WHITE & CASE

January 2010

Japan External Trade Organization

WTO and Regional Trade Agreements Monthly Report

IN THIS ISSUE

Table of Contents

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

Summary of Reports

United States

Forecast 2010: US Trade Likely to Follow Last Year's Path

In 2009, there was little movement on US unilateral, bilateral, and multilateral trade policy under the new Democratic Administration and the Democratic majority in Congress. There will likely be a similar lack of movement in 2010, and the Administration and Congress will likely direct US trade policy on a course that continues to avoid a "proactive" trade agenda. President Obama has not yet outlined US trade policy under his Administration, and it is unclear when he and his Administration officials will do so. Without a clear trade policy direction, there is **unlikely to be any major activity on the pending US trade agreements** with Colombia, Panama and Korea, and the **Administration is likely to proceed slowly on the recently-announced Trans-Pacific Partnership (TPP)** trade agreement negotiations. **Little movement is also expected in the stalled multilateral Doha Round**, although the **United States will likely keep busy on the dispute settlement front** as it engages in disputes with trading partners on a variety of issues, including "zeroing," US farm subsidies, and mandatory country-of-origin labeling, among others. **Bilateral "tensions" may continue between the United States and China** in 2010, although they are unlikely to result in a full-scale "trade war" between the two trading partners. On the domestic front, **US legislators may explore reforming US preference programs**. It is **unlikely that Congress will pass and finalize a climate change bill in 2010**, although unilateral climate change rule and regulations may increase throughout the year.

United States Highlights

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

- Obama Administration Releases FY 2011 Budget: Most Trade-Related Agencies See "Freezes," Lower Figures
- President Obama Addresses Some Trade Issues in State of the Union Address
- USTR Designates New AUSTR for Small Business, Market Access, and Industrial Competitiveness
- Japan Announces Changes to Cash-for-Clunkers Program
- USTR Announces Hearing, Requests Comments on 2010 Special 301 Review
- Senate Approves DUSTR Nominee Miriam Sapiro

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

Free Trade Agreements

Free Trade Agreements Highlights

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

- House Trade Working Group Sends Letter to USTR on TPP FTA
- ITC Initiates Investigation of TPP FTA

Multilateral

WTO Appellate Body Rules on US-China AV-Publications Dispute

Decision: The WTO Appellate Body has affirmed that a number of restrictions imposed by China on the importation and distribution of publications, audiovisual products, sound recordings and films are WTO-inconsistent. In response to a complaint by the United States, the Appellate Body ruled that such measures violate China"s Protocol of Accession, as well as the General Agreement on Trade in Services (GATS).

Multilateral Highlights

- US Requests WTO Dispute Settlement Consultations with Philippines Over Taxes on Distilled Spirits
- US, Thailand Provide Notice to WTO of Procedural Agreement in Plastic Bag-Zeroing Dispute

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

Reports in Detail

United States

Forecast 2010: US Trade Likely to Follow Last Year's Path

Summary

In 2009, there was little movement on US unilateral, bilateral, and multilateral trade policy under the new Democratic Administration and the Democratic majority in Congress. There will likely be a similar lack of movement in 2010, and the Administration and Congress will likely direct US trade policy on a course that continues to avoid a "proactive" trade agenda. President Obama has not yet outlined US trade policy under his Administration, and it is unclear when he and his Administration officials will do so. Without a clear trade policy direction, there is **unlikely to be any major activity on the pending US trade agreements** with Colombia, Panama and Korea, and the **Administration is likely to proceed slowly on the recently-announced Trans-Pacific Partnership (TPP)** trade agreement negotiations. **Little movement is also expected in the stalled multilateral Doha Round**, although the **United States will likely keep busy on the dispute settlement front** as it engages in disputes with trading partners on a variety of issues, including "zeroing," US farm subsidies, and mandatory country-of-origin labeling, among others. **Bilateral "tensions" may continue between the United States and China** in 2010, although they are unlikely to result in a full-scale "trade war" between the two trading partners. On the domestic front, **US legislators may explore reforming US preference programs**, although it still is unclear if such reforms will actually happen or if legislators will simply extend the programs another year as they have done in the past. It is **unlikely that Congress will pass and finalize a climate change bill in 2010**, although unilateral climate change rule and regulations may increase throughout the year.

Analysis

As noted, 2010 will likely feature standard trade themes, including but not limited to: (i) possible Congressional approval of pending bilateral Free Trade Agreements (FTAs) and US negotiations with trading partners on possible new FTAs; (ii) a continued focus on the US-China relationship; (iii) possible Congressional reform of US preference programs; (iv) questionable US involvement in the stalled "Doha Round" of World Trade Organization (WTO) negotiations; (v) US involvement in several WTO dispute

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

settlement proceedings; and (vi) a focus on climate change and its implications for trade. We review these themes below.

I. Potential Activity on US Trade Agreements

There is likely to be little activity on pending trade agreements that the United States completed several years ago. Trade Promotion Authority (TPA) expired in mid-2007. The Obama Administration has not yet provided a comprehensive trade policy, even after US officials – including United States Trade Representative (USTR) Ron Kirk – promised in 2009 that a "major speech" outlining the Administration's trade policy would arrive "soon." Consequently, it remains unclear if the Obama Administration will request TPA and if Congress will grant the President TPA. The lack of TPA renewal will continue to affect US trade policy in 2010 and beyond. US international trading partners view TPA as a US commitment to liberalized trade and a necessary tool for trade negotiations with the United States, and they could view the absence of TPA as an indication that the United States is not committed to free trade. Some observers question whether TPA has any relevance anymore, in light of the Democratic Congress' actions in 2008 that eliminated the TPA-mandated timetable for consideration of the pending US-Colombia FTA. These skeptics argue that TPA used to provide a US FTA partner with an assurance that the final agreement that it signed would remain intact after Congressional review and approval, and that Congress would consider the agreement under a strict schedule. The actions on the Colombia agreement, however, have made some trading partners question the effectiveness of TPA. The absence of TPA could mean that US trading partners will continue distancing themselves from negotiating with the United States because they have no guarantee that Congress will not alter a negotiated trade agreement once completed (indeed, US trading partners have continued their negotiation of bilateral and regional FTAs with other countries in light of the United States' "stalled" trade policy and the lack of success in the Doha Round).

Nonetheless, although TPA expired in mid-2007, USTR seems to be moving ahead on FTA negotiations with several US trading partners under a TPA model. Besides FTA negotiations, 2010 may see some movement from the Administration and the Congress on the pending FTAs with Colombia, Panama and Korea, although the November 2010 mid-term elections could halt movement on these agreements until after the elections are over.

A. Latin America: Colombia and Panama FTAs

Colombia. Members of Congress have been relatively quiet on the fate of the pending US-Colombia FTA, mostly because they were focused on issues such as climate change and health care in 2009.

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

Congressional Democrats continue to cite Colombia"s record of human rights violations and violence against labor leaders as a major stumbling block for ultimate passage of the agreement. Proponents of the US-Colombia FTA continue to lobby Congress and the Administration to support the agreement, and they point to the Uribe Administration"s work in recent years to decrease the assassinations of Colombian labor leaders. The issue, however, does not appear ready to be easily resolved. If and when Members of Congress decide to explore the fate of the Colombia FTA, Democrats will likely continue to focus on Colombia"s labor issues, demanding that "benchmarks" be established to record Colombia"s progress in addressing the concerns of Members of Congress with regard to human and labor rights. The Administration is aware of Congress" view of the agreement and in July 2009, requested public comments on the FTA. The notice stated that USTR is conducting a review of labor-related issues in the context of the US-Colombia FTA and seeks comments "to assist USTR in working with the Colombian government to secure continued progress in ensuring that Colombia"s workers can fully exercise their fundamental labor rights." According to USTR, "issues have been raised about the extent to which Colombians are able to exercise their fundamental labor rights, as referenced in the FTA." USTR will likely continue to sift through these comments and seek others in 2010 in order to decide on how best to approach the agreement. The Administration is unlikely to submit implementing legislation for the agreement to Congress in the short-term, and Congress is unlikely to shift its attention to the agreement until after the November 2010 elections, if at all this year.

