

October 2009

**Japan External Trade Organization**  
WTO and Regional Trade Agreements  
Monthly Report

IN THIS ISSUE

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## Summary of Reports

### United States

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#### **Cato Institute Holds Policy Forum on Implications of the Bush/Obama Auto Industry Intervention**

On October 15, 2009, the Cato Institute held a Policy Forum entitled “Driving in the Wrong Direction: Sordid Details and Lasting Consequences of the Bush/Obama Auto Industry Intervention.” The purpose of the forum was to review and evaluate the steps taken by then-President Bush and current President Obama as they attempted to bring back to life the failing auto companies Chrysler and General Motors (GM).

#### **EU Trade Commissioner Ashton and European Parliament Call for Greater EU-US Regulatory Cooperation**

On October 26, 2009, EU Trade Commissioner Catherine Ashton held a speech on current challenges for trade and investment between the European Union and the United States at the US Chamber of Commerce in Washington, DC. Ashton herein called for the establishment of a “transatlantic market for regulation” through the promotion of dispute prevention and regulatory convergence, and highlighted the importance of EU-US cooperation within the frameworks of the Transatlantic Economic Dialogue (TEC) and the World Trade Organization Doha Round to achieve this objective. In a related development, the European Parliament (EP) on October 22, 2009 adopted a resolution that expresses support for the completion of an integrated transatlantic market by 2015 and therefore similarly calls for greater EU-US cooperation within the framework of the TEC. Both the speech and the adoption of the resolution took place in anticipation of the fourth meeting of the TEC, which took place in Washington, DC, on October 27, 2009.

#### ***United States Highlights***

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

- Senators Introduce Trade Enforcement Priorities Act of 2009; Bill Would Revive “Super 301” Authority
- USTR Announces New Assistant United States Trade Representative for Congressional Affairs
- President Signs Agriculture Spending Bill Containing Language Ending Chinese Poultry Ban
- Potential Deputy USTR Receives Another Hold on Nomination

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- Treasury Department Again Does Not Cite China as Currency Manipulator in October 2009 Semi-Annual Report
- Lawmakers Introduce “Reciprocal Market Access Act”
- ITC Releases Report on Economic Effects of Significant US Import Restraints

### **Free Trade Agreements**

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#### **Sixth Ministerial Level Meeting of the US - India Trade Policy Forum Held**

On October 26, 2009 the sixth ministerial – level meeting of the United States (US) – India Trade Policy Forum (TPF) was held in New Delhi. During the meeting, both the US and India emphasized their commitment to deepening economic relations between the two countries and to working in collaboration towards a framework for promoting further trade and investment cooperation. Key areas that were identified for enhanced cooperation include infrastructure, health care services, education services, communications technology, energy and environmental services, among others. Ambassador Kirk expressed his desire to make India one of the top ten US trading partners. He underscored the opportunity the two nations had to build what “should be one of the most productive geopolitical relationships in the world.”

#### ***Free Trade Agreements Highlights***

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

- USTR Compares Completed Korea-EU FTA to Pending KORUS FTA
- US and Maldives Sign TIFA
- Customs

### **Customs**

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#### ***Customs Highlights***

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

- Senate Finance Committee Hears Testimony on Customs Facilitation and Trade Enforcement Reauthorization Bill

## Multilateral

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### *Multilateral Highlights*

- WTO Members Hash Out Details of Upcoming Seventh Ministerial Conference
- Mexico Joins Canada in WTO Panel Request on US COOL Requirements

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## Reports in Detail

### United States

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#### **Cato Institute Holds Policy Forum on Implications of the Bush/Obama Auto Industry Intervention**

##### **Summary**

On October 15, 2009, the Cato Institute held a Policy Forum entitled “Driving in the Wrong Direction: Sordid Details and Lasting Consequences of the Bush/Obama Auto Industry Intervention.” The purpose of the forum was to review and evaluate the steps taken by then-President Bush and current President Obama as they attempted to bring back to life the failing auto companies Chrysler and General Motors (GM).

Full video of the forum can be found on Cato’s website at: <http://www.cato.org/event.php?eventid=6495>.

##### **Analysis**

The Cato Institute held a Policy Forum on October 15, 2009 in which a panel of experts discussed the implications and consequences of the intervention of the Government in the process of reincarnating failing Chrysler and GM. Each of the speakers agreed that not only was the way in which the bankruptcy proceedings were held improper, but that the lasting effect of this process is likely to lead to further situations arising which require similar, potentially unfair treatment by the Government.

##### **I. Background**

**Daniel Ikenson, Associate Director of the Center for Trade Policy Studies at Cato**, acted as moderator for the event but also gave his views on the recent Government intervention in the auto industry. He began the forum by stating that “the industry was never in bad shape.” Rather, it was merely two companies, Chrysler and GM, which were “facing desperate times.” **David Skeel, Professor of Corporate Law at the University of Pennsylvania Law School**, agreed with Ikenson that these two companies alone were failing. Both men admitted that filing for Chapter 11 Bankruptcy was essentially the only realistic option the two companies had although this process proved to be much more complex than a simple bankruptcy filing.

In his testimony in front of the House of Representatives Judiciary Committee, Subcommittee on Commercial and Administrative Law, on July 22, 2009, Ikenson explained the process of the two auto giant's demise and subsequent resuscitation with the help of the Government. He noted that when it was discovered that Chrysler and GM were both under-performing, the House of Representatives passed a bill which, had it not died in the Senate, would have provided funding to the automakers. With this bill failing to pass through the Senate, Ikenson noted that a "taxpayer bailout seemed remote and the proper course of action... Chapter 11, appeared imminent." However, after then-Secretary of Treasury Henry Paulson stated that he had no authority under the "Troubled Assets Relief Program" (TARP) to divert funds to auto manufacturers, then-President Bush announced that he would authorize the diversion of these funds to assist Chrysler and GM with their re-building. Ikenson explained further that after failing to layout a viable business plan for the future of their companies, and thus proving that the bailout money wouldn't suffice to put the companies back on their feet, rather than pointing "the way toward the bankruptcy courts" and moving on, President Obama instead "asserted a major role... for the administration by choosing to facilitate the bankruptcy processes of both companies by brokering pre-bankruptcy deals with major stakeholders."

While the process of bringing back to life the failing Chrysler and GM companies seems to have been proper and a smooth and successful process, Ikenson stated in his presentation at the forum that there is "evidence to suggest that the bailout was misguided and companies were unworthy" of such treatment.

