



May 2010

Japan External Trade Organization
WTO and Regional Trade Agreements
Monthly Report

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Summary of Reports

United States

USTR Releases 2010 “Special 301” Report on IPR Enforcement

On April 30, 2010, 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 2010 Special 301 annual report and several of its country assessments.

Submitted Comments Differ on Merits, Disadvantages of Retrospective and Prospective AD/CVD Systems

In March 2010, the Department of Commerce (DOC) requested public comments on the merits and disadvantages of prospective and retrospective antidumping (AD) and countervailing duty (CVD) systems. Comments were due by April 20, 2010. We review and summarize herein submitted comments on the two types of AD/CVD systems.

Senators Introduce Draft Climate Change Bill: “The American Power Act”

On May 12, 2010, Senators John Kerry (D-MA) and Joseph Lieberman (I-CT) introduced the “American Power Act” (APA), a bill that addresses climate change and greenhouse gas emissions, among other things. The Senators initially wanted to introduce the climate change bill in late April 2010 but political difficulties forced the legislators to delay their bill introduction to May. We review below the bill and its provisions as well any next steps for the bill and its chances for Senate passage.

US and Chinese Trade Officials Meet Under Second Annual Strategic and Economic Dialogue Gathering

US and Chinese officials gathered in Beijing, China May 24-25, 2010 for the second annual meeting of the Strategic and Economic Dialogue (S&ED). Secretary of State Hillary Rodham Clinton and Secretary of the Treasury Timothy Geithner led the US delegation that included Secretary of Commerce Gary Locke, United States Trade Representative (USTR) Ron Kirk, Federal Reserve Chair Ben Bernanke, and several other Cabinet officials. China’s delegation included State Councilor Dai Bingguo, Vice Premier Wang

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Qishan, and Minister of Commerce Chen Deming. The S&ED covered strategic issues, including discussions on security and politics, and economic issues, including macroeconomics, trade and investment. We review the S&ED's economic discussions and any outcomes of the bilateral meeting.

United States Highlights

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

- EU Trade Commissioner De Gucht Visits US to Discuss Transatlantic Regulatory Dialogue under TEC
- President Obama Names New Director for NEI; AUSTR for WTO and Multilateral Affairs to Leave in June

Free Trade Agreements

Free Trade Agreements Highlights

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

- Pending FTAs See Renewed Calls for Passage

Multilateral

Multilateral Highlights

- WTO DSB Forms Panels to Address South Korea, Vietnam Complaints on US Zeroing

Reports in Detail

United States

USTR Releases 2010 “Special 301” Report on IPR Enforcement

Summary

On April 30, 2010, 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 2010 Special 301 annual report and several of its country assessments.

The 2010 Special 301 annual report can be found at:

<http://www.ustr.gov/about-us/press-office/reports-and-publications/2010-3>.

Analysis

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 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,

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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. 2010 Special 301 Report

USTR reviewed 77 trading partners for the 2010 Special 301 Report, and placed 41 countries on the Priority Watch List, Watch List, or the Section 306 monitoring list. There are eleven countries included in the **2010 Priority Watch List** (a decrease from the twelve countries included in the 2009 Priority Watch list after Israel was removed from the list in early 2010): China, Russia, Algeria, Argentina, Canada, Chile, India, Indonesia, Pakistan, Thailand, and Venezuela. There are 29 countries included in the **2010 Watch List** (a decrease from the 33 countries included in the 2009 Watch List; Saudi Arabia was removed from the list in early 2010, and the 2010 Special 301 Report noted the removal from the list of the Czech Republic, Hungary and Poland). Trading partners on the Watch List include Belarus, Bolivia, Brazil, Brunei, Colombia, Costa Rica, Dominican Republic, Ecuador, Egypt, Finland, Greece, Guatemala, Italy, Jamaica, Kuwait, Lebanon, Malaysia, Mexico, Norway, Peru, Philippines, Romania, Spain, Tajikistan, Turkey, Turkmenistan, Ukraine, Uzbekistan, and Vietnam. 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 2010 report, USTR removed the **Czech Republic, Hungary and Poland** from the Watch List for progress made to their IPR monitoring and enforcement regimes. The Report also notes that in February 2010, USTR removed **Israel** from the Priority Watch List and **Saudi Arabia** from the Watch List for IPR improvements made by both countries. USTR also cited progress by **Sweden** (for the implementation of IPR measures that have increased public awareness of IPR protection and decreased illegal downloads) and **the EU** (for its 2009 ratification of the World Intellectual Property Organization Copyright Treaty and the Performances and Phonograms Treaty).

B. Priority Watch List Country: China

China will remain on the Priority Watch List in 2010 and will also remain subject to Section 306 monitoring. The 2010 report notes that although China took several positive steps in 2009 with respect to software piracy prosecution and with respect to increasing the numbers of civil IP cases in the courts, "the United States is also deeply troubled by the development of policies that may unfairly disadvantage US rights

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holders by promoting 'indigenous innovation' including through, among other things, preferential government procurement and other measures that could severely restrict market access for foreign technology and products."

According to the report, China's IPR enforcement regime remains largely ineffective and non-deterrent, and widespread IPR infringement continues to affect products, brands and technologies from a wide range of industries, including movies, music, publishing, entertainment software, apparel, athletic footwear, textile fabrics and floor coverings, consumer goods, chemicals, electrical equipment, and information technology, among others. US copyright industries continued to report severe losses due to piracy in China, especially through trade in pirated optical discs. The theft of software, books and journals also remain key concerns. The report also notes that "China's market access barriers create additional incentives to infringe products such as movies, video games, and books, and lead consumers to the black market, thereby compounding the severe problems already faced by China's enforcement authorities." The 2010 report specifically notes that "progress, or lack thereof, in protecting and enforcing IPR in China can vary greatly by region." According to USTR, IPR enforcement at the local level is hampered by 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.

In addition, the 2010 Special 301 report noted "notorious markets" that deal in infringing goods, including Baidu (the vast majority of all illegal downloads of music in China are associated with Baidu), business-to-business (B2B) and business-to-consumer (B2C) websites (that offer infringing products to consumers and businesses), TV Ants (that provides pirated sporting event telecasts), the Small Commodities Market in Yiwu (that serves as a center for wholesaling of infringing goods), the Silk Market in Beijing, China ("an egregious example of the counterfeiting of consumer and industrial products that is endemic in many retail and wholesale markets throughout China"), and the Lowu Market in Shenzhen, China.

USTR urges China to significantly increase criminal prosecutions and other enforcement actions against Internet-based piracy and counterfeiting operations through a sustained national effort backed by appropriate resources. USTR also encourages China to adopt a more sustained campaign to address counterfeiting and urges China to increase penalties levied by courts for counterfeiting as well as implement additional measures, including criminal sanctions, to address counterfeiting. In addition, the 2010 report encourages China to "provide an effective system to expeditiously address patent issues in connection with applications to market pharmaceutical products." The report notes that the United States

will continue to work with China on IPR problems through bilateral dialogue and cooperation, including through the Joint Commission on Commerce and Trade (JCCT) and other fora.

C. Priority Watch List Country: Russia

Russia remains on USTR's Priority Watch List in 2010. According to the Special 301 report, although Russia has made some progress in improving IPR protection and enacting necessary legislation, "concerns remain, particularly with respect to Russia's continued failure to implement fully its commitments in the November 2006 Bilateral Agreement on Protection and Enforcement of Intellectual Property Rights." The report notes that in the IPR Bilateral Agreement, Russia committed to fight optical disc and Internet piracy, enact legislation to protect against unfair commercial use of undisclosed test or other data generated to obtain marketing approval for pharmaceutical products, deter piracy and counterfeiting through enhanced criminal penalties, strengthen border enforcement, and conform its laws to international IPR norms. The report states that Russia continues to delay full implementation of the IPR Bilateral Agreement.

In addition, the 2010 Special 301 report noted "notorious markets" that deal in infringing goods, including Allofmp3.com clones (that illegally distribute copyrighted materials), and Gorbushka and Rubin Trade Center and Savelovskiy Market in Moscow (that sell pirated goods, including pirated optical discs).

USTR urges Russia to address piracy and counterfeiting, which remain major concerns for US businesses. Similar to China, US copyright industries report significant losses due to copyright infringement, especially through online piracy. With regards to optical disc piracy, the report notes that although the level of cooperation among Russian agencies in optical disc raids is increasing, the quality of raids, and the level of police expertise, is uneven nationwide, and "a number of factors limit the effectiveness of raids, including the monetary damages threshold required to initiate criminal actions, and the general reluctance of prosecutors to initiate criminal cases in the field of IPR, even when there is evidence of a violation of criminal code provisions." Other key concerns include counterfeiting of trademarked goods, especially for consumer goods, distilled spirits, agricultural chemicals, biotechnology, and pharmaceuticals.

D. Other Priority Watch List Countries

We highlight USTR's assessment of the IPR regimes of several other countries placed on the 2010 Special 301 Priority Watch List.

Argentina. USTR notes that rampant counterfeiting and piracy continue to prevail in Argentina. In particular, challenges remain in the following areas: (i) copyright and internet piracy; (ii) backlog of patent

applications; and (iii) lack of adequate protection against unfair commercial use of undisclosed test and other data generated to obtain marketing approvals for pharmaceutical products. On enforcement, the report states that problems persist in the criminal and law enforcement areas, such as the lack of effective deterrent penalties in criminal cases and delays in the adjudication of IPR infringement cases. USTR urges Argentina to promptly address these challenges to improve overall enforcement and IPR concerns.