Panama. Of the pending FTAs, the US-Panama FTA has the most chances of passage in 2010 (or beyond). The US-Panama FTA was initially held hostage by political situations in Panama that raised alarm among some US legislators. The September 1, 2007 election of Pedro Miguel Gonzalez Pinzon as President of Panama"s National Assembly altered the FTA"s support in Congress in 2008 because Gonzalez Pinzon has an outstanding warrant for his arrest in the United States for the June 1992 slaying of US Army Sgt. Zak Hernandez Laporte and the attempted murder of Sgt. Ronald Marshall outside Panama City. Gonzalez Pinzon, however, completed his term of office in September 2008, and his departure from the National Assembly cleared the way for Congressional consideration of the FTA. The US-Panama FTA is considered by many a non-controversial trade agreement (especially because a majority of products from Panama already enter the United States duty-free) with big geopolitical linkages (*i.e.*, the Panama Canal is an important sea route). Consequently, many observers opine that when Congress considers the agreement, it should easily pass the FTA. In 2009, however, the US-Panama FTA was held hostage for other reasons, namely the Administration and the Congress" focus on remedying the domestic economy. If domestic economic concerns continue to take center stage in 2010 (and beyond), the US-Panama FTA may be overshadowed by these issues. The Obama Administration

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

is unlikely to submit implementing legislation on the Panama agreement to Congress in the short-term, and even if it did, Congress may not be able to consider the agreement until after clearing several other items from its busy legislative agenda and only after the November elections.

B. Asia-Pacific: KORUS and the TPP FTAs

Korea. Of the three pending FTAs, the US-Korea (KORUS) FTA"s fate is the most uncertain in 2010. The Obama Administration did not submit implementing legislation for the agreement to Congress in 2009, partly because the agreement does not enjoy firm Congressional support and partly because the Congress was focused on other (domestic) issues in 2009. There are also several contentious issues that could serve to delay Congressional consideration of the KORUS FTA. Several US automakers have complained that the KORUS FTA does not sufficiently address non-tariff barriers (NTBs) to auto trade in the Korean market, and they likely will continue to lobby Members to oppose the agreement. US labor unions have also indicated opposition to the agreement because they feel that the KORUS FTA offers weak protections for workers" rights and the environment, and that the preliminary negotiation process occurred without an adequate consultation process with civil society, including labor unions. An additional contentious issue is the treatment of US beef in the Korean market (South Korea currently only accepts US beef from cattle under 30 months of age under an industry-to-industry deal, provided the relevant specified risk materials are removed) and Korean non-tariff measures. According to USTR Kirk, the United States will continue to work with Korean officials, Members of the US Congress, and other stakeholders in its review of the KORUS FTA and in an effort to develop proposals to close the "gaps" in the agreement. If Congressional momentum on the KORUS FTA picks up, then labor unions will likely focus their energies in opposing the agreement and lobbying US legislators to do the same if and when the Obama Administration submits the KORUS FTA"s implementing legislation to Congress. Until that time, however, it is unclear what exactly will happen to the KORUS FTA in 2010, although many signs point to "non-passage" in 2010.

Trans-Pacific Partnership FTA. On December 14, 2009, the Obama Administration submitted to Congress a formal notification that it intends to commence negotiations on a TPP FTA. The first round of TPP FTA negotiations is expected to be held in March 2010 in Australia. USTR Ron Kirk submitted the notification letters to Speaker of the House Nancy Pelosi (D-CA) and President Pro Tempore of the Senate Robert Byrd (D-WV). The letters of notification to the Congressional leaders note that the United States" TPP negotiating partners currently include Australia, Brunei Darussalam, Chile, New Zealand, Peru, Singapore, and Vietnam. Brunei, Chile, New Zealand and Singapore concluded the TPP FTA in 2005, and the agreement went into effect in 2006. In March 2008, TPP countries began work on the

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

outstanding Financial Services and Investment chapters; the United States joined the TPP countries in these talks. Vietnam is an observer to the TPP, and Australia and Peru announced their interest in participating in the negotiations. Of the countries participating in the TPP FTA negotiations, the United States has implemented FTAs with Chile, Singapore, Australia, and Peru.

The TPP FTA notification provided some relief to a US trade community that has become increasingly nervous that the Obama Administration has placed trade on the "backburner." Members of the US trade community have been urging the Administration to move forward on pending US trade issues since President Obama assumed office in January 2009, including resumption of the TPP FTA. The Administration"s announcement on the TPP FTA has provided trade observers with some hope that the Administration is ready to move forward on US trade policy and initiatives. Nonetheless, it should be noted that the Administration has not yet detailed how it will approach the TPP FTA process.

Observers point to one possible contentious issue that will likely emerge if the United States formally engages in the TPP FTA negotiations: Vietnam"s participation. Some Members of Congress have already expressed reservations with Vietnam"s involvement. House Ways and Means Committee Chairman Charles Rangel (D-NY) and Trade Subcommittee Chairman Sander Levin (D-MI) have noted that the US participation in the TPP FTA negotiations presents "the challenge within a new trade policy of grappling with the inclusion of a country, Vietnam, transitioning from a non-market economy with government control of key sectors, restrictions in the Vietnamese labor market, and absence of worker rights" and they urged the Administration to continue active consultations with Congress on that and other TPP FTA-related matters.

Similar to Vietnam"s participation in the talks, other issues could serve to slow the negotiations. Without a clear US trade policy in place, US negotiators may find it difficult to make concessions in the negotiations without a clear negotiating strategy or direction. US negotiators may also choose to negotiate the agreement at a slower pace because of Members of Congress" attention on the talks and the concessions that might be offered; already the House Trade Working Group is working on a letter to USTR providing suggestions on approaches to the TPP FTA negotiations. Given the scrutiny by legislators on the negotiations, USTR may choose to "tread carefully" in the talks so as not to upset any Members of Congress. Other possible contentious areas in the TPP FTA negotiations that could delay or lengthen the talks include:

- **Dairy.** The US National Milk Producer"s Federation (NMPF) has sought an exclusion for the dairy industry in any potential FTA negotiations with New Zealand, and claims that the New Zealand dairy cooperative Fonterra acts as a monopoly and controls milk production in New Zealand. NMPF is

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

concerned that if Fonterra acts as a monopoly, it can exert pricing power through cross-subsidization and provide marketing and other subsidized services for New Zealand dairy, thereby making US dairy imports to New Zealand less competitive.

- **Beef.** US beef cattle producers have expressed concern over an FTA with New Zealand, and opine that New Zealand could remove its allocated a tariff rate quota (TRQ) for imported beef after achieving the agreement, thereby making US beef imports to New Zealand less competitive.
- **Intellectual Property Rights (IPR).** According to some reports, the United States could seek increased IPR protection in the TPP FTA that goes beyond the level of protection provided in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). This "strategy" could serve to further lengthen the talks.
- **Labor and Environment.** The current TPP contains a labor memorandum of understanding (MOU) and an environmental cooperation agreement between the parties that pledge the parties to work together to promote sound labor and environmental practices, while respecting the right of parties to set, administer, and enforce their own labor and environmental laws. US negotiators could, however, seek to strengthen the labor and environmental provisions of the agreement beyond the current language, thereby possibly lengthening negotiations.
- **Government Procurement.** New Zealand is currently not a member of the plurilateral Government Procurement Agreement, and it maintains certain government procurement preferences for its Maori population. As it did in the Malaysia FTA negotiations, USTR may attempt to address and seek concessions on these government procurement preferences.

C. Other Agreements

The Obama Administration may decide to pursue Trade and Investment Framework Agreements (TIFAs) and Bilateral Investment Treaties (BITs) with viable US trading partners in 2010 and beyond. Both types of agreements are considered precursors to full-fledged FTAs and provide some benefits to US trading partners while strengthening trade ties at the same time. The United States has already initiated BIT negotiations with China, India and Vietnam in the past several years. BITs have three main purposes: (i) to protect investment abroad in countries where investor rights are not already protected through existing agreements; (ii) to encourage the adoption of market-oriented domestic policies that treat private investment in an open, transparent, and non-discriminatory way; and (iii) to support the development of international law standards consistent with these objectives. BITs protect the rights of the participating

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

countries" foreign subsidiaries and investors in their BIT partner"s home market and, under US trade policy, typically precede formal FTA negotiations.

It is uncertain, however, whether USTR will formally commence BIT and TIFA negotiations with trading partners. In 2009, the Administration tasked the State Department with creating a panel to conduct a formal review of investment provisions in US FTAs and the US model BIT. According to several reports, the panel"s recommendations will "feed into an interagency review of investment issues conducted by the Obama Administration" and managed by USTR and the State Department. US officials have stated that "during the review, the United States will continue technical discussions in the BIT negotiations and informal discussions that have already begun, including those with China, India and Vietnam." The panel"s recommendations are expected in the first half of 2010, and some US businesses and business groups are concerned that the panel could recommend that the model BIT narrow the obligation to accord investors "fair and equitable treatment" or establish general exceptions or similar limits on core BIT obligations, thereby affecting US business practices with US trading partners. Consequently, in light of the ongoing review, it is unclear if and when the Obama Administration would initiate or continue BIT negotiations with trading partners and how the model BIT might change based on the recommendations of the panel. Once the panel"s recommendations are presented, a clearer picture on the Obama Administration"s BIT and TIFA policy should emerge.

