WHITE & CASE

December 2006

Japan External Trade Organization
WTO and Regional Trade Agreements
Monthly Reports

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United States

USTR Releases 2006 Report on China's WTO Compliance

On December 11, 2006, the Office of the United States Trade Representative (USTR) issued its *2006 Report to Congress on China's World Trade Organization (WTO) Compliance*. This is the fifth report that USTR has prepared pursuant to the U.S.-China Relations Act of 2000 which mandates annual reporting on China's compliance with the bilateral and multilateral commitments that China made as part of its WTO accession. We review here the report's assessment of China's WTO compliance and the role the United States wishes to play in ensuring that China complies with its WTO commitments.

The complete report is available at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/asset_upload_file688_10223.pdf.

United States and China Hold First Strategic Economic Dialogue Meeting in Beijing

On December 14-15, 2006, United States Treasury Secretary Henry M. Paulson Jr. and Chinese Vice-Premier Wu Yu led U.S. and Chinese government delegations that met in Beijing for the first U.S.-China Strategic Economic Dialogue (SED). The delegations discussed a number of bilateral economic issues including macroeconomic policies, trade and investment barriers, and intellectual property rights (IPR). The parties also agreed to cooperate on energy and environmental initiatives. The United States and China plan to convene a second SED meeting in Washington, DC in May 2007.

United States Highlights

We want to alert you to the following United States developments:

- Mexican Congress Repeals 20 Percent Tax on Soft Drinks
- Treasury Department Again Avoids Labeling China a "Currency Manipulator"
- USTR Announces Change to U.S. "Zeroing" Methodology, As Senators Urge USTR, DOC to Maintain the Methodology

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- USTR's notice did not specify how DOC will change its methodology. DOC is expected to announce its decision in a Federal Register notice in February or March 2007.
- 109th Congress Passes Trade Package – including GSP Renewal and PNTR for Vietnam – in its Last Hours

Free Trade Agreements

Free Trade Agreements Highlights

We want to alert you to the following Free Trade Agreements developments:

- United States and Panama Announce Completion of FTA Negotiations
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WTO Compliance Panel Releases Decision in United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina

A WTO "compliance" Panel has ruled that the United States failed to implement the 2004 rulings of the WTO in a dispute over the imposition of U.S. anti-dumping duties on steel pipe from Argentina. The Panel found that the measures challenged by Argentina remained in breach of U.S. obligations under the Anti-Dumping Agreement, both "as such" and "as applied." The decision of the Panel in *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina: Recourse to Article 21.5 of the DSU by Argentina* (DS268) was released on November 30, 2006.

WTO Releases Semiannual Reports On Safeguards and AD Measures

On November 27, 2006, the World Trade Organization (WTO) released its semiannual report on anti-dumping (AD) investigations and measures based on notifications made by WTO Members. On November 29, 2006, the WTO also released a separate semiannual report based on the latest statistics on safeguards actions notified by WTO Members pursuant to the WTO Agreement on Safeguards. The report summarizes information submitted by WTO Members to the Committee on Anti-Dumping Practices (ADP). We review herein the WTO reports and their statistical findings.

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Multilateral Highlights

We want to alert you to the following Multilateral developments:

- USTR Commends Provisional Agreement on Revised WTO GPA
- DUSTR Veroneau: US will Proceed with Litigation Against EU in Boeing-Airbus Dispute
- WTO Announces January 2007 Accession for Vietnam

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Reports in Detail

United States

USTR Releases 2006 Report on China's WTO Compliance

Summary

On December 11, 2006, the Office of the United States Trade Representative (USTR) issued its *2006 Report to Congress on China's World Trade Organization (WTO) Compliance*. This is the fifth report that USTR has prepared pursuant to the U.S.-China Relations Act of 2000 which mandates annual reporting on China's compliance with the bilateral and multilateral commitments that China made as part of its WTO accession. We review here the report's assessment of China's WTO compliance and the role the United States wishes to play in ensuring that China complies with its WTO commitments.

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Analysis

On December 11, 2006, USTR issued its *2006 Report to Congress on China's WTO Compliance*. Like previous versions, the 2006 report is an examination of nine broad categories of Chinese WTO commitments, with analysis focusing on the trade concerns that significant U.S. stakeholders raised to the U.S. Government in the multilateral context. USTR drew from its monitoring of China's WTO compliance efforts and the activities of the Trade Policy Staff Committee (TPSC) Subcommittee on China WTO Compliance - an inter-agency body devoted to China and its WTO commitments.[1] Among other things, the report focuses on the Chinese government's involvement in industry and trade, China's intellectual property rights enforcement efforts, trading rights, agriculture, services, and China's overall transparency:

General developments. The report notes that although China has taken steps since its December 2001 WTO accession to liberalize its economy, its record in implementing its WTO commitments is mixed.

[1] The TPSC subcommittee is composed of experts from USTR, the Departments of Commerce, State, Agriculture and Treasury, and the U.S. Patent and Trademark Office, among other agencies. The subcommittee evaluates, coordinates and prioritizes the monitoring activities being undertaken and to review China's implementation of its commitments or lack thereof

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USTR highlights Chinese government industrial policies that often rely on trade distorting measures including subsidies and import and export restrictions and adds that China faces problems in enforcing laws in areas where detailed WTO disciplines apply, such as intellectual property rights. . USTR also notes that U.S. businesses find that "excessive Chinese government intervention" in the market adds burdensome costs to their business activities and thus distorts trade flows.

- **Intellectual property rights (IPR)**. USTR noted that in 2006, the Administration continued to work with China to improve its IPR enforcement regime. Specifically, USTR states that in the past year, China took enforcement actions against plants that produce pirated optical discs and issued new rules requiring computers to be pre-installed with licensed operating system software. China has also committed to ensure the legalization of software used in Chinese enterprises, to pursue increased cooperation to combat pirated goods, and to intensify efforts to eliminate infringing products at major consumer markets in China. Even with all these actions, however, USTR reports that China does not effectively apply utilization of criminal remedies to combat IPR infringement. USTR also reports that China's lack of transparency makes it difficult for WTO Members to review details of China's administrative, civil and criminal enforcement system; when WTO Members do request further information from China, usually under Article 63.3 of the WTO TRIPs Agreement, China provides only limited information in response. USTR states, however, that when bilateral discussions with China do not resolve key differences on particular issues, the United States is prepared to take action, including WTO dispute settlement, to ensure that China implements an effective IPR enforcement system.
- **Trading rights and distribution services**. The report cites that U.S. companies and individuals in most sectors are now able to import and export goods in China directly without having to use a middleman. However, China's government policies, especially its maintenance of import and distribution restrictions on goods such as printed products and audio and video products, have reduced and delayed market access for these copyrighted products. The report also notes that China's commitment to open its market for "direct selling" (e.g. "door-to-door" sales or telemarketing) has proceeded slowly and has established restrictions on business operations for foreign sellers that rely on such tactics.
- **Agriculture**. The report notes that U.S. exports of agricultural commodities to China such as cotton and wheat have increased, but China's WTO implementation in the agricultural sector continues to be problematic because of the Chinese government's intervention in the market. USTR observes that "capricious practices" by Chinese customs and quarantine officials usually delay or halt shipments of

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agricultural products into China and that sanitary and phytosanitary (SPS) standards have "questionable scientific bases." The report also states that the regulatory regime lacks transparency and thus confuses foreign agricultural traders and makes business transactions more cumbersome. In 2007, USTR will continue to push China on progress on outstanding agricultural issues, especially China's import ban on U.S. beef and beef products.

- **Services**. USTR notes that the United States enjoyed a surplus in trade in services with China in 2006, but U.S. service providers feel that China must increase market access and remove restrictions in certain areas. Specifically, USTR highlights that Chinese regulatory authorities "continue to frustrate efforts" of U.S. providers of banking, insurance, motor vehicle financing, telecommunications, construction and engineering, legal and other services. According to USTR, the Chinese government has implemented an opaque regulatory process and burdensome licensing and operating requirements, thus discouraging U.S. service providers from effectively conducting business in China. USTR also notes that China has been slow to adjust capital requirements for telecommunications services providers and has also imposed new restrictions on foreign providers of financial information services.
- **Transparency**. USTR notes that although China has implemented numerous programs meant to increase transparency, two main problems remain. First, China has been slow to adopt and implement a single official journal for publishing all trade-related measures. Second, China has not yet regularized the use of "notice-and-comment" procedures for new or revised trade-related rules. USTR notes that WTO-required "notice-and-comment" procedures remain optional in China. The report notes that "many of China's regulatory regimes continued to suffer from systemic opacity" which in turn discourages foreign and domestic businesses from conducting efficient and effective business practices.

