WHITE & CASE

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Japan External Trade Organization

WTO and Regional Trade Agreements Monthly Report

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WTO Appellate Body Releases Decision in China – Measures Affecting Imports of Automobile Parts (DS339/340/342)

Decision: The WTO Appellate Body has affirmed that a charge imposed by China on imported auto parts violates China"s WTO obligations. The Appellate Body upheld the claims by the United States, the EC and Canada that the charge was an internal measure and was inconsistent with China"s national treatment obligations under GATT Article III. However, it overturned the finding of the Panel that the measures also violated the accession commitments of China, as set out in its Working Party Report.

Agriculture, NAMA Chairs Release Revised Doha Texts

On December 6, 2008, the Chairs of the World Trade Organization"s (WTO) Agriculture and Non-Agricultural Market Access (NAMA) negotiating groups issued revised Agriculture and NAMA draft "modalities" texts as part of the Doha Round of multilateral negotiations. The texts are revisions of drafts that the Chairs previously circulated in July 2007, February 2008, May 2008, and July 2008, and they reflect what might be agreed for cutting tariffs and trade-distorting agricultural subsidies, and other related provisions. We analyze below the revised Agriculture and NAMA texts.

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United States

Obama Administration Cabinet Appointments May Indicate Low Profile for US Trade Policy

Summary

On November 4, 2008, Sen. Barack Obama (D-IL) defeated Sen. John McCain (R-AZ) in the US Presidential race. President-elect Obama is the first sitting Senator elected as President since 1960. Following several weeks of consideration, President-elect Obama appointed members of his Cabinet, including those Cabinet positions that help craft US trade policy: United States Trade Representative (USTR), Secretary of the Treasury, Secretary of Commerce, Secretary of State, and Secretary of Agriculture. We review herein the appointees for these Cabinet positions, and the implications of their appointments for US trade policy.

Analysis

I. Background

On November 4, 2008, Sen. Obama was elected to serve as the 44th President of the United States. Between November 5 and December 19, President-elect Obama appointed several members of his Cabinet, including USTR, Secretary of the Treasury, Secretary of Commerce, Secretary of State, and Secretary of Agriculture. Each of these Cabinet positions helps the President craft US international trade policy. The Senate will have to consider and approve each of the appointments, and will do so in the early months of 2009.

II. USTR Appointment

A. Background

On December 19, 2008, President-elect Barack Obama tapped former Dallas Mayor Ron Kirk to serve as USTR under the Obama Administration. Kirk serves as a Partner with the Houston-based law firm Vinson & Elkins. Prior to that, he served as Mayor of Dallas, Texas from 1995 to 2001. Kirk has also worked as Secretary of State of Texas for then-Texas Governor Ann Richards, and for then-Texas Senator Lloyd Bentsen. He attended Austin College and the University of Texas School of Law.

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B. Implications for US Trade Policy

Little is known within Washington circles of Kirk and his stance on US trade policy, and many observers expressed surprise upon hearing of his nomination. Journalists and many trade policy experts appeared determined to label Kirk a "free trader" but have offered little substantive proof of that stance beyond Kirk‟s overseas actions as Mayor on behalf of his Dallas constituents. For example, outgoing USTR Susan Schwab lauded Kirk‟s appointment and noted that "as a former mayor of Dallas, which is a major hub of international business, [Kirk] understands the importance of trade." According to some unsubstantiated reports, Kirk supported the permanent normalization of trade relations with China in 2000 and supported the North American Free Trade Agreement (NAFTA) as Mayor. Kirk, however, has also reportedly voiced concerns about the impact of trade on workers and the environment, a message that echoes some of President-elect Obama‟s campaign rhetoric. Thus, Kirk‟s views on trade remain unclear, and he is unlikely to offer a formal position on trade until 2009 at the earliest, perhaps during his Senate confirmation hearing. The Washington trade community will be observing Kirk closely at this hearing in order to get a better sense of where Kirk stands on free trade, and where he might steer the Office of the USTR.

Free-trade advocates are hopeful that Kirk‟s prior work as Mayor of an international business center will push him to support a free trade agenda amid growing skepticism to trade in Congress. Given the US and global financial climate, however, it is likely that trade will not be a priority item for the Obama Administration during the first half of 2009 because President-elect Obama and his Cabinet will be too focused on remedying the US economy and will not have enough political capital to spend on other issues, including "proactive" trade initiatives. Kirk‟s selection as USTR also indicates that trade will take a backseat to other issues within the Obama Administration. President-elect Obama‟s selection of a relatively unknown personality with no formal trade background over well-known and experienced candidates – including senior campaign advisors Lael Brainard and Dan Tarullo – could indicate that the Obama Administration will **not** focus on trade. Indeed, President-elect Obama‟s first pick for USTR – Representative Xavier Becerra (D-CA) – declined the offer of USTR because he felt that the USTR position – and trade in general – would not be a priority for the Obama Administration. Some observers also point out that the selection of USTR occurred during the last tranche of President-elect Obama‟s Cabinet announcements, a move that could indicate where trade stands in terms of priority relative to other policy matters. They opine that because Kirk was one of the last Cabinet announcements, his role will not be that important in the Cabinet, which in turn makes trade less of a priority item for the Obama Administration.

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Campaign sources have stated that the Office of the USTR under an Obama Administration will likely shift focus from a more proactive trade agenda to one centered on trade enforcement and monitoring. The incoming USTR will face several trade issues vying for the Administration‟s attention, including: (i) increased importance on labor and environmental aspects of any future US free trade agreements (FTAs); (ii) efforts to renew Presidential Trade Promotion Authority (TPA); (iii) trade enforcement of existing FTAs; (iv) efforts to resuscitate the World Trade Organization (WTO) Doha Development Agenda negotiations; (v) passage of pending FTAs with Colombia, Korea and Panama; and (vi) trade with China, among other matters. The key question is *how* Kirk will prioritize these issues, and how much political capital President-elect Obama will be willing to expend to accomplish these goals, given the growing protectionist sentiment in the US Congress. Observers opine that given the little attention the Obama officials will pay to trade – at least for the first half of 2009 – it is unlikely that Kirk or the USTR team will have enough authority to move the US trade agenda forward. President-elect Obama is unlikely to spend political capital on trade, and his Administration is unlikely to embrace trade as a tool to advance the US economy.

What also concerns some members of the trade community is whether USTR Kirk will make good on some of the anti-trade campaign promises that President-elect Obama made. During his campaign, then-Sen. Obama made several anti-trade statements, including calls to re-negotiate the NAFTA and strengthen labor and environmental provisions in US FTAs. Observers noted that the campaign promises were directed mostly at labor unions and organizations (*i.e.*, strong supporters of the Obama campaign), and these groups will certainly hold President-elect Obama to some of the promises he made on the campaign trail. Kirk has already acknowledged that he will work closely with President-elect Obama in implementing the incoming President‟s ideas and initiatives with regards to US trade policy. Consequently, members of the US trade community are concerned that President-elect Obama may move forward on some his anti-trade promises (in an effort to "pay back" labor unions for their campaign support), and that USTR Kirk will, without question, aid in implementing those promises. President-elect Obama will certainly feel pressure from the labor unions to implement some of his campaign trail rhetoric, which could spill-over into US trade policymaking. This adds credence to the general view that an Obama Administration will not have a "proactive" trade agenda, and that it will be unwilling to embrace trade.

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III. Secretary of Commerce Appointment

A. Background

On December 3, 2008, President-elect Obama appointed Governor of New Mexico William Blaine "Bill" Richardson III as Secretary of Commerce. Richardson is the current Governor of New Mexico who is serving his second term after being re-elected in 2006. In addition to his duties as Governor, Richardson has taught courses at New Mexico State University, the University of New Mexico, Harvard University"s Kennedy School of Government and the United World College. Prior to being elected governor, Richardson worked in the public sector. In 2001, Richardson assumed the chairmanship of Freedom House, a private, non-partisan organization that promotes democracy worldwide. In 1998, Richardson was unanimously confirmed by the United States Senate as Secretary of Energy. In 1997, Richardson was nominated to be the US Ambassador to the United Nations. Prior to that, he served for fifteen years in northern New Mexico representing the 3rd Congressional District. While a congressman, Richardson served as a special envoy on many sensitive international missions. Richardson received a B.A. from Tufts in 1970 and a M.A. from Tuft"s Fletcher School of Law and Diplomacy in 1971.

On January 2, 2008, however, New Mexico Governor Bill Richardson withdrew his name for Secretary of Commerce, citing an investigation into a company that has done business with his state. In announcing his withdrawal from the Cabinet appointment, Gov. Richardson stated that he and his Administration "have acted properly in all matters . . . [but] that the ongoing investigation also would have forced an untenable delay in the confirmation process." He also stated that he will continue to serve as Governor of New Mexico. In accepting Gov. Richardson"s withdrawal, President-elect Obama stated that "Governor Richardson is an outstanding public servant and would have brought to the job of Commerce Secretary and our economic team great insights accumulated through an extraordinary career in federal and state office." He noted that he and his transition team will now "move quickly to fill the void left by Governor Richardson's decision."

The investigation to which Gov. Richardson referred when announcing his withdrawal decision is a federal grand jury investigation on how a California company that contributed to Gov. Richardson's political activities won a lucrative New Mexico state contract. The New Mexico investigation began in the summer of 2008 and focuses on whether Gov. Richardson's office urged a state agency to hire a California firm as a result of generous contributions from the company and its president to political action committees established by Gov. Richardson.

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B. Implications for US Trade Policy

Because US trade policy is likely to be secondary to domestic economic concerns, the Department of Commerce may overshadow USTR with respect to counseling President-elect Obama on economic issues. If this is the case, the role of Commerce Secretary may be relatively more important than Kirk‟s role as USTR, and the Obama Administration could look more to the Department of Commerce to provide an informal lead on the direction US trade policy should take because of its work on domestic economic issues. The incoming Secretary‟s outlook on trade may influence how they manage the Department of Commerce, but the Department‟s domestic focus and tenured bureaucracy could counterbalance any possible free trade impulses. Indeed, the primary tools available to the Department of Commerce are trade remedy actions – antidumping, countervailing, and safeguard actions – and export/import control measures, which many consider to be antithetical to free trade. Whether the incoming Secretary can succeed in rebranding the Department seems unlikely, but the trade community will be watching the appointed position closely during his first several months as Commerce Secretary in order to understand how the Department of Commerce could affect the US trade environment, and how it might interact with other agencies on US trade policymaking, including USTR.

IV. Secretary of Treasury Appointment

A. Background

On November 24, 2008, President-elect Obama made his first official Cabinet announcement, and nominated Timothy Geithner to serve as Secretary of the Treasury. Geithner is the President and CEO of the Federal Reserve Bank of New York. In that capacity, he serves as the vice chairman and a permanent member of the Federal Open Market Committee, the group responsible for formulating US monetary policy. Prior to his work at the Federal Reserve, Geithner worked in three Administrations – Republican and Democrat – for five Secretaries of the Treasury in a variety of positions, and he served as Under Secretary of the Treasury for International Affairs from 1999 to 2001 under Secretaries Robert Rubin and Lawrence Summers. He was director of the Policy Development and Review Department at the International Monetary Fund from 2001 until 2003. Before joining the Treasury Department, Geithner worked for Kissinger Associates, Inc. Geithner obtained his B.A. in government and Asian studies from Dartmouth College in 1983 and his M.A. in International Economics and East Asian Studies from The Johns Hopkins School of Advanced International Studies (SAIS) in 1985. Geithner is also a member of the Council on Foreign Relations and the Group of Thirty.

