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Japan External Trade Organization
WTO and Regional Trade Agreements Monthly Report

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WTO Appellate Body Releases 2007 Annual Report

On January 30, 2008, the World Trade Organization (WTO) Appellate Body (AB) released its "Annual Report for 2007." The 2007 Annual Report summarizes the activities of the WTO AB in 2007. We present below highlights of the 2007 report. The AB's "Annual Report for 2007" can be found at: http://www.wto.org/english/tratop_e/dispu_e/ab_annual_report07_e.doc.

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United States

United States Highlights

Congress Approves Legislation Extending ATPA Through December 31, 2008

On February 28, 2008, the Senate unanimously approved by voice vote a bill that would extend the expiring Andean Trade Preference Act (ATPA) to December 31, 2008 (H.R. 5264). The House of Representatives had approved H.R. 5264 on February 27, 2008 under suspension of rules, under which a two-thirds majority is required for the bill's passage. The ATPA was scheduled to expire on February 29, 2008.

On February 14, 2008, the House Ways and Means Committee approved H.R. 5264 by voice vote. House Ways and Means Committee Chairman Charles Rangel (D-NY) introduced H.R. 5264 on February 8, 2008. In its original form, H.R. 5264 would have extended three expiring US trade preference programs. As noted, the ATPA was scheduled to expire on February 29, 2008, certain benefits under the Caribbean Basin Initiative (CBI) are scheduled to expire on September 30, 2008, and the Generalized System of Preferences (GSP) is scheduled to expire on December 31, 2008. H.R. 5264 would have extended all three preference programs to September 30, 2010. The bill in its original form also addressed certain textile provisions of the African Growth and Opportunity Act (AGOA) and the competitive need limitation (CNL) waiver provisions under the GSP program. During the February 14 Ways and Means Committee hearing, however, Chairman Rangel submitted an amendment in the nature of a substitute to H.R. 5264. The amendment removed all references of the CBI, GSP and AGOA programs in the original H.R. 5264, and only extended the ATPA to December 31, 2008 (as opposed to September 30, 2010).

Reaction to Congressional passage of H.R. 5264 was mostly positive, although Administration officials and members of Congress linked the 10-month ATPA extension to passage of the pending US-Colombia Free Trade Agreement (FTA). United States Trade Representative (USTR) Susan Schwab stated that passage of H.R. 5264 allows for extra time to obtain support for the US-Colombia FTA as well as additional time for Peru to implement the recently approved US-Peru FTA. Secretary of Commerce Carlos Gutierrez also lauded passage of H.R. 5264 but opined that the United States should move away

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from "one-way trade preferences to a permanent full reciprocal partnership" by approving the US-Colombia FTA. Ways and Means Ranking Member Jim McCrery (R-LA) stated that enacting the US-Colombia FTA would provide greater benefits to the United States than the trade preferences under the ATPA. Trade Subcommittee Ranking Member Wally Herger (R-CA) opined that the 10-month ATPA extension was not a substitute for passage of the US-Colombia FTA and he called on members of Congress to approve the agreement once the Bush Administration submits implementing legislation to Congress.

House Subcommittee on Trade Requests Written Comments on Miscellaneous Tariff and Duty Suspension Bills; Comments Due April 2008

On February 25, 2008, House Ways and Means Trade Subcommittee Chairman Sander Levin (D-MI) and Ranking Member Wally Herger (R-CA) announced that the Subcommittee is requesting written comments for the record from all parties interested in miscellaneous duty suspension proposals and corrections to US trade laws. The deadline for the public to submit written comments is April 10, 2008.

On November 1, 2007, Chairman Levin and Ranking Member Herger requested that all Members who planned to introduce tariff legislation or miscellaneous corrections to the trade laws do so by December 14, 2007. Chairman Levin and Ranking Member Herger are now requesting public comment on these bills and are requesting budget scoring estimates from the Congressional Budget Office (CBO). After the comment period, the Subcommittee will review all comments and determine which bills should be included in a miscellaneous tariff bill (MTB) package. The Subcommittee will consider the extent to which the bills create a revenue loss, operate retroactively, attract controversy, or are not administrable. A list of the House bills under consideration is available on the Ways and Means Committee's website at: http://waysandmeans.house.gov/media/pdf/MTBfull.html.

As noted, the deadline for public comments is April 10, 2008. Any interested party wishing to submit written comments for the record must follow the instructions as provided for on the Ways and Means Committee on its webpage: http://waysandmeans.house.gov/submissions.aspx.

AEI Panel Discusses Sovereign Wealth Funds, Implications for US National Security

On February 25, 2008, the American Enterprise Institute (AEI) hosted a panel discussion on sovereign wealth funds (SWFs) and their implications on US national security. Panelists discussed the fundamental issues raised by SWF activities and investments in the United States, and whether SWFs should adhere

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to a standard set of "best practices." Panelists included: (i) Edwin Truman, senior fellow at the Peterson Institute for International Economics and former Assistant Secretary of the Treasury for International Affairs; (ii) Randal Quarles, managing director of the Carlyle Group and former Under Secretary of the Treasury; (iii) Patrick Mulloy, member of the US-China Economic and Security Review Commission; and (iv) Eric Altbach, vice president for economic and trade affairs at the National Bureau of Asian Research. Desmond Lachman, resident fellow at AEI, served as the panel's moderator.

- **Edwin Truman** stated that "we live in a world full of risks and in my opinion, SWFs are not on that list of risks." According to Truman, the recent shift in focus to SWF investments is a result of Truman suggested that the formulation of these best practices must occur at the multilateral level (as opposed to the unilateral level), and that all SWFs should agree to a set of principles and standards that governs their activities.
- **Randal Quarles** agreed with Truman's views and opined that SWFs do not pose a large risk to US national security. Quarles stated that SWFs "are not a new phenomenon" and that SWF investments represent "only a moderate amount" of total global investment (i.e., about USD 3 trillion in proportion to USD 190 trillion of total global investment, according to Quarles). He also stated that SWFs have no history of irresponsible or disruptive behavior. According to Quarles, the current worries over SWFs stem from general economic insecurity as opposed to concerns over specific SWF investments and activities. He opined that national security concerns with SWFs can be addressed through less severe measures than controlling or limiting investment. According to Quarles, current US investment controls "succinctly and efficiently control foreign ownership." He noted that this "limited foreign control should be more than enough to address national security concerns."
- **Patrick Mulloy** stated that the United States is experiencing "a current account deficit of approximately USD 100 billion annually." According to Mulloy, the United States should closely monitor SWF activities and investments because of the political and national security implications of foreign government-funded investments. Mulloy opined that "people concerned with SWFtwo trends: (i) the rapid growth of SWFs and (ii) the re-distribution of wealth from private to public hands (i.e., to governments). Truman also noted that the rebalancing of wealth from industrialized countries to newly-wealthy countries has led many to shift focus to SWF investments. Truman stated that there exists a general "weak understanding" of SWFs, which in turn has led to several weak arguments as to why the United States should closely monitor and perhaps limit SWF investments. Truman opined that there is a weak link between SWF activities

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and US national security. He did state, however, that SWFs should agree upon a common set of best practices that would ensure more transparency and accountability. activities should not be labeled 'protectionists.'" He also opined that SWFs should agree to a set of best practices vis-à-vis a multilateral institution such as the International Monetary Fund (IMF) or the Organization for Economic Cooperation and Development (OECD). According to Mulloy, these best practices "can then be put into law" which could then serve to allay concerns regarding SWF investments.

- **Eric Altbach** stated that the United States must closely look at the role of states in SWFs and the presence of SWFs in the global economy. According to Altbach, the United States must strike a delicate balance between examining the role of states in SWFs and continuing to attract foreign investment into the United States. He opined that the anxiety over the general state of the global economy has translated into a focus on SWF investments, and he warned that unilateral protectionist measures could prevent the flow of future foreign investment into the United States.

The majority of the panelists seemed to agree that the recent shift in focus to SWF investments and activities stems from a general concern with the global economy. The panelists agreed that foreign investment in the United States is important and that unilateral protectionist measures limiting SWF investments may be harmful to the US economy. They also agreed that an international set of "best practices" for SWFs to follow would ensure more accountability and transparency in SWF activities.