Outlook

In 2007, the Office of USTR will likely continue its efforts to ensure China's full compliance with is WTO commitments, especially in the areas of IPR enforcement, institutionalization of China's market mechanisms, and transparency. The report notes that the United States is now willing to pursue WTO dispute settlement actions if it feels that China is not in compliance with its WTO obligations and/or is not working to become or to remain compliant. USTR's new stance was made evident in the United States' September 15, 2006 request for the WTO to establish a dispute settlement Panel to adjudicate the WTO-consistency of China's imposition of a tariff surcharge on imported automobile parts. The WTO Dispute

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Settlement Body (DSB) formed the panel during its September 26 meeting. The auto parts case is the first WTO dispute settlement Panel that China has faced since its 2001 accession and indicates an evolving strategy for the United States: if China does not comply with its WTO commitments, the United States is no longer content to use "quiet diplomacy" and thus avoid direct confrontation. 2007 may see more of a shift from USTR from "quiet diplomacy" to direct confrontation at the WTO, but USTR continues to assure the U.S. Congress and U.S. industry that it will first address major issues with China through bilateral consultative channels.

USTR's concerns with Chinese industrial subsidies might also change in 2007 if the U.S. Department of Commerce (DOC) alters its longstanding policy of not applying countervailing duties ("CVDs") to allegedly subsidized Chinese imports because China is a "non-market economy" under U.S. law. The Department recently initiated a CVD case against Chinese coated paper products. If it completes the investigation and overrules over 20 years of prior practice by finding that imports benefiting from Chinese subsidies can indeed be subjected to CVD investigations and properly assessed remedial duties, China's industrial subsidy policies – and/or the United States' approach to them – could change dramatically.

On December 12, 2006, China responded to USTR's report. Chinese government officials contended that China has met its WTO obligations. Qin Gang, spokesman for the Ministry of Foreign Affairs, stated that that China has implemented all the promises it made in its WTO accession package and has followed all WTO rules. Gang dismissed the report and called on the United States to ease security-related export controls on technology exports to China such as computer and aircraft technology.

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United States and China Hold First Strategic Economic Dialogue Meeting in Beijing

Summary

On December 14-15, 2006, United States Treasury Secretary Henry M. Paulson Jr. and Chinese Vice-Premier Wu Yu led U.S. and Chinese government delegations that met in Beijing for the first U.S.-China Strategic Economic Dialogue (SED). The delegations discussed a number of bilateral economic issues including macroeconomic policies, trade and investment barriers, and intellectual property rights (IPR). The parties also agreed to cooperate on energy and environmental initiatives. The United States and China plan to convene a second SED meeting in Washington, DC in May 2007.

Analysis

On December 14, 2006, U.S. Treasury Secretary Henry M. Paulson Jr. and Chinese Vice-Premier Wu Yi co-chaired the first U.S.-China SED in Beijing. Paulson led a U.S. delegation that included Commerce Secretary Carlos Guiterrez, Labor Secretary Elaine Chao, Health and Human Services Secretary Mike Leavitt, Energy Secretary Sam Bodman, U.S. Trade Representative (USTR) Susan Schawb, Environmental Protection Agency Administrator Stephen Johnson and Federal Reserve Chairman Ben Bernanke. The U.S. delegation also met with Chinese President Hu Jintao during their visit to Beijing. The Chinese delegation included, among others, National Development and Reform Commission Minister Ma Kai, Finance Minister Jin Renging, People's Bank of China Governor Zhou Xiaochuan and the Ministers of Agriculture, Health and Information.

The United States and China announced the SED's creation in a September 20, 2006 joint statement. The two countries established the dialogue as a high-level forum in which U.S. and Chinese representatives could meet biannually to "focus on bilateral and global strategic economic issues of common interests and concerns" and to supplement existing bilateral dialogue mechanisms such as the U.S.-China Joint Commission on Commerce and Trade (JCCT). The meetings alternate between Beijing and Washington, and the SED's next meeting is scheduled for Washington in May 2007.

During the SED meeting, Secretary Paulson and Vice-Premier Wu outlined their countries' respective objectives for the dialogue. Paulson focused on the importance of maintaining stable growth with balanced trade, opening markets to trade, competition and investment, and cooperation on energy and environmental issues. Wu confirmed China's commitment to economic reform but also focused on the need for the United States to understand the difficult economic and social challenges that China's rapid

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development has created. Wu cited underdeveloped productivity, regional economic inequality, rural to urban migration and an increasing population as some of the challenges that China must address in the long-term.

The two sides also discussed a number of bilateral economic and trade concerns including macroeconomic policies, trade and investment barriers and IPR protection. On **macroeconomic policy**, Paulson urged the two sides to pursue policies that promote "balanced, sustainable growth and raise living standards." Paulson noted the importance of monetary policy as a tool to bring about such growth and opined that China could strengthen its monetary policy's effectiveness by moving "over the next several years" toward a more flexible and market-oriented currency regime. Many Members of Congress claim that China deliberately undervalues its currency, the RMB, to increase the competitiveness of Chinese exports and have sought to introduce legislation that would impose punitive measures including tariffs on Chinese imports until China revalues its currency.[2] Although the RMB has appreciated against the dollar by more than three percent since China began in July 2005 to allow the RMB to float within a limited range, U.S. critics of China's currency policy claim that the RMB remains undervalued, and they continue to demand that China take action to revalue.

The two sides also recognized the need to take measures that would increase the U.S. savings rate and boost Chinese domestic consumption to reduce further the expanding bilateral trade deficit. In 2005, the United States ran a $202 billion trade deficit with China, and the figure in 2006 is expected to exceed this amount.

Regarding **trade and investment barriers**, China expressed concern over a proposed U.S. export control law would loosen controls on certain high-technology exports and tighten restrictions on certain defense-related exports to China. The U.S. Department of Commerce (DOC) is reviewing public comments on the proposed rule and could enact the rule as early as February 2007. China claims that certain provisions of the rule could violate Chinese law and therefore encouraged the U.S. delegation to delay the rule's implementation.

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[2] Since April 2005, Sens. Chuck Schumer (D-NY) and Lindsey Graham (R-SC) have threatened a vote four times on their proposed bill (S. 295) that would impose a 27.5 percent tariff on Chinese imports until China "adopts a process that leads to a substantial upward currency revaluation." Although the Senators on September 29, 2006 withdrew their latest request for a Senate vote on the bill, both Senators stated that they will work with Senate Finance Committee Chair Sen. Charles E. Grassley (R-IA) and Ranking Member Max Baucus (D-MT) to draft a new bill on China currency that will be consistent with World Trade Organization (WTO) rules and Administration policy.

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Both parties agreed to establish a bilateral investment dialogue that would consider a possible bilateral investment treaty (BIT). A BIT between China and the United States would protect the rights of foreign subsidiaries and investors in the countries' home markets. Under U.S. trade practice, BITs are a required step towards the initiation of formal bilateral or regional Free Trade Agreement (FTA) negotiations.

The United States and China also reached an agreement under which the two countries' export-import banks would cooperate to increase U.S. exports to China. According to December 14 a U.S. Export-Import (Ex-Im) Bank statement, the agreement will finance U.S. exports with loans under $20 million, which the Chinese Ministry of Finance (MOF) will guarantee, and the U.S. Ex-Im Bank will support with a medium-term export credit guarantee. MOF and the Ex-Im Bank concluded the deal under a January 24, 2005 Framework Agreement.

China agreed to allow the New York Stock Exchange (NYSE) and NASDAQ Stock Market to open formal business offices in China. Although the NYSE signed a memorandum of understanding (MOU) with the Shanghai Stock Exchange in October 2003, and NASDAQ maintains a representative office in Beijing, the Chinese government has limited the NYSE and NASDAQ business activities.

Regarding **IPR protection**, both parties agreed to "reinvigorate" the JCCT on the issue but did not reach any agreement on specific actions that China might take to strengthen IPR enforcement. In its December 11 *2006 Report to Congress on China's World Trade Organization (WTO) Compliance*, USTR noted that despite improvements in 2006 including enforcement actions against pirated optical disc plants and the issuance of new rules requiring the pre-installation of licensed operating system software on computers sold in China, China's application of criminal penalties to combat IPR infringement remains ineffective. The Report also stated that China's lack of transparency makes it difficult for WTO Members to review details of China's administrative, civil and criminal enforcement system.

The U.S. and Chinese delegations agreed to cooperate on **energy and environmental initiatives** through the establishment of a joint economic study on energy and the environment. During the SED meeting the two countries also signed the Energy Efficiency and Renewable Energy Protocol to renew cooperation in the development of clean energy technologies. China also agreed to join the FutureGen International Partnership, a 10-year $1 billion U.S. Government program to develop the world's first zero-emissions fossil fuel power generation plant. China and the United States are the world's two largest consumers of energy, and China's rapid economic development during the last decade has increased the country's demand for energy and increasingly strained its natural environment.