II. US-China Relations

Members of the US Congress will continue to look at China and its currency practices as well as its compliance with multilateral obligations. Legislators could once again broach legislation targeting Chinese currency practices (especially during this election year) under the argument that such bills would help stimulate US economic activity and address the trade imbalance between the two countries. Congressional sentiment has shifted over the last several years as the Yuan has appreciated against the dollar since 2005, but because legislators are looking out for the interests of the US economy, these domestic concerns could trump all other approaches to China, and thus spur legislators to address China. Other matters that will form a part of the Congress" 2009 China legislative agenda likely include trade enforcement, import safely and intellectual property protection.

China will likely continue to remain a top trade agenda item for the Obama Administration. Given the "tensions" between the two countries in 2009, US and Chinese officials will continue the bilateral dialogue that the Bush Administration vigorously pursued with China through the US–China Joint Commission on Commerce and Trade (JCCT) and the US-China Strategic Economic Dialogue (S&ED) in 2010. However, President Obama will continue to use enforcement tools and trade measures against China (such as the

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

2009 Section 421 decision on Chinese tires) and like the US Congress, will be closely monitoring China's compliance with multilateral obligations. Nonetheless, it is unlikely that the United States and China will engage in a full-scale "trade war," as the economic relationship is too important and large for both countries. And although some observers point to increased numbers of trade remedy cases between the two countries as a sign of a "trade war," the cases follow in large part the same pattern of trade remedy cases in past years. Certainly, some bilateral and multilateral tensions may arise in 2010 but for the large part, the United States and China are likely to continue the same patterns of trade and interaction as in 2009 and before.

III. US Preference Programs

As they have done in years past, Members of the US Congress have vowed to explore amendments to US preference programs in 2010. The Generalized System of Preferences (GSP) program and the Andean Trade Promotion Act (ATPA) are now set to expire on December 31, 2010, following affirmative votes for their extensions by the House of Representatives and the Senate in December 2009. House Ways and Means Committee Chairman Charles Rangel (D-NY) and Trade Subcommittee Chairman Sander Levin (D-MI) have stated that the year-long extension affords lawmakers more time in 2010 to introduce major changes to the programs, a statement that legislators have repeated over the past several years whenever the preference programs are up for expiry. For the past three years, Congress has granted these preference programs short-term extensions, much to the consternation of preference program participating governments and US and international businesses. Congressional sources expect the Senate Finance and House Ways and Means Committees to hold hearings on the preference programs in 2010 to discuss these short-term extensions and how Congress can amend the programs to limit the participation of certain larger developing countries, for example, or make the programs more permanent. Whether these hearings will result in long-standing and permanent changes is questionable, given the track record of legislators' preference program promises over the past several years. A clearer picture on (if and) where preference program reform could head should emerge after the first set of Congressional hearings on GSP, ATPA and other programs.

IV. Doha Negotiations

Completion of a final WTO Doha Round agreement has been delayed several times over the past few years, and 2009 did not witness any concrete movement forward. The Obama Administration still has not outlined its policy regarding the Doha talks, and WTO Members are questioning whether the United States remains committed to the multilateral negotiations. Although President Obama has stated that achieving a final Doha Agreement remains important and although the Administration has expressed its

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

political willingness to complete the negotiations, the Administration did not expend any political energy towards injecting life into the stalled Round in 2009 and its is unlikely to devote a great deal of political energy for the Round in 2010.

The negotiations suffer from the same issues that have bogged down the multilateral talks over the past several years. Agriculture negotiations continue to stall over several issues, including the reductions in agricultural support programs that WTO Members are willing to make and an agriculture special safeguard mechanism (SSM). Developed and developing countries continue to argue over the final contents of an Agriculture agreement, and at this stage, the United States and other WTO Members have not indicated that they are willing to issue revised offers. Similar to the agriculture negotiations, the non-agricultural market access (NAMA) negotiations also remain entrenched on several issues, including tariff coefficients WTO Members must agree on to the "Swiss formula" of tariff cuts. Finally, the Rules and Services negotiations continue to be victims of the Agriculture and NAMA talks, with WTO Members focusing their energies on Agriculture and NAMA and devoting littler of their attention to Services and Rules. Although WTO Director-General Pascal Lamy has indicated that in 2010, WTO Members should refocus their energies and include Rules and Services in their negotiating plans, it is unlikely that WTO Members will change course from their current focus on the troubled Agriculture and NAMA talks.

In March 2010, WTO Members will undergo a "stocktaking" exercise to measure the health of the Doha Round and see if they can develop a roadmap for completion of the negotiations in 2010. Although the message indicates the political will of WTO Members to complete the Round by end-2010, the message is similar to that of previous years, where WTO Members vowed to complete negotiations at the end of the year. It is unlikely that WTO Members will be able to complete negotiations by their end-2010 informal deadline and negotiations will likely drag out into 2011. Even if WTO Members were able to complete the Agriculture and NAMA negotiations in 2010, they would then have to tackle the Rules and Services talks, neither of them "easy" negotiating areas. And if WTO Members were to complete negotiations in all areas of the Doha Round, they would still require months of intensive negotiations and technical work on individual countries" tariff schedules and services schedules. Nonetheless, world leaders will not "give up" on the Doha Round in 2010 and beyond, mostly because they do not want to admit that they failed in achieving a comprehensive multilateral agreement. Thus, negotiations will continue in 2010, and WTO Members will likely follow the same course of action and negotiating models that they did in 2009 and prior to that.

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

V. WTO Dispute Settlement Proceedings

Although there may be little movement on the stalled Doha Round, the United States will likely be busy on the trade dispute front, handling complaints from its trading partners on a range of issues, from "zeroing" to subsidies:

- **Zeroing.** The United States Department of Commerce's (DOC) practice of "zeroing" in antidumping investigations and administrative reviews has been one of the most extensively-litigated measures in the WTO, and similar to 2009, in 2010, the United States could see more dispute settlement activity regarding this methodology. Even with the various DSB panel and Appellate Body rulings against the United States' use of "zeroing," the United States will likely continue to face challenges from various WTO trading partners as long as it continues to defend (and use) "zeroing." Korea is the latest trading partner to bring the United States to the WTO over the US use of the "zeroing methodology" (DS402), and it is likely that as long as the United States continues to use various forms of zeroing in calculating trade remedies, trading partners will continue to raise the issue at the WTO Dispute Settlement Body in 2010 and beyond.
- **Farm subsidies.** The United States may also be involved in disputes brought by other WTO Members regarding US agricultural support. The Obama Administration supports US ethanol subsidies and has also left unaltered US sugar policy and US cotton subsidies, despite multiple adverse WTO rulings. Consequently, WTO Members – such as Canada and Brazil – may bring the United States to task on its agricultural support through dispute settlement measures. Brazil, for example, received authorization from the WTO in November 2009 to impose countermeasures against the United States in the long-standing US-Brazil cotton dispute (DS267). 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 could retaliate up to USD 294.7 million on a range of US imports. Brazil has already drafted a retaliation list against imports originating from the United States and is expected to publish a final list in February 2010. At that time, Brazill will announce the goods exports against which it would retaliate in the dispute, the date of implementing the retaliation, as well as the total amount of retaliatory measures. Brazil's retaliation on US cotton support may further open the doors for increased dispute settlement activity on US agricultural support.
- **Country of Origin Labeling**. The United States will also be involved in dispute settlement proceedings in 2010 over its mandatory country of origin labeling (COOL) requirements. In November 2009, the WTO DSB established a panel to determine whether the United States' COOL

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

requirements for certain products (DS384) are in compliance with WTO rules. The measure is the result of complaints by Canada and Mexico that the US COOL requirements discriminate against Canadian and Mexican livestock exporters. The panel is expected to issue a decision in mid-2010.

