

Chapter 11

Trade, Commercial Relations, Investment, and Transportation

A. TRANSPORTATION BY AIR

1. Bilateral Open Skies Agreements and Air Transport Agreements

Information on recent U.S. Open Skies and other air transport agreements, by country, is available at www.state.gov/e/eeb/tra/c661.htm. During 2009 the United States engaged in negotiations with a number of countries, including the following:

By an exchange of diplomatic notes in March 2009, the United States and Israel agreed to extend the Protocol relating to and amending the Air Transport Agreement between the Government of the United States of America and the Government of the State of Israel of June 13, 1950, as amended, signed at Jerusalem July 11, 2001, as extended, until March 31, 2010. The diplomatic notes are available at www.state.gov/documents/organization/130177.pdf.

By an exchange of diplomatic notes dated October 15 and November 5, 2009, the United States and Ecuador agreed that Annex I to the 1986 Air Transport Agreement between the two countries, as modified in 1995 and 2002, and Annex II to the 1986 Agreement, would continue to govern air services between the two countries through June 30, 2010, with effect from July 1, 2009. The U.S. diplomatic note, dated October 15, 2009, is available at www.state.gov/documents/organization/140373.pdf.

The United States and Uganda concluded an Air Transport Agreement on October 27, 2009, and the agreement entered into force on that date. The agreement is available at www.state.gov/e/eeb/rls/othr/ata/u/uy2/131429.htm.

By an exchange of diplomatic notes in December 2009, the United States and Colombia agreed that paragraphs 1 and 3 of the 2000 understanding and amendments relating to the 1956 Air Transport Agreement between the two countries would continue to apply through December 31, 2010. The U.S. diplomatic note, dated December 29, 2009, is available at www.state.gov/documents/organization/140372.pdf.

2. Air Transport Preclearance Agreements

In 2009 the United States concluded a bilateral agreement with Bermuda to expand preclearance operations at Bermuda's international airport. Department of Homeland Security Secretary Janet Napolitano, on behalf of the United States, signed an agreement with Bermuda Premier and Minister of Tourism and Transport Dr. Ewart Brown on April 23, 2009, which, upon entry into force, will supersede the Agreement on Preclearance for Entry into the United States, with Annexes, which entered into force on January 15, 1974, 25 U.S.T. 288, T.I.A.S. 7801. In general, bilateral preclearance agreements enable U.S. authorities to screen individuals, goods, and aircraft for entry or admission to the United States at airports outside the United States. Among other things, the new agreement with Bermuda will expand the scope of the 1974 agreement to cover preclearance of private aircraft destined for the United States. The agreement enters into force upon the later notification through an exchange of notes that mutually acceptable protocols have been established. A press release issued by the Department of Homeland Security on April 23, 2009, available at www.dhs.gov/ynews/releases/pr_1240515431927.shtm, provided additional details on the agreement.

3. Other Aviation Agreements

On April 27, 2009, the United States and Japan concluded an agreement concerning promotion of aviation safety. The agreement entered into force on that date. Article II(1) of the agreement obligates both countries "to accept the airworthiness approvals that have been made by the other Party's authorities in accordance with the other Party's laws and regulations as well as the terms and conditions of the Implementation Procedures referred to in Article III." Article II(2) provides further that, "[i]n negotiating the Implementation Procedures under this Agreement, the authorities of each Party shall endeavor to formulate terms and conditions for the reciprocal acceptance of airworthiness approvals for civil aeronautical products to ensure that each Party's civil aeronautical products meet a level of safety and environmental quality equivalent to that provided by the applicable laws, regulations and requirements of the other Party." The full text of the agreement is available at www.state.gov/documents/organization/130473.pdf.

B. NORTH AMERICAN FREE TRADE AGREEMENT

1. Investment Dispute Settlement Under Chapter 11

a. Expropriation and minimum standard of treatment: Glamis Gold, Ltd. v. United States

On May 7, 2009, an arbitral panel constituted under Chapter 11 of the North American Free Trade Agreement (“NAFTA”) dismissed a Canadian mining company’s claim for injuries relating to a proposed gold mine in California. *Glamis Gold, Ltd. v. United States of America*. The claimant alleged that certain federal and California state regulatory measures expropriated its investment in the proposed gold mine in violation of NAFTA Article 1110 and denied its investment the minimum standard of treatment under international law in violation of Article 1105. A media note issued by the Department of State on June 9, 2009, excerpted below, provided details on the tribunal’s decision and the claim. The full text of the media note is available at www.state.gov/r/pa/prs/ps/2009/06a/124527.htm. The arbitration panel’s award (with confidential information redacted) and submissions, transcripts, and other orders in the proceedings are available at www.state.gov/s/l/c10986.htm. For prior developments in the arbitration, including discussion of U.S. submissions, see *Digest 2006* at 709–26 and *Digest 2007* at 535–48.

A three-member NAFTA arbitration tribunal rejected a \$50 million claim filed by the Canadian mining company, Glamis Gold Ltd., challenging certain actions taken by the Department of the Interior (DOI) and certain measures adopted by the State of California relating to land reclamation in connection with proposed open-pit mining operations. The Office of the Legal Adviser of the Department of State represented the United States in the case.

The claimant, Glamis, submitted its claim to arbitration in 2003, alleging that certain DOI actions and California measures relating to its proposed open-pit gold mine on federal lands in California made development of that project economically infeasible, and deprived it of the value of its investment in that project, in violation of NAFTA investment protections. The tribunal unanimously rejected Glamis’ claim and ordered Glamis to pay two-thirds of the arbitration costs.

Background

The Glamis case concerns the claimant’s proposed development of the “Imperial Project,” a gold mining operation that was proposed to be located on federal lands in the environmentally sensitive California Desert Conservation Area. Glamis claimed that certain actions taken by the DOI during the permitting process, combined with reclamation requirements adopted by the State of California, made development of the project economically infeasible.

Concurrent with the DOI’s review of Glamis’ proposed Imperial Project, and in order to address concerns about the potential impact of open-pit metallic mines on the environment and Native American cultural resources, the State of California adopted measures requiring all future

open-pit metallic mines to backfill and re-grade the large open pits left on mined lands. Glamis claimed that the actions taken by California, together with alleged delay by the DOI in its review of Glamis' application, violated the provisions of NAFTA Chapter Eleven, which, consistent with international law, ensure a minimum level of treatment and prohibit uncompensated takings of property. Glamis alleged that the California measures were politically motivated and lacked any legitimate public policy basis.

The United States maintained that there was no undue delay in the DOI's review of Glamis' application and that the California reclamation requirements were supported by legitimate public policy goals of protecting the environment and Native American cultural resources.

The tribunal agreed with the United States and rejected Glamis' claim in its entirety. It held that the actions and measures in question were supported by legitimate public policy goals and did not violate the minimum standard of treatment provision of the NAFTA or constitute an expropriation of Glamis' investment.

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***b. Lack of investment in the territory of the host state and other issues:
Grand River Enterprises Six Nations v. United States***

On May 13, 2009, the United States filed its rejoinder in *Grand River Enterprises Six Nations v. United States of America*, an arbitration proceeding under Chapter 11 of the NAFTA. In this case, Grand River Enterprises Six Nations, Ltd., a Canadian tobacco manufacturer that exports cigarettes to the United States, and certain members of Canadian First Nations contended that certain U.S. state laws relating to the 1998 Master Settlement Agreement ("MSA"), which settled litigation brought by U.S. states against major tobacco companies, violated Chapter 11. The claimants' allegations specifically concerned amendments to escrow statutes that altered the formula for obtaining releases of escrow deposits made by tobacco manufacturers under the statutes. For additional background, see *Digest 2006* at 688-93 and *Digest 2008* at 351-57 and 528-42.