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B. Implications for US Trade Policy

Chief among the incoming Secretary of Treasury‶s concerns will be US response to the current global financial crisis. The new Secretary will also focus on an agenda to stimulate the US economy that will likely include infrastructure projects and financial assistance for states. With the global financial crisis underway, Geithner likely has one of the most powerful and important positions in President-elect Obama‶s Cabinet. The Obama Administration has made it clear that its first priority will be to tackle the economic problems that the United States is facing, and Geithner will serve as the Administration‶s point-man on issues concerning the domestic economy. Congress has already enacted several stimulus packages in 2008, and Democrats foresee more action during the 111th Congress. These packages, coupled with the US Government‶s massive Troubled Asset Relief Program (TARP, a program initiated and implemented by Geithner‶s predecessor, current Treasury Secretary Hank Paulson) will keep Geithner and the Treasury staff busy throughout 2009 and beyond.

Treasury‶s focus on the domestic economy will likely cut into its work on the international economy. Bilateral economic dialogues spearheaded by Treasury – such as the US-China Strategic Economic Dialogue (SED) and the US-China Joint Commission on Commerce and Trade (JCCT) – may become secondary to Treasury‶s TARP work, for example. International tax treaties and other mechanisms that Treasury uses to secure and strengthen ties with US trading partners may be limited because of the focus on the US economy. Because the Treasury Secretary is an influential Cabinet posting, President-elect Obama will be turning to Geithner consistently to provide him with counsel on economic issues, more so than other Cabinet postings, including the Commerce Secretary and USTR. As noted, trade‶s secondary role to the US domestic economy may influence the advice Geithner provides President-elect Obama, which in turn may further push trade to the background in light of competing domestic economic concerns. On the bright side, Geithner is an unabashed supporter of open markets and free trade. Thus, to the extent that trade is an issue for the Obama Administration, Geithner‶s should provide a strong and principled pro-trade voice.

V. Secretary of State Appointment

A. Background

On December 1, 2008, President-elect Obama selected his former campaign opponent, Senator Hillary Clinton (D-NY), to serve as the Obama Administration‶s Secretary of State. Sen. Clinton is married to Bill Clinton, the 42nd President of the United States, and was the First Lady of the United States from 1993 to 2001. She was elected as Senator for New York State in 2000, and during her time as Senator, has

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opposed the Bush Administration on its conduct of the war in Iraq, among other issues. She was reelected in 2006. In the 2008 Presidential nomination race, Sen. Clinton narrowly lost to Senator Barack Obama, who became the party‟s presumptive nominee in June 2008. At that point, Sen. Clinton endorsed and campaigned for him. She attended Wellesley College and earned her J.D. from Yale Law School.

B. Implications for US Trade Policy

Some observers opine that Sen. Clinton may attempt to exert a larger influence on trade policy as Secretary of State. Although the Department of State did not appear to play a pivotal role in US trade policy under the Bush Administration, Sen. Clinton may seek to enhance the Department of State‟s involvement in trade policymaking, as part of a broader move to expand the agency‟s policy jurisdiction. Regardless of Sen. Clinton‟s plans, her addition to the Cabinet will certainly add a new dynamic to the interaction between different agencies.

Sen. Clinton‟s stance on trade is mixed, although it is generally free-trade oriented. That said, she has expressed concern about China‟s economic practices, including the revaluation of the yuan, and has cosponsored several legislative bills that would, among other things, impose a tariff on all Chinese goods in an effort to address the currency manipulation. She has also expressed skepticism about aspects of the NAFTA, and has voiced her opposition to the pending Colombia, Panama and Korea FTAs. During her campaign, Sen. Clinton stated that she would implement a "time-out" on trade for the first several months of her Presidency to "provide an opportunity to systematically review every trade agreement to ensure that it is delivering benefits to American workers." On the other hand, Sen. Clinton was far less hostile to trade before the 2008 election.

Several observers note that if Sen. Clinton attempts to enlarge the Department of State‟s policymaking role, then her views on trade could spill over and affect US trade policymaking. The Department of State is a member of USTR‟s Trade Policy Staff Committee (TPSC) and is actively involved in inter-agency activities with USTR. Thus, if the Department of State extends its sphere of influence under Sen. Clinton, this in turn could affect US trade policy. To date, however, Sen. Clinton has not made any statements that would indicate a larger role for State in trade policymaking, and her influence over US trade will likely not be indicated – or felt – for at least several months at the start of President-elect Obama‟s term of office.

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VI. Secretary of Agriculture Appointment

A. Background

On December 17, 2008, President-elect Obama chose former Democratic Iowa Governor Tom Vilsack as his nominee for Secretary of Agriculture. Vilsack, who serves as Counsel with the firm Dorsey & Whitney, served as the 40th Governor of the state of Iowa, and was first elected in 1998 and re-elected to a second four-year term in 2002. On November 30, 2006, he formally launched his candidacy for the Democratic Party‟s nomination for President of the United States in the 2008 election but ended his bid on February 23, 2007. Prior to his election as Governor, Vilsack served as Mayor of Mount Pleasant, Iowa, as a member of the National Governors Association Executive Committee, and as a chair of the Democratic Governors Association, chair of the Governors Biotechnology Partnership, the Governors Ethanol Coalition, the Midwest Governors Conference, and the National Governors Association‟s committee on Natural Resources.

Supporters of Vilsack‟s appointment opine that his selection "indicates a commitment to rural development and conservation not witnessed in decades." Opposition to the Vilsack appointment has come from the Organic Consumers Association (OCA), which believes that Vilsack demonstrates a preference for large industrial farms and genetically modified crops, although supporters are quick to argue that Vilsack enacted legislation to ensure that small family farms and producers are granted equal bargaining power with large food processors over price negotiations on agricultural products.

B. Implications for US Trade Policy

There are mixed views on Vilsack‟s stance on agriculture and free trade. According to Obama staffers, Vilsack is a strong advocate of ethanol as an energy source and would like to enact a greenhouse gas cap-and-trade system to combat global warming. In announcing Vilsack‟s appointment, President-elect Obama stated that Vilsack "understands that the solution to [the US] energy crisis will be found not in the oil fields abroad but our farm fields at home," and he praised Vilsack‟s emphasis on producing crop-based renewable fuels. This comment and Vilsack‟s deep connections to Iowa suggest that Vilsack could be a proponent for agriculture subsidies, including domestic support for corn-based ethanol. On the other hand, some observers note that Vilsack has advocated phasing out ethanol subsidies and endorsed removing the tariff on Brazilian sugar-based ethanol. Consequently, it remains unclear as to where Vilsack stands on trade – and how this will affect his direction of the Department of Agriculture – although several observers opine that agriculture policy under the Obama Administration is unlikely to differ much from agriculture policy under President Bush. Vilsack has also been described as "sympathetic to big

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agribusiness" and "a very articulate spokesperson for agricultural interests," which could serve to strengthen the argument that President-elect Obama‟s agriculture policy will likely be similar to agriculture policy under the Bush Administration.

With regards to Vilsack and the US trade agenda, again it seems likely that trade will not be a priority for the Department of Agriculture. Vilsack and the Department of Agriculture will likely seek to address the pressing domestic concerns of US agriculture producers with respect to the financial crisis, including volatility in food and commodity prices. This focus in turn could affect US trade initiatives, such as the US stance in the WTO Doha Round Agriculture negotiations. The majority of observers opine that the United States will likely continue to support the conclusion of the Doha negotiations, but it is unclear whether the United States will continue to whole-heartedly pursue the Doha Round under an Obama Administration or whether it will scale back its Agriculture (and any other) offer in an effort to protect domestic agriculture producers facing competing international pressures. The next Farm Bill (the 2008 Farm Bill provides supports up to FY 2013) – its contents and its support amounts – will also provide the trade community with another indicator of the importance of trade with regards to agriculture: if the next Farm Bill is similar to the current Farm Bill (*i.e.*, it still contains significant domestic support for certain US agricultural commodities that trading partners may view as WTO-inconsistent and protectionist), then this will serve to reinforce the view that trade is secondary to other domestic issues, including agriculture.

Outlook

Although it is difficult to predict where trade will ultimately fall in the Obama Administration‟s list of priority issues, the general view is that US trade policy will not be a top issue for President-elect Obama. This view reflects most of Obama‟s campaign rhetoric, which was critical of US trade policy, although many Obama supporters believed that he would abandon that stance once elected. President-elect Obama‟s selection of Cabinet members with jurisdiction over trade reinforces the view that trade will not be a priority in the Obama administration. Obama‟s selection of Kirk for USTR – a relative unknown in the trade community – after Rep. Becerra turned down the position likely shows that trade will take a backseat to the domestic economy. Although it is unlikely that the Obama Administration will institute a "time-out" on trade as Sen. Clinton suggested during her campaign, the global financial crisis and its effects will slow US trade initiatives and will deny USTR Kirk the political capital necessary to advocate strong free trade policies. Treasury Secretary Geithner and Secretary of State Clinton likely will have the most important roles in the Cabinet because of the state of the US economy and because of the Department of State‟s large (and possibly growing) influence on US policymaking.

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Some observers have questioned whether President-elect Obama"s selection of Kirk as USTR means that USTR – at some point – will be demoted from a Cabinet position. They argue that because Kirk is a "relatively unknown player" compared to the other more-famous Cabinet members, this may mean that the Obama Administration does not see USTR as a "power player" within the Cabinet. Although it is unlikely in the short-term that President-elect Obama demote USTR from the Cabinet, Kirk"s selection does signal that the Obama Administration will be looking to other Cabinet members (as opposed to USTR) for counsel, which again solidifies the notion that trade will take a backseat to other priority issues. Even more interesting will be how USTR Kirk responds to the other Cabinet members: when the agencies begin their power plays in seeking political capital from President-elect Obama to move forward on their agendas, Kirk is unlikely to be a major factor and is unlikely to win or gain political capital from the President in light of counsel and demands from other Cabinet positions, such as Secretary of State Clinton or Secretary of Treasury Geithner. Instead, Kirk will likely be at the end of the line of policy-making within the Cabinet, which reflects where US trade policy stands relative to other Administration concerns.

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United States Highlights

ITC to Conduct Review of "First Sale Rule" for Customs Valuation of US Imports

On December 29, 2008, the US International Trade Commission (ITC) announced that it would conduct a review of the use of the "first sale rule" for customs valuation of US imports from September 2008 through August 2009. The "first sale rule" allows US importers to base the transaction value of an imported product on that product‟s first sales transaction and not on the value added by subsequent transactions prior to the importer‟s purchase of the good. The rule ensures that US importers pay customs duties on the import‟s underlying value by eliminating additional charges by distributors and other intermediaries. In its review of the rule, which is required by the Food, Conservation, and Energy Act of 2008, the ITC will provide data on the use, frequency, value, and tariff and sector classifications of the rule‟s application based on data from US Customs and Border Protection (CBP). The ITC plans to submit the report to the House Ways and Means Committee and Senate Finance Committees in February 2010. The ITC will accept submissions for the record through 5:15 pm on April 30, 2009.

President-Elect Obama Looks to Former Dallas Mayor to Serve as USTR

On December 19, 2008, President-elect Barack Obama tapped former Dallas Mayor Ron Kirk to serve as the United States Trade Representative (USTR) under the Obama Administration. Kirk serves as a Partner with the Houston-based law firm Vinson and Elkins. Prior to that, he served as Mayor of Dallas, Texas from 1995 to 2001. Kirk has also worked as Secretary of State of Texas for then-Texas Governor Ann Richards, and for then-Texas Senator Lloyd Bentsen. He attended Austin College and the University of Texas School of Law.

DOC Requests Comments on Proposed Extension of Steel Import Monitoring and Analysis System

In a December 12, 2008 Federal Register (FR) notice, the Department of Commerce (DOC) requested comments on its proposed extension of the Steel Import Monitoring and Analysis (SIMA) System (73 FR 75624). DOC proposes to extend the SIMA system to March 2013.