### II. Lawsuits

Ikenson and Skeel were not the only speakers at the forum to question the process of reviving Chrysler and GM. **Richard Mourdock, Treasurer of the State of Indiana**, noted at the forum that two aspects about the Government intervention should have "raised eyebrows." The first was that the Government stated the bankruptcy case would be one of the most complex in history, and the second was that the Government also stated the process would be completed in 30 days. According to Mourdock, this language was highly unusual as some bankruptcy cases, regardless of how complex, could take anywhere from a month to a year to be completed. For Mourdock, this timeframe seemed lofty and highly improbable given the likely complexity of the issues. Making him further skeptical of the process, Mourdock noted that the Government declared the proceedings would take 30 days because Fiat, the proposed buyer, stated they would walk away from the deal if it wasn't completed in 30 days. Yet it was Fiat, according to Mourdock, that stated that the 30 day deadline did not come from them.

According to Mourdock, it appeared that the US Government was dictating to the two companies that they were "too big too fail." Because of this, and for other reasons, Mourdock submitted various legal filings on

behalf of Indiana and currently has a Writ of Certiorari in front of the United States Supreme Court, to which the Cato Institute has submitted an Amicus Curiae brief.

The legal issues which have been brought forth by Mourdock are based on three grounds. The first issue is that, in the process of overseeing the Chapter 11 proceedings, the US Government unjustly intervened and overthrew the rights of secured creditors and thus, violated the key contractual aspect of a proper bankruptcy proceeding. Second, and similar to the views of Ikenson, Mourdock claims in his lawsuit that TARP money was improperly given to the auto manufacturers. His basis for this claim is that Congress attempted to pass an automotive bailout bill and failed. Mourdock claims that had TARP funds initially been meant for the auto industry, there would have been no need to attempt to pass such a bailout bill when TARP funds already existed. And lastly, Mourdock argues that there was a *sub rosa* or “under-the-table arrangement” between the Government and Chrysler which “prevented fair valuation of the assets.” Similar to his first point, Mourdock argues that the Treasury alone would be the bidder by virtue of raising stakes unfairly for any other entity to bid. Further, according to Mourdock, even secured creditors couldn’t have their rights protected against the Government’s new rules.

### **III. Lasting Consequences**

Despite Chrysler and GM having each completed Chapter 11 proceedings, and despite the fact each company is still manufacturing cars today, each speaker expressed their concern over what the long-lasting implications could be of the US Government’s intervention in this process. Skeel specifically detailed the potential consequences for both future bankruptcy proceedings as well as for markets and financing.

According to Skeel, as a result of Government actions in the Chrysler and GM bankruptcy proceedings, it is now possible that future proceedings may allow for “insiders” to “squeeze out disfavored classes of creditors.” Similarly, Skeel argues that it may be possible for bidders to be excluded from future proceedings as in the case of the auto industry proceedings. Skeel echoed Mourdock’s point that the US Government was able to effectively push away potential bidders by virtue of raising the bar so high that no bidder could match the terms set forth by the Government in their bid.

With regard to the markets and financing, Skeel anticipates that the way in which the auto industry bankruptcy proceedings happened, it’s possible that in the future, there may be reluctance for entities to lend money.

### **Outlook**

As it became clear that both Chrysler and GM would fail if they continued to operate in the same manner without any change, it appeared that Chapter 11 bankruptcy proceedings were clearly the answer, as Ikenson pointed out at the Cato Forum. Skeel stated that he believed the US bankruptcy laws were equipped to handle the Chapter 11 filings of Chrysler and GM. Although this is ultimately what happened, each speaker at the policy forum cautioned that the way the US Government intervened both before and during these proceedings has the possibility of setting major precedents in a very negative way. Ikenson proclaimed that “industry bailouts are unfair to tax payers and firm’s not asking for funds.” He argued that those who do not require government bailouts are put at a disadvantage when their competitors get help from the government rather than running the normal course of a failing business, such as filing for bankruptcy or dissolving as a company. Essentially, according to Ikenson, the willingness of the US Government to help failing institutions will likely pave the way for future bailouts of companies which could, in turn, ultimately hurt the prosperous companies that don’t require Government intervention.

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## **EU Trade Commissioner Ashton and European Parliament Call for Greater EU-US Regulatory Cooperation**

### **Summary**

On October 26, 2009, EU Trade Commissioner Catherine Ashton held a speech on current challenges for trade and investment between the European Union and the United States at the US Chamber of Commerce in Washington, DC. Ashton herein called for the establishment of a “transatlantic market for regulation” through the promotion of dispute prevention and regulatory convergence, and highlighted the importance of EU-US cooperation within the frameworks of the Transatlantic Economic Dialogue (TEC) and the World Trade Organization Doha Round to achieve this objective. In a related development, the European Parliament (EP) on October 22, 2009 adopted a resolution that expresses support for the completion of an integrated transatlantic market by 2015 and therefore similarly calls for greater EU-US cooperation within the framework of the TEC. Both the speech and the adoption of the resolution took place in anticipation of the fourth meeting of the TEC, which took place in Washington, DC, on October 27, 2009.

### **Analysis**

#### **I. PU Trade Commissioner Ashton Calls for Greater EU-US Cooperation on Dispute Prevention and Regulatory Convergence**

On October 26, 2009, EU Trade Commissioner Catherine Ashton held a speech on current challenges for trade and investment between the European Union and the United States at the US Chamber of Commerce in Washington, DC<sup>1</sup>. In general, Ashton highlighted the continuing importance of the EU-US relationship as “the main engine of the world economy” which represents over half of the global GDP and generates up to 4.4 billion per year in commercial exchanges. She also added however that different approaches in areas such as product licensing, risk assessment rules, and standards are a “glass ceiling” that prevents the relationship from reaching its full potential, and therefore urged both parties to establish a “transatlantic market for regulation” by promoting dispute prevention and regulatory convergence.

To achieve this objective, Ashton first of all underlined that the EU-US Transatlantic Economic Council (TEC) could become a “genuine strategic instrument” to allow dispute prevention through upstream

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<sup>1</sup> The full text of the speech is available at:  
<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/499&format=HTML&aged=0&language=EN&guiLanguage=en>.

regulatory cooperation and convergence. The Commissioner hereby specified that one of the EU's "major objectives" for the TEC is to cooperate on finding win-win solutions for a number of long-standing "legacy" disputes. She added however that the parties should also realize that the EU does not advocate a "regulatory revolution" and that "practices developed over many years cannot be turned around overnight".

In addition, Ashton stressed that the current global economic and financial crisis strengthens the arguments in favor of concluding the World Trade Organization (WTO) Doha Round, which would offer "a boost to global growth of around USD 220 billion every year". The Commissioner therefore urged the EU and the US to assume a leading role in pushing for an early conclusion of the Round, and noted that to achieve this objective the parties should increase efforts to bring about a convergence of views on the benefits of what is currently on the negotiating table.