2008 Farm Bill Debate Continues in Congress as President Threatens Veto

Members of Congress continue to debate the 2008 Farm Bill. Both the House and Senate versions of the Farm Bill are ready to move to conference, where negotiators from both chambers of Congress will attempt to reconcile differences between the two versions and present one final version to the President for his signature. The Senate has already named those Senators that will participate in the Farm Bill conference. Senate Finance Committee Chairman Max Baucus (D-MT), Senate Budget Committee Chairman Kent Conrad (D-ND), Senate Judiciary Committee Chairman Patrick Leahy (D-VT), and Sens. Blanche Lincoln (D-AR), Debbie Stabenow (D-MI), Saxby Chambliss (R-GA), Richard Lugar (R-IN), Charles Grassley (R-IA), Thad Cochran (R-MI), and Pat Roberts (R-KS) will participate in the conference. The House of Representatives has not yet named its conferees.

Meanwhile, legislators are beginning to introduce further proposals to the 2008 Farm Bill. Senate Finance Chairman Max Baucus (D-MT) has prepared a proposal to amend certain funding totals in the Senate's version of the 2008 Farm Bill now awaiting conference. Under Chairman Baucus' proposal, the

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current Senate's version of the Farm Bill would increase nutrition funding from USD 5.4 billion to USD 9 billion over 10 years, increase energy program spending from USD 1.1 billion to USD 1.5 billion over five years, and decrease conservation funding from USD 4.6 billion to USD 3.6 billion. Congressional sources stated that these suggested provisions would be funded through "non-controversial loophole closures" in tax law. Congressional sources also note that Chairman Baucus is seeking support from several of the Farm Bill's Senate conferees.

On the House side, Congressional sources have reported that Agriculture Chairman Collin Peterson (D-MN) is proposing stricter limits on payments to farmers and other cuts to subsidies for the final version of the 2008 Farm Bill. According to Congressional sources, Chairman Peterson's proposal is meant to address the Bush Administration's concerns that the final version of the Farm Bill would be "too expensive and include tax increases while not doing enough to shrink agriculture subsidies that violate international trade law." Specifically, Chairman Peterson may try to limit or deny subsidy payments to agricultural producers who make more than USD 500,000 per year. The Bush Administration is pushing for the income cap to be lowered to USD 200,000 a year, whereas the House version of the 2008 Farm Bill, as it stands, would set the cap at USD 1 million. The Senate's version contains a USD 750,000 cap. Chairman Peterson is working against a March 15 deadline when the last remaining provisions under the 2002 Farm Bill expire. Although the majority of the provisions of the 2002 Farm Bill expired on September 30, 2007, several fell under the March 15, 2008 expiry date.

The Administration, however, has indicated that it will reject a 2008 Farm Bill that does not address its concerns. On February 6, 2008, President Bush stated he would veto any version of the 2008 Farm Bill that raises taxes or fails to reform existing agriculture support programs. The Administration and members of Congress have butted heads on the Farm Bill's farm income subsidies, tax provisions and commodity support totals. Reaction to the Administration's veto threat has been negative. Chairman Harkin opined that the veto threat is "unproductive and against the bipartisan spirit that made [the 2008 Farm Bill] a reality."

Members of Congress are working against a mid to late-spring deadline in achieving a final 2008 Farm Bill. The 2002 omnibus Farm Bill (P.L. 107-171) included a wide range of program authorities, both mandatory and discretionary. The mandatory commodity support programs authorized in the 2002 Farm Bill cover the 2007 crops. As noted, although though many provisions of the 2002 Farm Bill expired on September 30, 2007, the subsidized crops harvested in calendar year 2007 are still covered by the 2002 Farm Bill. Harvest usually comes late in the calendar year for most subsidized crops but the absence of a new Farm Bill by mid-2008 poses some risk for crops harvested in 2008, especially winter wheat that is

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harvested in early summer. Most agricultural analysts, however, agree that the absence of a new Farm Bill would not begin to inconvenience the majority of US agricultural producers until late spring-early summer 2008.

If members of Congress do not complete a Farm Bill in conference before the beginning of the 2008 harvest (*i.e.*, by late spring-early summer), then the non-expiring provisions of the Agriculture Adjustment Act of 1938 and the Agriculture Act of 1949 take effect. Provisions of these permanent laws are temporarily superseded by each new Farm Bill; absent a Farm Bill, however, provisions under this permanent authority will apply. The commodity support provisions of the Agriculture Adjustment Act of 1938 and the Agriculture Act of 1949 are very different from current agriculture policy. According to the government reports, the Agriculture Adjustment Act of 1938 and the Agriculture Act of 1949 are "inconsistent with today's farming, marketing, and trade practices, as well as costly to the federal government . . . [and] Congress is unlikely to let permanent law take effect." Permanent law provides mandatory support for basic crops through non-recourse loans without the option of settling the loan obligations at posted county prices. Non-recourse loan rates could be as high as 90 percent of parity, and not less than 75 percent of parity for peanuts, 65 percent of parity for cotton, and 50 percent of parity for wheat and corn.[3] The only settlement options would be forfeiture of the commodities used as loan collateral or full repayment of the loans. Permanent law does not authorize counter-cyclical payments or decoupled direct payments. Acreage allotments and marketing quotas under the Agriculture Adjustment Act of 1938 and the Agriculture Act of 1949 could be implemented for wheat and cotton, and dairy support would be between 75 percent and 90 percent of parity. Support for rice and soybeans are not mandatory under the Agriculture Adjustment Act of 1938 and the Agriculture Act of 1949. Consequently, members of Congress have received additional pressure from agricultural producers that would not like to see the Agriculture Adjustment Act of 1938 and the Agriculture Act of 1949 take effect, and are thus working to achieve a final 2008 Farm Bill before the permanent laws take effect.

Democratic Senators Insist on Actions Addressing China Before Senate Considers Pending FTAs

In a January 30, 2008 letter to Senate Majority Leader Harry Reid (D-NV), US Senators Sherrod Brown (D-OH), Ben Cardin (D-MD), Robert Casey (D-PA), Amy Klobuchar (D-MN), Bernie Sanders (I-VT), Jon Tester (D-MT), Jim Webb (D-VA), and Sheldon Whitehouse (D-RI) urged the Senate to address issues with China before considering the three Free Trade Agreements (FTAs) pending before Congress (*i.e.*, the US-Colombia, US-Panama and US-Korea FTAs). The letter states that the freshmen Democratic

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Senators would like to offer their support for prioritizing trade legislation addressing China because they feel that "a host of difficult trade issues with China require strong action."

According to the letter, the US deficit with China accounts for about 32.5 percent of the overall US trade deficit and for November 2007, the US trade deficit with China totaled USD 237.5 billion. The letter also states that in 2007, the United States imported USD 288 billion in goods from China. The Senators highlighted China's alleged currency manipulation, subsidies program, China's trade law, product safety, and China's enforcement of intellectual property rights (IPR) in their letter. The Senators state that "these issues are hurting American competitiveness and expose American consumers to unsafe goods." According to the letter, "China is by far the leading violator of international trade rules and its actions continue to harm American workers, industry, and manufacturing."

The Senators call on China to address "the fundamental misalignment of its currency" by floating the Yuan against the dollar and the other currencies of the world. The letter states that "should China and other nations fail to do so, an appropriate remedy would treat currency misalignment as a subsidy that is countervailable under US trade law." The Senators also support provisions that would apply countervailing duties to non-market economies (NMEs) such as China, as well as increased Customs and Border Patrol surveillance of imported food and products to ensure that importers of products from China and other countries are liable for their safety and quality.

Separately, the Bush Administration has indicated that it too is looking closely at China and its trade practices. On January 31, 2008, Assistant United States Trade Representative (AUSTR) for China Affairs Timothy Stratford stated that "the serious effects from [China's] lack of market reform on the US economy are too great to not take actions such as filing cases in the World Trade Organization." AUSTR Stratford made his remarks at a conference at the Georgetown University Law Center. According to AUSTR Stratford, "where China may lack the capability to implement reforms, even though their request for patience may seem reasonable and might be granted for other countries, we cannot be very patient with China because China's size and the speed of change going on in China result in significant harm to the United States, if the problems persist." He noted that the United States remains concerned with China's "incomplete transition to a market and rules-based economy" and its poor enforcement of intellectual property right and consumer protection. AUSTR Stratford highlighted that US businesses continue to have a very difficult time obtaining a business license in China and face long delays or do not ultimately receive a license. He noted that USTR is also concerned with China's recent promotion of Chinese "national champions" under which it establishes 30 to 50 promising or strategic companies that would receive a range of government benefits, including domestic tax breaks and low-interest funding from

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state-owned banks. According to AUSTR Stratford, the United States will continue to actively engage China on these issues. The United States will also continue its bilateral dialogue with China, file WTO cases against China when necessary and rely on US trade remedy law.