According to DOC, the purpose of the SIMA system is to provide steel producers, steel consumers, importers, and the general public with accurate and timely information on anticipated imports of certain steel products. Import licenses, obtained through the Internet-based SIMA licensing system

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(http://ia.ita.doc.gov/steel/license/), are required on US imports of basic steel mill products. The SIMA system is scheduled to expire on March 21, 2009, and DOC has proposed a four-year extension of the SIMA system (*i.e.*, until March 21, 2013) in order to continue DOC‟s "ability to track steel imports and make them publicly available in advance of the full trade data release." DOC‟s Chief Counsel for Regulation has stated that the proposed extension will not have a significant economic impact on a substantial number of companies because companies are already familiar with the licensing of certain steel products under the current system, and because "the Web-based nature of this simple license application should not be a significant obstacle to any firm in completing this requirement."

Comments on DOC‟s proposed extension of the SIMA system are due by **January 12, 2009**, and can be submitted by mail (address correspondence to Kelly Parkhill, Director for Industry Support and Analysis, Import Administration, Room 3713, Department of Commerce, 14th and Constitution Ave., NW., Washington, DC 20230); email (steel_license@ita.doc.gov); or though the Federal e-Rulemaking portal (http://www.regulations.gov). All comments responding to this FR notice will be a matter of public record and available for public inspection at the Import Administration's Central Records Unit.

Ways and Means Committee Welcomes New Democratic Members, New Ranking Member

On December 10, 2008, the House Democratic Caucus approved the addition of five Democratic members to the House Ways and Means Committee for the 111th Congress. The newest legislators on Ways and Means include Reps. Danny Davis (D-IL), Bob Etheridge (D-NC), Raúl Grijalva (D-AZ), Brian Higgins (D-NY), and John Yarmuth (D-KY). According to the Ways and Means Committee, the addition of the new Members will shift the ratio of majority (Democratic) and minority (Republican) Members on the Committee to 26 and 15 respectively for the new Congress. Ways and Means Committee Chairman Charles Rangel (D-NY) welcomed the new Members and stated that he and the others are "eager to begin working on the critical issues of economic recovery."

Separately, on December 10, 2008, House Republicans elected Rep. Dave Camp (R-MI) to replace Rep. Jim McCrery (R-LA) as Ranking Member of the House Ways and Means Committee. Rep. McCrery did not run for reelection this year and is retiring at the end of this session of Congress. Observers point out that Rep. Camp beat out the more-senior Rep. Wally Herger (R-CA) for the top Republican seat on the Committee. Rep. Camp was first elected in 1990, and has served on the Ways and Means Committee since that time.

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Free Trade Agreements

Free Trade Agreements Highlights

US-Oman FTA to Enter into Force on January 1, 2009

On December 29, 2008, President Bush issued a proclamation to implement the US-Oman Free Trade Agreement (FTA) on January 1, 2009. United States Trade Representative (USTR) Susan Schwab welcomed the President‟s proclamation and opined that the FTA‟s implementation would provide new opportunities to US workers, farmers and entrepreneurs in a growing market and would contribute to "strengthening ties and promoting freedom in the Middle East." The United States and Oman completed negotiations for the FTA in October 2005 after seven months of negotiations. The two countries formally entered into the agreement on January 19, 2006. The Senate approved implementing legislation for the FTA in June 2006, and the House of Representatives approved its version of the implementing legislation in July 2006; however, because the FTA implementing legislation is considered a revenue-related measure, Congressional rules mandate that the bill must originate in the House. Thus, the Senate was required to vote again on the House version of the bill on September 19, 2006, leaving President Bush free to sign the agreement into law.

The US-Oman FTA will eliminate duties on all consumer and industrial goods as well as duties on 87 percent of agricultural tariff lines upon entry into force. All remaining farm tariffs will be phased out over 10 years. The agreement will also free up trade in services and provide for improved protection of intellectual property rights (IPR) and effective enforcement of labor and environmental laws. According to USTR, the FTA will expand export opportunities for US machinery, automobiles, optic and medical instruments and electrical machinery, and agricultural products.

USTR Schwab also stated that the FTA builds upon the United States‟ other FTAs in the region and is "an important step in advancing President Bush‟s Middle East Free Trade Area (MEFTA) initiative." President Bush announced the MEFTA initiative in 2003 and hopes the United States will complete this initiative by 2013. The Oman FTA is the fifth bilateral trade agreement between the United States and a Middle Eastern country, following agreements with Israel, Jordan, Morocco, and Bahrain.

USTR Announces DR-CAFTA Entry Into Force for Costa Rica

On December 23, 2008, United States Trade Representative (USTR) Susan Schwab announced that the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA) would enter into force for

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Costa Rica on January 1, 2009. Costa Rica is the seventh and last country to implement fully the agreement. The United States and El Salvador put the DR-CAFTA into force on March 1, 2006. The agreement entered into force for Honduras and Nicaragua on April 1, 2006, for Guatemala on July 1, 2006, and for the Dominican Republic on March 1, 2007.

The DR-CAFTA establishes a two-year period for signatory countries to join the agreement after it first takes effect. The DR-CAFTA first took effect on March 1, 2006, which meant that the two-year period closed on March 1, 2008. However, a country may join after the two-year deadline, but only if the countries that have already joined agree to extend the deadline. Costa Rica approved the DR-CAFTA in a national referendum in October 2007 but was unable to implement the agreement because the Costa Rican Congress needed to enact legislation to bring Costa Rica"s laws in conformity with DR-CAFTA obligations. On February 27, 2008, the United States, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua agreed to give Costa Rica until October 1, 2008 to ratify the DR-CAFTA. Although the Costa Rican Congress approved the 12 laws necessary to implement DR-CAFTA, the country missed the October 1, 2008 deadline to implement the agreement after the country's Supreme Court ruled on September 11 that the Legislative Assembly approved an intellectual property right bill without consulting with the country's indigenous populations on the legislation. As a result, DR-CAFTA signatories gave Costa Rica another extension – until January 1, 2009.

On November 11, 2008, the Costa Rican Congress finally reconciled the constitutionality of the intellectual property bill by approving Law 16.955 that modifies intellectual property regulations, thus enabling Costa Rica to implement the DR-CAFTA on January 1, 2009. Law 16.955 allows schools and universities to copy certain materials and reduces the fines and prison time for copyright violators in Costa Rica. Reportedly, Costa Rican legislators lobbied the government to relax existing regulations for copyright violators in Costa Rica in exchange for clearing the way for the implementation of the DR-CAFTA. According to Costa Rican legislators, existing regulations for copyright violators were "too strict." The provisions included in Law 16.955 do not include modifications to Costa Rica's commitments under the World Trade Organization (WTO) Agreement on Trade-Related aspects of Intellectual Property ("TRIPs Agreement"). The approval of Law 16.955 cleared the last legislative hurdle for implementation of the DR-CAFTA by Costa Rica on January 1, 2009.

Senate Finance Chair Sees Next Congress Considering TAA, Pending FTAs

On December 10, 2008, Senate Finance Committee Chairman Max Baucus (D-MT) stated that he expects the 111th Congress to consider the three pending Free Trade Agreements (FTAs) with Colombia,

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Panama and South Korea, but only after it has approved and expanded the expired Trade Adjustment Assistance (TAA) program. Chairman Baucus, who made his remarks at a press conference on the Finance Committee‟s 2009 work agenda, stated that TAA and the pending FTAs are linked, and that "it is very important that the United States takes a more proactive stance on trade so long as we fully respect the legitimate anxieties of the men and women in American who worry about their jobs." He also opined that legislators may support the pending FTAs if a new TAA is implemented.

On TAA, Chairman Baucus stated that he may attempt to include the program‟s reauthorization within an economic recovery bill that the next Congress will likely consider during its first few weeks in office. By adding TAA reauthorization to an economic recovery bill, Chairman Baucus hopes to spur quick consideration and approval of the TAA program. He added, however, that he is still weighing his options on how to best address TAA and the new Congress, given the large number of proposals that other Senators will likely try to add to any economic recovery bill.

On the pending FTAs, Chairman Baucus did not provide an estimate as to when Congress could consider the agreements, but he noted that he will "take his cue from President-elect Barack Obama." Chairman Baucus‟ statements on the pending agreements follow statements made by House Ways and Means Committee Chairman Charles Rangel (D-NY) that the 111th Congress will likely approve the pending US-Colombia and US-Panama FTAs. Observers opine that the statements from these two key Members of Congress – whose Committees have jurisdiction over international trade – diminish any hope that Congress will consider the Colombia agreement or the other pending FTAs by the end of 2008.

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Customs

Customs Highlights

Senators Urge CBP to Withdraw Demand Letters Seeking Repayment of Byrd Funds

In a December 12, 2008 letter to US Customs and Border Protection (CBP) Commissioner W. Ralph Basham, fourteen Senators – led by Sen. Olympia Dukakis (R-ME) – urged CBP to withdraw letters sent to US companies in which CBP requested repayment of approximately USD 92 million in funds these firms received under the Continued Dumping and Subsidy Offset Act (CDSOA, also known as the "Byrd Amendment") between FY 2001-2005. The Senators requested that CBP notify all of the affected US companies that the demand letters are rescinded. Signatories to the letter include Sens. Snowe, Evan Bayh (D-IN), Susan Collins (R-ME), Mike Crapo (R-ID), Saxby Chambliss (R-GA), Sherrod Brown (D-OH), Roger Wicker (R-MI), Thad Cochran (R-MS), Johnny Isakson (R-GA), Jeff Sessions (R-AL), Richard Shelby (R-AL), Blanche Lincoln (D-AR), Robert Casey (D-PA), and Ron Wyden (D-OR).

CBP sent the demand letters (referred to in the Senator‟s correspondence) on November 28, 2008. On that date, CBP sent a formal notice to US companies that received money under the CDSOA in cases involving Canada and Mexico that they must return the money within 30 days of the date of the letter (*i.e.*, by December 28, 2008). In these letters, CBP identified the amount of the distributions received by the company since the CDSOA went into effect (*i.e.*, duties received after October 1, 2000). CBP cited as the impetus for requesting return of these CDSOA payments the February 25, 2008 decision by the Court of Appeals for the Federal Circuit (CAFC) in <u>Canadian Lumber Trade Alliance v. United States</u>. The CAFC affirmed the declaratory judgment of the Court of International Trade (CIT) that "pursuant to Section 408 of the NIA, the CDSOA does not apply to antidumping and countervailing duties assessed on imports of goods from Canada or Mexico." In its November 28 letter, CBP stated that the CAFC decision ruled that "CBP was not authorized to distribute such duties to the extent they were derived from goods from countries that are parties to the North American Free Trade Agreement."

In their letter, the Senators noted that CBP notified companies to which it sent the November 28 demand letter that it is "obliged to pursue a claim for the immediate return of this overpayment." The Senators believe that this statement is inaccurate and that it "represents a complete repudiation of CBP's earlier representations to the [CIT]." According to the Senators, the US companies from which past CDSOA distributions have been demanded are all petitioners or supporters of petitions in investigations that led to antidumping or countervailing duty orders against imports from Canada or Mexico. The Senators note that these US companies applied for CDSOA distributions in good faith and that CBP made distributions to these companies under the CDSOA without any qualification or warning that the money could be taken back. The Senators state that "CBP's unexpected reversal of position comes at a terrible time for these US companies and their workers," noting that 2008 is "the worst year" for US manufacturers. They note that many of these companies used their distributions as long ago as 2001, and that they had not planned for repayment of the funds. The Senators also stated that CBP is incorrect in its interpretation of the CAFC"s decision in Canadian Lumber Trade Alliance v. United States. The Senators conclude that CBP's effort to seek repayment is indefensible, and that the affected US companies had a reasonable expectation that they were entitled to keep the past distributions without risk of repayment.

