WHITE & CASE

January 2007

Japan External Trade Organization
WTO and Regional Trade Agreements
Monthly Reports

IN THIS ISSUE

Table of Contents

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

Summary of Reports

United States

Forecast 2007: U.S. Trade Policy at a Crossroads

Although 2007 will feature many international trade themes similar to those of 2006, several critical issues will make 2007 a watershed year that will mold U.S. unilateral, bilateral, and multilateral trade policy for many years to come. Most importantly, the U.S. Congress must address the June 30, 2007 expiration of Presidential Trade Promotion Authority (TPA) and the September 30, 2007 expiration of the 2002 Farm Bill. The resolution of each will have a significant impact on many aspects of U.S. trade policy and greatly differentiate 2007 from previous years. The new Democrat majorities in both chambers of Congress could also alter the formulation of U.S. trade policy in 2007. On the other hand, 2007 will also feature many standard trade themes, including: (i) the possible completion and Congressional approval of bilateral and regional Free Trade Agreements; (ii) U.S. efforts to make significant progress in the struggling “Doha Round” of World Trade Organization (WTO) negotiations; (iii) U.S. amendment of preferential trading programs like the Generalized System of Preferences (GSP); (iv) Congressional consideration of Permanent Normal Trade Relations (PNTR) for countries acceding to the WTO; (v) U.S. involvement in several WTO dispute settlement proceedings; and (vi) administrative actions on critical issues affecting U.S. imports. Yet even these recurring themes could produce far different results because of the dramatic shift in power from Republicans to Democrats in the 110th Congress.

United States Highlights

- Members of Congress Introduce Several Trade Bills
- President Bush Calls on Congress to Renew TPA
- Senators Urge DOC to Apply CVDs to Chinese Imports
- Members of Democratic Freshmen Class Request Involvement in Trade Policy- Making
- DOC Further Delays Change to Zeroing Methodology to Allow Congressional Review
- USTR Appoints New General Counsel
- United States Places Chile on 2007 Priority Watch List
- Rep. English Introduces “CHINA” Act on China’s Alleged Currency Manipulation

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

- DOC Announces Change in "Zeroing" Methodology
- Ways and Means and Finance Committees Finalize Rosters
- President Bush Signs Trade-Related Proclamations on Vietnam PNTR and HTS Modifications

Free Trade Agreements

Free Trade Agreements Highlights

- Congress on FTAs: Rep. Lantos Calls for Suspension of Malaysia FTA Talks Over Iran Deal; Sen. Grassley Urges Congress to Move Forward on Peru and Colombia Agreements
- Democrats Begin Focus on Labor, Environment with Peru, Colombia and Panama FTAs

Multilateral

WTO Appellate Body Rules that U.S. "Zeroing" Violates U.S. WTO Obligations

The WTO Appellate Body has found that the practice of "zeroing" violates U.S. obligations under the WTO Anti-Dumping Agreement. In Fall 2006, a WTO Panel decided that certain types of zeroing - including zeroing during administrative reviews - were permitted under the Agreement. The Appellate Body reversed these findings by the Panel, ruling that all of the types of U.S. zeroing challenged by Japan were WTO-inconsistent. The decision of the Appellate Body in *United States – Measures Relating to Zeroing and Sunset Reviews* (DS322) was released on January 9, 2007.

WTO Panel Rules that U.S. "Zeroing" in Ecuador Shrimp Case Not Consistent with AD Agreement

A World Trade Organization (WTO) panel has ruled that the United States violated its obligations under the Anti-Dumping Agreement when it used the practice of "zeroing" in an anti-dumping investigation of shrimp from Ecuador. The United States agreed in advance, and in writing, not to contest any of the claims made against it – an unprecedented development in WTO dispute settlement. The decision of the panel in *United States – Anti-Dumping Measure on Shrimp from Ecuador* (DS335) was released on January 30, 2007.

Multilateral Highlights

- WTO Director-General Announces Formal Restart to Doha Negotiations

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

- Davos Ends with Cautious Optimism for WTO's Doha Round, but No Tangible Results
- EU, Australia, Argentina and Brazil Join Canada in WTO Consultation Requests on U.S. Corn Subsidies
- Deputy USTR Veroneau Provides Update on Doha Negotiations

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

Reports in Detail

United States

Forecast 2007: U.S. Trade Policy at a Crossroads

Summary

Although 2007 will feature many international trade themes similar to those of 2006, several critical issues will make 2007 a watershed year that will mold U.S. unilateral, bilateral, and multilateral trade policy for many years to come. Most importantly, the U.S. Congress must address the June 30, 2007 expiration of Presidential Trade Promotion Authority (TPA) and the September 30, 2007 expiration of the 2002 Farm Bill. The resolution of each will have a significant impact on many aspects of U.S. trade policy and greatly differentiate 2007 from previous years. The new Democrat majorities in both chambers of Congress could also alter the formulation of U.S. trade policy in 2007. On the other hand, 2007 will also feature many standard trade themes, including: (i) the possible completion and Congressional approval of bilateral and regional Free Trade Agreements; (ii) U.S. efforts to make significant progress in the struggling "Doha Round" of World Trade Organization (WTO) negotiations; (iii) U.S. amendment of preferential trading programs like the Generalized System of Preferences (GSP); (iv) Congressional consideration of Permanent Normal Trade Relations (PNTR) for countries acceding to the WTO; (v) U.S. involvement in several WTO dispute settlement proceedings; and (vi) administrative actions on critical issues affecting U.S. imports. Yet even these recurring themes could produce far different results because of the dramatic shift in power from Republicans to Democrats in the 110th Congress.

Analysis

I. TPA Renewal

A. Two Scenarios: Revenge or Consensus

Congressional consideration of the June 30, 2007 expiry of TPA will be the most important trade issue in 2007, and the new Democrat majorities in Congress will affect the prospects for TPA renewal. TPA is an Administration-led initiative, and Democrats may deny the Bush Administration TPA renewal to establish their Congressional power and exact "revenge" on the Administration. TPA's future is also in jeopardy because many Democrats have been upset over the Administration's refusal to heed their advice on U.S.

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

trade agreements during TPA's consultation phase.[1] For example, during Congressional consideration of the Oman FTA, many Democrats were angered after the Bush Administration omitted a provision to the FTA to deny trade benefits to any imports made with forced labor. In May 2006, the Senate Finance Committee unanimously approved a draft version of the legislation, with the slave labor amendment during its "mock markup" of Oman FTA legislation. Yet because amendments approved in mock markups are only advisory under TPA, the Administration forwarded the FTA's final implementing legislation to Congress without the forced labor amendment.

On the other hand, Democrats may be willing to work with the Administration and extend TPA if the Bush Administration agrees to prioritize Democrat-led initiatives, such as an increase in minimum wage or health care reform. Under these "consensus-building" scenarios, however, it is unlikely that Democrats would provide a wholesale renewal of TPA if Republicans agree to prioritize Democrat causes. Instead, Democrats would likely demand partial extension of TPA specific to the completion of a Doha agreement or an FTA with a trading partner.

B. Key Drivers of TPA Renewal

Whether TPA gets renewed depends on several key developments. If USTR Susan Schwab can successfully re-start the stalled WTO Doha negotiations before TPA expires, Congress may consider renewing TPA until a Doha agreement is completed. Congress could also vote to extend TPA for the limited purpose of securing the Doha deal. Significant progress in the agreement, such as full modalities in agriculture and industrial market access (NAMA), would also be necessary for Congress to use Doha as a basis for any form of TPA renewal. FTA negotiations, in particular U.S. negotiations with South Korea, will also influence TPA renewal. If USTR progresses with the U.S.-Korea (KORUS) FTA negotiations but fails to complete the deal by March 31, Congress might be willing to renew TPA – limited only to the KORUS FTA - to secure the final agreement. The KORUS FTA would be the largest U.S. trade agreement since NAFTA and is thus a business priority that enjoys broad Congressional support from both Republicans and Democrats.

C. Options for Congress

Congress can take one of four routes in considering TPA: (i) provide wholesale TPA renewal; (ii) deny TPA renewal; (iii) renew TPA for a specific timeframe and purpose, such as the completion of a Doha Agreement and/or an FTA with a major U.S. trading partner; or (iv) create a "new TPA." It is unlikely that

---

[1] By law, Congress can only suggest to the President revisions to U.S. trade agreements and then vote on the ultimate deal. It cannot amend the agreements.

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

Congress will provide wholesale extension of TPA. As noted, TPA is an Administration-led initiative, and the Democrat majority is unlikely to allow a Republican-led Administration the satisfaction of wholesale TPA renewal, particularly given Democrat concerns with the Bush Administration's alleged abuse of TPA's consultation procedures.

Democrats in Congress could opt instead to pursue the second option and deny the President TPA, as Republicans did to President Clinton in 1992. This "revenge" scenario would allow Democrats to demonstrate their newfound power in the 110th Congress and punish Republicans for their perceived mistreatment of the when Republicans controlled Congress. On a less personal level, Democrats simply might choose to reward traditional supporters like domestic labor unions – which broadly oppose FTAs and other trade liberalizing agreements – by opposing TPA. In either case, Congressional opponents of TPA are reluctant to cede power to the President to conclude a trade agreement that Congress cannot change. Democrats, in denying the President TPA, could justify their action on the assumption that the ban on amendments under TPA limits the constitutional role of Congress to regulate foreign commerce, while at the same time satisfying a longtime political base. Democrats could also deny TPA on the grounds that the consultation requirements of TPA have been ineffective because the President has consulted with only a few members of Congress, as the Oman FTA demonstrated.

Pragmatism could guide Democrats to avoid such a hard-line stance, as exacting "revenge" through TPA rejection could do Democrats more harm than good. To deny the President one of his top agenda items out of spite could lead to legislative gridlock for the next two years. Although Democrats now control both chambers of Congress, their majorities are not overwhelming, and the President still maintains veto power. Republican retaliation for Democrats' TPA rejection could severely burden the passage of far more important Democrat agenda items like the minimum wage or Medicare reform. Furthermore, the U.S. business community strongly supports TPA and might also withhold campaign funds if Democrats choose to scuttle TPA outright due to petty concerns like revenge. TPA denial could also lead to popular backlash against Democrats: a majority of the U.S. public favors open trade, and average citizens might view Democrats' staunch opposition to TPA as a rebuke of the bipartisanship that they promised in the 2006 elections.

Democrats could choose the third option and extend TPA until the United States has completed a Doha Agreement and/or a bilateral FTA. This option depends on USTR's ability to convey to Congress that it has made progress but needs more time to complete any of these agreements before TPA expires. Democrats might choose this option because each agreement enjoys broad support from influential U.S. lobbies and the U.S. business community. As noted above, denying TPA at the expense of several

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

valuable trade agreements could lead to backlash. On the other hand, passing TPA could create political capital with Congressional Republicans and the President to ensure the passage of Democratic priorities. Furthermore, if Congress were to provide a short-term extension of TPA for any of these agreements, Democrats might also be able to take that opportunity to amend the law to address key Democratic procedural and substantive concerns, such as TPA's consultation phase and labor issues.

Democrats could also urge Congress to consider the fourth option: drafting a "new TPA." Under this scenario, Congress would rewrite TPA to include greater Congressional oversight of trade agreements and an increased focus on labor and environmental issues, two topics important to Democrats and their traditional supporters. Senate Finance Committee Chairman Max Baucus (D-MT) has called for an extension of TPA but only if it has better trade enforcement capability, as well as labor and environmental provisions. Newly-elected Senator Sherrod Brown (D-OH) has also opined that renewal of the current form of TPA is "dead upon arrival," but that he and other Democrats are willing to consider a new version of TPA that focuses on labor and environment. This form of TPA would thus allow the Administration to continue pursuing its "competitive liberalization" strategy but would sate Democrats in Congress by providing for greater Congressional oversight. Whether the President would be willing to accept new Democrat conditions on his trade negotiating authority is unclear, as such conditions could prevent the negotiation of trade agreements with developing countries and run counter to Republican "free trade" values.

D. Implications of TPA Renewal or Denial

Because TPA expires in mid-2007, the Congressional battle over its future will occur in the first half of the year – likely Spring 2007. However, the outcome of the TPA debate will greatly affect U.S. trade policy for not only the rest of 2007, but also 2008 and beyond. The United States' international trading partners view TPA as a U.S. commitment to liberalized trade and an absolutely necessary tool for trade negotiations with the United States. Congressional refusal to extend TPA could indicate that the United States is not committed to free trade; it would also tie the hands of U.S. trade negotiators in FTA negotiations. TPA provides a U.S. FTA partner with the assurance that the final agreement that it signed will remain intact after Congressional review and approval. As discussed above, once an FTA is completed, Congress cannot unilaterally alter the agreement but instead can only offer suggestions to the Administration and then approve or oppose the FTA's final implementing legislation. Trading partners may not elect to negotiate with the United States if TPA is not in effect because they would have no guarantee that Congress would alter the agreement that they worked so hard to complete. Indeed, without TPA (formerly "fast track" authority), the United States has negotiated and implemented only one

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

FTA – the very innocuous U.S.-Jordan FTA. Without TPA, negotiation and completion of a far more important – and thus contentious – agreement like the KORUS FTA would be untenable.

II. Farm Bill 2007

Congress' consideration of the 2002 Farm Bill will also affect U.S. policy in 2007. Many of the 2002 Farm Bill's provisions expire in September 2007, and members of Congress are thus considering three options: (i) extending the 2002 Farm Bill for a defined period of time; (ii) altering the Farm Bill slightly but maintaining overall subsidy levels; or (iii) re-writing the Farm Bill entirely.