Chile. Despite Chile's efforts to address USTR's concerns, the country will remain on the Priority Watch List in 2010. USTR notes that Chile made considerable progress to meet its obligations on IP under the US-Chile Free Trade Agreement (FTA), including new legislation to create a National Institute for Industrial Property to oversee industrial property registration and protection and specific amendments to its IP law. USTR states, however, that these amendments fell short of Chile's bilateral commitments under the FTA and multilateral obligations. Moreover, USTR remains concerned regarding Chile's lax enforcement and the application of minimum sentences for piracy and counterfeiting, which do not effectively deter infringement. USTR recommends Chile to ratify the International Convention for the Protection of New Varieties of Plants and the Trademark Law Treaty. USTR strongly encourages Chile to work with US pharmaceutical groups to provide adequate protection against unfair commercial use as well as unauthorized disclosure of undisclosed test or other data generated to obtain marketing approvals for pharmaceutical products.

Canada. Canada was initially placed on the Priority Watch List in 2009. According to USTR, although "the United States looks forward to the government of Canada's implementation of its previous commitments, recently reaffirmed in 2010, to improve IPR protection, and is encouraged by the high level of cooperation between the Canadian and United States governments on IPR matters," Canada has not completed the legislative reforms in the copyright area that are necessary to deliver on its commitments. USTR urges Canada to enact legislation in the near term to update its copyright laws and address the challenge of Internet piracy. In addition, USTR urges Canada to improve its IPR enforcement system to provide for deterrent sentences and stronger enforcement powers, strengthen border enforcement, and provide its border officials with the authority to seize suspected infringing materials without the need for a court order.

India. India will remain on the Priority Watch List in 2010, and USTR notes that although India continues to make gradual progress on efforts to improve its legislative, administrative, and enforcement infrastructure for IPR, "concerns remain over India's inadequate legal framework and ineffective enforcement." Key concerns include piracy and counterfeiting, including the counterfeiting of medicines, and a weak enforcement regime. According to USTR, "amendments are needed to bring India's

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copyright law in line with international standards” and “a law designed to address the unauthorized manufacture and distribution of optical discs remains in draft form and should be enacted in the near term.” In addition, the 2010 Special 301 report noted “notorious markets” that deal in infringing goods, including Nehru Place and Palika Bazaar in New Delhi, Richie Street and Burma Bazaar in Chennai, Manish Market, Heera Panna, Lamington Road, and the Fort District in Mumbai, and Chandni Chowk in Kolkata (these markets are known for the high volume of pirated software, optical media, and counterfeit goods). USTR continues to urge India to improve its IPR regime by providing stronger protection for patents, providing protection against unfair commercial use and unauthorized disclosure of undisclosed test or other data generated to obtain marketing approval for pharmaceutical and agricultural chemical products, and providing for expeditious judicial disposition of IPR infringement cases as well as deterrent sentences.

Indonesia. Indonesia will remain on the Priority Watch List in 2010. Indonesia was placed on the Priority Watch List in 2009 because of the overall deterioration of the IP protection and enforcement climate, and a lack of follow-through on earlier promising steps. Concerns remain over weaknesses in the IPR enforcement system, including “an unreliable judicial system for IPR cases, a low number of criminal prosecutions, and non-deterrent penalties.” In addition, the 2010 Special 301 report noted “notorious markets” that deal in infringing goods, including Harco Glodok in Jakarta (one of the largest markets in Indonesia for counterfeit and pirated goods, particularly well-known for pirated optical discs). USTR notes that regulations intended to implement the Customs law amendments passed more than two years ago are still pending. According to USTR, Indonesia should provide effective protection against unfair commercial use, as well as unauthorized disclosure, of undisclosed test or other data generated to obtain marketing approval for pharmaceutical products.

Thailand. Thailand will remain on the Priority Watch List in 2010 although USTR will conduct an Out-of-Cycle Review (OCR) in 2010 to examine Thailand’s IPR regime. The report notes that “the United States is encouraged by the Royal Thai government’s senior level commitment to stronger IPR protection and enforcement through the creation of the National Task Force, and its action plan to improve its IPR regime.” Other positive steps that USTR recognized in the Special 301 report include Thailand’s accession to the Patent Cooperation Treaty and proposed legislation to address landlord liability for infringement, to address illegal camcording, and to enhance the authority of Thai Customs to take enforcement actions ex officio. The report notes, however, that piracy and counterfeiting remain widespread, and US industry reports “a growing challenge in the areas of Internet, cable, and signal piracy.” With regards to pharmaceuticals, USTR “encourages Thailand to engage in a meaningful and

transparent manner with all relevant stakeholders, including owners of intellectual property rights, as it considers ways to address Thailand's public health challenges while maintaining a patent system that promotes investment, research, and innovation." In addition, the 2010 Special 301 report noted "notorious markets" that deal in infringing goods, including Panthip Plaza, the Klong Thom, Saphan Lek and Baan Mor shopping areas, the Patpong and Silom shopping areas, the Mah Boon Krong (MBK) Center, and the Sukhumvit Road area ("notorious for openly selling pirated and counterfeit goods"). The report notes that the United States reiterates its support for the 2001 Doha Declaration on the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement") and Public Health. USTR notes that it looks forward to working with Thailand in the coming year through the OCR.

E. Watch List Countries

We highlight USTR's assessment of the IPR regimes of several countries placed on the 2010 Special 301 Watch List.

Egypt. The 2010 Special 301 report notes that although Egypt undertook positive efforts in 2009 to strengthen its IPR regime, several IPR-related concerns remain. Piracy rates for books, music, and motion pictures remain high, and the United States encourages the Ministry of Culture and other Egyptian ministries to increase their enforcement efforts. In addition, judges and prosecutors from Egypt's economic courts require additional training, and enforcement agencies require capacity building. USTR continues to urge the Ministry of Health to clarify its commitment to protect against unfair commercial use and unauthorized disclosure of undisclosed test or other data generated to obtain marketing approvals for pharmaceutical products, and to provide an effective system to address patent issues expeditiously in connection with applications to market pharmaceutical products.

Kuwait. The report states that although Kuwait has improved its IPR regime, it will remain on the Watch List in 2010. USTR notes that there is a lack of deterrent criminal penalties which limits the effectiveness of IPR enforcement efforts. The United States also remains concerned that several key pieces of IPR legislation have remained pending for many years, and encourages Kuwait to pass the necessary IPR-related legislation in order to improve its enforcement efforts.

Brazil. Brazil will remain on the Watch List in 2010. Although Brazil took concrete steps to fight piracy and counterfeiting and strengthen its enforcement actions, significant levels of piracy and counterfeiting remain, in addition to weak border enforcement and inadequate deterrent sentences. Other issues of concern include: (i) internet and book piracy; (ii) patent applications and the uncertain role of Brazil's sanitary regulatory agency (ANVISA); and (iii) unfair commercial use and unauthorized disclosure of

undisclosed test or other data generated to obtain marketing approvals for pharmaceutical products. USTR recommends Brazil to improve its enforcement efforts, strengthen its IP legislation and adopt the WIPO Internet Treaties.

Colombia. Colombia will also remain on USTR's Watch List in 2010. USTR notes many areas of improvement in 2009, such as improved coordination among responsible agencies and reduction in patent approval times, efforts that reiterate commitments under the US-Colombia Trade Promotion Agreement negotiations. USTR recommends Colombia to step up its efforts to impose deterrent sentences, provide additional training to responsible agencies, and develop an effective system to address patent issues expeditiously in connection with applications to market pharmaceutical products.

Malaysia. The report notes that piracy and counterfeiting remain widespread in Malaysia, and that enforcement efforts continue to decline. The United States encourages Malaysia's Customs officials to initiate IPR investigations ex officio, as authorized under Malaysian law, and urges Malaysia's specialized IPR courts to address their backlog and consider additional resources and training to strengthen the courts' work. The United States also encourages Malaysia to provide effective protection against unfair commercial use and unauthorized disclosure of undisclosed test or other data generated to obtain marketing approval for pharmaceutical products, and to provide an effective system to address patent issues expeditiously in connection with applications to market pharmaceutical products.

Mexico. Mexico will also remain in the Watch List in 2010 but USTR is positive about the country's enforcement efforts, such as increased raids, arrests, and indictments in 2009. The report also praises Mexico's decision to impose longer prison time for IPR violations (six and a half years), upcoming legislation to improve its IP laws, including an anti-camcording law and the implementation of the WIPO internet treaties, and efforts to improve its system to address patent issues in connection with applications to market pharmaceutical products. USTR recommends Mexico to undertake the following actions to strengthen its enforcement efforts: (i) improved coordination among officials at the federal, state and municipal level; (ii) legislation to provide ex officio authority to Mexican customs officials to prosecute IPR infringement; and (iii) adequate protection against unfair commercial use and unauthorized disclosure of undisclosed test or other data generated to obtain marketing approvals for pharmaceutical products.

Peru. Despite Peru's efforts to improve its IP law regime and meet its obligations under the US-Peru FTA, the country will remain in the Watch List in 2010. USTR notes numerous concerns, including overall weak enforcement and ineffective penalties in criminal IP cases, which has resulted in widespread piracy and counterfeiting. The report also urges improved measures to prevent government use of unlicensed software and provide a more reliable system for protecting undisclosed test or other data submitted to

obtain approval of agricultural chemical products, in particular measures that appear to provide for automatic approval of generic products.

The Philippines. USTR will conduct an OCR of the Philippines in 2010, and in the interim, the Philippines will remain on the Watch List in 2010. According to USTR, “ineffective enforcement of IPR continues to be a concern [and] although some agencies continue making progress to increase raid and seizure activity, these efforts have proven insufficient to address widespread piracy and counterfeiting in the country.” In addition, the 2010 Special 301 report noted “notorious markets” that deal in infringing goods, including Greenhills, Quiapo, Binondo, Makati Cinema Square, and 168 Mall in Manila, Philippines (that sell counterfeit clothing, shoes, watches, and handbags). USTR urges strengthened efforts to address inefficiencies in the judicial system, the establishment of specialized IPR courts, and the completion of legislative reforms needed to strengthen IPR protection. The United States remains concerned about amendments to the patent law that prohibit patents on certain chemical forms unless the applicant demonstrates increased efficacy.