In its rejoinder, the United States elaborated on positions set forth in its Counter-Memorial filed on December 22, 2008, and addressed claimants' new arguments. In particular, the United States argued that to qualify as an "investor" under NAFTA Article 1101(1), a claimant must be seeking to invest or have made an investment in the territory of the host state. On the merits, the United States elaborated on its earlier arguments that the claimants failed to establish a basis for their claim that the amended escrow statutes resulted in the expropriation of their investments in violation of NAFTA Article 1110 and discriminated against them in violation of Article 1102 (national treatment) and Article 1103 (most-favored-nation treatment). The United States also addressed the claimants' new arguments under Article 1105 (minimum standard of treatment) in support of their position that UN human rights and treaty law generally

required the United States to consult with them before the U.S. states adopted the challenged measures. The United States argued that (1) a consultation obligation cannot be imported into Article 1105(1) through the Universal Declaration of Human Rights (“UDHR”) and the UN Charter; and (2) a prohibition on racial discrimination cannot be imported into Article 1105(1) through Article 53 of the Vienna Convention on the Law of Treaties. The rejoinder (with confidential information redacted) is available at www.state.gov/s/l/c11935.htm. The arbitral panel’s award remained pending at the end of 2009.

c. Venue transfer under Article 2005(4) of the NAFTA: Dolphin-safe tuna dispute

On November 5, 2009, the United States initiated state-to-state dispute resolution proceedings under the NAFTA concerning Mexico’s failure to transfer its dispute about the U.S. “dolphin-safe” tuna labeling requirement for consideration under the NAFTA’s dispute settlement procedures rather than the WTO’s. Before doing so, the United States had attempted to change the venue under Article 2005 of the NAFTA, in the first such action since the NAFTA’s adoption. Article 2005 provides in relevant part:

4. In any dispute referred to in paragraph 1 that arises under Section B of Chapter Seven (Sanitary and Phytosanitary Measures) or Chapter Nine (Standards-Related Measures):

(a) concerning a measure adopted or maintained by a Party to protect its human, animal or plant life or health, or to protect its environment, and

(b) that raises factual issues concerning the environment, health, safety or conservation, including directly related scientific matters,

where the responding Party requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement.

Excerpts below from a press statement the U.S. Office of the Trade Representative (“USTR”) issued November 5 provide background on the dispute and its significance. The full text of the press statement is available

at www.ustr.gov/about-us/press-office/press-releases/2009/november/united-states-initiates-nafta-dispute-mexico-over.

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“In requesting NAFTA consultations, we are enforcing the right that the United States, Canada and Mexico negotiated in the NAFTA,” said [a USTR spokesperson]. “This is an important right that has not previously been invoked by a NAFTA party, and defending our right under this clause preserves and strengthens the NAFTA dispute settlement regime.”

The U.S. dolphin safe labeling provisions at issue in the WTO dispute prohibit tuna sellers from labeling their products as “dolphin safe” if the tuna is caught by intentionally encircling (“setting on”) dolphins with purse seine nets. Mexican fishing vessels use this technique to fish for tuna.

Mexico’s challenge to the U.S. dolphin safe labeling provisions meets the criteria in NAFTA Article 2005(4) choice of forum provision. . . .

NAFTA rules provide that once a responding party invokes the choice of forum provision, the complaining party may pursue the dispute solely under the NAFTA and must withdraw from the WTO proceedings.

BACKGROUND

On March 9, 2009 Mexico requested that a WTO panel be established to review Mexico’s claims that U.S. law limiting the use of the “dolphin safe” label on tuna and tuna products is inconsistent with U.S. obligations under the WTO Agreement. In response, the United States invoked the NAFTA choice of forum provision (Article 2005(4) of the NAFTA) on March 24, 2009.

However, Mexico pursued its request for a WTO panel and on April 20, 2009, the WTO Dispute Settlement Body established a WTO panel to review Mexico’s claims that U.S. dolphin safe labeling provisions are inconsistent with U.S. obligations under the WTO Agreement. Although Mexico agreed to postpone selecting panelists as it explored other settlement options with the United States, those efforts have not yet led to a resolution of the dispute and Mexico has resumed the WTO proceedings.

Consultations are the first step in a NAFTA dispute. Under NAFTA rules, if the parties do not resolve an issue through consultations, either party may request a meeting of the NAFTA Free Trade Commission to address the matter.

2. Trucking

Section 136 of the Department of Transportation Appropriations Act, 2009, which President Barack H. Obama signed into law on March 11, 2009, eliminated funding for a Department of Transportation (“DOT”) demonstration program that had allowed a limited number of Mexican carriers to operate trucks throughout the United States. Div. I, Title I, Pub. L. No. 111–8, 123 Stat. 932; *see also Digest 2007* at 556–62 for a discussion

of the pilot demonstration program. In response, Mexico increased tariffs on certain imports from the United States.

C. WORLD TRADE ORGANIZATION

1. Dispute Settlement

U.S. submissions in WTO dispute settlement cases are available at www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/wto-dispute-settlement.

The following discussion of a selection of WTO disputes involving the United States is drawn largely from Chapter II, “World Trade Organization,” of the 2009 Annual Report of the President of the United States on the Trade Agreements Program (“2009 Annual Report”), available at www.ustr.gov/2010-trade-policy-agenda. WTO legal texts referred to below are available at www.wto.org/english/docs_e/legal_e/legal_e.htm.

a. Disputes brought by the United States

(1) Disputes brought by the United States against China

(i) China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights (WT/DS362)

On January 26, 2009, as discussed below, a WTO panel issued a report in favor of U.S. claims against China concerning deficiencies in its intellectual property rights laws. See 2009 Annual Report at 73. In 2007 the United States had requested the WTO to establish a dispute settlement panel to consider China’s measures; see *Digest 2007* at 563–64.*

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The panel circulated its report on January 26, 2009. The panel found that China’s denial of copyright protection to works that do not meet China’s content review standards is inconsistent with the TRIPS Agreement [Agreement on Trade-Related Aspects of Intellectual Property Rights]. The panel also found it inconsistent with the TRIPS Agreement for China to provide for simple removal of an infringing trademark as the only precondition for the sale at public auction of counterfeit goods seized by Chinese customs authorities.

With respect to the U.S. claim regarding thresholds in China’s law that must be met in order for certain acts of trademark counterfeiting and copyright piracy to be subject to criminal procedures and penalties, the panel clarified that China must provide for criminal procedures and

* Editor’s note: When this volume went to press in 2010, the United States was working with China on its implementation of the DSB recommendations and rulings in this dispute.

penalties to be applied to willful trademark counterfeiting and copyright piracy on a commercial scale. The panel agreed with the United States that Article 61 of the TRIPS Agreement requires China not to set its thresholds for prosecution of piracy and counterfeiting so high as to ignore the realities of the commercial marketplace. The Panel did find, however, that it needed more evidence in order to decide whether the actual thresholds for prosecution in China's criminal law are so high as to allow commercial-scale counterfeiting and piracy to occur without the possibility of criminal prosecution.

The DSB adopted the panel report on March 20, 2009. On April 15, 2009, China notified the DSB that China intends to implement the recommendations and rulings of the DSB in this dispute, and stated it would need a reasonable period of time for implementation. On June 29, 2009, the United States and China notified the DSB that they had agreed on a one-year period of time for implementation, to end on March 20, 2010.

(ii) China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (WT/DS363)

In 2009, as described below, a WTO panel and the WTO Appellate Body issued reports in a dispute concerning China's restrictions on the importation and distribution of imported publications, films for theatrical release, sound recordings, and audiovisual entertainment products. See 2009 Annual Report at 73–74; see also *Digest 2007* at 564–65.

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The report of the panel was circulated to WTO Members and made public on August 12, 2009. In the final report, the panel made three critical sets of findings. First, the panel found that China's restrictions on foreign-invested enterprises (and in some cases foreign individuals) from importing films for theatrical release, audiovisual home entertainment products, sound recordings, and publications are inconsistent with China's trading rights commitments as set forth in China's protocol of accession to the WTO. The panel also found that China's restrictions on the right to import these products are not justified by Article XX(a) of the GATT 1994. Second, the panel found that China's prohibitions and discriminatory restrictions on foreign-owned or -controlled enterprises seeking to distribute publications and sound recordings over the Internet are inconsistent with China's obligations under the GATS. Third, the panel also found that China's treatment of imported publications is inconsistent with the national treatment obligation in Article III:4 of the GATT 1994.

In September 2009, China filed a notice of appeal to the WTO Appellate Body, appealing certain of the panel's findings. First, China contended that its restrictions on importation of the products at issue are justified by an exception related to the protection of public morals. Second, China claimed that while it had made commitments to allow foreign enterprises to partner in joint ventures with Chinese enterprises to distribute music, those commitments did not cover the electronic distribution of music. Third, and finally, China claimed that its import restrictions on films for theatrical release and certain types of sound recordings and DVDs were not inconsistent with China's commitments related to the right to import because those products were not goods and therefore were not subject to those commitments. The United States filed a cross-appeal on one aspect of the panel's analysis of China's defense under GATT Article XX(a). On December 21,

2009, the Appellate Body issued its report. The Appellate Body rejected each of China's claims on appeal. The Appellate Body also found that the Panel had erred in the aspect of the analysis that the United States had appealed.

