WHITE & CASE

September 2008

Japan External Trade Organization
WTO and Regional Trade Agreements Monthly Report

IN THIS ISSUE

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

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Summary of Reports

United States

US and China Convene 19th JCCT Meeting; Produce Few Significant Deliverables

The United States and China recently concluded the 19th session of the Joint Commission on Commerce and Trade (JCCT). The talks covered a number of issues including agriculture, government procurement, healthcare, intellectual property rights (IPR), services, and software and information technology (IT). US and Chinese officials failed to produce any key deliverables, but the two sides were able to reach agreements on several smaller matters. These included, among others, the lifting of a Chinese import ban on certain US poultry products, a reduction in China's telecommunications market capitalization requirements, and an agreement to sign two memoranda of understanding (MOU) on copyright and trademark protection and enforcement. China also committed to submit a revised offer to join the Government Procurement Agreement (GPA), regularly update its national and regional pharmaceutical reimbursement lists, and eliminate redundancies on medical device testing and approval. We summarize herein the key points of the officials' discussions during the meetings and further detail the main outcomes.

United States Highlights

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

- Congress Approves GSP, ATPA Extension But Provides Shorter Extension, Conditions for Bolivia, Ecuador
- Legislators Introduce New Climate Change-Based "Emissions Allowance" Bill
- Industry Groups Oppose Possible "Byrd Amendment" Revival in Congress
- Senate Finance Committee Leaders Introduce "International Intellectual Property Protection and Enforcement Act of 2008"

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Free Trade Agreements

US, Colombian and Korean Officials Discuss Pending FTAs

On September 17, 2008, the Global Business Dialogue (GBD) and the Korea Economic Institute (KEI) jointly hosted a panel discussion on the United States' three pending free trade agreements (FTAs) with Colombia, Korea and Panama. Discussants included United States Undersecretary of Commerce Christopher Padilla, Colombian Minister for Trade, Industry and Tourism Luis Guillermo Plata, and Minister for Economic Affairs at the Korean Embassy in Washington Seok-yong Choi. In their remarks, the officials considered the status of the pending agreements and their chances of Congressional consideration and approval, which remains uncertain. The US House of Representatives in April 2008 suspended a timetable under the now-expired Trade Promotion Authority (TPA) which would have required an up or down vote on the Colombia agreement. The Bush Administration has expressed hesitancy to submit the Korea and Panama FTAs for consideration without assurance from House Democratic leadership that it will not take a similar action with respect to those two agreements. Although some observers speculate that Congress might vote on the three FTAs during a "lame duck" session following the November 2008 elections, it is unclear whether Congress will convene such a session. The Administration remains confident that the bipartisan votes needed to pass the agreements exist, but such support could prove irrelevant unless the current Congress agrees to grant the FTAs an up or down vote before a new Congress begins its term in January 2009.

Free Trade Agreements Highlights

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

- US and Uruguayan Officials Discuss Trade, Investment Ties Under TIFA; Sign Protocols to Strengthen Partnership
- United States Announces US – Trans-Pacific Strategic Economic Partnership FTA Negotiations; Talks to Begin in Early 2009
- Costa Rica Missed October Deadline to Implement DR-CAFTA
- Fate of US-Colombia FTA Remains Uncertain; Could Hinge on Lame Duck Session, Trade Adjustment Assistance
- United States to Negotiate BIT with Georgia
- United States to Sign TIFA with Libya

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Customs

We would like to alert you to the following Customs highlights:

- Homeland Security Secretary Criticizes Cargo Scanning Requirement

Multilateral

WTO Establishes Panel to Examine EU Tariffs on Certain IT Products; EU Proposes to Update and Expand WTO ITA

On September 23, 2008 the World Trade Organization (WTO) Dispute Settlement Body (DSB) established a panel to determine whether the European Union is in compliance with the WTO Information Technology Agreement (ITA) in imposing tariffs on certain information technology (IT) products. The measure is the result of complaints by Taiwan, Japan, and the United States about EU tariffs on imports of cable and satellite boxes that can access the internet, flat panel computer monitors, and computer peripherals such as printers or copiers. The panel is now expected to issue a decision within six months and the DSB to approve this decision within nine months after the appointment of the panel.

WTO Panel Releases Decision in United States – *Continued Existence and Application of Zeroing Methodology* (DS350)

Decision: A World Trade Organization (WTO) Panel has ruled that the United States acted inconsistently with its WTO obligations when it used "zeroing" in original investigations and reviews of anti-dumping orders on EC products. The Panel showed a clear reluctance to find that zeroing during reviews breached the Anti-Dumping Agreement, and made such a ruling only in light of a clear line of Appellate Body decisions on this issue.

China Requests WTO Consultations on US AD/CVDs on Four Chinese Products

On September 19, 2008, the Government of China requested World Trade Organization (WTO) consultations with the United States regarding US definitive anti-dumping and countervailing duties imposed on imports of four Chinese products. China's request alleges that the Untied States' failed to determine that Chinese state-owned enterprises and commercial banks are public entities that directed the provision of subsidized goods and services to the producers of these products. China further challenged the United States' determination that the Chinese government provided land and land use rights to specific producers at subsidized rates. China also questioned the WTO-compliance of the third-

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country "benchmark" methodology that the United States used to determine the existence and amount of the alleged subsidies, and the United States' application of Non-market Economy (NME) methodology to simultaneously determine the alleged dumping margins and subsidy rates for imports of the four products. If the two sides fail to reach a resolution of these and the other issues cited in China's request within 60 days of China's filing the request, China may request the formation of a Panel to review the facts of the case. China has made WTO consultation requests against the United States twice before: once in 2002 regarding US safeguards on Chinese steel imports (DS252) and again in 2007 regarding preliminary anti-dumping and countervailing duty determinations on imports of Chinese coated paper (DS368).

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Reports in Detail

United States

US and China Convene 19th JCCT Meeting; Produce Few Significant Deliverables

Summary

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Analysis

Background

The US and Chinese governments established the JCCT in 1983 as an annual high-level mechanism to improve commercial ties and as a vehicle to resolve trade disputes. Both sides expanded the dialogue in 1997 to include sub-ministerial and working group-level dialogues that continue throughout the year. The JCCT contains a number of subcommittee-level dialogues and working groups to address specific issues such as IPR, medical devices and pharmaceuticals, steel and high technology and strategic trade. China and the United States last convened the JCCT in December 2007 in Beijing.

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Outcomes

On September 16, 2008, US and Chinese government officials met in Yorba Linda, California for the 19th JCCT Meeting. Although the talks produced a number of smaller concrete outcomes, they failed to produce any key deliverables on either side. We summarize below the main developments that occurred during the talks.

- **Agriculture.** Key developments in the agricultural sector included China's announcement that it had lifted avian influenza-related import bans on poultry products from six US states (China continues to maintain bans on imports from two states). The two sides agreed to continue cooperation on sanitary and phytosanitary (SPS) and other issues through expert level discussions and the JCCT Agriculture and SPS Working Groups, which both met prior to the 19th JCCT meeting. Despite these developments, US officials who participated in the talks cited continued dissatisfaction with China's failure to apply internationally-accepted scientific standards in agricultural matters; thus, issues such as China's treatment of US imports of beef, poultry and other agricultural imports are likely to remain a topic of discussion in future JCCT and other bilateral talks.
- **Government Procurement.** Regarding China's ongoing negotiations to join the GPA, Chinese officials confirmed that the government would submit a revised offer to the World Trade Organization (WTO) soon. China submitted its application to join the GPA and its initial offer to do so in December 2007. USTR responded to China's offer by requesting that China lower thresholds for goods and services and expand coverage to include additional central and sub-central government entities. During the JCCT, US officials reportedly continued to encourage China to submit its revised offer as soon as possible. US government figures estimate China's government procurement market to be worth some USD 35 billion annually. Also during the JCCT meetings, officials agreed to ensure that each country's foreign-invested firms were able to participate in their respective government procurement markets.
- **Healthcare.** Discussions on healthcare focused mainly on pharmaceuticals and medical devices, and produced concrete outcomes on both issues. On pharmaceuticals, officials agreed to continue cooperation to eliminate bulk sales of chemicals used as active pharmaceutical ingredients (APIs). This agreement follows a similar commitment China made during the 18th JCCT to close loopholes in its regulation of bulk sales of API chemicals, which may be used to produce counterfeit pharmaceutical products. China also agreed to comprehensive biannual updates of its National and Regional Drug Reimbursement Lists. Only products included in the lists are eligible for reimbursement under state insurance plans, making drugs not included in the lists more costly

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alternatives for Chinese consumers. Notably, Chinese regulations already require such updates; however, 2004 was the most recent year in which the list was reviewed. US pharmaceutical manufacturers expect that more timely updates of the list will increase market access for new products. On medical devices, Chinese regulatory authorities announced that they would eliminate redundancies in the testing of medical devices by requiring only a single test, report, fee, and factory inspection in granting approval to the devices. The National Development and Reform Commission (NDRC) also agreed to consider input from US government and industry stakeholders in developing pricing policies for medical devices. According to officials who participated in the talks, US industry has expressed concern that pricing policies under consideration might require the disclosure of proprietary information.

- **Intellectual Property Rights (IPR).** The two sides also agreed to sign by year-end two MOUs to cooperate to improve the administration and effectiveness of copyright and trademark protection and enforcement. US officials who participated in the talks noted that their Chinese counterparts demonstrated a greater willingness to discuss IPR issues than they had in earlier meetings. According to the officials, since USTR's April 2007 request for WTO consultations over China's alleged inadequate enforcement of IPR, their Chinese counterparts have been reluctant to discuss IPR issues during bilateral meetings. The opening of the 18th JCCT talks was reportedly delayed by disagreement between the two sides over the WTO case on IPR.
- **Services.** One key services-related development was China's announcement immediately prior to the JCCT meeting that it had lowered the basic telecommunications capitalization requirement to RMB 1 billion (USD 146 million) from RMB 2 billion (USD 292 million). China had agreed to lower this requirement, which telecom firms must meet to enter the Chinese market, during the 18th JCCT in December 2007. Although US government sources close to the talks indicated that they were pleased with the announcement, they will continue to seek a further reduction in China's capitalization requirement, which they argue is still higher than international norms.
- **Software and Information Technology (IT).** Chinese officials clarified their government's policies regarding software purchases by state- and privately-owned enterprises and confirmed that both types of enterprises would have the autonomy to purchase software based on market considerations and without government direction. A number of US high-tech firms have expressed concerns to the US government regarding the possible interplay between China's management of its state-owned enterprises (SOEs) and the promotion of the government's innovation policy, which aims to promote the domestic development of software and other high-tech goods. Many US firms fear that the

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Chinese government might seek to direct SOEs to purchase only domestically-innovated versions of such products. The Chinese side also agreed to delay the publication of regulations on standards for 13 IT products. US investors have reportedly expressed concern that the standards might require them to disclose proprietary information such as source code or other sensitive intellectual properties. US officials who participated in the talks were uncertain whether the delay would result in a revision to the proposed standards but suggested that the Chinese government might consider reducing the scope of products covered by the standards.