Vietnam. The 2010 Special 301 report notes that the United States is encouraged by recent steps that Vietnam has taken to improve IPR protection and enforcement, including recent amendments to the IP Law, an increase in administrative fines for copyright infringement, and a continuation of efforts to address Internet piracy. Nonetheless, according to USTR, “overall enforcement efforts remain insufficient to address rampant piracy and counterfeiting [and] industry reports growth in Internet piracy.” USTR recommends that deterrent penalties be imposed more regularly, and urges enforcement agencies to consider initiating more criminal prosecutions. The United States also encourages Vietnam to continue considering regulations to protect against unfair commercial use and unauthorized disclosure of undisclosed test and other data generated to obtain marketing approval for pharmaceutical products.

Outlook

The 2010 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. These positive developments were reflected in USTR’s removal of Saudi Arabia, the Czech Republic, Hungary, and Poland from the Watch List, and USTR’s agreement with Israel to remove it from the Priority Watch List (and ultimately, from the Watch List) based on improvements to its IPR regime. Nonetheless, the report listed several areas of concern for USTR and US businesses, including numerous counterfeiting and piracy problems; the majority of the country reports in the 2010 report included the same IPR-related concerns and observations that USTR made in its 2008 and 2009 reports. As in the 2009 Special 301 report, the 2010

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report 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. The 2010 Special 301 report also made special mention of “notorious markets” among US trading partners that participate in the illegal production, sale and distribution of counterfeited and pirated products; USTR noted that these markets were present in many different countries, although the list of notorious markets in China appeared to be the longest of all the countries included in the report.

Similar to the 2008 and 2009 Special 301 reports, China and Russia continue to top the list of countries that, according to USTR, require strengthened IPR regimes. USTR’s assessment of China’s IPR regime (and its weaknesses) continues to be the longest and the most comprehensive, and USTR’s assessment of Russia was also more comprehensive than the assessments of the other US trading partners on the Priority Watch and Watch Lists. Other assessments that appeared to be more comprehensive and lengthy included those for Thailand and the Philippines, although it should be noted that USTR commended these two countries for improvements in their IP regimes. USTR will conduct OCRs for both these countries in 2010, which could mean that USTR is considering changing the Special 301 status of these two countries based on improvements that the trading partners have made to their IPR regimes in the past several years.

Submitted Comments Differ on Merits, Disadvantages of Retrospective and Prospective AD/CVD Systems

Summary

In March 2010, the Department of Commerce (DOC) requested public comments on the merits and disadvantages of prospective and retrospective antidumping (AD) and countervailing duty (CVD) systems. Comments were due by April 20, 2010. We review and summarize herein submitted comments on the two types of AD/CVD systems.

Analysis

I. Background

In a March 31, 2010 Federal Register (FR) notice, DOC requested comments on the relative advantages and disadvantages of prospective and retrospective AD and CVD systems (75 FR 16079-16080). According to the FR notice, in the conference report accompanying the 2010 Consolidated Appropriations Act (P.L. 111-117), Congress directed DOC to work with the Departments of Homeland Security and the

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Treasury to conduct an analysis of the relative advantages and disadvantages of prospective and retrospective antidumping and countervailing duty systems. DOC's report is currently scheduled to be transmitted to Congress on June 14, 2010. As part of its analysis, legislators requested that DOC address the extent to which each type of system would likely achieve the goals of:

- remedying injurious dumping or subsidized exports to the United States;
- minimizing uncollected duties;
- reducing incentives and opportunities for importers to evade antidumping and countervailing duties;
- effectively targeting high-risk importers;
- addressing the impact of retrospective rate increases on US importers and their employees; and
- creating minimal administrative burden.

To help in its analysis, DOC invited the public to comment on the issue as well as identify additional issues or considerations that it believes are deserving of DOC's attention as it prepares its report. Comments were due by April 20, 2010.

II. Analysis of Submitted Comments

Approximately 39 comments were submitted to DOC in response to its March 31, 2010 FR notice (please refer to **Appendix A** for a table that summarizes the submitted comments). Of the submitted comments, 19 of them support maintenance of the current retrospective system, 18 of them indicated support for a switch to a prospective system, and two of them did not offer a position.

Commenting parties supporting a prospective system argued that a prospective system of determining AD and CVD duties would help importers, noting that because of "the tremendous exposure importers face from retrospective assessments, and the lack of information about the amount of potential duties, imports are deterred whether they are fairly traded or not." According to these commenters, the current retrospective trade remedy system used by the United States does not allow predictability; consequently, that lack of predictability is costly and prevents sound business planning. These commenters argued that adopting a prospective system would also diminish the administrative burdens on DOC, US Customs and Border Protection, and the International Trade Commission. They also noted that the United States appears to be the only country in the world that continues to use a retrospective system.

Commenting parties supporting the current US retrospective system argued that the basic elements of the retrospective system make it superior to a prospective system. They noted that a retrospective

system makes it possible to account for the over- and under- collection of duties and minimizes the likelihood that continued dumping and subsidization will not be captured. They also argued that the current retrospective system best serves the interests of domestic industries affected by unfairly traded imports as well as importers. In some comments, parties argued that “no prospective system affords the same level of accuracy in addressing unfair trade practices or provides the same ongoing incentive for foreign producers to charge and/or importers to pay a fair price [as a retrospective system does].”

Outlook

DOC will now review the comments and will incorporate them into its report to Congress, due by June 14, 2010. At this stage, it is unclear whether DOC will decide to adopt a new prospective system, but given the strong push from several influential domestic industries (including steel) and labor unions (including the AFL-CIO) to maintain the current retrospective system in place, some observers opine that it will be too difficult for DOC to make such a switch in systems. They also argue that switching to a prospective system will “not happen overnight” and will require further analysis and input from other industrial sectors, thereby making such a switch a lengthy and complex process. A clearer picture of the possible routes DOC will take (if any) should emerge once DOC transmits its report to Congress.

Appendix A: Summary of Submitted Comments Received by DOC as of April 20, 2010¹

Commenter	Position	Comments
Alcoa Mill Products	Supports prospective system	"Under the current system, importers do not know, and cannot know, the amount of duties that may be applied to their imports subject to antidumping and countervailing duty proceedings. The results depend on Commerce Department calculations that use information not available to importers and, in many cases (especially non-market economy cases), to exporters and foreign producers as well. No other country in the world presents importers with such an untenable situation."
American Apparel and Footwear Association	Supports prospective system	"A key to fairness and a rules based system is predictability. Unfortunately, the current trade remedy system used by the United States, which is retrospective in nature, does not permit this predictability. In fact, the uncertainty generated by the current U.S. system for the collection of antidumping and countervailing duties is a matter of great concern to our members."
American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)	Supports retrospective system	"A retrospective system also minimizes the likelihood that continued dumping and/or subsidization will not be captured. This is extremely important to the U.S. industries and workers, including our members, who must continue to compete against these imports in the U.S. market."
American Institute for International Steel	Supports prospective system	"The retrospective system has created a remedy that is more penalizing than the dumping warrants in many cases and it is therefore we believe, inconsistent with our WTO obligations."
Baker and Hostetler	Supports prospective system	"Prospective systems are better at collecting duties because they collect upon importation and do not have to wait through administrative and legal reviews and proceedings that can take years."
Ministry of Commerce of China – Bureau of Fair Trade for Imports and Exports	No position	"Any measures taken to increase the likelihood that the duties owed are collected should not be inconsistent with WTO rules, and any change should be done in a way that is fair, justified, and transparent. Moreover, any measures or changes should not impose an extra burden on the importers and exporters concerned."
China Chamber of Commerce for Import & Export Of Machinery & Electronic Products	Supports retrospective system	"The retrospective system is more effective in preventing importers from circumvent duties by lowering price."
Chinese National Federation of Industries (CNFI)	Supports prospective system	"Under the methodology of "Prospective System", the final duty liability is prospectively definite; there will be generally fewer necessities to proceed annual reviews unless a refund request is lodged. An interim review or an administrative review will be considerably simpler and less intrusive because the purpose is to set a new duty rate or a non-dumped price."

¹ See <http://ia.ita.doc.gov/download/rvp/cmts-20100420/rvp-cmt-20100420-index.html>.

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Commenter	Position	Comments
Coalition for Fair Lumber Imports (CFLI)	Supports retrospective system	"As the Government Accountability Office recognized in a recent study on this question, 'under a prospective system, the amount of duties assessed may not match the amount of actual dumping or subsidization.'"
Committee to Support US Trade Laws (CSUSTL)	Supports retrospective system	"No prospective system affords the same level of accuracy in addressing unfair trade practices or provides the same ongoing incentive for foreign producers to charge and/or importers to pay a fair price. Prospective systems are by their design not focused on an accurate offset of all unfair trade practices found. Some systems, like the EU's, actually can reward behavior that is the opposite of a return to fair pricing. Others, working off of reference prices, are at most an estimate of fair price conditions – resulting in over or under collection of duties vs. the actual levels of dumping or subsidization."
Consuming Industries Trade Action Coalition (CITAC)	Supports prospective system	"In sum, importers face unacceptable risks from importing products that are subject to AD/CVD duties, and cannot pass those risks back to exporters or producers overseas, nor can they pass them on to customers, because they cannot quantify them at the time of sale. Moreover, the retrospective system does no significant damage to foreign producers and exporters, unless it is assumed that the U.S. is the only market where they can sell."
Diamond Sawblade Manufacturers Coalition	Supports retrospective system	"We believe that prospective AD/CVD systems are inherently less accurate, result in higher levels of uncollected duties, and are more likely to result in evasion of duties by parties subject to AD and CVD orders. They are easily manipulated, particularly by "non-market economy" countries through "new shipper" reviews, and often do not discipline the injurious dumping or subsidization that can occur after an order is imposed. Because of these flaws, the United States would not be well served by a change to a prospective system."
Emergency Committee for American Trade (ECAT)	Supports prospective system	"Use of a prospective normal value system in the United States will not change the purpose or effect of the trade remedy laws. Properly designed, it will provide as accurate assessment of the dumping and subsidy rate as the current retrospective system. Indeed, since a prospective normal value system is based on an entry-by-entry analysis, it should provide a more accurate assessment and a more immediate incentive to change pricing behavior by foreign producers, who will see on a much more timely basis the costs of injurious dumping or subsidization."
Gerdau Ameristeel	Supports retrospective system	"We believe that the current retrospective system is the most accurate method of assessing and collecting duties on unfairly traded goods, and therefore is most consistent with the trade remedy laws and their purpose. In our view, a prospective system does not offer advantages or improvements to the current system."
Hughes Hubbard	Supports prospective system	"The prospective system serves the advantage of providing finality to all interested parties of the applicable duty rate, while minimizing the disruption of international trade. As opposed to the retrospective system, the finality of the prospective remedy provides certainty to the U.S. importers

