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Japan External Trade Organization
WTO and Regional Trade Agreements Monthly Report

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US unilateral, bilateral, and multilateral trade policy is likely to remain "on hold" in 2008 mainly because of the June 30, 2007 expiration of Presidential Trade Promotion Authority (TPA) and the November 2008 Presidential elections. The year will likely feature standard trade themes, including: (i) the possible Congressional approval of bilateral and regional Free Trade Agreements (FTAs); (ii) US efforts to make significant progress in the stalled "Doha Round" of World Trade Organization (WTO) negotiations; and (iii) US involvement in several WTO dispute settlement proceedings. Also, the US Congress likely will continue its attempts to pass the 2007 Farm Bill and to address US-China trade relations. However, the President's lack of TPA will limit new trade initiatives and the completion of the Doha Round, and election year politics could stymie passage of pending FTAs, despite the Administration's best intentions.

United States Highlights

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

- Senate Confirms Schafer as New Secretary of Agriculture
- President Bush Issues Amendment Clarifying Implementation of Foreign Investment and National Security Act of 2007
- President Bush Signs New Reform Directives Meant to Enhance US Export Controls
- United States Files Second Arbitration Request Under Softwood Lumber Agreement Concerning Canadian Assistance Program
- USTR Requests Comments on Foreign Countries' IPR Practices for Special 301 Report
- GAO Report: Impact of US Sanctions Against Iran in Furthering US Objectives "Unclear" and Requires Further Review

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Free Trade Agreements Highlights

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

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- President Bush Pushes Free Trade Agreements in State of Union Address
- United States and Ghana Meet Under TIFA
- President Bush Issues Proclamation Adjusting ROOs Under US-Chile, US-Singapore FTAs; Adjustments Effective Feb. 2008

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WTO Panel Report: United States - Zeroing (Mexico)

Decision: A World Trade Organization (WTO) Panel has issued a mixed ruling in a challenge by Mexico to US "zeroing" practices. The Panel agreed that zeroing during original anti-dumping investigations was WTO-inconsistent. However - despite clear Appellate Body authority to the contrary - the Panel upheld the use of zeroing during administrative reviews. The Panel stated that it had "no option but to respectfully disagree with the line of reasoning developed by the Appellate Body."

Multilateral Highlights

We would like to alert you to the following Multilateral highlights:

- WTO Members Call for Complete Ban on Zeroing in Doha Rules Negotiations
- Doha Agriculture Chair Releases Eight Additional Working Papers on Market Access

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Reports in Detail

United States

Forecast 2008: US Trade Policy "On Hold"

Summary

US unilateral, bilateral, and multilateral trade policy is likely to remain "on hold" in 2008 mainly because of the June 30, 2007 expiration of Presidential Trade Promotion Authority (TPA) and the November 2008 Presidential elections. The year will likely feature standard trade themes, including: (i) the possible Congressional approval of bilateral and regional Free Trade Agreements (FTAs); (ii) US efforts to make significant progress in the stalled "Doha Round" of World Trade Organization (WTO) negotiations; and (iii) US involvement in several WTO dispute settlement proceedings. Also, the US Congress likely will continue its attempts to pass the 2007 Farm Bill and to address US-China trade relations. However, the President's lack of TPA will limit new trade initiatives and the completion of the Doha Round, and election year politics could stymie passage of pending FTAs, despite the Administration's best intentions.

Analysis

I. NO TPA IN SIGHT

TPA expired in mid-2007 and the US Congress seems unwilling to renew the "fast-track" authority for the remainder of President Bush's term. The lack of TPA renewal has affected – and will continue to affect – US trade policy for the rest of 2008 and beyond. The United States' international trading partners view TPA as a US commitment to liberalized trade and a necessary tool for trade negotiations with the United States. US trading partners could view Congressional refusal to extend TPA as an indication that the United States is not committed to free trade. Lack of TPA also ties the hands of US trade negotiators in FTA negotiations. TPA provides a US FTA partner with an assurance that the final agreement that it signed will remain intact after Congressional review and approval. 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 (i.e., an "up-or-down vote"). 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, the United States has negotiated and implemented only one FTA – the innocuous US-

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Jordan FTA. Leading Democratic leaders in Congress, such as Speaker of the House Nancy Pelosi (D-CA) and House Ways and Means Committee Chairman Charles Rangel (D-NY), have noted that the majority of Democrats in Congress are not yet ready to renew TPA for President Bush. Thus, TPA renewal likely will not be an agenda item for Congress until the next Administration begins its term of office in 2009. Without TPA in the short-term, the United States is unlikely to commence formal FTA negotiations and is unlikely to complete pending FTA negotiations with trading partners such as Malaysia and Thailand (explored in detail below).

II. A NEW FARM BILL

The Farm Security and Rural Investment Act of 2002 ("the 2002 Farm Bill"), the most recent US omnibus agriculture law, was signed into law by President Bush on May 13, 2002. Many of its provisions expired on September 30, 2007. Nevertheless, congressional debate continues into 2008, despite lawmakers first considering a new Farm Bill early in 2007. On July 27, 2007, the House of Representatives approved the Farm Bill Extension Act of 2007 (H.R. 2419) by a margin of 231 to 191. H.R. 2419 would, with few exceptions, extend the 2002 Farm Bill through 2012 by authorizing USD 286 billion for farm subsidies, conservation, nutrition, rural development and energy programs. On December 14, 2007, the Senate passed its Farm, Nutrition and Bioenergy Act of 2007 (H.R. 2419) by a vote of 79 to 14. The majority of the provisions in the Senate version mirror those in the House version of the bill.

The two versions of H.R. 2419 are now in conference where House and Senate negotiators are reconciling the bills' differences. Once Senate and House negotiators have completed conference, Congress will send the 2007 Farm Bill to the President for his signature. Chairman of the House Agriculture Committee Colin Peterson (D-MN) has opined that "75 percent" of the House and Senate versions of the bill are similar. During the first half of January, staff from both chambers met multiple times to discuss the 2007 Farm Bill, but Congressional sources now predict that negotiators can complete the Farm Bill by end-February 2008.

The Administration has threatened to veto both versions of H.R. 2419. Acting Secretary of Agriculture Chuck Conner has opined that both versions of H.R. 2419 increase price supports, include "unfunded commitments and budget gimmicks," include new taxes, and continue to send farm subsidies to "people who are among the wealthiest 2 percent of Americans." Based on Secretary Conner's statements, President Bush might refuse to accept the 2007 Farm Bill unless House and Senate negotiators keep the Administration's views in mind during conference. If a Farm Bill emerging from conference does not address the Administration's views, the President could veto the bill, thus delaying completion of the 2007 Farm Bill even further. US agriculture groups and farm lobbies have increased their pressure on

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Congress to finish the 2007 Farm Bill as soon as possible so that they can lock in the increased support for certain commodities that is included in the bill, and so that they can reassure US agricultural producers that their demands have been met and will be implemented. Because a veto from President Bush could anger these influential groups and delay completion of what they consider to be an important measure, the President might begrudgingly accept the Farm Bill in whatever form emerges from conference.

