Japan External Trade Organization

WTO and Regional Trade Agreements Monthly Report

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Summary of Reports

United States

United States Highlights

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

- Senators Introduce "Clean Energy Jobs and America Power Act" Bill Containing Climate Change Provisions, Possible Border Measures
- Arbitral Tribunal Rejects Canada's Payment Offer to US to Cure SLA Breach
- House, Senate Lawmakers Agree to Agriculture Appropriations Language Ending Ban on Chinese Poultry
- President Obama Names New US Intellectual Property Enforcement Coordinator
- USTR Requests Comments for Annual NTE Report; Requests Comments for Two New Reports on SPS, Standards-Related Measures
- President Obama Imposes Tariff on Chinese Tire Imports
- Cato Institute Releases Analysis of US Climate Change Debate, Implications for Trade
- Deputy USTR Nomination Put on Hold While President Obama Nominates US Ambassador, Permanent Representative to WTO
- APHIS Revises, Extends Timetable for Lacey Act Declaration Requirements of Certain Products

Free Trade Agreements

Free Trade Agreements Highlights

- Brazil and the United States Discuss Trade Irritants

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Multilateral

WTO Releases Arbitration Decision in US-Brazil Cotton Dispute

Decision: A WTO Arbitrator has ruled that Brazil is entitled to impose retaliatory trade sanctions on US imports in the amount of USD 294.7 million. The award granted fell significantly short of the total amount of USD 2.681 billion sought by Brazil.

Multilateral Highlights

- Brazil Requests US Export Credit Data to Help Determine Trade Retaliation Amount
- G-20 Pittsburgh Summit Ends with Little Substantive Movement, Increased Frustration
- Informal New Delhi Ministerial Meeting Yields Little in Concrete Doha Movement

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Reports in Detail

United States

United States Highlights

Senators Introduce "Clean Energy Jobs and America Power Act" Bill Containing Climate Change Provisions, Possible Border Measures

On September 30, 2009, Senate Environment and Public Works Committee Chairwoman Barbara Boxer (D-CA) and Senate Judiciary Chairman John Kerry (D-MA) unveiled the "Clean Energy Jobs and America Power Act," a bill that seeks to reduce greenhouse gas emissions and promote US energy independence. The bill includes provisions on greenhouse gas emission reductions across multiple economic sectors, in addition to a "transition and adaptation" section that is meant to address the costs of a climate bill for US consumers and businesses. The US Environmental Protection Agency (EPA) would serve as the main administrator for the provisions and programs included in the bill. We summarize below some of the main provisions of the "Clean Energy Jobs and America Power Act."

1. **Emissions Reduction.** The bill proposes cuts in emissions from 2005 levels, with a three percent cut by 2012, a 20 percent cut by 2020, a 42 percent cut by 2030, and an 83 percent cut by 2050. This is slightly different from the House-led American Clean Energy and Security Act of 2009 (ACES; H.R. 2454) which proposed cuts in emissions from 2005 levels, beginning with a three percent cut in emissions by 2012, a 17 percent cut by 2020, a 42 percent cut by 2030, and an 83 percent cut by 2050.

2. **Pollution Reduction and Investment System.** The bill proposes the creation of a Pollution Reduction and Investment (PRI) mechanism that "sets pollution reduction targets, then uses market **incentives** to find the most affordable paths to achieve them." Under the PRI system – which initially "applies only to the largest polluters in the country" – major polluters will be required to turn in one "carbon credit" or voucher for the right to pollute one ton of carbon. Vouchers are tradable and can be bought or sold. The PRI system also limits the total number of vouchers available in a given year, thereby "allowing America to meet hard targets for carbon reduction." The total number of vouchers available shrinks every year.

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3. **Emissions Allowances.** The bill would establish an annual tonnage limit on greenhouse gas emissions from specified activities, and would direct the EPA to establish allowances equal to the tonnage limit for each year (with one allowance representing the permission to emit one ton of greenhouse gases, measured in tons of carbon dioxide equivalent). Covered entities are prohibited from emitting greenhouse gases in excess of their allowable emissions level, which is determined by the number of emission allowances and offset credits they hold on the specified date. In addition, the bill would establish criteria that must be met before allowances from foreign programs can be used for compliance by covered entities. The bill also establishes a "market stability reserve" of emission allowances that will be auctioned at a minimum set price that increases annually. According to the legislators, "the auction of additional allowances will help contain the costs of meeting the annual greenhouse gas limits and minimize price fluctuations."

4. **Support for Affected Industries.** The bill establishes a program that rebates emission allowances to eligible industrial sectors to compensate these sectors for costs incurred as a result of compliance with the "Clean Energy Jobs and America Power Act." The bill directs the EPA to determine which sectors and subsectors should be eligible for rebates through a rulemaking based on an assessment of the energy and greenhouse gas intensity of each sector and the trade intensity of each sector.

5. **Support for US Consumers.** The bill proposes rebates for low‐ and moderate‐income consumers on their energy bills to help offset any increased costs as a result of the implementation of the bill. In addition, the bill would create a market stability fund to protect consumers and businesses from excessive price volatility, as well as "strong policing measures to establish marketplace accountability and ensure the new carbon marketplace is transparent, fair, and accountable."

6. **Border Measures.** Regarding border measures, the bill states that "it is the sense of the Senate that this Act will contain a trade title that will include a border measure that is consistent with [US] international obligations and designed to work in conjunction with provisions that allocate allowances to energy-intensive and trade-exposed industries."

7. **Climate Change Worker Adjustment Assistance.** The bill establishes a program pursuant to which any worker displaced as a result of the provisions of the bill would be entitled to 156 weeks of income supplement, 80 percent of their monthly health care premium, up to USD 1,500 for job search assistance, up to USD 1,500 for moving assistance, and additional employment services

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for skills assessment, job counseling, training, and other services. Payments under the program cannot exceed the proceeds from the auction of allowances set aside for this purpose.

8. **Research and Development.** Under the bill, USD 10 billion would be spent over the next ten years to support research and development of new carbon capture and sequestration technology to advance the next generation of coal‐fired power plants. Additional funding would go to "first‐movers" who implement carbon capture and sequestration technology on new or retrofitted plants, and "the higher the level of carbon capture, the greater the level of funding." The bill creates a new federal program that encourages investment in low‐carbon power generation especially natural gas and provides additional incentives that reward companies for reducing leaks from natural gas pipelines. The bill proposes new programs for research and development for advanced nuclear technology and nuclear waste management, in addition to training programs meant to train the highly‐skilled workforce necessary for the construction, operation, maintenance and support of nuclear facilities.

9. **Other Provisions.** The bill would afford grants to US cities and states that embrace clean energy, and would provide "substantial investments" to reward cities and states for investing in renewable energy, energy efficiency, retrofits and building upgrades. In addition, the bill proposes new investments in research and development funding for renewable energy sources. The bill also proposes reforming transportation planning approaches in states and large metropolitan areas by "including reductions in harmful greenhouse gases as criteria for transit and development planning." In addition, the bill contains "a firm annual commitment to help the poorest and most at‐risk nations contain the effects of climate change and promote stability."

10. **Entities Not Covered.** The bill does not cover any agricultural enterprise or any small businesses that pollute less than 25,000 tons of carbon‐based pollutants.

The bill next travels to Senate Committees that have jurisdiction over the different provisions included within the draft. Trade observers will be closely watching the Committee mark-ups of the draft bill for the inclusion of the "border measures" that the draft promises. Sen. Kerry has already stated that the Senate Finance Committee is close to finalizing the language it would like to include in the bill "regarding tariffs against developing nations that do not reduce their carbon emissions." Sen. Kerry noted, however, that the border measure language in the Senate bill would comply with World Trade Organization (WTO) rules and would be implemented "in a way that would be WTO-compatible."

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It is unclear when the Environment and Public Works Committee will consider the legislation; five other Senate Committees that share jurisdiction over various aspects of the bill may also need time to review and mark-up the draft legislation. Consequently, given the number of Committees that may want to review the bill and given Congress' current focus on health care, there may be little forward movement on the bill in the short-term. Senate Majority Leader Harry Reid (D-NV) has stated that although he would like the Senate to begin work on the bill as soon as possible, other policy priorities might prevent the Senate from looking at the draft legislation this year. He added that the draft bill would move to the Senate floor once it has achieved "enough bipartisan support." In addition, it is uncertain if Sens. Boxer and Kerry have the 60 votes needed to beat a filibuster. Several legislators have already indicated their opposition to the bill, including Sen. John Rockefeller (D-WV) who opined that the draft legislation is "a disappointing step in the wrong direction," adding that the bill's provision that US greenhouse gas emissions be reduced by 20 percent by 2020 is "unrealistic and harmful [and does not provide us with] enough time to deploy the carbon capture and storage and energy efficiency technologies we need." Sen. Kent Conrad (D-ND) expressed similar concerns with the 20 percent reduction target. Consequently, the various issues surrounding the climate change debate and the draft Senate bill could prevent short-term consideration of the legislation, making it less likely that President Obama will have the climate change legislation he wants to sign before the start of the United Nations Climate Change Conference in Copenhagen in December 2009.