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Commenter	Position	Comments
		who are liable for the duties, and reduces the administrative burden on the agencies involved in administering the collection of duties as the necessity of having to wait for a final outcome as to duty liability is eliminated.”
ICL Performance Products LP	Supports retrospective system	“The retrospective U.S. system produces the most fair and accurate determination of dumping or subsidization based upon the most currently available information. Unlike the U.S. retrospective system, prospective systems favor importers at the expense of domestic industries that have suffered injury by reason of dumped or subsidized imports.”
Innophos, Inc.	Supports retrospective system	“The retrospective U.S. system produces the most fair and accurate determination of dumping or subsidization based upon the most currently available information. As do prospective regimes, the U.S. system provides refunds of any overpaid duties, in due course refunding duty deposits when dumping or subsidies cease. Unlike prospective regimes, however, the U.S. system also imposes additional duties when dumping margins or subsidies increase.”
Kelley Drye & Warren (on behalf of various domestic industries represented in Title VII cases before DOC)	Supports retrospective system	“Under a retrospective system, the duties finally assessed reflect actual economic behavior of subject exporters and importers (and governmental entities, in the case of subsidies) and minimizes the potential that dumping or subsidization that actually occurs is not captured. Conversely, it also minimizes the potential that importers of products from exporters who have modified their pricing, or whose costs have changed, or who are no longer benefiting from subsidies, will be required to pay duties that exceed their actual levels of dumping or subsidization. Thus, the U.S. system serves the principal goal of remedying injurious dumping and subsidized exports, identified in the report.” “Prospective AD/CV regimes do not provide the same level of accuracy in addressing unfair trade practices and do not provide the same incentives for foreign producers to charge and/or importers to pay a fair price.”
King & Spalding	Supports retrospective system	“A prospective system would not reduce the incentives and opportunities for importers to evade AD and CVD duties, nor would it reduce the problems associated with high-risk importers . . . a prospective assessment system would not eliminate or even reduce the likelihood for evasion of AD or CVD duties, because a prospective system would permit importers to avoid the consequences of increased dumping or subsidization. Foreign producers and importers would be free to increase levels of injurious dumping or subsidization without any recourse for domestic producers.”
Maritime Products International	Supports prospective system	“The retrospective system freezes the experienced and professional importers in any given industry out of their normal role in the supply chain and often brings in an element who is less concerned about long-term product development but rather is focused on ways to profit in what becomes very opaque and volatile market situations.”
Michael's Stores, Inc.	Supports prospective system	“Under the retrospective system, importers do not know, and cannot know, the amount of duties that may be applied to their imports subject to antidumping and countervailing duty proceedings. The results now depend on Commerce

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Commenter	Position	Comments
		Department calculations that use information not available to importers and, in many cases, to exporters and foreign producers as well. No other country in the world presents importers with such an untenable situation."
Mid Continent Nail Corporation	Supports retrospective system	"Changing to a prospective system would weaken Commerce's ability to effectively administer the trade laws, and would undermine the efficacy of all AD and CVD orders. By all appearances, the only parties who would benefit from such a fundamental change would be U.S. importers, who would eliminate the risk of increased duties when they import dumped product, and foreign exporters, who would be able to dump at levels above the assessment rate, until caught, with no risk that the U.S. importer would have to pay for these unfair trade practices. This is not the way the law is intended to work, and it would not remedy the injury suffered by the U.S. industries that our trade laws are intended to assist."
Mowrey & Grimson (on behalf of importers of wooden bedroom furniture)	Supports prospective system	"A shift to a prospective duty regime would enable the U.S. government to continue to remedy injurious dumping and subsidies while enhancing overall compliance with the regime. These gains in compliance would minimize uncollected duties, effectively targeting high-risk importers. Moreover, a change to a prospective regime would enhance the predictability of the current AD and CVD system, which is fraught with unpredictability for all actors involved - particularly for U.S. importers, the domestic industry and the government itself."
National Retail Federation (NRF)	Supports prospective system	"In order to plan and execute their operations and compete effectively, American companies need a regulatory and business environment that provides predictability and consistency. But the U.S. retrospective system creates uncertainty and arbitrariness. When faced with the contingent risk of an AD or CVD case, many American companies simply stop doing business with suppliers in the target country and shift their source of supply to another country. This option is obviously not available when the foreign manufacturer is effectively the only viable supplier of a product that a U.S. company must import for its operations, in which case the company may be forced pull its operations out of the United States entirely and move them offshore."
Nucor Corporation	Supports retrospective system	"Prospective AD/CVD systems are inherently less accurate, result in higher levels of uncollected duties, and are more likely to result in evasion of duties by parties subject to AD and CVD orders. They are easily manipulated, particularly by "non-market economy" countries through "new shipper" reviews, and often do not discipline the injurious dumping or subsidization that can occur after an order is imposed."
Philips Electronics North America	Supports prospective system	"Under the current U.S. retrospective system, importers do not know the amount of duties that may be applied to their imports subject to antidumping and countervailing duty proceedings. The result for companies like ours can be the loss of access to imports creating supply chain disruptions. Because our suppliers may not be willing to take the risk of

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Commenter	Position	Comments
		dramatic increases in duty liability, we can lose access to imports even if we are not liable to pay these additional duties. No other country in the world presents importers with such an untenable situation.”
Precision Metalforming Association (PMA)	Supports prospective system	“There is a better way to enforce the law and balance the interests of all. The prospective system of assessment is employed by all countries that enforce AD/CVD laws in the world, except the United States. PMA believes that such a system would better protect the interests of domestic producers while effectively guarding against the import of unfairly traded goods.”
Schagrin Associates	Supports retrospective system	“The unreliability inherent in determining the value of imported merchandise at the time of entry for prospective antidumping assessment when there is no sale to an unaffiliated party at the time of entry is overcome by the retrospective method used by the Department. Under the Department's retrospective method the assessment does not occur at the time of importation. “
Seaman Paper Company of Massachusetts, Inc.	Supports retrospective system	“In our proceedings, the retrospective assessment system has allowed the U.S. industry and Commerce to identify and combat circumvention and fraud in important ways that a prospective system would not.”
Sidley Austin (on behalf of global manufacturers of antifriction bearings)	No position	“It is impossible in the abstract for the Companies to advocate for one model over the other absent clarity about the specific features of a proposed prospective system. Despite the benefits of transparency and accuracy offered by the retrospective system, the Companies submit that the retrospective duty system employed by the United States suffers from an inherent problem – the lengthy uncertainty surrounding the amount of final duty liability due to the delay from the time of deposit of estimated duties until the time that the amount of additional liability or refund is finally determined.”
Steel Manufacturers of America	Supports retrospective system	“The current retrospective system is the most accurate method of assessing and collecting duties on unfairly traded goods, and therefore is most consistent with the trade remedy laws and their purpose.”
Stewart & Stewart	Supports retrospective system	“Replacing our current retrospective system with a prospective system, however, would likely seriously impair the effectiveness of the U.S. trade remedy laws. This is because the retrospective system as administered by the United States focuses on offsetting through the imposition of duties whatever level of dumping or subsidization has occurred on specific entries. The law is designed to avoid over-collection as well as under-collection of duties owed.”
Southern Shrimp Alliance (SSA)	Supports retrospective system	“Unfortunately, SSA's experience indicates that a change from a retrospective to a prospective duty assessment system is unlikely to minimize uncollected duties, reduce incentives or opportunities to evade trade relief, or improve the effectiveness of targeting high-risk importers.”
Trade Remedy Reform Action Coalition (TRRAC)	Supports prospective system	“A prospective system is a win-win policy choice. It provides an effective remedy against injurious dumping and subsidies, while providing U.S. businesses the predictable

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Commenter	Position	Comments
		global supply chains so essential in today's economy."
Skadden Arps (on behalf of U.S. Steel Corporation)	Supports retrospective system	"The current retrospective trade law system maintained by the United States has a number of significant advantages over prospective systems, and provides the most open, accurate and transparent trade law regime in the world. Preserving the strength and integrity of the existing system is vital in order to address the growing threat of unfair trade to our nation's industries and workers, and offers the most equitable outcomes for all market participants by ensuring that any AD/CVD measures are precisely calibrated to the actual level of unfair trade in the market."
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW)	Supports retrospective system	"A retrospective antidumping and countervailing duty assessment is by far the best system for ensuring that the trade remedy laws work as intended to fully counter unfairly traded imports and thus provide the domestic industry and workers with the relief intended."
U.S. Association of Importers of Textiles and Apparel (USA-ITA)	Supports prospective system	"USA-ITA is strong proponent of the principle of a prospective system, under which the amount of dumping or subsidization is calculated on the basis of a prior period (generally, one year, although less in the case of an initial investigation involving a product of a non-market economy) and then offsetting duties are put in effect going forward. USA-ITA firmly believes a fairly implemented prospective system of duty collection can and would effectively meet the goals of the antidumping and anti-subsidy agreements and laws while mitigating the most harmful and unnecessary effects of the retrospective system."
Vietnam Chamber of Commerce and Industry (VCCI)	Supports prospective system	"We do believe that the replacement of the current retrospective system of collecting AD/CV duties by a prospective system would be a significant step in improving the US' antidumping and countervailing laws and regulations and a signal of trade liberalization that could contribute to facilitating Vietnam export to the US, then leveling up the modest income of millions of Vietnamese working in exporting sectors."
Walmart	Supports prospective system	"A prospective system would increase economic predictability, eliminate the costly economic burden, and allow U.S. industries the same advantages as its trading partners who are currently using the prospective system of assessment, without impacting the importance of trade remedies in the United States."