### **II. European Parliament Outlines Recommendations for Future Role and Functioning of the TEC**

In a related development, the European Parliament (EP) on October 22, 2009 adopted a resolution that contains, *inter alia*, numerous recommendations for the future role and functioning of the TEC<sup>2</sup>. In general, the EP herein expresses itself in favor of completing an integrated transatlantic market by 2015 and therefore similarly calls for greater EU-US cooperation within the framework of the TEC, whereby it specifies that:

- trade cooperation should focus on, amongst other things: (i) EU concerns over the US measure regarding the 100 % scanning of US-bound maritime cargo containers; (ii) establishing a more common approach to new EU and US free trade agreements (FTAs); and (iii) the formal adoption of mutual recognition (MR) procedures for conformity declarations for products that are subject to mandatory third-party testing.
- cooperation should also address issues such as, *inter alia*: (i) ensuring coordinated US-EU regulatory responses to economic and financial crises; (ii) the protection of intellectual property (IP); (iii) consumer protection and product safety; (iv) the development of a common energy strategy; and (v) seeking convergent sustainability criteria for biofuels; and

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<sup>2</sup> The full text of the resolution is available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2009-0058+0+DOC+XML+V0//EN&language=EN>.

- transparency should increase by: (i) regularly publishing meeting schedules, agendas, road maps and progress reports; (ii) holding an annual debate on the progress made; and (iii) improving the involvement of the most appropriate members of the EP and the US Congress.

In conclusion, the EP instructed its President to forward the resolution to the Council of the EU, the European Commission, the governments and parliaments of the EU Member States, the US Congress, the co-chairs of the Transatlantic Legislators' Dialogue (TLD)<sup>3</sup>, and the co-chairs and secretariat of the TEC.

### **Outlook**

Both the speech and the adoption of the resolution took place in anticipation of the fourth meeting of the TEC, which took place in Washington, DC, on October 27, 2009, and which focused on how regulatory approaches can take into account innovation. In addition, the EU-US Summit will take place on November 2-3, 2009, also in Washington, DC, and will focus on issues such as climate change and the global economic and financial crisis.

The EU and the US remain each other's main trading partners and enjoy the largest bilateral trade relationship in the world. In 2008 US goods exports to and imports from the EU increased to respectively \$274.5 and \$367.9 billion, with a focus on manufactured goods such as machinery and vehicles or chemicals. In 2007 US exports of private commercial services amounted to \$179.2 billion and imports were \$133.1 billion, with financial, insurance, transportation, and royalties and license fees services as some of the key sectors. In the same year, US Foreign Direct Investment in the EU was \$1.4 trillion and concentrated to a large extent on non-bank holding companies, finance and insurance, and manufacturing sectors.

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<sup>3</sup> The TLD aims to strengthen political discourse between EU and US legislators through bi-annual meetings of the EP and the US Congress and a series of teleconferences that deal with specific topics of mutual concern.

## ***United States Highlights***

### **Senators Introduce Trade Enforcement Priorities Act of 2009; Bill Would Revive “Super 301” Authority**

On October 28, 2009, Sens. Sherrod Brown (D-OH) and Debbie Stabenow (D-MI) introduced the “Trade Enforcement Priorities Act of 2009” (S. 1982). Among other things, the bill would revive now-expired “Super 301” authority and would require the Office of the United States Trade Representative (USTR) to analyze foreign trade barriers in an annual report and “and work with those countries that have a pattern of unfair trade practices.” Sens. Russ Feingold (D-WI), Carl Levin (D-MI), and Arlen Specter (D-PA) are co-sponsors of the bill.

Section 310 of the Trade Act of 1974 (P.L. 93-618, as amended) is commonly referred to as Super 301. As enacted, Super 301 (which is now expired) required USTR to issue a report on its trade priorities and to identify priority foreign countries that practiced unfair trade practices that had the greatest effect on restricting US exports. Based on the findings of this report, USTR would then initiate a Section 301 investigation against trading partners identified as priority countries to obtain elimination of the practices that impeded US exports.

Under the Trade Enforcement Priorities Act of 2009, USTR would be required to analyze trade barriers in its annual National Trade Estimates (NTE) report to determine which barriers have the most adverse effect on US exports and employment. The bill would require USTR, in consultation with relevant agencies and Congress, to prioritize its enforcement strategy and work with those countries that have a pattern of unfair trade practices. Under the bill, “previously agreed-to methods of addressing disputes” would be used if USTR identifies a practice in a country that has a trade agreement with the United States. If an unfair trade practice takes place in a country that does not have a trade agreement with the United States, bilateral consultations between the United States and that country would be required until an appropriate remedy is identified.

It is unclear when the bill will travel through the Committee stage and to the Senate floor for a vote. The bill was last referred to the Senate Finance Committee on October 28, 2009. Finance Committee Members have not commented on the contents of S. 1982 and have not discussed a possible timeframe for Committee consideration and mark-up. Congressional observers are unsure if the Senate will have time to consider the bill, given its current focus on domestic issues such as healthcare and given the upcoming end-of-year “rush” of legislative matters on the Senate agenda. In addition, some observers have noted that the House of Representatives also has a bill on its docket similar to S. 1982. In January

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2009, House Ways and Means Committee Chairman Charles Rangel (D-NY) introduced a bill (H.R. 496) that, among other things, would revive Super 301 authority. That bill was last referred to several different Senate Committees for review in February 2009 and has seen little movement since. Some Congressional observers point to the lack of movement in H.R. 496 as an indicator for possible lack of movement on S. 1982. Nonetheless, Sens. Brown and Stabenow are likely to push strongly for consideration of the bill; the two legislators introduced S. 1982 at the same time as US and Chinese officials are meeting under the US-China Joint Commission on Commerce and Trade (JCCT). The move to introduce the bill during a high-level trade dialogue in which the United States is engaged likely shows that the Senators see S. 1982 as important to addressing US trade enforcement priorities.

### **USTR Announces New Assistant United States Trade Representative for Congressional Affairs**

On October 23, 2009, United States Trade Representative (USTR) Ron Kirk announced that Luis Jimenez will be named as the new Assistant United States Trade Representative (AUSTR) for Congressional Affairs. Jimenez will replace outgoing AUSTR Daniel Sepulveda who will serve as Senior Adviser to Senator John Kerry (D-MA). Prior to USTR Kirk's announcement, Jimenez served as Deputy AUSTR for Congressional Affairs. He has also served as the Legislative Director for Democratic Caucus Chairman Rahm Emanuel (D-IL) where he managed the Chairman's legislative agenda. In addition, Jimenez served as Emanuel's primary advisor for trade issues on the House Committee on Ways and Means, and as Emanuel's advisor for foreign affairs, immigration, defense and appropriations. He received his Bachelor of Arts degree in Political Science, International Studies and Spanish from the University of Kansas.