Although it is unlikely that the Senate will attempt to address all of its concerns with China before considering any of the pending FTAs (as the letter urges), the Democrats' letter indicates that China will remain on Congress' radar screen in 2008. It also seems that the Administration has become more intent on addressing China-related issues, including currency and IPR enforcement. Unlike Congressional demands for immediate and unilateral action against China, however, the Administration will likely pursue a more careful route in working with China to address these issues, albeit one that signals to China that the United States is serious about concerns it has repeatedly raised. The Administration's indication that it may bring more disputes against China at the WTO could reassure members of Congress that the Administration is attempting to address Congressional concerns which in turn could serve to delay any bills that unilaterally "punish" China. It seems likely, however, that freshmen Democratic Senators – such as those who signed the January 2008 letter – will continue to strongly push Congress to address problems with China throughout the year.

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Free Trade Agreements

USTR: Passage of US-Colombia FTA "Top Priority"

Summary

On February 27, 2008, the Woodrow Wilson International Center for Scholars held a discussion with United States Trade Representative (USTR) Susan Schwab, Colombian Vice-Minister of Labor Andres Palacio, Assistant Director for International Affairs at the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) Stanley Gacek, Director of Colombia's National Labor School Jose Luciano Sanin Vasquez, and Greg Farmer, who spoke on behalf of the US-Colombian Business Partnership. Speakers offered their views on the pending US-Colombia Free Trade Agreement (FTA) and Colombia's record on labor rights.

Analysis

The Woodrow Wilson Center International Center for Scholars held a discussion on the US-Colombia FTA, which awaits consideration by the US Congress. As the keynote speaker, USTR Schwab focused on the status of pending US FTAs with Colombia, Korea, and Panama. The speakers also discussed labor issues with regards to the US-Colombia FTA.

- **USTR Schwab** reiterated that passage of the three pending FTAs with Colombia, Korea, and Panama remains a priority for the Bush Administration. Schwab stated that the US-Colombia FTA is at the top of the list in the Administration's trade agenda and that USTR officials are working closely with Members of Congress to gather support for passage of the agreement. Schwab praised Colombia's efforts to curb the level of violence and homicides against union leaders and to improve its judicial system. She stated that Colombia began efforts to tackle these issues prior to the negotiation of the FTA, a reflection of its commitment to protect labor rights and comply with international labor standards. Schwab called on the US Congress to consider the Colombian FTA "as fast as possible" to provide certainty to US investors carrying out investments in Colombia, secure permanent market access for US exports, and preserve US security in the Andean region. Schwab stressed that the Administration "would not yield in its efforts" to get the US-Colombia FTA approved and warned of the dangers if Congress objects to the agreement. Regarding a timeframe for passage, Schwab stated that approval of the US Colombia and other pending FTAs is doable within a year but that consideration could take place "as early as tomorrow."

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- **Colombian Vice-Minister of Labor Andres Palacio reviewed** the status of labor rights in Colombia. Palacio was optimistic with Colombia's overall record on labor rights, although he acknowledged that the country lags behind in labor standards by approximately six years as compared to countries with high labor standards. Palacio stated that the US-Colombia FTA must be used as an instrument to improve Colombians' standard of living and their links to the global economy. He welcomed cooperation with the AFL-CIO to promote these standards. Palacio noted that the Colombian government has asked leading members of the AFL-CIO to join the Labor Ministry's meetings with Colombian labor leaders as a way to ensure that Colombian President Uribe's government is taking action to improve labor rights in Colombia.

- **AFL-CIO Assistant Director for International Affairs Stanley Gacek** stated that "sufficient progress" on labor rights is needed prior to granting full support to the US-Colombia FTA. Gacek welcomed Colombia's efforts to curb the killing of union leaders and to increase the number of convictions of criminals conducting these assassinations. He stated, however, that violence remains in Colombia and impunity continues to prevail in Colombia's judicial system. Gacek stated that since President Uribe's first election in 2002, 470 union members have been killed in Colombia, and to date, five union members have been murdered since the beginning of 2008. Gacek also criticized Colombia's failure to provide adequate mechanisms to grant workers with free association and collective bargaining rights.

- **Director of Colombia's National Labor School Jose Luciano Sanin Vasquez** stated that the situation of Colombia's labor standards is "precarious" and far from the Uribe Administration's depiction on labor rights. Vasquez echoed Gacek's assertions on the US-Colombia FTA and stated that "free trade without labor freedom" would be catastrophic for workers in Colombia. Vazquez stated that although the number of murders of union members in Colombia has decreased in recent years, violence still prevails and there is no guarantee that these assassinations will not increase in the future primarily because it is a "historic targeted violence," which seeks to curtail unions in Colombia. Vazquez criticized President Uribe's efforts to prosecute and convict murderers of union members and stated that "more needs to be done" to ensure that the violence stops completely.

- **Greg Farmer, on behalf of the US-Colombian Business Partnership,** urged the US Congress to approve the US-Colombia FTA in order to secure permanent access to the Colombian market for US exporters and service providers. Farmer stated that it "would be absurd" not to approve the agreement because it provides predictable rules, a reliable legal framework and permanent

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access to the Colombian market. He stated that the US-Colombia FTA is not a "tough call" and that it is the responsibility of the US Congress to approve an agreement that is good for US businesses and US economic growth.

Outlook

Both Vazquez and Gacek agreed with the need to implement further reforms to Colombia's judicial system as a first step in improving the labor rights situation in Colombia. According to Colombia's National Labor School, Colombia has the highest rate of trade unionist murders in the world with over 2,500 unionists murdered since 1986, and with more than 400 occurring during President Uribe's Administration. Although most speakers, including USTR Schwab, welcomed Colombia's efforts to reduce the number of union leader murders in recent years, the country's record on labor rights remains a very contentious and divisive issue, especially among US lawmakers. Congress's recent extension of the expiring Andean Trade Preference Act (ATPA) to December 31, 2008 (H.R. 5264) signals that US lawmakers are in no rush to consider the US-Colombia FTA over the coming months. Consequently, consideration of this agreement could happen anytime during 2008, if not beyond. The prospects for approval of the US-Colombia FTA in 2008 are slim, given Congress' busy spring agenda and the shift in focus later this year to the November 2008 presidential elections. Key members of Congress have already indicated that the US-Colombia FTA may not move forward much in 2008: in a speech on February 27, 2008, House Ways and Means Committee Chairman Charles Rangel (D-NY) stated that neither the US-Panama FTA nor the US-Colombia FTA will likely advance through Congress this year. Whereas most House Democrats argue that it is necessary to present a hard line on trade issues to win the November elections and retain control of the House, others, including President Bush, see opportunity in securing market access opportunities to US exports through pending FTAs. President Uribe's government, however, is determined to convince the US Congress and US labor groups that Colombia is committed to put an end to the violence of union leaders and make improvements to its judicial system; thus it will conduct a new round of Ministers' visits with major US stakeholders in March 2008 in another attempt to garner support for passage of the US-Colombia FTA.

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Free Trade Highlights

United States, DR-CAFTA Countries Agree to Provide Costa Rica Until October 2008 to Ratify Agreement

On February 27, 2008, United States Trade Representative (USTR) Susan Schwab announced that the United States and five countries of the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA) have agreed to provide Costa Rica more time to ratify and complete the legislative and regulatory steps required to join the agreement. According to USTR Schwab's announcement, the United States, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua agreed to give Costa Rica until October 1, 2008 to ratify the DR-CAFTA. The DR-CAFTA is now in force for all signatories, except Costa Rica; Costa Rica is the sole DR-CAFTA country that has not yet ratified the agreement.

The United States, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua signed the DR-CAFTA on August 5, 2004. The United States and El Salvador put the DR-CAFTA into force on March 1, 2006. The agreement entered into force for Honduras and Nicaragua on April 1, 2006, for Guatemala on July 1, 2006, and for the Dominican Republic on March 1, 2007. The DR-CAFTA establishes a two-year period for signatory countries to join the agreement after it first takes effect. However, a country may join after the two-year deadline, but only if the countries that have already joined agree to extend the deadline. According to USTR, Costa Rica approved the DR-CAFTA in a national referendum in October 2007. Since then, the Costa Rican Congress has remained busy enacting legislation to bring Costa Rica's laws in conformity with DR-CAFTA obligations. The granted extension by DR-CAFTA partners will allow the Costa Rican Congress, the necessary time to complete its legislative and regulatory process before the DR-CAFTA can enter into force.