- **China.** In addition, the United States and China will continue to pursue dispute settlement resolutions to various complaints that each has brought up at the WTO. The latest dispute involves a complaint by the United States, Mexico and the EU on China"s export quotas and duties on certain raw materials used for the production of steel and chemicals (DS394). Observers opine that this latest dispute on raw materials will likely be contentious, in part due to the EU"s and Mexico"s involvement and in part due to recent bilateral tensions that have cropped up between the United States and China on a variety of issues. Other US-China WTO disputes involve US measures affecting poultry imports from China (DS392), Chinese measures affecting the protection and enforcement of intellectual property rights (DS362), and Chinese measures affecting imports of automobile parts (DS339/340/342).
- **Boeing-Airbus.** The ongoing Boeing-Airbus dispute between the United States and the EU will likely continue in 2010. The dispute centers on the payment of government subsidies to the US aircraft-manufacturer Boeing Company and its European rival, Airbus. It seems likely that the United States and the EU will continue to pursue the WTO route in the hope that multilateral channels will produce a settlement that bilateral consultations have not achieved. An interim panel report on the EU"s challenge of subsidies allegedly given to Boeing (DS353) is expected by June 2010, and the final report would likely follow a couple of months after. A separate panel is expected to deliver its final report by April 2010 on US allegations that launch aid provided by four European Union member states to Airbus violated WTO subsidy rules (DS316).

VI. Climate Change and Other Issues

As in 2009, the US Congress will likely use 2010 to continue exploring the issue of climate change. In 2009, the House of Representatives and the Senate introduced the American Clean Energy and Security Act of 2009 (ACES; H.R. 2454) and the Clean Energy Jobs and America Power Act (S. 1733). Both bills seek to reduce greenhouse gas emissions and promote US energy independence and both propose the creation of a cap-and-trade program and the imposition of border measures for “carbon-intensive” imports. However, both bills contain differing provisions that would have to be reconciled if the bills make it to conference (the House of Representatives has already approved the ACES although the Senate has not yet voted – and is unlikely to approve – its climate change bill). Although debate on climate change and a cap-and-trade program will likely last through the year, it is unlikely that Congress will approve of the

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

proposed measures as-is and that the President will sign them into law. Critics of cap-and-trade programs have noted, among other things, that if the United States does not implement a cap-and-trade program correctly, it will encourage heavy industry to move offshore to a country that does not have as strict environmental standards as those in the United States. This criticism has spurred US industry to actively lobby legislators to oppose the bill altogether or "carve-out" special provisions and exceptions for certain industrial sectors. Consequently, it is unlikely that the Congress will approve the current text of the climate change bills without major changes.

In place of a climate change bill, legislators may act on a possible energy bill. Sen. Byron Dorgan (D-ND) has already opined that the Senate is unlikely to pass climate change legislation this year and that legislators will likely focus on a separate energy bill that would have more bipartisan support. According to Sen. Dorgan, the energy legislation, which has already cleared the Senate Energy and Natural Resources Committee, would be easier to pass. The bill would require more US electricity supplies to be generated from renewable sources, and expand offshore drilling into the eastern Gulf of Mexico. Although it is unclear if the final version of the energy bill will contain any trade measures or border measures, given Senate support for such measures in the climate change bill, trade provisions could appear in the energy bill, consequently making it a piece of legislation to closely monitor.

With little concrete movement expected on the climate change bills, 2010 may witness increased unilateral changes related to climate change. On December 7, 2009, the US Environmental Protection Agency (EPA) issued its final findings regarding greenhouse gas emissions (GHGs) in which it determined that greenhouse gases endanger the public health and the emissions of greenhouse gases from new motor vehicles and new motor vehicle engines contribute to the greenhouse gas pollution that endangers the public health and welfare. On December 29, 2009, a final rule promulgated by the EPA requiring mandatory reporting of greenhouse gas (GHG) emissions entered into effect. The "Mandatory Reporting of Greenhouse Gases Rule" applies to fossil fuel suppliers and industrial gas suppliers (including importers and exporters of these products), direct greenhouse gas emitters and manufacturers of heavy-duty and off-road vehicles and engines. The rule requires that these sources monitor and report annual emissions of certain greenhouse gases. Critics opine that these measures are just the beginning of a new era of "eco-protectionism" or "green protectionism" (*i.e.*, the use of regulations to limit or block imports under the guise of preserving the environment), and they are worried that the new regulations that the EPA has implemented could open the door for further unilateral changes that limit and/or block trade. The EPA"s recent decisions and new rules, for example, as being viewed by some as a way to regulating carbon emissions without Congressional passage of a climate change bill. They also

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

indicate that the Administration could be considering some form of import regulation related to the endangerment ruling which would certainly trade slows and patterns. Thus, although the United States is not the only country that is engaging in "green protectionism," the limited results of the recent Copenhagen Climate Change conference make it likely that countries – such as the United States – will continue to resort to increased rules and regulations on climate change that might have a negative effect on trade flows.

Outlook

During its first year in the White House, the Obama Administration did not adopt a proactive attitude towards trade, relegating it to a "backburner" issue in 2009 and making it secondary to other (mostly domestic) issues. The Obama Administration has still not outlined its trade policy, and until it does so, trade is unlikely to be a major agenda item for the Administration in 2010. The US Congress is likely to follow suit and maintain its focus on domestic issues, consequently sidelining trade issues. Congress may look to preference program reform in 2010 and may continue to observe China, but at this stage, it seems likely that similar to 2008 and 2009, US trade policy will be mostly stagnant in 2010.

On the bilateral front, there may be some movement on trade negotiations. Although uncertainty still surrounds the timing of a Congressional vote on pending FTAs with Colombia, Panama and Korea, the recent announcement of TPP FTA negotiations and the ongoing Anti-Counterfeiting Trade Agreement (ACTA) negotiations could provide some movement in an otherwise quiet US trade-negotiating front. The Administration may also consider negotiating BITs and TIFAs although it is uncertain at this point if and when the Administration would engage in such negotiations. On the multilateral front, the United States will continue to indicate its political willingness to complete the Doha Round but will unlikely be very active in the negotiations in 2010, similar to last year. Although the United States – and other WTO Members – continue to indicate their political willingness to complete a final Doha Agreement as soon as possible, similar statements were made in 2007, 2008 and 2009 and stand-offs continue to prevent substantive forward movement in the negotiations. The United States will be embroiled in several WTO disputes – as both complainant and the subject of trading partners‟ complaints – and 2010 could see some action on disputes involving US agricultural support and other US rules and regulations.

Consequently, 2010 will likely be another challenging year for trade. Although there may be some movement on the US trade front, 2010 will likely be similar to 2009, and US trade policy will continue to be a "sideline" issue for the Administration.

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

United States Highlights

Obama Administration Releases FY 2011 Budget: Most Trade-Related Agencies See "Freezes," Lower Figures

On February 1, 2010, the Office of Management and Budget (OMB) released the Obama Administration's fiscal year (FY) 2011 budget proposal, which sets out the President's tax and spending policies that the Administration will seek to enact in the next fiscal year. The budget envisions the federal government spending about USD 3.8 trillion in FY 2011, which starts on October 1, 2010. Observers note that the FY 2011 budget "freezes" or lowers budgets for trade-related agencies, and that although the budget notes a focus on export promotion and trade enforcement, the Administration has not detailed in the budget its trade policy goals or initiatives for FY 2011. We review below the proposed budgets for different government agencies' trade-related initiatives.

I. Office of the United States Trade Representative (USTR)

President Obama has proposed USD 48 million in FY 2011 for USTR, which, according to several reports, is "essentially a freeze." USTR Ron Kirk defended the President's decision and stated that the proposed budget "still invests in sustained efforts to enforce Americans' trade rights around the world and to enhance economic opportunity here at home." Senate Finance Chairman Max Baucus (D-MT), meanwhile, criticized the budget proposal, opining that USTR "plays a critical role in promoting US exports, but that role is not reflected in [the proposed] budget."

II. Department of Commerce (DOC)

The budget proposes USD 9.1 billion for DOC, of which USD 8.9 billion would be discretionary spending. The FY 2011 figures are a reduction from the USD 14 billion in discretionary funds that DOC received for FY 2010. The FY 2011 budget proposes USD 534 million to the International Trade Administration (ITA) in order to help it launch the National Export Initiative, "a broader Federal strategy to increase American exports." The proposed figures are a nearly 20 percent increase over fiscal 2010 levels. According to the budget, "ITA will strengthen its efforts to promote exports from small businesses, help enforce free trade agreements with other nations, fight to eliminate barriers to sales of US products, and improve the competitiveness of US firms."