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Outlook

Although the first SED meeting did not produce any definite timetables for solving U.S. concerns such as China's currency policy or weak IPR enforcement mechanisms, U.S. officials continue to emphasize the dialogue's importance as a venue for exchanging opinions on such concerns and reaching a consensus upon which the two parties may later build solutions. At the meeting's conclusion, Paulson stated that "[w]hile we cannot resolve every difference in a single meeting, the candid conversations we have had here will make progress more achievable." U.S. reactions to the dialogue's lack of concrete results, however, have been less optimistic. In a December 15 press release, House Ways and Means Subcommittee on Trade Member (and future Chairman) Rep. Sander Levin (D-MI) stated that the SED meeting "confirms the fact that China has been controlling their currency to gain a major unfair advantage in its trading relationship with the United States." Levin added that the United States should take actions against China including pursuit of a WTO case against China's alleged currency manipulation, and he called on the Bush Administration to label China a "currency manipulator" in the Treasury Department's Semi-Annual Report on International Economic and Exchange Rate Policies. Incoming Senate Finance Committee Chair Sen. Max Baucus (D-MT) also addressed China's currency policy in a December 15 statement in which he opined that "greater flexibility for China's currency is overdue" and added that "dialogue and action must go hand-in-hand." Congressional action against China's currency policy remains unlikely in the short-term, but Democratic control of Congress might apply more pressure on the Bush Administration to act on the matter. The Bush Administration has balked at the idea of directly confronting China's currency policy through unilateral actions or a WTO dispute settlement action.

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United States Highlights

Mexican Congress Repeals 20 Percent Tax on Soft Drinks

On December 21, 2006, the Mexican Congress approved the 2007 Income Tax Law (*Miscelanea Fiscal*), eliminating a controversial 20 percent tax on High Fructose Corn Syrup (HFCS). The 20 percent tax, enacted by the Mexican Congress in January 2002, essentially blocked the entry of U.S. HFCS imports into Mexico for over four years. The repeal of the 20 percent tax on HFCS follows the United States and Mexico's agreement to a deadline for Mexico to comply with a World Trade Organization (WTO) ruling (DS308, *Mexico–Tax Measures on Soft Drinks and Other Beverages*) that a Mexican tax on soft drinks and other beverages with non-sugar sweeteners was inconsistent with WTO rules. On July 27, 2006, Mexico and the United States agreed to the terms of an agreement to end the 12-year-old dispute over U.S.-Mexico sugar trade. Among other things, Mexico agreed not to impose duties on U.S. HFCS effective January 1, 2008. With the possibility of facing U.S. retaliation upon failing to comply with the WTO ruling, Mexico came under strong pressure to repeal the 20 percent tax.

In early December 2006, Mexico's President Felipe Calderon sent his proposal for the 2007 Income Tax Law to the Mexican Congress. Among other things, Calderon's proposed legislation included measures to replace the 20 percent tax on HFCS with a 5 percent tax on all soft drink sales in Mexico regardless of their sweetener content. The Calderon administration's main goal with this measure was to increase tax revenues. On December 19, 2006, Mexico's lower Chamber of Deputies approved the 5 percent tax but the Mexican Senate voted against it. On December 20-21, 2006, the two chambers reconciled their differences and adopted the Senate-passed measure, which was included in the revenue portion of the 2007 Income Tax Law approved on December 21. The Senate measure rejected the 5 percent tax and repealed the 20 percent tax on HFCS.

The elimination of the 20 percent tax on HFCS will bring Mexico into compliance with the WTO. The elimination of the 20 percent tax may also put an end to the 12-year-old dispute over U.S.-Mexico sugar trade. This dispute centered on U.S. quota restrictions on Mexican sugar imports and Mexican duties on U.S. imports of High Fructose Corn Syrup (HFCS). The repeal of the 20 percent tax on HFCS is expected to encourage U.S. HFCS imports into Mexico and improve the market access of Mexican sugar exports to the United States as well.

The U.S. Corn Refiners Association (CRA), the members of which produce HFCS, welcomed the repeal of the 20 percent tax arguing that "it will yield positive results for sweetener industries on both sides of the

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border." According to the CRA, the sweetener dispute with Mexico resulted in more than $4 billion in lost HFCS sales.

Treasury Department Again Avoids Labeling China a "Currency Manipulator"

The U.S. Treasury Department's semiannual "Report to Congress on International Economic and Exchange Rate Policies" did not label China or any other U.S. trading partner a "currency manipulator." Released December 19, 2006, the report criticizes China's exchange rate policy as distorting the domestic economy and impeding international economic imbalance adjustments. However, it acknowledges that China's exchange rate policy has improved in the past several months through changes to the Chinese financial sector that allow for greater transparency and liberalization of the country's exchange rate practices.

The 1988 Omnibus Trade and Competitiveness Act calls on the U.S. Treasury Department to report to Congress on "whether countries manipulate the rate of exchange between their currency and the United States dollar for purposes of preventing effective balance of payments adjustment or gaining unfair competitive advantage in international trade." The latest currency report notes that in the first half of 2006, the flexibility of the Chinese renminbi with respect to the U.S. dollar increased significantly relative to the second half of 2005. According to the report, since China first revaluated the renminbi on July 21, 2005, the currency has appreciated 5.88 percent as of December 14, 2006.

In its report, Treasury noted that the U.S.-China bilateral dialogue and recent meetings of the Strategic Economic Dialogue (SED) focused on accelerated efforts that China can undertake to revalue its currency. The report also urged China to allow its currency to be flexible, establish a more balanced pattern of growth that was less dependent on Chinese exports, and create a modern financial sector. As noted above, the report also failed to deem any other U.S. trading partner a "currency manipulator."

Upon the report's release, incoming Senate Finance Committee Chair Max Baucus (D-MT) opined that the report is no longer useful and suggested that Treasury explore "a new approach and new tools." Baucus' opinion likely stems from the two previous reports, in which Treasury has not labeled China a "currency manipulator," despite some Congressional sentiment to the contrary. Treasury has continuously assuaged Congress' concerns by stating that the best means of addressing China's currency imbalance is not via direct confrontation but rather through "quiet diplomacy" and bilateral dialogue. Nevertheless, members of Congress, like Sen. Baucus, seem to be getting impatient with China's refusal to undertake a more drastic currency revaluation, as well as Treasury's repeated aversion

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to labeling China a "currency manipulator." Despite protests from Congress and some U.S. manufacturers, the Bush Administration is unlikely to change its stance on China's currency policies in the near future. At the SED, China demonstrated an unwillingness to make significant changes to its trade policies, and the Administration would likely not wish to disrupt the delicate U.S.-China relationship through direct confrontation, particularly given that Chinese imports remain a vital part of the United States' current economic prosperity.

USTR Announces Change to U.S. "Zeroing" Methodology, As Senators Urge USTR, DOC to Maintain the Methodology

On December 14, the Office of the United States Trade Representative (USTR) notified Congress of a proposed methodological change in the manner in which the Department of Commerce (DOC) will calculate dumping margins in antidumping investigations. The change to the U.S. practice of "zeroing" was necessitated in order to implement the recommendations and rulings of the WTO Dispute Settlement Body (DSB) in connection with the U.S.-EU dispute US - Zeroing (EC) (DS294). USTR's announcement follows a mandated consultative process with Congress pursuant to Section 123(g) of the Uruguay Round Agreements Act (URAA).

Zeroing refers to the practice whereby an investigating authority discounts "negative" dumping margins to zero. Where the export price is lower than the price in the exporting country, this creates a positive dumping margin. However, when zeroing is used, investigating authorities do not account for negative dumping margins, i.e., when the export price of the product is higher than the price in the exporting country. The investigating authority will not average positive and negative dumping margins together, as negative dumping margins are assigned a value of zero. In turn, this can have the effect of inflating the overall average dumping margin or even lead to the imposition or maintenance of anti-dumping duties which, in the absence of zeroing, would not otherwise apply.

In June 2003, the EU requested consultations with the United States on its use of zeroing. The EU challenged DOC's use of zeroing in 31 antidumping (AD) cases – 15 of them original investigations and 16 administrative reviews (involving imported EU goods such as steel, pasta, ball bearings, and chemicals) - as being inconsistent with U.S. WTO obligations.

In reversing the Panel decision, the WTO's Appellate Body (AB) found on April 18, 2006 that weighted average-to-weighted average zeroing was impermissible in not only original AD investigations, but also administrative reviews. The United States informed the DSB on August 1, 2006 that it would implement the findings of the AB by April 9, 2007.

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Several members of Congress voiced concern regarding the proposed methodological change. In a December 11, 2006, letter to USTR and DOC, eleven Senators expressed the view that zeroing is not within USTR's or DOC's administrative discretion and that any changes to the zeroing methodology must be made through the legislative process. Signatories to the letter included Sens. Jay Rockefeller (D-WV), Max Baucus (D-MT), Larry Craig (R-ID); Dick Durbin (D-IL); Mike Crapo (R-ID); Robert Byrd (D-WV); George Voinovich (R-OH); Kent Conrad (D-ND); Lindsey Graham (R-SC); Elizabeth Dole (R-NC); and Evan Bayh (D-IN). The Senators' letter also indicated that discontinuing the practice of zeroing would be inconsistent with U.S. law.

DOC's use of zeroing has been the subject of several WTO challenges. On November 17, 2005, Ecuador initiated WTO dispute settlement proceedings (DS335) against the United States over DOC's zeroing methodology in AD investigations. Ecuador specifically challenged DOC's 2004 use of the zeroing methodology to calculate AD duties during its investigation of shrimp imports from Ecuador and other countries. Japan requested the creation of a panel in February 2005 as part of its challenge (DS322) to several U.S. laws and regulations related to zeroing and sunset reviews, as well as the specific application of those measures in 16 antidumping cases against Japanese imports. That panel decision has been delayed until late August or early September. On April 24, 2006, Thailand requested consultations with the United States concerning the U.S. zeroing methodology in the AD investigation of Thai shrimp imports – part of the same investigation underlying Ecuador's complaint. Following the AB's ruling in US – Zeroing, the EU urged the United States to revise the AD calculations in the 15 original investigations challenged by the EU and abandon its zeroing methodology in all future AD investigations.