United States and Rwanda Sign Bilateral Investment Treaty

On February 19, 2008, the United States and Rwanda signed a Bilateral Investment Treaty (BIT). President Bush and Rwandan President Paul Kagame signed the agreement meant to afford US and Rwandan investors with legal protections including nondiscriminatory treatment and effective compensation in the event of an expropriation. The BIT will enter into force once the US Senate and the Rwandan legislature approve the treaty. Once both countries have ratified the agreement, they will exchange instruments of ratification. The BIT will enter into force shortly thereafter. The US-Rwanda BIT is the first BIT concluded between the United States and a Sub-Saharan African country since 1998; to date, the United States has five BITs in force with Sub-Saharan African countries including Cameroon, the Democratic Republic of Congo, Mozambique, the Republic of Congo, and Senegal.

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As noted, the US-Rwanda BIT will provide legal protections for US and Rwandan investors including nondiscriminatory treatment, free transfer of investment-related funds, prompt, adequate, and effective compensation in the event of an expropriation, and transparency in governance. The BIT also gives investors the right to bring investment disputes to neutral, international arbitration panels. According to USTR, the agreement will reinforce the Rwandan government's achievements in rebuilding the Rwandan economy after the 1994 genocide. According to USTR, bilateral trade flows between the United States and Rwanda increased by 40 percent in 2007, totaling nearly USD 29 million. US imports from Rwanda were valued at USD 13 million during this period, an increase of 43 percent from 2006. US exports to Rwanda totaled USD 16 million in 2007, an increase of 37 percent over 2006.

BITs have three main purposes: (i) to protect investment abroad in countries where investor rights are not already protected through existing agreements; (ii) to encourage the adoption of market-oriented domestic policies that treat private investment in an open, transparent, and non-discriminatory way; and (iii) to support the development of international law standards consistent with these objectives. USTR notes that BITs also provide investors six core benefits: (i) requiring that investors and their "covered investments" be treated as favorably as the host party treats its own investors and their investments or investors and investments from any third country (non-discrimination); (ii) establishing clear limits on the expropriation of investments and provide for payment of prompt, adequate, and effective compensation when expropriation takes place; (iii) providing for the transferability of investment-related funds into and out of a host country without delay, using a market rate of exchange; (iv) restricting the imposition of performance requirements as a condition for the establishment, acquisition, expansion, management, conduct, or operation of an investment; (v) giving covered investments the right to engage the top managerial personnel of their choice, regardless of nationality; and (vi) giving investors from each party the right to submit to international arbitration an investment dispute with the other party's government.

The completion of the BIT comes close to two years after the United States and Rwanda signed a Trade and Investment Framework Agreement (TIFA). On June 7, 2006, the United States and Rwanda signed a TIFA meant to improve trade and investment ties between the two economies. Under the TIFA, both countries created a US-Rwandan Council on Trade and Investment that addressed trade and investment issues, including trade capacity building, intellectual property rights, labor, investment, and environmental issues. According to USTR, the idea of a United States-Rwanda BIT arose out of the TIFA discussions.

The US-Rwanda BIT is indicative of USTR's strategy in sub-Saharan Africa. On June 5, 2006, USTR officials noted that the United States plans to explore new BITs and TIFAs with African countries over the next several years, but that the United States is not yet ready to initiate formal Free Trade Agreement

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(FTA) negotiations with these countries. US BITs and TIFAs typically indicate that the United States is considering future FTAs with its BIT and TIFA partners, but as USTR noted, the United States will not likely initiate formal bilateral or regional FTA negotiations with countries such as Rwanda in the near future. The current lack of Presidential Trade Promotion Authority (TPA) coupled with other issues – such as differing economic development levels between the United States and African economies, and the contentious stand-off between industrialized countries such as the United States and developing economies in the World Trade Organization (WTO) Doha Round negotiations – prevent the exploration and formal commencement of FTA negotiations in the short term. The US-Rwanda BIT, however, is indicative that the United States is keeping a close eye on countries in the region and is attempting to strengthen trade and commercial linkages with these African economies through other means until it feels that FTA discussions would be appropriate.

US and Indian Officials Discuss Doha, Possible US-India BIT Under Fifth Meeting of Trade Policy Forum

US and Indian officials met the week of February 18, 2008 under the United States-India Trade Policy Forum (TPF) to discuss US-Indian trade ties, investment and the ongoing World Trade Organization (WTO) Doha Round negotiations, among other issues. United States Trade Representative (USTR) Susan Schwab led the US delegation and Indian Minister of Commerce and Industry Kamal Nath led the Indian delegation. This was the fifth ministerial-level TPF meeting between the United States and India since both countries launched the TPF in July 2005. The last TPF meeting was held during USTR Schwab's visit to India in April 2007.

During the week, US and Indian officials discussed a broad array of issues such as licenses for opening Indian bank branches in the United States, mutual recognition of engineering standards, Indian motorcycle emission regulations, agriculture trade between the United States and India, and the Doha negotiations. Officials also reviewed progress made since the April 2007 TPF meeting. During the week, the second meeting of the US-India Private Sector Advisory Group (PSAG) to the TPF also took place. The PSAG presented a "Vision Statement" on key policy areas on which the Governments of India and the United States "could enhance their engagement and further bolster the US-India economic partnership." The PSAG's first meeting took place in New York on September 24, 2007. The "Vision Statement" identifies intermediate goals that the PSAG feels the two governments should pursue, including:

- The negotiation of a US-India Bilateral Investment Treaty (BIT);

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- The promotion of regulator cooperation on a wide range of US-Indian trade matters;
- The continued promotion of sectoral openings; and
- Increased cooperation on intellectual property enforcement and technology transfer.

Government sources note that the mood during the talks was generally positive and that both USTR Schwab and Minister Nath were actively engaged in all discussions. USTR Schwab stated that the TPF "offers an essential venue to move the [US-India economic] dialogue forward on trade matters of importance to both countries." Minister Nath noted that the two sides have been able to resolve a variety of issues and find mutually acceptable solutions through a dialogue under the TPF.

On November 12, 2005, the United States and India launched the India-United States TPF. Then-USTR Rob Portman and Minister Nath described the forum as a "hub" around which the two countries can strengthen economic ties and resolve bilateral trade issues, and as a forum that would serve as an "early warning system" for any impending trade problems and a means of open communication. The TPF also allows USTR to explore the feasibility of a Free Trade Agreement (FTA) with India before announcing formal FTA negotiations. However, given the countries' differences on the Doha Round negotiations and other contentious issues such as the Indian economy's complexity and lack of Presidential Trade Promotion Authority (TPA) in the United States, it seems unlikely that the two countries will announce formal FTA negotiations in the short-term. Instead it appears that the two countries may begin exploring the creation of a US-India BIT, as suggested by the PSAG. Many of the February TPF meetings' discussion points echoed themes highlighted by President Bush and Indian Prime Minister Manmohan Singh during President Bush's March 2006 visit to India. In a joint statement released at the time, the United States and India agreed to cooperate to ensure a successful Doha Round conclusion and to promote trade and investment relations between the two countries. USTR has not yet announced when the next meeting of the TPF will be held but in the meantime, USTR Schwab and Minister Nath will likely continue to meet under the Doha Round with other WTO Members in an effort to move the stalled negotiations forward, and under exploratory discussion for a possible US-India BIT.

Colombian Government Hopes for Congressional Passage of US-Colombia FTA

On February 8, 2008, the Inter-American Dialogue held a discussion with Colombian Foreign Affairs Minister Fernando Araujo on the prospects for passage of the US-Colombia Free Trade Agreement (FTA) and Colombia's foreign policy agenda. Minister Araujo stated that the Colombian government is seeking to provide a suitable business environment for investors through the following measures: (i) continued

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security; (ii) respect to democracy and rule of law; and (ii) reliable investment rules. In particular, the Colombian government is striving to provide security and implement a reliable legal framework on labor and environmental protection that is fully compliant with international standards.

Overall, Minister Araujo was optimistic about potential passage of the US-Colombia FTA. Minister Araujo stated that although Colombia is doing everything it can to seek support for the FTA by the US Congress, certain issues "remain unresolved" and Colombia must work further to resolve them. Minister Araujo said that Colombia has made considerable progress in improving labor conditions, tackling human rights issues and establishing rule of law. On current labor conditions in Colombia, Minister Araujo stated that observers must look beyond an "instant picture of Colombia" and see the whole picture, which shows that Colombia has made enormous progress in recent years, and more recently, in 2007, to address humanitarian and human rights concerns. Minister Araujo also stated that the US-Colombia FTA is one of Colombia's most important foreign trade policy tools to enhance cooperation with the United States on various areas beyond trade and investment. He reiterated that the FTA is beneficial for both countries: whereas Colombia would secure permanent preferential access to the US market, the United States would secure permanent access for its exports and investments in Colombia.