- **China's Market Economy Status.** The two sides failed to reach an agreement on the United States' recognition of China's status as a market economy. China's Commerce Minister Chen Deming indicated that although China and United States appear to share similar positions, reaching a mutual understanding on the key underlying concepts related to the issue remains a sticking point. Both sides expressed a willingness to work toward recognition of China's market economy status, but discrepancies remain on specific procedures going forward. Notably, some observers suggest that the United States' designation of China as a non-market economy (NME) allows the United States to calculate relatively higher dumping margins on Chinese imports in US antidumping investigations. Since 2007, the US Department of Commerce has also applied US countervailing duty law to China, reversing a twenty-year practice of not applying the law to NMEs.
- **Other Issues.** The talks made no breakthrough on the quarantine of certain Chinese agricultural and related products due to the two countries' inconsistent standards and quarantine systems. China urged the United States to take active measures to address outstanding issues including: (i) barriers to Chinese exports of apples, pears, miniature gardens, and wooden craftwork; (ii) the US Food and Drug Administration's automatic detention of Chinese aquacultural exports; (iii) recognition of China's food export safety administration system; (iv) stricter inspection and supervision of US cotton and soybeans exported to China; and (v) bilateral cooperation on environmental protection and consumer product safety for imported and exported goods.

Outlook

The 19th JCCT occurred between significant administrative changes on both sides: it was the first time that China's Vice Premier Wang Qishan had headed the Chinese delegation to the JCCT since his election to that post in March 2008, and the final time US Commerce Secretary Carlos Gutierrez and USTR Susan Schwab were to head the US delegation under the Bush Administration, which will end as a new US President takes office in January 2009. US officials who participated in the talks opined that Vice Premier Wang's negotiating style differed from that of his predecessor, former Vice Premier Wu Yi. They

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noted that Wang demonstrated a more open and business-like style during the talks and that, in part, this contributed to a positive atmosphere. The officials also cited China's concern over the outcome of the November 2008 US Presidential election and uncertainty about the resulting change in administrations as factors that affected the talk's atmosphere; they opined that their Chinese counterparts appeared desirous to demonstrate a cooperative stance as a result of this concern and uncertainty. Given the meetings timing amidst such transitions on both sides, however, it is perhaps not surprising that the talks did not produce a large number of concrete results. It is also noteworthy that a number of the deliverables appeared to be confirmation that the Chinese government will implement commitments made in earlier JCCT meetings (*e.g.*, telecoms capitalization requirements and controls on bulk chemical sales) or regulations already in place (*e.g.*, updates to the drug reimbursement lists). The US-China Business Council (USCBC), whose membership includes more than 250 US companies that do business in China, opined that such a return to previously discussed areas suggests likely slow progress going forward.

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United States Highlights

Congress Approves GSP, ATPA Extension But Provides Shorter Extension, Conditions for Bolivia, Ecuador

On October 3, 2008, the House of Representatives approved by voice vote a bill (H.R. 7222) that would, among other things, extend the Generalized System of Preferences (GSP) program and the Andean Trade Preferences Act (ATPA) for an additional year. The Senate unanimously approved H.R. 7222 on October 2, 2008. Both GSP and ATPA are set to expire on December 31, 2008, and the House of Representatives had approved an earlier version of H.R. 7222 by unanimous consent on September 29, 2008; that version provided a straightforward year extension for the GSP and ATPA programs. The Senate, however, made amendments to H.R. 7222 that affect ATPA renewal for two of the preference program's participants – Bolivia and Ecuador. This latest incarnation of H.R. 7222 is the version of the bill that both chambers of Congress have approved. The bill now moves to the President for his signature.

Specifically, H.R. 7222 would, among other things:

- Extend the GSP program for one additional year (*i.e.*, until December 31, 2009);
- Extend the ATPA program with respect to Colombia and Peru for one additional year (*i.e.*, until December 31, 2009);
- Extend the ATPA program with respect to Ecuador for six months (*i.e.*, until June 30, 2009), followed by an automatic extension of ATPA benefits for the period July 1 – December 31, 2009 unless the President, in reviewing Ecuador's ATPA participation, determines by June 30, 2009 that Ecuador is not satisfying ATPA requirements as a beneficiary country;
- Extend the ATPA program with respect to Bolivia for six months (*i.e.*, until June 30, 2009), after which preferences will expire unless the President determines that Bolivia satisfies ATPA requirements as a beneficiary country. The President will make his decision on the extension of ATPA benefits for Bolivia for the period July 1 – December 31, 2009 by June 30, 2009 and will report his decision to Congress;
- Make changes to the African Growth and Opportunity Act (AGOA), including a repeal of an "abundant supply" requirement that restricts least-developed AGOA countries' ability to use AGOA's flexible "third country fabric" rule (which provides duty-free treatment to apparel assembled in a least-developed AGOA country regardless of the source of the fabric), and a reinstatement of Mauritius' eligibility to use AGOA's "third-country fabric" provisions;

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- Establish a “2 for 1" textile and apparel allowance program to be developed and administered by the US Secretary of Commerce under which producers who purchase a certain quantity of qualifying US fabric for apparel production in the Dominican Republic will receive a credit that can be used to ship a corresponding quantity of eligible apparel from the Dominican Republic to the United States duty-free regardless of the origin of the fabric from which the apparel product is made; and
- Make several technical corrections to AGOA and the Haitian Hemispheric Opportunity through Partnership Encouragement Act of 2008 (HOPE).

The amendments to H.R. 7222 that affect ATPA came out of a compromise between Senate Finance Committee Ranking Member Charles Grassley (R-IA) and Democratic Majority Leader Harry Reid (D-NV). Sen. Grassley has consistently criticized the participation of Bolivia and Ecuador in the ATPA program, and has expressed his dissatisfaction with the two countries’ anti-drug efforts. According to Sen. Grassley, “Peru and Colombia have pursued a strong reciprocal trading relationship with the United States and are being treated accordingly [whereas] Bolivia and Ecuador have taken different paths.”

The year-long extension of ATPA for Colombia and Peru assures that both countries receive duty-free benefits for an additional length of time as officials from both economies continue to work on their respective Free Trade Agreements (FTAs) with the United States. Peruvian officials have been working over the past year to implement the completed US-Peru FTA, and although earlier reports suggested that Peru may approve all necessary laws and regulations in order to implement the FTA by the end of 2008, recent reports suggest that Peru may need additional time to make the proper changes to assure full implementation. The fate of the US-Colombia FTA, meanwhile, remains uncertain as members of Congress wrap up work for the 110th session without the possibility of considering the agreement. Although the chances of a Congressional “lame-duck” session after the November election have increased, Congressional sources note that legislators have already indicated that they may not consider the Colombia agreement (in addition to the other pending FTAs with Korea and Panama) during that lame-duck session. Observers opine, however, that the ATPA extension likely alleviates some of the concerns raised by Colombian officials regarding the loss of duty-free benefits at the end of 2008. Bolivia and Ecuador’s ATPA participation, however, presents both countries with a more difficult scenario, as duty-free benefits are only assured for a shorter period of time, with an additional extension contingent upon certain conditions. The one year ATPA extension (with a review in six months) for Ecuador and the six-month extension for Bolivia, (after which preferences will expire unless the Administration determines the country is in compliance with ATPA regulations) will likely prove problematic to US importers that conduct business with these two countries, as they have continually sought longer-term extensions that

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provide lengthier duty-free guarantees and ensure more effective and stable business ties and transactions.

Regarding GSP, this is the second time this year that the House has voted to extend the GSP program. On July 29, 2008, the House of Representatives approved a bill (H.R. 6560) that extended the GSP program to December 2009. H.R. 6560, however, did not address the ATPA. That initial extension of the GSP program caught many observers off-guard because observers opined that Congress would be too focused on other pending legislative issues prior to GSP's expiry to vote on an extension, and that it would not turn to GSP and other preference programs until later in the year. Although some observers may again point to the "early" date by which the House and the Senate voted on GSP and ATPA extension (*i.e.*, a September vote as opposed to a December vote closer to the date of expiry of these programs), the upcoming November election and Congress' impending adjournment for the year may have driven legislators to once again consider and approve legislation (*i.e.*, H.R. 7222) that extends the GSP and ATPA programs. Congressional sources opine that during this year-long extension, members of Congress – including House Ways and Means Committee Chairman Charles Rangel (D-NY), Senate Finance Committee Chairman Max Baucus (D-MT) and Sen. Grassley – may seek to re-vamp and amend the preferences programs, although if past years serve as a model, members of Congress may find themselves too busy in working with a new Administration and considering other larger pieces of legislation to afford themselves time to introduce large and long-standing changes to these preference programs.

Legislators Introduce New Climate Change-Based "Emissions Allowance" Bill

On September 26, 2008, Representative Jay Inslee (D-WA) introduced a bill that would, among other things, authorize a distribution of emission allowances under a domestic climate policy to facilities in certain domestic energy-intensive industrial sectors to prevent an increase in greenhouse gas emissions by manufacturing facilities located in countries without commensurate greenhouse gas regulation (H.R. 7146). The bill – also known as the "Carbon Leakage Prevention Act" – has one co-sponsor: Rep. Mike Doyle (D-PA). Specifically, H.R. 7146 purports to help US producers remain competitive and address any costs or challenges incurred under a "cap-and-trade" or other climate change-related program that the US government may have implemented. We analyze below the main provisions of H.R. 7146.

I. Purpose of H.R. 7146

H.R. 7146 includes the following findings from Congress:

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- All domestic and foreign industries should contribute to climate stabilization;
- Domestic producers of certain energy-intensive products subject to international competition "present a unique challenge for United States climate policy because increased costs associated with compliance may unintentionally cause domestic industry to divert new investments and production to facilities located in countries without commensurate greenhouse gas regulation;"
- The United States must make progress on economy-wide action on climate change while "reducing incentives for producers to relocate to unregulated countries, which could displace both jobs and emissions;"
- International agreements are the most "appropriate means" to reduce emissions from energy-intensive industries; and
- Carbon leakage can be mitigated substantially through the output-based distribution of emission allowances that should complement other targeted domestic and international policies and agreements meant to encourage United States trading partners to substantially reduce global greenhouse gas emissions.

Based on these findings, H.R. 7146 states that its purposes are:

- to compensate certain facilities from a subset of eligible domestic industrial sectors for carbon emission costs incurred under any already-established cap-and-trade program;
- to limit compensation to facilities in eligible industrial sectors to an amount of emission allowances that will prevent carbon leakage while also rewarding innovation and facility-level investments in performance improvements;
- to provide compensation to the owners and operators of facilities for both the direct and indirect costs of purchasing emission allowances needed for compliance with a domestic cap-and-trade program, but not for costs associated with other related or unrelated market dynamics; and
- to prevent carbon leakage resulting from direct and indirect compliance costs incurred under a domestic cap-and-trade program.

II. Industry Identification

The bill states that the Environmental Protection Agency (EPA) will annually distribute emission allowances to the owners and operators of facilities in "eligible" industrial sectors and subsectors. The bill defines "emission allowance" as authorization, under any cap-and-trade program, to emit one carbon

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dioxide equivalent of greenhouse gas. By January 1, 2011, the EPA will promulgate a rule identifying these industrial sectors and subsectors eligible to receive emission allowances under H.R. 7146. The bill states that the EPA will consider, among others, the iron, steel, pulp, paper, cement, rubber, basic chemicals, glass, industrial ceramics, and aluminum and other non-ferrous metals industrial sectors and subsectors. In identifying eligible sectors and subsectors, the EPA will take into account each of the following:

- The greenhouse gas intensity of the domestic production, including direct emissions from the combustion of fuels and process emissions at the facility and the indirect emissions by electric power providers;
- The potential for greater foreign sourcing of production or services and the effect of international competition on domestic production;
- The effect of international markets on product pricing;
- The potential for net imports to increase or exports to decrease (resulting in a loss of market share held by domestic manufacturers to manufacturers located in other countries) caused by the direct and indirect compliance costs under a domestic cap-and-trade program; and
- The state of international negotiations, agreements, and activities to reduce global greenhouse gas emissions.

