR) protection and enforcement. The United States also raised concerns with illegal logging practices in Indonesia. Trade Minister Pangestu later acknowledged the concerns that US officials had raised in the talks, noting that there was some "tough talk" during the TIFA meetings, but she noted that the Indonesian government was aware of these contentious issues and was taking steps to address them. She noted, for example, that a special IPR task force has been operating in Indonesia for the past two years and is beginning to see results. She also stated that some policies put into place by the Indonesian government were not intended to restrict or impede trade, but rather sought other objectives such as protecting consumer safety. She noted that all trade ministers were under pressure to establish protectionist policies, but that ministers were seeking to make sure protectionist measures were at least temporary, consistent with international commitments, the least damaging option, and reviewed to ensure there are not unintended consequences.

According to USTR, two-way goods trade between the United States and Indonesia totaled USD 21.7 billion in 2008. Indonesia is the United States' seventh largest agricultural export market, with exports totaling USD 2.2 billion in 2008. US foreign direct investment in Indonesia totaled USD 10 billion in 2007.

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

Multilateral

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

Summary

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

Significance of Decision / Commentary: This is an important Appellate Body decision, and its significance extends beyond the issue of zeroing. The Appellate Body made ***key rulings on WTO compliance obligations in the context of the US "retrospective" system of duty assessment***.

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

The US retrospective duty system gives rise to unique "temporal" issues when the United States implements rulings of the DSB. In the present case, certain imports entered the United States before the expiration of the compliance period, but liquidation (*i.e.*, actual collection of the duties) occurred after the compliance period. The United States took the position that it had no legal obligations with respect to such imports. It argued that "the critical event is the importation ('entry') of products subject to the duty," and that "no failure to comply can be found in relation to imports made before the expiry of the reasonable period of time."

The United States won on this point at the Panel stage. However, the Appellate Body reversed the Panel on this issue, and found that the use of zeroing during administrative reviews after the expiration of the compliance period is WTO-inconsistent, even if the imports entered the United States before that time.

In essence, ***the Appellate Body has drawn a bright line for compliance purposes***. Based on this ruling, it would appear that all US anti-dumping measures after the expiration of the compliance period must be WTO-consistent, regardless of the date of importation of the goods. The Appellate Body was careful to leave open the issue of US obligations when liquidation has been delayed by US domestic

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

judicial proceedings. But the language of the decision provides a strong basis to argue that any US actions related to anti-dumping duties, whether on zeroing or on other issues, must be WTO-consistent as of the date of expiration of the compliance period.

The Appellate Body also made ***significant procedural rulings on the scope of compliance panel proceedings***. A Panel established under Article 21.5 of the WTO Dispute Settlement Understanding (DSU) has the mandate to rule on the WTO-consistency of "measures taken to comply" with the DSB rulings. However, in some cases, it is by no means clear whether a particular measure can be considered as having been "taken to comply" with the DSB rulings.

In the present dispute, the Panel had decided that US administrative reviews that pre-dated the DSB rulings could not be considered as "measures taken to comply" because "a measure taken before the adoption of the DSB's recommendations and rulings could rarely, if ever, be found to be a measure taken 'to comply' with such recommendations and rulings." The Appellate Body chided the Panel for its "formalistic reliance" on dates, and instead stressed that the relevant enquiry was whether the subsequent reviews "still bore a sufficiently close nexus, in terms of *nature*, *effects*, and *timing*, with those recommendations and rulings, and with the declared measures 'taken to comply', so as to fall within the scope of Article 21.5 proceedings [original emphasis]."

Such a test can be very difficult to apply in practice. Indeed, in the present case, the ***application of the "nexus" test to certain US measures triggered a rare dissenting opinion within the Appellate Body.*** The original DSB recommendations at issue related to the use of one particular type of zeroing methodology ("model zeroing") in the context of the original investigations. During the administrative reviews, the USDOC used a different type of zeroing methodology ("simple zeroing"), and the anti-dumping order was revoked. The United States took the strong position that these reviews could not be considered as compliance measures, as it was only required to implement the DSB rulings on model zeroing.