Separately, on December 12, 2008, a coalition of law firms representing US producers sent a letter to CBP"s Assistant Commissioner for Finance Eugene Schied requesting an extension of the repayment deadline set forth in CBP"s November 28 demand letters. The coalition specifically requests that CBP extend the December 28, 2008 deadline by 90 days to March 28, 2009. The letter states that the 30-day repayment period is insufficient, and that "the timing of these repayment requests could not be more harmful as US producers reduce production operations and American workers lose their jobs in record numbers." The coalition notes that the recipients of CBP"s letter need additional time to review the legal basis for its claim and that the affected US companies may ask CBP and the Courts to reconsider CBP's claim on the merits.

US Customs Requests Repayment of Byrd Money

On November 28, 2008, US Customs and Border Protection (CBP) contacted US companies in unfair trade cases involving imports from Canada and Mexico and requested that they repay the money they have received under the Continued Dumping and Subsidy Offset Act (CDSOA), also known as the Byrd Amendment. We describe below the request made by CBP, the legal basis for this request and the reactions of affected US companies.

I. CBP Request for Repayment

On November 28, CBP sent formal notice to companies that received money under the CDSOA in cases involving Canada and Mexico that they must return the money within 30 days of the date of the letter. In these letters, CBP identifies the amount of the distributions received by the company since the CDSOA went into effect (i.e., duties received after October 1, 2000). Next, CBP states that, "your company must promptly return all funds previously received" because "your company"s receipt of the stated amount(s)" is "inconsistent with judicial interpretation of the CDSOA." CBP requests payment within 30 days of the date of the letter, and states that "any amount not returned within 30 days will begin to accrue interest at the rate indicated in 19 C.F.R. §24.3a(c)."

News reports estimate that CBP is requesting the repayment of USD 95 million from producers of lumber and paper products, USD 15 million from steel companies, and USD 35 million from cement producers.[1]

II. Legal Basis for CBP Request

CBP cites as the impetus for requesting return of these CDSOA payments the February 25, 2008 decision by the Court of Appeals for the Federal Circuit ("CAFC") in Canadian Lumber Trade Alliance v. United States.[2] The CAFC affirmed the declaratory judgment of the Court of International Trade ("CIT") that, "pursuant to Section 408 of the NIA, the CDSOA does not apply to antidumping and countervailing duties assessed on imports of goods from Canada or Mexico."[3] The NIA or North American Free Trade Agreement Implementation Act, which was enacted in 1993, provides in Section 408 that "[a]ny amendment enacted after the Agreement [i.e., NAFTA] enters into force with respect to the United States that is made to ...title VII of the Tariff Act of 1930…shall apply to goods from a NAFTA country to the extent specified in that amendment."[4] Because the CDSOA, which was enacted in 2000, amended title VII, but did not specify that it applied to goods from Canada or Mexico, the CIT ruled that the CDSOA could not be applied to imports from Canada or Mexico. The CIT stated that, "based on Congress" plain language in Section 408 [of the NIA], Customs is not authorized to apply the [CDSOA] to goods from Canada or Mexico.[5]

[1] Inside U.S. Trade, "CBP Demands Return of Byrd Money From Canada, Mexico Imports," December 5, 2008.

[2] 517 F.3d 1319 (Fed. Cir. 2008), cert. denied sub nom. United States Steel v. Canadian Lumber Trade Alliance, - S. Ct.-, 2008 WL 4454382 (Oct. 6, 2008).

[3] 517 F.3d at 1344.

[4] See id. at 1342 (citing 19 U.S.C. §3438).

[5] See id. (citing 425 F. Supp.2d, at 1373). We note that the CIT issued two opinions in the underlying case. First, it issued an opinion finding, among other decisions, that CBP"s distribution of duties assessed on imports from Canada was unlawful because the CDSOA must be read in light of section 408 of the NIA not to apply to goods from Canada or Mexico. Canadian Lumber Trade Alliance v. United States, 425 F. Supp. 2d 1321, 1373 (Ct. Int'l Trade 2006). Because the parties were unable to reach agreement on remedies, the CIT issued a second opinion setting out relief. In the second decision, the court declared that, pursuant to section 408 of the NIA, the CDSOA does not apply to antidumping and countervailing duties assessed on imports of goods from Canada or Mexico, and declined to instruct CBP to "collect back" any duties already distributed. Canadian Lumber Trade Alliance v. United States, 441 F. Supp. 2d 1259 (Ct. Int'l Trade 2006).

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In its November 28th letter, CBP states that the CAFC decision ruled that, "CBP was not authorized to distribute such duties to the extent they were derived from goods from countries that are parties to the North American Free Trade Agreement." CBP sets out the following legal authority justifying its letter seeking repayment of these duties:

> CBP is obliged to pursue a claim for the immediate return of this overpayment. See 31 U.S.C. §3701(b)(1)(C). By law, an agency shall collect a claim of the United States Government for money arising out of its activities, 31 U.S.C. §3711(a)(1). The Federal Claims Collection Standards (31 C.F.R. Parts 900-904), state that „Federal agencies shall aggressively collect all debts arising out of activities of, or referred for collection services to, that agency. Collection activities shall be undertaken promptly with follow-up action taken as necessary." 31 C.F.R. 901.1(a). In discussing overpayments the General Accounting Office has consistently advised agency officials to recover overpaid amounts without undue delay. Similarly, the Court of Claims has held that the Government has a duty to recover erroneously made payments. Fansteel Metallurgical Corp. v. United States, 172 F. Supp. 268, 270 (Ct. Cl. 1959) (citations omitted). For these reasons, CBP is issuing this demand letter.

The timing of CBP"s request for payment is likely due to the fact that the US Supreme Court recently denied review of the CAFC"s decision. Consequently, the CAFC decision is now final and binding on the US Government and the parties.

III. US Industry Reaction to CBP Request

US companies have objected to the demand for repayment under the terms set by CBP in its letter. For example, the Coalition for Fair Lumber Imports, which represents US softwood lumber manufacturers, has requested in a December 4th letter that CBP either withdraw the demands or extend the repayment period. Specifically, they stated that, "At a minimum, we request that CBP extend the deadline identified in the letters 90 days to enable the Executive Branch to reconsider the demand for repayment."[6] We understand that the lumber, steel, cement and other industries also are coordinating efforts to protest CBP"s request for repayment. This week they are expected to jointly request an extension to respond to CBP"s request.

The Coalition for Fair Lumber Imports and other US producers also argue that CBP"s demand for repayment is unlawful. They claim that the demand letter is inconsistent with the CIT"s decision in the

[6] Inside U.S. Trade, "CBP Demands Return of Byrd Money From Canada, Mexico Imports," December 5, 2008.

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underlying case that US producers would not be required to pay back past distributions, and that CBP supported the CIT‟s decision in this regard. In its decision, the CIT states that "when the government grants or distributes money to parties, those parties have some right to rely on the money they receive," and "denies Plaintiff‟s request for an order directing Customs to disgorge any funds already distributed."[7] We note that, although the CIT decided not to order CBP to request repayment, CBP determined that it was required by law to seek repayment.

The US producers also challenge the lawfulness of the law, regulations and cases relied on by CBP in its November 28th letter. They claim that the 1959 Fansteel Metallurgical Corp. case involved unlawful overpayments to a US company. In contrast, they claim that there was no oversight or mistake in the case of the CDSOA payments. Further, they assert that the Federal Claims Collection Act and accompanying regulations "merely confirm that the government is to collect on debts to the government," whereas the US companies that received money under the CDSOA are not indebted to CBP.

Finally, the US producers also intend to challenge the fairness of this action at this time of economic crisis.

[7] Canadian Lumber Trade Alliance, 441 F. Supp.2d at 1268.

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Multilateral

WTO Appellate Body Releases Report on *EC – Bananas* Dispute

Summary

Decision: The World Trade Organization (WTO) Appellate Body has affirmed that the EC import regime for bananas, which grants preferences for bananas from the African, Caribbean and Pacific (ACP) countries, violates the obligations of the EC under GATT Article XIII (which requires the non-discriminatory application of quantitative restrictions) and GATT Article II (which prohibits the application of tariffs above bound levels). The EC did not contest that its measures were also inconsistent with GATT Article I (Most Favoured Nation).

Significance of Decision / Commentary: The Bananas case is one of the oldest and most contentious disputes in the history of the multilateral trading system. It has generated considerable litigation in both the GATT and the WTO, which has resulted in multiple rulings by panels, the Appellate Body, and special arbitrators. All of this litigation has been targeted at the preferences that the EC maintains for ACP bananas to the disadvantage of bananas from Latin America (sometimes referred to as "dollar bananas" or "MFN bananas").

At issue in the present case was a bananas import regime that the EC maintained from January 1, 2006 until December 31, 2007. It established an MFN tariff rate of €176 per metric ton (mt) for bananas, with a preferential tariff quota of 775,000 mt for duty-free imports of bananas originating in ACP countries. Non-ACP exporters, principally in Latin America, had no access to this preferential quota.

As noted above, the EC conceded that its measures were inconsistent with its MFN commitments under GATT Article I. The Appellate Body affirmed that the EC also violated its obligations under GATT Article XIII. It stated that the duty-free tariff quota reserved for the ACP "plainly excludes non-ACP countries" and thus "offends the principle of access to, and participation in, a tariff quota in Article XIII:1."

The preferential quota for the ACP was repealed on January 1, 2008, upon the entry into force of EC Economic Partnership Agreements (EPAs), or interim EPAs, with many ACP countries. Under the EPAs, ACP bananas have duty-free, quota-free access to the EU market. Thus, while the Appellate Body found the ACP quota to be WTO-inconsistent, it declined to make any recommendation with respect to a measure that it noted was "no longer in existence."

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This meant that the most substantively consequential part of the Appellate Body‟s report related to its rulings on the EC‟s breach of its tariff bindings under GATT Article II. In 1994, under the auspices of the "Banana Framework Agreement" (BFA), the EC agreed to a tariff quota concession of 2.2 million metric tons for bananas, bound at the in-quota rate of €75/mt. All MFN suppliers had access to this quota. The BFA stated that "This agreement shall apply until 31 December 2002." These provisions were later incorporated into the EC‟s Uruguay Round Tariff Schedule.

The Appellate Body considered that the expiry date in the BFA referred only to the agreement on the allocation of the tariff quota shares, while "the tariff quota quantity and the in‑quota tariff rate" were set out as final commitments in the EC‟s tariff schedule. Therefore, the Appellate Body concluded that the tariff quota concession of 2.2 million metric tons did not expire at the end of 2002, and "remains in force." The Appellate Body then found that the EC‟s current tariffs on bananas, set at €176/mt, "without consideration of the tariff quota of 2.2 million mt bound at an in-quota tariff rate of 75€/mt", breached the tariff bindings of the EC under GATT Article II:1(b).

Given this Appellate Body ruling, the repeal of the preferential tariff quota for the ACP will not resolve the WTO-inconsistency. The EC has asserted that the challenge to the ACP quota is "obsolete." However, this "obsolescence" does not apply to the tariff regime. The Appellate Body has found that the EC continues to apply a tariff regime that does not comply with its Uruguay Round commitments.

A political deal on bananas was close in July 2008, but it slipped away when the Ministerial meeting at that time collapsed. A statement by the Commission, issued after the release of the Appellate Body decision last week, indicated that "the EU is ready to take up the negotiations on a deal on bananas with all suppliers where they were left off in July and settle this longstanding dispute once and for all." Given the history of this dispute, no one harbours any illusions about how difficult that will be.

Analysis

A. Procedural Issues

Claims not barred by the "Bananas Understanding"

In 2001, the EC negotiated parallel agreements with the United States and Ecuador, known in each case as the "Understanding on Bananas." These Understandings stated, among other things, that the Parties had "identified the means by which the longstanding dispute over the EC‟s banana import regime can be resolved." They indicated that the EC would "introduce a Tariff Only regime for imports of bananas no

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later than 1 January 2006." In the interim, the EC agreed to implement an import regime on the basis of historical licensing.