III. Calculation of Emission Allowances

Under the bill, the quantity of emission allowances distributed by the EPA for a calendar year to the owner or operator of a covered facility will be equal to the sum of the facility's "direct compliance allowance factor" and the facility's "indirect carbon allowance factor" (calculations are based on data from two calendar years prior to the calendar year of distribution). The ***direct compliance allowance factor*** for a facility for a calendar year is the amount obtained by multiplying the output of the facility by 85 percent of the average tonnage of greenhouse gas emissions per unit of output for all facilities in the sector or subsector. The ***indirect carbon allowance factor*** for a facility for a calendar year is the product obtained by multiplying the total output of the facility by the emissions intensity factor (the average tonnage of greenhouse gas emissions per kilowatt hour of the electricity purchased by the facility, as determined by the facility owner or operator) and the electricity efficiency factor (85 percent of the average amount of electricity, in kilowatt hours, used per ton of production for all facilities in the sector or subsector concerned, as determined by the EPA) for the year concerned. The bill also mandates each owner or operator of a facility in any sector or subsector identified under H.R. 7146 to provide the EPA

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with information as the EPA finds necessary to determine the direct compliance allowance factor and the indirect carbon allowance factor for each facility subject to H.R. 7146.

IV. Maximum Emission Allowances

The bill states that the maximum quantity of emission allowances distributed each year will equal 15 percent of the total quantity of allowances distributed or auctioned under a cap-and-trade program for emissions occurring during the first year for which allowances are required to be submitted under such program. If the total allowances exceed this maximum, the EPA will reduce the amount distributed to owners and operators on a *pro rata* basis.

V. Modification and Elimination of Distribution of Allowances

The bill states that if the President finds that international governmental activities to reduce global greenhouse gas emissions have substantially mitigated: (i) the disadvantage to domestic manufacturers of energy-intensive products subject to competition from facilities in countries without commensurate greenhouse gas regulation"; and (ii) the carbon leakage and related diversion of production of such products to facilities located in countries without commensurate greenhouse gas regulation, then the EPA will reduce the amount of emission allowances distributed in an amount "reasonably calculated." If the President determines that the competitive disadvantage to domestic manufacturers has been rendered insignificant, the EPA will terminate the distribution of emission allowances.

VI. Emission Allowances for New Facilities

The bill states that during the first and second year of operation of a new facility in any sector or subsector identified under H.R. 7146, the owner or operator will receive a quantity of emission allowances equal to emission allowances distributed to the owner or operator of a comparable facility in the same sector or subsector that produces equivalent output using a substantially similar production process, as determined by the EPA. In the third year of operation of the new facility, the EPA will adjust the quantity of emission allowances to be distributed to the owner or operator to reconcile the total quantity of allowances received during the first and second years of operation to the quantity the facility would have received during the first and second years of operation had the appropriate data been available for such years.

VII. Other Eligible Entities

According to the bill, the quantity of emission allowances distributed by the EPA for a calendar year to an owner or operator of a facility in an eligible industrial sector or subsector that is ***not*** a covered facility

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under H.R. 7146 will be equal to the indirect carbon allowance factor for the facility following the same calculation methods as described above.

VIII. Reports to Congress

The bill mandates the EPA, in consultation with the Secretary of Commerce, the Secretary of Energy, the Secretary of State, and the United States Trade Representative, no later than one year after the first year in which allowances are distributed to submit to Congress a report on the carbon leakage of domestic energy-intensive industrial manufacturers and the effectiveness of the distribution of emission allowances The report must include recommendations on how to better achieve the purposes of H.R. 7146.

Initial reaction to the proposed bill has been relatively quiet, although several Congressional observers questioned the "price tag" of implementing such a program and funding the emission allowances to the sectors and subsectors covered under H.R. 7146. Others opined that although the proposed legislation helps domestic industry address the challenges stemming from a cap-and-trade program, the bill does not encourage foreign trading partners to reduce greenhouse gas emissions. Proponents of the bill, however, argue that the legislation would enable US industry to remain competitive relative to foreign trading partners that may not have a cap-and-trade or other climate change program established. They also argue that the bill addresses domestic producers and does not impose limits or allowances on foreign imports, ensuring a cooperative environment between the United States and foreign countries to successfully draft an international agreement on climate change

The bill was last referred to the House Committee on Energy and Commerce on September 26, 2008, and Congressional sources are uncertain if the House of Representatives will be able to consider and vote on the bill before it adjourns its 110th session.

Industry Groups Oppose Possible "Byrd Amendment" Revival in Congress

In a September 24, 2008 letter to Democratic and Republican leaders in Congress, several agriculture, manufacturing, service, and business groups voiced opposition to efforts by certain members of Congress to insert the Continued Dumping and Subsidy Offset Act (CDSOA, also known as the "Byrd Amendment") into any final legislative package of the 110th Congress. Over 90 US farm, manufacturing and service industries urged Congress "to firmly reject any attempts to reinstate any provisions of the Byrd Amendment" because US courts have determined the Byrd Amendment to be "unconstitutional, unfair to other domestic manufacturers and harmful to the competitiveness of US exporters."

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Specifically, the letter states that US businesses are concerned that the Byrd Amendment could be added to a “must-pass” bill in the closing days of the 110th Congress. The letter’s signers express their opposition to the CDSOA and state that the Byrd Amendment:

- “has been ruled unconstitutional by US courts”;
- “benefits those few US companies that receive CDSOA money without regard to how they use those funds or whether they are creating jobs, while undermining the competitiveness of many more US companies and industries”; and
- has been found to violate US World Trade Organization (WTO) obligations, “prompting many of [the United States’] largest trading partners to impose substantial retaliation against US exports.”

The letter also cites a September 2005 Government Accountability Office (GAO) report that criticized the Byrd Amendment and found that the majority of CDSOA payments went to a few companies without any controls or oversight.

For the reasons cited above, the US businesses and groups signing the letter “strongly urge . . . Congress to reject any efforts to reinstate the Byrd Amendment.” Businesses and business groups signing the letter include (but are not limited to) the American Apparel & Footwear Association (AAFA), the American Farm Bureau Federation (AFBF), Business Roundtable, Consuming Industries Trade Action Coalition (CITAC), Emergency Committee for American Trade (ECAT), General Electric (GE), the National Association of Manufacturers (NAM), the National Cattlemen’s Beef Association (NCBA), the National Foreign Trade Council (NFTC), the US Chamber of Commerce, and Wal-Mart Stores, Inc., among others.

The Byrd Amendment instructed the Bureau of Customs and Border Protection (CBP) to distribute duties collected in antidumping and countervailing duty cases to affected domestic producers that petitioned for such distributions. Before the Byrd Amendment was enacted in October 2000, such duties went to the general fund of the Treasury. According to the GAO, since 2001, the US government has distributed more than USD 1.26 billion under Byrd Amendment rules to domestic companies. More than USD 476 million went to the Timken Company – a US bearings manufacturer – and two of its subsidiaries. In January 2003, however, a WTO dispute settlement panel (DS234) ruled that the Byrd Amendment constituted a "non-permissible specific action against dumping or a subsidy" contrary to global trade rules, and gave eight WTO members that initiated a joint complaint against the United States (the European Union, Japan, Canada, Mexico, South Korea, Brazil, India, and Chile) the right to impose trade sanctions up to 72 percent of the amount of disbursements from US duties levied on their goods after the United

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States missed an end-of-2003 deadline for withdrawing the legislation. In February 2006 the US Congress approved legislation repealing the Byrd amendment; the legislation, however, added transitional provisions that allowed US Customs authorities to continue collecting duties for distribution under the Byrd amendment until October 1, 2007. On October 1, 2007, the Byrd Amendment was officially phased out. Congressional sources have reported recently, however, that several members of Congress – including the Byrd Amendment's original drafter Sen. Robert Byrd (D-WV) – have been quietly campaigning within Congress to revive the CDSOA.

Congressional sources are uncertain if members of Congress will add the CDSOA to remaining legislation before members of Congress adjourn the 110th session in late September or early October (depending on pending legislative work). Legislators are still considering several large bills, including an economic stimulus bill focused on creating jobs and funding infrastructure projects, a bill on the US - India nuclear deal, and a continuing resolution for government funding into early-2009. Members of Congress have engaged in lengthy debate over each of these proposed bills, and thus it remains unclear if the Byrd Amendment can be inserted in any of these bills without attracting attention from legislators. If members of Congress are unable to slip the Byrd Amendment into one of these pending bills (or any other bill) by the time the 110th Congress adjourns, then it is likely that the 111th Congress could witness a similar campaign to revive the CDSOA. In either scenario, it is apparent that a large group of US businesses and business groups remain opposed to the Byrd Amendment and will counter the quiet campaign to revive the CDSOA with loud resistance.

Senate Finance Committee Leaders Introduce "International Intellectual Property Protection and Enforcement Act of 2008"

On September 10, 2008, Senate Finance Committee leaders announced a proposal for legislation meant to reduce intellectual property (IP) theft. Sponsored by Senate Finance Committee Chairman Max Baucus (D-MT) and Sen. Orrin Hatch (R-UT), the **International Intellectual Property Protection and Enforcement Act of 2008** directs the Office of the United States Trade Representative (USTR) to crack down on countries that violate US IP rights, provides funds to increase USTR's capability to work with developing countries to improve IP protection and enforcement, and gives the President powerful enforcement tools to deal with countries that refuse to fight widespread theft of US intellectual property, among other things.

Specifically, the bill includes the following provisions:

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- **Action Plans.** The bill requires USTR to develop an action plan for each foreign country that has remained on USTR's "Priority Watch List" of intellectual property deficient countries for at least one year. The action plan must list the legislative, enforcement, or other actions that the foreign country must take in order to achieve adequate and effective protection of intellectual property rights (IPR), and fair and equitable market access for US companies that rely on IP protection.
- **Enforcement Actions.** The bill states that if a foreign country has not complied with its action plan within one year, the President is authorized to take various enforcement actions against the country, including, prohibiting federal government procurement from the foreign country; prohibiting new financing by the Overseas Private Investment Corporation (OPIC) and the Export-Import Bank of the United States with respect to projects in, or exports to, the foreign country; and withdrawing any preferential treatment for which the foreign country qualifies under the Generalized System of Preferences (GSP) or other US preference programs.
- **Developing Country Assistance.** The bill authorizes appropriations to USTR to assist developing countries in complying with their action plans, including capacity building, activities designed to increase awareness of IPR, and training for officials responsible for enforcing IPR in the developing country.
- **Congressional Report.** The bill requires USTR to include, in its annual "Special 301" report, a description of the action plan developed for each country and the actions taken by each country pursuant to that plan.
- **IPR Officials.** The bill requires the President to ensure that IP officials are placed in the US embassy of each foreign country that has a commercially significant relationship with the United States. The official will serve as a liaison between the United States and the foreign country on matters relating to IP protection and enforcement, and gather and provide information requested by USTR for purposes of developing or determining compliance with the intellectual property action plans.

In announcing the International Intellectual Property Protection and Enforcement Act of 2008, Chairman Baucus stated that "Congress can do more to protect American intellectual property around the world." Sen. Hatch echoed his statements and expressed hope that the bill would serve as a "bridge in the battle" to protect US IPR "amid a rising tide of piracy and counterfeiting abroad." Congressional sources say that the likelihood of the bill moving through Congress over the next several weeks is small, especially in light of the Senate Finance Committee's current focus on the overhaul and renewal of the Trade Adjustment Assistance (TAA) program. They opine, however, that the Senators will likely reintroduce the bill in the

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111th Congress. A companion measure to the International Intellectual Property Protection and Enforcement Act of 2008 has not yet been introduced in the House of Representatives, and Congressional sources are uncertain as to whether that will happen by the end of 2008.

