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General Trade Report - JETRO

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Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
50 Raffles Place, #30-00, Singapore, 048623
sscoles@whitecase.com

UNITED STATES

GENERAL TRADE POLICY

Treasury Decides Not to Label China a Currency Manipulator

Summary

On February 4, 2011, the US Department of the Treasury submitted to Congress its semi-annual report on international economic and exchange rate policies. The Treasury report found none of the United States' major trading partners, including China, to be manipulating its currency for the purpose of preventing effective balance of payments adjustment or gaining unfair competitive advantage in international trade during 2010.

Analysis

I. THE REPORT'S FINDINGS

In the report, Treasury again chose not to label China a "currency manipulator," despite the Department's view that China's currency, the renminbi (RMB), remains undervalued. Treasury is required to submit the report to Congress under the 1988 Omnibus Trade and Competitiveness Act to determine "whether countries manipulate the rate of exchange between their currency and the US dollar for purposes of preventing effective balance of payments adjustment or gaining unfair competitive advantage in international trade." The report was due to be published in October 2010, as required by law. Sources opine that the Treasury Deparment did not release the report on time in order not to cast a shadow over President Hu's January 2011 visit to the United States. The current Treasury report found none of the United States' major trading partners to be manipulating their currencies for the above cited purposes during 2010.

The report cites several factors in support of the Department's conclusion that the RMB remains undervalued, including: (i) China's sustained purchase of large amounts of foreign currency reserves; (ii) the limited real effective appreciation of the RMB despite rapid productivity growth; and (iii) the widening of China's current account surplus. However, the report does emphasize the difference between RMB appreciation in real terms and the lower RMB appreciation in nominal terms, which is commonly cited by those who allege China is not making sufficient efforts to ease control of the RMB-USD exchange rate. According to the report, while the RMB appreciated only 6 percent against the US dollar over 2010 in nominal terms, the appreciation of the RMB against the US dollar in real terms over the same period is closer to 10 percent due to Chinese inflation. The higher, real appreciation of the RMB with respect to the US dollar combined with China's recent relaxation of the restrictions on the use of the RMB in international transactions, according to the report, "will gradually erode the controls that help the [Chinese] authorities manage the level of the exchange rate and, over time, will contribute to a more market-determined exchange rate."

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
50 Raffles Place, #30-00, Singapore, 048623
sscoles@whitecase.com

Treasury's report also notes the growing sentiment among Chinese authorities that, in light of China's size relative to the world economy and the limited economic growth of its primary trading partners, China cannot continue to rely on foreign demand to sustain its own economic growth. According to the report, Chinese authorities recognize that exchange rate flexibility is an integral part of China's efforts to rebalance its economy away from export-driven growth toward growth driven by domestic demand. In March 2011, Chinese officials are expected to publish a 5-year plan that will detail this rebalancing of the Chinese economy. According to Treasury's report, this 5-year plan will include "increased spending on health and education, higher and more strictly enforced minimum wages, greater private sector investment in services, expanded access to financial services for households and small businesses, and higher taxes on carbon and pollution-intensive industries." While it remains unclear whether exchange rate flexibility will be explicitly addressed in this 5-year plan, the public spending policies contained therein will inevitably stimulate domestic demand and will apply upward pressure on the RMB.

II. REACTION TO THE REPORT

Immediate reaction to the Treasury report was routine. Some lawmakers and industry groups expressed frustration with the report's findings:

- Ranking Member of the House Committee on Ways and Means Rep. Sander Levin (D-MI) issued a written statement in which he expressed disappointment with Treasury's findings and reaffirmed his intention to introduce legislation in the House to address China's currency practices;
- Chairman of the Senate Committee on Finance Sen. Max Baucus (D-MT) issued a written statement in which he urged Treasury Secretary Timothy Geithner to label China a currency manipulator;
- Sen. Charles Schumer (D-NY) expressed disappointment with Treasury's findings, stating that "the only way to address [China's currency practices] is for Congress to act";
- Sen. Sherrod Brown (D-OH) expressed disappointment with Treasury's findings, stating that China's progress on currency has been "inadequate"; and
- Alliance for American Manufacturing Executive Director Scott Paul stated that Treasury's decision not to label China a currency manipulator was disappointing and posited that "boosting American exports, creating jobs, and accelerating [US] economic growth will not be easy to accomplish without a dramatic, market-based and sustained appreciation of China's currency." He reaffirmed his intention to spur lawmakers to address currency misalignment.

US organized labor, which in the past has been critical of Treasury's refusal to label China a currency manipulator, has not issued any statement in response to the February 4, 2011 release of the Treasury report.

As a counterweight to these calls for unilateral legislative action against Chinese currency practices, many business associations expressed support for the Treasury report's findings. For example, US-China Business Council (USCBC) President John Frisbie lauded Treasury's decision to not label China a currency manipulator,

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
50 Raffles Place, #30-00, Singapore, 048623
sscoles@whitecase.com

stating that doing so "would achieve nothing" and noted that USCBC supports the Obama Administration's approach of bilateral and multilateral engagement with China on the currency issue.

Outlook

Given the more constructive tone of recent bilateral consultations between US and Chinese officials, Treasury's decision not to label China a currency manipulator was expected because the determination helps the Obama Administration avoid stoking unnecessary bilateral tensions. During President Hu's January 2011 visit to Washington, President Obama and President Hu made progress on such issues as government procurement and indigenous innovation, intellectual property rights (IPR), the bilateral investment treaty (BIT), and cooperation in science and technology. Treasury's determination also supports the Obama Administration's preference for bilateral and multilateral dialogue and consultation in addressing China's trade policies, rather than direct conflict. In this regard, the Obama Administraton will likely continue to urge China to reform its currency practices through these avenues.

House and Senate lawmakers will continue to advocate legislation aimed at unilaterally addressing the RMB's alleged undervaluation. It is unlikely, however, that currency legislation similar to that passed in the House in September 2010 (during the 111th Congress) will move far in the current 112th Congress. Despite promises from such Democratic lawmakers as Rep. Levin and Sen. Schumer to re-introduce currency legislation, Republican congressional leadership has expressed unwillingness to allow such legislation to move forward. Therefore, due to that Republicans now enjoy majority-control of the House and increased representation in the Senate as compared to the previous 111th Congress, congressional movement on currency will not disappear but is unlikely to go far. These recent Republican gains in Congress combined with the macroeconomic outlook for China, which shows a 10 percent real appreciation of the RMB annually, should allay concerns over US unilateral action on China's currency practices.

USTR Kirk Testifies before House Ways and Means on Obama's Trade Policy Agenda; Pending FTAs Highlighted

Summary

On February 9, 2011, United States Trade Representative (USTR) Ron Kirk testified before the House Ways and Means Committee on President Barack Obama's trade policy agenda, focusing on the three pending free trade agreements (FTAs) and the Trans-Pacific Partnership (TPP). In his testimony, USTR Kirk provided updates on the trade initiatives and outlined in general terms the manner in which the Obama Administration would pursue such issues going forward. Although lacking specifics, USTR Kirk's testimony serves as a good indicator of what the Obama Administration's trade policy agenda for 2011 will be.