(iii) China-Grants, loans and other incentives (WT/DS387)

On December 18, 2009, the United States and China reached an agreement to settle a dispute concerning more than 90 Chinese government subsidies provided at the national and subnational levels to promote sales of Chinese products outside China. The subsidies largely supported exports of Chinese products the government designated as "famous brands" and covered products such as textiles, household appliances, medicines, and food. A summary of the dispute and its resolution is provided below and in the 2009 Annual Report at 75-76. *See also* USTR's press statement, issued on December 18, 2009, available at www.ustr.gov/about-us/press-office/press-releases/2009/december/united-states-wins-end-china's-famous-brand-sub.

On December 19, 2008, the United States requested consultations with China regarding government support tied to China's industrial policy to promote the sale of Chinese brand name and other products abroad. This support is provided in the form of cash grant rewards, preferential loans, research and development funding, and payments to lower the cost of export credit insurance. Because these subsidies are offered on the condition that enterprises meet certain export performance criteria, they appear to be inconsistent with several provisions of the WTO Agreement, including Article 3 of the *Agreement on Subsidies and Countervailing Measures* and Articles 3, 9, and 10 of the *Agreement on Agriculture*, as well as specific commitments made by China in its WTO accession agreement. In addition, to the extent that the grants, loans, and other incentives also benefit Chinese-origin products, but not imported products, the measures appear to be inconsistent with Article III:4 of the *General Agreement on Tariffs and Trade 1994*. Mexico and Guatemala also initiated disputes regarding the same subsidies.

Joint consultations were held in February 2009. On December 18, 2009, the parties concluded a settlement agreement in which China confirmed that it had eliminated all of the export-contingent benefits in the challenged measures.

(iv) China-Measures Relating to the Exportation of Various Raw Materials (WT/DS394)

On June 23, 2009, the United States requested consultations with China concerning China's export restraints on various industrial raw materials used to produce steel, aluminum, and chemicals. The United States requested the establishment of a WTO dispute settlement panel to examine this matter on November 4, 2009. The WTO established a panel on December 21, 2009. A summary of the dispute is set forth below.

On June 23, 2009, the United States requested consultations with China regarding China's export restraints on a number of important industrial raw materials. The materials at issue are: bauxite, coke, fluorspar, magnesium, manganese, silicon metal, silicon carbide, yellow phosphorus, and zinc. These materials are inputs for steel, aluminum, and chemical products.

Specifically, the United States is concerned that certain Chinese measures restrain the exportation of these raw materials by imposing on their exportation: (1) quantitative restrictions in the form of quotas; (2) export duties; and (3) additional requirements such as licensing, minimum export prices, and excessive fees and formalities. The United States is also concerned that China administers its export procedures unfairly in other respects, including, for example, by not publishing relevant measures in a manner that allows them to be readily available to governments and traders, by restricting the right of Chinese as well as foreign enterprises to export, and by requiring foreign-invested enterprises to satisfy certain criteria that Chinese enterprises need not satisfy in order to export. The measures at issue appear to be inconsistent with several WTO provisions, including provisions in the General Agreement on Tariffs and Trade 1994, as well as specific commitments made by China in its WTO Accession Protocol. The United States and China held consultations on July 31 and September 1–2, 2009, but they did not resolve the dispute. The European Union and Mexico have also requested and held consultations with China on these measures.

On November 19, 2009, the European Union and Mexico joined the United States in requesting the establishment of a panel, and on December 21, 2009, the WTO Dispute Settlement Body established a single panel to examine all three complaints.

(2) European Union–Measures Concerning Meat and Meat Products (Hormones) (WT/DS26, 48)

On May 13, 2009, as described below, the United States and the European Union concluded a Memorandum of Understanding (“MOU”) relating to the dispute concerning the EU ban on imports of meat from animals that had been administered certain growth hormones. The MOU provides U.S. beef exports with additional access to EU markets and provides that the two parties will not pursue WTO litigation relating to the dispute before February 11, 2011. See 2009 Annual Report at 76–77; for additional background on the MOU, see USTR's May 13, 2009 press release, available at www.ustr.gov/about-us/press-office/press-releases/2009/may/ustr-announces-agreement-european-union-beef-hormones. For additional background on the WTO dispute, see *Digest 2008* at 562–67.

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On December 22, 2008, the EU requested consultations with the United States and Canada pursuant to Articles 4 and 21.5 of the DSU, regarding the EU's implementation of the DSB's recommendations and rulings in the EU–Hormones dispute. In its consultations request, the EU

stated that it considered that it has brought into compliance the measures found inconsistent in EU–Hormones by, among other things, adopting its revised ban in 2003. Consultations took place in February 2009.

Discussions between the United States and the EU resulted in the conclusion of a Memorandum of Understanding (“Beef MOU”) on May 13, 2009. The Beef MOU provides for increased, duty-free access to the EU market for beef produced without certain growth promoting hormones and maintains increased duties on a reduced list of EU products. Under the terms of the Beef MOU, after three years, duty-free access to the EU market for beef produced without certain growth promoting hormones may increase and the application of all remaining increased duties imposed on EU products may be suspended. The Beef MOU also suspends further litigation in the *EU–Hormones* compliance proceeding until at least February 3, 2011.

(3) European Communities–Certain Measures Affecting Poultry Meat and Poultry Meat Products from the United States (WT/DS389)

On January 16, 2009, the United States requested consultations with the European Union concerning EU prohibitions on imports of certain poultry meat and poultry meat products. The U.S. initiative exemplified its broader effort, announced later in 2009 and discussed below in D.1., to address sanitary and phytosanitary measures that restrict U.S. agricultural exports. A summary of the dispute is set forth below; see 2009 Annual Report at 81.

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On January 16, 2009, the United States requested consultations regarding certain EU measures that prohibit the import of poultry meat and poultry meat products that have been processed with chemical treatments designed to reduce the amount of microbes on poultry meat, unless such pathogen reduction treatments (“PRTs”) have been approved. The EU further prohibits the marketing of poultry meat and poultry meat products if they have been processed with PRTs. In December 2008, the EU formally rejected the approval of four PRTs whose approval had been requested by the United States, despite the fact that EU scientists have repeatedly concluded that poultry meat and poultry meat products treated with any of these four PRTs does not present a health risk to European consumers. The EU’s maintenance of its import ban and marketing regulation against PRT poultry appears to be inconsistent with its obligations under the SPS [Sanitary and Phytosanitary Measures] Agreement, the Agreement on Agriculture, the GATT 1994, and the TBT [Technical Barriers to Trade] Agreement. Consultations were held on February 11, 2009, but those consultations failed to resolve the dispute. The United States requested the establishment of a panel on October 8, 2009, and the DSB established a panel on November 19, 2009.

b. Disputes brought against the United States

(1) United States–Subsidies on Upland Cotton (WT/DS267)

On August 31, 2009, arbitrators issued awards against the United States in arbitration arising from Brazil's requests to impose countermeasures against the United States in a longstanding dispute involving Brazil's claims that certain subsidies to upland cotton and export credit guarantees under the GSM 102 program were inconsistent with U.S. obligations under the WTO ("Cotton dispute").* The arbitral awards and related developments at the WTO are discussed below; see 2009 Annual Report at 87–88. For previous developments in the dispute, see *Digest 2005* at 633 and *Digest 2008* at 557–62.**

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The Arbitrators issued their awards on August 31, 2009. They issued one award concerning U.S. subsidies found to cause serious prejudice to Brazil's interests (marketing loan and countercyclical payments for cotton), and another award concerning U.S. subsidies found to be prohibited export subsidies (export credit guarantees under the GSM 102 program for a range of agricultural products, plus the repealed "Step 2" program for cotton).

The Arbitrators found that Brazil may impose countermeasures against U.S. trade:

(1) for marketing loan and countercyclical payments for cotton, in an annual fixed amount of \$147.3 million; and

(2) for export credit guarantees under the GSM 102 program, in an annual amount that may change each year based on a formula.

The Arbitrators rejected Brazil's request for countermeasures for the Step 2 program.

The Arbitrators also found that, in the event that the total level of countermeasures that Brazil would be entitled to in a given year should increase to a level that would exceed a threshold

* Editor's note: Information on GSM 102, the U.S. Department of Agriculture's Export Guarantee Credit Program, is available at www.fas.usda.gov/excredits/exp-cred-guar-new.asp.