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Senators Introduce Draft Climate Change Bill: “The American Power Act”

Summary

On May 12, 2010, Senators John Kerry (D-MA) and Joseph Lieberman (I-CT) introduced the “American Power Act” (APA), a bill that addresses climate change and greenhouse gas emissions, among other things. The Senators initially wanted to introduce the climate change bill in late April 2010 but political difficulties forced the legislators to delay their bill introduction to May. We review below the bill and its provisions as well any next steps for the bill and its chances for Senate passage.

The full text of the APA can be found at: <http://kerry.senate.gov/americanpoweract/intro.cfm>.

Analysis

I. Background

As noted, Sens. Kerry and Lieberman, along with Sen. Lindsey Graham (R-SC), had originally intended to introduce the APA in late April 2010. Sen. Graham had worked with the other legislators since 2009 in drafting the bill but in April 2010, withdrew his support for the bill after Democratic leaders raised the possibility of moving an immigration bill to the floor before the climate bill. Although Sens. Kerry and Lieberman (unsuccessfully) attempted to draw Sen. Graham back to the climate change bill, the two Senators ultimately decided to introduce the bill without the support of the Republican Senator. Upon its unveiling, Sen Graham stated that he looks forward to working with his colleagues “on both sides of the aisle to improve upon these concepts and find a pathway forward on energy independence, job creation, and a cleaner environment,” prompting some observers to opine that “the door remains open for a return to bipartisan work on the bill.”

II. American Power Act Provisions

The APA is intended to provide incentives for the domestic production of clean energy technology, achieve meaningful pollution reductions, and create jobs. We review below several of the provisions of the APA as related to greenhouse gas emissions, emissions allowances, offset credits, and general US policy on climate change, among other things.

A. Greenhouse Gases and Emissions Targets

In regards to greenhouse gas emissions and targets, the APA would cover only those operations that emit more than 25,000 tons of greenhouse gases each year. The bill also includes provisions that address, among other things:

Global warming pollution reduction goals and targets. The bill proposes cuts in emissions from 2005 levels, beginning with a 4.75 percent cut in emissions from 2005 levels by 2013, 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.

Greenhouse gas list. The bill establishes a list of greenhouse gases regulated under the bill that includes carbon dioxide, methane, nitrous oxide, sulfur hexafluoride, hydrofluorocarbons (HFCs) emitted as a byproduct, perfluorocarbons, and nitrogen trifluoride.

Greenhouse gas markets. The bill contains language regulating greenhouse gas markets and addresses the trading of greenhouse gas instruments (including the requirements for the trading of greenhouse gas instruments), excessive speculation, registration for regulated greenhouse gas market participants, and compliance, among other things.

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, as noted, 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 entities, and allowances are tradable. Specifically, the bill establishes emission allowances for covered industries, and includes provisions that address, among other things:

Emission allowances. The APA establishes an annual tonnage limit on greenhouse gas emissions from specified activities, and directs the Environmental Protection Agency (EPA) to establish allowances equal to the tonnage limit for each year. The bill prohibits covered entities from emitting or having attributable greenhouse gases in excess of their allowable emissions level, which is determined by the number of emission allowances and offset credits they hold on the specified date. Emission allowances will be distributed for three primary goals: “to protect consumers from energy price increases, to assist industry in the transition to a clean energy economy, and to spur energy efficiency and the deployment of clean energy technology.” As noted, the bill allows the auctioning of allowances and includes rules on the auctions.

International emission allowances. The APA establishes criteria that must be met before allowances from foreign programs can be used for compliance by covered entities.

Emission allowance rebate program. The bill establishes a program that rebates emission allowances to eligible industrial sectors to compensate these sectors for costs incurred as a result of compliance with the APA and its changes to current climate change law. The bill mandates the government to determine which sectors and subsectors should be eligible for rebates through a rulemaking based on an assessment of the energy and greenhouse gas intensity of each sector and the trade intensity of each sector. Under the bill, the EPA will annually distribute rebates to the owners and operators of entities in eligible industrial sectors. The bill sets aside 15 percent of the allowances for a transitional period to provide qualifying industries with free allowance rebates. The distribution formula, based on the industry-average emission rate and each firm's specific output, will reward firms that become more energy-efficient and lower-emitting.

International Reserve Allowance Program. The bill requires the President to establish an International Reserve Allowance Program if a multilateral climate change agreement has not entered into force by January 1, 2020, unless the President determines that such program would not be in the national economic or environmental interest of the United States. The International Reserve Allowance Program would enable "the sale, exchange, purchase, transfer, and banking of international reserve allowances for covered goods with respect to the eligible industrial sector." The government would establish a general methodology for calculating the quantity of international reserve allowances that a US importer of any covered good must submit. Observers opine that the International Reserve Allowance Program serves as a "border adjustment" in that it requires importers to purchase allowances when importing into the United States covered commodities such as steel, aluminum, or cement from countries that fail to adopt their own climate change programs. Sen. Kerry addressed the "border adjustment" in a press statement, noting that:

We also set up a tough, WTO-consistent border adjustment mechanism so that there won't be any "carbon leakage" of companies manufacturing things overseas in countries that don't manage their emissions. Imports from those countries will have to pay a fee at the border. This will protect American industry and make sure jobs stay here at home. And we threaded that needle

in a way that President Obama can support - you'll remember he was concerned about the way it's been handled in previous bills.²

C. Offset Credits

The bill establishes "offset credits" for domestic and international emission reductions, and contains provisions that address, among other things:

Offset credit program for domestic emission reductions. The bill establishes an "offsets program" and requires that regulations ensure offsets are additional, measurable, verifiable and enforceable. Under the bill, the government will establish and update a list of offset project types that are eligible under the program. The bill also establishes procedures for the issuance of offset credits to eligible entities.

International offset credits. The bill establishes establish "a program for the issuance of international offset credits . . . based on activities that reduce or avoid greenhouse gas emissions, or increase sequestration of greenhouse gases, in a developing country." Under the program, offset credits would be provided to "qualifying offset projects that result in emission reductions." The bill states that in order "to minimize the potential for leakage and to encourage countries to take nationally appropriate mitigation actions to reduce or avoid greenhouse gas emissions, or sequester greenhouse gases," the government will identify sectors, or combinations of sectors, within specific countries with respect to which the issuance of international offset credits on a sectoral basis is appropriate, and issue international offset credits for those sectors only on a sectoral basis. Under the bill, the government is required, for each offset project type, to establish standardized methodologies, including accounting for and mitigating potential leakage. The bill also mandates the creation of a list of categories for international offset credits including sector-based, credits issued by an international body, or those from reduced deforestation.

D. US Policy on Climate Change

The bill contains general provisions addressing the US position on climate change and emissions reductions, and includes provisions that address, among other things:

International negotiations and reporting. The bill encourages the United States to achieve the goals included in the bill "through international agreements and states that it is the policy of the United States to work proactively under the UNFCCC and in other forums to establish binding agreements committing all major-emitting countries to contribute equitably to the reduction of global greenhouse gas emissions."

² See http://www.huffingtonpost.com/john-kerry/transforming-our-power_b_573303.html.

The bill also requires the Secretary of State, working with the Strategic Interagency Board, to prepare annually an interagency report on the climate change and energy policies of the top five largest greenhouse gas emitting countries that are not members of the Organization for Economic Co-Operation and Development (OECD).

Clean Energy Technology Fund. The bill establishes a Clean Energy Technology Fund to support programs that “enhance the economic, energy, and environmental security of the United States through the development of energy technologies and promotes US leadership in developing and deploying advanced energy technologies.”

E. Other Provisions

The bill also includes provisions meant to address other aspects of climate change. Among other things, the bill:

- Contains tighter provisions on offshore oil and gas (in light of the recent oil spill), including language that allows new oil and gas drilling off the southeast Atlantic coast, although the bill enables a state to enact a law prohibiting leasing within 75 miles of its coastline (Florida would be permitted to extend a ban out 125 miles);
- Contains provisions on aid and emission allowances for states and consumers for various energy sources, including electricity, low-carbon heating, natural gas, home heating oil, and propane;
- Contains provisions addressing the consumption of HFCs, black carbon emissions, and mitigation of greenhouse gas emissions focusing on non-carbon dioxide climate-forcing gases;
- Contains provisions encouraging domestic nuclear power generation;
- Contains provisions encouraging the exploration and adoption of commercial-scale deployment of carbon capture and storage technology;
- Amends the Clean Air Act to establish performance standards for new coal-fueled power plants;
- Enables the government to make available loans to qualified consumers to implement energy efficiency measures;
- Mandates the government to develop a national transportation low-emission energy plan that projects the near- and long- term need for and location of electric drive refueling infrastructure and identifies infrastructure and standardization needs of electricity providers, vehicle manufacturers, and electricity purchasers;

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- Directs states and metropolitan planning organizations to address transportation-related greenhouse gas emissions by including emission reduction targets and strategies to meet those targets; and
- Enables the EPA to provide grants to manufacturers and component suppliers to refurbish or expand existing manufacturing facilities to produce advanced technology vehicles and to support engineering integration of certain vehicles and components such as plug-in electric drive vehicles.

III. Reaction to Introduction of APA

The APA was met with mixed reaction. **President Obama**, who has made climate change legislation a priority for his Administration, welcomed the bill, stating that the legislation is an important step in moving the United States to a clean energy economy “that will create American jobs building the solar panels, wind blades and the car batteries of the future.” He noted that “for too long, Washington has kicked this challenge to the next generation [and] the status quo is no longer acceptable to Americans.” Sen. Kerry echoed the President’s statement and noted that “the President has said that he wants to move forward with this legislation and he thinks it’s important to try to do so . . . the White House is committed to moving forward.”