The Senate-led IP bill is not the first major IPR bill that US legislators have introduced in 2008. The Senate Judiciary Committee – which Congressional insiders say usually has oversight over IP enforcement and monitoring issues – introduced its own IPR bill in July. On July 24, 2008, Senate Judiciary Committee Chairman Patrick Leahy (D-VT) and Ranking Member Arlen Specter (R-PA) introduced the “Enforcement of Intellectual Property Rights Act of 2008” (S. 3325), a bill designed to enhance remedies for violations of US intellectual property laws. The bill would, among other things, give the Attorney General authority to bring civil actions against anyone whose conduct constitutes criminal copyright infringement; enhance civil IPR law by eliminating unnecessary burdens to instituting a suit, improving remedies, and applying the copyright and trademark laws not only to imported goods, but also to exported and transshipped items; and create an advice-and-consent level position - the Intellectual Property Enforcement Coordinator (IPEC) - to serve in the Executive Office of the President and chair an inter-agency committee, that will produce and implement a joint strategic plan to enforce intellectual property laws as well as increase the resources available to federal and local law enforcement agencies to combat theft of intellectual property. On September 26, 2008, the Senate approved S. 3325 by unanimous consent. On September 28, 2008, the House of Representatives approved the legislation by a vote of 381 to 41.

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Free Trade Agreements

US, Colombian and Korean Officials Discuss Pending FTAs

Summary

On September 17, 2008, the Global Business Dialogue (GBD) and the Korea Economic Institute (KEI) jointly hosted a panel discussion on the United States' three pending free trade agreements (FTAs) with Colombia, Korea and Panama. Discussants included United States Undersecretary of Commerce Christopher Padilla, Colombian Minister for Trade, Industry and Tourism Luis Guillermo Plata, and Minister for Economic Affairs at the Korean Embassy in Washington Seok-yong Choi. In their remarks, the officials considered the status of the pending agreements and their chances of Congressional consideration and approval, which remains uncertain. The US House of Representatives in April 2008 suspended a timetable under the now-expired Trade Promotion Authority (TPA) which would have required an up or down vote on the Colombia agreement. The Bush Administration has expressed hesitancy to submit the Korea and Panama FTAs for consideration without assurance from House Democratic leadership that it will not take a similar action with respect to those two agreements. Although some observers speculate that Congress might vote on the three FTAs during a "lame duck" session following the November 2008 elections, it is unclear whether Congress will convene such a session. The Administration remains confident that the bipartisan votes needed to pass the agreements exist, but such support could prove irrelevant unless the current Congress agrees to grant the FTAs an up or down vote before a new Congress begins its term in January 2009.

Analysis

On September 17, 2008, the Global Business Dialogue (GBD) and the Korea Economic Institute (KEI) jointly hosted a panel discussion on the United States' three pending FTAs with Colombia, Korea and Panama. Panelists included government officials from the United States, Colombia and Korea. We summarize below the officials' remarks regarding the status of the pending agreements and their chances of US Congressional approval.

- **US Undersecretary of Commerce Christopher Padilla** stated that the passage of the three pending FTAs with Colombia, Korea and Panama depended "entirely" on Congress and Speaker of the House Nancy Pelosi (D-CA) and their willingness to grant the agreements an up or down vote on their merits. Padilla suggested that the Administration was willing to consider working with Members of Congress in good faith on issues such as Trade Adjustment Assistance (TAA) that were related to the pending

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FTAs passage; he added, however, that the Administration would not engage in an "if only" debate in which Congress agrees to hold a vote on the FTAs only if the Administration compromises. Padilla noted that the Administration had already concluded such a compromise deal with Congress in the May 10, 2007 bipartisan agreement (in which Congress agreed to consider the four pending FTAs if the agreements were revised to include certain labor and environmental provision), but that Congress had failed to uphold its part of the agreement. Padilla dismissed most Congressional efforts to link the FTAs' passage through "if only" issues as continuingly changing excuses of a political nature that did not reflect on the actual merits of the agreements themselves. Padilla opined, however, that the agreements would eventually receive a vote and would pass with broad bipartisan support. Regarding the order of approval, Padilla stated that the Administration was "committed" to Congressional consideration of the Colombia Agreement first, since the Administration has already submitted the agreement to Congress for approval. On April 10, 2008, however, the House of Representative approved a resolution that eliminated the TPA-mandated timetable under which the House must consider the US-Colombia FTA. Padilla therefore added that the Administration would like a "clear signal" from Speaker Pelosi that she would not seek to pass similar resolutions to suspend the TPA timeframe for consideration of the Korea and Panama FTAs. Padilla also discussed the individual FTAs. On the Colombia FTA, he noted that since the United States and Colombia signed the agreement on November 22, 2006, approximately USD 1.3 billion in tariffs have accrued on bilateral trade flows. Padilla also emphasized the agreement's political and strategic importance, stating that Colombia remains a key ally in the US war against terrorism and a strong supporter of democracy and free markets. Padilla noted that Panama was also an important democratic ally that experienced 11 percent economic growth in 2007. On the KORUS FTA, Padilla stated that the Bush Administration would not engage in "managed trade" in the automobiles sector, and added that such practice was not the role of government or of a trade agreement. Padilla's statement referred to calls by a number of members of Congress to renegotiate the FTA's automobiles chapter to include provisions that would guarantee minimum annual sales targets for US automobiles in the Korean market.

- **Colombian Minister for Trade, Industry and Tourism Luis Guillermo Plata** described his country's economic and social progress during recent years and suggested that the implementation of the FTA with the United States would play a key role in enabling Colombia to continue this progress. He noted that the United States has already concluded FTAs with Central America, Chile, Mexico and Peru, and suggested that the United States' failure to approve the FTA with Colombia would place the country at a competitive disadvantage equivalent to that it would face if the United States had placed

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trade sanctions upon it. Plata dismissed Congressional arguments against the Colombia FTA, notably those arguments targeting violence against labor unions, as unrelated to trade. He acknowledged that the Colombian government still faced a number of challenges in reducing and eliminating such crimes, but suggested that no amount of progress would satisfy critics of the agreement who used such acts as an excuse to oppose the agreement for political reasons. Plata added that by rejecting the FTA, Congress would likely only exacerbate such violence by limiting Colombia's ability to reduce the poverty and lack of opportunity that is its root cause.

- **Minister for Economic Affairs at the Korean Embassy in Washington Seok-yong Choi** stated that the Korean government was currently negotiating the timing for resubmitting the KORUS FTA to the 18th National Assembly for consideration but he did not indicate a target date for doing so. The government submitted the agreement to the 17th National Assembly in September 2007; however, the legislative body was unable to ratify the FTA before it adjourned in May 2008. Choi opined that given the ruling Grand National Party's majority in the 18th National Assembly, once submitted, the FTA's passage was likely. He added that although the challenges to the agreement's passage in the United States were more complicated, he remained optimistic that Congress would approve the FTA in a lame duck session following the November Presidential and Congressional elections. Choi also highlighted the potential costs of the agreement's failure and suggested that Congress' refusal to consider the agreement would set a bad example for the United States' trading partners and weaken US leadership in the world economy. Choi noted the political cost that Korean President Lee Myung-Bak had paid to reopen Korea's markets to imports of US beef—a key condition that a number of influential Members of Congress, including Senate Finance Committee Chair Sen. Max Baucus (D-MT) had placed on legislative consideration of the KORUS FTA—and expressed the Korean government's concern over rising protectionist sentiment in the United States.

Outlook

The fates of the three pending FTAs have hung in the balance since the June 2007 expiry of TPA. The Bush Administration has remained hesitant to deliver several of the agreements to Congress for consideration because of uncertainty as to whether there would be enough support, *i.e.*, votes to pass the agreements. The agreement that the Administration did deliver—the US-Colombia FTA—was met with harsh opposition by Congressional Democrats, and members of Congress have not signaled that they would treat the Korea or Panama FTAs any differently. Starting with calls for stricter labor and environmental provisions in the FTAs—notably the US-Colombia agreement—Democratic members of Congress further lessened the likelihood for passage for the agreements when the House of

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Representatives decided in April 2008 to eliminate the TPA-mandated timetable under which the chamber must consider the US-Colombia FTA. The approved resolution suspended two provisions of the Trade Act of 1974 regarding TPA rules: sections 151(e)(1) and 151(f)(1) that address the timetable that the House of Representatives must follow in considering the US-Colombia FTA, and although the resolution was specific only to the US-Colombia FTA, observers opined that the House move made questionable the fates of all pending FTAs, especially because the Administration has insisted that it will present the agreements to Congress in the order in which they were completed, beginning with the Colombia FTA.

Recent moves by the Administration and foreign government officials to convince Congress to pass these agreements might be the “final push” that the Administration can offer. Congressional sources report that the 110th Congress might attempt to adjourn by the end of September, which leaves the possibility of a “lame duck” session (in which Congress could consider the agreements) an open-ended question. Sources are unclear whether Congress will simply adjourn by the end of September and not return until the 111th Congress is sworn-in in January 2009, or whether Congress will agree to lengthen its current session or hold a lame duck session after the November election. Neither scenario promises Congressional approval of the FTAs, but Administration officials and their foreign counterparts likely believe that the longer Congress remains in session, the more chances there are to pass these FTAs under TPA. It also remains uncertain whether TPA rules will apply to the agreements beyond the 110th Congress; the majority of Congressional observers note that once the 111th Congress begins its term, the pending FTAs will no longer enjoy TPA-mandated rules and timelines because these rules applied to the agreements only under the 110th Congress. There are, however, unverified rumors that several Members of Congress have sought the advice of the House and Senate Parliamentarians regarding the extension of TPA to these pending agreements beyond the 110th Congress. Sources suggest that the two chambers’ Parliamentarians might not agree on TPA’s application in the 111th Congress.

Invited officials at the GBD-KEI joint discussion echoed the Administration in their urging Congress to pass the agreements as soon as possible. To date, Congress has not given any clear signal that it is willing to pass, or even consider, the pending FTAs. Administration officials believe that the bipartisan votes necessary to pass the FTAs do exist, however, and will no doubt continue to call on Congress to pass the FTAs. The timing of the 110th Congress’ adjournment, and its decision regarding a lame duck session, are certainly key determinants of these pending agreements’ futures. Because the status of both the adjournment and the lame duck session remain uncertain, however, passage of these agreements remains equally as uncertain.

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Free Trade Agreements Highlights

US and Uruguayan Officials Discuss Trade, Investment Ties Under TIFA; Sign Protocols to Strengthen Partnership

On September 23, 2008, US and Uruguayan officials met in New York under the auspices of the US-Uruguay Trade and Investment Framework Agreement (TIFA) to discuss trade and investment ties. United States Trade Representative (USTR) Susan Schwab led the US delegation and Uruguayan Foreign Minister Gonzalo Fernandez led the Uruguayan delegation. Sources report that during the meeting, USTR Schwab and Minister Fernandez noted that they would continue their efforts under the 2008 TIFA work plan in addition to reconfirming "their commitment to expand economic opportunities between Uruguay and the United States while simultaneously coordinating their efforts to promote greater trade liberalization through the World Trade Organization (WTO)." Both sides also agreed to convene another meeting of the Trade and Investment Council by November 2008.