The final provisions in a 2007 Farm Bill have consequences beyond those for domestic US agricultural producers. The majority of provisions of the 2002 Farm Bill were carried over and inserted directly into the 2007 Farm Bill; in fact, the 2007 Farm Bill increases the amount of support for certain commodities. US trading partners questioned the WTO-consistency of the 2002 Farm Bill and are likely to question the same support programs and provisions included in a final 2007 Farm Bill. The recent WTO compliance Panel ruling against US cotton subsidies (DS267) increased US trading partners' attention to the conflict between US farm programs and US WTO obligations.[1] The compliance Panel ruling leaves other US support programs in a 2007 Farm Bill for specific commodities – such as wheat, corn and sugar – vulnerable to WTO dispute. Furthermore, Brazil and Canada have commenced WTO dispute settlement proceedings (DS365) against the United States for agriculture support under the 2002 Farm Bill.[2]

Because the 2007 legislation continues the agricultural support programs included in the 2002 legislation and increases subsidy levels for certain crops, the United States could face additional WTO disputes with other trading partners regarding US agricultural support and farm subsidies along the same vein as the Brazil and Canada disputes. That Congress refused to curtail US agricultural support programs in the 2007 Farm Bill likely will anger other WTO Members and fuel their initiation of other dispute settlement proceedings over US agricultural support programs.

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[1] On December 18, 2007, a WTO compliance Panel ruled that US cotton subsidies continue to violate the obligations of the United States under the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") and the Agreement on Agriculture. The Panel found that the United States had failed to implement the original (2005) WTO rulings on cotton. The Panel concluded that US subsidies continued to cause "significant price suppression" in the world market for cotton. *See* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm.

[2] Brazil and Canada argue that the United States has provided trade-distorting agricultural subsidies in excess of its WTO commitments in 1999, 2000, 2001, 2002, 2004 and 2005. If the 2007 Farm Bill contains levels of support similar to the 2002 Farm Bill – including the same AMS commitments as the 2002 Farm Bill – then US trading partners might argue that the United States' total farm support continues to be WTO-inconsistent. *See* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds365_e.htm.

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III. BILATERAL AND REGIONAL AGREEMENTS "ON PAUSE"

Although TPA expired in mid-2007, USTR has indicated that it is willing to move ahead on FTA negotiations with several US trading partners (such as Malaysia and countries within the Trans-Pacific Strategic Economic Partnership Agreement), albeit in an informal manner. As noted, however, TPA expiry has limited USTR's ability to negotiate and complete FTAs; USTR thus is unlikely to complete any FTA negotiations this year. Besides FTA negotiations, Congress will also consider the completed Colombia, Panama and Korea FTAs if/when the Bush Administration submits implementing legislation to Congress.

A. Asian Agreements: Korea, Malaysia, Thailand, and the P4

Korea. Because the President signed the US-Korea (KORUS) FTA before TPA expired, Congress can only issue an up-or-down vote on the FTA's implementing legislation. Yet the Bush Administration has not submitted that legislation to Congress, despite the FTA negotiations' completion in June 2007. The KORUS FTA does not enjoy firm Congressional support for several reasons. First, several US automakers have complained that the KORUS FTA does not sufficiently address non-tariff barriers (NTBs) to auto trade in the Korean market, and they likely will lobby members to oppose the agreement. US labor unions have also indicated opposition to the agreement because they feel that the KORUS FTA offers weak protections for workers' rights and the environment, and that the preliminary negotiation process occurred without an adequate consultation process with civil society, including labor unions. Labor unions will focus their energies in opposing the agreement and lobbying US legislators to do the same when the Bush Administration submits the KORUS FTA's implementing legislation to Congress.

Second, Korea has not yet fully opened its borders to US beef. As long as the Korean market remains closed to imports of US beef, key members of Congress, including Senate Finance Committee Chairman Max Baucus (D-MT), will oppose the agreement. The new Korean President, Lee Myung-bak, elected in December 2007, appears to be more business-oriented and has indicated his support of the KORUS FTA. He has also indicated that Korea may open its market to US beef products soon, perhaps by Spring 2008. If Korea opens its market to US beef products by the Spring, then the Bush Administration will likely begin its campaign for Congressional approval. Opening the Korean market to US beef would likely lead Chairman Baucus to throw in his support for the KORUS FTA, thus leaving only unions and some segments of the US auto industry in opposition. The Korean Congress could likely consider and ratify the FTA by end-Spring 2008, which would then provide impetus to the Bush Administration to deliver the FTA's implementing legislation to Congress. Korea's opening of its market to US beef and Korea's

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ratification of the FTA, in addition to strong US business lobbying on the KORUS FTA that is likely to begin later this year, could provide the US Congress with enough reasons to pass the agreement.

Malaysia. The United States and Malaysia met for the most recent FTA negotiating round the week of January 14, 2007. The United States and Malaysia launched formal FTA negotiations in March 2006 and held their last formal negotiating round in February 2007. TPA's expiry, however, effectively halted the formal talks, although USTR officials noted that they would continue to meet with their Malaysian counterparts informally to complete as much of the agreement as possible, so that if Congress renews TPA, the two sides would be close to completing a comprehensive FTA. Contentious agenda items in the FTA talks include Malaysia's *bumiputra* policy, which grants preferential treatment to ethnic Malaysian companies, as well as financial services and government procurement. Without the presence of TPA, however, US officials have opined that it may be difficult to formally complete the bilateral negotiations with Malaysia. Given the lack of TPA, the current political climate in Washington and the upcoming election season, government sources have stated that it is likely that the United States and Malaysia will complete the FTA after the November 2008 US Presidential elections, and only if TPA is in place.

Thailand. A similar scenario applies to US-Thailand FTA negotiations. In October 2003, President Bush announced his intent to enter into FTA negotiations with Thailand. Both sides held two rounds of FTA negotiations in 2004 and four rounds in 2005. However, political uncertainty since former Thai Prime Minister Thaksin Shinawatra's February 24, 2006 dissolution of Thailand's Parliament has stalled the FTA indefinitely. Secretary of the Ministry of Commerce Karun Kittisataporn issued a statement that US-Thailand FTA negotiations had been suspended until a new Thai administration is in place. Although USTR seems to possess the political will to negotiate an FTA with Thailand upon the installation of a new Thai government, US negotiators are unlikely to formally continue the FTA negotiations before that time. US negotiators may meet with their Thai counterparts in informal negotiating rounds, similar to US-Malaysia FTA talks. Again, however, given the lack of TPA and the upcoming election season, it is unlikely that the United States and Thailand will resume FTA negotiations until after the November 2008 US Presidential elections.