The Panel had found that the Bananas Understandings did not provide an effective settlement to the dispute, and therefore did not prevent the United States and Ecuador from bringing compliance challenges under Article 21.5 of the WTO Dispute Settlement Understanding (DSU). The Panel reasoned that the Bananas Understandings would bar future compliance panel proceedings only if such accords constituted a "positive solution and effective settlement to the dispute in question."

However, the Appellate Body found that "the Panel's requirement that the Understandings must constitute a „positive solution and effective settlement" to the dispute in question to preclude recourse to Article 21.5 proceedings was not a correct interpretation of what the DSU requires." Instead, the Appellate Body stressed that "there must be a clear indication in the agreement between the parties of a relinquishment of the right to have recourse to Article 21.5." It added that "the language in the Understandings must reveal clearly that the parties intended to relinquish their rights." The Appellate Body found that the Understandings did not include a relinquishment of the right to initiate compliance proceedings. It therefore arrived at the same conclusion as the Panel, although for different reasons, that the complainants were not precluded from initiating compliance panel proceedings.

The Appellate Body also rejected an EC argument that the complainants were precluded by the principle of good faith from challenging the EC measures. The Appellate Body stated that "irrespective of the type of proceeding, if a WTO Member has not clearly stated that it would not take legal action with respect to a certain measure, it cannot be regarded as failing to act in good faith if it challenges that measure."

EC bananas import regime found to constitute a "measure taken to comply" with the original DSB rulings

The EC argued that its revised import regime for bananas was not a "measure taken to comply" with the original 1997 recommendations and rulings of the DSB. The EC claimed, among other things, that the US decision to suspend retaliation in 2002, upon implementation of the tariff quota-based import regime described in the Bananas Understanding, "confirmed that the United States and the European Communities had agreed that the European Communities had complied with the recommendations and rulings of the DSB in the original dispute."

The Appellate Body dismissed this argument. It found that it was "clear from the language of the Understanding that the tariff quota-based import regime was intended to be of an interim nature." The

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Appellate Body saw "no basis in the text of the Understanding to support the position that the United States had agreed that a tariff quota-based import regime would be the final measure taken to comply."

Repeal of the challenged measure – Panel can still make a finding

The EC argued that since the 775,000 mt duty-free tariff quota reserved for ACP imports was repealed prior to the issuance of the Panel Report in the US case, there was "no recommendation that could be made or that could „remain operative‟." The Appellate Body dismissed this argument. It noted that the disputing Parties agreed that this EC measure had been included in the Panel's terms of reference. It added that "[t]he DSU nowhere provides that the jurisdiction of a panel terminates or is limited by the expiry of the measure at issue." It recalled earlier jurisprudence that "the Appellate Body has distinguished the question whether a panel can make a *finding* concerning an expired measure from the question whether a panel can make a *recommendation* relating to an expired measure [original emphasis]." At the end of its report in the US case, after making its findings of WTO-inconsistency, the Appellate Body stated that: "As the measure at issue in this dispute is no longer in existence, we do not make any recommendation to the DSB pursuant to Article 19.1 of the DSU."

B. Substantive Issues

GATT Article XIII: imports from ACP countries were "not similarly restricted"

GATT Article XIII sets out certain disciplines to ensure the "non-discriminatory administration of quantitative restrictions." Article XIII:1 provides in part that no restriction can be applied by a WTO Member on the importation of any product from any other WTO Member "unless the importation of the like product of all third countries" is similarly restricted. Article XIII:2 adds that in applying import restrictions to any product, an importing country must "aim at a distribution of trade in such product approaching as closely as possible" the shares which the various WTO Members "might be expected to obtain in the absence of such restrictions…."

The Panel had found the EC measures to be in violation of these provisions. It stated that "[s]ince bananas from MFN countries do not have access to [the] preferential tariff quota reserved for bananas from ACP countries, on its face, the importation into the European Communities of bananas from ACP countries is not „similarly restricted‟ compared to that of bananas from MFN countries."

On appeal, the EC argued that Ecuador‟s claim under Article XIII should be rejected. The EC asserted that in enacting the challenged measure, it had followed a suggestion made by the first Ecuador Article 21.5 Panel, *i.e.*, that of "applying a tariff-only system with a duty-free tariff quota for ACP countries covered by a suitable waiver." The Appellate Body rejected this argument, reasoning that "the conformity

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of the measures taken to comply with the covered agreements will depend on whether actual implementation of the DSB recommendations and rulings has been achieved by the Member concerned." It added that the fact that a Member had chosen to follow a Panel‟s suggestion "does not create a presumption of compliance in Article 21.5 proceedings."

The Appellate Body then explained the requirements of Article XIII as follows:

> …[N]o tariff quota shall be applied by a Member on the importation of any product of the territory of any other Member, unless the importation of the like product of all third countries is similarly made subject to the tariff quota. The application of the tariff quota is thus on a product-wide basis. The principle of non-discriminatory application captured by Article XIII:1 requires that, if a tariff quota is applied to one Member, it must be applied to all; and, consequently, the term "similarly restricted" means, in the case of tariff quotas, that imports of like products of all third countries must have access to, and be given an opportunity of, participation. If a Member is excluded from access to, and participation in, the tariff quota, then imports of like products from all third countries are not "similarly restricted".

The Appellate Body noted that under the EC bananas import regime, the duty-free tariff quota of 775,000 mt was reserved for imports from ACP countries, and that non-ACP suppliers did not have access to this tariff quota. The Appellate Body concluded that:

> Article XIII:1, as we have observed, articulates a principle of access to, and participation in, a tariff quota for imports of the like product from all Members. The duty-free tariff quota reserved for ACP countries plainly excludes non-ACP countries. By so doing, the tariff quota does not apply to, or "similarly restrict", imports of like products from non-ACP countries, and thus offends the principle of access to, and participation in, a tariff quota in Article XIII:1.

The Appellate Body found that the tariff quota also failed to meet the requirements regarding distribution and allocation in Article XIII:2. It said that "[a]llocating the entire tariff quota exclusively to ACP countries, and reserving no shares to non-ACP suppliers, cannot be considered to be based on the respective shares of ACP and non-ACP supplier countries in the European Communities' banana market."

MFN claim uncontested by the EC

At the November 2001 Ministerial Meeting in Doha, WTO Members adopted the "Doha Article I Waiver." The waiver provided, among other things, that GATT Article I:1 was waived "to the extent necessary to permit the European Communities to provide preferential tariff treatment for products originating in ACP

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States…without being required to extend the same preferential treatment to like products of any other member." The Panel found that this waiver expired on December 31, 2005.

The Panel had found that the preference granted by the EC to imported bananas originating in ACP countries was inconsistent with the EC‟s MFN obligations under GATT Article I:1. The Appellate Body noted that the EC did not appeal the Panel's findings concerning GATT Article I:1 and the Doha Article I Waiver, and it similarly did not contest that the Doha Article XIII Waiver expired on December 31, 2005. As the Appellate Body stated, the EC "does not contest that the zero duty within the ACP tariff quota is inconsistent with Article I:1 and is not covered by a suitable waiver."

Doha Bananas Waiver not a "subsequent agreement"

The "Bananas Framework Agreement" (BFA), originally negotiated in 1994 between the EC and Colombia, Costa Rica, Nicaragua and Venezuela, provided for an MFN quota volume of 2.2 million mt, with in-quota rate of €75/mt. The BFA stated that "This agreement shall apply until 31 December 2002." These provisions were later incorporated into the EC‟s Uruguay Round Tariff Schedule.

The Panel had found that the Doha Article I Waiver constituted a "subsequent agreement" between the parties, which extended the EC‟s tariff quota concession for bananas beyond 31 December 2002 until the rebinding of the EC‟s tariff on bananas. The Panel ruled that "the Waiver, as it relates to the European Communities' WTO market-access commitments relating to bananas, is a "subsequent agreement between the parties" to the Bananas Framework Agreement (i.e., the WTO Members), regarding the *application* of the provisions of the WTO agreement as it pertains to such market access commitments [original emphasis]."

The Appellate Body reversed the Panel on this issue. It began by explaining the purpose of a waiver:

> In our view, the function of a waiver is to relieve a Member, for a specified period of time, from a particular obligation provided for in the covered agreements, subject to the terms, conditions, justifying exceptional circumstances or policy objectives described in the waiver decision. Its purpose is not to modify existing provisions in the agreements, let alone create new law or add to or amend the obligations under a covered agreement or Schedule. Therefore, waivers are exceptional in nature, subject to strict disciplines and should be interpreted with great care.

The Appellate Body found the Panel's conclusion that the "Doha Article I Waiver extended the duration of the tariff quota concession beyond 31 December 2002, and thereby modified or changed the content of the European Communities' Schedule, difficult to reconcile with its conclusion that the Waiver should be considered an agreement on the *application* of existing commitments contained in that Schedule [original

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emphasis].” The Appellate Body stated that the Doha Article I Waiver was “concerned with the zero-duty preference for ACP suppliers, not with the tariff quota concession for MFN suppliers specified in the European Communities' Schedule.”

Thus, the Appellate Body concluded the Doha Article I Waiver did not constitute a “subsequent agreement” under the *Vienna Convention on the Law of Treaties* regarding the interpretation or application of the EC‟s Schedule of Concessions. It similarly did not consider that the Doha Article I Waiver “constituted an agreement by WTO Members” to extend the duration of the EC‟s tariff quota concession for bananas.

The Appellate Body considered that the expiry date in the BFA referred “only to the agreement on the allocation of the tariff quota shares.” It stressed that: “The overall tariff quota quantity and the in-quota tariff rate, on the one hand, and the allocation of the quota shares among supplier countries, on the other hand, are distinct aspects of the European Communities' market access commitments relating to bananas.” It said that the main function and content of the BFA was the allocation of the quota shares for a certain period of time, whereas the tariff quota quantity and the in-quota tariff rate were set out as final commitments in the EC‟s tariff schedule.

For these reasons, the Appellate Body concluded that the tariff quota concession of 2.2 million metric tons, bound at the in-quota rate of €75/mt in the EC‟s tariff schedule, “did not expire on 31 December 2002 and remains in force until the rebinding process and the Article XXVIII negotiations have been completed, and the resulting tariff rate has been consolidated in the European Communities' Schedule.” It made a consequential ruling that the tariff applied by the EC to MFN imports of bananas, set at €176/mt, “without consideration of the tariff quota of 2.2 million mt bound at an in-quota tariff rate of 75€/mt”, breached the tariff bindings of the EC under GATT Article II:1(b).

US claim not barred by lack of “standing”

The EC argued that even if the preferences to the ACP countries were WTO-inconsistent, this measure did not cause any nullification or impairment to the United States. The EC argued that the United States was a net importer of bananas, and was “not actively involved in the business of exporting bananas to any country in the world, let alone the European Communities[.]” The Appellate Body rejected this argument, reasoning that “while present production in the United States is minimal, it could at any time start exporting the few bananas it produces to the European Communities. That this may be unlikely does not disprove that the United States is a potential exporter of bananas to the European Communities.” It therefore upheld the Panel‟s ruling that to the extent that the EC bananas import regime

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"contain[ed] measures inconsistent with various provisions of the GATT 1994, it ... nullified or impaired benefits accruing to the United States under that Agreement."

The decisions of the WTO Appellate Body in European Communities – Regime for the Importation, Sale and Distribution of Bananas: Second Recourse to Article 21.5 of the DSU by the United States (WT/DS27/AB/RW/USA) and European Communities – Regime for the Importation, Sale and Distribution of Bananas: Second Recourse to Article 21.5 of the DSU by Ecuador (WT/DS27/AB/RW2/ECU) was released on November 26, 2008.

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WTO Appellate Body Releases Decision in China – Measures Affecting Imports of Automobile Parts (DS339/340/342)

Summary

Decision: The WTO Appellate Body has affirmed that a charge imposed by China on imported auto parts violates China‟s WTO obligations. The Appellate Body upheld the claims by the United States, the EC and Canada that the charge was an internal measure and was inconsistent with China‟s national treatment obligations under GATT Article III. However, it overturned the finding of the Panel that the measures also violated the accession commitments of China, as set out in its Working Party Report.