A. Simple Extension

Congress' take on the Farm Bill could depend on the WTO Doha Round negotiations. If Doha negotiations remain stalled throughout the first half of 2007, Congress will probably extend the current Farm Bill at least through 2008. Congressional advocates of a simple extension – including Senate Agriculture Committee Ranking Member Saxby Chambliss (R-GA) – argue that the United States should not unilaterally change its own subsidy programs ahead of a final multilateral trade agreement, and that the outcome of the Doha negotiations on domestic support must be known before altering U.S. agriculture policy through a new Farm Bill. These Members believe that if Congress reduces domestic supports unilaterally, the United States may have less leverage to use to convince other countries to reduce their tariffs and export subsidies. A simple extension of the 2002 Farm Bill would also enhance Members' political support in the farming community because it would convince U.S. agricultural producers that the United States has not "unilaterally dismantled" its farm support program, while U.S. trading partners "still maintain high tariffs and trade barriers to U.S. farm products."

B. Revised Bill with Similar Subsidy Levels

Rather than pass a simple extension, Congress could decide to lower the subsidization levels for certain commodities or reorganize the commodity programs to avoid new WTO dispute settlement complaints. The overall level of agricultural subsidization, however, would likely be only slightly reduced. Such a maneuver could prove shrewd. By maintaining the current overall subsidy levels, members of Congress would appease their agricultural constituents, and they could avoid WTO complaints by altering specific commodity programs that are most likely to come under attack. By the time that WTO Members discovered and assessed the adverse effects of the new programs, a new Doha Agreement might be in place that would mandate that the United States rewrite the Farm Bill to conform with its new commitments on domestic supports.

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

Another issue that Congress must consider in revising the Farm Bill is the growth of non-traditional recipients of farm support, such as fruit and vegetable producers and conservationists. These non-traditional recipients have begun an aggressive lobbying campaign against a Farm Bill that rewards only a few agricultural producers and "ignores" environmental concerns. In revising the Farm Bill, Congress could choose to reduce subsidization levels for traditional recipients (like corn, wheat, etc.) and increase support for non-traditional producers and conservation groups. Overall subsidization thus would remain at levels similar to the previous year's farm support, but individual subsidization levels among agricultural producers may be altered.

C. Completely Overhauled Bill

The Bush Administration advocates a complete overhaul of the Farm Bill and is urging members of Congress to re-write the United States' farm programs. Should Congress opt to drastically alter the Farm Bill, they will likely face the ire of U.S. agricultural groups that support a simple extension of the Farm Bill in order to protect the subsidies that the Bill provides. On the other hand, Congress would likely change subsidy levels to ensure that U.S. farm supports comply with WTO obligations. The new bill thus would shelter the United States farm policies from further WTO disputes. A revised bill would also protect the U.S. Government from domestic criticism about unjust distribution of farm payments and a problematic crop insurance system. The 2002 Farm Bill has come under attack from domestic consumer groups – and even several Members of Congress – because it disproportionately benefits large-scale agribusiness and politically connected producers of certain commodities like cotton and wheat. Democrats could put their "stamp" on a new Farm Bill by addressing these concerns and others like crop insurance. As noted, however, drastic alterations in U.S. agriculture policy would likely anger the U.S. farm lobby, despite criticism at home and abroad. It thus remains unclear what direction Congress will take when considering the Farm Bill, although option (2) appears the most politically acceptable.

III. A Major Change In Congress

Congress' focus on trade issues in 2007 will depend in large part on the relationship between the Bush Administration and the Democrat majorities in the House and the Senate. Democrats can take one of two paths: (i) "get even" with the Bush Administration; or (ii) work with the Bush Administration. In "getting even" with the Bush Administration, Democrats in Congress could make their mark by denying passage of any Administration-led trade initiative. Democrats could delay Congressional consideration of FTAs, for example, by demanding great focus on labor and environmental issues. They could also oppose along party lines any FTA implementing legislation or TPA extension. As noted above, without TPA the Administration would find it difficult – if not impossible – to complete outstanding bilateral or multilateral

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

trade agreements. Should Democrats flatly oppose TPA or other FTAs, they would not be without precedent. Indeed, in 1997 Republicans – far more free trade-oriented than Democrats – chose politics over policy and denied "fast track" negotiating authority (now TPA) to President Clinton for the remainder of his tenure. Again, only the Jordan FTA was negotiated during Clinton's remaining years in office.

Democrats could, however, work with the Bush Administration to allow for the passage of FTA implementing legislation, certain preference programs, and perhaps a form of TPA renewal. Such comity would accomplish two things. First, it would help the Democrats secure priority agenda items like the minimum wage increase and health care reform. Democrats could agree to pass the Administration's trade-related measures in exchange for Republican support (*e.g.*, no Presidential veto) of Democrats' priority legislative items. Such political "horse-trading" is common. Second, Democrats could put their "stamp" on FTAs and TPA by agreeing to pass the measures only if they address key Democrat concerns like labor and the environment. Such a maneuver could assuage traditional Democratic supporters, while not offending U.S. business groups that broadly support free trade legislation. As such, Democrats may be more willing to compromise with the Bush Administration and Republicans on certain trade issues if doing so will accomplish broader Democrat goals.

Whatever strategy Democrats embrace, it will greatly affect the 2007 trade agenda. For this reason, any predictions for 2007 must take the new Democrat majorities into account.

IV. Bilateral And Regional Agreements

Before Spring 2007, USTR will attempt to conclude FTA negotiations with South Korea, Malaysia and the UAE because TPA's mid-2007 expiry mandates that USTR complete these FTA negotiations by March 31 to ensure that Congress considers the agreements under "fast-track" authority. Besides FTA negotiations, Congress will also consider the completed Peru, Colombia and Panama FTAs if/when the Bush Administration submits implementing legislation to Congress.

A. Asian Agreements: Thailand, South Korea and Malaysia

USTR will continue to negotiate the successful completion of FTA negotiations with South Korea, Malaysia and Thailand. USTR has suspended bilateral negotiations with Thailand indefinitely until a new Thai government is in place but has indicated that once Thailand's political situation is in order, the United States is willing to resume negotiations from where they stopped in 2006. Resolution to the Thai political situation could, however, occur after TPA expires on June 30, 2007, and it is thus unclear whether USTR – and the Thai Government – will be as willing to resume FTA negotiations at that time.

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

USTR will continue to negotiate with South Korea throughout the first half of 2007 in an attempt to conclude negotiations by the Spring. The parties likely will undertake several more formal negotiating rounds before late March, with inter-sessional meetings held in between rounds. USTR sources predict that the United States and Korea will achieve the agreement, but that a lot of "last-minute" activity from both sides will occur. As noted above, because of the KORUS FTA's commercial magnitude, Congress could extend TPA solely for the completion of the agreement if sufficient progress has occurred by March 31, and USTR convinces Congress that the negotiations can be concluded in the near term. Once the agreement is completed, Congressional passage is all but certain due to overwhelming business support and Korea's strong labor and environmental record.

U.S. and Malaysian negotiators will likely continue to meet throughout the first half of 2007 in an effort to complete FTA negotiations by March 31. Unlike the KORUS FTA, the Malaysia FTA does not have the same commercial significance that could convince Congress to extend TPA until a final Malaysia agreement is achieved. However, sources predict that the parties can achieve an agreement by the Spring. On the other hand, the parties have only held four formal negotiating rounds and have not yet resolved contentious issues such as government procurement and financial services trade. Assuming that USTR does complete the agreement by the March deadline, it seems likely that Congress will approve the FTA. Like the South Korea FTA, the U.S. business community supports the Malaysia agreement and there seems to be little Congressional opposition to a final accord.

B. Latin American Agreements: Peru, Colombia, Panama and DR-CAFTA

The first half of 2007 will likely witness Congressional activity on the Peru and Colombia FTAs. The Bush Administration will likely present Congress with implementing legislation for the Peru Trade Promotion Agreement (PTPA) during the first few months of 2007, at which point Congress will schedule a floor vote on the agreement in both the House and the Senate. The same Congressional committees will also begin holding hearings examining the impact of the Colombia FTA, and the Administration will likely send implementing legislation to Congress towards the tail-end of the first half of 2007.

The new Democrat control in Congress will certainly affect the two agreements. Democrats have already stated that they would not consider the PTPA until it has been renegotiated to include improved provisions on international labor standards. Democrats could also seek to re-negotiate labor provisions in the Colombia FTA, if not oppose the agreement altogether. With labor as a focus in both agreements, the Peru and Colombia FTAs will face a more difficult time moving through Congress, and unless USTR can renegotiate labor and environment provisions in both agreements, it seems likely that Democrats will ensure that neither agreement passes unless the Administration and Democratic leaders in Congress

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

strike a political bargain. Peruvian and Colombian officials and U.S. businesses have urged Congress to pass the agreements as soon as possible, and further lobbying is expected. As discussed below, Congress extended the Andean Trade Preferences and Drug Eradication Act (ATPDEA) for six months with an additional six months if Congress approves the Peru and Colombia FTAs. Should Congress wait to consider the two agreements, Peru and Colombia could lose their duty-free benefits to the United States without a guaranteed bilateral trade agreement in place.

Congress will also consider the recently completed Panama FTA (December 19, 2006). Because the FTA is less contentious than the Peru and Colombia FTAs, it is likely that it will move at a faster pace through Congress. Unlike the Peru and Colombia FTAs, the Panama FTA has the support of most Democrats, hence it likely will not face strong opposition in Congress. The Senate Finance and House Ways and Means Committees will hold their hearings exploring the agreement during the first half of 2007, and barring some environmental concerns, it seems likely that Congress will approve the agreement when it ultimately gets to the floor for a vote. The primary driver of the Panama FTA is the United States' desire to have preferential access to the massive amount of construction work that the widening of the Panama Canal will produce.

Full implementation of the Dominican Republic- Central American Free Trade Agreement (DR-CAFTA) depends on the Dominican Republic (DR) and Costa Rica. The DR still needs to complete regulations related to intellectual property rights (IPR) and customs fees, and officials estimate that the DR government will be able to implement the agreement by February 2007. The Costa Rican Congress will likely approve the agreement in January or February 2007. Once the DR and Costa Rica implement the agreement, the DR-CAFTA will be fully implemented by all parties.

C. Middle East Agreements: UAE

USTR has been relatively quiet on its FTA negotiations with the UAE, though sources note that the political will still exists on both sides to complete the agreement by the March 31 deadline. Negotiators from both countries last met for a formal negotiating round in the first half of 2006 but have held various inter-sessional and informal meetings throughout the past year. Now that UAE-based Dubai Ports World has divested itself of its U.S. port interests (acquired last year through its purchase of British-based Peninsular and Oriental Steam Navigation), USTR will likely resume formal negotiations with the UAE in the first months of 2007. Because the UAE FTA is relatively small compared to other FTAs, and because it is similar to the recently-passed Oman and Bahrain FTAs (indicative that USTR already has a "template" to work with in completing the UAE FTA), it seems likely that both sides can achieve the agreement by March 31, 2007. Congressional Democrats probably will focus on labor issues, as they did for the

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

Bahrain and Oman FTAs, and will likely push for the UAE's recognition of international labor standards either through amendments in the final FTA or through side letters and agreements. Like the Oman and Bahrain FTAs are also part of the Administrations U.S.-Middle East Free Trade Area (USMEFTA) initiative, the completed UAE FTA should face a relatively smooth path to approval in Congress.

D. Other Agreements

With TPA's impending expiry and its unsecured renewal, USTR is unlikely to commence formal FTA negotiations with any trading partners during the first half of 2007. USTR will, however, continue to pursue Trade and Investment Framework Agreements (TIFAs) and Bilateral Investment Treaties (BITs) with viable U.S. trading partners. USTR is likely to pursue more TIFAs and BITs with Middle Eastern countries as part of the Bush Administration's USMEFTA initiative, which it intends to complete by 2013. The recently signed Lebanon TIFA indicates that the Bush Administration is still pursuing the USMEFTA and will likely continue to create economic links with other Middle Eastern economies in 2007. Of all the Middle Eastern countries, the one with which USTR is most likely to pursue a formal FTA with next is Kuwait. USTR will also likely focus on Africa in the coming year, both in FTA talks with the Southern African Customs Union (SACU) and in negotiating TIFAs and BITs with other African economies. Although TPA extension is unlikely, the Bush Administration would vigorously pursue new FTAs if given a renewed TPA.

V. Multilateral Negotiations As Part Of The Wto's Doha Round

On November 16, 2006, WTO Director-General Pascal Lamy announced an informal re-start to the WTO's Doha Round of multilateral trade negotiations. Since the multilateral talks collapsed in July 2006, Lamy has repeatedly warned that WTO Members have a "small window of opportunity" to conclude the talks and secure a final agreement by Spring 2007 before TPA expires. WTO Members thus are working under an unofficial deadline of Spring 2007 to secure a final agreement. As has been typical since the start of negotiations, agriculture and NAMA are the contentious issues in the negotiations and have held hostage other negotiating sectors such as services and trade facilitation. U.S. and EU officials have stated that they are unwilling to amend their latest offers until they see a willingness from other parties to change their offers.