P4 and FTAAP. In the meantime, the United States has continued to assert its interest in building stronger trade ties with its Asian trading partners and has begun exploratory talks with the members of the Trans-Pacific Strategic Economic Partnership Agreement (Singapore, Brunei, New Zealand and Chile – also known as the "P4 Agreement") on a possible FTA. US officials have opined that a US-P4 FTA could serve as a building block for a longer-term Free Trade Area of the Asia-Pacific (FTAAP) between the United States and other Pacific economies. Asia-Pacific Economic Cooperation (APEC) members

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formally agreed to consider the FTAAP as a long-term proposal during the 2006 APEC Summit in Hanoi, Vietnam. Members instructed their respective ministers to prepare a report on the proposal, and the ministers presented the report to the Leaders during the 2007 Summit in Sydney, Australia. Although the 2007 Ministerial Statement emphasized APEC members' commitment to a successful conclusion of the Doha Round, it also noted members' agreement to "examine the options and prospects" for the FTAAP going forward. US officials have noted that the creation of an FTAAP would be challenging because APEC consists of twenty-one economies at differing levels of development with different types of barriers. US officials feel, however, that a US-P4 FTA – in addition to the pending US-Korea FTA – would make it easier for Pacific economies to agree to common standards and regulations (in areas such as express delivery, insurance and telecommunications) under the proposed FTAAP. The United States would also likely build on existing FTAs with P4 countries to simplify the process of creating a US-P4 FTA. The United States already has FTAs with Singapore and Chile and a TIFA with Brunei. If the United States and the P4 complete an FTA, then they may consider adding other Asian or Pacific nations, such as Vietnam, Peru or Korea, to the agreement to create a larger trading bloc. Without TPA, however, it is uncertain how US and P4 negotiators will progress on the suggested FTA, or if they will even announce a formal start to negotiations in the short-term.

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

The first half of 2008 could witness Congressional activity on the Colombia and Panama FTAs. It is unclear when the Bush Administration will present Congress with implementing legislation for the Colombia and Panama agreements, and at this point, Congress has not yet scheduled Committee hearings on the two FTAs. The Bush Administration, however, has begun intense lobbying efforts to get Congress to support these two pending FTAs. On January 28, 2008, President Bush delivered his final State of the Union address and urged Congress to approve the pending agreements with Colombia and Panama by the end of the year. President Bush stated that many products from these economies enter the United States duty-free, but that many US products face steep tariffs in these markets. According to President Bush, the FTAs will provide the United States increased market access while simultaneously promoting the United States' strategic interests. The President's mention of the pending FTAs in his State of the Union address indicates that trade has become a priority issue for the Administration during its remaining months in office. The Bush Administration is likely to use 2008 to lobby for Congressional approval of each FTA, especially in light of the weakened US economy. President Bush would like to see Congress approve these three pending agreements by the end of 2008 to ensure that they are part of his legacy. Although it remains unclear just when the Administration will deliver implementing legislation for

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these agreements to the Congress for its consideration, the Administration's lobbying efforts will likely increase over the next several months. Congressional passage or disapproval of whichever agreement the President decides to submit to Congress first will provide a good litmus test for the other two agreements.

Colombia. The US Congress likely will consider the Colombia FTA first. However, some US legislators remain concerned with Colombia's record of human rights violations and violence against labor leaders. The Bush Administration, in response to these concerns, has sought to garner support for the agreement by organizing Congressional delegation visits to Colombia. Congressional sources indicate that these visits have convinced several members of Congress that Colombia has made labor reforms and has decreased its levels of violence against labor unions. However, many in Congress remain skeptical. The Bush Administration has also attempted an alternate strategy for drumming up support by shifting US legislators' focus to the geopolitical importance of the Colombia FTA, especially the United States' fight against the drug trade in Latin America and Colombia's proximity to Venezuela. The success of these tactics is uncertain, but the Administration will likely continue its campaign to garner support for the Colombia agreement throughout the first half of 2008. Once the Bush Administration is secure that it has enough support from Congress, then President Bush will submit implementing legislation.

Panama. The outlook for the US-Panama FTA has changed considerably since June 2007 when US and Panamanian negotiators completed the agreement before TPA expired. At that time, Congressional sources opined that Congress would vote on the Panama FTA after it considered the Peru agreement, and that the Panama FTA would pass by a strong margin. However, the September 1, 2007 election of Pedro Miguel Gonzalez Pinzon as President of Panama's National Assembly altered the FTA's support in Congress. Gonzalez Pinzon has an outstanding warrant for his arrest in the United States for the June 1992 slaying of US Army Sgt. Zak Hernandez Laporte and the attempted murder of Sgt. Ronald Marshall outside Panama City. Gonzalez Pinzon has denied any involvement in the crimes and was acquitted in a trial in Panama in 1997. The political issue, however, is sensitive enough that it has garnered statements from key members of the US Congress, such as Chairman Baucus, that until the Panamanian government addresses the issue, the agreement stands little chance of passage in the US Congress. The US and Panamanian government are working on the issue behind closed doors but the situation has led USTR Schwab to state that the Administration may wait to submit implementing legislation for the agreement until after Gonzalez Pinzon completes his term of office[3] (*i.e.,* September 2008). USTR

[3] Under Panamanian law, the President of Panama's National Assembly serves a term lasting one year, although the National Assembly can re-elect him for one additional term.

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Schwab, however, has been careful to temper such statements by noting that the issue is one that "the Panamanian people must decide." Thus the US Congress could consider the US-Panama FTA later in 2008 after consideration of the Colombia FTA, but only after the Gonzalez Pinzon issue has been resolved.

***DR-CAFTA*.** Full implementation of the Dominican Republic- Central American Free Trade Agreement (DR-CAFTA) depends on Costa Rica and will likely occur later this year. The Costa Rican Congress is undergoing ratification procedures, including implementing laws and regulations in Costa Rica that comply with the DR-CAFTA. Once Costa Rica implements the agreement, the DR-CAFTA will be fully implemented by all parties.

C. Middle Eastern Agreements: UAE and Oman

UAE. Little movement in 2008 is expected for several Middle Eastern agreements, notably US-UAE FTA negotiations and the already-completed US-Oman FTA. USTR has been relatively quiet on its FTA negotiations with the UAE, though sources note that political will still exists on both sides to continue FTA negotiations. 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. USTR noted that the June 29, 2007 US-UAE Trade and Investment Framework Agreement (TIFA) "Plus" talks were productive, and that the two sides "have laid the groundwork for substantive cooperation in a number of areas including intellectual property, the digital economy, and in the area of standards." US officials stated that investment remains a contentious issue in the talks, specifically restrictions that the UAE places on foreign investment. The United States is pressing the UAE to change its Companies Law to allow 100 percent foreign ownership across the whole country. The United States is also advocating UAE labor market reforms and services sector liberalization. According to USTR, US and UAE officials will continue to meet under the TIFA Plus to "build upon the significant progress made in the FTA negotiations and work towards an eventual resumption of negotiations." Without TPA in place, however, USTR is unlikely to formally complete the FTA negotiations. Furthermore, with USTR's attention focused on garnering support for the three pending FTAs (with Korea, Colombia and Panama), it seems unlikely that the United States and the UAE will make significant progress in FTA talks in 2008.