Arbitral Tribunal Rejects Canada's Payment Offer to US to Cure SLA Breach

In a decision released on September 28, 2009, an arbitral tribunal rejected Canadian claims that an offer to pay the US Government USD 36.66 million cured Canada's breach of the Softwood Lumber Agreement (SLA). The tribunal was formed under the auspices of the London Court of International Arbitration (LCIA); in March 2008, the tribunal had determined that Canada breached the SLA, consequently requiring Canada to cure its breach or impose additional export charges on shipments of softwood lumber products to the United States. Canada initiated the arbitration proceeding to have the tribunal determine whether Canada's payment offer of USD 36.66 million cured the breach.

In March 2008, the LCIA tribunal found that Canada breached the SLA by failing to calculate quotas properly during the first six months of 2007. On February 26, 2009, the LCIA tribunal issued its decision on a remedy for that breach. The LCIA tribunal determined that, as an appropriate adjustment to compensate for its breach, Canada must collect an additional 10 percent ad valorem export charge on softwood lumber shipments from Eastern Canadian provinces until USD 54.8 million has been collected.

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Canada was required to cure the breach by March 28, 2009. Canada, however, did not impose the compensatory measures determined by the tribunal, and in place, offered to tender a payment of USD 36.66 million to the U.S. Government in March 2009 meant to cure the breach. The United States considered that such an offer did not cure the breach identified by the tribunal, and rejected Canada's offer. On April 2, 2009, Canada requested that the LCIA tribunal determine whether Canada had cured the breach with its payment offer.

The LCIA tribunal rejected Canada's argument that it cured its breach when it offered to pay USD 36.66 million to the US Government, and also rejected the notion that any government-to-government payment could cure a breach of the SLA, "because such a payment would have no impact on exports of softwood lumber products from Canada to the United States." In response to the tribunal's decision, the Canadian federal government announced it would adhere to the remedy endorsed by the tribunal, and start charging 10 percent ad valorem duties on exports of softwood lumber from Quebec, Ontario, Manitoba and Saskatchewan on a first-to-ship basis until USD 54.8 million is collected. United States Trade Representative (USTR) Ron Kirk, meanwhile, noted that "the tribunal's decision confirms the view of the United States that the Softwood Lumber Agreement is enforceable [and that] Canada failed to cure its breach."

House, Senate Lawmakers Agree to Agriculture Appropriations Language Ending Ban on Chinese Poultry

On September 25, 2009, House and Senate lawmakers agreed to include language in an agriculture appropriations bill for FY 2010 that would allow the US Department of Agriculture (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. According to Congressional sources, the language effectively ends a ban imposed by Congress earlier this year on Chinese processed poultry. The agreed-upon language mandates US inspections of Chinese poultry facilities before any cooked poultry products could be imported to the United States and increases port-of-entry re-inspections. Chairwoman of the House Appropriations Agriculture Subcommittee Rosa DeLauro (D-CT) lauded the language, stating that "the final conference language would firmly establish that Chinese poultry imports must live up to American sanitary conditions before being shipped to the United States."

The language that House and Senate lawmakers agreed to states that 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

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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.

The appropriations conference language that makes it possible for China to export poultry products to the United States could lessen the tension between the United States and China that has flared up recently as a result of President Obama's September 11, 2009 decision to impose a three-year safeguard import

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tariff on Chinese tires for light trucks and passenger vehicles that were the subject of a Section 421 investigation. The President's move angered China, which requested WTO dispute settlement consultations with the United States and initiated trade remedy investigations on US imports to China of poultry and automotive products. Whether the conference language on Chinese poultry is enough to diminish the bilateral tension as a result of the Section 421 decision is questionable, and some observers opine that the two issues – the US ban on Chinese poultry and the Section 421 tires decision – are not related. US government officials and several US agricultural groups, including the USA Poultry and Egg Export Council and the National Pork Producers Council, however, have noted that the conference language provides necessary food protection measures and avoids language incompatible with US WTO trade obligations, thereby demonstrating to China that the United States is willing to adhere to a "rules-based global trading system" and is willing to work and cooperate with China to address bilateral trade irritants.

President Obama Names New US Intellectual Property Enforcement Coordinator

On September 25, 2009, President Obama named Victoria Espinel the new US Intellectual Property Enforcement Coordinator, a position created by Congress in 2008 as part of the "Prioritizing Resources and Organization for Intellectual Property Act of 2008" (P.L. 110-403) that is meant to "augment American efforts to prevent the exploitation of pirated or counterfeited movies, music and software, as well as other intellectual property." The Intellectual Property Enforcement Coordinator, part of the Office of Management and Budget, is mandated to strengthen US enforcement efforts to stop the sale of pirated or counterfeited movies, music, drugs and software.

Espinel is the founder and president of Bridging the Innovation Divide, a non-profit focused on the "innovation divide" and "empowering all Americans to obtain the full benefit of their creativity and ingenuity." From 2007-2009, Espinel served as a visiting assistant professor at the George Mason University School of Law, focusing on IP and international trade issues. She also served as an adviser on IP issues to the staff of the Senate Judiciary Committee, Senate Finance Committee, House Judiciary Committee and House Ways and Means Committee. In 2005, Espinel became the first Assistant United States Trade Representative (AUSTR) for Intellectual Property and Innovation, serving as chief US trade negotiator on those subjects. Espinel also served as Deputy AUSTR for Intellectual Property and as Associate General Counsel at USTR. Prior to joining USTR, Espinel was with the law firms of Covington & Burling, and Sidley, Austin, Brown & Wood. She holds an L.L.M. from the London School of Economics,

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a J.D. from Georgetown University Law School, and a B.S. in Foreign Service from Georgetown University's School of Foreign Service.

USTR Requests Comments for Annual NTE Report; Requests Comments for Two New Reports on SPS, Standards-Related Measures

In a September 24, 2009 Federal Register (FR) notice, the Office of the United States Trade Representative (USTR) requested that interested parties submit comments to assist it in identifying significant barriers to US exports of goods, services, and US foreign direct investment for inclusion in the National Trade Estimate Report on Foreign Trade Barriers (NTE) (74 FR 48811-48813). The FR notice states that "for the first time this year, the Trade Policy Staff Committee [TPSC] is requesting that comments on standards-related measures and sanitary and phytosanitary (SPS) measures that create barriers to US exports be submitted separately from other NTE comments." The FR notice states that this will assist USTR in preparing two new annual reports starting in 2010 highlighting SPS and standards-related measures that may be inconsistent with international trade agreements to which the United States is a party or that otherwise act as significant barriers to US exports.

On July 16, 2009, USTR announced plans to begin publishing two new reports on foreign trade barriers, specifically SPS measures and standards-related measures. The reports will be issued annually starting in 2010 and are meant to serve as "tools to bring greater attention and focus to resolving SPS and standards-related measures that may be inconsistent with international trade agreements to which the United States is a party or that otherwise act as significant foreign barriers to US exports."

Commenters should submit information related to one or more of the following categories of foreign trade barriers:

- Import policies (*e.g.*, tariffs and other import charges, quantitative restrictions, import licensing, and customs barriers);
- SPS measures;
- Standards-related measures (including standards, technical regulations, and conformity assessment procedures);
- Government procurement restrictions;
- Export subsidies (*e.g.*, export financing on preferential terms and agricultural export subsidies that displace US exports in third country markets);

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- Lack of intellectual property protection (*e.g.*, inadequate patent, copyright, and trademark regimes);
- Services barriers;
- Investment barriers;
- Government-tolerated anticompetitive conduct of state-owned or private firms that restricts the sale or purchase of US goods or services in the foreign country's markets;
- Trade restrictions affecting electronic commerce; and
- Other barriers (*e.g.*, barriers that encompass more than one category, such as bribery and corruption, or that affect a single sector).

Written comments from the public on issues concerning SPS or standards-related measures are due November 4, 2009. Comments concerning all other measures are due November 18, 2009.

President Obama Imposes Tariff on Chinese Tire Imports

On September 11, 2009, President Obama announced that the United States would impose a three-year safeguard import tariff on Chinese tires for light trucks and passenger vehicles that were the subject of a Section 421 investigation. The President's move has angered China which has requested World Trade Organization (WTO) dispute settlement consultations with the United States and initiated trade remedy investigations on US imports to China of poultry and automotive products. We review below President Obama's decision to impose the tariff and reaction to the Section 421 decision.