** Editor's note: On March 8, 2010, Brazil announced countermeasures on goods that would take effect on April 7, 2010. On April 6, 2010, the United States and Brazil reached agreement on certain steps to help make progress for a negotiated outcome in the dispute. As a result, Brazil did not impose countermeasures on April 7. Pursuant to the agreement, on April 20, 2010, the United States and Brazil signed a Memorandum of Understanding ("MOU") providing for a fund of approximately \$147.3 million per year on a pro rata basis to provide technical assistance and capacity building for the cotton sector in Brazil and certain other countries. The fund is scheduled to continue until the next U.S. statute authorizing the continuation of U.S. agricultural programs is enacted or a mutually agreed solution to the Cotton dispute is reached. After negotiating the MOU, the United States and Brazil negotiated a framework regarding the Cotton dispute. On June 17, 2010, Brazil approved the framework that the governments had negotiated, and on June 21 it announced that it would not impose countermeasures as long as the framework remained in effect. The framework includes elements addressing cotton support, the GSM 102 program, and further discussion between the United States and Brazil.

based on a subset of Brazil's consumer goods imports from the United States, then Brazil would also be entitled to suspend certain obligations under the TRIPS Agreement and/or the GATS with respect to any amount of permissible countermeasures applied in excess of that figure.

On September 25, 2009, Brazil requested data from the United States for 2008 and 2009 to calculate countermeasures according to the formula in the Arbitrator's award. On November 19, the United States provided Brazil the data requested for 2008 and stated that it would provide 2009 data when they are complete.

On November 19, 2009, the WTO DSB granted Brazil authorization to suspend the application to the United States of concessions or other obligations consistent with the Arbitrators' awards.

(2) United States–Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (WT/DS381)

On April 20, 2009, the WTO established a panel at Mexico's request in a dispute concerning the United States' requirements for "dolphin-safe" labeling for tuna and tuna products. Background on the WTO dispute is provided below; see 2009 Annual Report at 98. The United States' attempt to transfer the venue of the dispute for consideration under the NAFTA's dispute resolution procedures is discussed in B.1.c. *supra*.

On October 24, 2008, Mexico requested consultations regarding U.S. dolphin-safe labeling provisions for tuna and tuna products. . . . Mexico challenges three U.S. measures: (1) the Dolphin Protection Consumer Information Act (19 U.S.C. § 1385); (2) certain dolphin-safe labeling regulations (50 C.F.R. §§ 216.91–92); and (3) the Ninth Circuit decision in *Earth Island v. Hogarth*, 494 F.3d. 757 (9th Cir. 2007). [Editor's note: *Digest 2007* discusses *Earth Island v. Hogarth* at 718–20.] On April 20, 2009, at Mexico's request, the DSB established a WTO panel to examine these measures. Mexico alleges that these measures accord imports of tuna and tuna products from Mexico less favorable treatment than like products of national origin and like products originating in other countries, and fail to immediately and unconditionally accord imports of tuna and tuna products from Mexico any advantage, favor, privilege, or immunity granted to like products in other countries. Mexico further alleges that the U.S. measures create unnecessary obstacles to trade, and are not based on relevant international standards. Mexico alleges that the U.S. measures are inconsistent with Articles I and III of the *General Agreement on Tariffs and Trade 1994* and Article 2 of the *Agreement on Technical Barriers to Trade*.

On December 14, 2009, the Director General composed the panel

(3) United States–Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China (DS399)

See D.5. below.

D. OTHER TRADE AGREEMENTS AND TRADE-RELATED ISSUES

1. Enforcement of Trade Agreements: Overview

On July 16, 2009, U.S. Trade Representative Ronald Kirk announced a new U.S. commitment to trade enforcement, including through new U.S. initiatives for enforcing trade agreements, in an address at the Mon Valley Works-Edgar Thomson Plant in Pittsburgh, Pennsylvania. Ambassador Kirk's remarks, excerpted below, are available at www.ustr.gov/about-us/press-office/speeches/transcripts/2009/july/ambassador-kirk-announces-new-initiatives-trade.

Today, on behalf of President Obama, I am here to affirm this administration's commitment to trade enforcement.

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We will take new steps to protect the rights of American farmers and small business owners. We will hold our trading partners to their word on labor standards. And we will use work we're already doing to fight even harder for the men and women who fuel our economy and support their families.

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Americans have believed that our government hasn't done enough to protect our trade rights. And, while our trading partners largely respect our agreements, sometimes those rules are violated. That's why enforcement cannot be an afterthought. It needs to be a centerpiece of trade policy.

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President Obama and I believe that on a level playing field, Americans can compete in any sector—from manufacturing to services to agriculture. Just enforcing the rules on the books can win our workers and companies the benefits of trading as fully, fairly, and freely as our agreements allow.

Our new approach to enforcement is simple. We will deploy our resources more effectively to identify and solve problems at the source. But make no mistake: we will pursue legal remedies when other options are closed.

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Legal remedies are never our first choice. Not because they are not effective, but because right now, many American companies, and the people who work for them, can't afford to wait years for an international legal case. So we will emphasize vigorous oversight, frank dialogue, and negotiation as faster means of getting trade back on track.

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President Obama has committed to a new approach to trade—one that rejects protectionism and creates opportunities at home and abroad. He recognizes that trade is essential to America’s prosperity and has the potential to lift up workers in America and around the world. The President will share more about our approach, but we already know that for trade to reach its full potential, we need to do a better job of enforcing our trade agreements.

So, in this administration, we will break down trade barriers that confront American workers and businesses.

First, we will build on what works. One of the best ways we guarantee America’s trade rights is by consistently monitoring our partners’ trade practices. If they know we are holding a magnifying glass up to their actions, they’ll be less likely to break the rules. So, we will use that magnifying glass on behalf of more American businesses.

Some of our best results have come from two targeted enforcement tools: one to stop violations in telecommunications trade, and one called Special 301, that does the same for American intellectual property rights.

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We’re going to apply the lessons of those successful programs to address other, equally important trade barriers. Two new, innovative tools will provide strong support for U.S. farmers, ranchers, and industry.

The first new tool will confront barriers that other countries raise to prevent our farmers and ranchers from marketing their products abroad. We must more strongly address sanitary and phytosanitary barriers, like the restrictive regulations some countries slapped on American pork because of the H1N1 flu scare. And we must address them across the board, as well as on a case by case basis. This will ensure our agricultural producers see their rights restored abroad, and their businesses saved here at home.

The second new tool will take on one of the biggest obstacles our manufacturers face: technical barriers to trade, such as technical regulations and standards that restrict U.S. exports of safe, high quality products. Now, we will seek out these barriers and tackle them head-on.

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We will also continue to use trade remedies, like anti-dumping and anti-subsidy laws that the U.S. has on the books, and that are vitally important tools. We use them to correct distortions of trade—situations where the playing field is artificially tilted against us—and to ensure that the field stays level everywhere else.

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2. Free Trade Agreements

During 2009 the United States’ free trade agreements with Oman and Peru entered into force on January 1 and February 1, respectively. Chapter III, “Bilateral and Regional Negotiations and Agreements,” of the 2009 Annual Report of the President of the United States on the Trade Agreements Program (“2009 Annual Report”) described the Peru agreement as follows:

The PTPA eliminates tariffs and removes barriers to U.S. services, provides a secure, predictable legal framework for investors, and strengthens protection for intellectual property, workers, and the environment. The PTPA is the first agreement in force that incorporates groundbreaking provisions concerning the protection of the environment and labor rights that were included as part of the Bipartisan Agreement on Trade Policy developed by Congressional leaders on May 10, 2007.

See 2009 Annual Report at 133, available at www.ustr.gov/webfm_send/1675. Section D.6. of this chapter discusses the labor rights standards incorporated into U.S. free trade agreements; see also *Digest 2007* at 579–84. See *Digest 2008* at 572 for discussion of the U.S.–Oman agreement.

The Dominican Republic–Central America–United States Free Trade Agreement (“CAFTA–DR”) entered into force for Costa Rica on January 1, 2009, bringing the CAFTA–DR into force for all seven states parties.

The texts of U.S. free trade agreements are available at www.ustr.gov/trade-agreements/free-trade-agreements.

3. Other Trade and Investment Instruments

Information on trade and investment instruments, including texts of agreements, is available at www.ustr.gov/trade-agreements/trade-investment-framework-agreements.

a. Trade and Investment Framework Agreements

During 2009 the United States concluded trade and investment framework agreements with Angola on May 19, and with the Maldives on October 27. Each agreement establishes a Trade and Investment Council to provide a forum for senior representatives of the United States and its respective partner to discuss a range of issues relating to trade and investment, including the environment, labor, capacity building, and intellectual property. The texts of these and other trade and investment framework agreements are available at www.ustr.gov/trade-agreements/trade-investment-framework-agreements. See also USTR’s press releases, available at www.ustr.gov/about-us/press-office/press-releases/2009/may/united-states-and-angola-sign-trade-and-investment-fra and www.ustr.gov/about-us/press-office/press-releases/2009/october/united-states-signs-trade-and-investment-agreement.

b. Trade and Investment Cooperation Forum Agreement

On January 15, 2009, USTR announced that Assistant U.S. Trade Representative for Europe and the Middle East Chris Wilson and Icelandic Minister of Industry and Energy Össur Skarphéðinsson had signed a Trade and Investment Cooperation Forum Agreement (“TICFA”) as a “part of a comprehensive U.S. effort to support the Icelandic Government.” The TICFA “will provide a vehicle for deepening and broadening already strong U.S.–Icelandic economic relations,” USTR explained. The full text of the press release is available at www.ustr.gov/about-us/press-office/press-releases/2009/january/united-states-and-iceland-sign-trade-and-investmen. Despite its different title, the agreement performs the same function as the trade and investment framework agreements discussed in D.3.a. *supra*.