The majority of the Appellate Body rejected this position, ruling that "the analysis of compliance with the DSB's recommendations and rulings should focus on what was found to be inconsistent (that is, zeroing) and not on what was not found to be inconsistent (that is, the use of a particular comparison methodology in a particular stage of the proceedings)." One (unnamed) member of the Appellate Body Division issued a dissenting opinion on this issue, calling for "circumspection" by compliance panels in deciding their terms of reference. The dissenter stressed that compliance panel proceedings cannot be "expanded to include compliance obligations with respect to measures for which there were no recommendations and rulings by the DSB…."

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

As this debate within the Appellate Body itself indicates, the application of the "nexus" test will continue to be a difficult and contentious issue in many future compliance disputes.

Analysis

Panel's terms of reference: establishing a "close nexus" to the DSB rulings

The EC initially argued that the subsequent USDOC reviews were "amendments" to the investigations at issue in the original dispute. The Appellate Body rejected this argument, reasoning that "successive…review determinations issued in connection with the measures at issue in the original proceedings constitute separate and distinct measures, which therefore cannot be properly characterized as mere 'amendments' to those measures." In the view of the Appellate Body, such successive determinations did "not constitute mere 'amendments' to the immediately preceding measure, because they constitute *distinct* determinations [original emphasis]."

The EC then argued that the subsequent reviews were nevertheless "measures taken to comply" because they had "a sufficiently close nexus with, or are closely connected to, the DSB's recommendations and rulings, and with the measures at issue in the original proceeding."

The Appellate Body began its analysis of this issue by recalling its earlier rulings that "a panel's mandate under Article 21.5 of the DSU is not necessarily limited to measures that the implementing Member maintains are taken 'in the direction of' or 'for the purpose of achieving' compliance", but may also extend to "measures that the implementing Member maintains are *not* 'taken to comply' with the recommendations and rulings of the DSB." It affirmed that "measures with a 'particularly close relationship' with the declared measure 'taken to comply', and to the recommendations and rulings of the DSB, may also fall within the purview of a compliance panel." It stated that the compliance panel should "seek to determine whether such distinct measures are particularly closely connected to the measures the implementing Members asserts are 'taken to comply', and to the recommendations and rulings of the DSB, so as to fall within the purview" of DSU Article 21.5.

The Panel in this dispute had excluded certain reviews from its terms of reference because they pre-dated the adoption of the DSB rulings. The Appellate Body reversed the Panel on this issue, stating that "the Panel's formalistic reliance on the date of issuance of the subsequent reviews in ascertaining whether these reviews had a close nexus with the recommendations and rulings of the DSB was in error." In the view of the Appellate Body, "the relevant inquiry was whether the subsequent reviews, despite the fact that they were issued before the adoption of the recommendations and rulings of the DSB, still bore a sufficiently close nexus, in terms of *nature*, *effects*, and *timing*, with those recommendations and rulings,

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

and with the declared measures 'taken to comply', so as to fall within the scope of Article 21.5 proceedings [original emphasis]." It therefore overturned the Panel's determination that reviews that pre-dated the adoption of the DSB rulings were outside its terms of reference.

Applying these principles to the facts of this case, the Appellate Body found that "the use of zeroing in the excluded subsequent reviews provides the necessary link, in terms of *nature* or subject matter, between such measures, the declared measures 'taken to comply', and the recommendations and rulings of the DSB." However, with respect to the link in terms of "effects", the Appellate Body found "a more mixed picture." It found that administrative reviews in which zeroing was used provided a "sufficient link, in terms of *effects*", between those reviews and the DSB rulings [original emphasis]. However, reviews in which the USDOC recalculated margins of dumping without zeroing did not have the necessary link.

Appellate Body splits on the "nexus" test: dissent calls for "circumspection by panels"

The United States argued that two administrative reviews issued after the expiration of the reasonable period of time did not have sufficiently close links to the original DSB rulings to be considered as "measures taken to comply."