On October 2, 2008, Uruguayan Minister of Foreign Affairs Gonzalo Fernández and Assistant USTR Everett Eissenstat signed two protocols to the TIFA, addressing substantive commitments in trade facilitation and public participation in trade and environment. The United States and Uruguay also signed a Memorandum of Understanding on renewable energy and energy efficiency cooperation. The two governments pledged continued cooperation in these areas and continued dialogue under the TIFA work program.

According to USTR, commercial ties between the United States and Uruguay have strengthened over the past several years. The United States and Uruguay negotiated a Bilateral Investment Treaty (BIT) which entered into force on November 1, 2006. Following completion of the BIT, both countries signed the TIFA on January 25, 2007. The last US-Uruguay TIFA meeting was held on August 18, 2008, in Atlanta, Georgia. Assistant USTR for the Americas Everett Eissenstat and Uruguay's Ambassador to the United States Carlos Gianelli led their respective delegations. Similar to this latest meeting, the August meeting took stock of discussions undertaken pursuant to the TIFA Work Program as agreed to by the Trade and Investment Council at its April 2008 meeting. At the August meeting, USTR officials lauded progress in the areas of e-commerce, trade facilitation and environment.

The US-Uruguay TIFA enables US and Uruguayan officials to lay the foundation for a potential future FTA, while simultaneously reinforcing existing commercial ties in the region. Although both parties are keen to negotiate an FTA, this option is not a viable one at the moment due to domestic constraints (lack of Trade Promotion Authority-TPA for the United States and lack of approval from Mercosur partners for Uruguay).

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The United States' active participation in its TIFA talks with Uruguay and other TIFA partners reflects a shift in US trade policy towards less ambitious trade initiatives given the current deadlock at the Doha World Trade Organization (WTO) talks and the stalled pending US Free Trade Agreements (FTAs) in the US Congress. Congressional sources report that Congress will not consider any of the pending US FTAs with Colombia, Korea and Panama before it adjourns, and there are no guarantees that there will be a lame-duck session following the November election wherein members of Congress can vote on the FTAs. TPA also expired in mid-2007, and Congress has not provided any signal to renew TPA. US officials are still concerned with the proliferation of other trade agreement negotiations between US trading partners that exclude the United States (which may help partly explain USTR's recent decision to announce the US – Trans-Pacific Strategic Economic Partnership FTA negotiations). Consequently, TIFAs (and BITs) – which do not fall under TPA-mandated rules and timelines – provide USTR with an additional route to pursue further trade liberalization and increased commercial linkages with trading partners. USTR is also likely proactive in its TIFA work with Uruguay in an effort to maintain its presence in Latin America and reinforce ties with the few political allies it has in the region, especially at a time of increased political tensions with Bolivia, Ecuador and Venezuela, and increased frustration from Colombia and Panama due to the lack of movement on their respective FTAs.

United States Announces US – Trans-Pacific Strategic Economic Partnership FTA Negotiations; Talks to Begin in Early 2009

On September 22, 2008, United States Trade Representative Susan Schwab announced the launch of negotiations for the United States to join the Trans-Pacific Strategic Economic Partnership Agreement ("P4 Agreement"), a trade agreement between Brunei Darussalam, Chile, New Zealand, and Singapore. P4 Ministers present with USTR Schwab when she made the announcement included Foreign Affairs and Trade Minister for Brunei Darussalam II Lim Jock Seng; Foreign Affairs Minister for Chile Alejandro Foxley; Trade Minister for New Zealand Phil Goff; and Foreign Affairs Minister for Singapore George Yeo. The officials had held discussions in New York prior to USTR Schwab's announcement.

During their talks, the officials highlighted the P4 Agreement as a "regional agreement [that] sets a high standard that will enhance the competitiveness of the countries that are part of it and help facilitate trade and promote investment between them, increasing their economic growth and development." According to the meeting's observers, Ministers from the P4 countries enthusiastically welcomed participation by the United States in the negotiations. Officials agreed to hold the first round of the US-P4 negotiations in early 2009, although they did not confirm a specific date.

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In announcing the US-P4 negotiations, USTR Schwab stated that the United States "is particularly interested in [the P4 Agreement] potentially serving as a vehicle for advancing trade and investment liberalization and integration across the Trans-Pacific region and perhaps beyond." She added that for the past year, US officials have conducted a thorough exploratory process on whether to join the agreement and have held several rounds of detailed discussions with P4 partners about US participation in the negotiations. She also expressed hope that "this initiative will support other priority US trade initiatives, including approval of the pending Free Trade Agreements (FTAs) with Colombia, Panama, and South Korea."

Brunei, Chile, New Zealand and Singapore concluded the P4 Agreement in 2005, and the Agreement went into effect in late 2006. In March 2008, P4 countries began work on the outstanding Financial Services and Investment chapters; the United States joined the P4 countries in these talks. The United States already has FTAs in place with Chile and Singapore, and New Zealand has approached the United States on several occasions regarding a potential FTA. According to USTR, the Asia-Pacific region represents nearly 60 percent of global gross domestic product (GDP) and 50 percent of international trade.

USTR Schwab's announcement drew positive reaction from members of Congress and US business groups. Senate Finance Committee Chairman Max Baucus (D-MT), a strong supporter of increased US economic ties with the Asia-Pacific region, opined that the agreement could provide the United States with more market access in the Asia Pacific region. Senate Finance Committee Ranking Member Charles Grassley (R-IA) stated that "it is in [the United States'] national interest to strengthen our economic relations with the Trans-Pacific region [and] negotiation of this agreement will help further that effort." The US Chamber of Commerce and the National Foreign Trade Council (NFTC) both lauded the announcement as did the National Pork Producers Council (NPPC) and the National Association of Manufacturers (NAM). The Coalition of Service Industries (CSI) noted that the P4 Agreement provides the United States "with an excellent opportunity to maintain and build on the high standards of previous US free trade agreements [while ensuring] a practical way to maintain momentum and build the core for new trade liberalization in the face of a stalled (World Trade Organization [WTO]) Doha Round." The National Milk Producers Federation, however, expressed its opposition to the proposed agreement, noting that "New Zealand is the world's largest dairy exporter, and benefits tremendously from the *de facto* dairy monopoly in New Zealand" and that "there would be no new opportunities for US dairy exports under a Trans-Pacific agreement."

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The United States' announcement regarding US-P4 FTA negotiations comes during a time when many observers question the direction in which US trade policy is headed. Uncertainty continues to surround the fate of the three pending FTAs the United States completed with Colombia, South Korea and Panama, and although USTR Schwab expressed hope that the US-P4 FTA announcement may spur movement on these stalled agreements, Congressional sources opine that Congress may not consider these agreements until 2009 or beyond. The ongoing WTO Doha Round experienced a severe setback in July 2008 when a Ministerial meeting in Geneva broke down over differences between developed and developing countries, and to date, trade ministers have been unable to get the Doha talks back on track. Add to these developments the expiry of Trade Promotion Authority (TPA) in June 2007 and the lack of prospects for TPA renewal in addition to the upcoming Presidential election (which will likely put a halt on any trade developments in the US Congress and elsewhere), and many observers opine that the current state of US trade policy looks bleak.

USTR's announcement, however, may have been timed in order to inject a promise of some movement on trade into an otherwise stalled trade environment. Although US-P4 negotiations are slated to begin in 2009, observers are already wondering how USTR will go about completing the negotiations (when that time arrives) without prospects for TPA renewal and under a new Presidential Administration. USTR, for its part, may view the US-P4 FTA as a longer-term objective and one that will help the Asia-Pacific Economic Cooperation (APEC) goal of promoting regional economic integration as well as build a solid foundation for a future Free Trade Area of the Asia Pacific. The US FTAs with Singapore and Chile may make the US-P4 negotiations proceed more smoothly (*i.e.*, the negotiators have a basis from which to work and do not have to start from "scratch"), and New Zealand's long-standing interest in securing an FTA with the United States could also move negotiations forward (although differences between the United States and New Zealand on nuclear policy and New Zealand's opposition to the US-led invasion of Iraq could also hamper negotiations). How far "forward" these negotiations and the concluding agreement move, however, remain unclear because of circumstances surrounding the US trade environment. US and P4 negotiators will likely continue to hold FTA negotiating rounds throughout 2009 and attempt to complete the agreement by the end of 2009. At that stage, USTR will likely see how conducive the political environment is for the US-P4 FTA and decide on an appropriate course of action at that point.

Costa Rica Missed October Deadline to Implement DR-CAFTA

Costa Rica has missed an October 1, 2008 deadline to implement the Dominican Republic- Central American Free Trade Agreement (DR-CAFTA), following a September 11 ruling by Costa Rica's Supreme

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Court that the country's Legislative Assembly improperly approved intellectual property rights (IPR) legislation without consulting Costa Rica's indigenous populations on the bill. According to Costa Rican sources, the IPR bill was the last of 13 pieces of legislation the National Assembly needed to pass in order to implement DR-CAFTA.

Costa Rica is the last of the seven DR-CAFTA signatories to implement the agreement. The United States, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua signed the DR-CAFTA on August 5, 2004. 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. However, a country may join after the two-year deadline, but only if the countries that have already joined agree to extend the deadline. According to USTR, Costa Rica approved the DR-CAFTA in a national referendum in October 2007. In February 2008, DR-CAFTA signatories agreed to provide Costa Rica more time to ratify and complete the legislative and regulatory steps required to join the agreement. 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.

Costa Rica's Supreme Court ruled that the Legislative Assembly's failure to consult Costa Rica's indigenous populations on the IPR bill (specifically, a provision of the IPR bill relating to biodiversity) is in violation of the country's obligations under the International Labor Organization (ILO) Convention No. 169 to consult with indigenous and tribal peoples. According to sources, the Costa Rican government has requested in indefinite extension in order to implement the DR-CAFTA. In response to the developments in Costa Rica, the Office of the United States Trade Representative (USTR) stated that it will "carefully consider any request [by Costa Rica] for an extension, in consultation with other agencies, the Congress, and parties to the DR-CAFTA." USTR added that Costa Rica has made progress toward implementing the agreement and that USTR remains confident that it will be able to work closely with Costa Rican government officials in ensuring proper implementation of the DR-CAFTA.

Fate of US-Colombia FTA Remains Uncertain; Could Hinge on Lame Duck Session, Trade Adjustment Assistance

The fate of the pending US-Colombia Free Trade Agreement (FTA) remains uncertain as the November elections and the upcoming adjournment of the 110th Congress quickly approach, causing some Congressional observers to ask whether legislators will consider the FTA during a "lame duck" session. For its part, the Bush Administration – with the help of Colombian officials and representatives – has

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increased its lobbying efforts towards Congress to approve the agreement. On September 9, 2008, Colombian and US officials visited Capitol Hill where they urged legislators to vote on the agreement as soon as possible after the November 4 elections. According to Colombian officials – including Colombian Vice Minister for Foreign Trade Eduardo Munoz – over 125 meetings with Members and staff had been scheduled. Munoz expressed his hope that "in a lame duck session the agreement will be brought to the floor [because] we believe that if it is brought to the floor, we will have enough votes to pass it."

On September 10, 2008, Republican members of Congress and Administration officials, including United States Trade Representative (USTR) Susan Schwab and Secretary of Commerce Carlos Gutierrez, continued their lobbying efforts to push for approval of the US-Colombia FTA and the pending US FTAs with Korea and Panama. At the rally, USTR Schwab opined that "the votes are there for the US-Colombia FTA." Secretary Gutierrez echoed USTR Schwab's comment, although he acknowledged that Congress was unlikely to consider the agreement before the November elections. The Administration will now focus its efforts on pushing Congress to hold a post-election lame duck session wherein legislators can hold a vote on the Colombia FTA. However, at this stage, it remains unclear if Congress will return after the November elections for a lame duck session.