Oman. Regarding the completed US-Oman FTA, government sources expect President Bush to issue a proclamation in Spring 2008 implementing the agreement. President Bush signed the US-Oman FTA in June 2006 but did not implement the agreement because the United States was waiting for the Omani government to implement new laws and regulations on intellectual property protection, government procurement and telecommunications licensing. Government sources opine that the Omani government

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has implemented almost all the new laws and regulations necessary for the FTA's implementation, but more work remains.

D. Other Agreements

Because of TPA's expiry, USTR is unlikely to commence formal FTA negotiations with any trading partners during the first half of 2008. USTR will, however, continue to pursue TIFAs and Bilateral Investment Treaties (BITs) with viable US trading partners. In a December 4, 2007 letter to President Bush, the President's Export Council (PEC) recommended that the United States negotiate comprehensive and binding BITs with China, India, Brazil, and Russia. According to the PEC, China, India, Brazil, and Russia have untapped domestic markets where US service suppliers have a significant comparative advantage. The letter states that US companies "cannot make the most of these opportunities unless, first, all of these countries give the United States' companies the right to invest in these countries on an equal footing with their domestic and foreign competitors, and, second, they can operate in a stable, fair and transparent regulatory environment." According to the PEC, high standard BITs with each of these countries would provide for market entry, national treatment and most favored nation status, as well as ensure fair administrative and judicial processes, permit the free transfer of capital, protect against uncompensated expropriations, and put in place an arbitration mechanism for enforcing obligations.

BITs have three main purposes: (i) to protect investment abroad in countries where investor rights are not already protected through existing agreements; (ii) to encourage the adoption of market-oriented domestic policies that treat private investment in an open, transparent, and non-discriminatory way; and (iii) to support the development of international law standards consistent with these objectives. BITs protect the rights of the participating countries' foreign subsidiaries and investors in their BIT partner's home market and, under US trade policy, typically precede formal FTA negotiations. Whereas the United States has not yet formally indicated its interest in exploring an FTA with China or India, US officials opine that BITs with both these countries could serve as a first step for consideration of longer-term FTAs, and solidify the US trade relationship with China and India in the meanwhile.

It is uncertain, however, whether USTR will formally initiate negotiations with all of these suggested BIT partners in 2008. BITs and any subsequent agreements with any of these economies would be complicated and would likely involve contentious negotiations and intense Congressional criticism. With USTR's attention focused on Congressional approval of pending FTAs, it is unclear if USTR has the resources and time – or the political will – to negotiate such agreements. Thus, although the United

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States has indicated its interest, chances of negotiating BITs with each of these economies are slim in 2008.

IV. US-CHINA RELATIONS

The US Congress will likely continue to focus on US-China trade relations in 2008. Members of Congress have grown impatient with China and its currency practices and will likely deliberate the Yuan in 2008. Although Congress seemed to have shifted its focus from legislation addressing China's currency by the end of 2007, members of Congress could once again closely explore such legislation at the beginning of 2008, especially in light of the weakened state of the US economy. Some Members of Congress argue that legislation targeting Chinese currency practices would help stimulate US economic activity and address the trade imbalance between the two countries. As noted, however, Congressional sentiment may have shifted over the last 18 months, as the Yuan has appreciated over 12 percent against the dollar since 2005, and the dollar is very weak internationally.

There are also unsubstantiated rumors that members of Congress are preparing an omnibus China bill that incorporates several different 2007 proposals addressing China's currency and other issues. Should members of Congress introduce this omnibus bill, then China will once again become a central topic of discussion among US legislators and will be the object of increased scrutiny and focus within the US Congress. Members of Congress will also look closely into import safely (following the product recalls in 2007) and intellectual property protection. The Administration, meanwhile, will continue to urge members of Congress to be mindful of prospective China legislation, particularly with regards to how such legislation would impact US interests in China and whether such US policy will hurt the US economy or downstream industries.

The Bush Administration, however, may attempt to address US legislators' concerns regarding China at the multilateral level. Since China's accession to the WTO in 2001, the United States has filed five complaints to the WTO DSB, three of which are in the panel stage.[4] These disputes indicate that the

[4] The United States requested consultations with China in March 2004 over the latter's alleged use of value-added tax rebates to favor domestic integrated circuit manufacturers (DS 309). The United States (cont.) and China resolved the matter during the consultation stage, and the United States did not make a second request for consultations with China until March 2006. In the second request, the United States alleged that China unfairly applied higher tariffs to certain foreign automobile parts imports (DS 340). DSB appointed a Panel to rule on the complaint in September 2006, however, the Panel has twice postponed the announcement of its decision, most recently until March 2008, due to "complicated issues" in its review of the facts. The third US request for consultations with China involved China's alleged use of refunds, reductions or tax and other exemptions for certain Chinese enterprises (DS 358). Although the DSB established a Panel in August 2007, in November the United States and China announced that they had reached an agreement whereby China would eliminate the measures by January 1, 2008, and the United States would suspend the Panel but reserve the right to reinstate its complaint if

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Administration is willing to address concerns over the US-China trade relationship, but that it prefers to do so through bilateral negotiations, at the WTO, or through WTO-consistent trade remedies. Thus, USTR may file other WTO disputes in order to assuage Congressional rancor over China trade. The Administration would find this approach to be far preferable to any unilateral legislation targeting China that could seriously disrupt the US-China relationship and that might be WTO-inconsistent.

V. US PREFERENCE PROGRAMS

The US Congress may explore amendments to US preference programs in 2008. The Andean Trade Promotion and Drug Eradication Act (ATPDEA) is set to expire on February 29, 2008, and because members of Congress have not explored a long-term renewal of the program, Congress may grant another short extension to the ATPDEA. Such an extension could maintain Colombia's preferential treatment until the US-Colombia FTA is passed and could afford Congress more time to consider amendments to the program.

The US Generalized System of Preferences (GSP) program is set to expire in December 2008, and members of Congress may begin exploring amendments to the GSP towards the end of the year. House Ways and Means Committee Chairman Rangel has consistently indicated that he would like to amend the GSP program (and other preference programs) to encourage more participation from less developed economies. If Chairman Rangel brings up the issue again in 2008, members of Congress will likely begin exploring US preference programs and their renewals before the end of the year. Members will ask themselves if US preference programs are effectively encouraging the market participation of least-developed economies or whether they have encouraged increased participation by richer economies that are still considered "developing." Congress will also likely consider increasing Congressional oversight.