The budget proposes USD 1.9 billion for the Trade Adjustment Assistance (TAA) program. The budget request notes that TAA will expire at the end of 2011 and the President will submit legislation to continue the program. The budget also proposes USD 113 million for DOC's Bureau of Industry and Security (BIS),

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

an increase from the current USD 100 million BIS receives. Of that proposed USD 113 million, USD 56 million would go to export administration and USD 51 million would go to export enforcement.

Secretary of Commerce Gary Locke stated that the proposed budget is a "fiscally sound approach" and invests in "innovation, security and long-term economic competitiveness."

III. Department of Agriculture (USDA)

The budget proposes USD 23.9 billion in discretionary spending for USDA, a five percent decrease from FY 2010 spending levels. USDA's Foreign Agricultural Service would receive USD 258.7 million, an increase from the USD 180 million it currently receives. Within this proposed budget, USD 54 million would be used to fund the promotion of US agricultural exports, USD 35 million would be used for assistance to agricultural trade associations in support of overseas market development activities, USD 10 million would be used to increase exporters assistance, in-country market promotions and trade enforcement activities, and USD 9 million would be used for a grant program to assist US specialty crop producers in overcoming sanitary, phytosanitary and other technical barriers to trade.

The FY 2011 also proposes reducing the USD 500,000 adjusted gross income ceiling for direct payments to farmers, and would reduce the cap on direct payments to wealthy farmers by 25 percent and cut the Adjusted Gross income payment eligibility limits for farm and non-farm income by USD 250,000 over three years.

IV. Customs and Border Protection (CBP)

Under the proposed FY 2011 budget, CBP's budget would largely remain the same as FY 2010; the Administration is proposing USD 11.1 billion for CBP. Of that amount, USD 380 million would be used for the Automated Commercial Environment (ACE) system, and USD 25 million would be used as funding for enforcement of intellectual property rights (IPR).

The entire FY 2011 budget is available at: http://www.whitehouse.gov/omb/.

President Obama Addresses Some Trade Issues in State of the Union Address

On January 27, 2010, President Obama delivered his first State of the Union address. Although the majority of the speech focused on domestic issues, President Obama did include several trade-related issues in his address. On **US exports**, President Obama announced a goal of doubling US exports over the next five years by opening markets around the world, tying in the market expansion with the creation

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

of US jobs. He also announced the creation of the **National Export Initiative** meant to help US agricultural producers and small businesses increase their exports and his intent to reform **US export controls**. The Administration will announce details of the National Export Initiative and US export control reform shortly, and Secretary of Commerce Gary Locke will deliver a speech on February 4, 2010 at the National Press Club outlining the Administration's "strategy to support job creation by promoting the growth of US exports." The President did not explicitly make any announcements regarding the **pending Free Trade Agreements (FTAs)** with Panama, Colombia and Korea, although he did state that the Obama Administration intends to "strengthen [US] trade relations in Asia and with key partners like South Korea, Panama and Colombia." On **current FTAs**, President Obama noted that the Administration will focus on enforcing trade agreements that have already been implemented to ensure that US trading partners "play by the rules." On the stalled multilateral **World Trade Organization (WTO) Doha negotiations**, President Obama stated that Administration officials will "continue to shape a Doha trade agreement that opens global markets."

Reaction to President Obama"s inclusion of trade in his State of the Union address was positive, albeit limited. WTO Director-General Pascal Lamy stated that he "detected more attention to the macroeconomic side of what he wants to do, and including the trade side, not least because increasing exports is also a way to stimulate the US economy" and he opined that "what [he] read in the State of the Union address goes in the right direction." House Ways and Means Committee Chairman Charles Rangel (D-NY) praised President Obama"s export initiative and stated that the "global economy demands global solutions." Senate Finance Committee Chairman Max Baucus (D-MT) also lauded the President"s speech and urged the Administration to pursue "a positive trade agenda that gives American ranchers, farmers, service providers and manufacturers the help they need to export their first-class, American-made products to the world"s consumers." Meanwhile, Senate Finance Committee Ranking Member Charles Grassley (R-IA) opined that "international trade has been neglected and effectively rejected by the Administration, putting US employers at a competitive disadvantage because America"s trading partners have moved on and made trade agreements among themselves and not with us." House Ways and Means Ranking Member Dave Camp (R-MI) also criticized the Administration for the lack of movement on the pending FTAs and Ranking Member of the House Ways and Means Trade Subcommittee Kevin Brady (R-TX) added that the President could "back his statements" by sending the pending FTAs to Congress for consideration.

President Obama followed up on his State of the Union address by meeting with Republican legislators on January 29, 2010 at an annual legislative issues retreat. At the retreat, President Obama discussed

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

trade with some Republican lawmakers, stating that he hopes that the Administration and Congress can "move forward with some of these [pending] trade agreements having built some confidence – not just among particular constituency groups, but among the American people – that trade is going to be reciprocal; that it's not just going to be a one-way street." The President noted that Korea has recently signed an FTA with the EU, "which presents worries that Europeans might get into the Korean market ahead of US companies."

Although the President included several trade-related issues in his address, the remarks he made still do not provide the trade community with any signs as to the direction this Administration will take with regards to US trade policy. Certainly enforcement appears to be a big theme for the Administration, although observers were made aware of that during President Obama's campaign. And the announcement of the National Export Initiative and the reform to US export controls indicate that exports will feature heavily this year, although the Office of the United States Trade Representative (USTR) signaled the shift in focus to exports towards the end of 2009. Consequently, neither of these "themes" is new, and the Administration has been focused on them for some time now. Left unclear are the pending FTAs with Panama, Colombia and Korea. In addition, although the President indicated the US willingness to complete the Doha Round, he did not back his statement with any affirmation as to how the United States could inject life into the stalled talks, or what direction US negotiators would take in the multilateral negotiations. Thus, trade observers are again left to ponder how the Administration will tackle trade in 2010 and beyond for the time being.

USTR Designates New AUSTR for Small Business, Market Access, and Industrial Competitiveness

On January 21, 2010, United States Trade Representative (USTR) Ron Kirk announced the designation of an Assistant United States Trade Representative (AUSTR) for Small Business, Market Access, and Industrial Competitiveness at the Office of the USTR. Jim Sanford, the current AUSTR for Market Access and Industrial Competitiveness, will also serve in the new position that will focus on small business issues. The appointment was made in consultation with Congressional leaders.

Japan Announces Changes to Cash-for-Clunkers Program

On January 19, 2010, the Government of Japan announced changes to its cash-for-clunkers program. Japan's cash-for-clunkers program is similar to the US program in that it provides consumers with a tax break equivalent to (est.) USD 2,800 if they trade in a car 13 years old or older and purchase a new

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

vehicle that meets Japan"s 2010 fuel efficiency standards. The program also offers (est.) USD 1,115 for a new vehicle that is at least 15 percent higher than the 2010 fuel efficiency standard. Under the original cash-for-clunkers program, any automobile certified under the "Type Designation System" (TDS) in Japan qualified under the cash-for-clunkers program because the certification process required emission testing. However, automobiles certified under the expedited "Preferred Handling Procedure" (PHP) did not qualify for Japan"s cash-for-clunkers because no emission testing was required in Japan. Under the rule changes, automobiles entering the Japanese market under the PHP are now eligible for the cash-for-clunkers program.

Japan introduced the PHP in 1986, at the request of the US government, to encourage the import of certain vehicles. Under this expedited certification procedure, vehicles sold in Japan do not have to undergo testing under the country"s 10-15 mode emissions assessment. Prior to the rule change to the cash-for-clunkers program, automobiles entering Japan under the PHP were ineligible for the cash-for-clunkers program because they bypassed the Japanese fuel efficiency tests that were the basis for the cash-for-clunkers eligibility requirements. Any company could choose which of the two certification procedures it wished to pursue. US companies chose to participate in the PHP program to enter their goods into the Japanese market. Consequently, most US automobiles did not qualify fo the Japanese cash-for-clunkers program. US government officials argued that the program discriminated against automobiles produced in the United States. The Japanese government, however, argued that the program was not discriminatory at all because all companies were treated equally. In order to qualify for the cash-for-clunkers program, the automobile had to be certified under the TDS, which included the Japanese emission testing. Observers point out that the Japanese program differed from the 2009 US cash-for-clunkers program in that all automobiles (domestic and imported) were considered eligible under the US program whereas the Japanese program "effectively barred US firms from participating" because of their choice to participate in the PHP program.