The Senators' December 11 letter further indicates that the change in leadership in the Senate will not likely affect the Senate's support for U.S. trade remedy laws. The Senate has long opposed efforts to "weaken" U.S. trade laws, a position reaffirmed by incoming Senate Finance Committee Chair Max Baucus (D-MT). USTR, on the other hand, needs to find a way to implement the adverse WTO rulings against zeroing. Thus, the Administration may find itself in a position of having to balance U.S. obligations under the WTO (and the Panel and AB decisions on zeroing) with certain Congressional desires to maintain the practice of zeroing.

109th Congress Passes Trade Package – including GSP Renewal and PNTR for Vietnam – in its Last Hours

On Saturday December 9, 2006, the Senate passed a final package of tax and trade measures that included a 2-year renewal of the Generalized System of Preferences (GSP) program and Permanent

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Normal Trade Relations (PNTR) for Vietnam. On December 8, 2006, the House approved H.R. 6406, which contained the identical trade provisions, by a margin of 212-184. Following the vote, the House sent H.R. 6406 to the Senate along with H.R. 6111, which contained several tax and Medicare provisions. Under special rules created specifically for the two bills, the House combined the legislation and sent the single bill to the Senate as a "privileged message," which allowed Senate leaders to call up the bill immediately for a vote and move to cut off debate. The Senate passed the bill by a margin of 79-9 on December 9, thus approving all trade measures within. The President is expected to sign the measures into law in the coming days.

H.R. 6406's trade provisions address:

- **GSP.** The bill extends GSP for two years (until December 31, 2008) and after six months, will tighten rules on competitive need limits (CNL) waivers. Under the legislation, the President is given discretion to end CNL waivers on products that constitute 150 percent of the competitive need limit or 75 percent of total U.S. imports of that product from the previous calendar year;
- **AGOA.** The bill extends current African Growth and Opportunity Act (AGOA) provisions allowing benefits for apparel made with fabric from third countries until September 30, 2012, with a 3.5 percent cap;
- **CBI.** The legislation adds a new provision to the Caribbean Basin Initiative (CBI), entitled the Haitian Hemispheric Opportunity through Partnership Encouragement Act (HOPE), which allows duty-free treatment for certain products from Haiti;
- **ATPDEA.** The bill extends duty-free access under the Andean Trade Preferences and Drug Eradication Act (ATPDEA) to the U.S. market for six months for Peru, Bolivia, Ecuador and Colombia. Benefits would be renewed for another six months if the United States and the Andean nations completed the legislative process to implement free trade agreements (FTAs); and
- **Vietnam PNTR.** The legislation grants PNTR to Vietnam, eliminating the annual evaluation of Vietnam's emigration practices under "Jackson-Vanik." H.R. 6406 also establishes a subsidies enforcement mechanism to ensure that the Administration responds if Vietnam grants any prohibited subsidies to its textile and apparel industry in violation of its WTO accession terms.

Upon the legislation's passage in the Senate, the White House and the Office of the United States Trade Representative (USTR) commended Congress for its work on the trade provisions. USTR Schwab stated that the strong bipartisan vote in Congress on the trade initiatives showed that Democrats and Republicans can work in consensus on the U.S. trade agenda, adding that Senate and House passage of

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legislation authorizing the grant of PNTR for Vietnam begins a new era in the U.S. relationship with Vietnam. Schwab also opined that the strong bipartisan vote could lay the groundwork for bipartisan action on trade issues in the 110th Congress, including passage of the Peru and Colombia FTAs.

The bills, however, did not progress smoothly through Congress, and the trade provisions on Haiti and Vietnam generated the most debate. On December 8, 2006, Sens. Lindsey Graham (R-SC), Elizabeth Dole (R-NC), Saxby Chambliss (R-GA), John Isakson (R-GA), Richard Burr (R-NC), Richard Shelby (R-AL), Jeff Sessions (R-AL), and Jim Bunning (R-KY) sent a letter to House and Senate leaders opposing the Haiti provision in H.R. 6406. The Senators stated that their textile constituents are concerned with the provision of H.R. 6406 that would provide new rules of origin for apparel from Haiti. The Senators noted that over 100,000 textile jobs have been lost, and that the United States must aid Haiti but must do so in a thoughtful way. Several Republican House members also objected to PNTR for Vietnam, including Rep. Dana Rohrabacher (R-CA), who stated that granting Vietnam PNTR was tantamount to "big business sacrificing the interests of American workers by chasing cheap labor." The other trade provisions, including GSP renewal and AGOA benefits, were not as contentious as the Haiti and Vietnam provisions.

The debates over the final trade provisions could mean changes ahead for U.S. trade policy. Congressional sources note that the weekend's frenzied activity and the debates over Haiti and Vietnam prove that Congress is conflicted about U.S. trade policy and will likely be so during its 110th session. The Administration hopes that the bicameral passage of the trade provisions will extend to Congressional consideration of the Peru and Colombia FTAs, as well as other Administration-led trade initiatives like possible FTAs with Korea and Malaysia and the extension of Presidential Trade Promotion Authority (TPA). Congress' approval of H.R. 6406, however, could have been spurred more by a desire to conclude the 109th Congressional session by December 9 rather than a consensus among Democrats and Republicans. Indeed, although the Senate easily passed the provisions, the narrow House margin of passage indicates that extensive opposition to trade measures exists in the House – a concern that might be exacerbated in the 110th Congress, considering the relative harmlessness of the trade provisions at issue and the influx of "progressive" freshman Democrats who might be averse to open trade. Should this possibility prove true in 2007, future trade measures might face a tough – if not impassable – road through Congress.

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Free Trade Agreements

Free Trade Agreements Highlights

United States and Panama Announce Completion of FTA Negotiations

On December 19, 2006, the United States and Panama announced the completion of Free Trade Agreement (FTA) negotiations. United States Trade Representative (USTR) Susan Schwab and Panama's Minister of Trade and Industry Alejandro Ferrer made the announcement in Washington after both countries completed a week of negotiations. According to officials from the Office of the USTR, the bilateral agreement will eliminate tariffs and other barriers to trade in goods and services and will expand trade between the two countries. Both sides also agreed to continue additional discussions on labor.

Schwab stated that the United States and Panama were able to successfully conclude the Agreement in part because of the long history of close ties and a strong economic partnership between the two countries. She added that the FTA will expand the countries' trade and investment relationship and provide new economic opportunities for U.S. exporters, including opportunities to participate in the $5.25 billion expansion plan for the Panama Canal, scheduled for completion in 2014.

The agreement will eliminate nearly 90 percent of Panama's tariffs on industrial goods immediately, with remaining tariffs phased out over ten years. According to USTR, U.S. negotiators were able to secure new openings for financial services suppliers in the insurance sector – including the establishment of brokerage firms and cross-border supply of insurance for maritime, aviation, and transportation – during the FTA talks. The agreement also includes customs administration provisions, such as a monitoring program for imports and exports, meant to enhance the transparency and efficiency of U.S.-Panama trade.

The countries launched FTA negotiations in April 2004. Negotiations stalled in February 2006 over agricultural issues, specifically sanitary and phytosanitary (SPS) standards. However, the United States agreed to allow Panama to review the U.S. Department of Agriculture's (USDA) domestic food safety and inspection system so that Panama could formally recognize the equivalency of the U.S. meat and poultry inspection system before concluding FTA negotiations. Up next, the countries will have to submit the draft agreement to their respective legislatures for review before formal implementing legislation can be presented and approved.

As with past FTAs, the Senate Finance and House Ways and Means Committees should hold "mock mark-ups" on the Panama agreement in early 2007. In a mock markup, the Congressional Committees

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review the proposed trade agreement and suggest revisions that the Administration has the discretion to insert into the FTA's formal implementing legislation, which Congress then must approve without amendment. The joint decision to continue U.S.-Panama labor discussions at a later date could cause the new Democrat majorities in Congress to delay consideration of the agreement until USTR addresses their labor concerns. Presidential Trade Promotion Authority (TPA), however, sets firm timetables for Congressional consideration of FTAs. The President must provide Congress with a minimum of 90 days notice that he will sign the Panama FTA. Once he signs the agreement, the President will then submit to Congress draft implementing legislation of the FTA, at which point the House Ways and Means and the Senate Finance Committees have a maximum of 90 days to hold mock mark-ups and send it back to the President for his review. Following the mock mark-ups, the President submits final text of agreement and a draft implementing bill to Congress. House committees must then report the draft implementing bill 45 session days after the implementing bill is introduced or it will be automatically discharged. Once the House sends the draft implementing legislation to the Senate, Senate Committees must report the legislation within 15 session days, or it will be automatically discharged. Each chamber of Congress is then provided 20 hours of floor debate, followed by a simple "up-or-down" vote on the implementing bill. These strict timelines, therefore, limit how much Democrats can stall the Panama FTA's movement through Congress. On the other hand, with new Democratic majorities in both chambers, the President will likely have to work with Congress and accept many of the Committee amendments or suggestions arising from the mock mark-ups in order to ensure that Congress will pass the final implementing legislation. In the past, President Bush could – and did in the case of the Oman FTA – ignore Committee suggestions and still rely on loyal Republican majorities to pass the final agreement. With Democrats in control, the President likely will not have this luxury.