4. Trade Legislation and Trade Preferences

This section highlights selected 2009 developments relating to U.S. trade preference programs. For a broader overview of U.S. trade preference programs, see Chapter V, “Trade Enforcement Activities,” of the 2009 Annual Report of the President of the United States on the Trade Agreements Program, at 180–87, available at www.ustr.gov/webfm_send/1677.

a. Andean Trade Preference Act and Andean Trade Promotion and Drug Eradication Act

The Andean Trade Preference Act (“ATPA”) was enacted in 1991 to combat drug production and trafficking in Bolivia, Ecuador, Colombia, and Peru. The ATPA authorized the President, upon a determination that the statutory eligibility criteria had been met, to grant trade benefits to any of those four Andean countries. The eligibility criteria included a provision concerning counternarcotics cooperation with the United States. The ATPA expired in 2001, and in 2002 the Andean Trade Promotion and Drug Eradication Act, Title XXXI of the Trade Act of 2002, Pub. L. No. 107–210, 116 Stat. 933 (“ATPDEA”), reinstated the ATPA’s benefits with certain amendments that made more items eligible for trade benefits. The ATPDEA also provided additional criteria for the President to consider in designating ATPDEA beneficiaries. Congress extended the ATPA benefits, as amended, in 2006, 2007, and 2008. On October 16, 2008, Congress extended the preferences for Colombia and Peru through December 31, 2009. The legislation made

Ecuador eligible for benefits through December 31, 2009, unless the President determined on or before June 30 that Ecuador did not satisfy the statutory eligibility requirements. The legislation extended preferences for Bolivia through June 30, 2009, but only if the President determined on or before then that Bolivia satisfied the statutory eligibility requirements.

On June 30, 2009, President Obama transmitted a report to Congress containing his determinations concerning Bolivia and Ecuador “based on a review of the performance of Bolivia and Ecuador with respect to the ATPA’s eligibility criteria and a summary of the developments and concerns that exist in four key areas reflecting the criteria set forth in the ATPA.” The President’s letter transmitting his report is available at Daily Comp. Pres. Docs., 2009 DCPD No. 00525, p. 1. In the report, President Obama stated with respect to Bolivia:

Having reviewed the criteria set forth in section 203 of the Andean Trade Preference Act, as amended (19 U.S.C. 3202) (ATPA or Act) and taken into account each of the factors set forth in section 203(d) of the Act (19 U.S.C. 3202(d)), I have not determined pursuant to section 208(a)(3)(A) of the Act (19 U.S.C. 3206(a)(c)(A)) that Bolivia satisfies the requirements set forth in section 203(c) of the Act (19 U.S.C. 3202(c)) for being designated as [a] beneficiary country under the ATPA. Therefore, as provided for in section 208(a)(3) of the Act (19 U.S.C. 3206(a)(3)), no duty free treatment or other preferential treatment extended under the ATPA, as amended (19 U.S.C. 3201 *et seq.*) shall remain in effect with respect to Bolivia after June 30, 2009.

President Obama stated with respect to Ecuador:

Having reviewed the criteria set forth in section 203 of the Act, and taken into account each of the factors set forth in section 203(d) of the Act, I have not determined pursuant to section 208(a)(c)(A) of the Act (19 U.S.C. 3206(a)(c)(A)) that Ecuador does not satisfy the requirements set out in section 203(c) of the ATPA for being designated as a beneficiary country under the ATPA. Therefore, as provided for in section 208(a)(c) of the Act (19 U.S.C. 3206(a)(c)), duty-free treatment or other preferential treatment extended under the ATPA shall remain in effect with respect to Ecuador after June 30, 2009.

The full text of the report is available at www.ustr.gov/webfm_send/1184.

On December 28, 2009, President Obama signed into law legislation extending the preferences available under the ATPA, as amended, for Colombia, Ecuador, and Peru through December 31, 2009. Pub. L. No. 111-124, 123 Stat. 3484.

b. Haitian Hemispheric Opportunity through Partnership Encouragement Act

On October 16, 2009, President Obama determined and certified to Congress that Haiti had met the statutory criteria for eligibility for continuing trade benefits under the Haitian Hemispheric Opportunity through Partnership Encouragement Act of 2008 (“HOPE II Act”), Pub. L. No. 110-246, 122 Stat. 1651, 2289. President Obama’s certification, excerpted below, is available at Daily Comp. Pres. Docs., 2009 DCPD No. 00816, p. 1. For background on the HOPE II Act, see *Digest 2008* at 582; see also USTR’s press release of October 17, 2009, available at www.ustr.gov/about-us/press-office/press-releases/2009/october/ustr-kirk-statement-haiti-certification-hope-ii-be.

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Since enactment of HOPE II, Haiti has issued a decree establishing an independent labor ombudsman’s office, and the President of Haiti has selected a labor ombudsman following consultation with unions and industry representatives. In addition, Haiti, in cooperation with the International Labor Organization, has established a Technical Assistance Improvement and Compliance Needs Assessment and Remediation (TAICNAR) Program. Haiti has also implemented an electronic visa system that acts as a registry of Haitian producers of articles eligible for duty-free treatment and has made participation in the TAICNAR Program a condition of using this visa system.

In light of these actions and in accordance with section 213A of CBERA [the Caribbean Basin Economic Recovery Act], as amended [by the HOPE II Act], I have determined and hereby certify that Haiti: (i) has implemented the requirements set forth in sections 213A(e)(2) and (e)(3); and (ii) is requiring producers of articles for which duty-free treatment may be requested under section 213A(b) to participate in the TAICNAR Program and has developed a system to ensure participation in such program by such producers, including by developing and maintaining a registry of producers.

* * * *

5. Trade Enforcement Action: Imposition of Additional Duties on Tires from China

On September 11, 2009, President Obama issued Proclamation 8414, “To Address Market Disruption From Imports of Certain Passenger Vehicle and

Light Truck Tires From the People's Republic of China." Daily Comp. Pres. Docs., 2009 DCPD No. 00701, pp. 1-2. The White House Office of the Press Secretary explained the President's action as follows:

After reviewing recommendations from the United States Trade Representative (USTR), the President today signed a determination to apply an increased duty to all imports of passenger vehicle and light truck tires from China for a period of three years in order to remedy a market disruption caused by a surge in tire imports. As part of its accession to the World Trade Organization (WTO), China agreed to a special safeguard mechanism that would allow its trading partners to implement remedies in response to import surges and under other circumstances. The President decided to remedy the clear disruption to the U.S. tire industry based on the facts and the law in this case.

The White House statement is available at www.whitehouse.gov/the_press_office/Statement-from-the-Press-Secretary-on-the-Remedy-to-Address-Market-Disruption-from-Imports-of-Certain-Passenger-Vehicle-and-Light-Truck-Tires. See also the statement of U.S. Trade Representative Ronald Kirk, available at www.ustr.gov/about-us/press-office/press-releases/2009/september/kirk-white-house-fulfilling-trade-enforcement-pl.

In making his determination to apply the additional duty, the President acted pursuant to § 421(a) of the Trade Act of 1974, 19 U.S.C. § 2451(a), which provides:

If a product of the People's Republic of China is being imported into the United States in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of a like or directly competitive product, the President shall, in accordance with the provisions of this section, proclaim increased duties or other import restrictions with respect to such product, to the extent and for such period as the President considers necessary to prevent or remedy the market disruption.

Excerpts follow from the President's proclamation. See *also* Presidential Determination No. 2009-28, "Imports of Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China," issued on September 11, 2009, and available at Daily Comp. Pres. Docs., 2009 DCPD No. 00702, pp. 1-2.

1. On July 9, 2009, the United States International Trade Commission (USITC) transmitted to me a report on its investigation under section 421 of the Trade Act of 1974, as amended (the “Trade Act”) (19 U.S.C. 2451), with respect to imports of certain passenger vehicle and light truck tires from the People’s Republic of China (China). In its report, the USITC stated that it had reached an affirmative determination under section 421(b)(1) of the Trade Act that certain passenger vehicle and light truck tires from China are being imported into the United States in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products.