I. Background

Section 421 of the Trade Act of 1974 ("the Trade Act"), as amended, permits the United States to impose import relief measures when products from China are imported in increased quantities or under other conditions that cause or threaten to cause "market disruption" to domestic producers of like or directly competitive products. The provision was added to the Trade Act by the US-China Relations Act of 2000 as part of China's accession to the World Trade Organization (WTO). Section 421 permits the President to reject such relief if he determines that its provision is "not in the national economic interest of the United States" and would have an "adverse impact on the United States economy clearly greater than the benefits." As such, ultimate discretion to impose countermeasures rests with the President alone.

On April 20, 2009, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW) filed a petition under Section 421 alleging that a surge of certain passenger vehicle and light truck tires from China has been a "major factor" in the decline of

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domestic tire production in the United States and the loss of thousands of US jobs in the industry. The petition stated that consumer tire imports from China increased by 215 percent by volume between 2004 and 2008 and called for the imposition of a 21 million unit annual quota on imports that would increase by five percent during the quota's second and third years.

On June 18, 2009, the US International Trade Commission (ITC) announced its affirmative determination in the Section 421 investigation of imports of certain passenger vehicle and light truck tires from China. The ITC decided, by a vote of 4 to 2, that tires from China are being imported into the United States in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products. The ITC recommended that the President impose a three-year safeguard tariff on Chinese tires for light trucks and passenger vehicles starting at 55 percent in the first year, 45 percent in the second year, and 35 percent in the third year. President Obama had a September 17, 2009 deadline to decide whether to impose a tariff on Chinese tires.

II. Section 421 Decision

On September 11, 2009, President Obama announced that the United States would impose a three-year safeguard import tariff on Chinese tires for light trucks and passenger vehicles. Effective September 26, 2009, the United States will impose a tariff of 35 percent on certain passenger vehicle and light truck tires from China in the first year, followed by a 30 percent in the second year and a 25 percent tariff in the third year. The tariff rates that President Obama decided to impose are less than the ITC-recommended tariff rates. President Obama also decided that workers affected by the Chinese tire imports should receive targeted Trade Adjustment Assistance (TAA). In announcing the Section 421 decision, a White House spokesperson stated that "as part of its accession to the World Trade Organization, China agreed to a special safeguard mechanism that would allow its trading partners to implement remedies in response to import surges and under other circumstances [and] the President decided to remedy the clear disruption to the US tire industry based on the facts and the law in this case."

III. China's Reaction

Chinese officials reacted negatively to President Obama's Section 421 decision. China's Ministry of Commerce released a statement noting that "China strongly opposes this serious act of trade protectionism by the United States," and Chinese officials have stated that as many as 100,000 Chinese jobs in the tire industry may be threatened as a result of the President's decision. Chinese officials also opined that the President's 421 decision violates the rules of the WTO and is "contrary to the relevant commitments that the United States government made at the G-20 financial summit" not to erect

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"protectionist" barriers to trade. Chinese officials noted that the 421 decision "has also harmed China . . . [and] sends the wrong trade protectionist signal to the world before the [September 24-25, 2009 G-20 Economic Summit in Pittsburgh] . . ."

On September 14, China put forward a formal request for consultations with the United States under the WTO dispute settlement mechanism on the US Section 421 decision. According to a press statement from the Chinese Mission to the WTO, "China believes that the [Section 421] measure by the United States, which runs counter to relevant WTO rules, is a wrong practice abusing trade remedies." The consultation request states that "China considers that the higher tariffs, not having been justified as emergency action under relevant WTO rules, are inconsistent with Article I:1 of the GATT 1994 because the United States does not accord the same treatment it grants to passenger and light truck tires originating in other countries to the like products originating in China." In addition, the consultation request notes that "the United States [cannot] justify these [Section 421] measures as properly applied exceptions to this fundamental WTO principle." On September 13, China's Ministry of Commerce launched anti-dumping and anti-subsidies investigations into certain automobile and chicken products from the United States. According to press reports, Chinese manufacturers allege that US poultry and certain US auto parts are imported to China's markets in an "unfair competition manner" that harms domestic industries. China denies, however, that the chicken and automobile investigations are retaliation for the US Section 421 decision.

IV. Other Reactions

The USW responded favorably to the decision, stating that "despite imposing a different remedy than recommended by the ITC, we are optimistic that the step taken by The President will provide real, effective relief." United States Trade Representative (USTR) Ron Kirk defended President Obama's Section 421 decision and stated that "this Administration is doing what is necessary to enforce trade agreements on behalf of American workers and manufacturers, [and] enforcing trade laws is key to maintaining an open and free trading system." Several Congressional Democrats also lauded the decision. Senate Finance Committee Chairman Max Baucus (D-MT), House Ways and Means Committee Chairman Charles Rangel (D-NY), Trade Subcommittee Chairman Sander Levin (D-MI) stated that President Obama's decision to impose the Section 421 safeguard mechanism "shows a readiness [by the Administration] to enforce trade agreements . . ."

Most reactions, however, have been negative. House Ways and Means Trade Subcommittee Ranking Member Kevin Brady (R-TX) noted that "the tariff amounts [will] tax working Americans in the middle of an economic downturn." According to press reports, Deputy Director-General of the WTO Alejandro Jara

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stated that "the US government's decision to impose tariffs on Chinese tires is a cause of concern [and it may be] a measure that does not help recovery and does not help increase world trade." David Spooner, outside counsel for the Chinese tire industry, opined that "these tariffs are unwarranted [and] it is troubling that the Administration would invoke an import surge safeguard over the objections of US industry and in response to falling imports; not a single US tire company supports these taxes." Spooner was referring to the fact that no member of the US tire industry supported the tires case; in fact, many US tire manufacturers and wholesalers argued against the imposition of the remedy. The American Coalition for Free Trade in Tires released a statement noting that it is "certainly disheartened that the President bowed to the union and disregarded the interests of thousands of other American workers and consumers."

V. Analysis

President Obama's safeguards decision in the tires Section 421 case serves as his Administration's first "litmus test" on China trade and Obama's trade policy more generally. His imposition of safeguards on Chinese tire imports under Section 421 represents a significant departure from the policy of the previous Administration; President Bush rejected the imposition of Section 421 safeguards on all four occasions such safeguards were recommended during his tenure. And unlike other recent trade spats, such as "Buy American" and the Mexican trucking dispute, the President alone decided whether ultimately to impose the Section 421 tariffs. The President's move, however, may not be as overtly protectionist as some critics have opined, and could represent a basic political decision to appease labor unions and Congressional Democrats in order to further the President's domestic priorities. The timing of the President's announcement – late Friday night – also indicates that President Obama is not a full-throated protectionist because late Friday or weekend news releases typically involve news that the White House wishes to shield from intense media scrutiny. If the President were a strong protectionist, he likely would have announced the Section 421 decision on a weekday at a time when the press and the trade community could focus greater attention on the announcement. The late Friday announcement thus likely indicates that the White House is uncomfortable at some level with its decision to prioritize domestic politics over a coherent and less-problematic trade policy.

Unfortunately, the President's political concessions to Congressional Democrats and the USW (and other unions) in the Section 421 case continues a troubling theme of sacrificing trade policy for domestic political gain. This approach, while likely not a harbinger of strong protectionist sentiment, has resulted in "passive protectionism" because President Obama is willing to placate Congress' and his domestic supporters' protectionist impulses in order to achieve his domestic goals. As such, the President's "politics-first" approach to trade is creating almost as many problems as would an express policy of trade

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hostility. In the case of the tires decision, China has already begun to retaliate. US tire manufacturers and wholesalers have indicated their discontent with the decision and are already concerned that the tariffs could drive tire prices higher in the United States. There is also concern that the President's decision could affect the September 24-25 G-20 Pittsburgh summit, as other US trading partners likely will criticize President Obama's decision and the broader implications of the President's *de facto* protectionism.

Cato Institute Releases Analysis of US Climate Change Debate, Implications for Trade

On September 9, 2009, the Cato Institute released a report on climate change and US trade policy ("A Harsh Climate for Trade: How Climate Change Proposals Threaten Global Commerce" available at http://www.freetrade.org/pubs/pas/tpa-041es.html). Policy Analyst with Cato's Center for Trade Policy Studies Sallie James writes that in considering a climate change abatement program, proponents of a cap-and-trade program for greenhouse gas emissions have "loaded up their proposal with giveaways, loopholes, and barriers to imports from nations with less stringent emission caps" in an effort to minimize adverse effects on certain domestic industries from higher energy costs. James opines that these trade measures are likely to be ineffective at best and harmful to US interests at worst.