### **President Signs Agriculture Spending Bill Containing Language Ending Chinese Poultry Ban**

On October 21, 2009, President Obama signed into law a USD 121.13 billion Department of Agriculture appropriations measure (H.R. 2997) that contains a provision effectively ending the US ban on Chinese processed poultry. On October 7, 2009, the House of Representatives had approved H.R. 2997 by a vote of 263-162. On October 8, 2009, the Senate had approved the bill by a vote of 76 to 22.

House and Senate lawmakers agreed to include language in the agriculture appropriations bill for FY 2010 that would allow USDA to promulgate a rule permitting processed poultry or poultry product imports from China only after the Secretary of Agriculture notifies Congress that certain conditions have been met. The agreed-upon language mandates US inspections of Chinese poultry facilities before any cooked

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poultry products could be imported to the United States and increases port-of-entry re-inspections. USDA will conduct audits of Chinese inspection systems and on-site reviews of Chinese slaughter and processing facilities, laboratories and other control operations before any Chinese facilities are certified as eligible to ship poultry or poultry products to the United States. USDA will also implement a “significantly increased level of port of entry re-inspection” and will establish and conduct a “formal and expeditious information sharing program with other countries importing processed poultry or processed poultry products from China that have conducted audits and plant inspections.” USDA is mandated to report to the House and Senate Committees on Appropriations with respect to the promulgation or implementation of any poultry products inspection rule authorizing China to export poultry or poultry products to the United States. In addition, USDA is mandated to make publicly available its reports of any new audits and on-site reviews used to determine whether China's poultry inspection system “achieves a level of sanitary protection equivalent to that achieved under United States standards.” USDA will also have to make publicly available a list of facilities in China certified to export poultry or poultry products to the United States; if the number of certified facilities in China exceeds ten, USDA must notify the House and Senate Committees on Appropriations.

US officials lauded the conference language. Secretary of Agriculture Tom Vilsack stated that the language ensures that poultry from China will meet US food safety standards, and United States Trade Representative (USTR) Ron Kirk opined that the language will allow the United States to address sanitary and phytosanitary (SPS) issues with China while complying with international trade rules. USTR Kirk was likely referring to the World Trade Organization (WTO) dispute between the United States and China regarding the US ban on Chinese poultry products. On July 31, 2009, the WTO Dispute Settlement Body (DSB) established a Dispute Settlement Panel to examine US measures affecting poultry imports from China (DS392). According to China's panel request, on March 11, 2009, President Obama signed into law a USD 410 billion dollar omnibus spending bill (H.R. 1105) that, among other things, prohibited poultry products to be imported into the United States from China. China contends that Section 727 of the omnibus spending bill continues the US ban on Chinese poultry and states that none of the funds made available in the legislation may be used to establish or implement a rule allowing poultry products to be imported into the United States from China. According to Chinese officials, “this resulted in a complete ban on the import of poultry products from China into the United States . . . thus violating various WTO rules.” China argues that the poultry ban violates Articles I:1 and XI:1 of the WTO General Agreement on Tariffs and Trade (GATT) and Article 4.2 of the WTO's Agriculture Agreement. Chinese officials also contended that the United States “had entirely closed the door to China's poultry products” since 2007 through a number of annual omnibus appropriation acts and a series of related measures.

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## Potential Deputy USTR Receives Another Hold on Nomination

According to several reports, Sen. Maria Cantwell (D-WA) has placed a hold on one of President Obama's nominees for Deputy United States Trade Representative (DUSTR), Miriam Sapiro. Congressional sources note that Sen. Cantwell placed the hold on Sapiro over "the Administration's perceived failure to help move her bill to create duty-free trade preferences for imports from Pakistan and Afghanistan." Sen. Cantwell reportedly blames the United States Trade Representative (USTR) and the Obama Administration for not pushing hard enough for action on the bill which has been tied up over a House-Senate dispute over labor standards for Afghan-Pakistani workers.

Sapiro faces another hold on her nomination from Senate Finance Committee member Jim Bunning (R-KY). According to Congressional sources, Sen. Bunning has blocked Sapiro's confirmation in order to pressure the Obama Administration into taking action against a Canadian legislative proposal that would "effectively ban imports of American cigarettes blended with burley tobacco." Sen. Bunning argues that the proposed Canadian legislation "which was originally intended to address the growing concerns over candy-flavored tobacco products being targeted to minors, had morphed into overbroad legislation that would effectively ban the export of American grown burley tobacco to Canada" and would "unfairly discriminate against US tobacco growers and had the potential to destroy family-owned small businesses and jobs in Kentucky."

Meanwhile, major industry groups representing multinational firms, including the Business Roundtable, National Association of Manufacturers (NAM) and the US Chamber of Commerce, have written to Senate leaders urging them approve the nominations of Sapiro and four other nominees with international responsibilities, including Lael Brainard, nominated for Treasury Undersecretary for International Affairs; the Senate Finance Committee has not yet held a nomination hearing on Brainard because of its continuing investigation of Brainard's tax returns and financial dealings. It is unclear what investigators are looking into with regards to Brainard's financial background.

It is unclear at this stage when legislators will remove their holds on Sapiro and when the Senate can confirm Sapiro, who was nominated as DUSTR on April 14, 2009. On July 23, 2009, the Senate Finance Committee favorably reported her nomination by voice vote. Once confirmed by the Senate, Sapiro will join DUSTR Demetrios Marantis at the Office of the USTR. Another DUSTR nominee, Michael Punke, is also waiting for Senate action on his nomination. If confirmed by the Senate, Punke will fill in the position left empty by former DUSTR Peter Allgeier.

## **Treasury Department Again Does Not Cite China as Currency Manipulator in October 2009 Semi-Annual Report**

On October 15, 2009, the US Department of the Treasury submitted to Congress its semi-annual report on international economic and exchange rate policies. In the report, Treasury again chose not to label China a “currency manipulator,” despite the Department’s view that China’s currency, the renminbi, remains undervalued. Treasury is required to submit the report to Congress under the 1988 Omnibus Trade and Competitiveness Act to determine “whether countries manipulate the rate of exchange between their currency and the United States dollar for purposes of preventing effective balance of payments adjustment or gaining unfair competitive advantage in international trade.” The current Treasury report found none of the United States’ major trading partners to be manipulating their currency for such purposes during the period January 1, 2009 to June 30, 2009.