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
50 Raffles Place, #30-00, Singapore, 048623
sscoles@whitecase.com

Analysis

I. USTR KIRK'S REMARKS

USTR Kirk testified on such issues as the pending US-Korea, US-Colombia and US-Panama FTAs, TPP, the Asia-Pacific Economic Cooperation forum (APEC), disputes brought before the World Trade Organization (WTO) against China and the European Union, Russia's accession to the WTO, Trade Adjustment Assistance (TAA) and US preference programs, including the Andean Trade Preferences Act (ATPA) and the Generalized System of Preferences (GSP). With the US-Korea FTA having moved forward over the past few months, members of the Committee sought specific reasons as to why the other outstanding FTAs were not being addressed with the same impetus. Ambassador Kirk provided non-specific answers to these questions as well as outlined the next steps with regard to the TPP negotiations.

USTR Kirk's remarks may be summarized as follows:

- **US-Korea FTA.** USTR Kirk confirmed President Obama's plan to submit the US-Korea FTA to Congress "within the next few weeks." This statement came less than a day before both USTR Kirk and Korean Trade Minister Kim Jong-hoon signed the legal texts related to the Agreement. With USTR Kirk and Minister Jong-hoon having signed the legal texts, the Agreement is set for legislative approval in both countries. USTR Kirk told the Committee that he looked to secure approval in Congress in Spring 2011;

- **US-Colombia and US-Panama FTAs.** Although the US-Colombia FTA was signed on November 22, 2006 and the Panama FTA was signed on June 28, 2007, many issues surrounding both have prevented the Agreements' implementing legislation from being submitted to the US Congress. USTR Kirk noted that the US-Colombia FTA faces challenges surrounding workers' rights and violence against union organizers in Colombia, while the US-Panama FTA faces challenges pertaining to persistent US government concerns over labor law in Panama and that Panama is a tax haven. Despite these outstanding issues, USTR Kirk noted that President Obama has directed him to "immediately intensify engagement with Colombia and Panama with the objective of resolving the outstanding issues as soon as possible this year and bringing those agreements to Congress for consideration immediately thereafter." USTR Kirk also informed the Committee that a team from USTR will be sent to Colombia the week of February 14, 2011 to continue negotiations;

- **TPP.** USTR Kirk lauded the progress made on TPP, noting that, in the last year, Malaysia and Vietnam have joined the now nine-country trade agreement. Calling it the "world's most dynamic regional trade negotiation," USTR Kirk stated that meetings would take place in Chile the week of February 14th. Given that the process of tabling offers in certain areas will begin during these meetings, USTR Kirk highlighted the opportunity the United States has in leading the negotiations as they start from a "blank sheet of paper";

- **TAA.** With TAA having expired on February 12, 2010, USTR Kirk noted in both his written and oral testimony the importance of renewing the program that, as he noted, helps "so many Americans get back on their feet." USTR Kirk called for a long-term extension of the program and noted that doing so would "keep faith with America's workers." While no specifics of the extension were discussed at the hearing, the vote on a bill,

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
50 Raffles Place, #30-00, Singapore, 048623
sscoles@whitecase.com

which would have extended TAA through the end of June, was originally scheduled for February 8, 2011 but was later cancelled;

- **APEC.** USTR Kirk noted that the United States will host the 2011 APEC Summit in Hawaii in November. The United States, according to USTR Kirk, will work with APEC members to "make it cheaper, easier and faster for our firms to trade in a greener regional economy";

- **Trade rules enforcement.** USTR Kirk highlighted the efforts made by the Obama Administration to hold US trading partners accountable for following global trading rules, citing WTO Dispute Settlement Body (DSB) cases against China and the European Union and the first labor enforcement case brought under a US trade agreement (against Guatemala under the Central American and Dominican Republic Free Trade Agreement (CAFTA-DR));

- **Russian WTO Accession.** USTR Kirk highlighted the Obama Administration's push to bring Russia into the WTO. He further noted that President Obama would work with Congress throughout 2011 to grant Russia Permanent Normal Trade Relations (PNTR) so as to allow "US firms and workers [to] fully benefit from Russia's accession to the WTO";

- **Preference Programs.** USTR Kirk noted the importance of ATPA and GSP in creating jobs in the United States and supporting developing countries. USTR Kirk urged Congress to renew both ATPA and GSP "for as long a period as possible."

II. COMMITTEE MEMBER REMARKS

Committee members pressed USTR Kirk on President Obama's trade agenda. Both Chairman Rep. Dave Camp (R-MI) and Ranking Member Rep. Sander Levin (D-MI) focused their remarks on the three pending FTAs although each touched upon such issues as TAA, APEC and trade rules enforcement.

Chairman Rep. Camp

Chairman Rep. Camp's remarks can be summarized as follows:

- **Pending FTAs.** Rep. Camp was perhaps the most vocal about what he perceived to be the lack of specificity pertaining to the pending FTAs. In questions directed at USTR Kirk, Rep. Camp asked, "Where is the roadmap for these agreements? Why isn't there a clear identification of the outstanding issues, an outline of reasonable steps that must be taken to address those issues, a timeframe for resolution, and a commitment to action?" Rep. Camp later maintained his goal of consideration of all three FTAs by July 1, 2011;

- **TPP and APEC.** With regard to the TPP, Rep. Camp explained that the agreement "would show our commitment to the fast-growing Asia-Pacific region as well as create America jobs by opening markets." For those reasons, Rep. Camp expressed his interest in concluding a "high-standard [TPP] agreement" by the time the United States hosts the APEC leaders later this year;

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
50 Raffles Place, #30-00, Singapore, 048623
sscoles@whitecase.com

- **General Trade Policy.** Rep. Camp tied together the outstanding FTAs and the United States' general trade policy by suggesting that the "lack of commitment on these critical, job-creating agreements is hindering the rest of our trade agenda." After pressing USTR Kirk for specifics on various other issues, including the pending FTAs, Rep. Camp claimed that the "time for generalities has passed."

Ranking Member Sander Levin

Ranking Member Rep. Sander Levin's remarks can be summarized as follows:

- **Colombia FTA.** After a 5-day "fact-finding" trip to Colombia in January 2011, Rep. Levin stated that he observed that the new Administration in Colombia "has now articulated a different approach from its predecessor that provides an opportunity for serious discussions between the two governments." Despite the openness of the new [Colombian President Juan Manuel Santos] Administration, Rep. Levin maintained that the burden is on the Colombian government to address the US concerns;

- **TAA.** Rep. Levin opened his remarks by expressing his disappointment that action had yet to be taken on extending TAA. With the lapse of the program, Rep. Levin estimated that "tens of thousands of displaced workers in [the United States] will be affected";

- **Trade rules enforcement.** Through actions such as the WTO dispute with China over tire imports as well as the first ever filing of a labor rights dispute under an FTA, as filed against Guatemala under CAFTA-DR, Rep. Levin stressed a "commitment to the enforcement of existing trade agreements and trade laws."