James notes that the key targets of the proposed import barriers - India and China - are relatively minor sources of imports of energy-intensive goods, and that most carbon-intensive imports to the United States come from other developed countries that have stricter emissions controls than the United States and "will therefore likely escape import penalties." She also notes that the proposed trade provisions of climate change proposals are "counterproductive" because certain import barriers that the United States would erect under such proposals to protect the environment could elicit trade disputes and possible retaliation from US trading partners. James notes that "antagonizing trade partners through probably illegal trade measures will undermine efforts to secure global cooperation on climate change [and] a freer, more prosperous economy is a more auspicious path to ensuring a more rapid spread of environmental technology and the global consensus needed to combat climate change."

James writes that the June 26, 2009 passage of the American Clean Energy and Security Act of 2009 (ACES; H.R. 2454) by the House of Representatives has proven to be controversial, and the bill includes provisions that domestic action on climate change be conditional upon similar regulations in competing countries. She notes, for example, that the ACES attempts to address competitiveness concerns by giving up to 85 percent of emission permits away free to certain industries and by implementing border measures to restrict imports from jurisdictions with fewer restrictions on greenhouse gas emissions. "In

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so doing, however, the bill creates a host of other problems, notably by running afoul of global trade rules and exposing US industry to retaliation and copycat regulations that would negatively affect US exports." In addition, she opines that by "irritating large developing countries that are most crucial to securing an international agreement on climate change, the bill may undermine the very purpose for which it was ostensibly designed."

James concludes that US policymakers need to avoid regulations and policies that "unnecessarily damage the global economy and trading system." The report states that domestic efforts to combat climate change are "not inherently in conflict with global trade rules" but that politicians have proposed a complex array of trade-related and other measures to keep favor with certain energy-intensive and trade-exposed industries. James opines that these trade-related measures put the United States at risk of retaliation, litigation, or both from its global trading partners, and she adds that "any trade-related measures (such as tariffs on goods from non-capped countries) need to be based strictly on the goal of protecting the environment, rather than an attempt to level the playing field for domestic competitors shackled by climate change regulations." In closing, James notes that "alienating our trade partners by unilaterally imposing tariffs and subsidies that flout global trade rules will undermine efforts to obtain global cooperation on climate change and inflict unnecessary damage on the US economy."

James' paper follows a September 9, 2009 letter by US legislators to President Obama urging him to support strong border adjustments in any climate change legislation. In the letter – signed by 25 House Democrats and three House Republicans – the legislators state that US jobs could be at risk "without a robust provision" to protect US manufacturers in any climate change proposal, and the lawmakers opine that without border adjustments "you give consumers an incentive to purchase products that cause emissions in other countries, putting domestic manufacturers at a disadvantage and likely leading to a sharp rise in imported goods." A similar letter was sent to President Obama on September 6, 2009. In that letter, a group of 10 Democratic Senators – including Sens. Sherrod Brown (D-OH), Debbie Stabenow (D-MI), Russell Feingold (D-WI), and Carl Levin (D-MI) – wrote that a border mechanism "is essential" for them to support a climate bill, also noting that any climate change legislation must also set aside "sufficient" emissions allowances for energy-intensive industries such as iron ore, steel, cement, and glass.

James' analysis of the United States' consideration of climate change policy and its implications for trade sums up nicely the contentious issues surrounding the cap-and-trade debate. Of concern to US trading partners is the imposition of trade barriers and other measures that would levy a tax on US imports of energy-intensive products and domestic support to US industries meant to "help" these industries

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acclimate to new emissions standards. But as James points out, in an effort to ensure that US industries are protected from "carbon leakage" and other problems that could stem from a new cap-and-trade program, legislators are creating more problems by looking to "protectionist" measures that could serve to harm US exports and US credibility in the global trade landscape. The letters from legislators urging the President to support border adjustment measures in any climate change legislation indicate that Democrats will likely fight hard for the inclusion of such measures (as they were included in the House-passed ACES bill). The key question that US trading partners and the trade community in general is asking is whether President Obama will bow to pressure from legislators and support the inclusion of such measures in a final climate change bill or whether he will oppose a final bill containing such measures. Such a decision likely depends on how much the Obama Administration would like to pass a climate change bill before the United Nations Climate Change Conference to be held in Copenhagen, Denmark in mid-December 2009.

Deputy USTR Nomination Put on Hold While President Obama Nominates US Ambassador, Permanent Representative to WTO

Senate Finance Committee member Jim Bunning (R-KY) has put a hold on Senate approval of one of President Obama's nominees for Deputy United States Trade Representative (DUSTR), Miriam Sapiro. 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." It is unclear at this stage when Sen. Bunning will remove the hold 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.

Separately, on September 3, 2009, President Obama nominated Michael Punke as DUSTR and the US Permanent Representative to the World Trade Organization (WTO) in Geneva. If confirmed by the Senate, Punke will fill in the position left empty by former DUSTR Peter Allgeier. Punke is an author and a lawyer. He formerly worked at the Washington, DC offices of Mayer, Brown, Rowe & Maw. From 1995 to 1996, he was senior policy adviser at USTR. From 1993 to 1995, he served as Director for

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International Affairs in the Clinton Administration, and prior to that, he served as International Trade Counsel on the staff of Sen. Max Baucus (D-MT). Pending Punke's Senate confirmation, Deputy Chief of the US Mission to the WTO David Shark and Assistant USTR for the WTO and Multilateral Affairs Matt Rohde (who will serve as interim senior official for the Doha Round of WTO negotiations) will represent the United States in Geneva. Although Punke's nomination has been well-received in the United States (mostly from other Administration officials and Sen. Baucus), several WTO Members and US trading partners are skeptical whether Punke can fill outgoing DUSTR Allegeier's shoes in the Doha Round, and they have expressed concern that Allgeier's departure and Punke's confirmation process (which could last several months, depending on the Senate agenda) "could impede the ability of the Obama Administration to fully engage in the Doha Round of trade talks."

APHIS Revises, Extends Timetable for Lacey Act Declaration Requirements of Certain Products

In a September 2, 2009 Federal Register (FR) notice, the Department of Agriculture's Animal and Plant Inspection Service (APHIS) announced revisions to its plan to phase in enforcement of the Lacey Act's declaration requirement and other implementation plans (74 FR 45415- 45418). APHIS has revised the timetable for Lacey Act declaration requirements (some of which were scheduled to take effect April 1, 2010) and has proposed to push enforcement back to September 1, 2010, or later. According to APHIS, it is proposing a revision to its timetable for enforcement based on objections filed by industry and other sources to a previous enforcement schedule published on February 3, 2009 (74 FR 5911). APHIS requests public comments on its proposal; comments on the proposed revised schedule are due November 2, 2009.

The Lacey Act, enacted in 1900, serves as an anti-trafficking statute protecting a broad range of wildlife and wild plants. In general, the Lacey Act makes it unlawful to import, export, transport, sell, receive, acquire or purchase any fish, wildlife or wild plants taken, possessed transported, or sold in violation of state, federal, Native American tribal, or foreign laws or regulations that are related to fish, wildlife, or wild plants. On May 22, 2008, the US Congress approved amendments to the Lacey Act banning commerce in illegally sourced plants and their products through the Food, Conservation, and Energy Act of 2008 (P.L. 110-246 or "the 2008 Farm Bill"). The amendments to the Lacey Act extend the statute's reach to encompass products, including timber, that derive from plants illegally harvested in the country of origin and brought into the United States, either directly or through manufactured products, including products manufactured in countries other than the country where the illegal harvesting took place. The amendments also require importers to declare the country of origin of harvest and species name of all

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plants contained in their products and establishes penalties for violations of the Lacey Act, including forfeiture of goods and vessels, fines and jail time, among other provisions.

The revised phased-in enforcement schedule through August 31, 2010 is described in the table below with the date that enforcement of the declaration requirement begins listed at the top of each column. Please note that while enforcement of the declaration requirement is being phased in, the other Lacey Act amendments are already effective, and actions to enforce provisions of the Lacey Act other than the declaration requirement may be taken at any time. The following Harmonized Tariff Schedule (HTS) Chapters are scheduled for the following phases of enforcement:

Phase	HTS Products
Phase II (April 1, 2009)	Ch. 44 Headings (wood & articles of wood): 4401—(Fuel wood) 4403—(Wood in the rough) 4404—(Hoopwood; poles, piles, stakes) 4406—(Railway or tramway sleepers) 4407—(Wood sawn or chipped lengthwise) 4408—(Sheets for veneering) 4409—(Wood continuously shaped) 4417—(Tools, tool handles, broom handles) 4418—(Builders' joinery and carpentry of wood).
Phase III (October 1, 2009)	Ch. 44 Headings (wood & articles of wood). 4402—(Wood charcoal) 4412—(Plywood, veneered panels) 4413—(Densified wood) 4414—(Wooden frames) 4419—(Tableware & kitchen-ware, of wood) 4420—(Wood marquetry; caskets; statuettes) **Plus all products listed under Phase II**
Phase IV (April 1, 2010 – September 30, 2010)	Ch. 44 Headings (wood & articles of wood) 4421—(Articles of wood, nesoi) Ch. 66 Headings (umbrellas, walking sticks, riding crops). 6602—Walking sticks, whips, crops. Ch. 82 Headings (tools, implements).