Senators Push USTR to Suspend FTA Negotiations Unless Korea Ends Ban on U.S. Beef Imports

In a December 13, 2006 letter to United States Trade Representative (USTR) Susan Schwab and Agriculture Secretary Mike Johanns, a group of Senators, led by outgoing Senate Agriculture Committee Chair Saxby Chambliss (R-GA), called on USTR and U.S. negotiators to suspend negotiations U.S.-Korea Free Trade Agreement (KORUS FTA) negotiations until Korea lifts its ban on imports of U.S. beef. Other signatories to the letter include Sens. Pat Roberts (R-KS), Norm Coleman (R-MN), Pat Leahy (D-VT), Craig Thomas (R-WY), Kent Conrad (D-ND), and Jim Talent (R-MO).

The letter states that through negotiations with U.S. trading partners over the last three years on the resumption of U.S. beef imports, the United States has created an "uneven and convoluted patchwork of

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export verification agreements that balkanize the beef trade" and provides beef producers with varying import requirements. The Senators note that this "patchwork" in turn makes it more difficult for U.S. beef producers to secure reasonable access to export markets. The Senators state that South Korea's U.S. beef ban is a perfect example that the "patchwork" of beef agreements and the United States' willingness to overlook scientific principles in favor of "political sensitivities in foreign countries" is not working.

South Korea banned imports of U.S. beef after a case of bovine spongiform encephalopathy (BSE) appeared in Washington state in December 2003. However, on January 13, 2006, Korean officials announced that Korea would reopen its market and accept imports of U.S. boneless beef from cattle aged 30 months or younger. Critics say that the announcement amounted to an "import protocol," under which Korea would not resume trade in U.S. beef until late March 2007 at the earliest.

The Senate letter thus states that until Korea lifts its ban on U.S. beef, Chambliss and other members of the Senate Committee on Agriculture, Nutrition, and Forestry will oppose a KORUS FTA. The letter adds that continuing FTA negotiations with Korea would send a signal to other U.S. trading partners that the United States is willing to sacrifice issues that are important to its constituents. The Senators further state that they are not convinced that continued negotiations with Korea will result in a balanced and comprehensive agreement and that the United States cannot reward Korea's "bad behavior."

Although suspending the FTA talks is highly doubtful, USTR will likely take the Senators' letter into consideration when preparing for the next FTA negotiating round in January 2007. The beef issue adds to a large list of contentious FTA issues between the two nations. Sources state that the United States and Korea experienced a "disappointing" fifth round of negotiations during the week of December 4 because of a stalemate on auto and pharmaceutical issues. USTR will likely explore these two issues, as well as agriculture – including the treatment of sensitive items such as rice and beef – during the next round of talks. How USTR will address Korea's continued beef ban is unclear, and time is running out to complete the Agreement by Spring 2007. Should Korea refuse to accelerate its timeframe for allowing U.S. beef imports, the issue could prove to be more of contentious issue than originally thought, thus possibly delaying negotiations beyond Spring 2006. Should this scenario unfold, Congress would have to extend Trade Promotion Authority (TPA) before it expires on June 30, 2006 in order to complete the Agreement at a later date. TPA extension is unlikely, but given the Korea FTAs broad bipartisan support, extension might be possible for the limited purpose of completing the agreement.

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Multilateral

WTO Compliance Panel Releases Decision in United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina

Summary

A WTO "compliance" Panel has ruled that the United States failed to implement the 2004 rulings of the WTO in a dispute over the imposition of U.S. anti-dumping duties on steel pipe from Argentina. The Panel found that the measures challenged by Argentina remained in breach of U.S. obligations under the Anti-Dumping Agreement, both "as such" and "as applied." The decision of the Panel in *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina: Recourse to Article 21.5 of the DSU by Argentina* (DS268) was released on November 30, 2006.

Analysis

A. U.S. "waiver" provisions breach Article 11.3 "as such"

During the original proceedings, Argentina challenged the "waiver" provisions of U.S. law and regulations. In its analysis, the Panel and the Appellate Body distinguished between "affirmative waivers" and "deemed waivers." The statute provided that once a waiver occurred ("affirmative" or "deemed"), the USDOC must conclude that revocation of the order would be likely to lead to continuation or recurrence of dumping with respect to the waiving party. The original panel found that the affirmative and deemed waiver provisions were inconsistent with U.S. obligations under Article 11.3, a conclusion affirmed by the Appellate Body.

In implementing the consequent rulings of the Dispute Settlement Body (DSB), the United States left the statute unamended, but it made certain changes to the USDOC Regulations. Under the revised Regulations, the deemed waiver regulation was eliminated, and an affirmative waiver had to be accompanied by a written statement by the exporter that it was likely to continue or resume dumping if the order were revoked. According to the United States, this meant that any company-specific determination of likely dumping based on a waiver would now be based on affirmative evidence.

The compliance Panel considered that, in some situations, the waiver provisions might not necessarily preclude the USDOC from arriving at reasoned conclusions of likelihood of continuation or recurrence of dumping. For example, in a sunset review where all exporters explicitly and affirmatively waived their right to participate, and acknowledged that they were likely to continue or resume dumping if the measure

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were revoked, the Panel said that it "may well be reasonable for the USDOC to find likelihood for these exporters individually and arguably also on an order-wide basis." The Panel stated that in the circumstances of a given review, such a signed statement by one or several exporters could constitute "at least part of the evidentiary basis" on which an authority could base its sunset determinations.

However, the Panel found that there may be other situations in which the waiver provisions may preclude the USDOC from reaching reasoned conclusions on an adequate factual basis. The Panel concluded that following the USDOC regulatory amendments, the deemed waiver regulation had been removed and waiver provisions of the Act now addressed only affirmative waivers. The Panel similarly recalled that the U.S. Statement of Administrative Action that accompanied the U.S. Uruguay Round implementing legislation requires the USDOC to make its sunset determinations on an order-wide basis. Accordingly, the Panel found that in a sunset review involving multiple exporters from one country, where some of the exporters simply remained silent, while other exporters affirmatively waived their right to participate, the USDOC "may have to find likelihood on an order-wide basis because of the company-specific determinations" under the Act. Thus, the Panel concluded that "in every sunset review involving multiple exporters the USDOC will have to find likelihood on an order-wide basis if one exporter waives its right to participate, because otherwise the USDOC would have found no likelihood with respect to the exporters who waive their right to participate."

The Panel found that making such an affirmative likelihood determination without considering the information submitted by non-waiving exporters "would not, in our view, be a reasoned determination premised on an adequate factual basis." The Act "would preclude the USDOC from taking into consideration evidence submitted by cooperating exporters or evidence otherwise collected by the USDOC in sunset reviews where there is at least one other exporter who waives its right to participate." In such cases, the USDOC's order-wide determination would be based on the assumption that "because one exporter waived its right to participate and acknowledged to be likely to continue or resume dumping, other exporters are also likely to continue or resume dumping." In the view of the Panel, the USDOC would thus ignore relevant information and "would fail to observe the obligation of the investigating authorities to make reasoned determinations of likelihood of continuation or recurrence of dumping based on a sufficient factual premise in accordance with Article 11.3 of the Agreement."

B. United States can develop a new factual basis in its re-determination

The United States implements certain adverse WTO rulings through proceedings under Section 129 of the Uruguay Round Agreements Act. In conducting its Section 129 Determination in the present case, the USDOC sought new information from the Argentine exporters. The information sought by the

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Department related to the original sunset review period (i.e., 1995-2000). Argentina argued that the United States was not allowed to collect certain new facts in its re-determination, i.e., those facts that the authority could have developed at the time of its review, but did not.

The Panel rejected this argument, stating that the relevant provisions of the Agreement did not preclude an investigating authority from "developing a *new* factual basis pertaining to the original review period in the course of implementing the DSB recommendations and rulings pertaining to the original determination [original emphasis]." In the view of the Panel, to preclude the United States from developing a new factual basis in its sunset redetermination would be "counter to the overall operation of the WTO dispute settlement system, and, in particular, the notion of *implementation* of the DSB recommendations and rulings…[original emphasis].

C. USDOC likelihood determination in this case "lacked a sufficient factual basis"

The Section 129 Determination was based on two findings: (i) likely past dumping; and (ii) the USDOC's volume analysis, which had been incorporated from the original sunset review. Argentina argued that both of these findings were devoid of a sufficient factual basis under Article 11.3. The Panel ruled in favour of Argentina on both points.

