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In This Issue

U.S.-Colombian Accord On Labor Issues And U.S.-Panamanian Accord On Tax Information Open Way For Congressional Action On Three FTAs; Timing And Legislative Process Still Uncertain

The United States has reached accords with Colombia on labor issues and with Panama on the exchange of tax information as part of these countries' bilateral trade negotiations. These accords, along with one reached earlier this year with Korea on auto trade, appear to have finally opened the way for congressional action on the free trade agreements negotiated by the United States during the Bush Administration with Colombia, Panama, and Korea. Congressional consideration of the three FTAs had previously been delayed by disagreements between Democrats and Republicans in Congress over both substantive and procedural issues. Although timing and legislative process issues are still being sorted out between the White House and Congress, there now seems to be basic agreement on both ends of Pennsylvania Avenue that the three FTAs should be taken up and, if possible, passed by Congress this year.

With respect to Colombia, President Obama and Colombian President Santos announced on April 7 a three-stage "action plan" to improve labor rights in Colombia, *see* https://www.ustr.gov/webfm_send/2787. The action plan outlines various commitments to be carried out by Colombia over the next six months, some with deadlines that occurred as early as April 22. The commitments include, among others, the immediate expansion of protection for union leaders; reforms to Colombia's Criminal Code; outreach and education programs on workers' rights; and the dedication of a specified number of police investigators and labor inspectors.

With respect to Panama, the Panamanian legislature approved a Tax Information Exchange Agreement on April 14, which will allow the United States and Panama to seek information from one another regarding taxes and will bring Panama into compliance with international standards designed to prevent countries from becoming tax havens.

The exact timing and legislative procedures to be used for taking up the three FTAs still remains uncertain. This is complicated further by disagreement between the Obama Administration and Congress as to how other pending trade matters

should be dealt with by Congress this year. These matters include:

- reauthorization of the lapsed Trade Adjustment Assistance program, which provides financial aid and training to workers displaced due to international trade;
- renewal of the Andean Trade Promotion and Drug Eradication Act, which provides duty-free access to a wide range of goods from Bolivia, Colombia, Ecuador, and Peru;
- renewal of the Generalized System of Preferences, which permits lower tariffs for least developed countries; and
- extension of permanent most favored nation status to Russia once it enters the World Trade Organization.

Whether any or all of these matters will be considered by Congress prior to, or as part of, legislation implementing the FTAs is unclear at this point.

Federal Circuit Rebuffs Commerce For Inconsistent New Zeroing Policy

In a case with potentially broad ramifications for U.S. users of the trade laws, the U.S. Court of Appeals for the Federal Circuit questioned the Department of Commerce's strategy for bringing its antidumping practice into compliance with WTO law with respect to "zeroing." "Zeroing," the subject of years of WTO litigation, basically means that Commerce "zeros out" non-dumped sales, rather than offsetting them against dumped sales (*i.e.*, the non-dumped sales are basically ignored). In a series of recent rulings, the WTO has said that rather than doing this Commerce must offset non-dumped sales against dumped sales in a sort of averaging methodology. Commerce had applied the practice of "zeroing" when calculating dumping margins for decades. U.S. producers favor Commerce's zeroing practice, because it enables Commerce to target illegal dumping when a foreign producer sells its products below fair value for some sales but not others. In January 2007, Commerce stopped zeroing in antidumping investigations in response to these adverse WTO rulings, but it has continued zeroing in antidumping administrative reviews, which are yearly updates of antidumping orders and which Commerce had believed are dealt with differently under WTO rules.

Although the Federal Circuit has upheld Commerce's zeroing practice numerous times, this is the first case that addresses whether Commerce can apply the practice differently in investigations and administrative reviews.