As noted, TPA is set to expire on June 30, 2007, and WTO Members must reach an agreement before March 31, which is the final day upon which the President can sign the Agreement and submit it to Congress before TPA expires. Because TPA's renewal prospects have declined considerably with the newly-elected Democrat majority in the 110th Congress, WTO Members cannot prolong negotiations

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

beyond Spring 2007 under the assumption that Congress will renew TPA. However, if Members make great strides and establish a completed Doha framework – but fail to complete a final agreement – by the 2007 deadline, there is a chance that Congress would extend TPA for the limited purpose of completing the Doha Agreement (and/or the KORUS FTA). However, because TPA approval under even this limited scenario appears unlikely, WTO Members must act quickly to complete a final Agreement. As such, the scenario seems bleak: few WTO Members expect a final agreement by March 31, 2007.

VI. U.S. Amendment of Preferential Trading Programs

A. GSP

On December 8-9, 2006, Congress passed a final package of tax and trade measures that included a 2-year renewal (until December 31, 2008) of the GSP program.[2] President Bush signed the bill into law on December 20, 2006. Congress will likely use the two-year extension period to review the GSP program, in particular competitive needs limits (CNL). Along with the two-year extension comes a provision that provides the President with discretion to end CNL waivers for products that constitute 150 percent of the competitive needs limit or 75 percent of total U.S. imports of that product from the previous calendar year. The provision will most likely affect imports from Brazil and India, two large "developing" economies that many members of Congress feel should not enjoy benefits under the GSP program.[3]

GSP enjoys strong support from the U.S. business community and it is unlikely that USTR and Congress will amend the program radically to begin graduating countries altogether from GSP. USTR and Congress could, however, focus on certain aspects of the program, such as CNL waivers, in an effort to amend the benefits program so that they can "graduate" certain products from the program.

B. ATPDEA

The ATPDEA will also see activity in 2007. ATPDEA was scheduled to expire on December 31, 2006, but the 2006 trade bill extended for six months duty-free access under the ATPDEA for Peru, Bolivia, Ecuador and Colombia. Benefits would be renewed for another six months (*i.e.*, until December 31, 2007) if the United States and the Andean nations complete the legislative process to implement the

[2] Public Law No. 109-432.

[3] On December 20, 2006, USTR announced that it expects to issue a Federal Register notice in February 2007 that will identify those waivers that meet either of the new thresholds and thus subject to potential revocation. USTR also announced that based on 2006 import data, a preliminary assessment of the CNL waivers meeting the new statutory thresholds are: Brazil - brakes and brake parts ($242 million) and ferrozirconium ($ 0.7 million); India - gold jewelry ($1.6 billion) and brass lamps ($20 million); and Thailand - gold jewelry ($611 million). *See* http://www.ustr.gov/Document_Library/Press_Releases/2006/December/Ambassador_Schwab_Announces_Process_to_Respond_to_Congressional_Changes_to_GSP_Progam.html.

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

outstanding FTAs. The second six-month extension really only involves Peru and Colombia because completion of the Bolivian and Ecuadorian agreements is untenable. As noted, passage of the Peru and Colombia agreements is not guaranteed, and should Congress not approve the FTAs, Peru and Colombia will lose their ATPDEA benefits in six months. In that event, it is likely that more members of Congress will push for an extension of ATPDEA benefits for the Andean countries, given the market size and importance of Peru and Colombia. Democrat support for unilateral preference programs like ATPDEA and GSP is greater than for bilateral FTAs, so an ATPDEA extension is quite possible.

VII. Congressional Consideration of PNTR for Countries Acceding to the WTO

In December 2006, Congress granted Vietnam Permanent Normal Trade Relations (PNTR) in preparation for Vietnam's January 11, 2007 accession to the WTO.

In November 2006, Russia and the United States signed a bilateral accession agreement as part of Russia's WTO accession. Should Russia near completion of its multilateral obligations at the WTO, Congress will have to consider Russia's PNTR status in 2007 in order to reap all of the market access benefits that Russia's WTO accession would provide WTO Members. Although the overall reaction to the bilateral agreement was positive, Congressional critics will likely focus on those items that USTR was unable to secure, such as limits on foreign bank branching in the country or intellectual property rights. Critics might also focus on non-trade issues such as Russia's stance on Iran and North Korea, as well as human rights and democracy concerns.

The U.S. government will also have to address Russia's bilateral accession agreement under the context of Section 1106 of U. S. trade law. If the President determines that Russia's State Trading Enterprises (STEs) adversely affect the U.S. economy, then he must reserve the right of the United States to withhold application of the WTO Agreement between Russia and the United States until: (i) Russia undertakes commitments governing the business activities of its STEs; or (ii) the U.S. Congress passes a law extending the application of the WTO Agreement to Russia. Russian STEs involved in energy production might cause concerns for this process, and Congressional action under Section 1106 (scenario (ii)) would almost certainly be problematic. It is likely, however, that the Administration will avoid this scenario by securing Russian commitments related to its STEs.

VIII. U.S. Involvement in WTO Dispute Settlement Proceedings

Events in 2006 indicate that the United States will continue its heavy involvement in the WTO dispute settlement process in 2007.

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

A. Boeing/Airbus

Throughout 2006, tensions rose between the United States and the EU regarding their dispute (DS 316) over the payment of government subsidies to the U.S. aircraft-manufacturer Boeing Company and its European rival, Airbus. The long-running civil aircraft dispute experienced further discord when Airbus announced in late 2006 that it would proceed with the A350 superjumbo. The United States remains open to a negotiated settlement but will continue to press the EU to eliminate its subsidies program through multilateral channels. The EU and several member states refuse to abandon the launch aid program. It seems likely that the United States and the EU will continue to pursue the WTO case in the hope that multilateral channels will produce a settlement that bilateral consultations have not achieved. A final Panel decision would likely find both sides at fault, costing billions of dollars; settlement is thus preferable. Time for settlement is running out, however: the Panel ruling on U.S. claims against Airbus expects to complete its work by mid to late 2007. Although the recently-appointed Panel that will rule on the EU's counterclaims against Boeing has not yet issued a timetable, it is highly unlikely that the EU will back off if the U.S. Panel issues a detrimental ruling.

B. Zeroing Disputes

The United States Department of Commerce’s (DOC) practice of “zeroing” in anti-dumping (AD) investigations and administrative reviews has been one of the most extensively-litigated measures in the WTO. On December 27, 2006, the DOC announced that it will change its “zeroing” methodology in AD investigations, and that it will no longer make average-to-average comparisons without providing offsets for non-dumped comparisons in calculating the weighted-average dumping margin in AD investigations. The modification will take effect on January 16, 2007. The change was necessitated to implement the recommendations and rulings of the WTO DSB in connection with the U.S.-EU dispute *US - Zeroing (EC)* (DS 294). Even with the reported change in DOC’s zeroing methodology, however, the United States will likely continue to face challenges from various WTO trading partners on other aspects of U.S. use of zeroing. DOC’s change does not address the transaction-to-transaction calculation method or “zeroing” in administrative reviews. Because several other WTO disputes address these types of DOC zeroing and remain outstanding, further WTO actions on zeroing are likely in 2007.

C. Brazil Cotton

On September 28, 2006, the WTO DSB established a compliance Panel after Brazil decided to recommence proceedings against the United States in their cotton dispute (DS 190). Brazilian officials opine that the United States "has not fully implemented" earlier WTO rulings finding its cotton subsidy

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

programs illegal. Brazil's latest request for a WTO compliance panel comes after the United States formally repealed the "Step 2" cotton program on August 1, 2006. The program compensated U.S. mills and exporters for purchasing higher-priced U.S. cotton and was ruled illegal by a final decision of the WTO's AB in March 2005. It is unlikely that Brazil and the United States will reach a compromise while the DSB explores U.S. compliance with the AB's March 2005 decision. A compliance panel decision is expected in mid-2007.

D. More Actions Against China

The United States will continue to closely scrutinize China's actions on its WTO obligations in 2007. The Bush Administration's previous strategy of "quiet diplomacy" with China has changed, and USTR has indicated that it will pursue more direct and public means to ensure China's WTO compliance in 2007 should China not listen to U.S. demands. The WTO case against Chinese barriers to auto parts (DS 340) is the first WTO Panel against China, and a decision in that case is expected by end-2007. The threat of WTO action could spur China into addressing U.S. concerns, but the new U.S. stance on China likely indicates that the United States will continue to pressure China in 2007 to comply with WTO obligations and U.S. demands via multilateral channels. Key areas of concern that could result in new WTO disputes include IPR and export subsidies.

IX. Administrative Actions

A. USTR and GSP

USTR will focus on the GSP program and its specific components in 2007. USTR's Trade Policy Staff Committee (TPSC, comprised of various USTR personnel and officials from other government agencies) held discussions in 2006 on amending CNL waivers to graduate certain products benefiting from the program. The TPSC will likely continue discussions on CNL waivers in 2007. It is unlikely that USTR will work towards graduating countries from the program in 2007, but USTR will likely continue to focus on India and Brazil's GSP participation. USTR will scrutinize both countries' imports to the United States under the GSP program in considering amendments to CNL waivers and other aspects of the preference program. The TPSC's findings could determine what course USTR decides to take with GSP. As noted, USTR will issue a Federal Register notice in late February 2007 that will identify those waivers that meet either of the new thresholds and thus subject to potential revocation.

B. DOC and China

DOC's countervailing duty (CVD) investigation of coated free sheet paper (CFS) from China will also take center stage in 2007, and a final affirmative CVD determination could have wide-ranging consequences.

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

Based on a longstanding Department policy upheld by the courts, DOC has never completed a CVD investigation against China or any other non-market economy (NME). If DOC issues an affirmative CVD ruling against Chinese CFS imports, other U.S. companies could follow suit and file CVD cases against Chinese imports that allegedly benefit from subsidies that were previously thought to be off-limits. For this reason, DOC's final ruling in the CFS case will attract great attention in 2007.

C. Continuous Bonding

The Bureau of Customs and Border Protection's (CBP) amended bonding procedures (continuous bonds) are another contentious administrative issue for 2007.[4] The Court of International Trade (CIT) temporarily enjoined CBP from enacting its amended bonding procedures for eight U.S. shrimp importers, and other importers could follow suit.[5] As part of a related case, the CIT will also rule on whether the bonding procedures violate U.S. law. Thailand has also challenged the measures at the WTO.[6] Should these cases prove successful, CBP will have to abandon its new continuous bond procedures. On the other hand, if CBP wins or if the courts rule narrowly against the agency, CBP could apply the bonding procedures to other industries.

Outlook

Three issues will drive trade issues in 2007: (i) TPA renewal; (ii) Farm Bill consideration; and (iii) the Democrat majority in Congress. Congressional consideration of TPA and the Farm Bill will affect future FTA negotiations, multilateral Doha talks, and a host of other issues. The Democratic majority in both chambers of Congress could prevent the Administration from garnering enough votes to renew TPA or implement new FTAs, but Democrats could focus on consensus-building and work with the Republicans on these and other trade initiatives. Wholesale extension of TPA without changes is highly unlikely, but a limited TPA for the Doha Round or KORUS FTA is possible. Also a "new TPA" that provides for greater congressional oversight and addresses key Democratic concerns like labor and the environment is also

[4] Under current legislation, the United States may require importers of certain goods subject to AD or CV duties to furnish bonds worth more than the total value of such duties on imports during the preceding twelve month period. These bond requirements only apply to goods designated as a "special category" or a "covered case" within a "special category." At present, agriculture and aquaculture goods are the only designated special categories, and shrimp the only "covered case." Prior to amendment of the bond rules in 2004, importers were required to submit continuous entry bonds of substantially lower amounts as security for compliance with U.S. customs regulations, equivalent to only 10 percent of the duties, taxes and fees levied on the same good in the year before.

[5] National Fisheries Institute, Inc., et al., v. United States Bureau of Customs and Border Protection, Ct. No. 05-00683, December 2006.

[6] United States — Measures Relating to Shrimp from Thailand, DS 343.

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

possible. Regardless of form, one thing is clear: should Congress deny the President TPA, U.S. trading partners will be far less willing to enter into bilateral FTA negotiations with the United States, and a final Doha deal will be impossible.

Farm Bill consideration will also affect U.S. trade policy. If Congress decides to extend the 2002 Farm Bill to allow more time to complete Doha negotiations, then the United States will likely face WTO disputes on U.S. subsidization levels. Congress could change subsidization levels during the 2002 Farm Bill's extension but would likely not make major changes to the support levels in order to maintain U.S. negotiating "leverage" in the Doha Round. If Congress decides to re-write the Farm Bill, however, it will have to balance the needs of U.S. agricultural producers and U.S. obligations at the WTO.

On the Congressional front, Democratic change in leadership in both chambers of Congress could halt progress on pending trade legislation, in particular on the U.S.-Peru and U.S.-Colombia FTAs. In recent years, Democratic support for trade liberalization has eroded sharply. However, Democrats could be more open to Administration-led trade initiatives if Republicans are willing to work with them and exchange Democrat concessions on trade issues for Republican support for key Democrat initiatives. Congress will consider the Peru and Colombia FTAs at the beginning of the 110th Congress, but their prospects have dwindled with Democrats' return to power. It is too early to tell what will happen with the Malaysia, Panama and UAE FTAs, but time is running short, as TPA's mid-2007 expiry mandates that all FTAs be completed by March 31, 2007.