Minister Araujo stated that the Colombian government would continue to work closely with the House Democratic leadership and leading US labor organizations to garner support for passage of the FTA. Prospects for passage, however, remain slim because most Democrats believe that Colombia has not done enough to address the level of violence against labor leaders in the country. Although nearly one half of all Democrats in the House of Representatives supported the recently-approved US-Peru FTA, the Peruvian agreement was far less contentious than the Colombian FTA. Sources report that the Democratic leadership will not vote on the FTA until Colombia and the Administration develop a plan to determine the additional steps needed to allow for consideration of the FTA. The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) remains strongly opposed to the Colombian FTA but its leaders are holding talks with Colombian President Alvaro Uribe to address the persistent violence against trade unionists and request the strengthening of Colombia's judicial bodies to prosecute crimes against these leaders.

Meanwhile, Colombia is pushing for a limited extension of the Andean Trade Preferences and Drug Eradication Act (ATPDEA), scheduled to expire February 29, 2008. The Colombian government would like the US Congress to extend these preferences until 2009 while the US Congress debates the FTA. On February 8, 2008, House Ways and Means Committee Chairman Charles Rangel (D-NY) introduced H.R. 5264, a bill that would extend ATPDEA and other preference programs until September 30, 2010.

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Rangel's bill would extend ATPDEA for all four Andean countries (i.e., Bolivia, Colombia, Ecuador, and Peru), allow for sufficient time for implementation of the US-Peru FTA, which could take up to a year, and allow for future consideration of the US-Colombia FTA. As noted, H.R. 5264 also extends the expiring Generalized System of Preferences (GSP) program and several preferences under the Caribbean Basin Initiative (CBI) program. The inclusion of all three preference programs under one bill may prove beneficial as different members of the US Congress will likely indicate support for extension of one if not all three preference programs. H.R. 5264 makes it hard for members of Congress to "pick and choose" among the expiring preference programs which ones they wish to extend. Chairman Rangel is also a key member of Congress and his push for ATPDEA extension is likely to garner some, if not large support. Then again, 2008 is an election year and members of Congress may be hesitant to pass any new trade initiatives until a new Administration has assumed office. Members of Congress will likely debate the bill before the end of February when ATPDEA expires.

Sens. Dorgan, Brown Introduce "Trade Agreement Benchmarks and Accountability Act" on FTA Benchmarks

On February 7, 2008, Sens. Byron Dorgan (D-ND) and Sherrod Brown (D-OH) announced their "2008 trade reform agenda" which includes proposing a bill that would require benchmarks for any new US Free Trade Agreement (FTA) and an anti-sweatshop labor bill. According to Congressional sources, the "2008 trade reform agenda" also includes "defeating" the three US FTAs pending before Congress (US-Colombia, US-Panama and US-Korea FTAs). Sen. Brown has opined that "there is no real excitement about any of these three trade agreements coming from the House or Senate in either party."

The "Trade Agreement Benchmarks and Accountability Act" (S. 2611) that Sens. Dorgan and Brown have proposed would create a point of order in the Senate against legislation to implement any new FTA unless it includes benchmarks measuring the agreement's impact on US jobs, wages, foreign market access, and the extent to which labor and environmental laws are followed. Under the bill, the US International Trade Commission would assess, every five years, whether the benchmarks had been met. If the benchmarks have not been met, any member of Congress can then introduce a privileged resolution to pull the United States out of that specific FTA. The privileged resolution would be referred to the House Ways and Means and Senate Finance committees, and automatically discharged if neither Committee takes action after a set period of time. Once such resolutions reach the voting floor, they would not be subject to amendment or filibuster. Sen. Brown also indicated that he will introduce a separate bill shortly that would place a moratorium on FTAs until a bipartisan, bicameral commission is established to examine the benefits of FTAs, those already implemented and any future agreements.

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Sens. Dorgan and Brown acknowledged that they may face an uphill climb in their push to enact their legislation in 2008, but they added that the bills address concerns among many members of Congress regarding the benefits of FTAs. Sen. Dorgan stated that "when you have these kind of [trade] deficits that continue unabated, clearly something is wrong, and it does weaken our economy in the longer term." The "Trade Agreement Benchmarks and Accountability Act" has been referred to the Senate Finance Committee where it is likely to remain without movement for the next several weeks. Members of Congress are focused on other issues right now, including the 2008 Farm Bill, pending FTAs and the state of the US economy, so it is unlikely that the Senate Finance Committee will hold a hearing on S. 2611 in the short-run. The bill's introduction, however, indicates that members of Congress are re-assessing the benefits of US FTAs, a topic that will likely remain on the radar screen for 2008, especially if Presidential candidates discuss trade as the November general elections approach. The "Trade Agreement Benchmarks and Accountability Act" may not move anywhere in the short-term but it may have the indirect effect of catalyzing Congressional debate on the pros and cons of US FTAs, which in turn could affect potential passage of the US-Colombia, US-Panama and US-Korea FTAs.

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Multilateral

WTO Appellate Body Releases 2007 Annual Report

Summary

On January 30, 2008, the World Trade Organization (WTO) Appellate Body (AB) released its "Annual Report for 2007." The 2007 Annual Report summarizes the activities of the WTO AB in 2007. We present below highlights of the 2007 report.

The AB's "Annual Report for 2007" can be found at: http://www.wto.org/english/tratop_e/dispu_e/ab_annual_report07_e.doc.

Analysis

I. Composition of the AB

The current seven members of the AB are: (i) Georges Michel Abi-Saab (Egypt); (ii) Luiz Olavo Baptista (Brazil); (iii) Lilia R. Bautista (Philippines); (iv) Arumugamangalam Venkatachalam Ganesan (India); (v) Jennifer Hillman (United States) (vi) Giorgio Sarcedoti (EC/ Italy); and (vii) David Unterhalter (South Africa). Bautista and Hillman replaced Merit Janow (United States) and Yasuhei Taniguchi (Japan), whose terms of office expired on December 10, 2007.[1] Bautista and Hillman formally took office on December 17, 2007, after a WTO Selection Committee appointed them on November 27, 2007.

II. Appeals Filed in 2007

WTO Members appealed four of a possible nine Panel reports in 2007. The appealed Panel reports were: *(i) United States - Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Argentina* (DS268), (ii) *Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Products* (DS207), (iii) *Japan - Countervailing Duties on Dynamic Random Access Memories from Korea* (DS336), and (iv) *Brazil - Measures Affecting Imports of Retreaded Tyres* (DS332).[2] In addition to these four reports, the AB circulated its Recourse report on *United States -*

[1] Merit Janow informed the WTO Dispute Settlement Body (DSB) that she would not seek reappointment to a second term earlier in the year. Yasuhei Taniguchi served the maximum of two four-year terms.

[2] The five unappealed Panel reports were: (i) *United States - Anti-Dumping Measure on Shrimp from Ecuador* (DS335), (ii) *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (DS285), (iii) *Mexico - Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala* (DS331), (iv) *Korea - Anti-Dumping Duties on Imports of Certain Paper from Indonesia* (DS312), and (v) *Turkey - Measures Affecting the Importation of Rice* (DS334).

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Measures Relating to Zeroing and Sunset Reviews (DS322), which the parties to the dispute appealed in 2006.

III. Summary of AB Reports

We present below highlights of the five AB reports issued in 2007. A more complete discussion of those reports can be found in the reports White & Case issued at the time the AB released the decision in each appeal.[3]

A. United States - Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Argentina (DS268)

On April 12, 2007, the AB circulated its Implementation report on DS268. This was the fourth substantive report issued in this case (*i.e.*, the second AB report), following the Panel and AB reports arising from Argentina's original panel request, and following the Panel report relating to Argentina's claims that the United States had not, through its implementation proceedings, brought itself into conformity with its WTO obligations.

The dispute between the United States and Argentina concerned the United States' alleged failure to implement its obligations under Article 11.3 of the Anti-Dumping Agreement, which is known as the "sunset" clause. After the DSB adopted the original Panel and AB reports finding that the United States had violated its obligations under Article 11.3, the United States pledged to bring itself into conformity with its obligations, requesting a "reasonable period of time" (RPT) to do so. As the parties could not agree on the RPT for implementation, an arbitrator decided that the United States would be given a 12 month RPT to bring itself into compliance. During the RPT, the relevant US agency (Department of Commerce - DOC) modified one of the regulations applicable to its national sunset proceedings (the "waiver" regulation), and then conducted another sunset proceeding according to its domestic law (a so-called "Section 129(b)" proceeding).