VI. MULTILATERAL DOHA NEGOTIATIONS

Completion of a final WTO Doha Round agreement has been delayed several times over the past several years, and it seems likely that 2008 will not witness any drastic changes to the negotiations or any concrete movement forward. WTO Members have resigned themselves to an unofficial deadline of end-2008 to secure a final agreement, but this is the same position that the parties took in 2007, with almost

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China failed to adhere to the agreement. The United States issued its fourth request for consultations with China in April 2007 regarding China's use of certain measures pertaining to the protection and enforcement of intellectual property rights (DS 362). The DSB established a Panel in September 2007, and appointed Panelists in mid-December after the United States and China disagreed on the Panel's composition. The United States also filed its fifth request for consultations in April 2007, regarding China's alleged application of measures that affect trading rights and distribution services for certain publications and audiovisual entertainment products. The DSB established a Panel in November 2007, but the United States and China have yet to agree on the Panel's composition.

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no substantive movement during that year. On the other hand, US business groups – such as the American Business Coalition for Doha (ABC Doha) – feel that the negotiations are gaining ground and see enough momentum in the current talks that could lead to a final agreement by the end of year. Groups like ABC Doha will likely increase their lobbying efforts during the first half of 2008 in order to get WTO Members to reach a final Doha deal. As has been typical since the start of negotiations, agriculture and non-agricultural market access (NAMA) remain the most contentious issues and have delayed the completion of other negotiating sectors such as services.

Agriculture negotiations remain stalled over the reductions in agricultural support programs that WTO Members are willing to make. Chairman of the Doha Committee on Agriculture Crawford Falconer planned to release a revised draft text on agriculture (reflecting WTO Members' revised agriculture offers) in mid-November but scrapped the informal deadline after it was made clear that WTO Members had not offered any new concessions. In place of a revised draft text (which Falconer intends to release in February 2008), Falconer has instead issued Working Documents related to agricultural market access and domestic support. These Working Papers are the result of intensive negotiations on the Revised Draft Modalities for Agriculture paper that Falconer distributed on August 1, 2007, and they suggest legal language that would be incorporated into the text of a final Doha Agreement, including a tiered formula for tariff reductions, legal language on sensitive products and tariff quotas. The Working Documents display a small turnaround in Doha agriculture proceedings, but to date, WTO Members have provided little reaction to the documents. The Working Papers indicate that the Agriculture Committee and negotiators are working behind the scenes in attempting to move the stalled talks forward but until WTO Members provide revised offers, the agriculture talks will remain stuck throughout 2008. To date, the United States and other WTO Members have not indicated that they are willing to issue revised offers; in fact, WTO Members seem to be waiting for one another to make the first move in the stalled agriculture talks, a pattern that occurred throughout 2007 and could continue in 2008.

The NAMA negotiations remain entrenched on tariff coefficients WTO Members must agree on to the Swiss formula of tariff cuts. Chairman of the Doha Committee on NAMA Don Stephenson had intended to release a revised draft NAMA text in mid-November; Stephenson, however, delayed the issuance indefinitely because WTO Members could not agree on Swiss formula coefficients or the flexibilities to be given to developing countries to shield sensitive tariff lines. It seems possible that, similar to the agriculture talks, NAMA negotiations will continue throughout 2008 without any significant new proposals from WTO Members or positive forward movement.

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Surprisingly, what little movement that has emerged in the negotiations over the past several months came in the form of a revised rules text. On November 30, 2007, Chairman of the WTO Doha Negotiating Group on Rules Guillermo Valles released draft text that proposes changes to the WTO Antidumping Agreement and Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). The draft text also proposes new provisions prohibiting and restricting certain subsidies in the fisheries sector. WTO Director-General Pascal Lamy described the draft texts as "ambitious and balanced in all areas they cover" and opined that the texts will "enable negotiators to work in a more intensive manner in the coming weeks." Several WTO Members, however, criticized the draft text for its permissive approach to "zeroing" in anti-dumping investigations and reviews, as well as other provisions that strongly favor traditional users of national trade remedies laws. In the text, Chairman Valles incorporated amendments to the Anti-dumping Agreement that would allow "zeroing" in some situations, despite opposition from many WTO Members to discuss zeroing at all in the Rules negotiations and WTO Appellate Body decisions that found all forms of zeroing to be inconsistent with WTO rules.

The incorporation of the zeroing provisions in the draft text represents a strong victory for the United States and reflects hard work on the part of US negotiators to include zeroing in a final Doha agreement. The Bush Administration is under growing pressure from Congress to negotiate the full permissibility of zeroing in original investigations and reviews into the final consolidated texts of the Doha Negotiating Group on Rules, and it is likely that for the remainder of the 2008 rules negotiations, the United States will fight to maintain the zeroing provisions as included in the draft text. The United States, however, will face contention from a vast number of WTO Members that disagree with the US zeroing methodology. Protests on zeroing will likely intensify within the Doha Negotiating Group on Rules. Many WTO Members, especially those that have initiated WTO dispute settlement proceedings with the United States on its use of zeroing, will continue to oppose new rules which reverse established dispute settlement precedent prohibiting zeroing. China will also likely oppose the inclusion of zeroing disciplines that will predominantly prejudice Chinese imports to the United States. On the other hand, the United States may have been bolstered by the recent WTO Panel decision in *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* (DS344) which, in direct opposition to prior AB rulings, found zeroing permissible in reviews. Although the AB could overturn this decision on appeal, the United States can rely on the Panel's ruling to show that the zeroing issue is unsettled, and that the WTO Rules text should address it in a "balanced manner." Thus, the final Rules text might include limited, but permissive, rules on zeroing despite the intense opposition of some WTO Members.

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Lack of TPA also affects the successful conclusion of the Doha Round. The United States and its trading partners are unlikely to formally complete a Doha Agreement without TPA in place. TPA assures US trading partners that once the United States completes a trade agreement, Congress cannot amend it. Although it remains uncertain if WTO Members will complete a final Doha Agreement by the end of the year, should they reach such an agreement, Congress might have to consider TPA renewal, even if it is a limited one that only applies to the Doha Agreement. Under such a scenario, Congress would likely grant TPA to the President if only to implement the Doha Agreement because pressure from the international trading community, as well as US businesses, would be great.

VII. LIKELY INVOLVEMENT IN MORE WTO DISPUTE SETTLEMENT PROCEEDINGS

A. Disputes Regarding the United States' Zeroing Methodology

The United States Department of Commerce's (DOC) practice of zeroing in antidumping investigations and administrative reviews has been one of the most extensively-litigated measures in the WTO, and in 2008, the United States could see more dispute settlement activity regarding this methodology. 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 took effect in February 2007. The change was necessary to implement the recommendations and rulings of the WTO DSB in connection with the US-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 US use of zeroing, especially in light of the December 2007 release of a mixed ruling by a WTO dispute panel in *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* (DS344). As mentioned above, the Panel agreed that zeroing during original anti-dumping investigations was WTO-inconsistent but upheld the use of zeroing during administrative reviews. The WTO Appellate Body has twice ruled that zeroing during reviews is WTO-inconsistent, in the 2006 case of *US – Zeroing (EC)* and in its 2007 ruling in *US – Zeroing (Japan)*, but the Mexico dispute Panel's ruling in favor of zeroing during reviews may fan the flames for further disputes between the United States and its trading partners, should the United States use the Panel's recent decision to justify its continued use of zeroing in antidumping investigations.