Overall, it is likely that the 110th Congressional trade agenda in 2007 will suffer from increased gridlock, unless Republicans and Democrats strike some sort of "grand bargain" to ensure legislative progress. The United States will continue to hammer out details of the South Korea, Malaysia, and UAE FTAs through the spring, with the hopes of completing these agreements before TPA expires. On the multilateral front, the United States will focus on the Boeing-Airbus dispute and will have to address its zeroing methodology in light of both DOC's recent changes and the other outstanding WTO disputes on the topic. The United States will also likely take a closer look in 2007 at China's WTO obligations and address them more firmly through multilateral channels and increased bilateral consultations.

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

United States Highlights

Members of Congress Introduce Several Trade Bills

Several Members of Congress have introduced bills addressing the enforcement of U.S. trade laws and global trading rules. On January 31, 2007, Senate Finance Committee member Sen. Debbie Stabenow (D-MI) and Sen. Lindsey Graham (R-SC) introduced a bill (S. 445) that would establish a trade enforcement division at USTR charged with fighting unfair foreign trade practices by taking more cases to the World Trade Organization (WTO). The legislation would also create a new USTR office to assist small businesses. Sens. Stabenow and Graham stated that the Bush Administration has focused on negotiating new trade agreements but not on enforcing those agreements. They added that their bill would ensure a "level playing field" for the United States when it comes to global trade. Sen. Stabenow also stated that U.S. failure to enforce its trade agreements has cost the United States millions of jobs over the past 15 years in various sectors of the economy, including auto manufacturing, agriculture, textiles, and furniture.

In the House, Ways and Means Committee member Rep. Phil English (R-PA) introduced legislation (H.R. 708) on January 29, 2007 to alter U.S. trade remedy laws. The bill would make it easier for U.S. companies to file antidumping and countervailing duty (AD/CVD) complaints and apply the U.S. CVD law to imports from countries designated as "non-market economies (NMEs)." According to Rep. English, the bill would improve and clarify the rules that prevent circumvention of AD/CVD orders and would amend the U.S. safeguard law to provide a "more effective mechanism to obtain relief from serious injury caused by increased imports." The bill would also create a commission to review WTO dispute panel decisions adverse to the United States and to advise Congress if "panels exceed their authority." Other provisions included in Rep. English's "Trade Law Reform Act of 2007" include permitting the participation of domestic companies or interested parties in WTO panel proceedings and strengthening principal trade negotiating objectives and consultation with Congress.

The new bills indicate that the Members of 110th Congress have begun to address trade issues following the Democratic leadership's first 100 hours. Like Rep. English, Senator John D. Rockefeller IV (D-WV) introduced S. 364 on January 23, 2007 that would apply the U.S. CVD law to imports from NMEs. These measures, however, are not likely to generate immediate Congressional action because other trade issues have priority. At the top of the Congressional trade agenda is the renewal of Presidential Trade Promotion Authority (TPA), which expires on June 30, 2007 and is integral to the Administration's efforts to negotiate bilateral and multilateral trade agreements. Re-writing the Farm Bill is another top item, as the

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

2002 Farm Bill will expire on September 30, 2007. Congress must also consider the Peru and Colombia Free Trade Agreements (FTAs) upon receipt of the Administration's implementing legislation. These issues will certainly take precedence over the recently-introduced trade bills.

President Bush Calls on Congress to Renew TPA

In his January 31, 2007, "State of the Economy" address in New York, President George Bush called on Congress to extend Presidential Trade Promotion Authority (TPA), which is set to expire on June 30, 2007. President Bush stated that the most promising opportunity to expand fair trade is by concluding World Trade Organization's (WTO) Doha Round, but that TPA provides the only way for the United States to complete a Doha agreement and other free trade agreements (FTAs). President Bush noted that U.S. trading partners consider TPA essential for the success of multilateral and bilateral trade agreements. He urged Congress "to reject protectionism . . . and keep [the U.S.] economy open to the tremendous opportunities that the world has to offer" by extending TPA.

Reaction to the President's TPA request was mixed. House Ways and Means Committee Chairman Charles Rangel (D-NY) criticized the President for "lecturing" Congress on TPA rather than reaching out to Democrats who want to work with him. Chairman Rangel added that the President "missed a golden opportunity to truly work with Congress toward solution," and that "many of the issues he discussed are traditionally partisan issues and will not lead to bipartisan solutions without strong leadership on his part." Senate Finance Committee Chairman Max Baucus (D-MT) voiced his support for TPA renewal but added that the Bush Administration must be prepared to deal with labor and environmental protection, "tougher" trade law enforcement, and assistance for U.S. workers if it expects to Congress to extend TPA. House Ways and Means Committee Ranking Member Jim McCrery (R-LA) noted that FTAs implemented since TPA took effect have reduced the U.S. trade deficit by $5.5 billion, and that TPA renewal could remove more trade barriers and further decrease the trade deficit. Senate Agriculture Committee Ranking Member Charles Grassley (R-IA) stated that Democratic leadership in the House of Representatives is considering TPA extension and opined that without TPA extension, U.S. trading partners would abandon the Doha Round negotiations. United States Trade Representative (USTR) Susan Schwab was encouraged by the President's request and by the reaction on Capitol Hill. She opined that extending TPA is necessary to completing the Doha Round.

The business community also backed President Bush's request. National Association of Manufacturers (NAM) President John Engler opined that TPA is key to negotiating international trade agreements" and stated that other nations will not negotiate with the United States without assurances that any agreement

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

will be subject to an up or down vote (*i.e.*, a vote without amendment) in Congress, as TPA dictates. He urged Congress to fulfill President Bush's request to extend TPA. The National Foreign Trade Council (NFTC) issued a press release in which it noted that WTO Members are committed to achieving a breakthrough on the Doha Round, and that TPA renewal is critical to the Round's ultimate success. The U.S. Chamber of Commerce welcomed the President's remarks and stated in a press release that TPA is critical to keeping the benefits of trade flowing. American Federation of Labor- Congress of Industrial Organizations (AFL-CIO) President John Sweeney, however, stated that extending TPA would "hamstring Congress's ability to fix [the United States'] broken trade policy," and that "misguided trade policies have exacerbated stagnant wages and growing job insecurity" in the United States.

A group of Senators have already indicated that they will not support TPA extension. In a January 30, 2007 letter to President Bush, Sens. Byron Dorgan (D-ND), Robert Byrd (D-WV), Barbara Boxer (D-CA), Russ Feingold (D-WI), Debbie Stabenow (D-MI), Sherrod Brown (D-OH), and Bernie Sanders (I-VT) stated that over the last twenty years, TPA "has been used to push through Congress a series of trade agreements lacking strong, enforceable mechanisms to protect [U.S] labor and environmental standards, as well as economic and national security interests." The Senators opined that because of these agreements, the United States has suffered an increased trade deficit and "millions of American jobs lost to unfair global competition." The Senators stated that the Bush Administration has been unwilling to address these problems during the six years it has held the "fast track" authority that TPA mandates, and has instead focused on negotiating "flawed agreements like the Central American Free Trade Agreement (CAFTA)." The Senators called for a "new trade policy that demands fair and reciprocal trade," and they thus will oppose any TPA renewal efforts.

The President's TPA request will remain a top item in Congress' trade agenda. President Bush requested a simple extension of TPA, but Congress is unlikely to grant this request. However, Congress could extend TPA to allow for the successful conclusion of the WTO Doha Round or FTA negotiations with South Korea and Malaysia if USTR can prove to Congress that there is significant and tangible progress in those negotiations, and that more time is needed beyond the March 30 deadline to complete the agreements. Thus far, the stalled Doha Round and the slow-moving Korea and Malaysia FTA talks have probably not demonstrated sufficient progress to convince Congress that a limited TPA extension is warranted. Regarding a broader TPA extension, the Bush Administration will have little choice but to work with the Democratic leadership in Congress on labor and environmental additions to TPA in order to have even a chance of such an extension. However, given the broad opposition to any form of TPA and

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

the chance that Democratic demands could eviscerate much of the trade liberalization that current agreements provide, wholesale TPA extension appears unlikely.

Senators Urge DOC to Apply CVDs to Chinese Imports

In a January 22, 2007 letter to the Department of Commerce (DOC), a bipartisan group of Senators opined that the United States countervailing duty (CVD) law should be applied to imports from non-market economies (NMEs), including goods from China. In the letter, the Senators stated that they firmly believe U.S. CVD law should be applied to China, and that DOC possesses the legal authority to make that application. The Senators noted that the CVD statute does not limit the application of CVDs to only market economies, and that Senators in previous congressional sessions had introduced legislation that would have applied the CVD law to NMEs. The Senators also alleged that "non-application of the CVD law to China means that non-market economies like China, which subsidize their industries most heavily and which cause the greatest injury to U.S. manufacturers and workers, are exempt from the reach of American anti-subsidy remedies."

Sens. Evan Bayh (D-IN) and Susan Collins (R-ME) organized the letter, which also includes signatures from Senate Finance Committee Chairman Sen. Max Baucus (D-MT) and Sens. Olympia Snowe (R-ME), Richard Durbin (D-IL), and 17 other Senators. In the 109th congressional session, Sens. Bayh and Collins introduced legislation that would have allowed the application of U.S. CVD law to Chinese imports.

DOC has long held that it will not apply CVDs to imports from NMEs. In 1986, the Court of Appeals for the Federal Circuit affirmed that DOC has the discretion not to apply CVD law to NMEs (Georgetown Steel Corp. v. United States, 801 F.2d 1308, Fed. Cir. 1986), and DOC has affirmed its rule as recently as 2002. However, on November 20, 2006, DOC initiated a CVD investigation of coated free sheet (CFS) paper imports from China (DOC Case No. A-570-906). This is the first CVD investigation involving China since 1991, when DOC initiated investigations on lugnuts and ceiling fans. DOC terminated both those investigations before issuing a final determination after determining that there was no basis for applying the CVD law to the Chinese industry in question. On December 15, 2006, DOC requested public comment regarding the application of CVDs to NME imports. (71 Fed. Reg. 75507) That request produced over forty sets of comments, which DOC is currently reviewing. The Chinese government is also challenging DOC's initiation of the CVD investigation of CFS paper imports at the Court of International Trade (CIT), asking the court to halt the proceedings. The Senators' letter likely comes in response to both of these actions. Application of the CVD law against China would be a provocative act by the Bush Administration. When China acceded to the World Trade Organization (WTO)(, it agreed to

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

allow WTO Members for 15 years to apply NME methodologies in antidumping investigations but at that time, the United States had an established practice of not applying the CVD law to NMEs.

Members of Democratic Freshmen Class Request Involvement in Trade Policy- Making

In a January 17, 2007 letter to House Ways and Means Committee Chairman Charles Rangel (D-NY), 39 members of the Democratic freshmen class expressed their desire to be more involved in trade policy-making. The Congressional members stated that the Democrats' success in the November 2006 elections was partially attributed to their "ability to take a vocal stand against the Administration's misguided trade agenda, and offer voters real, meaningful alternatives to the job-killing agreements" such as the Dominican Republic – Central American Free Trade Agreement (DR-CAFTA). The members also state that the Bush Administration's "misguided U.S. trade policies" have caused the loss of millions of U.S. manufacturing jobs and that the Democrats will work to reverse the "troubling results" of the Administration's trade agreements and trade policies.

Reps. Betty Sutton (OH), Paul Hodes (NH), Heath Shuler (NC), Patrick Murphy (PA), Joe Courtney (CT), Bruce Braley (IA), Michael Arcuri (NY), Jason Altmire (PA), John Yarmuth (KY), Phil Hare (IL), Steve Cohen (TN), Albo Sires (NJ), Christopher Carney (PA), Zachary T. Space (OH), Carol Shea-Porter (NH), Jerry McNerney (CA), Mazie Hirono (HI), Christopher Murphy (CT), Ed Perlmutter (CO), Brad Ellsworth (IN), Joe Donnelly (IN), Nancy Boyda (KS), Charles Wilson (OH), David Loebsack (IA), Ciro Rodriguez (TX), Keith Ellison (MN), Nick Lampson (TX), John Hall (NY), Steve Kagen (WI), Harry Mitchell (AZ), Ron Klein (FL), Hank Johnson (CA), John Sarbanes (MD), Peter Welch (VT), Tim Walz (MN), Yvette Clark (NY), Kathy Castor (FL), Joe Sestak (PA), and Jim Jordan (OH) signed the letter.

The letter is likely more of an attempt by freshmen Democrats to demonstrate to their constituents their stance on trade rather than a realistic attempt to inject themselves into Congressional trade-policy making. As freshmen Congressional members, these Representatives have little influence on major Congressional trade initiatives among other Congressional issues. It is unlikely that Chairman Rangel will make a concerted effort to involve these freshmen Representatives in House trade policy decisions.

DOC Further Delays Change to Zeroing Methodology to Allow Congressional Review

On January 23, 2007, the U.S. Department of Commerce (DOC) announced a second delay in the effective date of the change to its "zeroing" methodology. After further consultations with Congress, DOC will delay the change until February 22, 2007 to provide Congress with adequate time for review. On

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

December 27, 2006, DOC announced that the change in calculating the weighted average dumping margin was to take effect on January 16, 2007. On January 16, DOC announced a delay in the “zeroing” modification to January 23, 2007 but did not provide reasons for the delay.