1. Likely past dumping: the USDOC did not take into account "elementary aspects of the *concept of dumping"*

In its Section 129 Determination, the USDOC found that dumping likely had occurred during the original sunset review period based solely on a comparison of the export prices of a minor Argentine exporter with the prevailing prices in the U.S. market during the period of review. The Department did not ask the company to provide information regarding its normal value and its export price, and there was no other evidence or previous finding that the company had "dumped" within the meaning of the Agreement. The Panel found that the USDOC "made a finding of likely dumping without making any effort to obtain information that is essential to the core principle of dumping as a price-to-price comparison." The Panel said that it did not see how a finding of likely past dumping could have a sufficient factual basis "if it did not take into account at a bare minimum these elementary aspects of the concept of *dumping* as that term is used in the Anti-dumping Agreement."

The United States had argued that it did not seek Argentine producers' export prices because it was "aware of the brevity of the time available to conduct the proceeding." The Panel dismissed this defence, reasoning that "[w]e do not consider the allegedly limited amount of time the USDOC had in order to complete the Section 129 proceedings at issue could absolve the USDOC from any of its obligations

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under the Anti-dumping Agreement, let alone an obligation as fundamental as observing the definition of dumping set out under…the Agreement [original emphasis]."

2. USDOC's volume analysis: "not the kind of determination that would be made by an unbiased and objective investigating authority"

Panels established under DSU Article 21.5 adjudicate the WTO-consistency of "measures taken to comply" with the DSB rulings. In the present case, the compliance Panel made a threshold determination on whether the USDOC's analysis on the volume of imports was part of the U.S. "measure taken to comply" with the DSB rulings.

In the original proceedings, Argentina raised a claim against the Department's volume analysis. However, the original panel exercised "judicial economy", i.e., it declined to rule on this claim. The United States argued that as the original panel made no findings with respect to the volume analysis, and as this analysis was incorporated without change into the U.S. implementing measure, it was not part of the "measure taken to comply."

The Panel rejected this argument, reasoning that the volume analysis was an integral part of the Section 129 Determination, and was therefore part of the "measures taken to comply" by the United States. It underlined that:

The fact that a panel, in an original dispute settlement proceeding, did not make findings regarding certain issues relating to the investigating authorities' determination that were raised and argued before the panel, can not preclude a compliance panel, in its assessment under Article 21.5 of the DSU of the measures taken to comply with the DSB recommendations and rulings, from reviewing those aspects which have been incorporated by the authorities in the measure taken to comply.

Turning to the substance of Argentina's claim, the Panel found that the volume analysis breached Article 11.3. The USDOC analysis found that the volume of dumped imports declined following the imposition of the order. The Department concluded that "[d]eclining import volumes after, and apparently resulting from, imposition of [the] antidumping order indicate that exporters would need to dump to sell at pre-order levels." However, the Panel found that "there may be other possible explanations for such decline, depending on the circumstances of each review." It said that the Department's finding was "not based on a thorough evaluation of the possible causes" of a decline and was "not, in our view, the kind of determination that would be made by an unbiased and objective investigating authority." Thus, it concluded that the USDOC's determination regarding the decline in the volume of imports "lacks a sufficient factual basis" under Article 11.3.

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D. Procedural Violations

Argentina argued that the Section 129 Determination violated a number of procedural obligations of the United States under Article 6 of the Anti-Dumping Agreement. While a number of these claims were dismissed, the Panel ruled that the United States breached two procedural provisions.

1. Providing information to interested parties: "WTO obligations apply concurrently and cumulatively"

Argentina established a violation of Article 6.4, which provides that investigating authorities "shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential…and that is used by the authorities in an anti-dumping investigation…." Argentina pointed to certain memoranda that had been prepared by the USDOC, but that were only released to the interested parties with the issuance of the Section 129 Determination itself – that is, when the USDOC released its final determination on the day that the compliance period expired. The Panel found that the United States violated Article 6.4 with respect to two of the five memoranda challenged by Argentina. The Panel said that under Article 6.4, these documents should have been made available to the interested parties prior to the final decision.

The Panel rejected the U.S. argument that because certain challenged documents were taken from the file of the original sunset review, Argentine exporters had access to them since that time. The Panel found that Article 6.4 required the investigating authorities to allow interested parties to see the information they use in their determinations "irrespective of whether that same information may have been used in a previous proceeding and may have been made available to the same interested parties in connection with that past proceeding."

The Panel similarly rejected the U.S. argument that whether it was "practicable" under Article 6.4 to allow interested parties to see the information had to be determined in light of the limited amount of time that the United States had to implement the DSB rulings. Argentina argued that the United States had to comply with the ruling of the arbitrator on "reasonable period of time" to implement the DSB rulings at the same time that it complied with the procedural obligations of Article 6. The Panel said that it "agree[d] with Argentina that the WTO obligations apply concurrently and cumulatively" and that the fact that the United States spent most of the implementation period on the amendment to the Regulations "can not be an excuse for the United States' failure to meet its obligations under the Agreement."

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2. Provision of non-confidential summaries: access by counsel to the confidential record is not sufficient

The Panel also found that the United States breached Article 6.5.1 of the Agreement, which states investigating authorities "shall require interested parties providing confidential information to furnish non-confidential summaries…." Argentina argued that the United States failed to require a U.S. petitioner to submit a non-confidential summary of its information. The United States argued that there could be no violation of Article 6.5.1 because U.S. law permitted the lawyers for the Argentine exporters to have access to all confidential information on the record. The Panel dismissed this defense, reasoning that "[w]hat matters for purposes of Article 6.5.1 is whether the interested parties themselves receive non-confidential summaries of the confidential information submitted to the investigating authorities."

E. Panel Recommendations

For the reasons noted above, the Panel found that the United States acted inconsistently with Articles 11.3, 6.4 and 6.5.1 of the Anti-Dumping Agreement.

As in the original dispute, Argentina asked the Panel to make a formal "suggestion" to the United States under Article 19.1 of the Dispute Settlement Understanding to revoke the WTO-inconsistent order. However, the Panel once again declined, as it saw "no particular reason" to make such a suggestion.

The Panel noted that the original DSB rulings "remain operative."

Outlook

There is a certain incongruity in the way the compliance Panel interpreted the rules applicable to importing Members that seek to extend an anti-dumping duty beyond the five-year limit set by the WTO Anti-Dumping Agreement for the expiration (or "sunset") of such orders. (Under Article 11.3 of the Anti-Dumping Agreement, anti-dumping duties must terminate within five years, unless the investigating authority of the importing country determines that the continuation or recurrence of dumping and injury would be "likely" if the order were to expire. The Appellate Body has interpreted "likely" in this context to mean "probable.") The compliance Panel based its findings of U.S. non-compliance on the well-established principle that the continuation of an anti-dumping order must be supported by a substantive review and a reasoned determination by the investigating authority. At the same time, however, the Panel found that a WTO Member can bring itself into compliance with the sunset rules by developing the evidence to do so essentially at any time, which undermines the time-bound nature of these disciplines.

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The U.S. government divides sunset review proceedings between two agencies (as it does in original investigations). The U.S. Department of Commerce (USDOC) determines whether there would be "likely dumping" if the duty were to expire, while the U.S. International Trade Commission (USITC) determines "likely injury."

There is no suspense associated with the outcome of USDOC sunset review proceedings. In every sunset review in which the affected U.S. industry has participated since entry into force of the WTO Agreement, the USDOC has found "likely dumping." Given these virtually insurmountable odds, some companies choose not to participate in the proceedings before the USDOC and concentrate instead on the injury proceedings before the USITC, a route permitted through the so-called "waiver" provisions of U.S. law.

In the original WTO dispute, Argentina successfully challenged the "waiver" provisions of the U.S. Tariff Act and the implementing Regulations, under which the USDOC was mandated to find "likely dumping" for an exporter that waived, or was deemed to have waived, its participation in the USDOC proceedings. The Appellate Body ruled that these "statutorily-mandated *assumptions* about a company's likelihood of dumping" breached the obligation of an investigating authority under Article 11.3 to arrive at a "reasoned conclusion" on the basis of "positive evidence" [original emphasis].

In implementing the WTO rulings arising from the original dispute, the USDOC changed its Regulations to provide that an exporter waiving its participation was required to file an express statement that it was "likely to dump" if the order were revoked. According to the United States, such a statement would constitute positive evidence of likely dumping, thereby obviating the need to rely on "assumptions" in waiver cases. The compliance Panel rejected this argument, and found the U.S. waiver provisions continue to violate Article 11.3. It based its decision on the fact that the USDOC makes its sunset determinations on an order-wide basis, i.e., it makes its likelihood determination with respect to all exporters from the country subject to the anti-dumping order. Thus, in the case of a sunset review involving multiple exporters from one country, the USDOC would find that the statutorily-mandated "likely dumping" determination with respect to one or more "waiving" exporters would affect the country-wide determination. In such cases, the compliance Panel found that the USDOC would fail to observe the obligation to make a reasoned determination of likely dumping based on a "sufficient factual premise." Therefore, it concluded that U.S. waiver provisions remained in breach of Article 11.3.