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B. Disputes Regarding US Agricultural Support

The completion of the 2007 Farm Bill has implications for US involvement in WTO disputes, especially disputes brought by other WTO Members regarding US agricultural support. As noted, Brazil and Canada have already initiated dispute settlement proceedings against the United States regarding US agricultural support provided under the 2002 Farm Bill. Brazil and Canada argue that the United States has provided trade-distorting agricultural subsidies in excess of its WTO commitments in 1999, 2000, 2001, 2002, 2004 and 2005. Under its Total Aggregate Measurement of Support (Total AMS) commitments under the WTO Agreement on Agriculture, the United States agreed that its level of trade-distorting domestic support would not exceed USD 19.9 billion for 1999 and USD 19.1 billion for each subsequent year. In October 2007, the United States notified the WTO of what it considers to be its trade-distorting subsidies for the years 2002-2005. The United States claims that these notifications, along with its earlier WTO notifications, show that its annual levels of trade-distorting support have been within its WTO commitments. However, Brazil and Canada argue that when these programs are properly accounted for under the WTO Agreement on Agriculture, the level of US trade-distorting agricultural subsidies exceeded US WTO commitments in 1999-2002 and in 2004 and 2005. The US-Brazil dispute could lead to additional WTO disputes against the United States. The US Congress is currently debating the 2007 Farm Bill which is very similar to the 2002 Farm Bill and continues the agricultural support programs included in the 2002 legislation. The bill increases subsidy levels for certain crops - a fact that will likely anger other WTO Members. Because of this fact, it is almost certain that the 2007 Farm Bill will not resolve current WTO dispute settlement cases regarding US farm subsidies and indeed could lead to more WTO disputes over US agricultural support.

C. Disputes Between the United States and China

As noted, the United States will continue to closely scrutinize China's actions on its WTO obligations in 2008. 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 should China not listen to US demands. The various WTO cases against China will certainly see Panel activity throughout the year. The Panel in C*hina — Measures Affecting Imports of Automobile Parts* (DS340) is scheduled to issue its decision in early 2008, likely by the end of March. WTO Director-General Pascal Lamy composed the Panel to *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights* (DS362) in December 2007, and that Panel will continue to review the facts of the US allegations against China's IP regime throughout the year. The threat of WTO

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action could pressure China into addressing US concerns regarding China's compliance with its WTO obligations.

D. Boeing-Airbus Dispute

2007 seemed to be a quiet year for the Boeing-Airbus dispute between the United States and the EU (DS316), but DSB activity in this dispute is likely to pick up again in 2008. The dispute centers on the payment of government subsidies to the US aircraft-manufacturer Boeing Company and its European rival, Airbus. US officials have noted that the United States remains open to a negotiated settlement with the EU 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 route 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 US claims against Airbus expects to issue its preliminary decision in April 2008. Meanwhile, a separate WTO panel decision in the EU's complaint against alleged subsidies to Boeing is expected to come out in Fall 2008.

VIII. PNTR FOR COUNTRIES ACCEDING 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 in 2008, Congress will have to consider Russia's Permanent Normal Trade Relations (PNTR) status in order to reap all of the market access benefits that Russia's WTO accession would provide WTO Members. Although Russian officials have indicated that they believe Russia can accede to the WTO by the end of the year, similar statements were made in 2007, with almost no substantive movement during that year.

If Russia nears its WTO accession goals, the US government will also have to address Russia's bilateral accession agreement under the context of Section 1106 of US trade law. If the President determines that Russia's State Trading Enterprises (STEs) adversely affect the US 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 US 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. Indeed, it

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seems that the Administration is already addressing STEs in bilateral talks with Russia. US and Russian officials met in Washington, DC in August 2007 to discuss outstanding issues related to Russia's WTO accession. The two sides discussed 13 outstanding sections of the working party report, including IPR, sanitary and phytosanitary measures, government support for agriculture, government procurement, export duties, technical barriers to trade, price controls, and the activities of STEs.

IX. OTHER ISSUES

A. 2008 Presidential Elections

The 2008 Presidential elections will also affect US trade policy this year. Presidential candidates have already begun their campaigns, and although international trade has appeared as a discussion topic during various debates, attention could shift from trade towards domestic issues and the Iraq war through the November elections. On the other hand, the Republican and Democratic frontrunners – John McCain/Mitt Romney and Hillary Clinton/Barack Obama, respectively – have very divergent views on international trade, and the issue could garner public attention. Despite the debate, however, substantive movement on trade issues is unlikely. Political pundits have already predicted that US trade policy will remain "on pause" until the new Administration begins its term of office in January 2009. Even then, the future of a "proactive US trade agenda" remains questionable. With a Democratic majority in Congress that is skeptical of free trade initiatives, US trade policy under a Republican or a Democratic Administration will likely be very similar to current trade policy under the Bush Administration. Although a Republican President would likely be free-trade oriented, any new trade initiatives a Republican President wishes to pursue would face a critical Democratic-led Congress and would require political capital as well as large concessions on behalf of the President in order to get Congress to approve such initiatives. Generally, the trade positions of a Republican President coupled with a Democratic Congress would clash and would likely result in a stalemate, unless the President wins in November 2008 by a large margin (thus garnering a "mandate" from the US citizenry). The latter outcome is unlikely. Should a Democrat win the elections, political analysts have predicted that the Administration and the Congress' trade policy would overlap and that the President likely would be unwilling to veto most protectionist legislation that the Democratic Congress passes. Analysts have also predicted that a Democratic President may be unwilling to pursue any new free trade initiatives.

B. Climate Change

In 2008, the US Congress could also explore the issue of climate change and the establishment of a "cap-and-trade" program. A standard cap-and-trade program establishes an economy-wide or sectoral

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"cap" on emissions, and allocates or auctions tradable "allowances" (the right to emit a ton of greenhouse gases) to greenhouse gas emission sources or fuel distributors. The total number of allowances is equal to the cap. The primary focus of a cap-and-trade program would be on sources of emissions that can be measured and monitored; these include almost all sources of carbon dioxide (CO2) emissions from fossil-fuel combustion as well as many sources of other greenhouse gas emissions. The EU has already implemented a cap-and-trade scheme: the European Union Emission Trading Scheme (EU ETS). The ETS currently covers more than 10,000 installations in the energy and industrial sectors which are collectively responsible for close to half of the EU's emissions of CO2 and 40 percent of its total greenhouse gas emissions. Under the EU ETS, large emitters of carbon dioxide within the EU must monitor and annually report their CO2 emissions, and they are obliged every year to surrender (*i.e.*, give back) an amount of emission allowances to the government that is equivalent to their CO2 emissions in that year. The installations may get the allowances for free from the government or may purchase them from others (*i.e.*, installations, traders, the government.) If an installation has received more free allowances than it needs, it may sell them to anybody. A current Senate bill (S. 2191) proposes a similar US program. Congress will likely continue to debate this issue during 2008, but it remains to be seen if Congress would approve such a measure and if the President would sign it into law. Critics of such a program have noted that if the United States does not implement a cap-and-trade program correctly, it will encourage heavy industry to move offshore to a country that does not have as strict environmental standards as those in the United States. Congressional opponents of a cap-and-trade program may use this argument to defeat S. 2191. Opponents may also raise the issue of whether advanced developing countries – including Brazil, India and China – will accept caps and limit their carbon emissions. Opponents to a cap-and-trade program may argue that without assurances that these economies will accept caps, it may be harmful to US industry if the United States accepts caps first because, as noted, industry can relocate from the United States to economies with less stringent standards.