Although Treasury declined to cite China as a currency manipulator, the report cites several factors in support of Treasury’s conclusion that the renminbi is undervalued, including: (i) the stability of the renminbi against the dollar over the past year (of the 17 currencies tracked in the report, the renminbi was the only one to remain unchanged against the dollar in the second quarter of 2009); (ii) the real effective depreciation of the renminbi by 6.9 percent between February and August 2009; (iii) continuing productivity growth in the Chinese economy; and (iv) the acceleration of foreign reserve accumulation in 2009. According to the report, “although China’s overall policies played an important role in anchoring the global economy in 2009 and promoting a reduction in its current account surplus, the recent lack of flexibility of the renminbi exchange rate and China’s renewed accumulation of foreign exchange reserves risk unwinding some of the progress made in reducing imbalances as stimulus policies are eventually withdrawn and demand by China’s trading partners recovers.” Treasury remains concerned with the “rigidity” of the renminbi and the reacceleration of reserve accumulation, and believes that both should be corrected to help ensure “a stronger, more balanced global economy.”

Treasury’s decision not to label China a currency manipulator effectively helps the Administration avoid increasing bilateral tensions that were recently peaked by the Section 421 tire decision and the (now resolved) ban on Chinese poultry. As we have previously noted, Treasury’s decision appears to reverse the Obama Administration’s position regarding China’s currency policy. As a Presidential Candidate, then-Senator Obama pledged to “end China’s manipulation of its currency” and use “all the diplomatic avenues available to seek a change in China’s currency practices.” Then-Senator Obama also was a co-sponsor of the Currency Exchange Rate Oversight Reform Act of 2007 (S.1607) to identify and correct “misaligned” currencies, and the Fair Currency Act of 2007 (S.796), which would have made exchange

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rate misalignment a countervailable subsidy under US law. Treasury Secretary Timothy Geithner supported this position during his January 2009 Senate confirmation hearing when he submitted a written response to questions stating that “President Obama - backed by the conclusions of a broad range of economists – believes that China is manipulating its currency.” These statements caused concern among many observers that the Treasury Department under the Obama Administration might abandon the Bush Administration’s precedent of not citing China as a currency manipulator in its semi-annual report to Congress. These concerns have been (mostly) dispelled with Treasury’s refusal to cite China as a currency manipulator in both its April 2009 and October 2009 reports to Congress.

The domestic unions and manufacturers that have lobbied for the “currency manipulator” label for China have not yet issued a response to the report, but Senator Sherrod Brown (D-OH) has already condemned the move. Some Democratic Members could interpret the Treasury report as a decision by the Obama Administration to ignore their concerns on this issue and might seek to introduce new legislation that would force stronger action against China unless it takes additional steps to amend its currency policy. On the other hand, with members of Congress clearly focused on domestic issues such as health care and with the clock ticking on the number of bills lawmakers can consider before the end of the year, there may not be enough time for such proposed legislation.

### **Lawmakers Introduce “Reciprocal Market Access Act”**

Senator Sherrod Brown (D-OH) and Representative Louise Slaughter (D-NY) have introduced new legislation meant to “enhance the Administration’s ability to reduce foreign trade barriers to strengthen the competitiveness of American industries globally and to support our nation’s workforce.” The purpose of the “Reciprocal Market Access Act” (S. 1766 and H.R. 3786) is to “require that United States trade negotiations achieve measurable results for United States businesses by ensuring that trade agreements result in expanded market access for United States exports and not solely the elimination of tariffs on goods imported into the United States.” According to Sen. Brown, the bill “is a strong step to ensure our nation’s manufacturers can succeed in global markets [and it is] critical that our trade negotiators enforce rules to ensure our industries can compete internationally.”

The bill includes provisions that address the following issues:

- **Foreign Market Barriers.** The bill instructs US trade negotiators to eliminate foreign market barriers before reducing US tariffs on foreign products when negotiating a trade agreement between the United States and a foreign country.

- **Certification.** Under the bill, prior to reducing US tariffs on foreign products, the President must transmit to Congress proper “certification” that the United States has obtained sectoral reciprocal market access and the reduction or elimination of tariff and nontariff barriers on US products from the foreign country with which it has entered into a trade agreement.
- **Enforcement.** The bill would also provide enforcement authority to reinstate a tariff if a foreign government with which the United States has entered into a trade agreement does not honor its commitment to remove its barriers.
- **Investigations.** The bill states that the Office of the United States Trade Representative (USTR) can initiate an investigation if an interested party files a petition that alleges that a foreign government has not honored its commitment to remove its barriers. The term “interested party” is defined as:
  - (i) a manufacturer, producer, or wholesaler in the United States of a domestic product that has the same physical characteristics and uses as the product for which a modification of an existing duty is sought;
  - (ii) a certified union or recognized union or group of workers engaged in the manufacture, production, or wholesale in the United States of a domestic product that has the same physical characteristics and uses as the product for which a modification of an existing duty is sought;
  - (iii) a trade or business association a majority of whose members manufacture, produce, or wholesale in the United States a domestic product that has the same physical characteristics and uses as the product for which a modification of an existing duty is sought; and
  - (iv) a member of the Committee on Ways and Means of the House of Representatives or a member of the Committee on Finance of the Senate.

Sen. Brown and Rep. Slaughter introduced the same version of the bill in their respective chambers. S. 1766 was last referred to the Senate Finance Committee and H.R. 3786 was last referred to the House Ways and Means Committee.

Sen. Brown’s introduction of the Reciprocal Market Access Act comes as no surprise to many trade observers given his track record of introducing, co-sponsoring or supporting legislation containing “protectionist” elements (such as the “Buy American” provision included in the stimulus package that President Obama signed into law earlier this year and that has angered US trading partners). If passed

by Congress, the bill would provide an additional obstacle that US negotiators would have to overcome when drafting trade agreements with US trading partners that might find the language of the bill aggressive and clearly skewed to US interests. The bill could, in effect, create an uncomfortable and hostile environment for US and foreign trade officials when negotiating a trade agreement. At this stage, however, it is unclear if either the Senate Finance or House Ways and Means Committees will consider and mark-up the bills. Legislators are currently focused on domestic issues including health care and climate change, and both Committees may not have enough time between now and the end of the year to review the bill and send it to their respective chambers' floors for a vote.

### **ITC Releases Report on Economic Effects of Significant US Import Restraints**

The US International Trade Commission (ITC) has released a 2009 Report on "The Economic Effects of Significant US Import Restraints" (Sixth Update 2009, Investigation No. 332-325, Publication 4094). The report analyzes the effects of the liberalization of significant US import restraints (although it does not address the effects of simultaneous liberalization of significant trade barriers in other countries). The study estimates that US economic welfare (*i.e.*, total public and private consumption) would increase by about USD 4.6 billion annually by 2013 if all significant restraints quantified in the ITC's report were unilaterally removed. According to the ITC, exports would expand by USD 5.5 billion and imports by USD 13.1 billion as a result of removing tariffs and tariff rate quotas (TRQs) in the following sectors: sugar, ethyl alcohol, canned tuna, dairy products, tobacco, textiles and apparel, and other manufacturing sectors.