In a March 31 decision, *Dongbu Steel Co. v. United States*, the Federal Circuit held that Commerce failed to adequately explain its zeroing practice in administrative reviews when it no longer uses the practice in antidumping investigations. The Federal Circuit held that the U.S. antidumping statute does not specify whether Commerce can employ its zeroing practice. As a result, the Federal Circuit has upheld Commerce's interpretation of the statute as permitting zeroing in past cases as a matter of its administrative discretion. In *Dongbu Steel*, however, the Federal Circuit stated that "the political branches' decision to comply with the WTO ruling only as to investigations does not mean that it is lawful to give inconsistent constructions to the same statutory language." Therefore, Commerce can continue or discontinue its zeroing practice in administrative reviews, but it must provide a reasonable explanation for its decision. In response to the Federal Circuit's ruling, Commerce will now, in a remand, have the opportunity to change its practice or provide further explanation for zeroing in antidumping administrative reviews.

This decision has potentially broad implications for U.S. users of the antidumping law, as ending zeroing in administrative reviews could significantly lower margins and protection against

unfair trade. The remand decision and the Federal Circuit's response to it will be closely watched.

Budget Compromise Unlikely To Have Significant Impact On Trade Programs

U.S. trade agencies operated under reduced budgets for half of the U.S. government's 2011 fiscal year, and sources at these agencies do not expect funding cuts resulting from the final 2011 budget to significantly impair operations. The U.S. government operates on an October 1-September 30 fiscal year. A series of short-term continuing resolutions had been providing funding starting October 1, 2010. Congressional leaders agreed in principle on the 2011 budget late on April 8, hours before much of the federal government would have otherwise shut down. President Obama signed the budget on April 15, thus ensuring funding for all U.S. government operations through September 30, 2011. Under the terms of the budget agreement, all non-defense accounts were cut 0.2 percent from 2010 spending levels. Many agencies and operations had significantly deeper funding cuts.

The budgets for the International Trade Commission and the Office of the United States Trade Representative were subject only to the 0.2 percent non-defense cut from their respective 2010 funding levels. The budget for the International Trade Administration, the agency within the Department of Commerce which houses most of the Commerce's trade-related functions, was cut by an additional $5 million from its 2010 level. President Obama had proposed an $87 million budget increase for this agency in 2011, largely to fund activities related to his National Export Initiative. Because the agency has been operating at the 2010 budget level for half of the 2011 fiscal year, agency sources do not expect the reduced budget to impair operations, including the agency's support of the National Export Initiative.

Attention already is turning to discussion of the 2012 budget, which would fund the federal government from October 1, 2011 to September 30, 2012. President Obama again has proposed a significant increase in the International Trade Administration's budget -- about $70 million more than the 2010 level, or an increase of 16 percent. President Obama has proposed an increase of $3 million from fiscal 2010, or about six percent, for the Office of the United States Trade Representative. The International Trade Commission, which is an independent agency that submits its own budget proposal, has requested $87 million for 2012, an increase of $9 million, or around 16 percent, from fiscal 2010.

Five New Antidumping/Countervailing Duty Petitions Filed In April Ending Recent Lull In Trade Remedy Filings

In response to petitions filed by members of various domestic industries, the Administration initiated five antidumping ("AD") and countervailing duty ("CVD") investigations on April 19-20. The five industry-specific cases were brought against (a) bottom mount refrigerator-freezers from Korea and Mexico, (b) steel wheels from China, (c) galvanized steel wire from China and Mexico, (d) stilbenic optical brightening agents from China and Taiwan, and (e) steel nails from United Arab Emirates. A major factor in initiating these cases was the increase in imports during 2010 after lower imports in 2009. In most of these cases, the total value and/or volume of imports of the subject merchandise decreased from 2008 to 2009, but increased from 2009 to 2010. These increases appear to be following the trend of growth in the U.S. economy, indicating that conditions may be ripe for more trade petitions.

These new petitions came after a significant lull in trade remedy petitions. Only one investigation was initiated from May 2010 to April 2011. Several U.S. government officials and private practitioners

offered their views on the lull in the April 12, 2011 program "Are AD/CVD Remedies Still Viable For U.S. Producers?" held at American University's Washington College of Law. Christian Marsh, Deputy Assistant Secretary for AD and CVD Operations at the Department of Commerce suggested that the dip in AD and CVD petitions during 2010 may be related to circumvention issues. Mr. Marsh stated that because of the continuing burden on petitioners to fight circumvention after the initial case is won, an industry may perceive the that the cost of bringing a new trade petition to be high. The newly filed petitions, however, suggest that the real reason for a decline in filings may have been a temporary decline in imports caused by the recession.