DOC’s January 23 announcement likely comes in response to Congressional pressure on the issue. In a January 19, 2007 letter to U.S. Secretary of Commerce Carlos Gutierrez and United States Trade Representative (USTR) Susan Schwab, House Ways and Means Committee Chair Charles Rangel (D-NY) and Senate Finance Committee Chair Max Baucus (D-MT) requested that the Bush Administration postpone implementation of recent WTO DSB rulings on DOC’s use of “zeroing” in antidumping investigations. The members of Congress urged the Administration to give Congress more time to consider the issue before DOC implements the ”zeroing” change. Chairman Baucus stated that Congress needs time to ensure that the United States efforts to comply with the WTO rulings do not weaken America’s trade remedies, and Chairman Rangel added that the Administration should not “rush to judgment on an issue that could hurt American workers, farmers and businesses.” Both Members also urged the Administration to consult closely with Congress on the issue. USTR and DOC must balance these concerns and the more general Congressional calls for “strong” trade remedy laws with the United States’ obligations at the WTO to alter the current zeroing practice. Choosing to delay implementation of DOC’s zeroing change, while eventually modifying the practice, might allow the Administration to assuage Congressional concerns and still comply with the adverse WTO rulings. Failure to comply could result in WTO Members’ imposition of millions of dollars in retaliatory tariffs against U.S. exports.

USTR Appoints New General Counsel

On January 18, 2007, United States Trade Representative (USTR) Susan Schwab announced the appointment of Warren Maruyama as the Office of the USTR’s General Counsel. Maruyama replaces James Mendenhall, who served in the position since 2005. Maruyama is currently an international trade partner at the law firm of Hogan & Hartson and served as Associate General Counsel at USTR in the 1980s. USTR Schwab stated that Maruyama is “a USTR veteran with tremendous insight and experience” who “has a fine reputation as one who understands both the broad issues in global trade and the nuts and bolts of making and implementing policy.”

Maruyama has been with Hogan & Hartson LLP since 1993. From 1989 to 1993, he served in the White House Office of Policy Development where he helped implement President George H.W. Bush's international trade and investment initiatives, such as the World Trade Organization’s (WTO) Uruguay Round, Super 301, and the North American Free Trade Agreement (NAFTA). Prior to working in the

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

White House, Maruyama served as USTR Associate General Counsel and worked on subsidies and countervailing duty negotiations in the Uruguay Round, the Trade and Tariff Act of 1984, and the Omnibus Trade and Competitiveness Act of 1988. Maruyama is a graduate of Carleton College and Cornell University Law School.

United States Places Chile on 2007 Priority Watch List

On January 5, 2007, the United States Representative (USTR) elevated Chile from its "Watch List" to its "Priority Watch List" as a result of its "Out-of-Cycle Review" (OCR) announced in USTR's April 2006 Special 301 Report on the adequacy and effectiveness of U.S. trading partners' intellectual property rights (IPR) protection.[7] According to USTR, Chile "is overdue in enacting legislation to implement certain intellectual property-related obligations reflected in the U.S.-Chile Free Trade Agreement (FTA). "

The 2006 Special 301 Report raised concerns on three main areas in Chile's IPR enforcement and protection: (i) trademark counterfeiting, (ii) copyright piracy, and (iii) issuance of marketing approvals for "unauthorized copies" of patent-infringing pharmaceutical products. USTR urged Chile to increase its efforts to meet the standards established under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement), the U.S.-Chile FTA, and other international trade agreements. USTR also noted that Chile has not fully implemented legislation to comply with FTA obligations regarding patent term adjustment and recommended modifications to its IPR legislation to conform with its bilateral commitments. The U.S.-Chile FTA provisions on IPR require Chile to bring its IP laws and enforcement practices in full compliance with international standards regarding U.S. patent protection, trademarks, and undisclosed information.

On August 10 -11, 2006, USTR officials visited Chile to evaluate its progress with respect to meeting its commitments under the U.S.-Chile FTA and the TRIPs agreement. Throughout 2005, Chile implemented two sets of amendments to its copyright laws to conform with the U.S.-Chile FTA. In December 2005, the Chilean Congress modified its Intellectual Property Law (*Ley de Propiedad Intelectual*) and in April 2006, the Chilean government proposed further amendments to this law to make its IPR laws fully compliant with the U.S.-Chile FTA and the Chile-European Free Trade Association (EFTA) FTA.

---

[7] On April 28, 2006, USTR released its "Special 301" annual report, which identifies governments that "need to take stronger actions to combat piracy and counterfeiting." As part of its Special 301 duties, USTR has created a Priority Watch List. Placement of a trading partner on this list indicates that particular IPR-related problems – including protection, enforcement and market access – exist in that country. Countries that have been placed on the Priority Watch List are "the focus of increased bilateral attention concerning the problem areas."

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

In June 2006, the U.S. Pharmaceutical Research and Manufacturers of America (PhRMA) and the U.S. Chamber of Commerce in Chile recommended Chile to take further steps to strengthen IPR protection, especially with regards to generic drugs. PhRMA's main complaint was that Chile authorized the marketing and distribution of patent-infringing pharmaceutical products and did not provide an effective mechanism through which patent holders could seek to prevent marketing in those cases. Pressured by pharmaceutical companies' concerns and reports that Chile continues to rely on undisclosed test and other data submitted in connection with the approval of new pharmaceutical products in approving generic drug versions, USTR decided to place Chile on its Priority Watch List. USTR also expressed concerns regarding Chile's eroding commitment to enforce and prosecute IP theft of copyrighted goods.

USTR's decision to place Chile on its Priority Watch list arises from Chile's "unwillingness" to address the concerns expressed by patent holders. Chilean analysts, however, attribute Chile's failure to enforce IPR laws to the lack of surveillance by Chile's Department of Intellectual Property (*Departamento de Propiedad Industrial* –DPI), which oversees pharmaceutical companies that commercialize generic drugs. Analysts also argue that the length of time DPI takes to issue patents in Chile constitutes another problem that needs to be addressed. At present, there are no provisions under Chile's IP Law to protect patent applicants while they await for their patent to be issued. Chile's government has already sent legislation to Congress to make further amendments to its IP Law to extend the term of protection for patents if patent applications before DPI suffer unjustifiable delays. The law would also provide protection for undisclosed information. The Chilean Congress has already approved this law and it is expected to be enacted in the coming months.

However, if Chile disregards USTR's recommendations to improve IP protection or fails to take immediate action to implement IP laws to be fully compliant with the IP provisions established under the U.S.-Chile FTA, the United States could consider temporarily suspending some of the benefits it grants to Chile through the FTA , justifying its action through Chile's failure to abide to its bilateral commitments. In the past, several countries that have been placed in USTR's Priority Watch List (e.g., Argentina, Ukraine and Brazil) have faced retaliatory measures for their refusal to modify their IPR laws. For now, though, it appears that U.S.-Chile trade relations will not be harmed by USTR's decision to place the latter in its Priority Watch List. Chile must act promptly to address U.S. concerns in order to resolve a long-standing irritant that could potentially affect other areas of its relationship with the United States, including trade.

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

Rep. English Introduces "CHINA" Act on China's Alleged Currency Manipulation

On January 9, 2007, Representative Phil English (R-PA) introduced the "Currency Harmonization Initiative through Neutralizing Action (CHINA) Act of 2007" (H.R. 321), a bill that would impose automatic tariffs on Chinese goods if the U.S. Treasury Department finds that China is manipulating its currency to gain a trade advantage. Specifically, the bill requires the Secretary of the Treasury, within 60 days of the bill's enactment, to analyze and report to Congress whether China is manipulating its currency within the meaning of Article XV of the General Agreement on Tariffs and Trade (GATT) 1994. Article XV of GATT 1994 prohibits WTO Members "from, by exchange rate action, frustrating the intent of the provisions of that Agreement, or, by trade action, the intent of the provisions of the Articles of Agreement of the International Monetary Fund (IMF)." The IMF prohibits the use of currency manipulation as a method of gaining unfair trade advantage. If Treasury determines that China's exchange rate policy conforms to the definition of currency manipulation, within thirty days after reporting manipulation to Congress, the Secretary of the Treasury is required to levy tariffs equal to the percentage of manipulation found, in addition to any existing tariffs on Chinese imports.

The bill also requires the Secretary of the Treasury to report to Congress on a yearly basis from the date of enactment and urges the Administration, without weakening or impairing existing trade remedy laws, "to clarify and improve World Trade Organization (WTO) rules on currency manipulation to reflect modern day monetary policy not envisioned at the time current rules were adopted in 1947."

Congressional sources report that Rep. English introduced the measure after Treasury again refused to label China a "currency manipulator." On December 19, 2006, Treasury released its semiannual "Report to Congress on International Economic and Exchange Rate Policies" in which it did not label China or any other U.S. trading partner a "currency manipulator." The report criticizes China's exchange rate policy as distorting the domestic economy and impeding international economic imbalance adjustments. However, it acknowledges that China's exchange rate policy has improved in the past several months through changes to the Chinese financial sector that allow for greater transparency and liberalization of the country's exchange rate practices.

This is not the first time that Rep. English has introduced legislation targeting China's currency practices. In 2003, Rep. English, along with Reps. Robin Hayes (R-NC) and Thomas Reynolds (R-NY), introduced similar legislation. The House Ways and Means Committee and Senate Finance Committee will likely hold hearings on the subject of China's currency manipulation in which they will discuss H.R. 321. It is

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

unclear what stance the Democratic majority will take in the 110th Congress with regard to China's currency, but it is likely that several members of Congress in leadership positions – notably Senate Finance Chair Max Baucus (D-MT) – will work to address the currency issue. Several bills were introduced in the 109th Congress addressing China's currency, notably the Schumer-Graham legislation that would have imposed a tariff of 27.5 percent on Chinese imports. These bills never arrived to the House and Senate floors for a vote because Sens. Baucus and Grassley promised to look at other legislative solutions to the currency issue. They will likely examine these other options in 2007.

DOC Announces Change in "Zeroing" Methodology

On December 27, 2006, the Department of Commerce (DOC) published a Federal Register notice (71 Fed. Reg. 77,722) in which it announced that it will change its "zeroing" methodology in antidumping (AD) investigations. As of January 16, 2007, when calculating the weighted-average dumping margin in antidumping investigations, the DOC will no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. On January 16, 2007, however, DOC issued another Federal Register notice (72 Fed. Reg. 1704) in which it announced that the effective date of the change to its "zeroing" methodology would be delayed until January 23, 2007. DOC did not provide any reasons for the delay.

"Zeroing" refers to the practice whereby an investigating authority discounts "negative" dumping margins to zero. Where the export price is lower than the price in the exporting country, this creates a positive dumping margin. When zeroing is used, investigating authorities do not account for negative dumping margins, i.e., when the export price of the product is higher than the price in the exporting country (the normal value). The use of zeroing does not permit negative dumping margins to offset positive dumping margins, as the investigating authority will not average positive and negative dumping margins together. Instead, negative dumping margins are assigned a value of zero. In turn, the denial of offsets for non-dumped comparisons can have the effect of inflating the overall average dumping margin or can even lead to the imposition or maintenance of anti-dumping duties which, in the absence of zeroing, would not otherwise apply.

According to DOC's notice, DOC usually divides export transactions into groups by model and level of trade when it applies the average-to-average methodology during an investigation. After dividing the export transactions, DOC then compares an average of the export prices or constructed export price of the transactions within one averaging group to the weighted-average of normal values of such sales. Prior to the change in its "zeroing" methodology, DOC did not permit the results of averaging groups for which the

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

weighted-average export price or constructed export price exceeds the normal value to offset the results of averaging groups for which the weighted-average export price or constructed export price is less than the weighted-average normal value when aggregating the results of the averaging groups to determine the weighted-average dumping margin. In other words, DOC assigned a zero value for all average groups in which the export price (or constructed export price) was greater than normal value, rather than include the "negative" margins in its calculation of the aggregate weighted average dumping margin. Through the modification, DOC will no longer make average-to-average comparisons without providing offsets for non-dumped comparisons. It will thus consider average groups' negative margins in calculating the aggregate weight average dumping margin. The modification will take effect on January 16, 2007.

On December 14, the Office of the United States Trade Representative (USTR) notified Congress of a DOC's proposed methodological change. The change to the "zeroing" methodology was necessary to implement the recommendations and rulings of the WTO Dispute Settlement Body (DSB) in connection with the U.S.-EU dispute US - Zeroing (EC) (DS294). USTR's announcement followed a mandated consultative process with Congress pursuant to Section 123(g) of the Uruguay Round Agreements Act (URAA).

DOC's notice indicates that its new policy will apply to all current and future AD investigations, including the AD investigation of Lime Juice from Argentina and Mexico, and the AD investigation of Coated Free Sheet Paper from China, Korea and Indonesia. However, DOC's notice provides that the policy will apply only to those AD cases in which DOC uses a weighted-average-to-weighted-average comparison to calculate the dumping margin. Thus, DOC's methodological change has not limited its ability to zero (i.e., not to provide an offset for negative margins) if it determines that use of a transaction-to-transaction comparison is appropriate. DOC did specify, however, that the weighted-average-to-weighted-average comparison remains the preferred methodology for original investigations. Finally, DOC announced that its methodological change does not affect its practice in annual administrative reviews or other AD proceedings.