The fate of the US-Colombia FTA has hung in the balance since the House of Representatives' April 2008 move to eliminate the Trade Promotion Authority (TPA)-mandated timeline that came along with the agreement. On April 10, 2008, in an unprecedented move, the House of Representatives approved a resolution (H. Res. 1092) that eliminated the TPA-mandated timetable under which the House of Representatives must consider the US-Colombia FTA. The House approved the resolution by a vote of 224 to 195 along mainly party lines. On April 9, 2008, Speaker of the House Nancy Pelosi (D-CA) announced and presented to the House of Representatives H. Res. 1092. The resolution suspended two provisions of the Trade Act of 1974 regarding TPA rules: sections 151(e)(1) and 151(f)(1) that address the timetable that the House of Representatives must follow in considering the US-Colombia FTA. The resolution is specific only to the US-Colombia FTA and does not apply to the other pending US FTAs with Panama and Korea that were also completed under TPA. However, most analysts agree that elimination of the Colombia FTA's timetable significantly lessened the chances for Congressional consideration of the Korea and Panama agreements by the end of 2008. It is also uncertain whether TPA rules will survive and apply beyond the 110th Congress; the majority of Congressional observers note that once the 111th Congress begins its term, the pending FTAs will no longer enjoy TPA-mandated rules and timelines because these rules applied to the agreements only under the 110th Congress. There are, however,

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unverified rumors that several Members of Congress have sought the advice of the House and Senate Parliamentarian regarding the extension of TPA to these pending agreements past the 110th Congress.

Some Congressional sources opine that a vote on the US-Colombia FTA could hinge on movement on the now-expired Trade Adjustment Assistance (TAA) program. Democrats – led by Speaker of the House Nancy Pelosi (D-CA) – have insisted that legislation expanding and renewing TAA must pass before the Colombia agreement comes to a vote. Republicans have countered that they will block legislation to reauthorize and expand the TAA program unless Democrats allow a vote on the US-Colombia FTA. Senate Finance Committee Chairman Max Baucus (D-MT) and Ranking Member Charles Grassley (R-IA) were attempting to hammer out a deal on a TAA vote prior to Congress' August recess, but the two Senate leaders were unsuccessful, leading Congressional observers to opine that Congress may not take up the issue of TAA renewal for the reminder of the year. Consequently, they also opine that the uncertainty over TAA clouds the future of the US-Colombia deal.

The Colombia agreement remains controversial and continues to enjoy little support among most Democrats, who are facing strong pressure from labor and interest groups to address labor rights in Colombia and other US FTAs. Democratic Presidential Candidate Barack Obama (D-IL), for example, has stated he will continue to oppose passage of the Colombian agreement until Colombia takes action to curb violence against its union leaders. President Bush is scheduled to host a visit from Colombian President Alvaro Uribe on September 20, 2008. The two leaders will likely discuss passage of the pending FTA during their meeting as well as Colombia's efforts to improve its labor record, and both Presidents will likely call on Congress again to pass the agreement. The partisan stand-off over TAA and the uncertainty regarding a lame duck session, however, could mean that the Presidents' message will go unheeded by Members of Congress. Meanwhile, the fates of the US-Korea and US-Panama FTAs also hang in the balance. The Bush Administration has reiterated it will not send the Korea and Panama agreements to Congress until a vote is held on the Colombia deal, thus making the future of these two agreements contingent on passage of the US-Colombia FTA.

United States to Negotiate BIT with Georgia

On September 3, 2008, President Bush announced that United States Trade Representative (USTR) Susan Schwab will lead efforts to expand the existing Trade and Investment Agreement (TIFA) with Georgia and begin negotiations with Georgia to conclude an enhanced Bilateral Investment Treaty (BIT). The United States and Georgia signed the US-Georgia TIFA in June 2007, and the TIFA serves as a forum to address trade issues and develop trade and investment relations between the two countries. The TIFA also established a Council on Trade and Investment to identify and remove impediments to

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trade and investment flows between the United States and Georgia. According to US officials, the US-Georgia BIT would offer investment protections for current and future US investors in Georgia, would provide a more stable and predictable legal and regulatory investment environment, and could promote increased investment in Georgia.

In his announcement, President Bush noted other efforts to expand trade and investment relations with Georgia. These efforts include additional legislation to expand preferential access to the US market for Georgian exports and assistance for Georgia to take advantage of the Generalized System of Preferences (GSP); trade-related technical assistance; a visit by trade missions of US firms to Georgia in Fall 2008; the extension of risk insurance to support US maritime commerce with Georgia; coordinated assistance efforts on the part of international financial institutions; and the continued extension of US defense and foreign aid to Georgia.

BITs have three main purposes: (i) to protect investment abroad in countries where investor rights are not already protected through existing agreements; (ii) to encourage the adoption of market-oriented domestic policies that treat private investment in an open, transparent, and non-discriminatory way; and (iii) to support the development of international law standards consistent with these objectives. USTR notes that BITs also provide investors six core benefits: (i) requiring that investors and their "covered investments" be treated as favorably as the host party treats its own investors and their investments or investors and investments from any third country (non-discrimination); (ii) establishing clear limits on the expropriation of investments and provide for payment of prompt, adequate, and effective compensation when expropriation takes place; (iii) providing for the transferability of investment-related funds into and out of a host country without delay, using a market rate of exchange; (iv) restricting the imposition of performance requirements as a condition for the establishment, acquisition, expansion, management, conduct, or operation of an investment; (v) giving covered investments the right to engage the top managerial personnel of their choice, regardless of nationality; and (vi) giving investors from each party the right to submit to international arbitration an investment dispute with the other party's government. Both USTR and the US Department of State share responsibility for BIT policy and negotiations.

United States to Sign TIFA with Libya

Secretary of State Condolezza Rice, during a visit to Libya September 4-7, 2008, is expected to announce a timeframe for signature of a US-Libya TIFA. According to US officials, this agreement will provide a forum for expanding and strengthening bilateral trade and investment relations between the United States and Libya, reflecting continued improvement of commercial relations between the two countries since the lifting of the US trade embargo against Libya in 2003. Assistant Secretary of State for

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Near East Affairs C. David Welch commented that the TIFA would "enhance and regularize" the countries' economic relationship, attract business interest to Libya, and extend US commercial and economic interests overseas.

TIFAs are limited trade agreements that establish joint councils of trade and economic officials to discuss trade issues; under the US-Libya TIFA, the council will establish a permanent dialogue with the expectation of expanding trade and investment between the United States and Libya, resolving trade issues, and deepening the bilateral trade relationship. In US trade policy, the next step in the process would be for the countries to enter into a BIT, which protects the rights of foreign subsidiaries and investors in the countries' home markets. US officials have not commented on the negotiation of a US-Libya BIT.

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Customs

Customs Highlights

Homeland Security Secretary Criticizes Cargo Scanning Requirement

Secretary of the Department of Homeland Security (DHS) Michael Chertoff has strongly criticized a Congressional requirement for 100 percent scanning of all sea cargo containers entering the United States by 2012. Under the Security and Accountability for Every (SAFE) Port Act of 2006, DHS is required to scan 100 percent of all maritime containers entering the United States by 2012, with scanning to take place at foreign ports of departure. In remarks made before the Brookings Institution on September 5, 2008, Chertoff opined that the Congressionally-mandated requirement follows an outdated "command and control approach." Chertoff instead endorsed the partnership approach currently used by DHS, one that "attempts to apply risk-based standards to evaluate where the true danger lies with respect to our container supply chain" and that relies on private sector knowledge and cooperation.

DHS has not yet issued detailed information concerning full implementation of the SAFE Port Act requirements, though DHS has introduced a voluntary pilot program. The Customs-Trade Partnership Against Terrorism (C-TPAT) program provides benefits including expedited customs clearance for importers, carriers, consolidators, licensed customs brokers, and manufacturers that agree to heightened security measures for their supply chains. Chertoff has endorsed this program, citing its "recognition that most businesses are very keenly aware of their personal incentive to maintain security and to protect their own assets and employees."

In June 2008, DHS announced that it would not meet the SAFE Ports Act 100 percent scanning mandate. At that time DHS cited significant impediments to trade capacity and cargo flow if it were to implement the plan in full. Further, DHS opined that the 100 percent plan would not provide an automated notification of questionable or high-risk cargo as trigger for further inspection and was "not a wise investment of taxpayer dollars." Instead, DHS proposed a 100 percent scanning at ports designated as "high-risk." The resistance of DHS to comply with the SAFE Port Act provisions prompted a strong reaction from some members of Congress, including House Homeland Security Committee Chairman Bennie Thompson (D-MS). According to Chairman Thompson, the resistance of DHS to the full implementation of the law "may have put at risk our nation's security and the credibility of the American government in the eyes of our international partners."

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Multilateral

WTO Establishes Panel to Examine EU Tariffs on Certain IT Products; EU Proposes to Update and Expand WTO ITA

Summary

On September 23, 2008 the World Trade Organization (WTO) Dispute Settlement Body (DSB) established a panel to determine whether the European Union is in compliance with the WTO Information Technology Agreement (ITA) in imposing tariffs on certain information technology (IT) products. The measure is the result of complaints by Taiwan, Japan, and the United States about EU tariffs on imports of cable and satellite boxes that can access the internet, flat panel computer monitors, and computer peripherals such as printers or copiers. The panel is now expected to issue a decision within six months and the DSB to approve this decision within nine months after the appointment of the panel.

In a related development, on September 15, 2008 the European Commission presented a proposal at the WTO to negotiate an update and expansion of the ITA in order to deal with challenges such as the elimination of non-tariff barriers (NTBs) or the need to expand the product coverage and membership of the agreement. The Commission hopes that the WTO Members will discuss its proposal in the near future and noted that it seeks "a prompt launch and conclusion of negotiations…within a matter of months, not years."

Analysis

I. Background

On May 28, 2008, United States Trade Representative (USTR) Susan Schwab announced that the United States had requested WTO dispute settlement consultations with the EU regarding the EU's imposition of tariffs of up to 14 percent on imports of certain information technology products in violation of the WTO ITA. In announcing the request for consultations, USTR Schwab stated that "it is critical that the European Union live up to its ITA obligations instead of imposing new taxes and duties on innovative technologies . . . [and] the EU should be working with the United States to promote new technologies, not finding protectionist gimmicks to apply new duties to these products."

According to USTR, the EU in the past several years has adopted a series of measures that resulted in new duties on imports of specific high-tech products. These products include cable and satellite boxes that can access the internet, flat panel computer monitors, and certain computer printers that can also

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scan, fax and/or copy. According to USTR, the EU claims that it can "charge duties on these products simply because they incorporate newer technologies or additional features." According to USTR's press release, the EU's imposition of tariffs on these IT products is equivalent to "taxing innovation – a move that could impair continued technological development in the information technology industry and raise prices for millions of businesses and consumers." USTR noted that it has repeatedly raised the issue of the tariffs with the EU in prior meetings, including several rounds of informal discussions held under the WTO ITA Committee in Geneva.

According to various reports, the US consultation request accused the EU of violating: (i) Article II of the General Agreement on Tariffs and Trade (GATT), which prohibits contracting parties from imposing duties or charges other than those included in their schedules; and (ii) Article X of the GATT, which obligates WTO Members to publish regulations promptly. Specific to its second charge, the United States argued that the EU failed to promptly publish a measure amending the "Explanatory Notes" to its Combined Nomenclature (CN). The measure stated that set-top boxes would be subject to a 13.9 percent tariff if they use an Ethernet connection or contain a hard drive. Flat-panel graphic displays would also be subject to the same 13.9 percent tariff. The United States argued that the EU enforced this measure before it was officially published on May 7, 2008 in the EU Official Journal.