According to the Government of Japan, under the new changes in Japan"s cash-for-clunkers program, the fuel efficiency standard given by the government of the country in which the automobile is manufactured can now be used to prove that the automobile meets the Japanese fuel efficiency standards; for US automobiles, if the US Environmental Protection Agency (EPA) certifies that a particular US vehicle meets Japan's 2010 fuel efficiency standards, that auto qualifies for the cash-for-clunkers program.

Several observers opine that pressure from the Obama Administration, Congress and US businesses led the Government of Japan to reassess the cash-for clunkers program. Secretary of State Hillary Clinton had informed Japanese Foreign Minister Katsuya Okada earlier in January that Members of the US

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

Congress were concerned with Japan"s cash-for-clunkers program. On January 5, 2010, Rep. Betty Sutton (D-OH) introduced a House resolution "expressing the sense of the House of Representatives regarding unfair and discriminatory practices of the government of Japan in its failure to apply its current and planned extension of the Government's Eco-friendly Vehicle Purchase and scrappage program to imported vehicles made by US automakers," and calling for the United States Trade Representative (USTR) to initiate talks with Japanese officials and bring a World Trade Organization (WTO) case against Japan if it did not open up its program to US cars (H. Res. 997). On January 14, 2010, House Ways and Means Trade Subcommittee Chairman Sander Levin (D-MI) announced that the Trade Subcommittee would hold a hearing on historic and current barriers to US auto imports in the Japanese and South Korean markets on January 21, 2010 that would focus on "Japanese and South Korean policies that have historically and currently shut US autos out of their domestic markets." On January 15, 2010, 40 members of the New Democrat Coalition sent a letter to Japan"s US Ambassador Ichiro Fujisaki calling on Japan to open the program to US autos. US Chamber of Commerce President and CEO Thomas Donohue also sent a similar letter to Ambassador Fujisaki on January 5, 2010. US automakers Ford Motor Co., General Motors Corp. and Chrysler had also complained to USTR in December 2009 that Japan's cash-for-clunkers program effectively barred US firms from participating.

USTR Announces Hearing, Requests Comments on 2010 Special 301 Review

In a January 12, 2010 Federal Register (FR) notice, the Office of the United States Trade Representative (USTR) announced a hearing and requested written submissions from the public in order to help it identify countries for its annual Special 301 report that deny adequate and effective protection of intellectual property rights (IPR) or deny fair and equitable market access to US persons who rely on intellectual property protection. USTR is requesting comments "that are relevant to the decision on whether a particular trading partner should be identified as a priority foreign country . . . or placed on the Priority Watch List or Watch List." Interested parties, including foreign governments, who want to testify at the public hearing must submit a request to testify at the hearing and a short hearing statement. We include the procedural deadlines below:

- **February 16, 2010** – For interested parties, except for foreign governments: Submit written comments, requests to testify at the Special 301 Public Hearing, and hearing statements.
- **February 23, 2010** – For foreign governments: Submit written comments, requests to testify at the Special 301 Public Hearing, and hearing statements.

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

- **March 3, 2010, and additional days from March 4-8, 2010 as necessary** – Special 301 Committee Public Hearing for interested parties, including representatives of foreign governments, held at the United States International Trade Commission.
- **April 30, 2010 (est.)** – In accordance with statutory requirements, USTR will publish the 2010 Special 301 Report on or about April 30, 2010.

Senate Approves DUSTR Nominee Miriam Sapiro

On December 24, 2009, the Senate approved President Obama's nomination of Miriam Sapiro to be Deputy United States Trade Representative (DUSTR). President Obama nominated Sapiro to be DUSTR on April 14, 2009, and on July 23, 2009, the Senate Finance Committee favorably reported her nomination by voice vote. Sapiro, however, faced a hold on her nomination from Senate Finance Committee member Jim Bunning (R-KY). According to Congressional sources, Sen. Bunning 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."

Sapiro joins DUSTR Demetrios Marantis at the Office of the USTR. Another DUSTR nominee, Michael Punke, is also waiting for Senate action on his nomination. If confirmed by the Senate, Punke will fill in the position left empty by former DUSTR Peter Allgeier.

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

Free Trade Agreements

Free Trade Agreements Highlights

House Trade Working Group Sends Letter to USTR on TPP FTA

On January 20, 2010, a group of House legislators led by Rep. Mike Michaud (D-ME), Chairman of the House Trade Working Group (HTWG), sent a letter to United States Trade Representative (USTR) Ron Kirk on the Trans-Pacific Partnership (TPP) Free Trade Agreement (FTA). The letter requests a meeting with the USTR in order to "establish an ongoing process of consultation with members of the HTWG before and during the TPP negotiations."

In their letter, the signatories note that "for these [TPP FTA] negotiations to yield an agreement that could enjoy broad support, it will be critical that you work in cooperation with congressional trade reform advocates to transform the Bush TPP initiative into an opportunity to develop a new forward-looking American trade agreement model." The legislators are interested in working with USTR to "develop US standards and objectives for any agreement that might result from the TPP process" prior to the March 2010 TPP meeting in Australia. The letter also notes that of the seven countries proposed as a TPP partner, Vietnam does not have a market economy, and Vietnam and Brunei have authoritarian governments in place. The legislators "view the TPP negotiations as an opening to ensure that any country seeking to be part of the TPP meet criteria with respect to labor rights, democratic governance and other human rights."

The legislators also identify key provisions included in past FTAs from which they "expect additional progress in the TPP context" and new initiatives that the Administration should pursue, including, but not limited to:

- **Foreign investor rights**, in the context of a "new American trade agreement model [that] must no longer provide extraordinary foreign-investor privileges and private enforcement systems that promote offshoring and allow foreign investors to challenge [US] environmental, zoning, health and other public-interest policies in foreign tribunals," opposition to the "establishment of rights for foreign investors to obtain **compensation from the US government for regulatory takings**, and a guarantee of a "**minimum standard of treatment**" for foreign investors that is limited to guarantees of procedural due process;

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

- No limits on **capital controls and other policies** "countries may need to employ to counter financial and currency crises that have been included in past FTAs;"
- Better **affordable access to medicines;**
- "Advancements made to the Bush FTAs" **labor and environmental terms** in 2007 which were included in the FTA with prospective TPP partner Peru," including better enforcement of labor and environmental terms and the requirement that signatories enforce the core International Labor Organization"s (ILO) standards as set forth in the ILO Conventions;
- No limits on the ability of Congress and state legislatures to design **stimulus, infrastructure and other government procurement** activities;
- No constraints on the ability of Congress to regulate either **foreign financial service firms** operating in the United States or the **cross-border provisions of financial services**;
- US FTAs "entered into only with trading partners that have **democratic governments**;"
- Improvements to the **safety and inspection standards for imported food and products."**

ITC Initiates Investigation of TPP FTA

On January 11, 2010, the International Trade Commission (ITC) announced that it is seeking input for a newly initiated investigation into the probable economic effect of a potential US Free Trade Agreement (FTA) with Australia, Brunei Darussalam, Chile, New Zealand, Peru, Singapore, and Vietnam, *i.e.*, the countries with which the United States will engage to negotiate a Trans-Pacific Partnership (TPP) FTA. The Office of the United States Trade Representative (USTR) requested the investigation on December 15, 2009.

As requested by USTR, the ITC will advise the President as to the probable economic effect of providing duty-free treatment for imports of products of the TPP members on industries in the United States producing like or directly competitive articles and on consumers. In preparing its advice, the ITC will consider each article in Harmonized Tariff Schedule (HTS) Chapters 1 through 97 for which US tariffs will remain after the United States fully implements its Uruguay Round tariff commitments and US FTAs with a TPP country. The ITC will also advise the President as to the probable economic effects of eliminating tariffs on imports of certain agricultural products of the TPP members on US industries producing the product concerned and the economy as a whole.

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

The ITC expects to submit its confidential report to USTR by **June 2, 2010**. The ITC is seeking input for this investigation from all interested parties and requests that the information focus on the issues for which the ITC is requested to provide information and advice, and will hold a public hearing in connection with the investigation on **March 2, 2010**. Requests to appear at the hearing must be filed by **February 16, 2010**. Written submissions for the record must be submitted by **March 23, 2010**.

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

Multilateral

WTO Appellate Body Rules on US-China AV-Publications Dispute

Summary

Decision: The WTO Appellate Body has affirmed that a number of restrictions imposed by China on the importation and distribution of publications, audiovisual products, sound recordings and films are WTO-inconsistent. In response to a complaint by the United States, the Appellate Body ruled that such measures violate China"s Protocol of Accession, as well as the General Agreement on Trade in Services (GATS).