Significance of Decision / Commentary: This is the first time that the Appellate Body has ruled against China.

China joined the WTO in late 2001, with a bound duty rate of 25 per cent on complete vehicles, but only 10 per cent on auto parts. In 2004/2005, China adopted measures that imposed a 25 per cent charge on auto parts that were imported and then assembled into complete vehicles in China. The charge is imposed following the assembly of the parts into the vehicle.

The principal issue on appeal was whether the charge should be considered as an internal measure (to which the national treatment disciplines of GATT Article III would apply) or a border measure (which would be subject to the rules on customs duties under GATT Article II). The Appellate Body upheld the finding of the Panel that the charge should be considered as an internal measure, as the obligation to pay it arose after the auto parts had entered into China and were assembled into a complete motor vehicle.

This threshold ruling essentially decided the outcome of the appeal. Having determined that the charge was an internal measure, the Appellate Body had little difficulty making the consequential ruling that the measure violated China‟s national treatment obligations under GATT Article III.

The Appellate Body‟s ruling on China‟s Working Party Report commitments hinged on its interpretation of the scope of the challenged measure. China‟s Protocol of Accession incorporates by reference all of its Working Party commitments, and the Protocol is an "integral part" of the WTO Agreement. China did not contest this – either before the Panel or on appeal – but successfully argued before the Appellate Body that the Panel misconstrued the measure at issue in this case. The Appellate Body left intact the Panel‟s conclusion that accession commitments are in principle fully enforceable in WTO dispute settlement.

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Analysis

Background: the challenged measures

China‟s tariff schedule provides for a duty of 10 per cent on auto parts and 25 per cent on complete vehicles. However, under the measures challenged by the complainants in this case, China imposed a charge of 25 per cent on auto parts that were imported by automobile manufacturers and used in the production or assembly of complete vehicles. The charge was imposed on imported auto parts after their assembly into motor vehicles.

Threshold issue: internal measure or "ordinary customs duty"?

The complainants argued that the measures imposed an internal charge that violated China‟s national treatment obligations under GATT Article III. China asserted that the charge was permissible as an ordinary customs duty under GATT Article II.

GATT Article III:2 provides that imported products cannot be subject to "internal taxes or other internal charges of any kind" in excess of those applied to like domestic products. GATT Article III:4 provides that imported products must be accorded "treatment no less favourable" than that accorded to like domestic products.

GATT Article II:1(b) deals with customs duties. It provides that imported products, "on their importation", must be exempt from ordinary customs duties in excess of those set forth in the importing Member‟s tariff schedule.

In a key threshold determination, the Panel ruled that the charge at issue in this case should be considered as an internal measure, as the obligation to pay it arose after the auto parts had entered into China and were assembled into complete motor vehicles. As the measure imposed a charge in excess of that imposed on like domestic products, the Panel found that it violated China‟s national treatment obligations under GATT Article III:2. The Panel similarly found that it created "a disincentive for auto manufacturers to use imported auto parts", inconsistently with GATT Article III:4.

On appeal, China argued that in interpreting Article II:1(b), the Panel failed to take into account the context provided by the rules of the Harmonized System, the customs classification system developed by the World Customs Organization. China argued that one of the "General Rules for the Interpretation of the Harmonized System" allowed customs authorities to classify unassembled parts as a complete article, even though the assembly of the parts occurred after importation.

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The Appellate Body stated that the Harmonized System "does not serve as relevant context for the interpretation of the term "internal charges" in Article III:2." It saw the Harmonized System "as context that is most relevant to issues of classification of products." However, it stressed that "[t]he Harmonized System, and the product categories that it contains, cannot trump the criteria contained in Article II:1(b) and Article III:2, which distinguish a border measure from an internal charge under the GATT 1994." Therefore, the Appellate Body concluded that even if the Harmonized System allowed "auto parts imported in multiple shipments to be classified as complete vehicles based on subsequent common assembly, as China suggests, this would not per se affect the criteria that define an ordinary customs duty under Article II:1(b) [original emphasis]." In any event, the Appellate Body recalled that the Panel "did not accept the broad interpretation" proposed by China of the Harmonized System Rules of Interpretation.

The Appellate Body also reasoned that "accepting that a charge imposed on auto parts following, and as a consequence of, their assembly into a complete motor vehicle can constitute an ordinary customs duty would significantly limit the scope of "internal charges" that fall within the scope of Article III:2 of the GATT 1994." It shared the views of the Panel that "the security and predictability of tariff concessions would be undermined if ordinary customs duties could be applied based on factors and events that occur internally, rather than at the moment and by virtue of importation, and that this, in turn, would upset the carefully negotiated and balanced structure of key GATT rights and obligations, including the different disciplines imposed on ordinary customs duties and internal charges."

The Appellate Body thus upheld the Panel‟s ruling on the threshold issue that the charge under the contested measures was an internal charge under GATT Article III:2. The Appellate Body recognized that in some cases "the same measure may exhibit some characteristics that suggest it is a measure falling within the scope of Article II:1(b), and others suggesting it is a measure falling within the scope of Article III:2." According to the Appellate Body, in such instances the role of a Panel is to "identify the leading or core features of the measure at issue, those that define its "centre of gravity" for purposes of characterizing the charge that it imposes as an ordinary customs duty or an internal charge."

The Appellate Body emphasized that in the present case, "[t]he Panel did not, as China suggests, find that the mere fact that the assembly of parts into a complete vehicle will necessarily occur after the parts have entered the customs territory means that a charge assessed on this basis is an internal charge." Rather, the Panel found that "the obligation to pay the charge accrues internally after auto parts enter into the customs territory of China and are assembled/produced into motor vehicles", a finding that was not appealed by China [original emphasis]. The Appellate Body concluded that the Panel "committed no

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error" in its analytical approach to the threshold issue or in its interpretation of the term "ordinary customs duties" in Article II:1(b).

As the Appellate Body upheld the Panel's finding that the charge imposed under the measures at issue was an internal charge, it also upheld that Panel‟s findings that the measures were inconsistent with China‟s obligations under GATT Article III:2. It similarly upheld the Panel‟s finding that the measures accorded imported auto parts "less favourable treatment than like domestic auto parts", in violation of GATT Article III:4.

Alternative ruling: whether measures impose "ordinary customs duties" above China's bound rate

The Panel had made an alternative finding under GATT Article II. It ruled that even if the charge was an "ordinary customs duty" rather than an internal measure, it was in violation of GATT Article II:1(b) because it exceeded the level specified in China‟s tariff schedule. The Appellate Body noted that the Panel made these findings on the assumption that it may have erred in concluding that the charge was an internal charge. However, as the Appellate Body had found that "the Panel properly characterized the charge imposed under the measures at issue as an internal charge, and properly found the measures at issue to be inconsistent with China's obligations under the first sentence of Article III:2 of the GATT 1994", it found "no reason to examine the Panel's alternative findings under Article II:1(a) and (b)."

China's Working Party Report commitments: Panel ruling overturned

The complainants also challenged China‟s imposition of the charge on so-called "completely knocked down" (CKD) kits and "semi knocked down" (SKD) kits. (CKD kits are auto parts imported together in unassembled condition that can be used to manufacture a whole vehicle, while SKD kits include parts and components that have already been assembled.) The Panel found that the term "motor vehicles" in China‟s tariff schedule did not preclude CKD and SKD kits. Therefore, the Panel ruled that "the complainants have not proved that China's tariff treatment of CKD and SKD kits…is inconsistent with China's obligation under Article II:1(b) of the GATT 1994." This finding was not appealed.

However, the Panel did find a violation of a provision of the Working Party Report for China‟s accession. Paragraph 93 of the WPR states in part that "China had no tariff lines for completely knocked-down kits for motor vehicles or semi-knocked down kits for motor vehicles. If China created such tariff lines, the tariff rates would be no more than 10 per cent. The Working Party took note of this commitment."

The Appellate Body recalled that the Panel proceeded on the basis that the commitment made by China in Working Party Report was "enforceable in WTO dispute settlement proceedings and should be

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interpreted in accordance with the customary rules of interpretation", as codified in the Vienna Convention on the Law of Treaties. It added that, "[n]either of these propositions has been disputed at any point in these proceedings, including in this appeal."

However, the Appellate Body found that the Panel had misconstrued the measure at issue. China argued on appeal that the Panel erred in its conclusion that the measure imposed a charge on importers of CKD and SKD kits who declared and paid duties at the border. In China‟s view, the challenged measure exempted imports of CKD and SKD kits from both the administrative procedures and the charge that would otherwise apply. The Panel had concluded that the exemption invoked by China relieved importers of CKD and SKD kits only of their obligations to comply with the various administrative requirements under the measures, but not from the imposition of the charge. The Appellate Body disagreed, concluding that the measure "does not indicate that importers of CKD and SKD kits are exempted from only the administrative procedures, while remaining subject to the charge, under the measures [original emphasis]." The Appellate Body consequently reversed the Panel's finding that the measure was inconsistent with the China‟s WPR commitment.

The decision of the Appellate Body in China – Measures Affecting Imports of Automobile Parts (DS339/340/342) was released on December 15, 2008.

Agriculture, NAMA Chairs Release Revised Doha Texts

Summary

On December 6, 2008, the Chairs of the World Trade Organization"s (WTO) Agriculture and Non-Agricultural Market Access (NAMA) negotiating groups issued revised Agriculture and NAMA draft "modalities" texts as part of the Doha Round of multilateral negotiations. The texts are revisions of drafts that the Chairs previously circulated in July 2007, February 2008, May 2008, and July 2008, and they reflect what might be agreed for cutting tariffs and trade-distorting agricultural subsidies, and other related provisions. We analyze below the revised Agriculture and NAMA texts.

The December revised Agriculture text can be found at:
http://www.wto.org/english/tratop_e/agric_e/chair_texts08_e.htm.

The December revised NAMA text can be found at:
http://www.wto.org/english/tratop_e/markacc_e/markacc_chair_texts07_e.htm.

Analysis

On December 6, 2008, the Chairs of the WTO Agriculture and NAMA negotiating groups issued revised Agriculture and NAMA draft "modalities" texts. The texts are the latest revisions of drafts that the Chairs previously circulated in July 2008, and they reflect what might be agreed for cutting tariffs and trade-distorting agricultural subsidies, and other related provisions. As before, the papers were circulated simultaneously because of the strong political linkage established by WTO Members between these two negotiations.

IV. Agriculture Text

The December 6 Agriculture text does not differ greatly from the July 10 draft, and includes all three pillars: domestic support, export competition and market access. We highlight below some of the language included in the December text:

- **Tariff Cuts.** Agriculture Chairman Crawford Falconer's December revised draft maintains the same range of proposed cuts in farm tariffs and subsidies, and includes a minimum average agriculture tariff cut of 54 percent for developed countries. The text proposes tariff cuts for developed countries of 50 percent on products with the lowest tariffs (*i.e.,* tariffs of 20 percent or less) to 66-73 percent cuts in the highest tariff band (*i.e.,* tariffs above 75 percent). Developing countries would need to accept cuts of two-thirds of those for developed countries, including tariff cuts of 33 percent on

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products with the lowest tariffs (*i.e.,* for tariffs of 30 percent or less) and tariff cuts between 44-48 percent on products with the highest tariffs (*i.e.,* tariffs above 130 percent).

- **Domestic Support.** According to figures provided in the December text, the European Union would cut its overall trade-distorting supports by 80 percent, the United States and Japan by 70 percent and remaining WTO Members by 50 percent. The EU, the United States and Japan will include a "down payment" of a 33 percent cut. The text states that industrialized countries are required to make their cuts in five equal installments, whereas developing countries will have up to eight years to make their cuts. The December text remains similar to the July text with regard to the "Amber box" of trade-distorting programs and product-specific payments.