Within Congress, **Sens. Kerry and Lieberman** touted the bill as one that would propel the use of clean energy in the United States and protect US jobs. **Chairman of the House Select Committee on Energy Independence and Global Warming Edward Markey (D-MA)** noted that Sen. Kerry “has worked extraordinarily hard [and] it’s a good bill,” opining that Congress “can make real progress this year—if not, then we will pass it next year.” **Chairwoman of the Senate Environment and Public Works Committee Barbara Boxer (D-CA)** opined that the draft climate change legislation is a “crucial effort” that she looks forward to “perfecting” as it moves forward. According to observers, **Senate Majority Leader Harry Reid (D-NV)** applauded the bill although he appeared to show little interest in taking a lead in promoting it, stating that he welcomes “the ideas of my colleagues to strengthen this proposal [and] to be successful we will need significant bipartisan cooperation, and I am hopeful Republicans will join us in working to further develop this bill so that it has broad support and can pass this year.” **Sen. James Inhofe (R-OK)**, however, pledged to fight the bill, and **Sen. Christopher Bond (R-MO)** criticized the APA, stating that “the American people do not want a new gas tax, intentionally higher energy prices and lost jobs that the bill would force on them in the name of climate change.”

Within the private sector, reaction to the bill was more measured and muted. Although **Thomas Kuhn, head of the Edison Electric Institute** (which represents most of the United States’ electricity production), **James Rogers, CEO of Duke Energy**, and **John Rowe, CEO of Exelon** were present at the bill’s rollout

with Sens. Kerry and Lieberman, other private sector groups and entities noted that they required more time to review the bill. The **US Chamber of Commerce** did not directly endorse the bill but did not oppose the legislation either. The US Chamber of Commerce's Vice President of Government Affairs R. Bruce Josten praised the Senators for "their work to constructively engage the business community on these issues," adding that the US Chamber of Commerce supports efforts to address global warming and energy security and "believes that any legislation must be comprehensive and bipartisan, and take into account a wide spectrum of issues including American jobs and our economy." The **American Petroleum Institute (API)** noted that API was "reviewing the released text to assess the proposal's possible impact on jobs, energy production, and consumers of oil and natural gas."

The American Wind Energy Association noted that it looks forward "to seeing provisions on renewable energy like a strong renewable electricity standard as well as energy efficiency to create new clean energy jobs and avoid carbon in the near term in any package considered by the Senate." **The Dow Chemical Co.** commended the Senators for their hard work in developing draft legislation and noted that it supports a sustainable energy policy for the United States. **The Natural Resources Defense Council** noted that "as the Deepwater Horizon disaster continues to unfold with tragic consequences, it has become painfully clear that America needs a safer, cleaner approach to energy development [and] Congress must enact a comprehensive clean energy and climate bill this year that puts America back in control of our energy situation," although it added that it had not yet developed a position on the bill itself. **The United Steelworkers** stated that "a climate bill must ensure that emissions are actually reduced and not simply off-shored along with millions of American jobs [and] a well-constructed approach should limit the amount of carbon 'leakage' — the incentive for production of goods and jobs to simply move to countries that fail to address global climate change." **Shell Oil Co.** stated that the APA "ensures America's global competitiveness and recognizes the role clean natural gas can play in growing the economy and protecting the environment."

The **Nuclear Energy Institute** opined that the bill provided "a solid platform for the expansion of nuclear energy to meet our electricity needs, create thousands of jobs and help achieve the desired reductions of greenhouse gas emissions." According to the **Nuclear Information and Resource Service**, however, "this bill is just business as usual: taxpayer giveaways to giant nuclear and other energy corporations, wrapped in the guise of doing something about our climate crisis."

IV. Next Steps and Likelihood of Congressional Passage

According to Sens. Kerry and Lieberman, the APA, as it stands, is a "discussions draft" and neither Senator has formally introduced the APA in the Senate. According to Sen. Kerry, he and other Senate

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Committee Chairmen will meet in the coming weeks with Senate Majority Leader Reid to determine a strategy on how to move forward on the bill. Sens. Kerry and Lieberman also will brief other Democratic legislators at the Democratic Senate caucus meeting the week of May 17, 2010. Senate Majority Leader Reid specified that he will summon the Chairmen of the various Senate Committees with jurisdiction over climate and energy legislation to discuss how to proceed after the Senate returns from its Memorial Day recess (in early June). According to several reports, Sen. Reid has told the Sens. Kerry and Lieberman that they must demonstrate to him that they have the 60 votes needed to overcome a filibuster before he would bring the APA to the Senate floor for consideration.

Even with Sen. Reid scheduling discussions on the APA by early June, the prospects for Congressional consideration and passage of the APA in 2010 are small. In terms of logistics, the EPA, Energy Information Administration and Congressional Budget Office must still conduct their budgetary analyses of the bill which will likely take several weeks. Even if these agencies were able to complete their analyses by the early June start to the talks among Senate Committees on the bill, the Senate calendar is already exceedingly full with other legislative proposals and priorities that Senators will want to consider before year's end. As noted, the bill contains provisions that address issues over which several different Senate Committees have jurisdiction, and these Committees will need time to review the bill, mark it up, and hold Committee votes on the APA before it is sent to the Senate floor. Add to that the complications to scheduling that will result from the November 2010 elections, and it becomes very hard to fit in Senate consideration and passage of the 900-page APA before the end of the year.

In terms of politics, the APA does not have firm Republican backing and support. Indeed, with Sen. Graham distancing himself from the bill, many observers opined that the bill was "doomed from the start." No other Republican has stepped forward to support the bill. Sens. Kerry and Lieberman thus face a tough uphill battle in obtaining and showing to Senate Majority Leader Reid that they have the 60 votes needed to overcome a filibuster.

Further, the "muted" industry reaction and the opposition to the bill that some Senators have already expressed create additional obstacles that Sens. Kerry and Lieberman will have to address and overcome in pushing the bill forward. These "obstacles" could certainly drag out or stretch Senate consideration of the bill.

Consequently, at this stage, it does not appear that the Senate will be able to successfully consider and pass the APA before the end of 2010. Logistical limitations (a June start to the APA talks, a packed Senate calendar, various Committees with jurisdiction over the bill's contents and the time needed for their review of the bill, upcoming November elections) combined with a difficult political environment (lack

of Republican support for the bill, an ultimatum from Sen. Reid to show that Sens. Kerry and Lieberman have the 60 votes necessary to defeat a filibuster) and other factors (a “muted” industry reaction and fierce opposition from some legislators) make it extremely difficult for the APA’s sponsors to move the bill forward for ultimate Senate consideration and passage by end-2010. According to observers, consideration of the APA in 2011 is a more realistic timeframe.

Outlook

The complications surrounding the development and introduction of the APA provided early indications to observers that the bill would face a rocky climb in the Senate and would unlikely see consideration and passage in 2010. According to most observers, the Senate is more likely to look at the bill in 2011 when it is not limited by the logistical realities of its already-packed calendar, the upcoming summer recess and the election season. Under a 2011 timeframe, some observers also opine that such an extended timeframe could offer Sens. Kerry and Lieberman more time to garner Republican and other support for the bill, thereby strengthening the bill’s support system.

Nonetheless, the introduction of the bill indicates that climate change is a priority for legislators and for the Administration. US trading partners are likely to review and monitor the bill closely, especially because it contains provisions that could affect foreign companies. As noted, observers opine that the International Reserve Allowance Program serves as a “border adjustment” in that it requires importers to purchase allowances when importing into the United States covered commodities such as steel, aluminum, or cement from countries that fail to adopt their own climate change programs. Under such a program, these imported products would essentially face a “tax” that could serve to make their products less competitive to US products or products imported into the United States from countries that have similar climate change programs to that of the United States. The inclusion of such a program in the Senate bill is likely to concern several US trading partners since it could indicate the willingness of the United States to impose such measures. In addition, other provisions of the bill indicate that the United States will be closely monitoring and pressuring its trading partners to adopt programs and regulations that address climate change and greenhouse gas emission. This increased scrutiny and pressure could translate to more demands for bilateral and multilateral participation by other countries on climate change initiatives that the United States supports.

As noted, the APA is still in “draft” form, and so it is unclear at this stage when the Senators will introduce the bill formally in the Senate and when Senate Committees will begin their consideration of the bill (if at all, this year). Thus, it remains to be seen what other provisions might be added to the bill that would affect US trade with its trading partners. The presence of the International Reserve Allowance Program

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indicates that legislators have and will continue to consider such measures to address “carbon leakage” and the competitiveness of US industry, which could translate to other provisions that may affect trading partners and foreign businesses.

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

US and Chinese Trade Officials Meet Under Second Annual Strategic and Economic Dialogue Gathering

Summary

US and Chinese officials gathered in Beijing, China May 24-25, 2010 for the second annual meeting of the Strategic and Economic Dialogue (S&ED). Secretary of State Hillary Rodham Clinton and Secretary of the Treasury Timothy Geithner led the US delegation that included Secretary of Commerce Gary Locke, United States Trade Representative (USTR) Ron Kirk, Federal Reserve Chair Ben Bernanke, and several other Cabinet officials. China’s delegation included State Councilor Dai Bingguo, Vice Premier Wang Qishan, and Minister of Commerce Chen Deming. The S&ED covered strategic issues, including discussions on security and politics, and economic issues, including macroeconomics, trade and investment. We review the S&ED’s economic discussions and any outcomes of the bilateral meeting.

Analysis

I. Background

President George W. Bush and Chinese President Hu Jintao initiated the original Strategic Economic Dialogue (SED) in September 2006 as a high-level forum in which representatives from their two governments could meet biannually to discuss “bilateral and global strategic economic issues of common interest and concern.” China and the United States convened the first SED meeting in December 2006, followed by meetings in May 2007, December 2007, July 2008, and December 2008. Upon entry into office, the Obama Administration decided to rename the forum and widen the topics covered under the S&ED to include political and security issues. President Obama and President Hu Jintao formally established the S&ED in April 2009.