The report estimates that the largest effect of tariff removal would be in the textiles and apparel sector, "in which consumers would benefit from lower priced imports while previous industry contractions limit the effects felt by competing domestic producers." According to the ITC, other sectors displaying positive effects as a result of tariff liberalization would include:

- **Dairy.** Removing tariffs and TRQs on imports of dairy products is estimated to increase US welfare by approximately USD 733 million.
- **Sugar.** Removing tariffs and TRQs on imports of raw and refined sugar is estimated to increase welfare by about USD 514 million. According to the ITC, the removal of US TRQs on raw and refined sugar would result in price declines throughout the industry.
- **Ethyl Alcohol.** Liberalization of ethyl alcohol would increase welfare by USD 356 million.
- **Tobacco.** Elimination of tariffs and TRQs on cigarettes and tobacco is estimated to increase welfare by about USD 99 million.

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- **Other.** In its report, the ITC identifies 10 other sector groupings as subject to relatively high tariffs. The welfare effects of tariff liberalization in these sectors are estimated to range from a potential gain of about USD 325 million for footwear and leather products to a potential loss of approximately USD 1 million for glass. According to the ITC, most of these sectors are expected to experience increased imports, increased exports, and lower consumer prices.

Although the goal of the report is to show the (mostly positive) effects of tariff liberalization, it is unlikely that the Obama Administration will shift much of its attention to the ITC's study, given the current political climate and the Administration's focus on domestic issues such as health care and climate change. Nonetheless, the scenarios and projected effects of tariff liberalization included in the ITC report provide an interesting view as to what might happen if the Obama Administration (or any other future Administration) adopted tariff liberalization policies, and should provide US businesses and free trade supporters with more ammunition in their efforts to have the Obama Administration turn its focus to US trade policy.

The full ITC report can be found at: <http://www.usitc.gov/publications/332/pub4094.pdf>.

## Free Trade Agreements

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### Sixth Ministerial Level Meeting of the US - India Trade Policy Forum Held

On October 26, 2009 the sixth ministerial – level meeting of the United States (US) – India Trade Policy Forum (TPF) was held in New Delhi. During the meeting, both the US and India emphasized their commitment to deepening economic relations between the two countries and to working in collaboration towards a framework for promoting further trade and investment cooperation. Key areas that were identified for enhanced cooperation include infrastructure, health care services, education services, communications technology, energy and environmental services, among others. Ambassador Kirk expressed his desire to make India one of the top ten US trading partners. He underscored the opportunity the two nations had to build what “should be one of the most productive geopolitical relationships in the world.”

#### Background

The US – India TPF was established during July 2005, with a view to providing a forum for discussing issues regarding trade and investment between the US and India. The TPF is co – chaired by the Indian Minister for Commerce and Industry and the United States Trade Representative. The TPF provides the opportunity for both countries to discuss and share concerns regarding their bilateral economic relations and undertake the necessary steps to expand economic interaction. A Private Sector Advisory Group (PSAG) was formed in April 2007 as an adjunct body to the TPF. The PSAG provides input and advice from non – government trade and investment experts to the TPF.

#### Latest Developments

The sixth ministerial – level meeting of the United States - India Trade Policy Forum (TPF) was held on October 26, 2009 in New Delhi. Key issues discussed at the meeting are set forth below:

- Both Mr. Anand Sharma, Minister for Commerce and Industry and United States Trade Representative Ambassador Ron Kirk expressed their firm commitment to continuing the bilateral trade policy dialogue within the five focus groups – Agriculture, Innovation and Creativity, Investment, Services and Tariff and Non – Tariff Barriers – under the TPF.
- Both sides agreed to work together on a framework for promoting further trade and investment cooperation. Ambassador Kirk noted that substantial progress was made during the meeting towards establishing such a framework which would likely be signed in the “very near future”.

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- The two sides agreed to work towards increased involvement of small and medium enterprises in each other's markets and to initiate collaboration on developing India's infrastructure, clean energy and environment services, and information and communication technologies. Two way sectors in which cooperation and trade could be increased include infrastructure, health care services, education services, communications technology and energy and environmental services among others.
- The US has asked India to work towards further strengthening its intellectual property regime in order provide the necessary assurance to US entrepreneurs and investors in the creative services. Such a move would not only act as an incentive to overseas investors but also prove beneficial to India's arts and entertainment business. Ambassador Kirk expressed the US desire to also see further improvement and openness in the investment environment for US businesses in India.
- The two sides discussed the work of the PSAG. Both Minister Sharma and Ambassador Kirk expect that the TPF will greatly benefit from the varied expertise offered by the PSAG. According to Minister Sharma, the advice and expertise of the private sector had added immensely to the forum's dialogue.

Ambassador Kirk expressed his desire to make India one of the top ten US trading partners. He noted that the two nations had an "extraordinary" opportunity to build on what "should be one of the most productive geopolitical relationships in the world." Though trade between the US and India had doubled over the last three years and the US was the second largest recipient of Indian exports, India was only the eighteenth largest trade partner for the US. Minister Sharma expressed hope that the forum would provide the "necessary momentum" and lay out a roadmap to exploit the potential for enhancing commercial relations between the two countries.

## ***Free Trade Agreements Highlights***

### **USTR Compares Completed Korea-EU FTA to Pending KORUS FTA**

On October 19, 2009, the Office of the United States Trade Representative (USTR) released its preliminary analysis comparing the EU-Korea Free Trade Agreement (FTA) (signed between the two parties on October 15, 2009) and the pending US-Korea (KORUS) FTA. The analysis showed the differences as well as similarities between the two agreements, and USTR Ron Kirk stated that his office would closely examine key differences between the FTAs and other issues as it continues its review of the KORUS FTA and consults with Congress and interested stakeholders.