- **Sensitive Products.** According to Agriculture Chair Crawford Falconer, the December text is "more clear" than the July text, although there is still no agreement on "sensitive" products among WTO Members. Chairman Falconer outlined the possibilities of "how to fix this" lack of agreement in a separate document. The December text proposes that developed WTO Members be allowed to designate up to four percent of their tariff lines as sensitive, therefore qualifying for lower tariff reductions. The text notes that Japan and Canada do not agree with this figure. For developed WTO Members with more than 30 percent of their tariff lines subject to the top band of tariff cuts, the draft proposes that they may increase the number of "sensitive products" by two percent (*i.e.*, a six percent designation allowance). The text states that developing WTO Members will have the right to designate up to one-third more than developed WTO Members of tariff lines as "sensitive products."

- **Special Products.** The text proposes that developing countries be entitled to self-designate "special products" guided by indicators "based on the criteria of food security, livelihood security and rural development." The text notes that for these developing countries, 10-13 percent of tariff lines will be eligible for self-designation as special products with up to five percent of lines eligible for no cuts. The December text notes, however, that "a number of developing country Members have expressed reservations concerning the numbers specified in this [text], noting also that this may be affected by what is decided in other areas of the text."

- **Special Safeguard Mechanism (SSM).** On the SSM – the issue that many observers felt led to the collapse of the July 2008 Ministerial meeting – Chairman Falconer stated that WTO Members have made some progress although "it is uneven . . . fragile" progress. The December text states that a price-based and a volume-based SSM will be made available, although "in no circumstances may any product be subject to the simultaneous application of price – and volume-based safeguards."

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- **Volume-based SSM.** The volume-based SSM will be applied on the basis of a rolling average of imports in the preceding three-year period ("base imports"). Where the volume of imports during any year exceeds 110 percent but does not exceed 115 percent of base imports, the maximum additional duty that may be imposed on applied tariffs will not exceed 25 percent of the current bound tariff or 25 percentage points, whichever is higher. Where the volume of imports during any year exceeds 115 percent but does not exceed 135 percent of base imports, the maximum additional duty that may be imposed on applied tariffs will not exceed 40 percent of the current bound tariff or 40 percentage points, whichever is higher. Where the volume of imports during any year exceeds 135 percent of base imports, the maximum additional duty that may be imposed on applied tariffs will not exceed 50 percent of the current bound tariff or 50 percentage points, whichever is higher. Where, formally, these triggers could be met, but the absolute level of imports is manifestly negligible in relation to domestic production and consumption, remedies would not be applied. The volume-based SSM may be maintained for a maximum period of 12 months from the initial invocation of the measure, unless a seasonal product is involved, in which case the SSM will apply for a maximum of six months or to cover the period of actual seasonality, whichever is the longer.

- **Price-based SSM.** The price-based SSM will be applicable where the import price of the shipment entering the customs territory of the developing country Member, expressed in terms of its domestic currency falls below a trigger price equal to 85 percent of the average monthly MFN-sourced price for that product for the most recent three-year period preceding the year of importation for which data are available, provided that the developing country Member's domestic currency has at the time of importation depreciated by at least 10 percent over the preceding 12 months against the international currency or currencies against which it is normally valued. The price-based SSM remedy will apply on a shipment-by-shipment basis, and the additional duty will not exceed 85 percent of the difference between the import price of the shipment concerned and the trigger price.

- **Tropical and Diversification Products.** On tropical and diversification products, Chairman Falconer stated that the December text remains the same as the July text, even though some progress had been made on this sensitive issue by WTO Members. According to the text, WTO Members will apply either of the following modalities for those tropical and diversification products attached in an

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annex to the text: (i) where the scheduled tariff is less than or equal to 25 percent ad valorem, it shall be reduced to zero, and where it is greater than 25 percent ad valorem the applicable tariff cut shall be 85 percent; or (ii) where the tariff is greater than or equal to 10 percent, it shall be reduced by 85 percent, except for tariffs in the top band which shall be reduced by the tariff escalation tariff cut for that band increased by two ad valorem points, and where the tariff is less than 10 percent, it shall be reduced to zero.

- **Cotton.** Regarding cotton, another highly contentious issue, Chairman Falconer noted that although WTO Members have engaged in "a good dialogue and a sense of trust" on cotton since the collapsed July Ministerial meeting, there is still no agreement on what the final text will include.

V. NAMA Text

Like the Agriculture text, the December 6 NAMA text does not differ greatly from the July 10 NAMA draft. We highlight below some of the language included in the December text:

- **Tariff Cuts.** The December text by Chairman Luzius Wasescha suggests a Swiss formula coefficient (under the Swiss formula, the lower the coefficient, the greater the tariff cuts, with the coefficient also determining the maximum tariff) of eight for developed countries. For developing countries, the revised text suggests three coefficients: (i) 20; (ii) 22; and (iii) 25. According to the draft, developing countries that are prepared to accept a coefficient of 20 would be allowed to shield 14 percent of their industrial tariff lines from the formula cuts as long as the products concerned do not exceed 16 percent of the total value of industrial imports. Alternatively, these countries would have the flexibility to exempt 6.5 percent of tariff lines from the formula cuts altogether, provided that the total trade value does not exceed 7.5 percent of total imports. Developing countries prepared to accept a coefficient of 22 would be eligible to shield 10 percent of their industrial tariff lines from the formula cuts, applying instead half the agreed cuts, with total value of imports not exceeding 10 percent of the total value of industrial imports; or these countries could exempt five percent of industrial tariff lines from any tariff cut as long as their total value of imports did not exceed five percent of total imports. Developing countries that are only prepared to accept a coefficient of 25 would have no flexibilities. Developed Members will implement their tariff reductions in five years, and developing Members will implement their tariff reductions in 10 years, except as otherwise provided.

- **Flexibilities.** Chairman Wasescha identifies country-specific flexibilities as an outstanding issue that needs further work. The December text states that developing Members with a binding coverage of non-agricultural tariff lines of less than 35 percent will be exempt from making tariff reductions

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through the Swiss formula. Instead, developing Members with a binding coverage of non-agricultural tariff lines below 15 percent will bind 75 percent of non-agricultural tariff lines, and those Members at or above 15 percent will bind 80 percent of non-agricultural tariff lines. The December text continues to provide special flexibilities for members of the Southern Africa Customs Union (SACU) and the Southern Common Market ("Mercosur"), although the text does not explicitly define these flexibilities. The text also contains flexibilities for "small, vulnerable economies" (*i.e.*, those Members having a share of less than 0.1 percent of world NAMA trade for the reference period of 1999 to 2001) and for recently acceded Members (RAMs). For RAMs, the text states that that these countries receive an additional three years to implement the agreed-to cuts, and that Albania, Armenia, Cape Verde, Macedonia, Kyrgyz Republic, Moldova, Mongolia, Saudi Arabia, Tonga, Vietnam and Ukraine will not be required to undertake tariff reductions beyond their accession commitments.

- **Non-Tariff Barriers (NTBs).** The December text, like the July 10 revision, contains a shortlist of seven proposals which WTO Members would agree merit "particular attention in text-based negotiations in order to achieve substantive NTB results." The short-list is followed by a timetable for the conclusion of text-based negotiations for legal revision before the submission of the final draft schedules, *i.e.* during the post-modalities phase.

- **Anti-Concentration.** The December text includes an anti-concentration clause, to avoid excluding entire sectors from tariff cuts. A minimum of 20 percent of tariff lines or nine percent of the value of imports in each tariff chapter would be subject to the full formula tariff reduction.

- **Sectoral Agreements.** Chairman Wasescha identifies sectoral tariff elimination initiatives as an outstanding issue that needs further work, and stated that "even though the included text is accepted as a basis for further work, we are far from a consensus among Members." The December text contains bracketed text that states that sectoral tariff reduction initiatives aim to reduce, harmonize or eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs and tariff escalation. The draft states that participation in sectoral initiatives is on a non-mandatory basis. There are 14 sectors currently under consideration: Automotive and related parts; Bicycles and related parts; Chemicals; Electronics/Electrical products; Fish and Fish products; Forestry products; Gems and Jewelry products; Raw materials; Sports equipment; Healthcare, pharmaceutical and medical devices; Hand tools; Toys; Textiles, clothing and footwear; and Industrial machinery.

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VI. Cancelled Ministerial

According to sources in Geneva, WTO Director-General Pascal Lamy has cancelled plans to convene a Ministerial meeting from December 17-19, 2008 because WTO Members remain unable to resolve contentious issues in the Agriculture and NAMA negotiations. Lamy had hoped to convene the Ministerial meeting in order to inject some momentum in the multilateral negotiations and in an effort to get WTO Members to return to the negotiating table with new offers.

According to Lamy, the special safeguard mechanism in the Agriculture negotiations and the proposed sectoral agreements in the NAMA talks are main issues of contention between developing and developed WTO Members. Lamy has "not detected the political drive . . . to make the moves which would give the final push to the establishment of modalities on these two issues," and he opined that "there was no readiness [among WTO Members} to spend the political capital needed." Lamy also stated that convening WTO Members in an effort to finalize modalities by the end of 2008 could result in failure which in turn could damage the Doha Round and the WTO system.

In making his announcement on the Ministerial meeting, Lamy did provide a 48-hour "safety" window for any "dramatic changes" in WTO Members‟ negotiating proposals which could result in a last-minute Ministerial meeting. The view in Geneva, however, is that the "gaps" in negotiating positions are too large to overcome in such a short timeframe, and observers opine that it is unlikely that a breakthrough will occur that in turn could spur a Ministerial meeting. According to some reports, negotiators are now focused on developing a 2009 work program in order to continue the Doha negotiations next year.

Reaction from WTO Members to Lamy‟s announcement was muted. United States Trade Representative (USTR) Susan Schwab stated that "the United States has shown flexibility repeatedly in the past several weeks to achieve the convergence among WTO Members necessary to convene a Ministerial" and noted that although she was disappointed in the outcome, "due to numerous outstanding issues voiced by several WTO Members, it became apparent that the gaps were too large to bridge at this time." EU Trade Commissioner Catherine Ashton stated that WTO Members must "safeguard what has been agreed and not abandon our efforts to conclude this agreement soon." Brazilian official Roberto Azevedo added that it was important to bring trade ministers to Geneva to make an "evaluation" of the ongoing work as well as prepare the ground for future work. Australia, however, criticized Lamy‟s decision, and Australian officials opined that enough groundwork had been laid that would have justified convening a Ministerial.

Reaction in the United States was more vocal. Members of the US Congress that opposed the Ministerial meeting (*please see our December 11, 2008 alert for further details*) – including key legislators on the

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Senate Finance Committee, the House Ways and Means Committee, and the Senate Agriculture Committee – lauded Lamy"s decision not to hold a meeting in Geneva, noting that WTO Members "were simply too far apart on key issues to facilitate a meeting at this time." The view in the US Congress is that legislators will work in 2009 with President-elect Barack Obama and his Administration in moving the Doha Round forward.

Outlook

The release of the revised Agriculture and NAMA texts is the first substantive move from the Committee Chairs after the collapse of the July Ministerial meeting and comes after several months of uncertainty and difficult negotiations. Although the December texts seem to have solidified some of the previously bracketed text and figures that appeared in the July versions, the lack of substantive change in both texts indicates that significant differences still remain between WTO Members on several important issues, including the SSM and cotton in the Agriculture negotiations, and sectoral negotiations in NAMA. Observers had initially opined that the November 15 Group of 20 meeting in Washington DC – where world leaders pledged to move the Doha negotiations forward – would spur some momentum in the multilateral talks, but consultations over the last month and the cancelled Ministerial meeting have demonstrated that WTO Members remain entrenched in their positions, thus requiring further work and negotiation in 2009.