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Phase	HTS Products
	8201—Hand tools. Ch. 92 Headings (musical instruments). 9201—Pianos. 9202—Other stringed instruments. Ch. 93 Headings (arms and ammunition). 9302—Revolvers and pistols. 93051020—Parts and accessories for revolvers and pistols. Ch. 94 Headings (furniture, etc.) 940169 (seats with wooden frames). 940330 (wooden office furniture) Ch. 95 Headings (toys, games, & sporting equipment). 950420—Articles and accessories for billiards. Ch. 97 Headings (works of art). 9703—Sculptures. **Plus all products listed under Phases II and III**

APHIS notes that there will be no further additions to Phases III or IV.

In addition, APHIS seeks comment on the following HTS chapters/subchapters currently under consideration for subsequent phases that would be scheduled to begin on or after **September 1, 2010**:

Phase	HTS Products
Subsequent Phases (Sept. 1, 2010 or later)	Ch. 44 Headings (wood & articles of wood) 4405—Wood wool [excelsior] 4410—Particle board 4411—Fiberboard of wood 4412—Plywood, including 44129906 and 44129957 4413—Densified wood 4415—Packing cases, boxes, crates, drums 4416—Casks, barrels, vats, tubs Ch. 47 Headings (wood pulp) 4701—Mechanical wood pulp 4702—Chemical wood pulp, dissolving

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Phase	HTS Products
	4703—Chemical wood pulp, sulfate 4704—Chemical wood pulp, sulfite 4705—Combination mechanical and chemical Ch. 92 Headings (musical instruments) 9205—Wind musical instruments Ch. 48 Headings (paper & articles of) 4801—Newsprint 4802—Uncoated writing paper 4803—Toilet or facial tissue stock 4804—Uncoated kraft paper 4805—Other uncoated paper and board 4806—Vegetable parchment, etc. 4807—Composite paper and board 4808—Corrugated paper and board 4809—Carbon paper 4810—Coated paper and board 4811—Paper coated, etc. Ch. 66 Headings (umbrellas, walking sticks, riding crops) 6601—Umbrellas 6603—Umbrella parts Ch. 94 Headings (furniture, etc.) 9401—Seats 940330—Wooden office furniture 940340—Wooden kitchen furniture 940350—Wooden bedroom furniture 940360—Other wooden furniture 940381—Furniture of cane, osier, bamboo, rattan, or similar materials Ch. 95 Headings (toys, games & sporting equipment) 9504—Articles for arcade, table, or parlor games

APHIS also seeks comment on how the declaration requirement should be enforced as to additional goods classified under the following HTS headings:

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- Ch. 48 Paper and articles of;
- Ch. 82 Tools, implements;
- Ch. 89 Ships, boats, & floating structures;
- Ch. 93 Arms and ammunition;
- Ch. 94 Furniture, etc.;
- Ch. 95 Toys, games, and sporting equipment; and
- Ch. 96 Brooms, pencils, buttons.

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Free Trade Agreements

Brazil and the United States Discuss Trade Irritants

On September 17-19, 2009, United States Trade Representative (USTR) Ron Kirk held a two-day visit to Brazil to discuss the following issues with Brazilian Foreign Affairs Minister in the US-Brazil bilateral agenda: (i) ongoing trade disputes; (ii) the World Trade Organization (WTO) Doha Round negotiations; (iii) Brazil's status under the US General System of Preferences (GSP) program; and (iv) a possible US-Brazil Trade and Investment Framework Agreement (TIFA). USTR Kirk also met with Brazilian private sector representatives from the National Confederation of Industries (CNI).

We summarize below the issues USTR Kirk and Amorim discussed during their meeting:

- **US Cotton Subsidies.** USTR Kirk reiterated the US intent to negotiate a solution with Brazil to the ongoing trade dispute over US cotton subsidies. On August 31, 2009, a WTO Arbitrator ruled that Brazil was entitled to impose punitive tariffs on US imports in the amount of USD 294.7 million due to the failure of the United States to implement an adverse WTO Dispute Settlement Body (DSB) ruling against US subsidies for cotton producers (DS267). When a WTO Member fails to implement the rulings of the DSB, the Dispute Settlement Understanding (DSU) provides for the use of retaliation as a "last resort" to induce compliance. The DSU sets out "principles and procedures" that govern the use of retaliation. In the US-Brazil cotton case, the DSU allowed for same-sector retaliation (*i.e.*, trade in goods) in addition to "cross-retaliation," (*i.e.*, retaliation in a different sector), which would allow Brazil to suspend its obligations under the General Agreement on Trade in Services (GATS) or the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Although Brazil has not indicated whether it will apply retaliatory measures against US imports and services, our sources in Brazil point out that Brazilian officials will seek a negotiated solution prior to imposing retaliatory sanctions. Amorim stated that "Right now, we are preparing the measures that would be necessary if there is no change in the American policy [on the subsidies], but obviously we hope that there will be changes in the policy so that it becomes compatible with WTO rules." USTR Kirk stated that the United States will wait for Brazil to consider its options and pursue next steps prior to making any proposals.
- **WTO Doha Negotiations**. On Doha, Amorim and USTR Kirk reiterated their efforts to achieve a successful outcome at the Doha negotiations in 2010. Although Doha remains a priority for Brazil and the United States, in practice, Doha is a low-priority item in the US agenda given the

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Administration's focus on domestic issues, the US protectionist stance on trade matters, and the lack of US Trade Promotion Authority (TPA), which expired in mid-2007.

- **Brazil's Extension under GSP**. Amorim stated that Brazil would like to remain included under the GSP program, which is under revision by the US Congress. Amorim stated that the GSP program is of crucial importance for Brazilian exporters, especially at a time of economic crisis. Brazilian private sector representatives affiliated to Brazil's CNI also called on US officials to extend Brazil's trade preferences under GSP.
- **US-Brazil TIFA.** USTR Kirk proposed Amorim to negotiate a TIFA. TIFAS are limited trade agreements that establish joint councils of trade and economic officials to discuss trade issues. Under US trade policy, TIFAs are usually the first step towards the initiation of formal bilateral or regional Free Trade Agreement (FTA) negotiations. Amorim welcomed the US proposal but expressed concerns regarding TIFA negotiations with the United States given its trade commitments within Mercosur and Brazil's reluctance to negotiate free trade agreements outside of Mercosur. Amorim stated that if Brazil were to consider a TIFA with the United States, it would have to be a different TIFA model than the one the United States has used with other trading partners.

USTR Ron Kirk's trip to Brazil evidences the Obama Administration's commitment to establish closer ties with Brazil and a more constructive dialogue to resolve existing trade disputes. It is clear, however, that Brazil and the United States continue to have diverging views on sensitive trade matters and further bilateral cooperation will be limited to non-sensitive issues, such as biofuels, climate change, and the energy sector. The prospects for closer US-Brazil cooperation on trade matters are also uncertain because the global economic crisis has strengthened protectionist policies in both countries, in particular in the United States. Brazilian officials are concerned that the United States is taking a "tougher stance" on trade, which leaves little room for negotiation to address amicably ongoing trade irritants. The US proposal to negotiate a TIFA with Brazil is in line with USTR's recent meetings with its TIFA partners to expand trade and investment ties given the lack of TPA that limits USTR from negotiating formal FTAs. Our sources in Brazil confirm that for the moment, Brazil will not pursue TIFA negotiations with the United States and will instead seek to maintain its inclusion under the GSP program in 2009 and US compliance with WTO rules regarding US cotton subsidies and US antidumping measures on imports of Brazilian orange juice.

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Multilateral

WTO Releases Arbitration Decision in US-Brazil Cotton Dispute

Summary

Decision: A WTO Arbitrator has ruled that Brazil is entitled to impose retaliatory trade sanctions on US imports in the amount of USD 294.7 million. The award granted fell significantly short of the total amount of USD 2.681 billion sought by Brazil.

Significance of Decision / Commentary: The rulings adopted by the Arbitrator in this case impose substantial constraints on the ability of complaining parties to seek compliance through the use of so-called "cross-retaliation."

The current arbitration arose from a request by Brazil to take "countermeasures" against the United States for its failure to comply with the rulings of the WTO Dispute Settlement Body (DSB) in *US – Upland Cotton*. The Arbitrator issued two reports, one on Brazil's claims related to the US prohibited subsidies, and the other on the US "actionable" subsidies.

When a WTO Member fails to implement the rulings of the DSB, the Dispute Settlement Understanding (DSU) provides for the use of retaliation as a "last resort" to induce compliance. The DSU sets out "principles and procedures" that govern the use of retaliation. The "general principle" is that "the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s)" as that in which the violation occurred. In other words, if the violation related to trade in goods, then the general principle is that the complainant "should first seek" to retaliate on goods, usually in the form of additional (and in some case, punitive) tariffs.