II. S&ED Economic Discussions

During the two-day S&ED talks, US and Chinese officials³ discussed a number of economic issues, including:

- **Global Economy.** Both sides discussed the global economy and government policy actions meant “to secure the recovery, create jobs and rebalance growth to make it more sustainable.” The United States pushed for “more home-grown, consumption-led growth in China,” and Chinese officials pushed for the United States to “reinforce fiscal consolidation and private savings in the United States.” Both sides also discussed policies to eliminate fossil fuel subsidies. In addition, both sides discussed financial sector regulation and strengthening the international financial architecture.
- **China’s Indigenous Innovation Policy.** According to reports, China’s indigenous innovation policy was a top priority for the US delegation at the S&ED. In November 2009, China proposed the creation of an indigenous innovation product list that would establish a government procurement preference for products that meet indigenous innovation criteria, such as requiring the intellectual property be developed in China, and that the trademark on the product be established in China. The product areas currently covered include computers and application equipment, telecom products, modern office equipment, software, new energy equipment, and high-efficiency energy saving products. In April 2010, China’s Ministry of Science and Technology eased the indigenous innovation clause that originally would have required companies to prove their high-tech products were developed specifically for the Chinese market according to domestic standards, in order to be published in a government procurement catalogue. US officials praised China for easing the policy somewhat but stated that more work is required in order to alleviate US concerns on fair competition and intellectual property protection. According to the Department of Treasury, the two sides committed to innovation policies consistent with strong principles, including non-discrimination, intellectual property rights protection, market competition and no government interference in technology transfer. China also agreed to launch expert and high-level bilateral innovation discussions with all relevant US and Chinese agencies and to take the results of these discussions into account in formulating and implementing its innovation measures.

³ Please refer to Appendix 1 for a full list of US and Chinese individuals participating in the economic discussions at the S&ED.

- **Currency.** Another priority issue for the US delegation was the value of China's currency, although the talks did not result in any substantial movement on the currency issue. President Hu Jintao announced that "China will continue to steadily advance the reform of the formation of the [yuan] exchange rate mechanism under the principle of independent decision-making, controllability and gradual progress," and US officials lauded "the fact that China's leaders have recognized that reform of the exchange rate is an important part of their broader reform agenda." The two sides agreed to continue discussions on currency in the time leading up to and at the June 2010 G-20 leaders' summit.
- **Export Controls.** According to reports, Chinese officials pushed for the Obama Administration to ease export control mechanisms for "dual-use" technology. Minister of Commerce Chen Deming expressed hope that any changes to the US export control system, especially in regards to "dual use" technology, "will be big, not small — not removing several items from the control list but improving the regime overall, and also a change in the practice of singling out China and treating China unfairly." Vice Premier Wang Qishan stated that through the S&ED and other discussions, China "hopes to learn about, in detail, the US timetable and road map" on export control reforms. Prior to the S&ED, Secretary Locke had alluded that the United States could soon ease restrictions on some high-tech exports to China.
- **Government Procurement.** China stated that it will submit a revised offer to join the World Trade Organization (WTO) Agreement on Government Procurement (GPA) by July 2010. China made its first government procurement offer in December 2007 although the United States and the EU criticized the initial offer as inadequate and lacking in commitments on procurement of services, among other things.
- **China's Market Economy Status.** Both sides discussed China's interest in recognition as a market economy although the United States and China did not reach an agreement on this matter. Both sides agreed to continue discussions about China's market economy status at upcoming plenary session of the Joint Commission on Commerce and Trade (JCCT).

III. S&ED Outcomes

According to the Department of State, the second annual S&ED produced 26 specific outcomes, including, but not limited to:

- A Memorandum of Understanding (MoU) between the Department of Homeland Security, US Customs and Border Protection (CBP) and the General Administration of Customs of the People's Republic of China Concerning Bilateral Cooperation on Supply Chain Security and Facilitation;
- US Trade and Development Agency grants to support cooperation between US and Chinese enterprises and institutions on combined heat and power, aviation bio-fuels, and smart grid standards;
- Strengthened cooperation on the inspections of soybeans to ensure the flow of US exports to China;
- Enhanced cooperation on preventing and combating the illegal trafficking of nuclear and other related radioactive materials;
- China's agreement to allow both foreign joint ventures in China and foreign investors investing in China through the Qualified Foreign Institutional Investor program to trade stock index futures; and
- An agreement by both sides to build a network of cooperative arrangements on issues such as boosting access to trade finance facilities for small and medium-sized enterprises, ensuring fair labor standards and strengthening protections for workers, and fighting money laundering and terrorist financing.

A full list of agreements is available at: <http://www.state.gov/r/pa/prs/ps/2010/05/142180.htm>.

Outlook

As many observers expected, US and Chinese officials did not make any substantive movements on the priority agenda items that the two sides brought to the second annual S&ED. Although US officials lauded China for making some changes to its indigenous innovation policy, they note that more work is required to address US concerns with policy and its effects on IPR and procurement. And although President Hu Jintao made a broad statement regarding China's continued reform of its currency, the United States did not press China too hard on the issue at the meetings and agreed to continue discussions on currency at the June 2010 G-20 leaders' summit. The bilateral dialogue on China's interest in recognition as a market economy continued but did not result in any agreement, and although the two sides discussed US export control reform at length, the United States did not make any major announcements regarding the matter following the Beijing gathering.

The agreements that both sides were able to reach at the meeting were smaller in scale than the large priority items on the negotiating table and more technical; in some instances, such "agreements" were simply announcements of continued cooperation on certain initiatives. The Department of Treasury is touting that China has agreed to submit a revised offer to join the WTO GPA by July 2010 but observers

are withholding opinion on this until they see China's offer, in light of the criticism that China's first GPA offer elicited.

Consequently, although the S&ED provided the United States and China the opportunity to air their concerns with regards to the US-China bilateral relationship, the Beijing meetings did not result in any substantive breakthroughs on the key issues that both sides have brought up repeatedly over the past several years. As noted, observers did not expect much movement on such issues from the S&ED. It will be interesting to measure expectations for the S&ED relative to expectations for the upcoming Fall 2010 JCCT meeting (expected to take place in October or November 2010). US officials met with their Chinese counterparts following the S&ED for a JCCT mid-year plenary session, and according to reports, US officials were focused on indigenous innovation and other discriminatory industrial policies at the session. Observers view the JCCT as the main forum for addressing bilateral trade matters and promoting commercial opportunities between the United States and China, and may thus expect the JCCT to prompt more substantive movement on the key issues that saw little progress at this latest S&ED.

Appendix 1: Participants in Economic Track of S&ED

US participants at the second annual S&ED included:

1. Secretary of the Treasury Tim Geithner;
2. US Ambassador to China Jon Huntsman;
3. Secretary of Commerce Gary Locke;
4. Secretary of Health and Human Services Kathleen Sebelius;
5. USTR Ronald Kirk;
6. Chair of the Council of Economic Advisors Christina Romer;
7. Director of the Office of Science & Technology Policy John Holdren;
8. Chairman of the Federal Reserve Ben Bernanke;
9. President of the US Export-Import Bank Fred Hochberg;
10. Chairman of the Federal Deposit Insurance Corporation Sheila Bair;
11. Director of the US Trade & Development Agency Leocadia Zak;
12. Administrator of the Energy Information Administration Richard Newell;
13. Under Secretary for International Affairs of the Department of Treasury Lael Brainard;
14. Under Secretary for Economic, Energy and Agricultural Affairs of the Department of State Robert Hormats;
15. Under Secretary for Farm and Foreign Agricultural Services of the Department of Agriculture Jim Miller;
16. Special Assistant to the President for International Economics and Senior Director of the National Security Council David Lipton;
17. Deputy Under Secretary for International Affairs, Department of Labor Sandra Polaski;
18. Assistant Secretary for Policy and International Affairs, Department of Energy David Sandalow;
19. Director of the Office of International Affairs of the Securities and Exchange Commission Ethiopis Tafara;
20. Director of the Office of International Affairs of the Commodity Futures Trading Commission Jacqueline Mesa;
21. Deputy Assistant Secretary of the Department of Transportation Susan McDermott;
22. Department of Justice Antitrust Division Economics Director of Enforcement Kenneth Heyer; and
23. Iowa State Insurance Commissioner Susan Voss.

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Chinese participants at the second annual S&ED included:

1. Vice Premier Wang Qishan;
2. Minister of Finance Xie Xuren;
3. Minister of the National Development and Reform Commission Zhang Ping;
4. Minister of Commerce Chen Deming;
5. Minister of Health Chen Zhu;
6. Governor of the People's Bank of China Zhou Xiaochuan;
7. Minister of the General Administration of Quality Supervision, Inspection, and Quarantine Wang Yong;
8. Chairman of the China Banking Regulatory Commission Liu Mingkang;
9. Chairman of the China Securities Regulatory Commission Shang Fulin;
10. Chairman of the China Insurance Regulatory Commission Wu Dingfu;
11. Chinese Ambassador to the United States Zhang Yesui;
12. Deputy Secretary-General of the State Council Bi Jingquan;
13. Vice Minister of the Office of the Central Leading Group on Financial and Economic Affairs Liu He;
14. Vice Minister of Foreign Affairs Cui Tiankai;
15. Vice Minister of the National Development and Reform Commission Zhang Xiaoqiang;
16. Vice Minister of Science and Technology Cao Jianlin;
17. Vice Minister of Industry and Information Technology Lou Qinjian;
18. Vice Minister of Finance Zhu Guangyao;
19. Vice Minister of Transport Xu Zuyuan;
20. Vice Minister of Agriculture Niu Dun;
21. Deputy Governor of the People's Bank of China Yi Gang;
22. Vice Minister of the General Administration of Customs Sun Yibiao;
23. Vice Minister of the Legislative Affairs Office of the State Council Yuan Shuhong; and
24. President of the Export-Import Bank of China Li Ruogu.