According to WTO sources, the EU has argued that it can impose duties on these specific products without violating the ITA because the changes in the technology of these products make them objectively different products falling outside of the original product categories covered by the ITA when WTO Members concluded the agreement in 1996. In a May 28, 2008 press statement, the European Commission noted that the EU has respected its ITA obligations and has indicated its willingness to reassess the current ITA product coverage to reflect new technology in a negotiation with all ITA signatories. According to the European Commission, the United States has refused to enter into such a negotiation. Further, the European Commission argued that "where changes in technology have given a product multiple functions . . . then these products in many cases are objectively different products falling outside of the original product categories covered by the ITA and are classified as such by the EU and others." According to the European Commission, although the United States claims this is a violation of the ITA, "both the spirit and explicit provisions in the ITA make it clear that extension to new products to reflect technological change would not be automatic, but based on periodic review by signatories." In response to the EU's press statement, USTR Schwab opined that "very few products would be eligible for duty-free treatment under the ITA today if the agreement's signatories only provided such treatment to products incorporating technology that existed at the time that the ITA was concluded."

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II. WTO Establishes Panel to Examine EU Tariffs on Certain IT Products

On September 23, 2008 the WTO DSB established a panel to determine whether the EU is in compliance with its WTO obligations in imposing tariffs on certain IT products. Taiwan (DS377), Japan (DS376), and the US (DS375) had all formally called for this measure on August 18, 2008, but renewed their request after the EU blocked a first attempt to appoint a panel at a meeting of the DSB on August 29, 2008. Under WTO rules, the EU could now only continue to block such a request if there was consensus amongst the DSB Membership in attendance – including the complainants – that the panel should not be established.

In particular, the complainants allege that EU tariffs of up to 14 percent on imports of cable and satellite boxes that can access the internet, flat panel computer monitors, and computer peripherals such as printers or copiers are in violation of the WTO ITA. The EU has countered however that it can impose the duties because changes in the technology of these products make them objectively different from the original product categories covered by the ITA. In addition, the EU has noted that any change to the ITA should be made on the basis of consensus and not as a result of litigation.

Signed under the auspices of the WTO in 1996, the ITA first entered into effect in 1997 and eliminated tariffs on six categories of IT products, including computers, telecommunications equipment, semiconductors, semiconductor manufacturing equipment, software, and scientific equipment. The original membership of the ITA included 14 signatories, but this number has expanded in recent years to 43 signatories that represent more than 97 percent of world trade in IT products.

III. EU Proposes to Update and Expand WTO ITA

In a related development, on September 15, 2008 the European Commission presented a proposal at the WTO to negotiate an update and expansion of the ITA.[1] It specified that such action is necessary because "after twelve years of technological development" and a significant expansion of trade in IT products, the current agreement has reached its limits on challenges such as the elimination of NTBs or the need to expand product coverage and membership. The purpose of the proposal is to initiate negotiations with ITA participants and other WTO Members with a view to:

- Eliminating all and preventing the creation of new NTBs that affect IT products;

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[1] The full text of the proposal is available at:
Hhttp://trade.ec.europa.eu/doclib/docs/2008/september/tradoc_140592.pdfH

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- Reviewing the coverage of the ITA and taking into account new products that have entered the market;
- Establishing effective mechanisms to keep the agreement up to date and to ensuring that it takes into account future technological development and convergence; and
- Including major producers of IT products that are still outside the scope of the ITA.

Outlook

Under WTO rules, the dispute settlement panel should issue a decision within six months and the DSB should approve this decision within nine months after the appointment of the panel. The full panel proceedings, which could include an appeal, could take up to 12 months. It is worth noting, however, that in practice procedures often end up exceeding these set deadlines.

The Commission hopes that the WTO Members will discuss its proposal in the near future and noted that it seeks “a prompt launch and conclusion of negotiations…within a matter of months, not years.” Some first reactions were skeptical however, with for example the US high-tech industry calling the Commission’s action an attempt to distract from the EC’s failure to live up to its obligations under the current ITA.

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WTO Panel Releases Decision in United States – Continued Existence and Application of Zeroing Methodology (DS350)

Summary

Decision: A World Trade Organization (WTO) Panel has ruled that the United States acted inconsistently with its WTO obligations when it used "zeroing" in original investigations and reviews of anti-dumping orders on EC products. The Panel showed a clear reluctance to find that zeroing during reviews breached the Anti-Dumping Agreement, and made such a ruling only in light of a clear line of Appellate Body decisions on this issue.

Significance of Decision / Commentary: This decision illustrates a growing rift between WTO Panels and the Appellate Body on the WTO-consistency of "zeroing" during administrative reviews.

Zeroing refers to the practice whereby an investigating authority discounts so-called "negative dumping margins" to zero. [For a further explanation of the mechanics of zeroing, please see our report of August 17, 2006 on the Appellate Body decision in *US – Softwood Lumber V (Article 21.5 - Canada)*; available upon request.] It is now settled that zeroing during original investigations violates the Anti-Dumping Agreement. Indeed, in the present case, the United States did not contest the EC claims on this point. However, the issue of zeroing during reviews remains extremely controversial.

Under the US retrospective duty assessment system, definitive anti-dumping duties are not assessed upon entry into the United States of a good subject to an anti-dumping order. Instead, a cash deposit is required, and the definitive duties are determined during the annual administrative reviews of the order conducted by the US Department of Commerce (USDOC).

Three prior panels – in *US – Zeroing (EC)*, *US – Zeroing (Japan)* and *US – Stainless Steel (Mexico)* - all found zeroing during reviews to be permissible under the Anti-Dumping Agreement. All three Panels were overturned on appeal on this issue. Indeed, in its April 2008 decision in *US – Stainless Steel (Mexico)*, the Appellate Body emphasized that it was "deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues." (The Panel in that case stated that it had "no option but to respectfully disagree with the line of reasoning developed by the Appellate Body.") The Appellate Body considered that the Panel's approach had "serious implications for the proper functioning of the WTO dispute settlement system" and "undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU."

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Statements such as this led the current Panel to conclude that it had little choice but to apply the Appellate Body jurisprudence and to find the United States to be in violation. It did so with a demonstrable lack of enthusiasm, characterizing the decisions of the three prior panels to be "persuasive." However, it decided that "[g]iven the consistent adopted jurisprudence on the legal issues that are before us with respect to…zeroing in periodic reviews, we consider that providing prompt resolution to this dispute in this manner will best serve the multiple goals of the DSU, and, on balance, is furthered by following the Appellate Body's adopted findings in this case."

All of this strengthens the US position that the Panels have been correct on the permissibility of zeroing in reviews, and the Appellate Body has overreached. While this may underpin the US position in any future Rules negotiations, it will have little bearing on the core legal issue of the WTO-inconsistency of zeroing during reviews, on which the Appellate Body rulings have been clear and dispositive.

Analysis

A. Preliminary Issues: Panel's Terms of Reference

United States successfully challenges "continued" application of duties as an "ambiguous 'as applied/as such' measure"

Article 6.2 of the Dispute Settlement Understanding (DSU) provides in part that a Panel request must "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." The United States challenged EC claims regarding the "continued" application of 18 anti-dumping duties as falling short of this "specificity" standard.

The EC argued that although it was not making any "as such" claims, it could still challenge the "continued" application of the duties because "the mere fact that…the measure has a life stretching an indeterminate time into the future is no bar to the measure being subject to dispute settlement." The United States countered that "the EC's attempt to describe a duty as a free-standing measure creates, by the EC's own admission, some sort of ambiguous 'as applied/as such' measure."

The Panel sided with the United States on this issue. It noted that the EC attempted to categorize the "continued" application of the duties "somewhere in between zeroing 'as such' and zeroing 'as applied'." The Panel stated that "[s]uch categorization in the abstract does not provide sufficient explanation regarding the existence and the precise content of the alleged measure." It added that "what the European Communities describes as a measure in these proceedings is the continued application of 18 duties, in isolation from any proceeding in which such duties have been calculated, allegedly through zeroing. As such, we do not consider this to represent a measure in and of itself." The Panel placed the

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18 duties outside its terms of reference because the EC "failed to identify the specific measure at issue…."

The Panel also rejected the EC's argument that the United States had to demonstrate that it had been prejudiced by the deficiency in the EC's Panel request. The Panel ruled that "neither Article 6.2 of the DSU nor any other provision of the WTO Agreement supports the argument that the defendant has to show prejudice in cases where the complaining Member's panel request falls short of the requirements of Article 6.2."

The Panel similarly upheld a US procedural challenge against the inclusion of EC claims against certain preliminary determinations by the USDOC. The Panel accepted the US argument that the Anti-Dumping Agreement generally limited claims to final actions.

Additional measures survive preliminary challenge: new claims concern "the same dispute"

The United States argued that 14 specific anti-dumping proceedings listed in the EC's Panel request should be outside the Panel's terms of reference because they had not been included in the EC's Consultations request. The Panel rejected this preliminary challenge, reasoning that "as long as the consultations request and the panel request concern the same matter, or dispute, claims raised in connection with measures identified in the complaining Member's panel request would fall within a panel's terms of reference even if those precise measures were not identified in the consultations request." The Panel found that the legal nature of the EC's claims regarding these 14 measures did "not in any way differ" from the other measures identified in the EC's consultations request. In the view of the Panel, "the EC's consultations request and its panel request refer to the same subject matter, the same dispute."

B. Substantive Issues: Zeroing in investigations and reviews

Zeroing in investigations: EC claims uncontested

The EC challenged the use of so-called "model zeroing" in anti-dumping investigations. In general terms, "model zeroing" is the method under which the USDOC made average-to-average comparisons of export price and normal value within individual "averaging groups" established on the basis of physical characteristics, or models. It then zeroed (*i.e.*, disregarded) any negative dumping margins when it aggregated the results of these multiple comparisons to calculate a weighted average margin of dumping. The USDOC discontinued this kind of zeroing in February 2007.

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In the present case, the United States did not contest the EC claims against model zeroing. It conceded that the USDOC applied model zeroing in these investigations. It also acknowledges that the reasoning of the Appellate Body in the 2004 decision of *US – Softwood Lumber V*, which found model zeroing in investigations to be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement, applied to the EC's claims. (Article 2.4.2 sets out certain rules for the calculation of a dumping margin, *i.e.*, the magnitude or amount of the dumping.) In *US – Softwood Lumber V*, the Appellate Body found that this type of zeroing "does not take into account the *entirety* of the *prices* of *some* export transactions" and "inflates the margin of dumping for the product as a whole [original emphasis]."

The Panel in the current dispute agreed that model zeroing was inconsistent with Article 2.4.2 of the Agreement, and upheld the EC claims with respect to the four investigations at issue.

Zeroing in periodic reviews: Panel reluctantly applies prior Appellate Body rulings

In the present case, the EC also challenged the use of "simple zeroing" in certain periodic reviews conducted by the USDOC. Under "simple zeroing", the Department determines a weighted average margin of dumping based on average-to-transaction or transaction-to-transaction comparisons between export price and normal value. The Department zeros negative dumping margins when it aggregates the results of these multiple comparisons.