The original DSB recommendations related to the use of model zeroing in the context of the original investigations. In order to implement these rulings, the United States initiated a proceeding under Section 129 of the *Uruguay Round Agreements Act*, the statutory vehicle for the United States to implement adverse WTO rulings in trade remedies cases. During the Section 129 proceeding, the United States used simple zeroing. As a result of the recalculation, the anti-dumping order in these two cases was revoked.

The Appellate Body divided on the issue of whether these reviews should be considered as "measures taken to comply." The majority found that "the use of zeroing in the… administrative reviews…establishes a link in terms of nature or subject matter between those reviews, the recommendations and rulings of the DSB, and the declared measures 'taken to comply'—that is, the Section 129 determinations in those Cases." The majority reasoned in part that "successive determinations under a single anti-dumping duty order form part of a continuum of events." They reasoned that "the analysis of compliance with the DSB's recommendations and rulings should focus on what was found to be inconsistent (that is, zeroing) and not on what was not found to be inconsistent (that is, the use of a particular comparison methodology in a particular stage of the proceedings)."

As noted above, one member of the Appellate Body Division issued a dissenting opinion on this issue. This person argued that "the 'close nexus test' needs to be applied with some circumspection by panels,

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

at the risk of overly broadening the scope of proceedings under Article 21.5 of the DSU and the compliance obligations related thereto to measures that share only a limited link to the recommendations and rulings of the DSB, and to the measures that a Member takes to implement those rulings." The dissenter stressed that there are significant differences between model zeroing and simple zeroing, including the fact that they are used in different contexts, and are governed by different obligations under the Anti-Dumping Agreement. The dissenter wrote that, "I do not see how it can be concluded…that the…administrative reviews…have a close nexus with the recommendations and rulings of the DSB or the declared measures 'taken to comply', and fall within the Panel's terms of reference." The dissenter concluded that, "I do not consider that the scope of these Article 21.5 proceedings can properly be expanded to include compliance obligations with respect to measures for which there were no recommendations and rulings by the DSB…."

Liquidation: the United States cannot "delay compliance depending on when it chooses to undertake final duty assessment"

As indicated above, the United States argued that, "no failure to comply can be found in relation to imports made before the expiry of the reasonable period of time", even if the administrative review took place after the expiry of that period.

The Appellate Body rejected this position. It stated that a "subsequent administrative review determination issued after the end of the reasonable period of time falls within the scope of the implementation obligations of the United States, even though, in that review, duty liability has been assessed for entries that occurred before the end of the reasonable period of time." It stressed that the obligation to cease using zeroing as of the end of the compliance period "is eminently prospective in nature." It added that, "[b]y contrast, the approach based on the date of entry advocated by the United States would allow a WTO Member operating a retrospective duty assessment system to resort to a methodology for assessing duty liability that has been found WTO-inconsistent beyond the end of the reasonable period of time." The Appellate Body rejected the notion that "the implementing Member would be able to extend the reasonable period of time and delay compliance depending on when it chooses to undertake final duty assessment."

Turning to the specific reviews challenged in the present case, the Appellate Body found that "compliance with the recommendations and rulings of the DSB…implies not only cessation of zeroing in the assessment of duties, but also in consequent measures that, in the ordinary course of the imposition of anti-dumping duties, derive *mechanically* from the assessment of duties [original emphasis]." The Appellate Body accordingly decided to "*reverse* the Panel's interpretation…that the United States'

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

obligation to implement the recommendations and rulings of the DSB does not extend to the actual collection and liquidation of duties, and to the issuance of assessment or liquidation instructions, when these actions result from administrative review determinations made before the end of the reasonable period of time [original emphasis]." However, it declined to offer any views on US implementation obligations if liquidation were delayed as a result of judicial proceedings.