The decision of this Panel on this issue is consistent with the well-established line of authoritative WTO jurisprudence on the scope of the sunset review disciplines of the Agreement. As the Appellate Body has found, Article 11.3 requires investigating authorities to act with an "appropriate degree of diligence" in

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making reasoned conclusions based on positive evidence. Assumptions mandated by law, or speculation regarding possible dumping in the past, fall far short of these strict standards, and cannot be the basis to continue an anti-dumping order.

The Panel also ruled that the USDOC likelihood determination in this case "lacked a sufficient factual basis" under Article 11.3. The Panel found that the USDOC determination "did not take into account...elementary aspects of the concept of dumping" and was not "the kind of determination that would be made by an unbiased and objective investigating authority." This "as applied" violation was based in part on the Department's assumption that declining import volumes after the imposition of the order "indicate that exporters would need to dump to sell at pre-order levels."

The "as applied" finding in this case may be more significant than the Panel's "as such" ruling. In sunset reviews, the USDOC often relies on a decrease in the volume of imports as indicative of "likely dumping." The Panel ruled that such an inference in this case lacked objectivity, a finding that could have implications for other cases in which USDOC relied on a decrease in volume exported to the United States as the basis for its likelihood determination. The ruling on the U.S. "waiver" provisions will probably have less of an impact, as it is doubtful that any exporter would ever file the "confession" provided for under the Regulations, i.e., the express statement that it was likely to dump if the order were revoked. The USDOC "confession" requirement may therefore operate as a *de facto* repeal of the statutory "waiver" requirement.

Another noteworthy aspect of this case was the Panel's ruling that the United States could develop new information relating to the original sunset review period. The United States argued that it needed this information for a determination based on the slightly surreal concept of "likely past dumping", i.e., that dumping would have been likely if the order had been revoked following the original sunset review. The Panel agreed that, in principle, the United States could develop a new factual basis for its redetermination. However, it found that the actual redetermination made by the USDOC in this case nevertheless lacked a sufficient factual basis under Article 11.3.

The Panel's ruling on the development of new information is extremely problematic. As noted above, anti-dumping orders are supposed to be terminated after five years, unless the importing country adheres to the strict disciplines of the Agreement to allow such measures to be continued. This Panel's decision would appear to permit the development of new information long after the presumptive expiration date. In other words, the continuation of the order could be based on information that the authority could have developed within the timeframe mandated by the Agreement, but did not. The Panel's ruling on this issue is not consistent either with the time-bound nature of the obligations imposed by Article 11.3, or with the

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strict conditions that apply to the invocation of the exception to allow the order to continue. The *ex post facto* development of new information to continue an order cannot be reconciled with the intent of the drafters of the Agreement that anti-dumping orders should "sunset" after five years.

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WTO Releases Semiannual Reports On Safeguards and AD Measures

Summary

On November 27, 2006, the World Trade Organization (WTO) released its semiannual report on anti-dumping (AD) investigations and measures based on notifications made by WTO Members. On November 29, 2006, the WTO also released a separate semiannual report based on the latest statistics on safeguards actions notified by WTO Members pursuant to the WTO Agreement on Safeguards. The report summarizes information submitted by WTO Members to the Committee on Anti-Dumping Practices (ADP). We review herein the WTO reports and their statistical findings.

Analysis

I. AD Investigations and Measures

On November 27, 2006, the WTO Secretariat reported that between January 1 – June 30, 2006, the number of initiations of new AD investigations continued to decline, while the number of new final measures increased relative to the same period in 2005. **Table 1** provides a breakdown of the information found in the WTO report.

A. AD Investigations and Measures

According to the report, between January - June 2006, 20 WTO Members notified the WTO of 87 initiated investigations - a decrease January – June 2005, during which WTO Members reported initiating 105 investigations. Developed WTO Members initiated 31 of the 87 investigations.. On the other hand, the WTO reports an increase in the application of AD measures in 2006. Fifteen WTO Members reported applying 71 new final AD measures between January-June 2006, a 29 percent increase from the reported 55 new measures applied during January-June 2005. Nine of the 71 new final measures were applied by developed Members during the first half of 2006.

B. WTO Members

According to the report, India was the most active WTO Member to initiate new AD investigations during January - June 2006: India notified the WTO of 20 new initiations during that period, an increase from the 14 initiations that they reported during the same period in 2005. The European Communities followed with 17 new initiations during January- June 2006 (an increase from 16 during the same period in 2005), followed by Australia with nine (an increase from two in 2005) and Argentina, Indonesia and Turkey with five initiations each (during the corresponding period in 2005, Argentina reported one new initiation,

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Indonesia zero, and Turkey eight). The United States, which had reported no new initiations in the first half of 2005, reported initiating no new investigations during the first half of 2006.

The report also states that **China** remains the most frequent subject of AD investigations: during January - June 2006, 32 of 87 new initiations focused on Chinese imports. This is an significant increase from the same 2005 period when China was the subject of 23 of 105 investigations. Following China were the United States and Chinese Taipei with six new investigations each, Thailand with five, and the European Communities, Japan, Korea, and Malaysia each with four new investigations . During the same period in 2005, the U.S. products were the subject of seven new AD investigations, Chinese Taipei products nine, Thai products seven, EC products three, Japanese products four, and Korean and Malaysian products six each.

The report notes that China reported applying the largest number of final AD measures during the first half of 2006: China applied 15 final AD measures, an increase from ten for the same period in 2005. Turkey reported 11 new AD measures, an increase from the four it reported for the first half of 2005. India applied eight new measures during the first half of 2006 followed by Egypt with seven; India reported seven final AD measures and Egypt zero during the corresponding period of 2005. The EC, Mexico and Pakistan, each applied five new AD measures during January-June 2006, followed by Argentina, Australia, Colombia, Indonesia, Korea, Peru, South Africa and the United States, each with three or fewer new measures.

Chinese products were also the most frequent subjects of new AD final measures and accounted for 15 new measures reported for January - June 2006 - a decrease from 18 AD measures during the first half of 2005. Indian and Korean products were each the subject of six final AD during January-June 2006 – a respective increase from one and four final measures during January – June 2005. Products from Brazil, the EC, Japan, and the United States, were each subject to five new measures during January-June 2006; in the first half of 2005, products from Brazil were subject to two final AD measures, from the EC and Japan four each, and from the United States six.

C. Products

Products most frequently subject to the reported new AD investigations during January-June 2006 included those in the base metals sector (subject to 19 new initiations), the machinery sector (16 initiations), the plastics sector (13 initiations), and the chemicals sector (11 initiations).

Products most frequently subject to the final AD measures during January-June 2006 included those in the chemicals sector (subject to 23 of the 71 total new measures reported) followed by products in the

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plastics sector (14 new measures), the textiles sector (nine measures), and the base metals sector (seven measures).

II. Safeguard Investigations and Measures

On November 29, 2006, the WTO also released a separate semiannual report based on the latest statistics on safeguards actions notified by WTO Members pursuant to the WTO Agreement on Safeguards. The report summarizes information submitted by WTO Members to the ADP Committee. **Table 2** provides a breakdown of the information found in the WTO report.

A. Safeguard, AD and CVD Investigations and Measures

The WTO report states that, based on WTO members' notifications, between January 1995 and October 2006, WTO Members initiated 155 safeguard investigations and imposed 76 safeguard measures. The report notes that between January 1995 and June 2006, WTO Members initiated 2938 AD investigations and imposed 1875 AD measures. From January 1995 to June 2006, WTO Members also initiated 183 countervailing duty (CVD) investigations and imposed 113 CVD measures.

According to the report, between January 1 and October 23, 2006, WTO Members initiated 13 safeguard investigations. In 2002, WTO Members initiated 34 safeguard investigations, a figure that dropped to 15 in 2003, 14 in 2004, and 7 in 2005. The 13 investigations in 2006 is an increase from the previous year, but WTO sources predict that safeguard investigation numbers will continue to remain low over the next several years. During the same period, WTO Members imposed six new final safeguard measures.

B. WTO Members

According to the WTO, India was the most active WTO Member to initiate safeguard actions: between 1995 and October 2006, India provided the WTO with 15 initiation notifications. Chile and Jordan had the second largest number of initiations with 11 initiations each, and Turkey and the United States followed with 10 initiations each. The 13 initiations reported between January 1 - October 23, 2006 came from Argentina, Chile, Indonesia, Jordan, Panama, the Philippines, Tunisia, and Turkey, with Tunisia notifying the WTO of two initiations and Turkey of five initiations. During the same period, WTO Members imposed six new final safeguard measures, four of which came from Turkey.

C. Products

According to the report, chemical products were the most frequent subject of safeguard actions: since 1995, WTO Members notified the WTO of 26 safeguard actions involving chemical products. Metals and metal products followed with 21 initiations, then foodstuffs (16 initiations), and ceramics and vegetables

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(14 initiations each). Between January 1 and October 23, 2006, electrical appliances were the most frequent subject of investigations with four initiations, followed by ceramics and footwear with two initiations each, and animal products, mineral products, chemical, plastics and vehicles with one initiation each.