2. For purposes of its investigation, the USITC defined certain passenger vehicle and light truck tires from China as new pneumatic tires, of rubber, from China, of a kind used on motor cars (except racing cars) and on-the-highway light trucks, vans, and sport utility vehicles, provided for in subheadings 4011.10.10, 4011.10.50, 4011.20.10, and 4011.20.50 of the Harmonized Tariff Schedule of the United States (HTS).

3. The USITC commissioners voting in the affirmative under section 421(b) of the Trade Act also transmitted to me their recommendations made pursuant to section 421(f) of the Trade Act (19 U.S.C. 2451(f)) on proposed remedies that, in their view, would be necessary to remedy the market disruption and the basis for each recommendation.

4. Pursuant to section 421(a) of the Trade Act (19 U.S.C. 2451(a)), I have determined to provide import relief with respect to new pneumatic tires, of rubber, from China, of a kind used on motor cars (except racing cars) and on-the-highway light trucks, vans, and sport utility vehicles, provided for in subheadings 4011.10.10, 4011.10.50, 4011.20.10, and 4011.20.50 of the HTS.

5. Such import relief shall take the form of an additional duty on imports of the products described in paragraph 4, imposed for a period of 3 years. For the first year, the additional duty shall be in the amount of 35 percent *ad valorem* above the column 1 general rate of duty. For the second year, the additional duty shall be in the amount of 30 percent *ad valorem* above the column 1 general rate of duty, and in the third year, the additional duty shall be in the amount of 25 percent *ad valorem* above the column 1 general rate of duty.

* * * *

On September 14, 2009, China responded to the imposition of the additional U.S. duties by requesting consultations through the WTO’s dispute settlement procedures. The 2009 Annual Report of the President of the United States on the Trade Agreements Program explained:

China alleges that the additional tariffs are inconsistent with the GATT 1994, the Agreement on Safeguards, and the Protocol of Accession. China alleges that various elements of USITC’s determination regarding market disruption are inconsistent with the Protocol of Accession. In addition, China alleges that the level and duration of the additional tariffs are inconsistent with the Protocol of Accession. Finally, China alleges that the

Section 421 definition of “significant cause” is in and of itself inconsistent with the Protocol of Accession.

The United States held consultations with China on November 9, 2009. On December 9, 2009, China filed a request for establishment of a panel. As of December 31, 2009, the panel had not been established.*

See 2009 Annual Report at 100. Other 2009 developments relating to WTO disputes are discussed in C.1. *supra*.

6. Labor

On July 16, 2009, as discussed in D.1. *supra*, U.S. Trade Representative Ronald Kirk outlined the United States’ new commitment to trade enforcement, including through an increased focus on enforcing labor rights in U.S. trade relationships. Excerpts follow from Ambassador Kirk’s remarks concerning labor standards. The full text of Ambassador Kirk’s speech is available at www.ustr.gov/about-us/press-office/speeches/transcripts/2009/july/ambassador-kirk-announces-new-initiatives-trade.

* * * *

. . . [W]e will hold our trading partners to their commitments on workers’ rights.

Since 2001, the United States has entered into free trade agreements with 14 countries.

Every one of those agreements contains an obligation to enforce domestic labor laws, and to strive for labor standards that adhere to international norms. Now, we will insist that our trading partners hold up their end of the bargain. American workers should not be expected to compete against substandard labor practices.

To date, we have enforced our trading partners’ labor obligations only on a complaint-driven basis. Well, no longer.

In close partnership with Labor Secretary Hilda Solis, Secretary of State Hillary Clinton, and their staffs, we will immediately identify and investigate labor violations . . . before they can disadvantage American workers.

Together, we will engage governments of countries that violate the rules, to restore workers’ rights quickly. If those governments can’t seem to fix their labor problems, we will help them find a way. And if they won’t fix their labor problems, we will exercise our legal options.

* * * *

* Editor’s note: On January 19, 2010, the WTO’s Dispute Settlement Body established a panel at China’s request.

7. Arbitration and Related Actions Arising from the Softwood Lumber Agreement

On September 12, 2006, the United States and Canada concluded the Softwood Lumber Agreement (“SLA”), which was intended to settle issues concerning trade between the two countries in softwood lumber that had given rise to arbitration under the North American Free Trade Agreement. See *Digest 2006* at 762–63 for an overview of the SLA, which entered into force on October 12, 2006. The text of the SLA is available at www.state.gov/documents/organization/107266.pdf. Amendments to Articles II–IV and X, as well as associated annexes, are available at www.state.gov/documents/organization/107267.pdf.

a. Arbitration on export measures requested in 2007 and new proceedings on remedies: Case No. 7941 and Case No. 91312

On February 23, 2009, a tribunal of the London Court of International Arbitration (“Tribunal”) issued an award in favor of the United States, in the amount of CDN \$68.26 million, as a remedy for Canada’s six-month failure to apply correctly to its eastern lumber producing provinces (“Option B provinces” in the SLA) a calculation of export measures required by the SLA. *United States of America v. Canada*, LCIA, Case No. 7941. For prior developments in the arbitration, see *Digest 2007* at 593–97 and *Digest 2008* at 583–89. The Tribunal determined that Canada was required to collect an additional 10 percent *ad valorem* export charge on the relevant softwood lumber shipments until it had collected a total of CDN \$68.26 million and thus remedied its failure to make the proper export adjustment as of January 1, 2007. The Tribunal further defined the remedy amount as the first of the four proposed damages the United States provided in its 2008 Statement of the Case on Remedy (available at www.ustr.gov/sites/default/files/us_statement_case_on_remedy.pdf): CDN \$63.9 million, plus CDN \$4.36 million in interest. For the text of the award, see www.ustr.gov/sites/default/files/award_on_remedy.pdf.

Acting U.S. Trade Representative Peter Allgeier welcomed the LCIA’s decision on February 26, 2009, saying that it “confirms the view of the United States that the SLA is an enforceable agreement.” See www.ustr.gov/about-us/press-office/press-releases/2009/february/tribunal-orders-canada-cure-breach-softwood-lumbe for the full text of the press release USTR issued on February 26.

Canada responded by maintaining its original interpretation of the SLA, arguing that it does not call for retrospective compensation to remedy a breach. Instead, Canada argued that the SLA only requires a state to end its breach and, if it fails to do so within the “reasonable period” established by the Tribunal, to adjust its export measures prospectively, as Canada had

done. On March 27, 2009, Canada offered to pay the United States U.S. \$34 million to cure the breach, provided the United States accepted four conditions that included ending its claims that Canada had failed to cure its breach and committing not to pursue additional arbitration against Canada in the matter. On April 2, 2009, the United States rejected Canada's offer. The United States also advised Canada that if it did not make the compensatory adjustments to its export measures required by the Tribunal's award, the United States would impose countermeasures against Canada, consistent with the SLA.

On April 3, 2009, Canada initiated new proceedings at the LCIA, requesting a ruling that its offer constituted a cure. *Canada v. United States of America*, LCIA, Case No. 91312. On April 7, USTR announced the imposition of an additional 10 percent *ad valorem* customs duty on softwood lumber imports from four provinces in eastern Canada (Ontario, Québec, Manitoba, and Saskatchewan) under § 301 of the Trade Act of 1974, 19 U.S.C. § 2411. See www.ustr.gov/about-us/press-office/press-releases/2009/april/united-states-imposes-tariffs-softwood-lumber-four-c. In the arbitral proceedings, the United States filed its Response on April 17 (available at www.ustr.gov/webfm_send/870) and its Statement of Defense on June 1, 2009 (available at www.ustr.gov/webfm_send/1034).