Outlook

US trade policy in 2008 will likely be stagnant, as it was during the last few months of 2007: "on pause." The lack of TPA and several other factors – such as the upcoming Presidential elections – have caused many of the typical vehicles for US trade policy to stall, and many members of Congress and the US public have shifted their attention away from trade towards domestic issues, the 2008 elections and the Iraq war.

On the bilateral front, US trade policy will likely remain "on hold" during 2008 largely due to the lack of TPA. Congress has indicated that it is unlikely to grant President Bush TPA for the remainder of his term

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in office and it is uncertain whether Congress will grant the new President TPA once they begin their term of office in 2009. Without TPA in place, the Bush Administration is unlikely to complete any pending FTA negotiations (such as those with Thailand and Malaysia) or to begin any formal FTA discussions. Without TPA, the Bush Administration will likely shift its focus to those agreements pending before Congress (*i.e.*, US FTAs with Colombia, Panama and Korea) and will increase its lobbying activity in an effort to get Congress to pass these agreements by the end of 2008. The Administration also likely will look to other bilateral initiatives – like TIFAs and BITs – that do not require TPA or congressional approval.

On the multilateral front, the United States will keep a close eye on the Doha Round in 2008 but will unlikely be active in the negotiations. Although the United States – and other WTO Members – have indicated their political willingness to complete a final Doha agreement by the end of 2008, similar statements in 2007 proved hollow. The United States is unlikely to offer any new concessions in the agriculture and NAMA negotiations without receiving new offers and assurances first from other WTO Members. The United States will also likely face increased criticism from other WTO Members for the inclusion of "zeroing" in the draft Rules text. Should the United States continue to defend the inclusion of these provisions in the draft text, it will certainly face hostility from WTO Members that oppose all forms of zeroing.

The United States is unlikely to see any significant action in trade until the new Administration begins its term of office in 2009. Even then, the future of proactive US trade policy likely will depend on which party wins the White House, with the Republican candidate far more likely to pursue a broad trade liberalization initiative. Between now and 2009, US trade activity will be confined to several specific focal issues, as noted above. Any other trade initiatives that fall outside the scope of pending FTAs before Congress or the Doha negotiations, for example, will likely remain on hold until the Administration feels that the political environment is conducive to and accepting of such initiatives. This may not happen until 2009 or beyond, thus making 2008 a relatively quiet year with regards to trade.

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United States Highlights

Senate Confirms Schafer as New Secretary of Agriculture

On January 28, 2008, the Senate unanimously confirmed Edward Schafer as Secretary of Agriculture. President Bush nominated the former governor of North Dakota for the Cabinet position on October 31, 2007. Schafer replaces former Secretary of Agriculture Mike Johanns who announced his resignation from his post on September 19, 2007. Between Johanns' resignation and the Senate's confirmation of Schafer, Deputy Secretary of Agriculture Chuck Conner served as Acting Secretary of Agriculture.

According to the White House, during his two terms as North Dakota's governor (1992-2000), Schafer "gained extensive experience with the leading agriculture industry" and was "a leader on agricultural issues." During his time as governor, Schafer led an agricultural trade mission from North Dakota to China in 2000 to help open new markets for North Dakota, oversaw initial development of North Dakota's biofuel industries and also directed the state's response to eight statewide disasters, including drought, flood and fire. The White House also stated that former Governor Schafer pioneered innovative programs to increase economic opportunity in North Dakota's rural communities by using technology to deliver education, healthcare and economic development. Schafer's priorities as Secretary of Agriculture will be to work with Congress in passing a Farm Bill, to help conclude the World Trade Organization (WTO) Doha Round of trade negotiations and to seek opening up new markets for US beef and other agricultural products.

Congressional reaction to Schafer's new post has been positive. Senate Agriculture Committee Chairman Tom Harkin (D-IA) stated that he looks forward to working with Schafer in passing a 2007 Farm Bill. Ranking Member on the Senate Agriculture Committee Saxby Chambliss (R-GA) noted that Schafer has a strong background in public service, "which will certainly be a valuable asset in his new role as Secretary." Private sector response has also been positive. United States Cattleman's Association (USCA) President Jon Wooster opined that Schafer has vast experience in areas critical to US cattle producers. President of American Farm Bureau Federation (AFBF) Bob Stallman also noted that Schafer's background in small business issues will give him "an understanding of the economic challenges US farmers and ranchers face."

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President Bush Issues Amendment Clarifying Implementation of Foreign Investment and National Security Act of 2007

On January 23, 2008, President Bush issued an amendment to Executive Order 11858 that clarifies how the Administration will implement the Foreign Investment and National Security Act of 2007 (FINSA). According to President Bush, the Executive Order "reaffirms [the United States'] commitment to open economies and [US] policy of welcoming foreign investment and the important economic benefits that such investment brings." He also noted that the Executive Order sets forth procedures for protecting US national security. The order is effective immediately.

On October 24, 2007, FINSA came into effect. FINSA amends the Exon Florio Amendment to the Defense Production Act of 1950, which gives the President the authority to review foreign acquisitions of US companies. FINSA also reformed the interagency Committee on Foreign Investment in the United States (CFIUS). CFIUS – an interagency committee established in 1975 to monitor and coordinate US policy on foreign investment in the United States – was delegated the investigative authority of Exon-Florio. The Secretary of the Treasury chairs CFIUS. Exon-Florio establishes a process for CFIUS investigations of bids by foreign entities to acquire US companies. The CFIUS drew criticism from Congress when in February 2006, the panel approved the sale of US port operations to DP World, a company controlled by the United Arab Emirates (UAE).

The amendment to Executive Order 11858 addresses agencies' duties, including Department of Commerce requirements to consolidate and analyze information on foreign investment in the United States, agreements to mitigate national security risks, and identification and clarification of national security risks. Specifically, the amendment addresses the following issues, among others:

- **CFIUS Membership.** Under the Executive Order, the President states that in addition to the members specified in FINSA, the United States Trade Representative, the Director of the Office of Science and Technology Policy, and the heads of any other executive department, agency, or office, as the President or the Secretary of the Treasury determines appropriate shall also be members of the CFIUS. The Director of the Office of Management and Budget, the Chairman of the Council of Economic Advisers, the Assistant to the President for National Security Affairs, the Assistant to the President for Economic Policy, and the Assistant to the President for Homeland Security and Counterterrorism shall observe and, as appropriate, participate in and report to the President on the CFIUS' activities.