Outlook

Ambassador Kirk's testimony, while non-specific, is an accurate reflection of President Obama's past and present trade policy, which many analysts characterize as unenthusiastic toward free trade initiatives. The discussion surrounding the three pending FTAs, despite USTR Kirk's reaffirmation of the Obama Administration's intention to submit the US-Korea FTA's implementing legislation to Congress for a vote soon, provided little new insight regarding when and how the Administration will do the same for the US-Colombia and US-Panama FTAs. That USTR has yet to provide Colombia with a specific "to do" list in order for President Obama to consider the Agreement primed for Congressional consideration and that US government concerns still linger over Panama's labor code and so-called "tax haven status" despite Panama having made significant reforms to its labor laws and having signed a Tax Information Exchange Agreement (TIEA) with the United States in November 2010 raise valid questions about the Obama Administration's commitment to definitively closing all three pending FTAs in the near-term. While it cannot be ruled out that the Obama Administration will send implementing legislation for the agreements with Colombia and Panama to Congress by mid-2011, as has been promised will be done for the agreement with Korea and has been requested repeatedly by congressional Republican leadership, the language with which members of the Obama Administration and Congressional Democrats have described what remains to be done on the agreements (with Colombia and Panama) in order to make them ready for Congressional consideration has been vague and does not augur well for the agreements' prospects in the near-term. Also, despite USTR Kirk's and Rep. Levin's rhetoric on TPP being seemingly more pessimistic than that of Rep. Camp with respect to the possibility of TPP negotiations being finalized by November 2011, USTR Kirk and Reps. Levin and Camp seemed to agree on the importance of the enforcement of global trading rules. Therefore, while

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
50 Raffles Place, #30-00, Singapore, 048623
sscoles@whitecase.com

progress on pending FTAs as well as the TPP will remain a point of contention between Democrats (the Obama Administration and congressional Democrats) and Congressional Republicans, it is likely that the United States will continue in 2011 to intensify its engagement with its trading partners on the multilateral level as well as maintain its enforcement of US trade laws.

General Trade Policy Highlights

DOC Announces Proposed Change to China and Vietnam AD Calculation Methodology

On January 27, 2011, the United States Department of Commerce (DOC) announced a proposed change to its price-adjustment calculation approach in antidumping (AD) proceedings involving certain non-market economy (NME) countries. For NME AD proceedings involving China and Vietnam, DOC has proposed deducting from the export price (EP) and the constructed export price (CEP) any export taxes, duties or other charges that are included in an exporter's price to its unaffiliated customer. Under current practice, DOC does not deduct export taxes, duties or other charges in any NME cases because "pervasive government intervention in NMEs precludes proper valuation of taxes paid by NME respondents to NME governments."

The basis for DOC's proposed change follows previous determinations made in 2007 and 2009 to apply US CVD laws to China and Vietnam. In those cases, DOC concluded that "present-day Chinese and Vietnamese economies are sufficiently dissimilar from Soviet-style economies" to an extent that allows DOC to "determine whether the Chinese or Vietnamese governments have bestowed an identifiable and measurable benefit upon a producer, and whether the benefit is specific, including certain measures related to taxation." As a result, DOC has now proposed changing its past practice and deducting from EP and CEP any export taxes and similar charges, including value-added taxes (VAT) imposed by the governments of China and Vietnam. If implemented, DOC's methodological change could result in higher AD duty margins for China- and Vietnam-based producers/exporters.

US AD laws direct DOC to deduct from EP and CEP any non-rebated export taxes or VAT to ensure that normal values, net prices (EP and CEP), and AD duty margins are calculated on a tax-neutral basis. DOC has followed this approach in market-economy (ME) AD proceedings but, in cases involving NMEs, the agency has always concluded that widespread government intervention in these economies makes it impossible to isolate and quantify export taxes and VAT separate and apart from other "intra-NME" transfers that occur between a government and an exporter. DOC is now proposing to reverse this policy approach in light of its earlier decisions to apply US CVD laws to China and Vietnam. DOC indicates in its January 27 announcement that the proposed change in practice would apply initially to cases involving China and Vietnam, but that its revised EP/CEP calculation methodology could be applied in other NME cases if the "NME at issue is dissimilar from Soviet-style economies."

DOC's proposed change is part of a fourteen-point National Export Initiative *Trade Law Enforcement Package* announced last August. DOC has been implementing the individual NEI AD/CVD initiatives one-by-one, including previous proposals to (1) end the practice of "zeroing" in AD administrative reviews, (2) select

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
50 Raffles Place, #30-00, Singapore, 048623
sscoles@whitecase.com

respondents through the increased use of random sampling, and (3) amend the separate rates test applied to NME exporters. DOC is soliciting public comments on the proposed change to its AD price-adjustment approach, with written comments due no later than February 28, 2011.

South Korea Requests WTO Consultations with US over "Zeroing"

On January 31, 2011, South Korea initiated World Trade Organization (WTO) dispute settlement proceedings against the United States pertaining to US antidumping (AD) measures imposed on corrosion-resistant carbon steel flat products imported from Korea (DS420). Korea's formal request for consultations with the United States is the first step in WTO dispute settlement proceedings, and targets the US Department of Commerce's (DOC) use of "zeroing" in AD proceedings. The request cites, *inter alia*, DOC's practice of comparing the export price for individual transactions to a weighted-average normal value and treating as zero any negative dumping margins – the methodology applied where DOC finds evidence of "targeted dumping."

The issues the Government of Korea would like to raise in the course of consultations include the following:

- In administrative reviews, the zeroing of negative dumping margins when comparing export prices and normal values on a weighted-average to transaction basis;
- The imposition and continuation of requirements that cash deposits be posted at the time of entry of merchandise based on determinations in administrative reviews in which the dumping margins were established using the practice of zeroing;
- The assessment of AD duties based on dumping margins determined in administrative reviews using the practice of zeroing, and the automatic assessment of AD duties based on dumping margins established in prior proceedings using the practice of zeroing, when no review is requested;
- The determination of dumping margins above *de minimis* levels as a result of the practice of zeroing negative dumping margins, and the consequent imposition, continuation, or collection of AD duties;
- The use, in sunset reviews, of dumping margins calculated in prior AD investigations and/or administrative reviews in which negative dumping margins had been treated as zero dumping margins, resulting in determinations that revocation of the AD duty orders would be likely to lead to continuation or recurrence of dumping; and
- The consideration by the United States International Trade Commission (USITC), in sunset reviews, of the magnitude of the margins of dumping provided by the DOC, in determining whether the revocation of an AD duty order would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.