Compliance claims may include "unchanged aspects of original measures"

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

The Appellate Body overturned the Panel on this issue. The Appellate Body "disagree[d] with the notion that a Member may be entitled to assume in Article 21.5 proceedings that an aspect of a measure that was not challenged in the original proceedings is consistent with that Member's obligations under the covered agreements." It added that, '[i]f certain claims against aspects of a measure were not decided on the merits in the original proceedings, they are not covered by the recommendations and rulings of the DSB and, therefore, a Member should not be entitled to assume that those aspects of the measure are consistent with the covered agreements." The Appellate Body reasoned that:

> While claims in Article 21.5 proceedings cannot be used to re-open issues that were decided on substance in the original proceedings, the unconditional acceptance of the recommendations and rulings of the DSB by the parties to a dispute does not preclude raising new claims against measures taken to comply that incorporate unchanged aspects of original measures that could have been made, but were not made, in the original proceedings. We do not see how allowing such claims in Article 21.5 proceedings would 'jeopardize the principles of fundamental fairness and due process', or how it would unfairly provide a 'second chance' to the complaining Member, provided these new claims relate to a measure 'taken to comply' and do not re-argue claims that were decided in the original proceedings.

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

However, given "the lack of factual findings by the Panel and of undisputed evidence in the Panel record", the Appellate Body found it did not have a sufficient factual basis to "complete the analysis" and rule on the merits of this EC claim.

Sunset reviews and other issues

The Appellate Body ruled on a number of subsidiary issues. For example, it found that "subsequent sunset reviews, in which zeroing was used and that provide the legal basis for the continued imposition of anti-dumping duties after the end of the reasonable period of time, establish a failure to comply with the recommendations and rulings of the DSB." It also made a number of rulings related to the specific reviews challenged by the EC, based on the principles set out above.

The decision of the Appellate Body in *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"): Recourse to Article 21.5 of the DSU by the European Communities (DS294)* was released on May 14, 2009.

Multilateral Highlights

WTO Schedules Next Ministerial Gathering; Meeting Not to Focus on Doha

The World Trade Organization's (WTO) General Council has formally scheduled a procedural Ministerial meeting to be held November 30 - December 2, 2009 in Geneva. According to the WTO Secretariat, the meeting is completely separate from the Doha round negotiations and is instead meant to address several "housekeeping" issues, including the role of the WTO going forward, which issues it should address in the future, and the economic crisis. WTO Members are mandated under the agreement establishing the WTO to meet every two years, although the last Ministerial meeting took place in 2005. Recent meetings have been postponed while ministers from key countries worked on the Doha talks on agriculture and industrial goods.

USTR Kirk Meets with Geneva Counterparts to Discuss Stalled Doha Round

On May 11, 2009, United States Trade Representative (USTR) Ron Kirk met with his counterparts from other World Trade Organization (WTO) Member economies in Geneva to discuss the Doha Round negotiations and how WTO Members could resuscitate the stalled multilateral talks. USTR Kirk met with several officials from Latin American and Caribbean economies in addition to the Chairs of the Doha negotiating groups. USTR Kirk's agenda also included meetings with WTO Director-General Pascal

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

Lamy, EU Trade Commissioner Catherine Ashton, Swiss Trade Minister Doris Leuthard, and officials from least-developed WTO Member economies.

According to sources, at the meetings, USTR Kirk did not provide any positive signals that the Obama Administration had completed its review of the Doha negotiations and was ready to move forward on the talks. Since being confirmed to his position, USTR Kirk has stated that the Obama Administration is committed to a successful conclusion of the Doha Round, but that USTR is still reviewing the Doha negotiations. Geneva-based sources note that USTR Kirk appears to have repeated this same message at his meetings with other WTO Members.