The new DOC determination reaffirmed the original decision to maintain the anti-dumping duties in respect of the Argentine goods. Argentina challenged this determination in an Article 21.5 DSU implementation proceeding. According to Argentina, by making this new determination and maintaining the duties in respect of Argentine products, the US had failed to bring its measures into conformity with its obligations under the AD Agreement. The compliance Panel sided with Argentina and found on various

[3] Please refer to the following White & Case reports for further details: (i) the April 13, 2007 WTO report on DS268; (ii) the May 8, 2007 WTO report on DS207; (iii) the December 12, 2007 WTO report on DS332; and (iv) the January 10, 2007 WTO report on DS322.

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grounds that the United States had not complied with its WTO obligations. The Panel considered that certain aspects of US law remained inconsistent with its WTO obligations under the AD Agreement and also found against the United States in respect of the specific imposition of AD duties on certain products from Argentina.

The United States appealed certain aspects of the compliance Panel's decision, but it did not appeal the Panel's decision that the DOC's Section 129(b) determination violated Article 11.3. Thus, even at the outset of this appeal, it was clear that the DSB would, at the end of this appeal, find that the United States remained in violation of its obligations.

The AB reversed the Implementation Panel's findings in respect of US law as such, in so far as it concerned the waiver requirement provided for in US anti-dumping laws and regulations. It considered that the waiver requirement did not preclude DOC from considering other available evidence before making order-wide determinations. As such, the AB considered that non-waiving exporters were adequately safeguarded against the prejudicial effects of waiving exporters. The AB left undisturbed the Implementation Panel's findings that the determination of likelihood of continued dumping lacked a sufficient factual basis. On May 11, 2007, the Dispute Settlement Body (DSB) adopted the AB's Implementation report in DS268.

While Argentina requested authorization to suspend concessions arising from the US violation of its Article 11.3 obligations, it is unlikely that suspension will be necessary. In June 2007, and as a result of a negative injury finding in the second sunset review, the United States revoked the underlying anti-dumping measure. Therefore, the retaliation proceedings were suspended until further notice.

(Please refer to our April 13, 2007 WTO report for details on *United States - Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Argentina* (DS268)).

B. Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Products (DS207)

Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Products (DS207) concerned amendments Chile made to its price band system in 2003 as they relate to imports of wheat and wheat flour to Chile, following a prior adverse ruling by the Panel and Appellate Body of Chile's Price Band system. In the AB annual report, Chile's price band system is described in the following manner: the price band system consists of upper and lower price band thresholds, and reference prices set in relation to certain international prices. When the reference price falls below the lower band threshold, a specific duty is imposed in addition to the applied tariff. When the reference price is between the lower

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and upper band thresholds, only the applied tariff is imposed. When the reference price is above the upper band threshold, a rebate is deducted from the amount of the applied tariff. Argentina challenged Chile's price band system under Article 4.2 of the Agreement on Agriculture.

In its report, the AB upheld the Panel's findings and conclusions that Chile's amended price band system, as applied to imports of wheat and wheat flour, was still inconsistent with Article 4.2 of the Agreement on Agriculture. The AB thus determined that Chile had not implemented the recommendations and rulings of the DSB in the original proceedings. On May 22, 2007, the DSB adopted the AB's report and the panel report, as upheld by the AB report.

(Please refer to our May 8, 2007 WTO report for details on *Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Products* (DS207)).

C. *Japan - Countervailing Duties on Dynamic Random Access Memories from Korea* (DS336)

The dispute between Japan and Korea in *Japan - Countervailing Duties on Dynamic Random Access Memories from Korea* (DS336) concerned the WTO-consistency of Japan's imposition of countervailing duties on imports of dynamic random access memories (DRAMs) from a Korean DRAMs manufacturer, Hynix Semiconductor, Inc. Korea alleged that Japan's imposition of the countervailing duties were inconsistent with Japan's obligations under a number of provisions of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").

The Panel had mainly sided with Korea and had found that Japan had failed to comply with a number of its obligations in respect of the determination of the existence of a subsidy and the calculation of the amount of the subsidy that allegedly had been granted by the Korean Government to the Korean DRAM producer in the course of a restructuring of this producer which had taken place in 2001 – 2002. Japan appealed from this finding arguing that the Panel had failed to make an "objective assessment of the matter before it and had conducted a de novo review of the facts."

The AB upheld some of Japan's claims to this effect, finding in particular that the Panel's analysis of the Japanese investigating authorities' determination of subsidization in respect of one of the restructuring programs did not sufficiently recognize the Japanese authorities' review of the totality of evidence. The AB found, therefore, that the Panel did not conduct an "objective assessment of the matter" as required by DSU Article 11. The AB also reversed the Panel's finding that the methods Japan used to calculate the amount of benefit had not been "provided for" in Japan's national legislation or implementing regulations, as required under Article 14 of the SCM Agreement.

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The AB, however, upheld the Panel's findings that Japan determined the existence and amount of benefit conferred by the restructuring programs in a manner inconsistent with Articles 1.1(b) and 14 of the SCM Agreement, thereby vitiating part of its subsidy determination. In addition, the AB upheld the Panel's finding that, in part, Japan was not justified in imposing countervailing duties on Korean DRAM products because, by the time of imposition, an important part of the subsidies had ceased to provide benefits to such products.

On December 17, 2007, the DSB adopted the AB report and the Panel report, as modified by the AB report.

D. *Brazil - Measures Affecting Imports of Retreaded Tyres* (DS332)

In *Brazil - Measures Affecting Imports of Retreaded Tyres* (DS332), the European Communities (EC) alleged that the imposition of certain measures by Brazil adversely affected exports of retreaded tyres from the EC to the Brazilian market. Most importantly, the EC challenged Brazil's imposition of an import ban on retreaded tyres, and its exemption from this import ban and from certain financial penalties, of retreaded tyres imported from Mercosur countries. The EC alleged that these provisions were inconsistent with Brazil's obligations under Articles I:1, III:4, XI:1 and XIII:1 of the GATT 1994.

The original Panel found that the import ban was inconsistent with Article XI:1 of the GATT 1994, but could be justified under the general exceptions of Article XX of the GATT 1994 as a measure necessary to protect human health. The Panel further found that the exemption from this ban of imports from Mercosur countries did not constitute "arbitrary or unjustified" discrimination, as this discrimination was in fact justified by the provisions of the free trade agreement between Mercosur countries and given the fact that such products were not imported in such quantities that would significantly undermine the health objectives of the measure in question.

The AB upheld the Panel's finding regarding Brazil's import ban on retreaded tyres, and also followed the Panel in its finding that such measures were necessary for the protection of human health. The AB, however, reversed the Panel's finding that the exemption from the import ban provided by Brazil to retreaded tyres originating in Mercosur countries did not result in the import ban being applied inconsistently with the chapeau of Article XX which requires that such health measures be applied in a manner which does not constitute arbitrary or unjustified discrimination. The AB emphasized that discrimination is only justified if the justification relates to the policy objective pursued by the measure in question. Since there is no less of a health risk caused by retreated tyres when imported from a Mercosur country than there is when such tyres are imported from the EC, the AB considered that the

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import ban was applied in a manner which constitutes unjustified discrimination. For similar reasons, the AB also reversed the original Panel's finding that imports of retreated tyres from Mercosur countries and used tyres under court injunctions did not result in "arbitrary discrimination", as long as imports of such tyres did not occur in volumes that "significantly undermined" the objectives of the import ban. On December 17, 2007, the DSB adopted the AB report and the Panel report, as modified by the AB report.

(Please refer to our December 12, 2007 WTO report for details on *Brazil - Measures Affecting Imports of Retreaded Tyres* (DS332)).