In its January 31, 2011 WTO filing, Korea alleges that DOC's use of zeroing in AD proceedings leads to inflated AD duty rates and is not WTO-consistent. Under its standard AD calculation methodology, DOC in administrative reviews disregards any negative dumping margins found (*i.e.*, transactions with an export price exceeding normal value) and does not offset an exporter's dumped transactions with non-dumped sales. However, on December

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
50 Raffles Place, #30-00, Singapore, 048623
sscoles@whitecase.com

28, 2010, the US Department of Commerce (DOC) proposed a revision to its antidumping (AD) duty regulations that, if implemented, would (i) end DOC's practice of zeroing in the calculation of overall weighted-average dumping margins for AD administrative review proceedings; and (ii) end the use of zeroing in AD investigations in which a transaction-to-transaction dumping margin calculation methodology is applied. While DOC's December 28, 2010 proposal puts forward deriving AD margins by comparing monthly weighted-average normal values to monthly weighted-average export prices, as opposed to comparing monthly weighted-average normal values to transaction-specific net export prices, DOC reserved the right in AD reviews to revert back to a weighted-average to transaction comparison calculation methodology under special circumstances on a case-by-case basis and it is not clear from the DOC's proposal if zeroing would be used in such cases.

Korea's January 31, 2011 request for consultations with the United States comes shortly after a WTO Dispute Settlement Panel backed Korea's complaint in a separate case (DS402) which also targeted DOC's use of zeroing. The WTO's Appellate Body has consistently ruled against DOC's use of the zeroing methodology in all stages of AD proceedings, from original investigations to administrative and five-year sunset reviews. DOC's December 28, 2010 proposal to abandon the use of the zeroing methodology aims, in part, to comply with these WTO rulings. However, complainants in many of these cases, including Japan and the European Union, have expressed concern the DOC's proposal to abandon zeroing may not bring the United States entirely in line with its WTO obligations. Korea's consultations request is a clear indication that US trading partners remain unconvinced of the United States' recent move to abandon zeroing. Moreover, a dispute settlement panel or the Appellate Body has yet to rule on the WTO-consistency of zeroing when using a weighted average-to-transaction methodology. Thus, Korea's request for consultations could reflect concerns that the United States might seek to use the zeroing methodology in future "targeted dumping" investigations, while abandoning it under the more common transaction-to-transaction and average-to-average methodologies.

US Requests WTO Dispute Settlement Panels on Certain Chinese AD/CVD Orders and E-Payment Restrictions

On February 11, 2011, The Office of the United States Trade Representative (USTR) announced that the United States requested before the World Trade Organization (WTO) the establishment of two Dispute Settlement Panels concerning cases against China. The first case involves Chinese antidumping (AD) and countervailing (CVD) duty orders imposed on imports of grain-oriented, flat-rolled electrical steel (GOES) from the United States and the second case involves China's allegedly discriminatory and restrictive treatment toward US suppliers of electronic payment ("e-payment") services.

With respect to the first case, China's Ministry of Commerce (MOFCOM) initiated AD/CVD proceedings on US GOES on June 9, 2009 and, on April 10, 2010, MOFCOM imposed AD and CVD duties on US GOES. The United States claims that the AD/CVD orders were not WTO-consistent and requested formal WTO consultations with China on September 15, 2010, alleging that China: (i) initiated AD/CVD proceedings on US GOES without sufficient evidence; (ii) failed to objectively examine the evidence; (iii) failed to disclose "essential facts" underlying its conclusions; (iv) failed to provide an adequate explanation of its calculations and legal conclusions; (v) improperly used investigative procedures; (vi) and failed to provide confidential summaries of Chinese submissions. The United States and China held consultations on November 1, 2010, which yielded no resolution

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
50 Raffles Place, #30-00, Singapore, 048623
sscoles@whitecase.com

of the matter. The Chinese AD duties levied on US GOES range from 7.8 to 64.8 percent and the CVDs levied range from 11.7 to 44.6.

With respect to the second case, the United States alleges that Chinese restrictions prevent wholly foreign-owned suppliers from supplying credit card and e-payment services over proprietary networks to Chinese customers in renmimbi (RMB). According to USTR, in order to provide credit card and e-payment services, these suppliers must enter into a joint venture with a Chinese firm and process payments through China UnionPay (CUP), a monopoly payment network. The US claims that these restrictions violate China's WTO services schedule, which contains commitments from China to allow wholly-owned foreign suppliers to provide payment services in foreign currency as well as in RMB. Per its WTO accession commitments, China was to eliminate these restrictions on foreign suppliers by December 11, 2006. As with the first case involving US GOES, the United States requested formal WTO consultations with China on September 15, 2010, however, these consultations yielded no resolution of the matter.

The February 22, 2011 US request for the establishment of WTO Dispute Settlement Panels falls in line with the Obama Administration's past approach to engagement with China, which is characterized by an express preference for bilateral and multilateral dialogue, consultation and cooperation concerning contentious trade issues as opposed to unilateral action that could trigger retaliatory actions on the part of China. On January 19, 2011, Presidents Barack Obama and Hu Jintao met in Washington, DC to discuss economic, political and security issues facing both countries and, at the meeting, the United States secured important commitments from China concerning government procurement policies and intellectual property protection (IPR). Also, the United States has been involved recently either directly or as a third-party in several WTO dispute settlement cases concerning China, including a case brought by China (DS379) regarding concurrent US AD/CVD orders on goods from non-market economies (NMEs), another case brought by China (DS399) regarding US safeguard measures against Chinese tire imports, and a case brought by the United States (DS419) regarding alleged illegal subsidies afforded to Chinese manufacturers of wind power equipment.

2011 Budget Passes in House; Implementation of Food Safety Modernization Act Placed in Jeopardy

On February 19, 2011, the US House of Representatives passed the Full-Year Continuing Appropriations Act, 2011 (H.R. 1) with 235 Representatives voting in favor and 189 voting against, of which all but 3 were Democrat. H.R. 1 makes appropriations for US government Departments and Agencies for the fiscal year (FY) ending September 30, 2011, and contemplates a USD 242 million cut in funding for the Food and Drug Administration (FDA) as compared to FDA appropriations for FY 2010.

According to experts, the USD 242 million in cuts to the FDA include a reduction in appropriations for the Center for Food Safety and Applied Nutrition, which is responsible for the safety of domestically-produced and imported foods, cosmetics, drugs, biologics, medical devices and radiological products. An August 12, 2010 Congressional Budget Office report estimated the FDA would need an additional USD 1.4 billion in order to implement the Food Safety Modernization Act through 2015. Although some of the USD 1.4 billion would be covered by user fees instead of by US government appropriations, experts now question the FDA's ability to enforce the Food Safety Modernization Act in light of the cuts in funding contained in H.R. 1 as many FDA

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com
Samuel Scoles
50 Raffles Place, #30-00, Singapore, 048623
sscoles@whitecase.com

employees, including food safety inspectors, would either be let go or placed on furlough. The Food Safety Modernization Act, as enacted, requires that the FDA inspect at least 600 foreign facilities in 2011 and that it double that figure each year thereafter until 2015. H.R. 1 also contemplates cuts in funding for the US Department of Agriculture's (USDA) Food Safety and Inspection Service (FSIS), which is responsible for the safety of domestically-produced and imported meat and poultry.