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United States Highlights

EU Trade Commissioner De Gucht Visits US to Discuss Transatlantic Regulatory Dialogue under TEC

On May 11, 2010, EU Trade Commissioner Karel De Gucht met in Washington, DC with US Deputy National Security Adviser for International Economic Affairs Michael Froman to discuss ways in which to proceed with the regulatory dialogue between the European Union and the United States within the framework of the Transatlantic Economic Council (TEC). Official sources indicate that the meeting particularly focused on the potential contribution of the TEC to achieving economic recovery from the global crisis, and De Gucht reportedly noted that the parties agreed to develop a short list of “deliverables” that can be achieved in the short term and would have a positive impact on employment. In addition, the Commissioner mentioned that the EU and the US will hold more strategic discussions on how to anticipate and prevent future barriers to trade, which has been a longstanding EU demand. As for the next meeting of the TEC, De Gucht reportedly stated that this will likely take place before the end of the year but could not confirm a specific date. The meeting was part of a two-day visit of De Gucht, who has maintained that his primary focus for the EU’s relations with the US will be to tackle non-tariff barriers (NTBs) resulting from regulatory differences through discussions under the TEC. During this visit, the Commissioner also met, amongst others, with United States Trade Representative (USTR) Ron Kirk for a general discussion on certain persisting trade irritants between the EU and the US and on the ongoing discussions under the World Trade Organization (WTO) Doha Round. With regard to the latter, sources indicate that De Gucht underlined the importance of a successful conclusion and the need for active US support for the negotiating mandate that is currently on the table to achieve such result.

At present, the EU and the US remain each other’s main trading partners in a highly interdependent relationship that accounts for more than 50 percent of the global GDP. Recent EU statistics indicate that in 2009, EU goods exports to and imports from the US amounted to, respectively, € 204.4 billion and € 159.8 billion, and continued to consist to a large extent of manufactured goods such as machinery, chemicals, and transport. In the same year, EU exports to and imports of private commercial services totaled, respectively, € 119.4 billion and € 127.0 billion, and focused on sectors such as financial, insurance, transportation, and royalties and license fees services. In 2008, EU and US foreign direct investment (FDI) in each other’s markets amounted to, respectively, € 121.4 billion and € 50.5 billion, and focused to a large extent on non-bank holding companies, finance and insurance, and manufacturing sectors.

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President Obama Names New Director for NEI; AUSTR for WTO and Multilateral Affairs to Leave in June

President Obama has named Courtney Gregoire as the Director for the National Export Initiative (NEI), a newly-created position within the Department of Commerce's (DOC) International Trade Administration (ITA). As NEI Director, Gregoire will oversee DOC's efforts to increase export assistance to small and medium-sized businesses (SMEs) and increase its focus on emerging markets and sectors under the President's NEI initiative. Gregoire was formerly Director of Legislative Affairs at DOC, and prior to joining the Obama Administration, served as legislative director and chief counsel for Sen. Maria Cantwell (D-WA). She also previously served as a policy assistant with the domestic policy council under President Bill Clinton.

Separately, according to several reports, Assistant United States Trade Representative (AUSTR) for World Trade Organization (WTO) and Multilateral Affairs Matt Rohde will be leaving USTR at the end of June. Chris Wilson, who currently serves as AUSTR for Europe and the Middle East, will assume Rohde's position upon his departure. It is unclear who will replace Wilson as AUSTR for Europe and the Middle East. Rohde has worked at USTR since 1995.

Free Trade Agreements

Free Trade Agreements Highlights

Pending FTAs See Renewed Calls for Passage

Administration officials and Congressional leaders have recently called for passage of the pending Free Trade Agreements (FTAs) with Panama, Colombia and South Korea. On May 12, 2010, Secretary of State Hillary Clinton, speaking at a conference of leaders from the Western Hemisphere at the Department of State, stated that President Obama is committed to finalizing the FTAs with Colombia and Panama but added that the agreements face uncertain outcomes in Congress. She opined that the agreements would likely face “difficult challenges” in Congress but noted that the Administration will “just have to deal with the political winds, and we need more help from the private sector.” She also cited improvements that Panama and Colombia have made in regards to various US concerns (notably, problems in Colombia related to the assassination of labor union leaders, and issues in Panama related to labor and bank secrecy laws) and stated that the Administration would continue to push for the FTAs, adding that she “can’t predict the outcome but it is something that the President and I in particular feel strongly about.” In a speech to the same group, United States Trade Representative (USTR) Ron Kirk stated that it is the Administration’s goal to bring the Panama and Colombia FTAs to Congress as soon as it can although he added that he “cannot put a timeline on that [although] they’re important to us.” USTR Kirk also opined that it is important to “get the deals done right so that the fight to win approval of the pacts does not create more hostility in the United States to trade.”

Separately, on May 10, 2010, several Republican members of the House Ways and Means Committee released a report “showing the harm suffered by American agriculture due to a failure to move forward on pending trade agreements.” Ways and Means Committee Ranking Member Dave Camp (R-MI), Rep. Frank Lucas (R-OK) and Rep. Kevin Brady (R-TX) released the report on the third anniversary of the bipartisan May 10 Administration-Congressional agreement on trade. Rep. Camp stated that “it has been three years since Congress reached a bipartisan compromise on a new framework designed to move forward on America’s trade policy, but the trade agenda has collapsed through inaction by the Administration and key Democrats in Congress [and] as a result, American workers are worse off and falling further behind our competitors.” He called on the Administration and Congress to find “a path forward on the pending trade agreements with Colombia, South Korea, and Panama.” Rep. Lucas noted that the study “shows in one year, from 2008 to 2009, [US] farmers lost over USD 800 million in market

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access in Colombia.” Rep. Brady added that “the Administration and Congressional Democrats have stood on the sidelines for too long [and] they need to show leadership and resolve any outstanding issues so Congress can approve the pending trade agreements quickly in order to realize their real economic and job growth potential.” The Republicans’ report shows that the delay in implementation of the Colombia FTA has resulted in a significant decline in US agriculture exports, and that “while the Administration and Democrats in Congress have stalled action, Argentina and Brazil have implemented their trade agreements with Colombia and used the resulting duty-free access to take market share away from America’s farmers and ranchers.” The report is available at the following [link](#).

Also on May 10, 2010, Chairman of the Senate Foreign Relations Committee John Kerry (D-MA) and Ranking Member Richard Lugar (R-IN) urged President Obama to resolve outstanding issues blocking passage of the US-Korea (KORUS) FTA and submit the FTA to Congress for a vote as soon as possible during Korea’s chairmanship of the G-20, which ends in 2010. In a letter to the President, the Senators stated that approval of the FTA would open a new market and be a “significant show of solidarity with a close and reliable ally.” According to the Senators, inaction on the KORUS FTA will result in the United States “ceding Korea’s vast markets to other countries, which are getting preferential access.” In addition, the Senators note that “renewed interest” in the KORUS FTA could provide a “strong incentive” for Korea to redouble its efforts to further opening its beef market and dealing with non-tariff barriers in the auto sector as well as “create an atmosphere more conducive to resolution of these issues.”

Although the calls for passage of the FTAs indicate that some Administration officials and legislators have not forgotten the agreements altogether, the Administration has not provided any signals as to when it plans to introduce the agreements to Congress for consideration. As USTR Kirk noted at this speech at the Department of State, he cannot provide a timeline for when the Administration will move on the pending FTAs that, at this stage, have remained dormant for several years. The calls to move on the pending agreements are likely to do little to push the Administration to present the FTAs to Congress, especially because the Administration seems more interested in the National Export Initiative (NEI) and its role as a “US trade policy driver.” Administration officials, such as USTR Kirk, continue to offer vague statements on the problems that each pending agreement faces and how it is important to “get the deals done right.” For trade community observers, these statements provide no indications if the agreements will ever see Congressional consideration and passage.

Multilateral

Multilateral Highlights

WTO DSB Forms Panels to Address South Korea, Vietnam Complaints on US Zeroing

On May 18, 2010, the World Trade Organization (WTO) Dispute Settlement Body (DSB) agreed to form dispute settlement panels in order to address separate complaints by South Korea and Vietnam on the US “zeroing” methodology. South Korea and Vietnam had made their first requests for separate panels on April 20, 2010, although the United States blocked the requests. Under WTO rules, the DSB automatically accepts second requests unless they are blocked by agreement of all WTO Members in attendance at the DSB. South Korea is challenging three US Department of Commerce investigations that led to the imposition of duties on imports of Korean stainless steel plate in coils, stainless steel sheet, and strip in coils, and diamond saw blades and parts thereof. Specifically, Korea is challenging the Department of Commerce's use of average-to-average zeroing which, it claims, resulted in a finding of dumping where none would otherwise have been found, or inflated the actual margins of dumping. Vietnam is challenging a US antidumping duty order on imports of Vietnamese frozen shrimp and is specifically challenging the Department of Commerce's use of the average-to-transaction zeroing methodology in administrative reviews and new shipper reviews of the 2004 shrimp dumping order.

South Korea and Vietnam's panel requests to address zeroing are the latest in a long list of WTO Members that have brought the United States to the WTO to address the controversial practice. The EU, Japan, Canada, Brazil, Mexico, Ecuador, and Thailand have already secured WTO rulings condemning zeroing in US proceedings targeting their imports, and the WTO has issued more than 20 rulings on the zeroing issue, nearly all of them involving the Department of Commerce's use of the methodology. The WTO Appellate Body has consistently ruled that zeroing is illegal whether used in the original dumping investigation, in periodic reviews, in new shipper reviews, or in sunset reviews. In addition, the Appellate Body has ruled that zeroing is illegal whether the Department of Commerce uses average-to-average or transaction-to-transaction comparisons of export and home market prices for the dumped good.

For its part, the United States recently indicated that it is “working intensely on changes [to antidumping procedures] that would allow us to be in conformity with the [WTO] Appellate Body findings” on zeroing, although US officials did not provide any details as to how the United States would ensure this compliance.

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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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