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Multilateral Highlights

Canada, Mexico Request WTO Consultations Over US Country of Origin Requirements

On December 1, 2008, Canada informed the World Trade Organization (WTO) Dispute Settlement Body (DSB) that it was beginning consultations with the United States over the Country of Origin Labeling (COOL) provisions included in the US Agricultural Marketing Act of 1946 as amended by the Food, Conservation and Energy Act of 2008 ("the 2008 Farm Bill"), which took effect on September 30, 2008 (DS384).

In its request for consultations, Canada argues that US COOL requirements discriminate against Canadian exporters because the regulations, among other things, make it mandatory to inform consumers at the retail level of the country of origin of COOL-covered commodities, including beef, pork, lamb, chicken, and goat meat, as well as certain perishable commodities. Specifically, Canadian officials are concerned that the requirements to separate COOL-covered products into three categories, based on the country or countries where they are produced, will impose additional costs at each stage of the production process, and that the additional costs could create a disincentive to purchasing Canadian beef or pork. Canada also argues that under COOL regulations, "the eligibility for a designation of a covered commodity as exclusively having a US origin can only be derived from an animal that was exclusively born, raised and slaughtered in the United States, which would exclude such a designation in respect of beef or pork derived from livestock that is exported to the United States for feed or immediate slaughter." According to Canada, the mandatory US COOL regulations are inconsistent with several WTO agreements, including: (i) Articles III:4, IX:4, X:3 of the General Agreement on Tariffs and Trade (GATT) 1994; (ii) Article 2 of the WTO Agreement on Technical Barriers to Trade ("the TBT Agreement") or, in the alternative, Articles 2, 5 and 7 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures ("the SPS Agreement"); and (iii) Article 2 of the WTO Agreement on Rules of Origin.

On December 12, 2008, Mexico requested to join the consultations over the US COOL requirements for beef, pork, lamb, chicken, and goat meat, as well as certain perishable commodities. In its request to join consultations, Mexico stated "an increased interest on this dispute due to increased trade flows between Mexico and the United States." The countries will now consult and if consultations fail to resolve the dispute within 60 days, Canada and Mexico may request that the WTO DSB establish a panel to determine whether the United States is acting consistently with its WTO obligations.

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Canadian agricultural producers, including the Canadian Pork Council, applauded the Government of Canada's request for consultations. Canadian producers have already complained that the COOL requirements are hurting exports, and that since the implementation of the measures in September, US livestock buyers have announced their intent to curb or even cease purchasing animals born outside of the United States. Canadian officials note that Canada submitted comments on country-of-origin labeling to the US Department of Agriculture's in previous years, and that Canada‟s most recent comments, submitted in September 2008, requested flexibility in applying the final rule for country-of-origin labeling to minimize any disruptions for Canadian industry. The Office of the United States Trade Representative (USTR) stated that it was closely reviewing both the Canadian and Mexican claims, and that the United States would consult with both countries in an effort to settle the dispute.

Doha Rules Chair Releases New Draft Rules Text Containing Points of Divergence, Contention Among WTO Members

On December 19, 2008, Chairman of the World Trade Organization (WTO) Doha Negotiating Group on Rules Guillermo Valles Galmes circulated new negotiating texts on anti-dumping and horizontal subsidies disciplines, and a conceptual "roadmap" on fisheries subsidies. According to Ambassador Valles Galmes, the new documents – a revision of May 2008 draft texts – are intended to provide a platform for further discussions among WTO Members. The Rules Chair plans to convene a series of meetings in 2009, the first of which is scheduled for the week of February 2, 2008. The December draft text can be found at: http://www.wto.org/english/tratop_e/rulesneg_e/rules_dec08_e.doc.

Ambassador Valles Galmes stated that the anti-dumping and subsidies texts are based on a "new, bottom-up approach" wherein draft legal language is provided only in those areas where some degree of convergence appears to exist. He noted that in other more contentious areas – such as "zeroing" – the issues are identified and a brief summary of the range of views expressed is included in brackets. Regarding fisheries subsidies, Ambassador Valles Galmen chose to issue a conceptual roadmap for further discussions as opposed to a new draft. He noted that the roadmap identifies the key questions that the Negotiating Group will need to address to reconcile participants‟ different approaches to disciplining subsidies that contribute to over-capacity and overfishing while formulating appropriate and effective special and differential treatment that addresses the interests and concerns of developing Members.

The December draft Rules text addresses several contentious issues in the Doha negotiations, including:

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- **Review of Anti-dumping Policies.** The December text states that WTO Members‟ anti-dumping policy and practices will be subject to periodic review by the WTO, and that "the purpose of the review is to contribute to the transparency and understanding of Members' policies and practices in respect of anti-dumping; [the] review is not intended to serve as the basis for enforcement of specific obligations under this Agreement or for dispute settlement procedures, or to impose new policy commitments on Members." The draft text includes procedures for reviews, a list of factors of Members‟ anti-dumping policies that will be examined (*e.g.*, institutional organization of the investigating authorities, statistics on proceedings carried-out, calculation of dumping margin, details and methodology of analysis and determination of injury and causal link, etc.), and provisions on technical assistance for developing Members. According to the text, the first cycle of reviews will begin three years after the date of entry into force of the results of the Doha Development Agenda. During the ensuing five years, the WTO will review the anti-dumping policies and practices of the 20 Members with the most anti-dumping measures in force as of the date of entry into force.

- **Zeroing.** Whereas previous versions of the Rules draft text addressed the United States‟ use of the "zeroing" methodology in antidumping investigations, the December draft text contains bracketed language that states that WTO Members "remain profoundly divided on this issue [and] positions range from insistence on a total prohibition of zeroing irrespective of the comparison methodology used and in respect of all proceedings to a demand that zeroing be specifically authorized in all contexts." Zeroing will likely serve as the most contentious point of debate among WTO Members in 2009.

- **Anti-Circumvention.** The December draft text contains bracketed language that states that WTO Members disagree as to whether there should be specific rules on anti-circumvention. Some Members consider that the only appropriate reaction to perceived circumvention is to seek initiation of a new investigation, whereas other Members consider that rules on anti-circumvention are necessary to achieve harmonization among the procedures used by different Members. WTO Members also disagree whether findings of dumping, injury and causation should be required and whether anti-circumvention measures should be company-specific or country-wide.

- **Sunset Reviews.** The draft text contains bracketed language that states that WTO Members have differing views regarding aspects of the sunset issue, specifically as to whether there should be any automatic termination of measures after a given period of time and, if so, after how long. Some WTO Members favor automatic termination after five years without any possibility of extension whereas others reject the principle of automatic termination altogether. Other issues dividing WTO Members

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include whether there is a need for additional standards and criteria governing sunset determinations, what rules should apply to the initiation of sunset reviews, and the timeframes for completion of investigations.

- **Third Country Dumping.** The draft text includes bracketed language on third country dumping. The text notes that some WTO Members believe that the current rules are unworkable, whereas other WTO Members "question whether it is desirable to operationalise this provision at all, with one delegation preferring that the provision be deleted entirely."
- **Causation of Injury.** The December text contains bracketed language that states that WTO Members maintain a wide range of views on issues such as whether it should be mandatory to separate and distinguish the effects of dumped imports and other factors, the extent to which authorities should be required to conduct a quantitative (as opposed to qualitative) analysis of non-attribution, and the extent to which authorities should be required to weigh the injurious effects of dumped imports against the effects of other factors.
- **Material Retardation.** The text contains bracketed language that states that WTO Members believe provisions regarding material retardation should be clarified. The text also states that WTO Members differ on how to best clarify material retardation provisions; whereas some Members believe that an industry might still be in establishment even if there was some domestic production, other Members consider that once there is any domestic production an industry is no longer "in establishment," "and in such cases the proper analysis is one of current injury or threat."
- **Public Interest.** The text contains bracketed language on public interest and lesser duties, and states that WTO Members "are sharply divided on the desirability of a procedure to take account of the representations of domestic interested parties when deciding whether to impose a duty." Some WTO Members believe that such a procedure would impinge on Members' sovereignty and would be costly and time-consuming, whereas others support inclusion of such a procedure. On lesser duty, many WTO Members support inclusion of a mandatory lesser duty rule whereas opponents to such a provision opine that it is not possible to calculate an injury margin.
- **Fisheries Subsidies.** As noted, the December 2008 text does not contain new text on fisheries subsidies and instead contains a conceptual roadmap for further discussions. The roadmap identifies the key questions that the Negotiating Group will need to address to reconcile participants‟ different approaches to disciplining subsidies.

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- **Other Issues.** The December text also contains bracketed language noting WTO Members‟ lack of convergence on a number of other issues, including export credits (market benchmarks and successor undertakings), special differential treatment, technical assistance, and export competitiveness, among other issues.

The revised Rules text arrived two weeks after the Chairs of the Doha Agriculture and Non-Agricultural Market Access (NAMA) Negotiating Groups released separate revised draft texts that also included points of divergence in the Agriculture and NAMA talks. The lack of movement in the Doha negotiations as exhibited in these draft texts convinced WTO Director-General Pascal Lamy to cancel a proposed mid-December Ministerial meeting, effectively canceling out any hopes that WTO Members would be able resolve several of their differences before the end of 2008. The Doha Negotiating Groups now appear to be developing their 2009 work plans, and will likely pick up negotiating activity in January 2009.

US Legislators Urge Administration to "Stand Firm" in Doha Negotiations

In a December 2, 2008 letter to President Bush, Senate Finance Committee Chairman Max Baucus (D-MT), Senate Finance Committee Ranking Member Charles Grassley (R-IA), House Ways and Means Committee Chairman Charles Rangel (D-NY), and outgoing House Ways and Means Committee Ranking Member Jim McCrery (R-LA) urged the Bush Administration to stand firm in the Doha Round negotiations at the World Trade Organization (WTO). The letter‟s signatories expressed their concern that the WTO proposals Members have tabled will not provide new market access for US agriculture and industrial goods, and they caution US negotiators against making concessions to secure a final deal by the end of 2008 that could be "harmful" to US interests. The letter comes after the November 15, 2008 G-20 Summit on Financial Markets and the World Economy where world leaders called on the WTO to strive to reach an agreement in the Doha Round by the end of 2008.

In their letter, the legislators stated that US negotiators should "not allow the calendar to drive the negotiations through efforts to hastily schedule a ministerial meeting, without adequate groundwork having been laid," referring to a mid-December Ministerial meeting in Geneva that WTO Director-General Pascal Lamy was considering; observers opine that the Ministerial meeting is now unlikely to occur because of differences in negotiating positions between WTO Members, and because of skepticism from several Members that a Ministerial will do little to resolve these differences. The legislators also stated that "developed and advanced developing countries must commit to provide meaningful new market access opportunities if Congress is to support a deal [and] if key trading partners are unwilling to do so at this time, then negotiations on a modalities package cannot conclude." The legislators suggested

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"revisiting" the US modalities approach, and stated that in order "to win Congressional support, any outcome to these negotiations must serve to facilitate meaningful increases in international trade flows and further strengthen the rules-based system of international trade."

On December 8, 2008, legislators, including 12 Senate Agriculture Committee Members, sent a similar letter to President Bush, expressing their "serious concern about the direction of global agricultural trade negotiations in Geneva." The letter"s signatories opined that the potential Agriculture modalities framework under consideration in Geneva "is not sound or balanced from the perspective of US agriculture," and they noted that other WTO Members have not responded adequately to US offers and that "key developing country trading partners have demanded even further concessions from the United States without responding on market access." The legislators also warned that a final Doha agreement that does not address their concerns will "fail to win support in the Congress," and they urged US negotiators to reject calls for further US concessions and instead push WTO Members for further offers that could offer "very substantial gains for US agriculture." Signatories to the letter include Senate Agriculture Committee Chairman Tom Harkin (D-IA), Agriculture Committee Ranking Member Saxby Chambliss (R-GA), and 20 other Senators, including ten Members of the Senate Agriculture Committee.

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