With President Obama having introduced to Congress a USD 3.7 trillion budget for FY 2012 on February 14, 2011, which contemplates a USD 147 million funding increase for the FDA as compared to FY 2010, among other increases, experts note that H.R. 1 (to fund the government through FY 2011) will not likely be received well in the Senate. Democrats, who remain the majority party in the Senate, have criticized the Republican-backed H.R. 1 for containing cuts that would halt the economic recovery and curb government programs, such as the FDA's food safety mechanism. Furthermore, President Obama stated on February 15, 2011 that he would not sign into law any budget that "curtails the long-term economic growth of the United States." H.R. 1 must be passed in the Senate and signed into law by the President before March 3, 2011 in order for the federal government to remain open thereafter. Experts opine that, in light of the appropriations contained in the Obama Administration's FY 2012 budget proposal standing in contrast with those contained in H.R. 1 for FY 2011 and the expected rejection of H.R. 1 on the part of Senate Democrats, Congressional Republicans and Democrats will likely come to a compromise budget although the possibility of the federal government closing cannot be ruled out. Therefore, it remains unclear what the eventual funding for the FDA will be for FY 2011 going forward and how any changes in funding will affect the implementation of the Food Safety Modernization Act.

Lawmakers Express Concern over DOC's Proposed Rule Changes in AD Proceedings

On February 17, 2011, 21 Democratic and two Republican lawmakers, sent a letter to US Secretary of Commerce Gary Locke and US Trade Representative (USTR) Ron Kirk, expressing concern over the Department of Commerce's (DOC) December 28, 2010 Federal Register (FR) notice, in which DOC proposes ending the practice of disregarding negative dumping margins in antidumping (AD) proceedings ("zeroing") in order to comply with several World Trade Organization (WTO) rulings on the matter. In the letter, the lawmakers also criticize the WTO rulings, stating that they "read new obligations into the text of existing agreements, are devoid of legal merit, and represent a clear overreaching by the WTO's Appellate Body."

The WTO's Appellate Body has ruled on several occasions against DOC's use of zeroing, including cases brought by the European Union, Japan and Mexico. In an apparent effort to conform its AD regulations to the WTO Appellate Body rulings, DOC proposed on December 28 of last year a revision that, if implemented, would (i) change the fundamental AD calculation methodology used in AD administrative review proceedings; (ii) end DOC's practice of zeroing in the calculation of overall weighted-average dumping margins for AD administrative review proceedings; and (iii) end the use of zeroing in AD investigations in which a transaction-to-transaction dumping margin calculation methodology is applied (*Please see the January 4, 2011 US Alert*).

The US lawmakers posit, however, that the WTO Appellate Body rulings and DOC's subsequently proposed changes, if implemented, "would weaken the ability of US companies and their workers to obtain redress for

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
50 Raffles Place, #30-00, Singapore, 048623
sscoles@whitecase.com

illegal, injurious dumping of foreign products into the US market." In the letter, the lawmakers urge the Obama Administration, if it proceeds to implement the proposed rule changes, to do the following:

- "Seek to resolve [the] matter in the ongoing Doha Round negotiations to ensure that [US] trade laws can effectively respond to foreign unfair trade practices;
- Alter the approach identified in the December 28, 2010 FR notice to ensure that any compliance action preserves the maximum flexibility for the United States in implementing its laws consistent with the WTO's decisions;
- Seek changes by [the United States'] trading partners to modify their own systems, consistent with what the United States is being asked to do;
- Assess what other steps might be taken that would further improve the ability of the United States to address foreign unfair trade practices and to ensure that those who are injured […] have the maximum ability to regain their competitive posture."

In response to DOC's December 28, 2010 FR notice, several foreign governments, including those of Canada, India, South Korea, Taiwan, Thailand, Mexico and Vietnam, have submitted comments generally supporting DOC's proposal to abandon the use of zeroing. Comments submitted by foreign and domestic industries, trade associations and organized labor, however, are mixed. It remains unclear whether DOC, at the behest of the White House, will fully implement the proposed rule changes or modify the rule based on the comments received. Most experts predict, however, that DOC will issue a final rule implementing some form of the proposed zeroing modifications. Although DOC has not yet set a date on which a final rule will be issued, it appears unlikely that this final rule will incorporate the lawmakers' suggestions.

Brazil Announces Victory in Orange Juice WTO Dispute with the US

On February 21, 2011, the World Trade Organization (WTO) Dispute Settlement Body (DSB) issued to the Parties the final report on panel "United States - Anti-dumping administrative review and other measures related to imports of certain orange juice from Brazil" (DS382). According to a statement issued by the Brazilian Ministry of Foreign Affairs (MFA), the report represents "a major victory" for Brazil and the country expects that the Panel decision will "encourage the US to definitively abandon the practice of zeroing in all anti-dumping proceedings."

The DSB had established the Panel on September 25, 2009, to examine a Brazilian complaint over the US Department of Commerce (DOC) use of its "zeroing" methodology in administrative reviews of antidumping (AD) orders on Brazilian orange juice, as well as the continued use of this methodology in successive AD proceedings (original investigations and administrative reviews). Zeroing refers to the practice whereby an investigating authority sets the so-called "negative dumping margins" to zero. Where the export price of a product is lower than the price in the exporting country, the difference between the two is a positive dumping margin. However, when the export price of the product is higher than the price in the exporting country and zeroing is used, investigating authorities do not give any credit for negative dumping margins. Under the zeroing practice, the investigating authority does not average positive and negative dumping margins together but, rather, it considers all negative

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
50 Raffles Place, #30-00, Singapore, 048623
sscoles@whitecase.com

dumping margins to be zero. Brazil alleges that this has the effect of inflating the overall average dumping margin, and leads to the imposition or maintenance of antidumping duties, which may not otherwise apply.

The United States has a long list of disputes with trading partners regarding the DOC's zeroing methodology. Experts note that the WTO Appellate Body has repeatedly found that DOC's zeroing in original investigations, periodic reviews, sunset reviews and new shipper reviews does not comply with US WTO obligations and has ruled against zeroing methods in previous disputes. In the DS382 dispute, Brazil had argued that the zeroing practice is inconsistent with several provisions of the WTO AD Agreement and the GATT 1994.

According to the Brazilian MFA statement, the government is closely following the progress of the DOC's proposed rule changes (published in the Federal Register on December 28, 2010), which foresees changes in the methodology for calculating the dumping margin in administrative reviews. Brazil urged the US to abandon the zeroing practice in order to comply with the WTO regulations.

Brazil noted the DSB will circulate to the public the final report on the DS382 panel once the text is translated into the three WTO official languages. Thereafter, the Parties will have 60 days to appeal the decision before the WTO Appellate Body. If there is no appeal, the WTO Dispute Settlement Body will implement the report.