This dispute arose from US allegations that China "denies US companies the right to import books, journals, movies, music, and videos, and instead requires all imports to be channeled through specially authorized state-approved or state-run companies." The United States also complained about similar restrictions on the distribution of these products. The Panel upheld a number of US claims, and China"s appeal was largely unsuccessful.

Significance of Decision / Commentary: From a legal perspective, the most important aspect of the current decision was the Appellate Body"s ruling that the "exceptions" set out in Article XX of the General Agreement on Tariffs and Trade (GATT) are potentially available to defend violations of non-GATT provisions.

GATT Article XX provides in part that "nothing in this Agreement" can be construed to prevent the adoption or enforcement of certain measures, including those "necessary to protect public morals." The "Agreement" is the GATT. This language was drafted in 1947, thus long predating the entry into force of the WTO Agreements in 1995 and China"s Protocol of Accession in 2001.

The United States had argued, among other things, that China acted inconsistently with the provisions of China"s Protocol of Accession relating to "trading rights" (the right to import and export). China pointed to language in the Protocol that its trading rights commitments were "[w]ithout prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement", which in China"s view included the "public morals" defense of GATT Article XX(a). China referred to cultural goods and services as "vectors of identity, values and meaning", which "do not merely satisfy a commercial need, but also play a crucial role in influencing and defining the features of society."

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

In a threshold ruling, the Appellate Body found that China could, in principle, invoke the "public morals" defense of GATT Article XX(a) to seek to justify a breach of its Protocol of Accession where the measure had a "clearly discernable, objective link to the regulation of trade in the goods at issue." Applying this test, the Appellate Body concluded that "the provisions that China seeks to justify have a clearly discernable, objective link to China's regulation of trade in the relevant products" and therefore, in principle, China could invoke Article XX(a) to seek to justify its measures as "necessary" to protect public morals in China.

Although China succeeded on this threshold issue, its defense under Article XX(a) ultimately foundered. The Appellate Body concluded that the particular measures at issue in this case could not be considered as "necessary" to protect public morals within the meaning of Article XX(a).

Strictly speaking, the Appellate Body"s ruling on this issue dealt only with the availability of GATT Article XX(a) to seek to justify a violation of China"s Protocol of Accession. However, the reasoning used by the Appellate Body would readily apply to any of the GATT Article XX exceptions (such as the protection of human life or health), and to other non-GATT provisions dealing with trade in goods (such as the Anti-Dumping Agreement or the Agreement on Technical Barriers to Trade). Thus, the principles set out by the Appellate Body in the present dispute will likely be extended in future cases.

Analysis

Trading rights: Appellate Body rejects the "artificial dichotomy" between content and goods

The measures relating to films for theatrical release provided that only enterprises "designated" or "approved" by the Chinese government could import films into China. The Panel found that this violated China"s trading rights obligations by "failing to ensure that all enterprises in China (including foreign-invested enterprises), foreign individuals, and foreign enterprises not registered in China have the right to import cinematographic films."

On appeal, China argued that its trading rights commitments "apply solely in respect of trade in goods" and that its impugned measures "do not regulate the importation of goods but, rather, regulate the content of films and the services associated with the importation of such content." The Appellate Body noted that "in claiming that the trading rights commitments do not apply to the measures, China does not contest that these measures restrict *who* may import films, but rather contends that *what* is imported by the enterprises designated/approved by the [Chinese government] under these measures is *not a good* [original emphasis]."

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

The Appellate Body rejected China"s position on this issue. It recalled its earlier jurisprudence that "a measure can regulate both goods and services and that, as a result, the same measure can be subject to obligations affecting trade in goods and obligations affecting trade in services." China had argued that its measure related "only to the right to import „intangible content" of films through licensing services, and do not relate to „the physical carrier" of such content." However, the Appellate Body did not agree with "the clear distinction drawn by China between „content" and „goods"…." It similarly did not consider "content and goods, and the regulation thereof" to be "mutually exclusive." The Appellate Body agreed with the United States that China's arguments were "premised on an artificial dichotomy between film as mere content (which China contends is not a good) and the physical carrier on which content may be embedded (which China views as a good)."

The Appellate Body therefore concluded that the relevant Chinese measures were subject to – and were in violation of – China"s accession commitments on trading rights.

China's "public morals" defense unsuccessful

1. GATT "public morals" exception: applicable in principle to China"s Protocol of Accession

The Panel had raised – but did not rule on – the issue of whether GATT Article XX was available as a defense for violations of China"s Protocol of Accession. The Panel proceeded on the provisional assumption that Article XX(a) was potentially available to China as a defense to violations under the Protocol. However, the Panel found that the Chinese measures at issue failed the "necessity" test, in part because "it is not apparent to us that the requirements in question make a contribution to protecting public morals." Moreover, the Panel found that the measures could not be considered as "necessary" in light of a less trade-restrictive alternative proposed by the United States, *i.e.*, that the Chinese Government could make final content review decisions before the products were cleared through customs.

The Appellate Body began its analysis of this issue by gentling chiding the Panel for proceeding on an "arguendo" basis on the threshold issue of whether Article XX was available for non-GATT provisions (although the Appellate Body itself proceeded on such a basis in the 2008 case of *US – Customs Bond Directive*). In the present dispute, the Appellate Body stated that "reliance upon an assumption *arguendo*…may not always provide a solid foundation upon which to rest legal conclusions." It added that "[u]se of the technique may detract from a clear enunciation of the relevant WTO law and create difficulties for implementation" and that "[r]ecourse to this technique may also be problematic for certain types of legal issues, for example, issues that go to the jurisdiction of a panel or preliminary questions on which the substance of a subsequent analysis depends." The Appellate Body concluded that the Panel's

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

approach rested on “an uncertain foundation as a result of the absence of a ruling on the applicability of Article XX(a) in this case.” It therefore turned to this issue.

The Appellate Body stated that “whether China may, in the absence of a specific claim of inconsistency with the GATT 1994, justify its measure under Article XX of the GATT 1994 must in each case depend on the relationship between the measure found to be inconsistent with China's trading rights commitments, on the one hand, and China's regulation of trade in goods, on the other hand.” It added that whether “a measure regulating those who may engage in the import and export of goods falls within the scope of China's right to regulate trade” would depend in part on “whether the measure has a clearly discernable, objective link to the regulation of trade in the goods at issue.” Whether the necessary “objective link” existed in a specific case would need to be established “through careful scrutiny of the nature, design, structure, and function of the measure, often in conjunction with an examination of the regulatory context within which it is situated.”

Applying this test to the challenged measures, the Appellate Body concluded that “the provisions that China seeks to justify have a clearly discernable, objective link to China's regulation of trade in the relevant products” and therefore, in principle, China could rely on Article XX(a) to seek to justify its measures as “necessary” to protect public morals in China.

2. China"s measures fail the “necessity” test

Having established that GATT Article XX(a) was in principle available to China to seek to justify a breach of the Protocol of Accession, the Appellate Body turned to review whether, in the present case, the Chinese measures could be considered as “necessary” to protect public morals.

Summarizing its earlier jurisprudence, the Appellate Body indicated that “an assessment of „necessity“ involves „weighing and balancing“ a number of distinct factors relating both to the measure sought to be justified as „necessary“ and to possible alternative measures that may be reasonably available to the responding Member to achieve its desired objective.”

One of the Chinese measures examined on appeal required that an enterprise had to be wholly State-owned in order to be eligible to import publications. The Panel found that China had not demonstrated that this requirement was “necessary” to protect public morals. The Appellate Body agreed, stating that “China did not establish a connection between the exclusive ownership of the State in the equity of an import entity and that entity's contribution to the protection of public morals in China.”

The Appellate Body similarly agreed that China had not demonstrated that the provisions prohibiting foreign-invested enterprises from engaging in the importation of the products were “necessary” under

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

Article XX(a). It reasoned that "[t]he mere fact that an entity involves some foreign investment does not necessarily imply that content review would be carried out by professionals who are not familiar with Chinese values and public morals, or incapable of efficiently communicating with and understanding the authorities."

The United States was successful in a cross-appeal related to the Panel"s interim finding regarding the "necessity" of China"s "State plan requirement" for the total number, structure, and distribution of publication import entities. The Panel had found that this requirement could make a "material contribution" to the protection of public morals. The Appellate Body reversed the Panel on this issue. It found that "the Panel did not cite any evidence in support of its assumption that the State plan requirement imposed a limitation on the number of import entities" and that "the Panel did not explain why the contribution made by the presumed limitation in the State plan requirement would be a „material" one." The Appellate Body concluded that "the Panel erred…in finding that the State plan requirement…is apt to make a material contribution to the protection of public morals and that, in the absence of a reasonably available alternative, it can be characterized as „necessary" to protect public morals in China."