According to USTR's initial analysis of the text and tariff schedules, "the EU-Korea FTA is a comprehensive agreement that in many respects is similar and comparable to the KORUS FTA." USTR concluded that the overall tariff package for industrial goods under the EU-Korea FTA appears to be comparable in ambition and comprehensiveness to the KORUS FTA tariff schedule, with 92 percent of Korean tariffs eliminated in three years (although USTR notes that the KORUS FTA eliminates 94.5 percent). Other provisions and issues that USTR compared between the two agreements included:

- **Manufacturing.** According to USTR, "the KORUS FTA appears to contain more detailed and extensive provisions on regulatory transparency and stakeholder input into the process of developing standards and other regulatory measures, to address concerns that non-transparent procedures result in measures that act as non-tariff barriers to goods." In addition, USTR observed that the KORUS FTA contains specific provisions to ensure that remanufactured goods qualify as originating goods.
- **Motor Vehicles.** For motor vehicles, both the EU and Korea will eliminate tariffs on cars in three or five years, depending on engine size. Under the KORUS FTA, Korea's eight percent auto tariff will be eliminated immediately. The United States would eliminate its 2.5 percent tariff on small cars immediately and on large cars over three years. The KORUS FTA also contains some key features lacking in the EU-Korea FTA with respect to autos, such as a specific enforcement mechanism that includes the ability to "snap back" US tariffs on Korean cars if Korea takes measures that impair the KORUS FTA's expected benefits, and Korea's commitment to eliminate many aspects of the discriminatory effect of its current automotive tax system. According to USTR, the EU-Korea FTA does not allow for a "snap back" remedy, and simply affirms that any modifications to Korean autos taxes will be made on an MFN basis. The two agreements also differ on how they address Korean automotive safety standards. Under the KORUS FTA, the United States obtained an exemption that

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allows each US automaker to sell up to 6,500 vehicles a year in Korea built to US safety standards (and which do not need to be modified for Korea). The EU-Korea FTA contains provisions committing Korea to harmonize some of its standards to European standards over time.

- **Investment.** According to USTR's analysis, there is no investment chapter or investor-state dispute settlement provisions in the EU-Korea FTA, whereas the KORUS FTA features investor protections.
- **Services.** The KORUS FTA uses a negative list approach for opening Korea's services and financial services market, whereas the EU-Korea FTA uses a positive list approach.
- **Labor and Environment.** USTR's analysis notes that "unlike the EU-Korea FTA, the KORUS FTA labor and environment provisions are subject to the same binding dispute settlement mechanism as the KORUS agreement's trade provisions."

In 2008, the United States was Korea's fourth-largest goods trading partner, with two-way goods trade totaling USD 85 billion. According to Korean trade data, the EU, however, is Korea's second-largest goods trading partner, with total two-way goods trade in 2008 totaling USD 98.4 billion. EU exports to Korea totaled USD 40 billion (approximately USD 1.6 billion more than the United States exported to Korea), whereas it imported USD 58.4 billion worth of goods from Korea in 2008. These trade figures and the announcement of the recently completed EU-Korea FTA (which observers expect to enter into force in 2010) in light of the pending KORUS FTA which has been languishing for close to two years has made some members of the US trade community nervous that the EU-Korea FTA will lock their ability to penetrate to Korean market while the Administration sits on the KORUS FTA. The Obama Administration has not provided any timeframe for when it plans to introduce implementing legislation for the KORUS FTA to Congress for a vote, but USTR has noted that it is still undergoing a review of the agreement, making it unlikely that any action on the agreement will take place by the end of 2009.

The US trade community does not appear to be the only concerned party with regards to the lack of US movement on pending FTAs and the "missed opportunities" of increased market access to Asia; members of Congress have also jumped on the bandwagon, and are urging the Administration to turn its attentions to Asia and its markets. For example, Senate Finance Committee Chairman Max Baucus (D-MT) and Ranking Member Charles Grassley (R-IA) are urging President Obama to conclude successfully negotiations on the Trans-Pacific Strategic Economic Partnership (TPP), noting that the TPP FTA "has the potential to further open new and emerging Asia-Pacific markets to US exports [and] will allow us to build a high-level trade framework in this vital region." They also opined that finalizing the TPP FTA "would send the message to the world that US trade policy was back in business." Similar to the KORUS

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FTA, the Obama Administration has not yet made a decision as to whether to continue negotiations on the TPP FTA, and similar to the KORUS FTA, members of Congress and the US business community is pushing for concrete movement forward on the TPP FTA so as not to allow US exporters to lose any market access opportunities in the region.

### **US and Maldives Sign TIFA**

On October 17, 2009, the United States and the Maldives signed a Trade and Investment Framework Agreement (TIFA). Assistant United States Trade Representative (AUSTR) for South and Central Asia Michael Delaney stated that the United States would use the TIFA with the Maldives to boost trade between the two countries. Maldives Minister for Economic Development Mohamed Rasheed stated that the TIFA would help encourage the private sector to invest in the Maldives. US goods exports to the Maldives in 2008 totaled USD 20 million, and consisted primarily of chemicals, storage devices, aircraft parts, and floor coverings. The Maldives exported fish and organic chemicals to the United States in 2008 that totaled USD 4 million.

## Customs

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### *Customs Highlights*

#### **Senate Finance Committee Hears Testimony on Customs Facilitation and Trade Enforcement Reauthorization Bill**

On October 20, 2009, the US Senate Finance Committee heard testimony on legislation designed to bolster both the trade and enforcement functions of US Customs and Border Protection (CBP) and US Immigration and Customs Enforcement (ICE). The legislation - the Customs Facilitation and Trade Enforcement Reauthorization Act of 2009 (S. 1631) - was introduced by Senate Finance Committee Chairman Max Baucus (D-MT) and Ranking Member Charles Grassley (R-IA) on August 6, 2009. Jerry Cook, vice president for government and trade relations at Hanesbrand, Inc.; Rick Cotton, executive vice president and general counsel at NBC Universal; Ted Sherman, director for global trade services at Target Corporation; and Mary Ann Comstock, brokerage compliance manager at UPS Supply Chain Solutions, Inc. testified at the hearing.

In a statement at the hearing, Senator Baucus criticized CBP's failure to prioritize trade facilitation and enforcement in recent years, citing fewer resources allocated to preventing importation of illegal and counterfeit goods, burdensome reporting requirements on US businesses, and failure to consult either Congress or businesses before implementing broad policy changes. Senator Baucus stated that the bill would "direct CBP to re-prioritize its trade mission," without diverting from its security mission. The bill, Senator Baucus indicated, would give CBP and ICE the necessary tools to strike a balance between these two missions by creating "new high-level trade positions, necessary resources to improve trade enforcement" and "enhanc[ing] CBP's ability to enforce trade."

The legislation, in particular, establishes and fully authorizes CBP and ICE, which currently exist only as a function of discretionary authority under the Homeland Security Act. The bill creates a new Principal Deputy Commissioner and Assistant Commissioner of Trade devoted exclusively to CBP's customs facilitation and trade enforcement efforts.

Prior to proposing or finalizing any new trade - related policies or regulations, the bill requires CBP to consult with Congress and the private sector, and establishes a new interagency Customs Review Board to ensure that proposed changes to CBP's rules or regulations are consistent with US international trade obligations.