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
50 Raffles Place, #30-00, Singapore, 048623
sscoles@whitecase.com

FREE TRADE AGREEMENTS

Free Trade Agreement Highlights

UPDATE: ITC Initiates Investigation into Impact of KORUS on US Automobile Sector

On February 2, 2011, the US International Trade Commission (ITC) published a notice in the Federal Register (FR) announcing the institution of an investigation into the likely impact of the US-Korea Free Trade Agreement (KORUS FTA) on the US passenger vehicle sector and requesting comments on the same from interested parties. The investigation's findings will be included in a report, which will partially supplant a September 2007 ITC report on the same matter.

The US Trade Representative requested in April 2007 that the ITC draft a report quantifying the likely impact of the KORUS FTA on the US economy as a whole, on specific sectors therein and on the interests of US consumers. ITC submitted its report to USTR in September 2007. Due to that the December 3, 2010 supplemental agreement substantively modifies the KORUS FTA provisions on automobiles, House Ways and Means Chairman Rep. Dave Camp (R-MI) sent a letter to ITC on January 27, 2011 requesting a revision of the 2007 report with respect to the passenger vehicle sector. In his letter, Rep. Camp specifies that the ITC, in drafting its revision, should employ the most recent data available and include a modeling simulation of the effects of the auto nontariff measures (*Please see January 28, 2011 US Trade Alert*).

In light of the short timeframe set forth in Rep. Camp's letter for ITC to complete the report, public hearings will not be held but interested parties are invited to submit written statements concerning the investigation. Written submissions must be received by February 14, 2011. ITC will submit the revised report to the House Ways and Means Committee by March 15, 2011.

Senate Finance Chairman Will Not Support KORUS without Improved Korean Market Access for US Beef

On February 3, 2011, Chairman of the Senate Committee on Finance Sen. Max Baucus (D-MT) stated that he will not support the US-Korea Free Trade Agreement (KORUS) in its current form, but will not seek to obstruct its passage in Congress. According to Sen. Baucus, Korea needs to agree to improved market access for US beef exports in order for him to back the Agreement.

KORUS, which had originally been completed on April 1, 2007 and signed on June 30, 2007 by then Presidents George W. Bush and Roh Moo-hyun, had languished until late 2010 due to White House and industry concerns over issues of market access for automobiles and beef. On December 3, 2010, however, United States Trade Representative (USTR) Ron Kirk and Korean Trade Minister Kim Jong-hoon reached an agreement on automobile market access that quelled the administration's auto-related concerns. The December 3, 2010

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
50 Raffles Place, #30-00, Singapore, 048623
sscoles@whitecase.com

supplemental agreement did not, however, resolve differences concerning Korean market access for US beef exports. Sen. Baucus expressed disappointment that the December 3, 2010 supplemental agreement did not include any enhanced provisions on market access for US beef, although the National Cattleman's Beef Association urged Congress to ratify KORUS.

Sen. Baucus' opposition to KORUS should not impede congressional approval of the agreement. As we have previously noted, the supplemental agreement's substantive modifications to the 2007 KORUS terms raise questions as to whether the FTA remains subject to Trade Promotion Authority (TPA), which imposes strict disciplines - including set timelines and a prohibition on amendments - on congressional consideration of a US trade agreement's implementing legislation. Both the Obama Administration and congressional leadership assert that KORUS will be considered in Congress under TPA, but a lone member of Congress could challenge TPA's applicability through a point of order in either chamber. The House and Senate Parliamentarians (experts in congressional procedure) would then determine whether TPA applies. Given that Sen. Baucus has stated that he will not obstruct KORUS' passage through Congress, it appears unlikely that he will raise such a point of order.

Treasury and State Departments Affirm that Obama Administration Seeks Passage of Three Stalled FTAs in 2011; US Trade Agenda Held Expectant

On February 16, 2011, US Secretary of the Treasury, Timothy Geithner, testified before the Senate Committee on Finance that the Obama Administration is pursuing passage of the US-Korea FTA (KORUS) as well as the US-Colombia and US-Panama FTAs in 2011. The Obama Administration, according to Secretary Geithner's testimony, also wants to see the Trade Adjustment Assistance (TAA) program extended along with the passage of the three pending FTAs. Experts note that the US trade agenda for 2011, including preference programs, Permanent Normal Trade Relations (PNTR) with Russia and TAA, hinges on the Obama Administration submitting implementing legislation for all three Agreements.

Referring to the December 3, 2010 supplemental agreement which allayed many US concerns over automobile tariff elimination and phase-out schedules contained in KORUS, Secretary Geithner stated that the KORUS Agreement is "much stronger" now than that which had originally been signed in 2007 by Presidents George W. Bush and Roh Moo-hyun. Furthermore, Secretary Geithner implied that the Obama Administration seeks to replicate the "improvements" made to KORUS with respect to the US-Colombia and US-Panama FTAs, stating "we are going to work to try to strengthen [the US-Colombia and US-Panama FTAs] and make sure that we can maximize the chance to get [the Agreements] passed [in Congress]."

In regard to the US-Colombia and US-Panama FTAs, however, the Obama Administration and congressional Democrats do not take issue with any specific provision contained in either of the two pending Agreements as was the case with the tariff elimination and phase-out schedules for autos contained in KORUS. The outstanding issues relate, rather, to alleged violence against organized labor activists in Colombia and, with respect to the Agreement with Panama, a reportedly weak labor code and concerns that "tax haven" issues were not been entirely resolved by the Tax Information Exchange Agreement (TIEA) signed between the United States and Panama in November 2010. Given that the outstanding issues are not related to the Agreements themselves but,

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
50 Raffles Place, #30-00, Singapore, 048623
sscoles@whitecase.com

reportedly, to actions that need to be taken by the Colombian and Panamanian governments, Senate Finance Committee Chairman Sen. Max Baucus (D-MT) and Ranking Member Sen. Orrin Hatch (R-UT) sent a letter to US Trade Representative (USTR) Ron Kirk on February 14, 2011 requesting that these steps be clearly laid out at a March 9, 2011 Senate Finance Committee hearing and, according to the letter, that USTR Kirk provide at the hearing a "clear and expeditious" timeframe for submitting the Agreements to Congress.