On September 21, 2009, the Tribunal issued its award in favor of the United States, rejecting Canada's contentions that its proffer of \$34 million, as a government-to-government payment, could constitute a "cure" under the SLA. The Tribunal accepted the U.S. argument that a "cure" for purposes of the SLA must impact directly those producers who were the cause of the breach (in this case, the softwood lumber producers of Canada's eastern provinces). The Tribunal also encouraged the parties to try to reach a settlement, bearing in mind the *ad valorem* tax the United States had imposed since April. The full text of the Tribunal's award is available at www.ustr.gov/webfm_send/1379. Ambassador Kirk welcomed the award and stated, "final resolution of this arbitration is an important enforcement action on behalf of the United States." See www.ustr.gov/about-us/press-office/press-releases/2009/september/tribunal-finds-canada-failed-cure-breach-softwoo.

b. Arbitration on provincial subsidies: Case No. 81010

On April 3, 2009, the United States filed its corrected Reply Memorial in *United States of America v. Canada*, LCIA, Case No. 81010. In this case, the United States alleged that six programs implemented by Québec and Ontario provided financial incentives that benefited Canadian softwood lumber producers in violation of the anti-circumvention provision of the SLA. The United States sought a remedy valued between CDN \$123.7 million and CDN \$288 million to reflect the financial benefits the provincial

subsidies provided to softwood lumber producers. In its Reply, the United States addressed Canada's arguments concerning liability and remedy and elaborated upon the arguments set out in the U.S. Statement of the Case. See *Digest 2008* at 589-93 for discussion of the U.S. Statement of the Case filed on December 23, 2008. The LCIA held hearings in Ottawa on July 20-24, 2009, and the United States filed its Post-Hearing Brief on October 15, 2009, and its Post-Hearing Reply Brief on November 20, 2009. The texts of the U.S. submissions in the arbitral proceedings are available at www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/2006-softwood-lumber-agreement. The panel's decision remained pending at the end of 2009.

E. TELECOMMUNICATIONS

1. U.S.-Mexico Telecommunications Agreement

On August 31 and September 1, 2009, the United States and Mexico signed an agreement concerning a cross border public security communications network to enhance the two countries' border security efforts. Protocol 18, Protocol Between the Department of State of the United States of America and the Secretariat of Communications and Transportation of the United Mexican States Concerning the Use of Radio Frequencies By Certain Fixed Terrestrial Links Constituting a Cross Border Public Security Communications Network Along the Common Border. The two countries entered into the protocol pursuant to the Agreement Between the Government of the United States of America and the Government of the United Mexican States Concerning the Allocation and Use of Frequency Bands by Terrestrial Non-Broadcasting Radiocommunication Services Along the Common Border, signed at Williamsburg, Virginia, June 16, 1994.

The Department of State Office of the Spokesman issued a statement that day, excerpted below, which provided details on the protocol. The full text of the statement is available at

www.state.gov/r/pa/prs/ps/2009/sept/128577.htm. The protocol is available at www.state.gov/e/eeb/rls/othr/telecom/128506.htm, and the underlying 1994 agreement is available at www.fcc.gov/ib/sand/agree/files/mex-nb/framework.pdf.

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The Department of State and the Department of Homeland Security announced today that senior officials on the United States-Mexico High-Level Consultative Commission on Telecommunications (HLCC) have signed a bilateral telecommunications agreement to support a new cross border communications network for public safety and law enforcement organizations focused on strengthening border security.

The agreement establishes a bilateral working group through which the Department of Homeland Security of the United States and the Secretariat of Public Security (SSP) of Mexico will coordinate the installation and operation of the network. The new network will allow participating public safety organizations to coordinate incident response and cooperate on a broad array of law enforcement activities through the establishment of new cross border voice, data and video channels.

The agreement also provides radio interference protection for the network's infrastructure and a process under which the bilateral working group can establish interoperable communications for qualifying federal, state, local and tribal public safety and law enforcement organizations that are invited to participate in the network.

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Negotiation of the agreement stemmed from a recommendation by HLCC working level officials in May 2008 to formulate a long-term plan to advance critical cross border communications networks for improving border security and combating border violence.

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2. International Telecommunication Union Treaties

On January 16, 2009, the United States deposited its instruments of ratification of five treaties concluded under the auspices of the International Telecommunication Union ("ITU"): the 1992 Partial Revision of the Radio Regulations (S. Treaty Doc. No. 107-17 (2002)); the 1995 Revision of the Radio Regulations (S. Treaty Doc. No. 108-28 (2004)); 1998 Amendments to the Constitution and Convention of the ITU (S. Treaty Doc. No. 108-5 (2003)); the 2002 Amendments to the Constitution and Convention of the ITU (S. Treaty Doc. No. 109-11 (2006)); and the 2006 Amendments to the Constitution and Convention of the ITU (S. Treaty Doc. No. 110-16 (2008)). The treaties entered into force for the United States on January 16, 2009. For background, see *Digest 2004* at 634-39; *Digest 2006* at 682-84 and 770-74; and *Digest 2008* at 158-60 and 388-93.

F. OTHER ISSUES

1. Intellectual Property

On April 30, 2009, the Office of the U.S. Trade Representative ("USTR") announced the issuance of the 2009 Special 301 Report to identify those foreign countries that deny adequate and effective protection of intellectual property rights or deny fair and equitable market access to U.S. persons that rely upon intellectual property protection, and those foreign countries determined to be priority foreign countries. USTR submits the report

annually pursuant to § 182 of the Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988 and the Uruguay Round Agreements Act (enacted in 1994). The 2009 report included countries on the Priority Watch List and the Watch List and one country under § 306 monitoring; placement of a trading partner in one of these categories indicates that particular problems exist in that country with respect to protection of intellectual property rights, enforcement, or market access for persons relying on intellectual property protection. See *Digest 2007* at 605-7 for additional background.

The 2009 report summarized continuing concerns about China and Russia, while also discussing steps both countries took in 2009 to improve their protection of intellectual property rights. See C.1.a. *supra* for discussion of the WTO's 2009 decisions in two disputes concerning intellectual property rights the United States brought against China. The report added Algeria, Canada, and Indonesia to the Priority Watch List and added Brunei and Finland to the Watch List. The report also removed Korea and Taiwan from the Watch List and retained Paraguay under § 306 monitoring. As excerpted below, the report contained a discussion of the United States' bilateral agreements or memoranda of understanding with the Russian Federation, Peru, and Paraguay relating to intellectual property rights. The full text of the report is available at www.ustr.gov/about-us/press-office/reports-and-publications/2009/2009-special-301-report. For a summary of countries identified in the 2009 report, see USTR press release of April 30, 2009, available at www.ustr.gov/about-us/press-office/press-releases/2009/april/ustr-releases-2009-special-301-report.

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Russia will remain on the Priority Watch List in 2009. While Russia has made some progress in improving IPR protection and enacting necessary legislation, concerns remain, particularly with respect to Russia's slow implementation of some of its commitments in the November 2006 bilateral agreement on IPR ("IPR Bilateral Agreement").

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In the IPR Bilateral Agreement, Russia committed to fight optical disc and Internet piracy, protect against unfair commercial use of undisclosed test or other data generated to obtain marketing approval for pharmaceutical products, deter piracy and counterfeiting through criminal penalties, strengthen border enforcement, and bring its laws into compliance with WTO and international IPR norms. Russia's implementation of these IPR commitments will be essential to completing the final WTO accession process. While Russia has made some progress in implementation, additional work remains for Russia to fully implement its commitments under the IPR Bilateral Agreement. Specifically, the United States looks to Russia to make further progress by ensuring that the Russian Customs Code, Civil Code and Law on Medicines comply with the IPR Bilateral Agreement and the relevant TRIPS Agreement obligations that will take effect upon Russia's accession to the WTO.

On the positive side, Russia recently acceded to the WIPO Internet Treaties, and has made progress combating software piracy. In addition, the Moscow City Government has recently banned DVD/CD kiosks in the public transport system and pedestrian spaces, thus eliminating one major nexus of retail trade in pirated videos and music. Amendments to the Civil Code and Customs Code have been introduced into the Duma and are under active consideration. The United States-Russia Bilateral Working Group on IPR met in March 2009. The United States Government looks forward to future collaborative meetings to discuss how both governments can work to strengthen the protection and enforcement of IPR.

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Peru will remain on the Watch List in 2009. As a result of the U.S.–Peru Trade Promotion Agreement (PTPA), Peru enhanced its IPR legal framework significantly to strengthen IPR protection and enforcement. [Editor’s note: *See* D.2. *supra* for additional discussion of the PTPA.] Nevertheless, there is inadequate enforcement carried out by enforcement agencies, due in part to the lack of resources provided to agencies. As a result, piracy rates are high and counterfeit clothing and toys continue to be easily found throughout the country at markets, street corners, and beach areas.

As part of the PTPA implementation process, Peru amended its laws and regulations to provide procedures and remedies for improved enforcement of IPR. For example, the Government reorganized the Intellectual Property Office, INDECOPI, to help expedite the hearing and granting of precautionary measures; revised its customs law and regulations to strengthen the procedures for suspending IPR infringing goods and ensuring that infringing goods are seized and destroyed absent the allowable exceptions; and put in place deterrent-level penalties for copyright and trademark infringement both in civil and criminal violations. The United States will work closely with Peru [to] ensure the effective enforcement of its obligations under the PTPA.