However, the drafters of the DSU recognized that same-sector retaliation could be insufficient to induce compliance. They therefore included in the DSU the concept of "cross retaliation", *i.e.*, retaliation in a different sector. If the violation related to trade in goods, then cross-retaliation would permit the suspension of obligations under the General Agreement on Trade in Services (GATS) or the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

The ability to impose cross-retaliation can play an important role in the effort to induce compliance. For example, the application of additional tariffs on goods can impose as much if not more pain on the economy of the complaining party than on the non-compliant Member. Higher tariffs on consumer goods or intermediate goods will mean higher prices for consumers and businesses, respectively, in the

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complaining country. The ability to cross-retaliate was included in the DSU to provide an additional tool to complainants to seek compliance.

The DSU is drafted in a manner that should provide considerable flexibility to complainants if they wish to move to cross-retaliation. It states "if that party [the complainant] considers" that it is "not practicable or effective" to retaliate in the same sector, and if "the circumstances are serious enough", it may seek to retaliate under another agreement. This wording clearly vests considerable discretion in the complainant as to when "that party considers" cross-retaliation is necessary. The discretion is not unlimited, as an arbitrator will need to determine whether these principles have been followed. In the present case, the Arbitrator interpreted the rules in a very restrictive manner.

First, the Arbitrator rejected the approach taken in the 2000 case of *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, which ruled that a consideration by the complainant of the sector that was "least harmful to itself" was sufficient to be consistent with the applicable principles of the DSU. The Arbitrator in the present case stated that "[w]e do not share the view of the arbitrator on *EC – Bananas III (Ecuador) (Article 22.6 – EC)* that a consideration by the complaining party of the sector or agreement in which suspension would be 'least harmful' to itself would necessarily be pertinent." It reasoned that the DSU principles "do not entitle a complaining party to freely choose *the most* effective sector or agreement under which to seek suspension." Instead, according to the Arbitrator, they entitle the complaining party "to move out of the same sector or same agreement, where it considers that suspension *in that sector or agreement* is not 'practicable or effective [original emphasis].'"

Second, and more seriously, in assessing whether it was "practicable or effective" for Brazil to cross-retaliate, the Arbitrator considered that a "20 per cent benchmark" constituted a "reasonable threshold" to estimate the extent to which Brazil could find alternative sources of supply for certain categories of consumer goods imported from the United States. Applying the 20 per cent benchmark to the share of US imports for these categories of goods, the Arbitrator concluded that "Brazil would still have at its disposal imports of other consumer goods from the United States amounting to a total value of at least USD 409.7 million from which to suspend concessions or other obligations."

There is no discussion in either report as to why Brazil's ability to cross-retaliate should be linked to this 20 per cent benchmark. This figure does not appear in the DSU. The Arbitrator simply stated, without explanation, that this was a "reasonable threshold." Moreover, the ability of a complaining importing country to find alternative sources of supply can vary greatly on a product-by-product basis. The Arbitrator stressed that "[i]n applying a benchmark of 20 per cent, this Arbitrator is not intending to signal

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that this is the appropriate percentage to use in this kind of analysis in all cases." Yet given the lack of explanation for this figure, it is unclear why this is the appropriate percentage to use even in this case.

Although Brazil will be permitted to impose cumulative countermeasures up to the value of USD 294.7 million, this is a variable amount. The level of the countermeasures can change annually, depending in part on the total amount of WTO-inconsistent US export credit guarantee transactions in the prior year. If the level of authorized countermeasures rises above USD 409.7 million, then Brazil can cross-retaliate under the GATS or the TRIPS. However, if the level falls below this threshold, then Brazil's retaliation will be confined to goods alone.

No one considers the use of retaliation to be a panacea to guarantee compliance. Yet decisions such as this one impair the ability of complaining parties to use the rules of the WTO to seek compliance in a manner that minimizes harm to their own economies.

Finally, the ability of Brazil to cross-retaliate in the future is now to some extent in the hands of the United States. The Arbitrator set out a complex formula on how the level of countermeasures can vary. As noted above, this is linked in part to the transaction value secured by certain US export credit guarantees. The amount of the US subsidies, while substantial, could be calibrated to ensure that the cross-retaliation "threshold" set out by the Arbitrator is never reached.

Analysis

1. Prohibited Subsidies

Request for "one time" countermeasures rejected

Brazil sought authorization for "one time" countermeasures of USD 350 million in relation to the US "Step 2" prohibited subsidies, to cover the period from July 1, 2005 (the deadline for compliance) and July 30, 2006 (when the Step 2 program was repealed by Congress). The Step 2 program was in existence when Brazil made its request for countermeasures, although it had been repealed by the time the "compliance" panel had been established under DSU Article 21.5. The compliance panel declined to make any findings on it.

The Arbitrator rejected Brazil's request. It did "not consider that there would be a legitimate basis to such countermeasures as requested by Brazil in relation to past payments made until the repeal of Step 2, in the absence of a multilateral determination of non-compliance in relation to such payments and independently of any continuing situation of non-compliance."

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US export credit guarantees: Arbitrator "not convinced" that countermeasures should be based on the amount of the subsidy

Brazil sought authorization to take countermeasures in relation to a US export credit guarantee program, "GSM 102."

The Agreement on Subsidies and Countervailing Measures (SCM Agreement) provides that in the event of non-compliance related to prohibited subsidies, the DSB "shall grant authorization to the complaining Member to take appropriate countermeasures…." A footnote adds that "[t]his expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited."

The Arbitrator found that "in considering whether proposed countermeasures are 'appropriate' and 'not ... disproportionate'…it is legitimate to give consideration also to the prohibited nature of the subsidy, in itself." It added that "it is permissible that the assessment of the overall trade impact on the complaining Member not be precise, nor that the countermeasure should be directly equivalent to that impact." However, the amount of the countermeasures "must at least be within a range of permissibly 'appropriate' amounts, and its assessment can take into account a variety of factors which flow from the failure to withdraw the subsidy and are relevant to the trade impact on the complaining Member."

The Arbitrator then examined how Brazil had calculated the amount of the proposed countermeasures. Brazil argued that its methodology reflected the "amount of the subsidy." The United States did not disagree with the "amount of the subsidy" as "a starting point for the calculations", but argued that Brazil's approach to calculating the amount of the subsidy was "flawed."

The Arbitrator stated that it was "not convinced" that "an 'amount of subsidy' approach, of itself and without adjustment, will always be consistent with the legal standard" set out in the SCM Agreement. It stressed that "in most cases such an approach will not be 'appropriate', notwithstanding its convenience…." The Arbitrator stressed that "there should be a degree of relationship between the level of countermeasures and the trade-distorting impact of the measure on the complaining Member."

The Arbitrator did not exclude the possibility that "in particular circumstances, the complaining Member could perhaps rightly claim that a countermeasure in the amount of the subsidy would be 'appropriate.'" However, it reasoned that "in most cases, the trade-distorting impact of the subsidy on one or several other Members would not necessarily bear any particular relationship to the amount of the subsidy." In the view of the Arbitrator, "it cannot be assumed that the total amount of the subsidy is an appropriate measure of its trade effects, or even that it is necessarily a relevant 'proxy' for those effects."

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Turning to the specifics of Brazil's request, the Arbitrator found that the "principle advanced by Brazil for the calculation of its proposed countermeasures is flawed" because it included elements that did not constitute "benefits" under the SCM Agreement, and which reflected "certain trade effects of the measure as well." The Arbitrator found that "even if we were convinced that the 'amount of the subsidy' approach was an appropriate benchmark for adjudging the appropriateness of the countermeasure sought by Brazil, we could not agree that Brazil's approach actually does measure that amount, as a matter of legal principle." It also rejected the "net cost to government" approach proposed by the United States.

The Arbitrator then went through the elements of the calculation proposed by Brazil, including "additionality", which Brazil defined as "additional economic activity for US exporters that would not otherwise have occurred." At the conclusion of its analysis, the Arbitrator determined that "the amount of USD 1.122 billion proposed by Brazil will not result in appropriate countermeasures." The Arbitrator consequently made "modifications to the calculation of the interest rate subsidy and additionality in order to more accurately calculate the trade-distorting impact of the GSM 102 programme on Brazil." Based on these modifications and its other determinations, the Arbitrator found that the appropriate countermeasures for the prohibited subsidies, based on the amount of GSM 102 transactions in 2006, was USD 147.4 million. The Arbitrator accepted Brazil's request that the amount of countermeasures could be "variable on an annual basis and that would depend on, among other things, the total amount of GSM 102 transactions in the most recent concluded fiscal year."