As noted above, the Panel noted that three prior panels [*US – Zeroing (EC)*, *US – Zeroing (Japan)* and *US – Stainless Steel (Mexico)*] all found simple zeroing in periodic reviews to be permissible under the Anti-Dumping Agreement. It stated that "we have generally found the reasoning of earlier panels on these issues to be persuasive." However, the Panel readily acknowledged that "[a]ll three panel reports were appealed and the Appellate Body reversed the panels on this issue in all three cases."

Given what the Panel called "the consistent line of reasoning underlying the Appellate Body's conclusion regarding simple zeroing in periodic reviews", the Panel considered the role of adopted Appellate Body reports in the WTO dispute settlement system. Among other things, the Panel cited the ruling of the Appellate Body in *US – Stainless Steel (Mexico)* on the importance of "consistency and stability" in interpreting the rights and obligations of Members under the covered agreements. The Appellate Body stressed that this was "essential to promote 'security and predictability' in the dispute settlement system." The Panel noted that the Appellate Body rebuked the Panel in *US – Stainless Steel (Mexico)* for not following earlier Appellate Body rulings on the impermissibility of zeroing in reviews: "The Panel's failure to follow previously adopted Appellate Body reports addressing the same issues undermines the

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development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU."

The current Panel accepted the need to apply the earlier Appellate Body decisions, although it chafed somewhat against the Appellate Body's approach:

> The Appellate Body suggests that security and predictability in the dispute settlement system *per se* is a purpose served by the development of a consistent body of case law based on panels following the reasoning of adopted Appellate Body reports. We agree that security and predictability in the multilateral trading system may also be furthered by the development of consistent jurisprudence and applying it to the same legal questions, absent cogent reasons to do otherwise….However, we do not consider that the development of binding jurisprudence is a contemplated element to enable the dispute settlement system to provide security and predictability to the multilateral trading system. [original emphasis]

The Panel stressed that "a panel cannot simply follow the adopted report of another panel, or of the Appellate Body, without careful consideration of the facts and arguments made by the parties in the dispute before it. To do so would be to abdicate its responsibilities under [DSU] Article 11." However, it added that: "neither should a panel make a finding different from that in an adopted earlier panel or Appellate Body report on similar facts and arguments without careful consideration and explanation of why a different result is warranted, and assuring itself that its finding does not undermine the goals of the system."

The Panel concluded that "[g]iven the consistent adopted jurisprudence on the legal issues that are before us with respect to simple zeroing in periodic reviews, we consider that providing prompt resolution to this dispute in this manner will best serve the multiple goals of the DSU, and, on balance, is furthered by following the Appellate Body's adopted findings in this case." It therefore found that United States acted inconsistently with GATT Article VI:2 and Article 9.3 of the Anti-Dumping Agreement by applying simple zeroing in the periodic reviews at issue.

One unnamed Panelist disagreed with the reasoning of the majority on the permissibility of zeroing during reviews. As noted above, the majority would have accepted the WTO-consistency of zeroing during periodic reviews, a position not shared by the dissenting panelist. However, the dissenter added: "Although my views generally overlap with the Appellate Body's reasoning on zeroing, I would like to emphasize that they reflect my objective examination of the facts and the legal issues presented in this

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case, as required under Article 11 of the DSU, and not a simple acceptance of the Appellate Body's opinion."

Zeroing in sunset reviews: impermissible use of tainted dumping margins

Under Article 11.3 of the Anti-Dumping Agreement, anti-dumping duties must terminate within five years, unless the investigating authority of the importing country determines that the continuation or recurrence of dumping and injury would be "likely" if the order were to expire. The Panel in the present case agreed with the EC that by using dumping margins obtained through model zeroing in prior investigations in the sunset reviews at issue in this dispute, the United States breached Article 11.3. It agreed with earlier Appellate Body rulings that "to the extent margins relied on in sunset determinations are WTO-inconsistent the resulting sunset determination is also rendered WTO-inconsistent."

The decision of the Panel in United States – *Continued Existence and Application of Zeroing Methodology* (DS350) was released on October 1, 2008.

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China Requests WTO Consultations on US AD/CVDs on Four Chinese Products

Summary

On September 19, 2008, the Government of China requested World Trade Organization (WTO) consultations with the United States regarding US definitive anti-dumping and countervailing duties imposed on imports of four Chinese products. China's request alleges that the Untied States' failed to determine that Chinese state-owned enterprises and commercial banks are public entities that directed the provision of subsidized goods and services to the producers of these products. China further challenged the United States' determination that the Chinese government provided land and land use rights to specific producers at subsidized rates. China also questioned the WTO-compliance of the third-country "benchmark" methodology that the United States used to determine the existence and amount of the alleged subsidies, and the United States' application of Non-market Economy (NME) methodology to simultaneously determine the alleged dumping margins and subsidy rates for imports of the four products. If the two sides fail to reach a resolution of these and the other issues cited in China's request within 60 days of China's filing the request, China may request the formation of a Panel to review the facts of the case. China has made WTO consultation requests against the United States twice before: once in 2002 regarding US safeguards on Chinese steel imports (DS252) and again in 2007 regarding preliminary anti-dumping and countervailing duty determinations on imports of Chinese coated paper (DS368).

Analysis

I. Background

The September 19, 2008 Chinese request for WTO consultations regarding US trade remedy methodology follows a similar request the Chinese government filed in September 2007 (DS 368). That request cited the US Department of Commerce's (DOC) decisions in April and May 2007 to apply preliminary anti-dumping and countervailing duties to Chinese imports of coated free sheet (CFS) paper. Notably, DOC's determination in the countervailing duty investigation marked the first time that the United States had imposed countervailing duties on imports from a non-market economy (NME). Prior to the decision, the United States adhered to a longstanding rule that it would not apply countervailing duty law to imports from China or other NME countries. In its consultation request, China alleged that DOC's determinations were inconsistent with the United States obligations under Article VI of the *General Agreement on Tariffs and Trade* (GATT), Articles 1, 2, 10, 14, 17, and 32 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") and Articles 1, 2, 7,9, and 18 of the *Anti-dumping*

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Agreement ("AD Agreement"). According to China's request, the United States: (i) failed to prove that the subsidies it alleged were specific to the paper industry; and (ii) miscalculated the benefit related to alleged preferential loan rates that the Chinese companies received, thus imposing preliminary countervailing duties in excess of the alleged subsidy. China also alleged that the US imposition of preliminary anti-dumping duties violated US obligations under Articles 7 and 9 of the AD Agreement to impose duties no higher than the provisional margin of dumping found. It is assumed that because the US International Trade Commission (ITC) issued negative final determinations in both the anti-dumping and countervailing duty investigations in December 2007, the Chinese government never requested a Panel to review the facts of the dispute; this effectively mooted the request's purpose. At the time the ITC issued its negative final determinations, however, the US government was engaged in anti-dumping and countervailing duty investigations on imports of seven other Chinese products,[2] four of which China cited in its most recent request for consultations. Further, since that time, the US government has begun anti-dumping and countervailing duty investigations on imports of five additional Chinese products.[3] US industry filed petitions to the ITC and DOC to institute and initiate anti-dumping and countervailing investigations on these twelve products following DOC's decision to apply US countervailing duty law to NMEs. The September 2007 request was China's second against the United States since its accession to the WTO in December 2001.

II. Summary of the Consultation Request

The Chinese request cites final anti-dumping and countervailing duty determinations and orders issued by DOC in investigations of four products: (i) circular welded carbon quality steel pipe; (ii) certain new pneumatic off-the-road tires; (iii) light-walled rectangular pipe and tube; and (iv) laminated woven sacks. DOC issued the determinations and orders on these products between June 5 and September 4, 2008. In China's consultation request, it alleges that the determinations and orders, including the conduct of the underlying anti-dumping and countervailing duty investigations, are inconsistent with Articles I and VI of the GATT, Articles 1, 2, 10, 12, 13, 14, 19, and 32 of the SCM Agreement, Articles 1, 2, 6, 9, and 18 of the AD Agreement, and Article 15 of China's Accession Protocol. According to the request, China's main allegations against the United States include:

[2] These include: (i) circular welded carbon quality steel pipe; (ii) certain pneumatic off-the-road tires; (iii) light-walled rectangular pipe and tube; (iv) laminated woven sacks; (v) raw flexible magnets; (vi) lightweight thermal paper; and (vii) sodium nitrite.

[3] These include (i) circular welded austenitic stainless pressure pipe; (ii) circular welded carbon quality steel line pipe; (iii) citric acid and certain citrate salts; (iv) tow-behind lawn groomers; and (v) kitchen appliance shelving and racks.

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- Failure to determine that Chinese state-owned enterprises (SOEs) are “public bodies,” and that the Chinese government “entrusts or directs” SOEs to provide producers of subject merchandise with goods for less than adequate remuneration. In the absence of a determination that SOEs are public bodies, China further alleges that the United States failed to determine that SOEs entrust or direct private enterprises to provide producers of subject merchandise with goods for less than adequate remuneration;
- Failure to demonstrate and substantiate specificity regarding the alleged provision of land or land use rights for less than adequate remuneration;
- Failure to determine that Chinese state-owned commercial banks (SOCBs) are “public bodies” and that the Chinese government “entrusts or directs” SOCBs to provide producers of subject merchandise with loans on preferential terms, Further the United States failed to demonstrate “specificity” regarding these alleged loans;
- Failure to accept prevailing terms and conditions in China as the basis for determining whether and to what extent producers of subject merchandise received subsidies from the Chinese government. The United States instead used a third-country “benchmark” to determine the existence and amount of the alleged subsides; and
- The simultaneous application of NME methodology to calculate anti-dumping margins and subsidy determination.

China’s request also questions the procedural conduct of the underlying anti-dumping and countervailing duty investigations and the United States’ alleged application of countervailing duties in excess of the determined subsidy in violation of Article IV of the GATT.

III. Next Steps

Under the WTO’s dispute settlement procedures, China and the United States must first attempt to resolve the matter through consultation and discussion. If they fail to reach a consensus resolution within 60 days after the requests for consultations were filed, China may request that the Dispute Settlement Body (DSB) form a Panel to review the facts of the dispute. WTO rules allow the United States to bock the Panel’s formation on the first request; however, China may make a second request to the DSB, which China cannot block during the body’s next meeting. Typically, within six months of its establishment, the Panel will issue its final determination to the Parties involved in the dispute. If no Party to the dispute appeals the determination within 60 days, the DSB adopts the determination. Should the dispute reach this stage, however, an appeal is likely.

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Outlook

The ITC and DOC are currently at various stages of anti-dumping and countervailing duty investigations on imports of six other Chinese products and have issued final affirmative determinations in investigations on imports of two other Chinese products (raw flexible magnets and sodium nitrite) not covered by China's request. Although it remains unclear what the outcome of the six ongoing investigations will be, the investigating authorities are likely to issue final affirmative determinations and impose anti-dumping and countervailing duties on imports of these products as well. Given US industry's increasing reliance on the application of countervailing duties to NMEs, and China in particular, and given the practice's apparent popularity among many in Congress and within the Bush Administration, a Panel decision in China's favor could limit the United States' ability to continue the practice. Such a decision could pressure the United States government to consider granting market economy status to China or make changes to the methodology used in investigating dumping and subsidization in NMEs. Further, such a decision could create new tension between Members of Congress who favor strengthening US trade remedy law to make it easier to apply to NMEs such as China and the WTO. On the other hand, China's request suggests a normalization of the US-China bilateral economic relationship as China moves towards becoming a more Member of the WTO. Past US requests for consultations with China over issues such as intellectual property rights (IPR) have been cause for tension between the two sides. US officials have long noted, however, that they consider the WTO's dispute settlement mechanism to be a normal means for WTO Members to address and resolve such matters in a fair and legal way.

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