Bradford Ward, Deputy General Counsel & Acting Assistant U.S. Trade Representative for Monitoring and Enforcement remarked that industries will continue to file AD and CVD petitions if they experience distortions in the market because trade remedies are one of the last tools available to combat international unfair trade practices. Mr. Ward also commented that industries may file AD and CVD petitions if they believe that the government is not responding to their concerns through legislation or other government-to-government dialogues.

News of Note

U.S. Aluminum Extrusion Industry Demonstrates Significant Subsidies To Chinese Aluminum Extruders

A coalition of U.S. aluminum extrusions manufacturers has obtained much needed relief in the form of antidumping and countervailing duties that will exceed 400 percent for most Chinese aluminum extrusion exports. Aluminum extrusions come in a wide variety of shapes and sizes and serve many different end uses. For example, aluminum extrusions can serve as window and door frames, car bumpers, boat trim, and flag poles, among many other applications. The investigations confirmed that Chinese aluminum extrusions are dumped in the U.S. market and that the Chinese government maintains an aggressive policy of subsidy support for the Chinese aluminum extrusions industry including preferential loans, grants and other benefits, which created an unfair advantage in the U.S. marketplace for Chinese products. The International Trade Commission's vote on April 28, finding injury to U.S. producers from the dumped and subsidized imports, will lead to imposition of final duties in the near future.

Proposed Legislation Would Reinstate "Super 301" Authority

U.S. Senators Sherrod Brown of Ohio, Debbie Stabenow of Michigan, and Robert Casey of Pennsylvania recently introduced legislation that would enhance the federal government's ability to address unfair trade practices. The Trade Enforcement Priorities Act of 2011 would reinstate "Super 301" authority, which derives from the Trade Act of 1974 and was previously enacted into law for a short 2-year period as part of the Omnibus Trade and Competitiveness Act of 1988, requiring the U.S. Trade Representative to identify and report on egregious trade practices that adversely affect U.S. exports and jobs. If the relevant criteria are met, USTR must initiate a full Super 301 investigation. Senator Brown stated that the USTR "needs to be more aggressive when it comes to enforcing trade laws, cracking down on China's currency manipulation, and stopping the flow of cheap, often unsafe imports that undermine workers and manufacturers." A similar bill was introduced in the House of Representatives by Representative Mark Critz of Pennsylvania and was referred to the House Committee on Ways and Means on April 13. There is no set timetable for further consideration of the Senate or House bills.

Administration Trade Policy Personnel Update

President Obama nominated David Johanson to be a member of the International Trade Commission. Mr. Johanson currently serves as International Trade Counsel on the Republican staff of the Senate Finance Committee. If confirmed, he would reportedly replace Commissioner Charlotte Lane, and his term would expire on December 16, 2018.

Two nominations also were made for the Export-Import Bank of the United States. Wanda Felton was nominated to be First Vice President for a term expiring January 20, 2013. Ms. Felton owns and runs MAP Capital Advisors, an advisor for private equity firms. She began her career as an Ex-Im Bank loan officer.

Sean Robert Mulvaney was nominated to be a member of the Board of Directors of the Ex-Im Bank for a term expiring January 20, 2015. Mr. Mulvaney currently serves as director of the Economic Policy Program at the German Marshall Fund of the United States.

The nominations were sent to the Senate committees of jurisdiction for review. The Senate Finance Committee has jurisdiction over International Trade Commission nominations while the Senate Banking, Housing, and Urban Affairs Committee's jurisdiction covers Ex-Im Bank nominations. Typically, a Committee will conduct investigations and hold hearings regarding nominees' qualifications and suitability for their potential appointments. If a Committee approves the nomination, it will report the nomination to the Senate for full Senate approval. If a nomination is not acted upon by the end of a Congress, it will be returned to the President.

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