Sources note that USTR Kirk was questioned by other WTO Members on a supposed new approach to the Doha negotiations under which WTO Members would initiate bilateral negotiations in 2010 on line-by-line tariff concessions in addition to solidifying modalities in the agriculture and non-agricultural market access (NAMA) negotiations. Under this new negotiating methodology, WTO Members would prepare draft schedules of tariff concessions throughout the remainder of 2009 and circulate the draft schedules at the end of 2009 so that WTO Members could begin bilateral negotiations seeking improvements in the schedules on tariff lines of particular interest in early 2010. WTO Members would continue to negotiate draft modalities for agriculture and NAMA, although according to the new negotiating methodology, the bilateral negotiations would continue in 2010 even if WTO Members are unable to secure agriculture and NAMA modalities. USTR Kirk did not confirm whether the Obama Administration supported such a negotiating methodology, and a spokesperson for USTR has stated that USTR is still reviewing all possible negotiating scenarios for the Doha Round, adding that there is no timeline for completing the review of the US position in the multilateral talks. Early reception to the new suggested negotiating methodology has been negative. At a May 7 meeting of the Group of 20 developing countries, WTO Members opposed the proposed methodology. The EU, Japan, India and Switzerland also voiced their opposition to "setting aside any agreement on modalities" and argued that "it is not the time for creating new negotiating templates." They insisted that all Members conclude modalities on the basis of the latest revised negotiating texts issued in December 2008.

Although some observers have indicated cautious optimism that the Obama Administration has turned some of its attention to the stalled Doha Rounds, others warn that USTR Kirk has not yet offered the Administration's position on the multilateral talks, and note that until the Obama Administration supports the talks and proactively jumps back into the negotiations, WTO Members are unlikely to engage in substantive Doha negotiations without US participation. More worrisome to some observers is USTR's statement that it has no timeline for completing its review of the US position in the Doha Round. This

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

statement, combined with the floating proposal to use the remainder of 2009 to solidify negotiating positions and initiate bilateral negotiations and modalities talks in 2010, could indicate to some that the Obama Administration is more interested in continuing its review of the Doha Round for the rest of the year and picking up the talks again in 2010 or beyond, thus potentially lengthening an already long-delayed round.

WTO Secretariat Reports Increase in New Anti-Dumping Investigations, Final Measures; FANs Call for Decreased Use of Such Measures

On May 7, 2009 the World Trade Organization (WTO) Secretariat published the results of the latest semi-annual reports on anti-dumping (AD) measures that WTO Members submitted to the WTO Committee for AD Practices (ADP) (the WTO AD reports can be found at http://www.wto.org/english/news_e/pres09_e/pr556_e.htm). In general, the Secretariat noted that from July 1 – December 31, 2008:

- 15 WTO Members initiated a total of 120 new AD investigations, which represents an increase of 17 percent as compared to the same period in 2007. The highest number of initiations came from India, Brazil, and China, who reported respectively 42, 16, and 11 new investigations.
- 11 WTO Members applied a total of 81 final AD measures, which represents an increase of 45 percent as compared to the same period in 2007. The highest number of final measures came from the United States, India, and Turkey, who reported respectively 21, 13 and 11 new measures.
- China was the most frequent subject of the AD measures, with 34 new initiations and 37 new final measures directed at its exports.
- Base metals, chemicals, textiles, and plastic and rubber were the sectors most affected by the new investigations, while the new measures mainly targeted chemicals, base metals, plastics and rubber, pulp and paper, textiles, and machinery and electrical equipment.

The report elicited reaction from some WTO Members. In a May 11 joint submission to the Doha Negotiating Group on Rules, the "Friends of Anti-dumping Negotiations" (FANs) noted that "in the wake of the unprecedented economic crisis, there have been increasing resorts to antidumping actions [and] WTO Members need to avoid the unwarranted use of such measures." The FANs called on WTO Members to "redouble their efforts to make meaningful progress in the anti-dumping negotiations with a view to achieving strengthened disciplines as the final outcome under the mandate of the Doha Development Agenda." Signatories to the FANs statement included Brazil, Chile, Colombia, Costa Rica,

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

Hong Kong, Israel, Japan, Mexico, Norway, Singapore, South Korea, Switzerland, Taiwan, Thailand, and Turkey.

WTO Reappoints Director-General Lamy to Second Term

On April 30, 2009, World Trade Organization (WTO) Members formally agreed give Pascal Lamy a second four-year term as WTO Director-General. The decision was unanimous and no WTO member voiced any opposition to his reappointment. Lamy's second term will start on September 1, 2009. In an April 29 speech to WTO members, Lamy outlined his priorities for the second term, noting that the stalled Doha Round is his primary objective.

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