Cross-retaliation: In its request to the DSB, Brazil sought authorization to suspend obligations not just under the GATT, but also under the GATS and the TRIPS Agreement. The Arbitrator agreed with a prior ruling that the principles and procedures set out in DSU Article 22.3 with respect to cross-retaliation "imply 'a margin of appreciation' for the complaining party", although it stressed that the consideration by the complainant of the principles and procedures in this provision "must be a substantive and reasoned one."

The Arbitrator then considered whether "a plausible determination" could have been made by Brazil that it was not "practicable or effective" to suspend obligations in trade in goods alone. The Arbitrator said that it could take into account the cumulated level of countermeasures arising from both decisions (*i.e.*, on both prohibited and actionable subsidies).

The Arbitrator noted that "[i]n these proceedings, Brazil has assumed…that it would be entitled to a total amount of countermeasures in the amount of USD 2.681 billion (USD 1.644 billion in relation to the prohibited subsidies plus USD 1.037 billion in relation to the actionable subsidies)." However, the Arbitrator had determined that "the cumulated amount of countermeasures to which Brazil is entitled to is USD 294.7 million." It ruled that "the amount of countermeasures that we have determined to be

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permissible is significantly lower than the amount assumed by Brazil in its request, and this fact alone compels a finding that the complaining party has not followed the principles and procedures of Article 22.3." It added that Brazil could not have applied "a proper consideration" of the principles and procedures set out in DSU Article 22.3, "because the amount of the countermeasure it assumed was much greater than the countermeasure determined by the Arbitrator."

The Arbitrator then examined whether Brazil could plausibly have considered that it was not practicable or effective to suspend concessions on trade in goods alone to the level of USD 294.7 million. After examining the pattern of US imports into Brazil, the Arbitrator said that it was "not convinced that Brazil could plausibly determine, on the basis of the elements presented to us in these proceedings, that it is not practicable or effective to seek to suspend concessions or other obligations in relation to the entirety of the broad range of consumer products that it proposes to exclude from consideration, in particular in the areas where the US share of imports is relatively small."

The Arbitrator found that it was useful to consider "the extent to which it may be expected that Brazil would in fact have alternative sources of supply at its disposal" for certain product categories. It found that "[w]hile there is no exact mathematical precision to this determination, we consider that, for the purposes of our assessment in these proceedings, a US share of imports of 20 per cent constitutes a reasonable threshold by which to estimate the extent to which Brazil may be able to find alternative sources of supply" for certain categories of imported consumer goods.

Applying the 20 per cent benchmark to the share of US imports for certain categories of consumer goods, the Arbitrator concluded that "Brazil would still have at its disposal imports of other consumer goods from the United States amounting to a total value of at least USD 409.7 million, from which to suspend concessions or other obligations. This would therefore still leave a value of US imports of consumer goods significantly in excess of USD 294.7 million, to which suspension could be applied." Accordingly, the Arbitrator found that "Brazil could not plausibly have reached the conclusion that it is not practicable or effective to suspend concessions or other obligations in trade in goods alone, even if it had considered the 'necessary facts', i.e. taking into account a level of permissible countermeasures not exceeding USD 294.7 million."

The Arbitrator found that there was at least USD 409.7 million worth of Brazil's imports of specified consumer goods from the United States that could be the subject of countermeasures, which it referred to as "the threshold." It recalled that the level of permissible countermeasures was variable. It stated that if the level of the variable countermeasures that Brazil would be entitled to in a given year exceeded this threshold, then "the suspension of concessions or obligations applied to trade in goods alone would not

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be ‘practicable or effective’ within the meaning of Article 22.3(c) of the DSU.” The Arbitrator concluded that “in the event that the level of countermeasures that Brazil would be entitled to in a given year should increase to a level that would exceed the threshold…then Brazil would be entitled to suspend certain obligations under the TRIPS Agreement and/or the GATS….with respect to any amount of permissible countermeasures applied in excess of that figure.”

However, if the level of permissible countermeasures fell below this threshold, then “Brazil would be entitled to suspend concessions or other obligations only in trade in goods.” In order to determine whether suspension of certain obligations under the TRIPS Agreement or the GATS was permissible in a given year, the Arbitrator stated that the threshold should be updated to account for the change in Brazil's total imports from the United States.

2. Actionable subsidies

Countermeasures must be commensurate with impact on Brazil alone

Brazil also sought authorization to take countermeasures in the annual amount of USD 1.037 billion in relation to US marketing loans and countercyclical payments. For this claim regarding actionable subsidies, the Arbitrator in its second report was called upon to determine whether the countermeasures sought were “commensurate with the degree and nature of the adverse effects determined to exist.”

The SCM Agreement defines “adverse effects” arising from subsidies to include “serious prejudice to the interests of another Member.” The Agreement adds that “serious prejudice” may arise in a number of circumstances, including where “the effect of the subsidy is…significant price suppression, price depression or lost sales in the same market.” Brazil argued that since this related to the existence of a significant price suppression on “the *world market*, the entirety of the effects of this price suppression on that market, in other words the worldwide impact of the price suppression, must be the basis for the award of countermeasures in relation to these ‘adverse effects’ [original emphasis].” The Panel disagreed, reasoning that “in determining whether Brazil's proposed countermeasures are ‘commensurate with the degree and nature of the adverse effects determined to exist’, we must consider whether they are commensurate with the impact *on Brazil* of the price suppression” resulting from the granting of the subsidies on the world cotton market [original emphasis].

After reviewing Brazil’s calculations, the Arbitrator concluded that the world price for cotton would have been higher by 9.38 percent “but for US marketing loans and countercyclical payments.” It determined that the adverse effects on the rest of the world from these US subsidies amounted to USD 2.905 billion. However, Brazil's share of cotton production in the rest of the world was 5.1 percent in 2005. After

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"making this apportionment", the Arbitrator found that the amount of countermeasures "commensurate with the degree and nature of the adverse effects determined to exist" was USD 147.3 million.

On the issue of cross-retaliation, the Arbitrator followed the same reasoning as that set out above for prohibited subsidies. The Arbitrator therefore concluded that Brazil would be entitled to suspend concessions for actionable subsidies up to the value of USD 147.3 million annually for trade in goods. If the cumulative level of permissible countermeasures increased above the threshold of USD 409.7 million, then Brazil would also be entitled to suspend obligations under the TRIPS Agreement and/or the GATS.

The decisions of the *Arbitrator in United States – Subsidies on Upland Cotton: Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement (DS267/ARB/1) and United States – Subsidies on Upland Cotton: Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 7.10 of the SCM Agreement (DS267/ARB/2)* were released on August 31, 2009.

Multilateral Highlights

Brazil Requests US Export Credit Data to Help Determine Trade Retaliation Amount

At a September 25, 2009 meeting of the World Trade Organization (WTO) Dispute Settlement Body (DSB), Brazilian officials called on the United States to supply data on export credit guarantees it paid to agricultural producers in 2009. Officials made the request so that Brazil can recalculate the amount of trade sanctions it may impose on US imports in retaliation for the United States' failure to withdraw domestic cotton support for US agricultural producers that the WTO has ruled illegal. Brazil also sent a letter to US officials requesting information on US export credit guarantee financing made through the US GSM-102 program for the fiscal year ending on September 30, 2009 and data on export prices for pork, poultry, and rice to be used in the calculation of the authorized amount of trade sanctions. According to observers, Brazil's statement at the DSB meeting and the letter to US officials requesting the data is a strong signal that Brazil will likely carry through its retaliation against the United States.

On August 31, 2009, the WTO issued arbitration reports in the US-Brazil cotton dispute (DS267). The WTO arbitration Panel ruled that the United States has failed to comply with an earlier WTO Panel decision that found that US cotton subsidies and support did not comply with US multilateral obligations. The arbitration Panel authorized Brazil to initially impose retaliatory measures worth USD 294.7 million on a range of US imports. The arbitration Panel's decision on the retaliation amount is less than the USD 2.68 billion initial retaliation amount that Brazil had requested. The United States, meanwhile, had argued

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that Brazil's retaliatory measures should not exceed USD 30 million. Arbitrators to the US-Brazil dispute approved a formula for Brazil to calculate the annual amount of sanctions based on current US spending for cotton subsidies; using US subsidy spending in FY 2006 as a reference, Brazil, as noted, could retaliate up to USD 294.7 million on a range of US imports. Brazil's Ambassador to the WTO Roberto Azevedo has noted, however, that export credit guarantees issued under the GSM-102 program increased from USD 1.36 billion in 2006 to a preliminary estimate of USD 4.62 billion for the first 10 months of FY 2009, thus potentially enabling Brazil to increase the amount of its retaliation, according to Brazilian officials.