Secretary Geithner's February 16th testimony came shortly after State Department Deputy Assistant Secretary for Canada, Mexico and Regional Economic Policy Matthew Rooney stated, on February 14, 2011, that the Obama Administration is pushing to submit the Agreements with Colombia and Panama to Congress before mid-2011. Although State Department Officials have since characterized Deputy Assistant Secretary Rooney's comments as "forward leaning", analysts opine that, at least with respect to the US-Colombia FTA, his remarks mirror those made by Secretary of State Hillary Clinton on January 28, 2011 during a joint press conference with Colombian Vice President Angelino Garzón in Washington, DC, in which she stated that the Obama Administration would submit the implementing legislation for the Agreement with Colombia to Congress in 2011. Sources note, however, that securing passage in Congress of KORUS is currently the Obama Administration's focus in regard to its trade agenda, with congressional consideration of the implementing legislation for Agreements with Colombia and Panama following thereafter. That the Obama Administration and such key Department Secretaries as Timothy Geithner and Hillary Clinton have recently changed tone and appeared more optimistic with respect to the Agreements with Colombia and Panama, according to sources, is likely due to that congressional Republicans have hinted at a possible blockage of KORUS in Congress if USTR, operating at the behest of the Obama Administration, fails to provide a credible plan forward on the US-Colombia and US-Panama FTAs although many analysts also view this as an empty threat. Also potentially blocked by Republicans without Obama Administration movement forward on the US-Colombia and US-Panama FTAs, according to sources, could be the renewal of the Generalized System of Preferences (GSP), the Andean Trade Promotion, the Drug Eradication Act (ATPDEA), PNTR with Russia and TAA, which is reportedly a priority for Democrats. Therefore, movement on non-FTA US trade policy in 2011 is likely dependent on the Obama Administration submitting KORUS to Congress and, shortly thereafter, demonstrating action in good faith on the Agreements with Colombia and Panama.

TPP Partners Hold 5th Round of Negotiations in Chile

From February 14-18, 2011, countries[1] participating in negotiations to establish the Trans-Pacific Partnership (TPP) Agreement held the 5th round of negotiations at the Extension Center of Universidad Católica in Santiago, Chile. This round addressed various issues including goods market access, labor, trade remedies, technical barriers to trade, intellectual property rights (IPR), e-commerce, rules of origin, and capacity building.

During the negotiations, TPP partner countries continued discussions on initial market access offers, which they exchanged in January 2011. In doing so, they agreed to exchange amendments to the initial offers as well as exchange initial investment and services market access offers and proposed product-specific rules of origin offers by March 2011. The latest round of negotiations presented TPP partner countries with the opportunity to make considerable progress on developing the legal text of the Agreement. All teams reviewed the legal text of each

[1] Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, United States, and Vietnam.

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
50 Raffles Place, #30-00, Singapore, 048623
sscoles@whitecase.com

participating country to ensure understanding of the others' proposals and to narrow the gap on any potential differences within their legal frameworks. They also agreed to develop cross-cutting issues, such as promoting small- and medium-sized enterprise participation in the export market, enhancing regulatory systems of TPP partners, and deepening production and supply chain linkages, among others.

TPP partner countries further participated in a series of presentations organized by industry stakeholders and members of the civil society from Chile and other Latin American countries, New Zealand and the United States. These presentations covered various issues, including: agriculture, environmental protection, investment, internet access, and IPR. They also participated in several seminars designed to facilitate communication with public and private sector stakeholders, including, among others, seminars on:

- labor, which addressed Chilean labor laws and practice, in which Chilean experts presented information on the enforcement of Chilean labor laws, and which addressed similar seminars on labor laws of participating countries to shed light on the labor provisions of the Agreement;

- sanitary and phytosanitary measures, which focused on electronic certification and risk-based inspection programs in respective TPP countries; and

- technical barriers to trade, which highlighted barriers in a range of sectors, particularly the organic food sector.

In January 2011, the United States had anticipated that it would be unable to table its full, formal proposal for an IPR chapter in the TPP Agreement at the 5th round of negotiations due to a need for further consultations with Congress on several controversial points. However, the United States was in fact able to table a legal text on IPR during the latest round, which appears to signal strong protections for copyright holders by providing them with the authority to notify the US government to stop importation of copyright goods from another country. However, the text does not fill in any provisions for the controversial topics of patent linkage, patent term extension and data exclusivity. According to sources at the US Trade Representative (USTR), the United States is yet to establish a position in these areas in the TPP Agreement.

TPP negotiating partners have scheduled four negotiating rounds prior to the Agreement's anticipated completion in November 2011. These rounds are expected to take place on March 28 in Singapore, June 20 in Vietnam, September 6 in the United States, and October 24 in Peru. Although TPP partners are expecting to conclude TPP negotiations by the November 2011 deadline, media sources report that USTR Ron Kirk has raised some doubts on whether TPP partners would be able to conclude negotiations by then, adding that negotiations are beginning to touch on more controversial issues. Delays may likely stem from various sources, including tabling of proposals for various chapters of the Agreement, delays in the regional goods schedules as well as the services access schedules negotiating process, and the potential addition of new negotiating partners, such as Japan.

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
50 Raffles Place, #30-00, Singapore, 048623
sscoles@whitecase.com

DR-CAFTA Countries Reach an Agreement on Dispute Settlement Rules and Textiles

On February 23, 2011, the Office of the US Trade Representative (USTR) announced at the conclusion of the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA) Free Trade Commission (FTC) meeting held in San Salvador from February 22-23, 2011 that representatives from the DR-CAFTA Countries[2] had agreed to adopt dispute settlement procedural rules and rosters of possible dispute settlement panelists. The parties also agreed to modify several of DR-CAFTA's textile and apparel rules of origin (ROO), establish two committees on agricultural issues and correct an alleged drafting error in the original Agreement.

The highlights of the FTC meeting can be summarized as follows:

- **Dispute Settlement.** According to a joint statement released by the DR-CAFTA representatives following the FTC meeting, the parties established model rules of procedure for dispute settlement panels and a panelist code of conduct to guide dispute settlement proceedings. The parties also established four rosters of possible panelists for disputes that could potentially arise under DR-CAFTA regarding general matters, as well as with respect to labor and environment chapters or provisions on financial services;

- **ROOs.** According to the joint statement, the parties also agreed to modifications of several of the Agreement's ROOs for textile and apparel goods in order to "facilitate regional trade and integration." These modifications will encourage "a vibrant textile and apparel supply chain in the Western Hemisphere to effectively face the challenge that Asian competitors represent." Furthermore, the parties agreed to increase cumulation limits in order to "encourage greater integration of regional production through limited reciprocal duty-free access with Mexico and Canada to be used in [DR-CAFTA] apparel";

- **Sanitary and Phytosanitary Standards (SPS).** The parties formally established the Committees on Agricultural Trade and SPS Matters, which will promote cooperation and communication between the DR-CAFTA countries with respect to obligations under the Agreement's agricultural provisions; and

- **Drafting Error.** According to an American Manufacturing Trade Action Coalition (AMTAC) press statement, the FTC meeting corrected a "long-standing problem with the definition of sewing thread under DR-CAFTA." The AMTAC press release alleges that DR-CAFTA as originally drafted contained an "error" in that it did not require single multifilament yarns to be originating goods in order for finished goods containing the yarn to enjoy duty-free treatment, and that this "single multifilament yarn loophole" was, before being corrected at the FTC meeting, very damaging to US thread manufacturers as their thread exports to the DR-CAFTA region had been "increasingly displaced by multifilament yarns from thread suppliers [in non-DR-CAFTA countries], such as China.