China complained that the Panel "erred in including an assessment of the effect on those wishing to engage in importing in its assessment of the restrictive effect of the measures at issue", which it asserted placed an "unsustainable burden of proof" on China. The Appellate Body disagreed, noting that "the assessment of the restrictive effect of a measure on international trade is part of the „weighing and balancing" approach for assessing „necessity."" It admonished that "if a Member chooses to adopt a very restrictive measure, it will have to ensure that the measure is carefully designed so that the other elements to be taken into account in weighing and balancing the factors relevant to an assessment of the „necessity" of the measure will „outweigh" such restrictive effect."

China argued that the alternative proposed by the United States (that the Chinese Government would be given sole responsibility for conducting content review) could not be considered as "reasonably available" because this alternative "would impose an undue financial and administrative burden on China." The Appellate Body rejected this argument, reasoning that "[c]hanging an existing measure may involve cost and a Member cannot demonstrate that no reasonably available alternative exists merely by showing that no cheaper alternative exists." Instead, "the respondent must establish that the alternative measure would impose an *undue* burden on it, and it must support such an assertion with sufficient evidence." China had not provided such evidence in the present case. The Appellate Body added that "adopting any alternative measure will, by definition, involve some change, and this alone does not suffice to demonstrate that the alternative would impose an undue burden."

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

The Appellate Body stressed that "[w]e are *not* holding that China is under an obligation to ensure that the Chinese Government assumes sole responsibility for conducting content review." Instead, it found that "the United States has demonstrated that the proposed alternative would be less restrictive and would make a contribution that is at least equivalent to the contribution made by the measures at issue to securing China's desired level of protection of public morals." Moreover, "China, in turn, has not demonstrated that this alternative is not reasonably available."

Accordingly, the Appellate Body concluded that China had not demonstrated that its measures were "necessary" to protect public morals within the meaning of GATT Article XX(a).

GATS: "Sound recording distribution services" includes electronic distribution

GATS Article XVII imposes a national treatment obligation with respect to services trade. It provides in part that "each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers." The Panel found a number of measures to be inconsistent with this obligation, including a law that prohibited foreign-invested enterprises from engaging in the electronic distribution of sound recordings in China.

On appeal, China argued that the Panel erred in interpreting the entry "Sound recording distribution services"" in China's GATS Schedule as "encompassing distribution by electronic means." China asserted that this entry in its GATS Schedule covered "only the distribution of sound recordings in physical form, for example, music embedded on compact discs…." The United States asserted that "the entry encompasses the distribution of sound recordings in both physical and electronic form, for example, through the Internet or by other electronic means."

The Appellate Body examined the "ordinary meaning" of the term "Sound recording distribution services" in China's GATS Schedule, "in its context and in the light of the object and purpose of the GATS", and concluded that "China's commitment covers both physical distribution as well as the electronic distribution of sound recordings." The Appellate Body therefore upheld the Panel's finding that the Chinese measures at issue were inconsistent with GATS Article XVII.

The Appellate Body dealt with only a portion of the issues adjudicated at the Panel stage, and thus its decision has to be read in conjunction with the August 12, 2009 Panel Report. (For example, the Panel found a violation of GATT Article III, and this finding was not appealed.) Our August 19 commentary on the Panel Report is available upon request.

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

The decision of the Appellate Body in *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (DS363)* was released on December 21, 2009.

Multilateral Highlights

US Requests WTO Dispute Settlement Consultations with Philippines Over Taxes on Distilled Spirits

On January 14, 2010, United States Trade Representative (USTR) Ron Kirk announced that the United States has requested World Trade Organization (WTO) dispute settlement consultations with the Philippines regarding the Philippine excise taxes on imported distilled spirits. According to USTR, "the Philippines taxes imported distilled spirits at significantly higher rates than domestic distilled spirits." A USTR press release noted that the Philippines applies tax rates to distilled spirits that differ depending on the product from which the spirit is distilled. The Philippines taxes distilled spirits made from certain materials that are typically produced in the Philippines, such as sugar and palm, at a low rate, whereas the Philippines taxes imported distilled spirits "at significantly higher rates (from approximately ten to forty times higher) than the low rate applied to domestic products."

This is not the first time that the United States has broached the issue of taxes on distilled spirits. According to USTR, the United States has raised concerns over this issue with the Philippines over the past several years and participated in consultations between the EU and the Philippines in October 2009 on the same issue.

The United States and the Philippines will now formally consult on the matter. If consultations fail to resolve the dispute within 60 days after both parties commence consultations, the United States may request that the WTO Dispute Settlement Body (DSB) establish a panel to determine whether the Philippines is in compliance with its WTO obligations.

US, Thailand Provide Notice to WTO of Procedural Agreement in Plastic Bag-Zeroing Dispute

On January 12, 2010, the United States and Thailand provided notice to World Trade Organization (WTO) Members of a procedural agreement that the two countries had reached in 2009 that addresses the US-Thai dispute over the US use of "zeroing" in an antidumping investigation of plastic bags from Thailand (DS383). Under the agreement (that the two countries appear to have reached in January 2009

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

during consultations), "provided that the panel's finding is limited to a finding that the [US] measures identified in the request for the establishment of a panel are inconsistent with the first sentence of Article 2.4.2 of the Anti-Dumping Agreement," the United States will initiate a "Section 129" review "to recalculate margins of dumping and to issue a new determination in order to render the anti-dumping measures on plastic carrier bags from Thailand consistent with the recommendations and rulings of the Dispute Settlement Body." The United States will recalculate the dumping margins within six months of a final panel ruling. The United States and Thailand also agreed that the results of the review would have a prospective effect only, "taking effect with respect to entries made no sooner than the date on which the United States Trade Representative directs the United States Secretary of Commerce to implement its recalculation of the margins and new determination."

In November 2008, Thailand sent a notification to the WTO requesting consultations with the United States over the US Department of Commerce's (DOC) use of its "zeroing" methodology in the dumping investigation involving imports of polyethylene retail carrier (PRC) bags from Thailand. In its consultation request, Thailand alleged that DOC used zeroing in determining a final antidumping order on PRC bags from Thailand in June 2004, and that the use of zeroing violates the WTO Agreement on Anti-Dumping Measures. On March 9, 2009, Thailand requested the establishment of a WTO dispute panel to challenge the DOC's use of its "zeroing" methodology in the dumping investigation involving imports of PRC bags from Thailand. The WTO Dispute Settlement Body (DSB) agreed to form the panel on March 20, 2009 and issued a preliminary ruling on December 11, 2009. On January 22, 2010, the dispute panel made public its ruling upholding Thailand's complaint against the DOC's use of zeroing.

Zeroing refers to the practice whereby an investigating authority discounts the so-called "negative dumping margins" to zero. Where the export price of a product is lower than the price in the exporting country, the difference between the two is a positive dumping margin. However, when the export price of the product is higher than the price in the exporting country and zeroing is used, investigating authorities do not give any credit for negative dumping margins. The investigating authority does not average positive and negative dumping margins together – instead, it considers all negative dumping margins to be zero. This has the effect of inflating the overall average dumping margin, and can lead to the imposition or maintenance of antidumping duties which may not otherwise apply.

The US-Thai dispute is the latest in a series of disputes the United States has had with trading partners over its use of zeroing. To date, there have been more than a dozen disputes regarding the DOC's zeroing methodology. Observers note, however, that various panels and the WTO Appellate Body (AB) have consistently found that DOC's zeroing does not comply with US WTO obligations. It appears that

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com

the outcome of the US-Thai dispute will be similar to the outcomes of past disputes. The procedural agreement may also indicate that US officials recognize that as long as the DOC uses "zeroing" in its investigations and margin determinations, trading partners will continue to bring the United States to the DSB and the WTO will continue to find "zeroing" inconsistent with US obligations.

Analysts note that the procedural agreement deviates from past AB rulings in that it would apply only in respect of entries from after the six-month reasonable period of time (RPT) and would thus allow final actions based on "zeroing" after the end of the RPT but in respect of entries from before the end of the RPT. The AB would consider this to be WTO-inconsistent behavior which some observers opine may be the reason the United States was willing to enter into this agreement with Thailand.

Contact: Scott Lincicome, Esq. and James Shea
701 Thirteenth Street NW, Washington, DC 20005
slincicome@whitecase.com and jshea@whitecase.com