G-20 Pittsburgh Summit Ends with Little Substantive Movement, Increased Frustration

From September 24-25, 2009, leaders of the Group of 20 major industrialized and developing nations (G-20) convened in Pittsburgh, Pennsylvania to discuss the state of the global economy and the status of the World Trade Organization (WTO) Doha Round, among other issues. The G-20 leaders – which included leaders from the United States, the European Union, Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Turkey and the United Kingdom – ended their two days of meetings by pledging to make every effort to conclude the Doha Round in 2010 although they did not set a target date of early 2010 for achieving a breakthrough in the stalled multilateral negotiations. The joint "Leaders' Statement" issued at the conclusion of the G-20 summit stated that the G-20 governments should proceed "as quickly as possible" in renewing the Doha negotiations and noted that trade ministers would "take stock of the situation" no later than early 2010. The G-20 statement also noted that an "ambitious and balanced" conclusion to the Doha Round should be based on progress already made and the statement called on "countries to directly engage with each other, within the WTO bearing in mind the centrality of the multilateral process, in order to evaluate and close the remaining gaps."

In their Joint Statement, the G-20 leaders also vowed to "keep markets open and free and reaffirm the commitments made in Washington and London: to refrain from raising barriers or imposing new barriers to investment or to trade in goods and services, imposing new export restrictions or implementing WTO inconsistent measures to stimulate exports and commit to rectify such measures as they arise." The leaders promised to "minimize any negative impact on trade and investment of our domestic policy actions, including fiscal policy and action to support the financial sector," and they promised to not "retreat into financial protectionism, particularly measures that constrain worldwide capital flows, especially to

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developing countries." According to the statement, the G-20 leaders remain committed to further trade liberalization.

The Joint Statement, however, did not include language proposed by the EU and other WTO Members, including Australia and Brazil, to set an early-2010 deadline for achieving a Doha agreement on the modalities for reducing or eliminating trade-distorting agricultural and industrial import tariffs. According to sources present at the G-20 meetings, the EU and other WTO Members pressured the United States to accept such language in the G-20 Joint Statement, although US officials expressed their objection to the early-2010 deadline and instead argued that "substance was more important than artificial timelines." US officials were quick to follow up on the reports of the United States' reluctance to agree to the language by noting that the United States continues to work under a timeline wherein Doha negotiations would be completed "sometime in 2010," although US officials would not provide any further details on when they expected WTO Members to complete such an agreement over the next year.

WTO Director-General Pascal Lamy was also present at the G-20 meeting where he provided the leaders with a progress report on the status of the Doha negotiations. At the briefing that Lamy provided G-20 leaders, he called on the G-20 governments to "inject new political momentum" into the stalled talks, opining that "strong political engagement is needed urgently if the G-20 is to meet its commitment to conclude the stalled Doha Round of trade talks in 2010." Lamy stated that the political will that the G-20 leaders displayed at the Pittsburgh summit "must now be translated into real engagement and hard bargaining." Lamy also called on the leaders to continue their work on Doha for the remainder of 2009; senior trade officials will meet in Geneva from October 19-23, November 23-27, and December 14-16 for "horizontal" discussions on achieving a balanced agreement across the Agriculture, Non-Agricultural Market Access (NAMA), Services, and Rules sectors under negotiation.

Opinions on the G-20 summit and the Joint Statement were mostly negative. Trade officials in Geneva complained that because the leaders' statement did not clearly indicate when WTO Members would conclude modalities, the G-20 contributed to a "pronounced" drift beyond 2010 and that without deadlines, the Doha process will likely continue to "just drag on." Other officials criticized the United States for throwing "cold water" on the Doha Round with US officials' reluctance to agree to a firm deadline for modalities. Still others opined that "nothing substantial in the Doha Round is going to happen in the coming months," especially if it is not clear whether the Obama Administration is willing to spend the necessary political capital to see the Doha Round through to completion. Others observers argue, meanwhile, that delegations such as China and India are not as engaged as they should be in the Doha Round and are using the United States as an excuse not to make concrete moves forward or offer any

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substantive new proposals. Senior trade officials representing several members of the G-20 continue to contend that the Pittsburgh summit should provide positive momentum for the Doha Round.

Although many had hoped that the G-20 summit in Pittsburgh would have produced some forward movement in the stalled multilateral talks, it appears that the results of the meeting are less than satisfactory for members of the trade community. G-20 leaders essentially reaffirmed the end-2010 target date that they had set out at the previous G-20 summit in London in April 2009, and apart from a reaffirmation of this deadline, leaders were unable to put forth a schedule of deliverables that may have provided some movement to the talks. Part of this can be attributed to the United States' lack of direction with regards to the Doha Round; US trading partners are still unsure if the Obama Administration has provided US negotiators with political capital and direction for proactive US involvement in the Round, but given the reluctance of US officials to agree to a modalities deadline, it seems unlikely that the Administration has provided the necessary policy direction to its trade officials. It seems unlikely that any substantive movement will happen until the United States has fully reentered the Round. Add to this "ambivalence" the fact that there is no set schedule for the Doha negotiations, and the odds increase that the Doha Round will stretch well into 2010 and perhaps beyond.

Informal New Delhi Ministerial Meeting Yields Little in Concrete Doha Movement

Senior trade officials from developed and developing countries converged in New Delhi, India from September 2-4, 2009 for a two-day informal Doha Development Agenda ministerial meeting. At the informal ministerial, the trade ministers all agreed that they could conclude the Doha negotiations in 2010 and they agreed to work with the Chairs of the various negotiating groups to prepare an overall agenda for moving the multilateral negotiations forward. According to Indian Commerce Minister Anand Sharma, trade ministers also agreed to work in consultation with the Chairmen of the Agriculture and Non-Agricultural Market Access (NAMA) negotiating groups in drafting "issue-based work plans [that are meant to] intensify engagement to complete negotiations." In addition, trade ministers agreed to work with one another to draft work plans as necessary on the finalization of modalities texts and the timelines for submission of revised offers in the stalled Services negotiations. Trade negotiators and senior trade officials are expected to assemble in Geneva during the week of September 14 to begin drafting a process of engagement for the next three months of Doha activity.

Some observers noted that the ministers were unable to agree on the exact starting point for negotiations. The G-20 and G-33 groups of developing countries, for example, insisted that the negotiations should be based on the December 2008 Agriculture and NAMA modalities texts whereas the United States and

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other countries would not agree to the suggested starting point, prompting trade officials to only agree that "negotiations should resume on the basis of progress achieved until December 2008." WTO Members also remained divided over the role of bilateral discussions in the multilateral negotiations. United States Trade Representative (USTR) Ron Kirk stated that bilateral engagement "will provide clarity on what nations will give and get in a final Doha agreement and will fill existing gaps to ensure an outcome that will bring new market-openings and economic opportunities worldwide." Brazilian Foreign Minister Celso Amorim, however, noted that developing countries, including Brazil, can no longer deliver any more concessions through bilateral talks. Chinese Trade Minister Chen Deming made similar remarks in response to USTR Kirk's insistence on the importance of bilateral negotiations in the Doha Round.

Some observers opine that the New Delhi meeting may have provided trade officials with a "fresh start" to the negotiations, whereas others expressed less confidence that the talks moved the stalled negotiating round. Although trade ministers agreed that they could complete an agreement in 2010 (with similar promises made in previous years), it appears that trade officials at the informal ministerial did not discuss in detail the two issues that led to the July 2008 halt to the Doha talks, namely the agricultural special safeguard mechanism (SSM) and the NAMA sectoral negotiations. Even more telling, ministers were unable to agree on a starting point for the negotiations moving forward, *i.e.*, whether to use the December 2008 Agriculture and NAMA texts as the foundations for the multilateral talks. Nonetheless, the work that trade officials will engage in over the next three months (in drafting work plans) could provide some clues as to how WTO Members intend to tackle these issues and under what timeframe they intend to do so.

The US role in the Doha talks has also proven controversial. Certainly, any final Doha Agreement will require the cooperation of all countries, including the United States. And although USTR Kirk has stated that the Obama Administration is fully committed to conclude the Doha Round and that US participation in the New Delhi informal ministerial meeting is strong "evidence" of the US commitment to engage with its WTO partners, observers have questioned whether the United States is ready to move forward in the talks. USTR Kirk has yet to provide US trading partners with the Obama Administration's new "trade policy" and it remains unclear what kind of negotiating mandate USTR has to continue the multilateral negotiations. Couple this with the recent departure of Deputy USTR Peter Allegeier in Geneva (and the lack of a full-time replacement for the time being, although President Obama has nominated Michael Punke as DUSTR and the US Permanent Representative to the WTO in Geneva), and some US trading partners remain concerned that the United States is sending signals that it will not be as involved in the Doha negotiations as it was in the past. As noted, the United States' participation over the next several

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months in WTO Members' efforts to draft work plans for the negotiations may provide clues as to how involved the United States is in the talks and how much political capital the Obama Administration is willing to endow USTR towards the conclusion of the Round.

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