The legislation, furthermore, directs CBP to develop concrete trade benefits to participants in the Customs - Trade Partnership Against Terrorism (C-TPAT) Program, and establishes a new Customs Facilitation Partnership Program (CFFP) that provides trade facilitation benefits for entities that have a history of complying with US customs and trade laws. The primary benefit afforded to CFFP participants would be priority clearance of merchandise during resumption after a trade incident based on the risk posed by participants.

The legislation makes clear that Congress seeks completion of the development of the Automated Commercial Environment (ACE) and conformity with the International Trade Data System (ITDS), and authorizes additional funding for both. The bill also streamlines CBP's duty drawback process, requiring that drawback claims be filed electronically and imposing objective drawback eligibility requirements.

On enforcement, the bill requires CBP and ICE to prepare a biennial Joint Strategic Plan outlining their plans to improve customs - related trade enforcement. The bill establishes a Commercial Targeting Division to develop and conduct commercial risk assessment targeting, prioritizing targeting as follows: intellectual property rights, health and safety laws, agriculture laws and regulations, textile and apparel laws and regulations, general revenue laws, and non-general revenue including antidumping and countervailing duties. The bill authorizes the use of available import data collected by CBP in its commercial targeting, including information provided under the 10 + 2 maritime cargo security rule – a rule that requires importers to submit ten data points and ocean carriers to submit two pieces of data on US-bound container cargo to CBP. In this regard, the bill would repeal Section 343(a)(3) of the Trade Act of 2002, which expressly prohibits CBP from using mandatory advance information for commercial enforcement.

To elevate intellectual property rights protection, the bill establishes a National Intellectual Property Rights Coordination Center within ICE to prevent the importation or exportation of pirated and counterfeit goods. Intellectual property provisions in the bill also strengthen CBP's targeting efforts to detect goods that violate intellectual property rights, and require CBP to dedicate port personnel with primary responsibility for enforcing these rights. The bill requires a strategic plan to best position personnel, and assigns at least one intellectual property specialist to each of the top ten ports pending development of a plan. CBP would also be required to maintain a confidential list of repeated intellectual property rights violators, and would be authorized to provide a sample of merchandise detained or seized to the intellectual property rights holder to determine if the goods infringe upon its mark.

Finally, the bill expands existing law to prohibit the importation of goods made with forced, convict, or indentured labor. Section 307 of the Tariff Act of 1930 already prohibits the importation of any product or

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good made with forced or indentured labor, but allows an exception if the subject good is not produced in the United States in sufficient quantity to meet domestic demand.

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## Multilateral

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### *Multilateral Highlights*

#### **WTO Members Hash Out Details of Upcoming Seventh Ministerial Conference**

On October 20, 2009, the World Trade Organization (WTO) General Council agreed to elect Chilean Trade Minister Andrés Velasco as Chair of the Seventh WTO Ministerial Conference, which will be held in Geneva from November 30, 2009 to December 2, 2009. In addition, Members agreed to two Working Sessions to run in parallel to the Plenary Session, with the sub-themes “Review of WTO Activities, Including the Doha Work Program” and “The WTO’s Contribution to Recovery, Growth and Development.” At the conference, trade ministers will also decide on the dates and venue for the next WTO ministerial conference in 2011.

According to WTO officials, the Seventh Ministerial Conference is meant to serve as a “regular” ministerial conference dedicated to all of the WTO’s activities, and not just dedicated to the stalled Doha Round of multilateral trade negotiations. The Doha Round served as the focus of the last ministerial conferences in Doha in 2001, in Cancun in 2003 and in Hong Kong in 2005. Nonetheless, the stalled negotiations will likely serve as the main discussion point for trade ministers.

#### **Mexico Joins Canada in WTO Panel Request on US COOL Requirements**

On October 9, 2009, Mexico joined Canada in its panel submission request to the World Trade Organization (WTO) Dispute Settlement Body (DSB), challenging the United States’ Country of Origin Labeling (COOL) requirements for certain products (DS384). In December 2008, Canada and Mexico requested the WTO DSB to begin consultations with the United States over the country’s COOL provisions included in the US Agricultural Marketing Act of 1946 as amended by the Food, Conservation and Energy Act of 2008 (“the 2008 Farm Bill”), and as implemented through the Interim Final Rule of August 28, 2008, which took effect on September 30, 2008. The United States published the Final Rule in the Federal Register on January 15, 2009, and the rule went into effect on March 16, 2009.

According to several reports, Canadian and Mexican officials decided to request a panel after two rounds of unsuccessful consultations with the United States. Canada and Mexico’s decision reflects a growing perception among US trading partners that US COOL regulations are non-compliant with WTO regulations. The WTO DSB will analyze Canada and Mexico’s panel request at its next meeting,

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scheduled for October 23, 2009. Should the United States block Canada and Mexico's first panel request, the DSB will automatically establish the panel if the parties make a second panel request at the next DSB meeting on November 20, 2009.

In its request for consultations, Canada and Mexico argued that US COOL requirements discriminate against Canadian and Mexican exporters because the regulations, among other things, make it mandatory to inform consumers at the retail level of the country of origin of COOL covered commodities, including beef and pork. They also argued that COOL regulations state that "the eligibility for a designation of a covered commodity as exclusively having a US origin can only be derived from an animal that was exclusively born, raised and slaughtered in the United States, which would exclude such a designation in respect of beef or pork derived from livestock that is exported to the United States for feed or immediate slaughter." According to Mexico and Canada, the mandatory US COOL regulations are inconsistent with several WTO agreements, including: (i) Articles III:4, IX:4, X:3 of General Agreement on Tariffs and Trade (GATT) 1994; (ii) Article 2 of the WTO Agreement on Technical Barriers to Trade ("TBT Agreement") or, in the alternative, Articles 2, 5 and 7 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement"); and (iii) Article 2 of the WTO Agreement on Rules of Origin.

In a press release issued by Canada's Foreign Affairs and International Trade Department (DFAIT), Canada states that "[the COOL] provisions impose unfair and unnecessary costs on integrated North American supply chains, reducing competitiveness in both Canada and the United States . . . US COOL regulations have also created confusion and uncertainty for livestock industries on both sides of the border." According to DFAIT, in 2008, US-Canada agricultural trade totaled USD 37 billion. Canada is the US largest agricultural trading partner and vice versa. Mexico's Ministry of Economy (SE) also stated in a press release that "US COOL regulations are inconsistent with international trade rules to determine the origin of certain agricultural goods and result in „segregation costs“ for cattle and hog exporters . . . in addition, US COOL regulations have resulted in increased speculation and uncertainty in the US cattle market in detriment of Mexican bovine exports." Mexico's Beef Council (*Consejo Mexicano de la Carne-COMECARNE*) is working closely with its Canadian counterparts to challenge the US COOL requirements. According to COMECARNE, US COOL requirements will decrease Mexican beef exports to the United States by 50 percent in 2009.