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In 2009, the United States will continue to monitor Paraguay under Section 306, specifically with respect to Paraguay’s implementation of [a] bilateral agreement regarding IPR protection and enforcement. In 2008, the United States and Paraguay signed an extension and revision of a previous Memorandum of Understanding, which will remain in effect through 2009. There have been continued strong efforts by Paraguay to improve IPR enforcement, particularly by increasing the number of raids and seizures of pirated and counterfeit goods (by the IPR investigative unit in particular). However, Paraguay continues to have problems providing effective IPR protection due to porous borders, ineffective prosecutions of IPR infringers, and the lack of deterrent-level sentences in court cases being issued. A new penal code, approved in 2008, provides minimum sentences for counterfeiting and piracy. The United States urges effective prosecutions under this new law, which goes into effect in July 2009. The United States has concerns about the inadequate protection against unfair commercial use of undisclosed test or other data generated to obtain marketing approval for pharmaceutical products as well as shortcomings in Paraguay’s patent regime. The United States will continue to work with Paraguay to address these IPR concerns during the coming year, including through the Joint Commission on Trade and Investment.

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2. Tax-related Issues

a. Bilateral tax treaties

In 2009 the United States continued to negotiate, conclude, and bring into force bilateral income tax treaties to eliminate double taxation and prevent tax evasion. For example, a new tax treaty with Italy (which replaced an existing treaty that was signed in 1984) and a protocol amending the U.S. tax treaty with France entered into force on December 16 and 23, 2009, respectively. The protocol to the tax treaty with France includes a provision for mandatory binding arbitration of certain disputes that is similar to arbitration rules that have been recently concluded with Belgium, Germany, and Canada. See *Digest 2008* at 610-16 for discussion. On November 10, 2009, Manal Corwin, International Tax Counsel, U.S. Treasury Department, explained the arbitration provision in testimony before the Senate Committee on Foreign Relations in support of the protocol and two other tax treaties:

. . . [T]he proposed Protocol provides for mandatory arbitration of certain cases that have not been resolved by the competent authority within a specified period, generally two years from the commencement of the case. A Memorandum of Understanding accompanying the Protocol sets forth rules and procedures for arbitration. The arbitration board must deliver a determination within six months of the appointment of the chair of the arbitration board, and the determination must either be the proposed resolution submitted by the United States or the proposed resolution submitted by France. The board's determination has no precedential value and . . . the board shall not provide a rationale for its determination. . . . [I]n response to concerns expressed by the Senate in the approval of prior agreements, the arbitration rule in the proposed Protocol differs from earlier arbitration provisions in some key respects. First, the proposed Protocol permits the concerned taxpayers to submit written Position Papers to the arbitration board. Second, under the proposed Protocol, the competent authority of a Contracting State may not appoint an employee of its tax administration to be a member of the arbitration board. Finally, the proposed protocol does not prescribe a hierarchy of legal authorities to which the arbitration board must adhere.

The full text of Ms. Corwin's testimony is available at www.treas.gov [search "tg402"].

Ms. Corwin also addressed the importance of information exchange provisions in preventing tax evasion. These provisions enable the United States to request information from a treaty partner that can be used in enforcing U.S. tax laws. "Concluding agreements that provide for the full exchange of information, including information held by banks and other financial institutions, is [a] key priority of the Treasury Department," Ms. Corwin said, explaining that "access to information from other countries is critically important to the full and fair enforcement of U.S. tax laws." She continued:

2009 has been a year of fundamental change in transparency, as many secrecy jurisdictions announced their intentions to comply with the international standard of full information exchange. In this changing environment, the Treasury has made many key achievements, including the conclusion of protocols of amendment to the U.S. tax treaties with Switzerland [September 23] and Luxembourg [May 29] that provide for full exchange of information, including bank account information.

Protocols of amendments to the U.S. tax treaties with Luxembourg and Switzerland, signed on May 20 and September 23, respectively, which have not yet been ratified, would both permit exchanges of information for income tax purposes "to the full extent permitted by Article 26 of the Organization for Economic Co-operation and Development (OECD) Model Income Tax Convention." See www.treas.gov [search "tg143"] and www.treas.gov [search "tg297"] for additional background on the two protocols.

b. Agreement with Switzerland on sharing banking information

In 2009, as part of a broad effort to hold U.S. taxpayers with undisclosed foreign accounts liable for evading U.S. tax laws, the U.S. Department of Justice and the Internal Revenue Service ("IRS") settled criminal and civil actions against UBS AG, a Swiss bank. See Department of Justice press statement of November 17, 2009, available at www.justice.gov/opa/pr/2009/November/09-tax-1241.html. On February 18, 2009, the Department of Justice announced that it had entered into an agreement with UBS AG, under which the United States would defer its prosecution of the bank "on charges of conspiring to defraud the United

States by impeding the Internal Revenue Service (IRS).” The Department of Justice’s press statement explained that

[a]s part of the deferred prosecution agreement and in an unprecedented move, UBS, based on an order by the Swiss Financial Markets Supervisory Authority (FINMA), has agreed to immediately provide the United States government with the identities of, and account information for, certain United States customers of UBS’s cross-border business. . . . UBS has further agreed to pay \$780 million in fines, penalties, interest and restitution.

The full text of the press statement is available at www.justice.gov/opa/pr/2009/February/09-tax-136.html.

On August 19, 2009, the United States and Switzerland concluded an agreement to enable the IRS to obtain information on certain U.S. account holders at UBS AG. The agreement provided a mechanism under the existing bilateral tax treaty for the IRS to access information it originally sought through civil proceedings in U.S. federal court in Miami, Florida. The IRS had issued a “John Doe Summons” to UBS AG, seeking information about its U.S. clients’ accounts in Switzerland.* Citing Swiss bank secrecy laws, UBS had declined to provide the information.

In remarks to the press on August 19, IRS Commissioner Doug Shulman called the agreement “unprecedented” and said it “[would] result in our receiving what we wanted all along from the beginning of our investigation into UBS.” Commissioner Shulman’s remarks are available in full at www.irs.gov/newsroom/article/0,,id=212203,00.html. An additional IRS press statement issued on August 19, excerpted below, provided details on the agreement and explained its relationship to the civil litigation. The full text of the IRS statement is available at www.irs.gov/newsroom/article/0,,id=212124,00.html. The agreement, the accompanying declarations of the United States and Switzerland, and a related settlement agreement between the United States and UBS AG concerning the civil litigation are available at www.irs.gov/pub/irs-drop/us-swiss_government_agreement.pdf, www.irs.gov/pub/irs-drop/declarations_us.pdf, and www.irs.gov/pub/irs-drop/bank_agreement.pdf, respectively.**

* Editor’s note: Information about John Doe Summons is available at www.irs.gov/irm/part25/irm_25-005-007.html.

** Editor’s note: Subsequent to the agreement’s conclusion, a Swiss court found that some of the requested account information could not be provided. The United States and Switzerland then concluded a revised agreement in 2010, resolving the court’s concerns, which the Swiss parliament ratified on June 17, 2010. *Digest 2010* will provide relevant details on these developments.

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Under the agreement, the IRS will submit a treaty request to the Swiss government describing the accounts for which it is requesting information. The Swiss government will then direct UBS to initiate procedures to turn over information on thousands of accounts to the IRS. The IRS will receive information on accounts of various amounts and types, including bank-only accounts, custody accounts in which securities or other investment assets were held and offshore company nominee accounts through which an individual indirectly held beneficial ownership in the accounts.

Also, the agreement retains the U.S. Government's right, if the results are significantly lower than expected and other measures fail, to seek appropriate judicial remedies, including resuming actions to enforce the John Doe summons.

The agreement involves a number of simultaneous legal actions:

- The judicial enforcement of the John Doe summons will be dismissed. While this enforcement motion will be withdrawn, the underlying summons remains in effect.
- Upon receiving the treaty request, the Swiss government will direct UBS to notify account holders that their information is included in the IRS treaty request. It is expected that these notices will be sent on a rolling basis with some being sent over the coming weeks and others over the coming months. Receipt of this notice will not by itself preclude the account holder from coming into the IRS under the Voluntary Disclosure Program.

In addition, the Swiss Government has agreed to review and process additional requests for information for other banks regarding their account holders to the extent that such a request is based on a pattern of facts and circumstances equivalent to those of the UBS case.

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Cross References

Counternarcotics certification process, **Chapter 3.B.2.a.**

U.S. report on goods produced with child labor, **Chapter 6.C.2.**

Commercial private international law, **Chapter 15.A.**

International civil litigation in U.S. courts, **Chapter 15.C.**

Forum non conveniens considerations in litigation arising from the Montreal Convention, **Chapter 15.C.4.a.**

Sanctions, **Chapter 16.**

Telecommunications service between the United States and Cuba,
Chapter 16.B.1.