Outlook

The report shows that China continues to be the biggest target for AD investigations and final measures, underscoring its role as a major global trading power. Because China's economic growth is expected to continue, WTO Members will likely continue in 2007 to investigate Chinese imports and to impose final AD measures on them at a high rate. However, Chinese economic growth might also spur domestic demand and thus lower Chinese import penetration in certain markets. The compiled statistics also show several other interesting trends. AD investigations decreased during the first half of 2006, but final AD measures increased during the same period. Safeguard investigations also experienced a downward trend, much like AD investigations. WTO Members are currently negotiating reforms to existing WTO rules on anti-dumping. Should WTO Members complete a final Doha Agreement that tightens rules on AD investigations and measures, there may be a continued downward trend of AD and safeguard investigations and final measures.

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Table 1: WTO AD Initiations and Measures Statistics

	January- June 2006	January- June 2005
Number of AD investigations initiated	87	105
Number of AD measures imposed	71	55
Most active WTO Member: AD initiations	India (20) EC (17) Australia (9) Argentina (5) Indonesia (5) Turkey (5)	China (14) EC (16) Australia (2) Argentina (1) Indonesia (0) Turkey (8)
Most frequent WTO Members subject to AD initiations	China (32) United States (6) Chinese Taipei (6) Thailand (5) EC (4) Japan (4) Korea (4) Malaysia (4)	China (23) United States (7) Chinese Taipei (9) Thailand (7) EC (3) Japan (4) Korea (6) Malaysia (6)
Most active WTO Member: final AD measures	China (15) Turkey (11) India (8) Egypt (7)	China (10) Turkey (4) India (7) Egypt (0)
Most frequent WTO Members subject to final AD measures	China (15) India (6) Korea (6) Brazil (5) EC (5) Japan (5) United States (5)	China (18) India (1) Korea (4) Brazil (2) EC (4) Japan (4) United States (6)
Products most frequently subject to	Base metals (19)	-

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	January- June 2006	January- June 2005
the new AD investigations	Machinery (16) Plastics (13) Chemicals (11)	
Products most frequently subject to the final AD measures	Chemicals (23) Plastics (14) Textiles (9) Base metals (7)	-

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Table 2: WTO Safeguard Initiations and Measures Statistics

	January 1995- October 2006	January- October 2006
Number of safeguard investigations initiated	155	13
Number of safeguard measures imposed	76	6
Most active WTO Member: safeguard initiations	India (15) Chile (11) Jordan (11) Turkey (10) United States (10)	Turkey (5) Tunisia (2)
Most active WTO Member: imposition of safeguard measures	-	Turkey (4)
Most frequent subject of investigations	Chemical products (26) Metals (21) Foodstuffs (16) Ceramics (14) Vegetables (14)	Electrical appliances (4) Ceramics (2) Footwear (2) Animal products (1) Minerals (1) Chemicals (1) Plastics (1) Vehicles (1)

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Multilateral Highlights

USTR Commends Provisional Agreement on Revised WTO GPA

On December 14, 2006, the Office of the United States Trade Representative (USTR) welcomed an agreement among World Trade Organization (WTO) signatories to the WTO's Government Procurement Agreement (GPA) to amend the GPA text. According to a USTR press release, the revised language in the agreement clarifies signatory obligations and increases transparency, thus making compliance to the agreement easier.

WTO Members negotiated the GPA during the WTO's Uruguay Round, and a revised GPA entered into force on January 1, 1996. WTO rules generally except government procurement. The GPA is a "plurilateral" (*i.e.*, non-mandatory) agreement that applies WTO non-discrimination and transparency disciplines to signatories' procurement laws, regulations, procedures and practices. The GPA is composed of two elements: (i) general rules and obligations and (ii) schedules of national entities that are subject to the agreement's disciplines ("covered entities"). The agreement has 28 current members[3] and obligates members to apply GPA disciplines only to its procurement decisions with respect to other GPA signatories. Its present version expands coverage to services, procurement at the sub-central level, and procurement by public utilities. The current GPA also reinforces rules guaranteeing fair and non-discriminatory conditions of international competition.

The agreement to amend the GPA's language came after several meetings in 2006 among the GPA's signatories. The amendments are contingent upon a successful outcome to the ongoing negotiations on expanding the agreement's coverage. GPA signatories predict that they will complete these negotiations in Spring 2007 and hope to have a completed text at that time.

According to the USTR, the revised text would improve the current GPA by clarifying obligations, removing ambiguities, and re-grouping related provisions into a single article. The language would also update the agreement to take into account developments in government procurement practices, for

[3] The United States; the European Union and its 25 Member States (Austria, Belgium, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, United Kingdom); the Netherlands with respect to Aruba; Canada; Hong Kong China; Iceland; Israel; Japan; Liechtenstein; Norway; the Republic of Korea; Singapore; and Switzerland.

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example, by reducing the tendering period for purchases of commercial goods and services and encouraging the use of electronic procurement. USTR also reports that the amendments expand and clarify transitional measures for developing countries to facilitate their GPA accession. USTR hopes that the amended language will also serve as an effective template for WTO Members that are acceding to the GPA, including Albania, Georgia, Jordan, Kyrgyzstan, Moldova, Oman, and Panama.

DUSTR Veroneau: US will Proceed with Litigation Against EU in Boeing-Airbus Dispute

The United States will continue pursuing litigation against the EU in the World Trade Organization (WTO) Boeing-Airbus dispute (DS 316). Deputy United States Trade Representative (DUSTR) John Veroneau announced in Geneva that U.S.-EU discussions in Brussels on December 6 failed to produce any momentum for further negotiations. He added that the United States remained open to a negotiated settlement, but that it would continue pressing the EU to eliminate its air subsidies program through multilateral channels. European Trade Commissioner Peter Mandelson, for his part, stated that the United States focused on eliminating future launch aid for Airbus during the December 6 talks, and that such a route was unacceptable for the Europeans.

The U.S. WTO complaints focus on the EU's "launch aid" program. The United States alleges that European governments cover the startup costs for Airbus' new aircraft, and that Airbus repays this assistance only if the plane is a success. The EU's complaint alleges that Boeing receives preferential tax breaks and similar "launch aid" from the U.S. military and Japan, especially for the Boeing 787 Dreamliner which competes against the Airbus A-350 superjumbo. On November 22, 2006, the WTO appointed new panelists to rule on the EU's claims against Boeing; the Panel has not yet issued a timetable for the submission of arguments and organizing hearings. Meanwhile, the Panel ruling on U.S. claims against Airbus is still conducting its examination of the case but expects to complete its work in 2007.

The long-running civil aircraft dispute experienced further discord when Airbus recently announced that it would cut operating expenses close to $3 billion annually starting in 2010, and that it would proceed with the A350 superjumbo, a project expected to cost Airbus close to $13 billion. Airbus, however, did not provide details on the financing for the A350 project, and Airbus chief executive Louis Gallois did not rule out the possibility of state aid from the EU. The announcements were enough to spark conversations between the United States and the EU on future aid. With the failure in negotiations, it seems likely that the United States and the EU will continue to pursue the WTO case in the hope that multilateral channels

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will produce a settlement that bilateral consultations have not achieved. Experts note that a final Panel decision would likely find that both parties are at fault and could result in the implementation of almost $40 billion in retaliatory sanctions.

WTO Announces January 2007 Accession for Vietnam

On December 12, 2006, the World Trade Organization (WTO) announced that Vietnam will accede to the multilateral body on January 11, 2007. The WTO's announcement followed the Vietnamese Government's notification to the WTO that the Vietnam's National Parliament ratified the country's WTO accession package. According to WTO rules, a country may fully accede thirty days after it notifies the WTO Secretariat that it has formally accepted the terms and conditions of its WTO membership. Upon its accession, Vietnam will become the multilateral trading body's 150th Member.

On November 7, 2006, the WTO General Council approved Vietnam's membership to the multilateral organization. On November 28, Vietnam's Parliament formally approved its accession protocol which includes Vietnam's commitments on goods and services and the WTO Working Party's report describing Vietnam's legal and institutional framework for trade. The accession package included Vietnam's schedule of concessions and commitments on goods and a schedule of specific commitments on trade in services.

The United States is sure to welcome the WTO's announcement. In early November, the United States submitted a notification to the WTO invoking the "non-application" clause, under which the United States could not reap the full benefits of Vietnam's WTO accession. The U.S. invocation of the non-application clause was due to Congressional failure to approve Permanent Normal Trade Relations (PNTR) with Vietnam before it had completed its accession requirements. Under WTO rules, a Member must extend an acceding country unconditional non-discriminatory access to its market before it can utilize the benefits that the acceding country's accession provides. The 2001 U.S.-Vietnam Bilateral Trade Agreement (BTA), however, obligates Vietnam to extend at least most favored nation (MFN) treatment to the United States for trade in goods. Thus, without a Congressional grant of PNTR, Vietnam would not be obligated to extend to the United States any benefits deriving from its WTO accession that are not explicitly indicated in the BTA. Such benefits could include MFN treatment for services, removal of non-tariff barriers (NTBs) or other market access measures. However, on December 8-9, Congress avoided this problem and passed a trade package (H.R. 6406) that, among other things, grants Vietnam PNTR. Thus, the United States will most likely be able to avoid the "non-application" clause and to enjoy the trade liberalization benefits that Vietnam will confer to all Members under WTO rules.

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