Deputy USTR Miriam Sapiro, who represented the United States at the FTC meeting, lauded the outcome, stating that the modifications will "strengthen the implementation and enforcement of the Agreement" and will "enhance competitiveness." According to USTR, the total trade between the United States and the remaining

[2] United States, Guatemala, El Salvador, Honduras, Costa Rica, Nicaragua and Dominican Republic.

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
50 Raffles Place, #30-00, Singapore, 048623
sscoles@whitecase.com

DR-CAFTA countries grew from USD 35 billion in 2005, when the Agreement entered into force, to USD 48 billion in 2010, a 37 percent increase.

New House Republicans Show Support for Pending Trade Agreements

On March 1, 2011, 67 freshmen Republican members of the House of Representatives sent a letter to President Barack Obama pledging their support for expanding free trade initiatives and urging the President to secure passage of pending Free Trade Agreements (FTAs) with Colombia, Panama and South Korea within the next six months. The letter references President Obama's initiative to double US exports and claims that implementation of these agreements will help meet this goal. The House Republicans also state the urgency of passing the Agreements by noting that the United States' trading partners have been actively pursuing trade agreements of their own which come at the detriment of the United States and its workers.

The letter from the House Republicans is a strong rebuttal to White House concerns that the 112th Congress would not support free trade initiatives, including the three pending FTAs. In a clear refutation of this idea, the freshmen Republicans note that they "are committed to working with [the President] to develop a comprehensive trade agenda," and that they "stand ready to work with [the President] to ensure that new opportunities are created for our farmers, manufacturers, service providers and workers by passing the three pending" FTAs. The House Republicans' letter also makes a general statement of principle in support of free trade independent of any piece of trade-related legislation, noting the members' "strong" belief that expanding trade, in all forms, will lead to economic growth and job creation in the United States.

The release of the letter comes just days after Senate Finance Committee Chairman Max Baucus (D-Mont.) met with Colombian President Juan Manuel Santos in Bogotá, Colombia and pledged support for the US-Colombia FTA which, of the three pending Agreements, is widely considered to face the most difficult passage in Congress due to intense union opposition. The combination of the newly assured commitment from House Republicans as well as the assurance of a leading Senate Democrat, Sen. Baucus, augurs well for passage of the pending FTAs in 2011, but their fate remains uncertain due to the White House's continued refusal to commit to a timetable for the submission of all three FTAs to Congress.

More generally, the new GOP letter bodes well for those hoping that the 112th Congress, especially those elected with strong support from the Tea Party, would broadly support free trade policies and resist anti-trade legislation. From a geographical perspective, it noteworthy that the majority of those House Republicans that did not sign the letter come from districts, such as Michigan and Pennsylvania, which are traditionally skeptical toward trade and would therefore potentially oppose the passage of a trade agreement. Additionally, the fact that such a large majority of freshman signed a letter on principles only without any underlying implementing legislation gives a strong sign of a pro-free trade agenda due to the fact that such a letter on principles only leaves the youngest members of Congress open for criticism. Lastly, this letter comes in the wake of the new House Republicans replacing Representatives which had been generally skeptical of trade.

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
50 Raffles Place, #30-00, Singapore, 048623
sscoles@whitecase.com

US and Mexico Agree on Path Forward in Cross-Border Trucking Dispute

On March 3, 2011, the Obama Administration issued a press statement announcing that the United States and Mexico agree on a "path" forward to resolve the long-standing cross-border trucking dispute. This "path" provides for the establishment of a reciprocal, phased-in program of "the highest safety standards" to allow Mexico-domiciled motor carriers ("trucks") to operate in US territory, as envisaged under NAFTA, and for Mexico to lift the "retaliatory tariffs" imposed on US goods. The United States and Mexico must still sign an official agreement based on this "path" in order to implement the program.

Articles 1108 and 1206 as well as Annex I ("Reservations for Existing Measures and Liberalization Commitments") of NAFTA provided for the liberalization of cargo trucking services in US and Mexican border states by December 18, 1995 and that this liberalization was to encompass the entire territories of both countries by January 1, 2000. Except for the period between April 27, 2007 and March 11, 2009, during which the US and Mexican Governments collaborated on the implementation of a pilot cross-border trucking program that allowed a limited number of Mexican trucking companies to operate in US territory, the United States has not fulfilled its obligations under NAFTA with respect to granting national and/or most favored nation (MFN) treatment to Mexican firms engaged in cross-border transport or cargo. On March 18, 2009, in response to the US ban on Mexican trucks, Mexico's Secretary of Economy (SE) published in the Official Gazette a list of 89 US goods on which Mexico would impose retaliatory import duties in accordance with Article 2019 of NAFTA, which allows the complaining party (Mexico) in a dispute (in this case, cross-border transport of cargo) to suspend benefits (*e.g.*, market access at preferential import tariff rates) until both the United States and Mexico reach an agreement on resolution of the dispute. To date, these retaliatory tariffs remain in effect.

On January 6, 2011, US Department of Transportation (DOT) Secretary Ray LaHood issued a concept document to Congress and the government of Mexico aimed at resolving the trucking dispute. The concept document provided for an inspection and monitoring program, which would allow for the United States to monitor Mexican long-haul trucks, its cargo, and its drivers. Experts opine that this concept document is, in effect, the groundwork for the current "path" forward. According to the March 3, 2011 White House press statement, the eventual agreement "will deliver a program that is safe, secure, efficient, and advances the economic interests of both the United States and Mexico." In exchange, "Mexico will suspend its retaliatory tariffs in stages beginning with reducing tariffs by 50 percent at the signing of an agreement and will suspend the remaining 50 percent when the first Mexican [truck] is granted operating authority under the program."

Experts widely attribute US resistance to the liberalization of cross-border cargo transport to the pressure that the International Brotherhood of Teamsters, which is the labor union representing US truckers, has applied on the successive Clinton, Bush and Obama Administrations. Since the trucking dispute began, the Teamsters and many US lawmakers receiving support from the same have provided the narrative that Mexican trucks have subpar vehicular safety standards despite statistics computed as part of the Bush-era pilot program that showed that Mexican trucks we safer than their US counterparts.

It remains unclear how soon US and Mexican negotiators will resolve the remaining issues and produce a draft final agreement although, according to the White House press statement, this will occur "very soon." Experts

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
50 Raffles Place, #30-00, Singapore, 048623
sscoles@whitecase.com

opine that the cross-border trucking program called for in the March 3, 2011 White House press statement will likely resemble that which operated under President Bush (between April 27, 2007 and March 11, 2009) though with more stringent requirements of the drivers related to driving skills and language proficiency. Once a draft final agreement is finished, the DOT and the US Trade Representative (USTR) will share it with interested members of Congress and publish it in the Federal Register (FR) for public comment.

Contacts:

Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
50 Raffles Place, #30-00, Singapore, 048623
sscoles@whitecase.com