E. *United States - Measures Relating to Zeroing and Sunset Reviews* (DS322)

On January 9, 2007, the AB circulated its report on DS322. The dispute between the United States and Japan concerned the DOC's zeroing methodology in original investigations and administrative reviews as applied in a number of specific anti-dumping cases and in respect of the zeroing methodology as such. Japan alleged that DOC's zeroing methodology violated Articles 2, 9 and 11 of the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-dumping Agreement"). 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, the difference between the two is a positive dumping margin. When the opposite is true, the price difference is referred to as a "negative dumping margin." When zeroing is used, the investigating authority does not give any credit for negative dumping margins, i.e., the authority does not average positive and negative dumping margins together, but instead 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 Panel found that the DOC's zeroing practice in weighted average-to-weighted average comparisons in original investigations violated the Anti-dumping Agreement. However, the Panel rejected Japan's claims that zeroing was prohibited in proceedings other than original investigations, i.e. periodic reviews, new shipper reviews, changed circumstances reviews and sunset reviews. The Panel, also rejected the claim that zeroing was prohibited when the transaction-to-transaction method was being used.

The AB reversed the Panel's findings and held that all types of zeroing were illegal because dumping could not be found to exist if the investigating authority failed to consider the results of "all the comparisons of normal value and export price, including those in which export price exceed[ed] normal value." Thus, the AB concluded that zeroing cannot be used in original investigations, annual reviews, new shipper reviews, changed circumstance reviews, whether using the average-to-average method or

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the transaction-to-transaction method without violating various paragraphs of Articles 2 and 9 of the Anti-dumping Agreement. On January 23, 2007, the WTO Dispute Settlement Body (DSB) adopted the AB report on DS322.

(Please refer to our January 10, 2007 WTO report for details on *United States - Measures Relating to Zeroing and Sunset Reviews* (DS322)).

Outlook

The second and final terms of office for Georges Michel Abi-Saab and Arumugamangalam Venkatachalam Ganesan expire on May 31, 2008. A WTO Selection Committee will likely appoint replacement members ahead of May 2008. The DSB will set a deadline for WTO Members to nominate candidates.[4]

The AB has received one appeal to date in 2008 in *United States - Final Anti-dumping Measures on Stainless Steel from Mexico* (DS344). In its report of December 20, 2007, the Panel once again ruled that certain types of zeroing were permissible in reviews. In so doing, the Panel expressed the view that it had "no option but to respectfully disagree with the line of reasoning developed by the AB." According to analysts, the Panel's findings stand in direct contradiction to the AB's findings in DS322, and go against the well established practice that following prior AB rulings on certain issues is "what is expected of a Panel." Its findings, questioning the role and relevance of AB jurisprudence in Panel determinations is therefore of great systemic importance. On January 31, 2008, Mexico appealed the Panel report. It is generally expected that the AB will reverse the Panel's findings. The AB is expected to issue its report in this case on April 30, 2008.[5]

[4] The DSB set a deadline of August 31, 2007 to Members who sought to nominate replacements for Merit Janow and Yasuhei Taniguchi. As noted, Merit Janow and Yasuhei Taniguchi's terms of office expired on December 10, 2007.

[5] *See* http://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm.

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Multilateral Highlights

Doha Services Chair Releases Status Report in Light of Stalled Negotiations

On February 12, 2008, Chair of the World Trade Organization (WTO) Doha Round Negotiating Group on Services Fernando de Mateo issued a report outlining "Elements Required for the Completion of the Services Negotiations." The four-page report outlined the status of consultations between WTO Members to date in the Doha Services negotiations. de Mateo stated in the report that while "discussions have revealed considerable convergence on a number of elements," consensus on these elements "has yet to be reached on the precise language to be adopted." However, he considered that "on a few other elements, significant divergences persist."

de Mateo noted in the report that Bolivia, Cuba and Venezuela have opposed a services text, and have indicated that they do not intend to join any agreement on such a text. de Mateo noted on the elements of convergence that "many of those elements are direct reiterations of existing language in provisions of the General Agreement on Trade in Services [GATS] as well as other instruments relating to the Doha Development Agenda (DDA)." One such "other instrument" is Annex C of the 2005 Hong Kong Ministerial, which featured prominently in de Mateo's report. Annex C set out the objectives for negotiators to achieve in the Doha services negotiations and emphasized the importance of request-offer negotiations (*i.e.,* bargaining) at bilateral and plurilateral levels. de Mateo explicitly referred to Annex C in five of the twelve elements of convergence that he cited in the report, which included reaffirmations of: (i) the importance of request-offer negotiations; (ii) the need for Members to negotiate agreed disciplines under GATS Articles X (on "emergency safeguards measures"), XIII (on "government procurement") and XV (on "subsidies"); (iii) the need for Members to give "due consideration to proposals on trade-related concerns of small economies;" and (iv) the need for Members to recognize "the special situation of recently-acceded Members who have undertaken extensive market access commitments at the time of accession."

de Mateo outlined four elements of divergence in his report; these elements featured disagreement between Members on whether they should: (i) invest "the same level of ambition and political will as reflected in the Agriculture and Non-Agricultural Market Access [NAMA] modalities" in the Doha Services negotiations; (ii) bind current market access commitments in combination with new market access commitments; (iii) broaden the range of sectors and modes of supply, and push for full commitments (without market access limitations) in these sectors; or (iv) increase market access commitments to

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modes of supply of export interest to developing Members, particularly Modes 1 (*i.e.*, cross border supply) and 4 (*i.e.*, presence of natural persons).

Members expressed mixed reactions to de Mateo's report. The United States is reportedly pressing for a "signaling conference" on services prior to the Spring 2008 horizontal negotiations within the Doha Agriculture and NAMA Negotiating Groups. Australian Minister for Trade Simon Crean released a statement on February 13, 2008 confirming that Australia is likewise "actively pursuing an early 'signaling exercise.'" The signaling conference would serve to clarify what commitments Members are prepared to make in the Doha services negotiations. Canada, the EU, India, and Japan are also in favor of such a conference, but have reportedly indicated that the conference should form part of the agriculture and NAMA horizontal negotiations. Opponents of the signaling conference argue that such a conference would run counter to the request-offer structure that Members agreed should dictate the Doha services negotiations at the Hong Kong Ministerial.

Industry associations welcomed the services report. The Global Services Coalition released a statement on February 12, 2008 indicating that the report was "only a start, and that intensive and sustained process of services negotiations must now follow." The statement called for "agreement on a statement of ambition for services, and a "signaling conference."" The Global Services Coalition includes service industry associations from Australia, Canada, the EU, Hong Kong, Japan, New Zealand, Taiwan, and the United States.

Earlier, on February 8, 2008, the Chairs of the Negotiating Groups on Agriculture and NAMA released two separate revised draft texts indicating possible areas of agreement between Members for reducing tariffs and subsidies. Both texts are largely based on previous drafts released in July 2007. Members have used the revised Agriculture and NAMA texts to engage in further negotiations and are hoping to begin horizontal negotiations on both disciplines by mid-Spring 2008. However, calls for a signaling conference on services prior to the start of these horizontal negotiations may serve to weaken the momentum of the agriculture and NAMA negotiations, or stall these negotiations altogether. Consequently, WTO Director-General Pascal Lamy has warned Members not to "overload the agenda" ahead of Spring 2008, and to leave services negotiations to a later date.

Agriculture, NAMA Negotiating Chairs Release Revised Texts, as Services Negotiations Lag Behind

On February 8, 2008, the Chairs of the Negotiating Groups on Agriculture and Non-Agricultural Market Access (NAMA) released two separate texts that reflect months of work and negotiations between

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countries as part of the World Trade Organization (WTO) Doha Round. The two documents are revisions of drafts previously circulated in July 2007, and are based on WTO Member governments' latest positions in the Doha discussions since September 2007.

The revised agriculture and NAMA texts are the Chairs' assessment of what might be agreed for the formulas for cutting tariffs and trade-distorting agricultural subsidies, and other related provisions. According to a WTO press release, Agriculture Chair Crawford Falconer and NAMA Chair Don Stephenson circulated the two papers at the same time because WTO Members link the two subjects. Their release kicks off another intensive series of meetings and after a period of further discussion in the negotiating groups for each subject, Members plan on moving to a new phase where they will compare the agriculture and NAMA texts with each other and other negotiating sectors with the hope that a final Doha agreement can be reached over the next several months. Both Crawford and Falconer noted that the drafts are not final drafts and that they only "put the possible areas of agreement on paper so that Members can react and further revise the texts."