Ways and Means and Finance Committees Finalize Rosters

The House Ways and Means and Senate Finance Committees have finalized their committee rosters for the 110th Congress. Subcommittee assignments have not yet been made. Committee members for the Ways and Means and Finance Committees are as follows:

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

House Ways and Means Committee

Democrats	Republicans
Charles Rangel (NY) – Chairman	Jim McCrery (LA) – Ranking Member
Allyson Y. Schwartz (PA)	Dave Camp (MI)
Artur Davis (AL)	Devin Nunes (CA)
Bill Pascrell Jr. (NJ)	Eric Cantor (VA)
Chris Van Hollen (MD)	Jerry Weller (Il)
Earl Blumenauer (OR)	Jim Ramstad (MN)
Earl Pomeroy (ND)	John Linder (GA)
Fortney Pete Stark (CA)	Jon Porter (NV)
Jim McDermott (WA)	Kenny C. Hulshof (MO)
John Larson (CT)	Kevin Brady (TX)
John Lewis (GA)	Pat Tiberi (OH)
John Tanner (TN)	Paul Ryan (WI)
Joseph Crowley (NY)	Phil English (PA)
Kendrick Meek (FL)	Ron Lewis (KY)
Lloyd Doggett (TX)	Sam Johnson (TX)
Michael McNulty (NY)	Thomas Reynolds (NY)
Mike Thompson (CA)	Wally Herger (CA)
Rahm Emanuel (Il)	
Richard Neal (MA)	
Ron Kind (WI)	
Sander Levin (MI)	
Shelley Berkley (NV)	
Stephanie Tubbs Jones (OH)	
Xavier Becerra (CA)	

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

Senate Finance Committee

Democrats	Republicans
Max Baucus (MT) – Chairman	Charles Grassley (IA) – Ranking Member
Blanche Lincoln (AR)	Craig Thomas (WY)
Charles Schumer (NY)	Gordon Smith (OR)
Debbie Stabenow (MI)	Jim Bunning (KY)
Jeff Bingaman (NM)	Jon Kyl (AZ)
John Kerry (MA)	Mike Crapo (ID)
John Rockefeller IV (WV)	Olympia Snowe (ME)
Ken Salazar (CO)	Orrin Hatch (UT)
Kent Conrad (ND)	Pat Roberts (KS)
Maria Cantwell (WA)	Trent Lott (MS)
Ron Wyden (OR)	

On January 17, 2007, the House Ways and Means Committee finalized its Trade Subcommittee membership. Committee members for the Ways and Means Trade Subcommittee include (ranked by seniority):

Democrats	Republicans
Sander Levin (MI) – Chairman	Wally Herger (CA) – Ranking Member
John Tanner (TN)	Jerry Weller (IL)
John Larson (CT)	Ron Lewis (KY)
Earl Blumenauer (OR)	Kevin Brady (TX)
Bill Pascrell Jr. (NJ)	Thomas Reynolds (NY)
Shelley Berkley (NV)	Kenny C. Hulshof (MO)
Joseph Crowley (NY)	
Chris Van Hollen (MD)	
Kendrick Meek (FL)	

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

Following the announcement, Chairman Levin stated that the subcommittee would work to find a new approach to trade, restore a bipartisan foundation for trade, and conduct appropriate oversight of the Executive branch. He stated that the subcommittee would focus on several key areas in the trade debate including trade as a tool for economic growth, international competition and equity, and the enforcement of trade rules.

President Bush Signs Trade-Related Proclamations on Vietnam PNTR and HTS Modifications

On December 29, 2006, President Bush signed two trade-related proclamations. The first proclamation formally extends Permanent Normal Trade Relations (PNTR) status to Vietnam from the United States and extends nondiscriminatory treatment to Vietnamese products. The extension of PNTR comes just before Vietnam's formal accession to the World Trade Organization (WTO), scheduled for January 11, 2007. On December 9, 2006, Congress passed a final package of tax and trade measures that included PNTR for Vietnam, which eliminates the annual evaluation of Vietnam's emigration practices under "Jackson-Vanik." The legislation also establishes a subsidies enforcement mechanism to ensure that the Bush Administration responds if Vietnam grants any prohibited subsidies to its textile and apparel industry in violation of its WTO accession terms.

President Bush also signed a proclamation modifying the Harmonized Tariff Schedule of the United States (HTSUS) as recommended by the International Trade Commission (ITC). The proclamation implements changes in tariff schedules already agreed to in various Free Trade Agreements (FTAS), including the North American Free Trade Agreement (NAFTA) and FTAs with Singapore and Jordan. In December 2006, the ITC released a report titled "Modifications to the Harmonized Tariff Schedule of the United States Under Section 1206 of the Omnibus Trade and Competitiveness Act of 1988" (ITC Publication 3898) in which it listed changes to the HTSUS that will be implemented on February 1, 2007. The World Customs Organization (WCO) recommended the changes, and the ITC as well as the Office of the United States Trade Representative (USTR) investigated and reviewed the proposed changes. The report lists several hundred amendments affecting 83 HTSUS chapters and 240 HTSUS headings. There are several changes that affect industrial and high-technology products classified in chapters 84, 85, 87, and 90.

The report is available on the ITC's website at: http://hotdocs.usitc.gov/docs/tata/hts/Pub3898.pdf.

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

Free Trade Agreements

Free Trade Agreements Highlights

Congress on FTAs: Rep. Lantos Calls for Suspension of Malaysia FTA Talks Over Iran Deal; Sen. Grassley Urges Congress to Move Forward on Peru and Colombia Agreements

In a January 31, 2007 letter to United States Trade Representative (USTR) Susan Schwab, Chairman of the House Committee on Foreign Affairs Tom Lantos (D-CA) requested that U.S. trade negotiators suspend Free Trade Agreement (FTA) negotiations with Malaysia until the Government of Malaysia cancels a liquefied natural gas (LNG) deal with Iran. According to Lantos, recent press reports have indicated that the National Iranian Oil Co. (NIOC) signed a $16 billion LNG deal with Malaysia's SKS Ventures on the development of the offshore Golshan and Ferdows gas fields in the Persian Gulf. Lantos states that the deal "is a disturbing development that requires swift action by the Administration." He adds that the fundamental purpose of any FTA is to "strengthen cooperation consistent with broader U.S. strategic goals" and thus believes that the United States has a right to expect Malaysia to join the United States in condemning the LNG deal. Lantos also calls for USTR to ensure that the LNG deal is nullified before USTR proceeds with further FTA negotiations.

The United States and Malaysia are in the midst of FTA negotiations. U.S. and Malaysian officials met in San Francisco during the week of January 8, 2007 for the fourth round of formal bilateral FTA negotiations and discussed a number of issues including agriculture, customs, the environment, labor, government procurement, services, telecoms and trade in goods. According to USTR, the round's overall progress exceeded expectations and U.S. officials indicated that negotiators are "within striking distance" of concluding an agreement. USTR hopes to complete negotiations by March 31, 2007, the Trade Promotion Authority (TPA) deadline by which USTR must notify Congress of the President's intention to sign an FTA. The United States and Malaysia plan to convene a fifth round of formal negotiations in Kuala Lumpur in February 2007 but have not announced specific dates.

Separately, Senate Finance Committee Ranking Member Charles Grassley (R-IA) made floor statements in Congress on January 30, 2007 related to the Peru, Colombia and Panama FTAs. Grassley urged Congress to quickly pass the Peru and Colombia FTAs and to approve the Panama agreement once the United States signs it. The Peru and Colombia FTAs were completed in 2006, but the Administration has yet to submit either agreement's implementing legislation to Congress for its consideration. The United

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

States has not signed the recently-completed Panama FTA. Grassley stated that by implementing trade agreements with Peru, Colombia, and Panama, Congress will level the playing field for U.S. farmers, manufacturers, and service providers. He noted that the agreements will boost U.S. exports and help create jobs. He opined that the United States must implement the respective trade agreements as soon as possible so that the United States does not "turn its back" on its allies in the region. According to Grassley, not approving the agreements will send a signal to Latin America that the United States does not care about opening markets and enhancing the rule of law in the region.

Grassley also addressed labor and environmental issues. Democrats in Congress have suggested renegotiating the labor and environmental provisions of the three agreements so that they "adhere to international standards." Grassley opined that renegotiating these provisions is a bad idea because the agreements' respective provisions on labor and the environment are strong.

Given the new Democratic majority and the impending expiry of TPA, FTAs will serve as a contentious topic of debate within the 110th Congress. FTA negotiations with Malaysia are progressing, but negotiators have indicated that disagreement remains on several key issues such as government procurement and financial services. Chairman Lantos' letter and the Malaysia-Iran deal will do little to bring the two sides closer and could delay negotiations if Congress chooses to scrutinize the FTA negotiations more closely.

Democratic warnings that labor and environmental provisions could be renegotiated have significantly delayed the completed Peru and Colombia FTAs. Should Congress decide to re-explore these provisions in both agreements and also the Panama FTA, implementation and passage of the agreements will become less certain. Any further delays will make Peruvian and Colombian officials nervous because Peru and Colombia's trade preferences to the United States under the Andean Trade Promotion and Drug Eradication Act (ATPDEA) are set to expire in mid-2007 unless Congress passes the agreements' respective implementing legislation. Failure to address these issues, however, could result in Democratic opposition that could ruin the agreements' chances for Congressional passage.

Democrats Begin Focus on Labor, Environment with Peru, Colombia and Panama FTAs

On January 17, 2007, Deputy United States Trade Representative (USTR) John Veroneau stated that the United States is willing to renegotiate the labor chapters of the Peru, Colombia and Panama Free Trade Agreements (FTAs) to ensure their passage in Congress. According to Veroneau, USTR has already informed the three countries that the United States likely will have to make "substantive changes" to the

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

FTA texts prior to each agreement's respective Congressional consideration. USTR will attempt to modify the signed Peru and Colombia FTAs' respective labor commitments through "some binding instrument," such as a side letter, that would make it unnecessary to reopen the text of the agreement. He noted that changes to the Panama FTA's labor provisions are more likely because the United States has not yet signed the agreement.

Veroneau stated that the Administration has informally discussed the labor issue with House Ways and Means Committee Chairman Charles Rangel (D-NY) and other Democrats and added that more discussions would transpire over the next several weeks. He opined that the Administration needs to "find a new template for [labor provisions] in the [Peru, Colombia and Panama] agreements," and that the Administration hopes to get Congressional approval of the three FTAs before Presidential Trade Promotion Authority (TPA) expires on June 30, 2007.

On January 18, 2007, Chairman Rangel and Ways and Means Ranking Member Jim McCrery (R-LA) met with USTR Susan Schwab to discuss how to ensure passage of the three Latin American FTAs; USTR sources did not release details on the labor discussions. During the meeting, Rangel also discussed the issues that the Ways and Means Committee would make a priority in the 110th Congress. Those issues were outlined in a January 17 letter from the Ways and Means Committee to the House Government Reform and House Administration Committees and include TPA renewal, the Korea and Malaysia FTA negotiations, China, U.S. preference programs such as the Generalized System of Preferences (GSP), and the World Trade Organization (WTO) Doha negotiations.

Separately, in a January 17, 2007 letter to USTR Schwab, eleven Democrat members of the Ways and Means Committee urged the Administration the renegotiate the environmental provisions of the Peru and Colombia FTAs. The Democrats stated that Peru and Colombia should adhere to international environmental standards, and that the FTAs should include more stringent environmental provisions for the two countries. The letter uses illegal logging as an example and states that Peru and Colombia trade in illegally logged timber, which destroys forests and creates a competitive disadvantage for U.S. timber producers. Reps. Jim McDermott (WA), Lloyd Doggett (TX), Pete Stark (CA), John Lewis (GA), Xavier Beccera (CA), Mike Thompson (CA), Earl Blumenauer (OR), Bill Pascrell, Jr. (NJ), Chris Van Hollen (MD), Allison Schwartz (PA), and John Larson (CT) signed the letter.

With the 110th Congress only days old, Democrats are already fulfilling their promise to revisit labor and environmental provisions in FTAs. The Peru, Colombia and Panama FTAs are likely to be the first to experience the new Democrat-controlled Congress' focus on these issues. Although it is likely that the Korea and Malaysia FTAs will undergo the same scrutiny, those nations lack similar labor concerns and

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

enjoy greater Congressional support. They thus might enjoy an easier time through Congress. As noted, the Peru and Colombia FTAs have already been signed, and as such, it is likely that the Administration will work with Congress and these countries to create side letters of agreement to the FTA that strengthen labor and possibly environmental provisions. However, many Congressional Democrats might dismiss side letters as insufficient, citing NAFTA side letters on the same issues that many Democrats (and U.S. labor unions) claim have done little to improve Mexican labor and environmental standards. Unlike the Peru and Colombia Agreements, the unsigned Panama agreement could see more comprehensive labor and environment negotiations and the insertion of new provisions into the actual FTA text. Such text would create more binding obligations for the parties than any side letters.

Democrats' desire to see strengthened labor and environmental provisions likely will delay Congressional consideration of the Latin American agreements. TPA's June 30 expiry, however, can only affect the unsigned Panama FTA, as the potential for renegotiation could stretch the agreement's signing beyond TPA's March 31 deadline to sign any outstanding agreement for it to be subject to TPA's strictures. On the other hand, because the Peru and Colombia FTAs have already been completed and signed, the current TPA's Congressional voting rules (up or down vote, without amendment) and timelines will apply to these FTAs, regardless of when or if their labor and environment side letters are completed. The only remaining step for these agreements is the Bush Administration's submission of each FTA's formal implementing legislation to Congress for a final vote. However, if Democrats are unsatisfied with the Administration's efforts to revise the agreements' labor and environmental standards, the FTAs will likely fail in Congress. Thus, Democrats' concerns have clouded when the Administration will deliver the agreements' implementing bills to Congress. Most sources believe, however, that the Administration is likely to do so in the first half of 2007.

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

Multilateral

WTO Appellate Body Rules that U.S. "Zeroing" Violates U.S. WTO Obligations

Summary

The WTO Appellate Body has found that the practice of "zeroing" violates U.S. obligations under the WTO Anti-Dumping Agreement. In Fall 2006, a WTO Panel decided that certain types of zeroing - including zeroing during administrative reviews - were permitted under the Agreement. The Appellate Body reversed these findings by the Panel, ruling that all of the types of U.S. zeroing challenged by Japan were WTO-inconsistent. The decision of the Appellate Body in *United States – Measures Relating to Zeroing and Sunset Reviews* (DS322) was released on January 9, 2007.

Analysis

I. Background: Three types of zeroing

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

Article 2.4 of the WTO Anti-Dumping Agreement provides that a "fair comparison" shall be made between the export price and the normal value. Article 2.4.2 sets out certain rules for the calculation of a dumping margin (*i.e.*, the magnitude or amount of the dumping). It sets out three basic methodologies for investigating authorities to calculate the margin of dumping, at least in an original investigation. The methods enumerated in Article 2.4.2 are:

- "Weighted average-to-weighted average": The dumping margin for an exporter is calculated by model (an individual type of the product under investigation), by comparing the weighted price of export transactions with the weighted-average normal value of the model. The results of the

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

comparisons for all models are then aggregated and weighted, *i.e.*, expressed as a percentage of imports.

- "Transaction-to-transaction": Prices are compared on a transaction-specific basis.
- "Weighted average-to-transaction": An individual export transaction is compared to the weighted average normal value. Article 2.4.2 limits the application of this method to so-called "targeted dumping", *i.e.*, if the authorities "find a pattern of export prices which differ significantly among different purchasers, regions or time periods."

In the present dispute, Japan made claims against what it called "model zeroing" and "simple zeroing" by the United States.

By "model zeroing", Japan identified the method under which the USDOC makes average-to-average comparisons of export price and normal value within individual "averaging groups" established on the basis of physical characteristics, or models. It then zeros, or disregards, any negative dumping margins when it aggregates the results of these multiple comparisons to calculate a weighted average margin of dumping. USDOC used model zeroing in the original investigation in this case.

By "simple zeroing", Japan referenced the method by which USDOC determines a weighted average margin of dumping based on average-to-transaction or transaction-to-transaction comparisons between export price and normal value. The Department zeros negative dumping margins when it aggregates the results of these multiple comparisons. USDOC used simple zeroing in the administrative and sunset reviews contested in this dispute.

II. Zeroing a "measure" for purposes of WTO dispute settlement

The United States did not dispute that USDOC consistently calculates margins of dumping by using zeroing. However, it argued that zeroing was not a "measure" that could be challenged as such in WTO dispute settlement.

The Panel recalled the 2004 ruling of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* that, in principle, any act or omission attributable to a WTO Member could be a "measure" for the purposes of WTO dispute settlement. In line with this Appellate Body ruling, the Panel stated that "we consider that the notion of rules or norms of general and prospective application connotes an essential condition in order for an act to be challengeable as such." Applying this principle to the impugned measures, the Panel found that the zeroing procedures could be considered a rule or norm of general and prospective application, and therefore constituted a measure that could be challenged as such.

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

The Appellate Body upheld this finding, ruling that the Panel had sufficient evidence before it to conclude that regardless of the different comparison methodologies, U.S. zeroing procedures "do not correspond to separate rules or norms, but simply reflect different manifestations of a single rule or norm." Therefore, U.S. zeroing procedures constituted a "measure" that could be challenged as such in WTO dispute settlement. Consequently, the Appellate Body rejected the U.S. argument that the Panel failed to make an "objective assessment of the matter" under Article 11 of the Dispute Settlement Understanding.

III. Appellate Body enumerates "fundamental disciplines" of anti-dumping proceedings

Before turning to the specific issues on appeal in this case, the Appellate Body set out what it considered to be "fundamental disciplines" that apply to all anti-dumping proceedings, including original investigations, periodic reviews, and new shipper reviews:

…it is evident from the design and architecture of the Anti-Dumping Agreement that: (a) the concepts of "dumping" and "margins of dumping" pertain to a "product" and to an exporter or foreign producer; (b) "dumping" and "dumping margins" must be determined in respect of each known exporter or foreign producer examined; (c) anti-dumping duties can be levied only if dumped imports cause or threaten to cause material injury to the domestic industry producing like products; and (d) anti-dumping duties can be levied only in an amount not exceeding the margin of dumping established for each exporter or foreign producer. These concepts are interlinked. They do not vary with the methodologies followed for a determination made under the various provisions of the *Anti-Dumping Agreement*.

The Appellate Body stressed that "dumping" and "margins of dumping" can be found to exist only in relation to the product as defined by the investigating authority, and "cannot be found to exist for only a type, model, or category of that product." The Appellate Body concluded that when an investigating authority calculates a margin of dumping on the basis of multiple comparisons of normal value and export price, "the results of such intermediate comparisons are not, in themselves, margins of dumping." Instead, they are merely "inputs" that are to be aggregated in order to establish the dumping margin of the product under investigation.

IV. "Transaction-to-transaction" zeroing breaches the Agreement

The Appellate Body ruled that the United States acted inconsistently with Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement by maintaining zeroing procedures when calculating margins of dumping on the basis of transaction-to-transaction comparisons in original investigations.

The Panel had concluded that model zeroing during investigations, involving weighted average-to-weighted average comparisons, was WTO-inconsistent, a finding that was not appealed by the

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

United States. However, the Panel found that zeroing under the other two methodologies (transaction-to-transaction and weighted average-to-transaction) was not prohibited by the Agreement. The Panel reasoned that "the interpretation that zeroing is prohibited under all circumstances is more anomalous and in conflict with the requirement of effective treaty interpretation than the interpretation that zeroing is prohibited only under the first comparison method." In the view of the Panel, prohibiting zeroing under all methods was "manifestly absurd and unreasonable."

The Appellate Body overruled the Panel. It said that it had "no reason to depart" from the reasoning of the Appellate Body decision in *US – Softwood Lumber V (Article 21.5 - Canada)*, that zeroing under the transaction-to-transaction methodology was also WTO-inconsistent. In that dispute, the Appellate Body found that it would be "illogical to interpret the transaction-to-transaction comparison methodology in a manner that would lead to results that are systematically different from those obtained under the weighted average-to-weighted average methodology."

In the present case, the Appellate Body stressed that, "the *Anti-Dumping Agreement* does not contemplate the determination of dumping or a margin of dumping at the model- or transaction-specific level. The *Anti-Dumping Agreement* contemplates the aggregation of all the comparisons made at the transaction-specific level in order to establish an individual margin of dumping for each exporter or foreign producer examined." The Appellate Body rejected the view that "dumping may be determined at the level of individual transactions, and that multiple comparison results are margins of dumping in themselves." It similarly disagreed with the Panel that the terms "product" and "products" could "apply to individual transactions and do not require an examination of export transactions at an aggregate level."

The Appellate Body concluded that, in establishing "margins of dumping" under the transaction-to-transaction methodology, an investigating authority must "aggregate the results of all the transaction-specific comparisons and cannot disregard the results of comparisons in which export prices are above normal value." It therefore found the United States to be in breach of Article 2.4.2.

On a related issue, the Panel had upheld simple zeroing under the "fair comparison" provision of Article 2.4 on the basis that the "somewhat indeterminate standard of fairness underlying the 'fair comparison' requirement may not be interpreted in a manner that renders the more specific provisions of the AD Agreement completely inoperative." It added that "the 'fair comparison' requirement cannot be interpreted to create a general prohibition of zeroing."

The Appellate Body reversed the Panel on this point as well. It recalled its ruling in *US – Softwood Lumber V (Article 21.5 - Canada)* that the use of transaction-to-transaction zeroing "artificially inflates the

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

magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely", with the result that such a methodology "cannot be described as impartial, even-handed, or unbiased." Therefore, it affirmed that zeroing in transaction-to-transaction comparisons in original investigations was inconsistent with the fair comparison requirement of Article 2.4.

V. Zeroing prohibited in periodic reviews and new shipper reviews

Article 9.3 of the Anti-Dumping Agreement provides that the amount of the anti-dumping duty "shall not exceed the margin of dumping" as established under Article 2.

The Panel had rejected Japan's argument that zeroing was inconsistent with Article 9.3. The Panel pointed to what it regarded as "important considerations specific to Article 9" that supported its view that there was "no general requirement to determine dumping and margins of dumping for the product as a whole, which, by itself or in conjunction with a requirement to establish margins of dumping for exporters or foreign producers, entails a general prohibition of zeroing." The Panel stated that "the obligation to pay an anti-dumping duty is incurred on an *importer*- and *import*-specific basis", in contrast with the determination of dumping margin on an exporter-specific basis in an original investigation [original emphasis]. The Panel reasoned that if certain export sales to a given importer were made at prices above normal value, those sales did not need to be taken into account in determining the margin of dumping for the relevant exporter.

The Appellate Body overturned the Panel on this issue. It began by noting that the Panel's approach was premised on the erroneous assumption that the terms "dumping" or "margins of dumping" could have different meanings under different provisions of the Agreement. It also affirmed its ruling in *US – Zeroing (EC)* that "the margin of dumping established for an exporter or foreign producer operates as a *ceiling* for the total amount of anti-dumping duties that can be levied on the entries of the subject product (from that exporter) covered by the duty assessment proceeding [original emphasis]." Moreover, this same "ceiling" applied equally to prospective and retrospective duty assessment systems.

The Appellate Body also found that zeroing in "new shipper" reviews was WTO-inconsistent. It affirmed that under the Anti-Dumping Agreement, dumping determinations related to the exporter, and both "dumping" and "margins of dumping" related to the pricing behaviour of the exporter. It stated that negative comparison results could not be disregarded when calculating a margin of dumping for an exporter. For these reasons, it ruled that the use of zeroing in establishing individual margins of dumping for new shippers breached Articles Articles 9.3 and 9.5 of the Anti-Dumping Agreement and GATT Article

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

VI:2. It also found that zeroing in the context of periodic reviews and new shipper reviews violated the fair comparison requirement of Article 2.4.

The Appellate Body further ruled that by maintaining zeroing procedures in the periodic reviews at issue, the United States breached Articles 2.4 and 9.3 of the Anti-Dumping Agreement and GATT Article VI:2. It reasoned that as the results of the comparisons were "systematically disregarded" by the USDOC, the "amount of anti-dumping duties collected in the periodic reviews at issue exceeded the exporters' proper margins of dumping."

VI. Zeroing inconsistent with the "sunset review" disciplines of the Agreement

The Appellate Body affirmed its earlier rulings on the scope of the "sunset review" disciplines of Article 11.3 of the Anti-Dumping Agreement. It stressed that a sunset review determination under Article 11.3 must be made on the basis of a "rigorous examination" leading to "reasoned and adequate conclusions" supported by "positive evidence" and a "sufficient factual basis." The Appellate Body ruled that as the likelihood-of-dumping determinations in the sunset reviews at issue in this appeal relied on margins of dumping calculated on the basis of zeroing, they were inconsistent with Article 11.3.

Outlook

This is the most definitive Appellate Body decision to date on the WTO-inconsistency of zeroing. In the present case, the Appellate Body ruled against the use of zeroing in original investigations, in periodic reviews, in new shipper reviews, and in sunset reviews.

The Appellate Body first ruled against zeroing in its 2001 decision in EC – Bed Linen. However, there has been a significant amount of additional litigation on this issue over the past few years, in part due to continued – and ultimately unsuccessful - U.S. attempts to argue that the prior jurisprudence should apply as narrowly as possible.

In our September 21, 2006 report on the decision of the Panel in the current dispute, we expressed the view that the Panel report was "highly vulnerable to being reversed on appeal" and that it seemed "unlikely that the Panel's rulings in favour of U.S. zeroing will withstand appellate scrutiny." Indeed, the Panel's ruling did not withstand appellate scrutiny, as each of the Panel's findings in favour of U.S. zeroing was overturned.

There have already been partial changes to the zeroing practices of the U.S. Department of Commerce (USDOC). On December 27, 2006, the USDOC published a notice in the Federal Register that it would no longer make average–to-average comparisons in investigations without providing offsets for

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

non–dumped comparisons, a change required to implement the 2006 WTO rulings in US – Zeroing (EC). These changes will take effect on January 16, 2007. However, the proposed change does not apply to other types of zeroing methodologies, and does not apply at the review stage.

In any event, yesterday's Appellate Body decision confirms that zeroing is not permitted either in original investigations or in any kind of reviews. The comprehensive and authoritative nature of this ruling should dispel any remaining doubts about the WTO-inconsistency of this longstanding and controversial practice.

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

WTO Panel Rules that U.S. "Zeroing" in Ecuador Shrimp Case Not Consistent with AD Agreement

Summary

A World Trade Organization (WTO) panel has ruled that the United States violated its obligations under the Anti-Dumping Agreement when it used the practice of "zeroing" in an anti-dumping investigation of shrimp from Ecuador. The United States agreed in advance, and in writing, not to contest any of the claims made against it – an unprecedented development in WTO dispute settlement. The decision of the panel in *United States – Anti-Dumping Measure on Shrimp from Ecuador* (DS335) was released on January 30, 2007. We review below the panel decision.