In their papers, Falconer and Stephenson included the majority of the same proposed figures for cutting tariffs on agricultural and industrial goods and cutting farm subsidy support as in their July 2007 drafts. The agriculture text would still require the United States and the EU to substantially cut back farm payments. The United States would have to reduce its spending cap on overall trade-distorting domestic support to a figure between USD 13-16.4 billion per year, whereas the EU would have to reduce its spending cap on overall trade-distorting domestic support to a figure between USD 24.4-40.8 billion per year. Proposed cuts for developed countries range between 48-52 percent on products with tariffs of 20 percent or less, to 66-73 on products with tariffs above 75 percent. Proposed cuts for developing countries range between 32-34 percent for tariffs of 30 percent or less and 44-48 percent for tariffs above 130 percent. The revised text would also allow developing countries to designate between 8-20 percent of their farm tariff lines as special, with proposed cuts of between 8-15 percent on one group of special products and 12-25 percent on another. Under the revised text, the special agricultural safeguard for developed nations would be restricted to no more than 1.5 percent of agriculture tariff lines. The number would be reduced to no more than one-half of that number two years later with full elimination after another two years. For developing nations, a similar special safeguard mechanism could be applied to no more than three to eight products in any given twelve-month period. A new element in the agriculture revised text is the inclusion of a minimum average tariff cut of 54 percent for developed countries and a maximum overall average reduction of 36 percent for developing countries.

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The NAMA text continues to propose that developing countries subject 10 percent of their industrial tariffs to half a formula cut or exclude 5 percent of tariffs from cuts altogether. Coefficients in the "Swiss" formula for tariff cuts were not altered in the revised text, with industrialized countries receiving a coefficient between 8-9 and developing countries receiving a coefficient between 19-23. A new element in the NAMA revised text is the deletion of figures for proposed flexibilities that would allow developing countries to set aside certain sensitive sectors from the agreed cuts on industrial tariffs, reflecting demands from some developing countries for increased flexibilities as a precondition for accepting the proposed range of tariff cuts included in the July 2007 draft. The NAMA text also proposes granting recently acceded WTO Members such as China and Taiwan a longer period to implement Doha Round commitments on decreasing industrial tariffs.

Reaction to the revised agriculture and NAMA texts was mixed. WTO Director-General Pascal Lamy lauded the revised draft texts and opined that "the two chairs have produced texts which are now comprehensive." He called on WTO Members to continue their active participation in the Doha talks so that they can "find the final balance for an ambitious and development-oriented round." The Office of the United States Trade Representative (USTR) issued a press statement in which it noted that USTR would closely analyze the revised texts. The press statement also indicated that "the United States is committed to the conclusion of a strong Doha Round in 2008, and will provide the leadership necessary to achieve this objective," and called on other WTO Members to make "similar contributions to ensure success." However, National Association of Manuafacturers (NAM) Vice President Frank Vargo opined that "there is some weakening" in the NAMA revised text. The Institute for Agriculture and Trade Policy's Carin Smaller also opined that the agriculture revised text "is not going to reignite passion" for a final Doha agreement.

WTO Members will now review the revised texts before conferring to discuss the papers. The agriculture negotiating group will next meet on February 15 followed by a more comprehensive meeting in Geneva February 19-23 where WTO Members will attempt to bridge the remaining gaps in the agriculture talks. The NAMA negotiating group has not yet formally scheduled a meeting to discuss the revised text.

In the meantime, the Doha services negotiations remain stalled. On February 4, 2008, Chairman of the Services Negotiating Group Fernando de Mateo announced to WTO Members that he will issue a report outlining points of convergence and disagreement on a possible services text. De Mateo will submit the report first to the services negotiating group before sending it to the WTO's Trade Negotiations Committee. The services chair, however, admitted that the paper may outline more areas of disagreement rather than convergence because of resistance from certain developing countries who

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argue that progress in services will depend on the outcome of the agriculture and NAMA negotiations. De Mateo has not yet released a revised services text.

The release of the agriculture and NAMA revised text may inject some momentum into the otherwise-stalled Doha negotiations. It is likely that WTO Members will focus their activities for the remainder of February on the proposed figures included in each revised text, and attempt to bridge their differences. The release of the revised texts, however, does not mean a final Doha agreement is imminent. Indeed, the revised texts, for the most part, include the same proposed figures from the July 2007 papers. Consequently, it is unclear if WTO Members will change their stance on agriculture and NAMA if both the July 2007 and February 2008 papers contain the majority of the same proposals. The release of the papers may encourage further discussion, however, and catalyze WTO Members' debate so that negotiators face the most contentious issues on the table head-on. Even if WTO Members complete the agriculture and NAMA negotiations in the next few months (a prediction that not many have made to date), WTO Members must still tackle the contentious areas of services and rules. De Mateo's announcement that the services negotiations remain stalled does not bode well for a final Doha agreement by the end of 2008, and WTO Members have not yet decided if a proposed mid-March ministerial meeting should address the issue of services or concentrate solely on agriculture and NAMA. WTO Director-General Pascal Lamy has warned WTO Members that they should not "overload the agenda" for the potential spring meeting, which could sway many WTO Members to focus only on agriculture and NAMA at that meeting, and leave services discussion to another date.

The revised agriculture and NAMA texts can be found at:
http://www.wto.org/english/news_e/news08_e/ag_draft_modalities_feb08_e.htm.

Mexico Challenges WTO Panel Ruling in Zeroing Dispute with United States

On January 31, 2008, Mexico appealed a World Trade Organization (WTO) dispute panel ruling in *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* (DS344), released on December 20, 2007. The Panel upheld the use of zeroing during US administrative reviews but determined that the use of zeroing during original anti-dumping investigations was WTO-inconsistent. In its appeal, Mexico argued that simple zeroing was inconsistent with Articles VI:1 and VI:2 of the General Agreement on Tariffs and Trade (GATT) of 1994 and Articles 2.1, 2.4, and 9.3 of the WTO Anti-Dumping Agreement (ADA). Moreover, Mexico argued that the United States violated these WTO provisions by applying "simple zeroing" in five periodic reviews in *Stainless Steel Sheet and Strip in Coils from Mexico*. Under "simple zeroing", the US Department of Commerce (DOC) determines a weighted average margin of

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dumping based on average-to-transaction or transaction-to-transaction comparisons between export price and normal value. DOC zeros negative dumping margins when it aggregates the results of these multiple comparisons. This has the effect of inflating the overall average dumping margin, and can lead to the imposition or maintenance of antidumping duties which may not otherwise apply at all.

The WTO Appellate Body previously ruled against DOC's zeroing methodology in *United States - Measures Relating to Zeroing and Sunset Reviews* (DS322), *United States - Laws, Regulations and Methodology for Calculating Dumping Margins* (DS294) and *United States - Final Dumping Determination on Softwood Lumber from Canada* (DS264). The WTO Appellate Body has 90 days to issue a decision on Mexico's appeal (i.e., until April 30, 2008). Officials from the Office of the United States Trade Representative (USTR) have not yet issued any statements regarding Mexico's decision to challenge the WTO panel ruling on zeroing. Mexican trade officials, however, remain confident that the Appellate Body will reverse the Panel's findings on appeal.

The US-Mexico zeroing dispute adds to a "reduced" list of long-standing bilateral trade irritants (*e.g.,* trucking and tuna). Although the United States and Mexico have successfully resolved major trade disputes on sugar, cement, tequila, pork products, and oil country tubular goods (OCTG), the trucking and tuna disputes remain highly sensitive due to US industry groups' concerns regarding Mexico's alleged failure to meet US safety and environmental requirements in these sectors. Mexico's complaint against DOC's zeroing methods, however, is at the forefront of a larger global effort to eliminate US zeroing practices. In late January and early February, close to 20 WTO Members submitted a proposal within the Doha Negotiating Group on Rules calling for a complete ban on "zeroing" methods in antidumping investigations and reviews. The Panel decision in DS344 may have added "fuel to the fire" however, by providing US negotiators in Geneva with an opportunity to defend the inclusion of zeroing in a final Doha text. Should US negotiators justify the inclusion of zeroing in a Doha Rules text based on the DS344 Panel's decision that zeroing in administrative reviews is permissible under WTO rules, then it is likely that the Doha Rules negotiations will remain stalled as US officials face the ire of WTO Members who oppose zeroing provisions in a final Doha agreement.

Mexico's decision to challenge the Panel's decision falls in step with its stance on the US zeroing methodology (Mexico was one of the 16 WTO Members that submitted the proposal within the Doha Negotiating Group on Rules on January 24, 2008 calling for the complete ban of zeroing). WTO Members will closely monitor the Appellate Body's decision. Regardless if the Appellate Body upholds the original Panel's ruling or reverses it, it is certain that the discussions on the US zeroing methodology will remain contentious in the Doha talks. At this stage, it is unclear if the Doha Rules negotiations will

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make significant progress (in light of DS344) and whether the United States can continue to push for the inclusion of the controversial zeroing methodology in a final Doha agreement.

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