Analysis

VII. Background

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

The present WTO dispute was an "as applied" challenge by Ecuador to the use of zeroing by the U.S. Department of Commerce (USDOC) in three anti-dumping measures on frozen warmwater shrimp. The USDOC calculated margins of dumping for the three largest producers/exporters of shrimp, which the Department selected as mandatory respondents in the investigation. It also applied an "all others" rate. Ecuador argued that the use by the USDOC of zeroing in calculating both the margins for the three respondents and the "all others" rate violated Article 2.4.2 of the Anti-Dumping Agreement, which sets out certain rules for the calculation of dumping margins.

VIII. U.S.-Ecuador Procedural Agreement: U.S. agrees not to contest the claims

During the organizational meeting of the Panel at the start of the litigation, the United States and Ecuador informed the Panel that they had reached a procedural agreement with respect to the conduct of the proceedings. This agreement provided, among other things, that:

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

- The United States would "not contest Ecuador's claim" that the measures identified in the panel request were inconsistent with Article 2.4.2 on the grounds stated in the Appellate Body Report in *US – Softwood Lumber V*. [In its 2004 decision in *US – Softwood Lumber V*, the Appellate Body found that the use of so-called "weighted average-to-weighted average zeroing violated Article 2.4.2.]

- Ecuador would not request that the Panel make a suggestion, pursuant to Dispute Settlement Understanding (DSU) Article 19.1, on "ways in which the United States could implement the panel's recommendations."

- Provided that the Panel's rulings were "limited to a finding that one or more of the challenged measures is inconsistent with Article 2.4.2, first sentence", the Parties agreed in advance that the "reasonable period of time for bringing each such measure into conformity with the Anti-Dumping Agreement will be six months", starting on the date of adoption of the Report by the Dispute Settlement Body (DSB).

- The United States would use Section 129(b) of the Uruguay Round Agreements Act (the statutory mechanism through which the United States implements such adverse WTO rulings) to recalculate certain dumping margins and to "issue a new determination in order to render the anti-dumping measures on shrimp from Ecuador not inconsistent with the findings of the panel." The agreement added that if any such recalculation resulted in a change in the cash deposit rate for the U.S. anti-dumping measures, "the new cash deposit rate will have prospective effect only…."

- The Parties indicated their intention to "cooperate to enable the panel to circulate its report as quickly as possible…." To this end, the Parties also agreed "to share with each other drafts of their respective written submissions prior to submitting them to the panel and to take all reasonably available steps to expedite the proceeding."

IX. Panel applies "a consistent line of Appellate Body Reports"

The Panel stated that it found itself in the unusual situation whereby the responding party, the United States, "does not contest any of the complaining party's claims." At the same time, the litigants had not reached a mutually agreed solution on the resolution of the dispute. In the light of this, the Panel said that it had no choice but to make an "objective assessment of the matter" under DSU Article 11, including whether Ecuador had established a violation.

Ecuador had advanced a number of arguments with respect to the use of zeroing by the USDOC in the investigation, and why this practice was inconsistent with Article 2.4.2. The United States, in turn, indicated that it "acknowledge[d] the accuracy of Ecuador's description of Commerce's use of 'zeroing' in

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

calculating the dumping margins…and the 'all others' rate in this investigation." The United States also recognized that "a measure using a similar calculation was the subject of the US – Softwood Lumber V report, and that the DSB ruled that the measure was inconsistent with Article 2.4.2, first sentence because of that calculation."

The Panel found that Ecuador had established that the USDOC used "zeroing" in the investigation, and that the zeroing methodology was similar to that used in US – Softwood Lumber V. Applying this decision to the case at hand, the Panel found that the United States had similarly breached Article 2.4.2 in the investigation on shrimp from Ecuador. The Panel added that, "there is now a consistent line of Appellate Body Reports, from EC – Bed Linen to US – Zeroing (EC) that holds that 'zeroing' in the context of the weighted average-to-weighted average methodology in original investigations (first methodology in the first sentence of Article 2.4.2) is inconsistent with Article 2.4.2."

Outlook

This marks the first time that a defending party in a WTO proceeding agreed with a complainant not to contest any of the issues in dispute. This is a surprising development, particularly given the tenacity with which the United States usually defends itself in WTO dispute settlement. However, in the present case, a series of authoritative Appellate Body rulings on the WTO-inconsistency of the zeroing methodology left the United States without any credible arguments to make in response to Ecuador's claims.

The United States and Ecuador entered into a formal written agreement on the conduct of the dispute, which was provided to the Panel during the organizational meeting. The United States agreed that it would "not contest Ecuador's claim" that the USDOC breached the Anti-Dumping Agreement by using zeroing during the investigation at issue. The United States also agreed in advance to a compliance period of six months to implement the Panel's expected rulings. Ecuador, in turn, waived its right to ask the Panel to make a suggestion on implementation, a provision that reflects the longstanding U.S. aversion to WTO Panels calling for revocation of anti-dumping orders. Instead, the United States agreed to recalculate the dumping margins in a manner consistent with the Panel's rulings. The parties also agreed to cooperate in the Panel proceedings, going so far as to "share with each other drafts of their respective written submissions prior to submitting them to the panel" – a provision that must surely be unique in the annals of adversarial dispute settlement.

Thus, the outcome of the Panel proceedings were preordained by the parties. The parties essentially resolved the dispute, although they were careful to stress to the Panel that they had not reached a formal "mutually agreed solution", and so no notification to that effect would be made to the WTO DSB.

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

Presumably, Ecuador wished to preserve all of its future rights (including retaliation rights) in the event that the United States failed to comply with the current Panel rulings. No implementation or retaliation rights would accrue from a mutually agreed solution.

The outcome of this dispute is also the strongest signal yet the USDOC intends to comply with prior Appellate Body rulings on zeroing.

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

Multilateral Highlights

WTO Director-General Announces Formal Restart to Doha Negotiations

On January 31, 2007, World Trade Organization (WTO) Director-General Pascal Lamy announced the formal restart of Doha Round multilateral trade negotiations and stated that WTO Members are in "full negotiating mode" that will result in intense discussions during February and early March. Lamy made the announcement at an informal heads of delegation meeting and stated that the chairs of the various Doha negotiating groups will begin formal negotiations over the next several weeks. Lamy noted that WTO Members have increased dialogue over the past few weeks – including at the World Economic Forum in Davos, Switzerland January 27-28 – and are exploring possible areas of convergence. This dialogue led to a formal restart of the multilateral negotiations that have been stalled since July 2006. According to Lamy, there was possible movement in certain negotiations, such as agriculture, where “new discussion" has occurred on product-specific limits for trade-distorting domestic support and product-specific disciplines.

Lamy’s announcement comes after a month of speculation on the Doha Round’s fate. After Lamy suspended talks in July 2006, a formal restart to the multilateral negotiations was expected in January 2007 after WTO Members reexamined their negotiating proposals. Lamy, however, did not restart the talks in January, leading many to believe that the Doha Round would remain stalled indefinitely. Positive signals from behind-the-scenes meetings and the Davos gathering may have been sufficient to restart the round, but several WTO Members’ reaction to Lamy’s announcement could temper his enthusiasm. The United States, for example, announced its commitment to continue Doha negotiations in earnest but warned that WTO Members still have many issues to overcome – including agriculture and non-agricultural market access (NAMA), the two most contentious issues of the round – and a short period of time in which to do so. EU Trade Commissioner Peter Mandelson echoed the U.S. commitment and stated that the EU was willing to further explore moving the round forward but that doing so would require more commitments from other WTO Members. Neither the United States nor the EU appears to be willing to move first in the restarted negotiations, a familiar theme throughout the Doha talks. These events indicate that although Davos and the other side discussions produced enough forward momentum to restart the talks, they might prove insufficient to produce significant and tangible results before the mid-2007 expiration of U.S. Trade Promotion Authority (TPA) halt talks once again.

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

Davos Ends with Cautious Optimism for WTO's Doha Round, but No Tangible Results

From January 27-28, 2007, trade ministers from key Members of the World Trade Organization (WTO) gathered in Davos, Switzerland for the annual World Economic Forum and agreed to intensify multilateral negotiations as part of the Doha Round. United States Trade Representative (USTR) Susan Schwab, European Trade Commissioner Peter Mandelson, and trade ministers from Brazil, India, and other WTO Members also agreed to increase bilateral meetings over the next several weeks and to focus on agriculture – one of the Round's two most contentious issues. Schwab, Mandelson and European Agriculture Commissioner Mariann Fischer Boel held their first bilateral agriculture discussion on January 28, but the details of that meeting were not released. Schwab also met with Indian Commerce Minister Kamal Nath in Davos, and U.S. Chief Agriculture Negotiator Richard Crowder will meet with Indian Chief Agriculture Negotiator Rahul Khullar in London on January 31 to continue discussions on farm trade.

Despite the optimistic rhetoric, neither the United States nor the EU put forward a new agriculture proposal in Davos. EU Trade Commissioner Mandelson, however, opined that the "emerging landing zone" for a Doha agriculture deal would match the Group of Twenty (G-20) developing nations' proposal that calls for a 54 percent overall average cut in the farm tariffs. U.S. officials reiterated that the United States is willing to improve its October 2005 agriculture offer and is ready to "get within close reach" of the G-20 proposal. However, the United States and the EU continue to demand that the other side move before they make any new offer..

USTR officials noted that the majority of agriculture discussions in Davos and earlier behind-the-scenes meetings focused on: (i) the number of farm tariff lines that can be declared "sensitive"; (ii) tariff cuts applicable to sensitive products; and (iii) tariff-rate quotas (TRQs).

On the services side, trade ministers are urging a comprehensive approach in the Doha negotiations in which parallel progress is made in the services, agriculture, and non-agricultural market access (NAMA) negotiations. The ministers also agreed that they must resume services negotiations, which Members halted until the stalled agriculture and NAMA talks resume. WTO Members will meet in Geneva between January 29 and February 2 to continue services discussions and will also negotiate on market access in areas such as financial services and telecommunications, among others. WTO Chairman of the Services Negotiations Fernando de Mateo, however, does not expect to issue any new timetable for the submission of revised services offers but does expect to receive a signal from WTO Members "very soon" on when to proceed with new offers.

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

Trade ministers at Davos were cautiously optimistic about the Doha Round's prospects. Swiss Economics Minister Doris Leuthard noted that trade and agriculture ministers from the attending WTO Member countries are urging for a "quick resumption of full-scale activity" in the various Doha negotiating groups. Brazilian Foreign Minister Celso Amorim opined that "some sort of breakthrough" should be achieved by the end of March or the beginning of April. Commissioner Mandelson stated that he was more confident that WTO Members could reach a breakthrough very soon but added that WTO Members are "not yet at the finishing line." USTR Schwab stated that the United States would like to see an agreement by March or April but added WTO Members must work within a realistic timeframe to assure the completion of such an agreement. She also dismissed suggestions from Commissioner Mandelson that a growing consensus was emerging for a deal around the G-20 agriculture proposal and opined that WTO Members do not yet know what an appropriate "landing zone" is in terms of a final agriculture deal. WTO Director-General Pascal Lamy stated that trade officials did not focus on specific numbers for cutting tariffs and reducing subsidies while in Davos, but instead reached a common understanding on the current state of the Doha Round and began working on possible next steps for moving forward.

EU, Australia, Argentina and Brazil Join Canada in WTO Consultation Requests on U.S. Corn Subsidies

On January 22, 2007, the European Union, Australia, Argentina and Brazil joined Canada in a World Trade Organization (WTO) complaint against the United States over U.S. subsidies to domestic corn producers. The five countries requested consultations with the United States; WTO rules mandate a 90-day consultation period for the parties to discuss the issue in an attempt to reach an amicable solution. Should the consultations not result in an agreement, the complainant WTO Members can request that the WTO Dispute Settlement Body (DSB) form a panel to rule on the matter.

Canada initially requested consultations on U.S. corn subsidies on January 8, claiming that the U.S. government pays approximately $9 billion annually in export credit guarantees and other subsidies to U.S. corn producers. Canada alleges that this system of support unfairly and illegally deflates international corn prices, thereby injuring Canadian corn producers. The other WTO Members that joined the complaint express similar opinions. In joining Canada's complaint, Brazil's ambassador to the WTO Clodoaldo Hugueney stated that any WTO Member's large subsidy program concerns Brazil because Brazil is a major agriculture exporter.

Officials from the Office of the United States Trade Representative (USTR) declined to comment on the Members' request to join Canada's complaint but did state that Canada's allegations are surprising given

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

that corn prices have increased significantly in both the United States and in Canada, and that U.S. corn exports to Canada have declined in the last year.

The request for consultations comes at a delicate time. Trade officials from WTO Member countries are attempting to formally restart the deadlocked Doha Round of multilateral trade negotiations and to make significant progress towards a final agreement before Spring 2007. U.S. officials have also begun the process of re-writing the Farm Bill, which will dictate U.S. agricultural policy for the next five to ten years. The current 2002 Farm Bill expires September 30, 2007. The Members' request for consultations indicates that they have little faith in the Doha Round's prospects or the United States' ability to unilaterally curb domestic farm subsidies without a Doha agreement. Indeed, many Congressional Members and the U.S. farm lobby have already called for a new Farm Bill that does not significantly lower domestic supports. Should Doha falter and Congress fail to lower farm subsidies, the Canadian complaint will likely result in a formal Panel dispute, and other WTO cases against U.S. farm subsidies could follow suit.

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