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- **Other CFIUS Activities.** Under the Executive Order, in addition to the functions assigned to the CFIUS by FINSA, the CFIUS shall also review the implementation of FINSA and report the implementation status to the President, together with recommendations for policy, administrative, or legislative proposals related to FINSA implementation.
- **Department of Commerce Activities.** Under the Executive Order, the Department of Commerce will: (i) obtain, consolidate, and analyze information on foreign investment in the United States; (ii) monitor and improve procedures for the collection and dissemination of information on foreign investment in the United States; (iii) prepare for the public, the President or heads of departments or agencies, reports, analyses of trends, and analyses of significant developments in appropriate categories of foreign investment in the United States; and (iv) compile and evaluate data on significant transactions involving foreign investment in the United States.

According to Treasury Secretary Henry Paulson, the Executive Order strengthens the process of the CFIUS and "will ensure that all appropriate federal agencies rigorously review potential foreign investments with national security implications . . . the Executive Order makes clear that America remains open to investment, consistent with the protection of our national security."

The amendment to Executive Order 11858 is available at:
http://www.whitehouse.gov/news/releases/2008/01/20080123-9.html.

President Bush Signs New Reform Directives Meant to Enhance US Export Controls

On January 22, 2008, President Bush signed a package of directives that will ensure the United States' export control policies and practices support the National Security Strategy of 2006. Specifically, the President signed several Export Control Reform Directives that provide for a number of reform objectives relating to the substantive rules, implementation, and enforcement of US export controls on dual-use articles. The descriptions of the Directives identify reform objectives rather than specific changes that will be implemented.

According to a Bureau of Industry and Security (BIS) fact sheet, the President has directed that steps be taken on the following:

- **Foreign End-Users.** The directives state that the US dual-use export control system will increasingly focus on foreign end-users of US high technology products in order to facilitate

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trade to reliable foreign customers and deny access to sensitive technologies to proliferators, international terrorists, and other foreign parties acting contrary to US national security and foreign policy interests. The focus on foreign end-users includes the Validated End User (VEU) program for reliable foreign companies and imposing additional scrutiny of exports to foreign parties with a record of activities contrary to US foreign policy and national security interests through expansion of the Department of Commerce's Entity List.

- **US Competitiveness.** According to the directives, technological and economic competitiveness are key to the United States' long-term national security, and the United States must ensure that export controls are constantly reassessed to ensure that the most sensitive items are controlled in order to sustain US economic competitiveness and innovation. This includes developing a regular process for systematic review of the Commerce Control List of controlled dual-use items, revised controls on intra-company transfers, revised controls on encryption products, and a review of re-export controls.
- **Transparency.** The directives state that there should be an increased focus on transparency which includes publication of advisory opinions on the Department of Commerce's website, as well as lists of foreign parties warranting higher scrutiny.

According to the State Department, the President has also ordered that:

- additional financial resources and intelligence support be made available for the timely adjudication of defense trade licenses;
- the electronic licensing system be upgraded so as to permit the submission of all types of defense trade licenses and enable all agencies to access the same electronic information;
- the Secretary of State update US controls on exports involving dual and third-country nationals from the North Atlantic Treaty Organization (NATO) and other allied countries;
- a multi-agency working group be established to improve procedures for conducting export enforcement investigations; and
- a formal interagency dispute mechanism be created to allow for timely resolution of licensing jurisdiction issues involving the departments of State and Commerce under the Commodity Jurisdiction process.

According to the White House, the new directives will advance a more efficient and transparent export licensing process and enhance dispute resolution mechanisms. Industry reaction to the directives,

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however, was mixed. Representatives of the National Foreign Trade Council opined that the success or failure of the directives depends on whether the National Security Council "will take a firm hand . . . to ensure that the president's decisions are quickly adopted by the State and Commerce departments." The Coalition for Security and Competitiveness, comprised of industry groups including the US Chamber of Commerce and the National Association of Manufacturers (NAM), meanwhile, lauded the directives and noted that they are important to the United States in its goal of "achieving meaningful reform in the way [the US government] regulates defense trade and advanced technology exchange."

United States Files Second Arbitration Request Under Softwood Lumber Agreement Concerning Canadian Assistance Program

On January 18, 2008, the United States filed its second request for arbitration under the 2006 US-Canada Softwood Lumber Agreement (SLA) in which it challenged Canadian provincial subsidy programs. The second request for arbitration came after the Government of Canada announced on January 10, 2008, the proposed creation of a USD 983 million Community Development Trust which, among other provisions, would provide aid to Canada's forestry sector. In response to concerns in the United States about this announcement, United States Trade Representative (USTR) Susan Schwab sent a letter on January 15, 2008 to Canadian Trade Minister David Emerson seeking Canada's assurance that any funds disbursed to the forestry sector from the Community Development Trust will be used in a manner consistent with Canada's obligations under the SLA. Following that letter and discussion between the United States and Canada, US officials decided to file a request for arbitration.

According to Canadian officials, the proposed Community Development Trust would "assist workers suffering economic hardship caused by the recent volatility in global financial and commodities markets" and would be funded from the Canadian federal government's budgetary surplus for fiscal 2007-2008. Canadian Prime Minister Stephen Harper has stated that the Community Development Trust "will support job training to create opportunities for workers in sectors facing labor shortages and community transition plans that foster economic development and create new jobs, and infrastructure development that stimulates economic diversification." The US Coalition for Fair Lumber Imports, however, believes that the Community Development Trust will serve as a new subsidy for Canadian softwood producers. According to US Coalition for Fair Lumber Imports Chairman Steve Swanson, "the money ostensibly earmarked for workers [under the Community Development Trust] will be used to reduce liabilities of Canadian lumber companies, which would violate the Softwood Lumber Agreement."

The US-Canada SLA entered into force on October 12, 2006. Under the SLA, the Government of Canada committed not to take any action that circumvents the SLA, including actions that reduce or offset

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the Agreement's export measures, such as providing new subsidies to producers or exporters of Canadian softwood lumber products. According to USTR, the Community Development Trust may be construed as an assistance program that violates the SLA's anti-circumvention provisions. The agreement provides for binding arbitration to resolve disputes under the SLA, conducted under the rules of the London Court of International Arbitration. On average, once a party to the agreement has filed an arbitration request, the arbitral tribunal issues its award within eight months (with the first two months dedicated to selecting arbitrators). Thus, USTR officials have opined that a panel could reach a decision regarding the United States' most recent arbitration request by the end of 2008.

The United States' first arbitration request challenged Canada's implementation of the export measures under the SLA, specifically Canada's application of surge mechanisms and quota volumes. The United States filed this first request for arbitration on August 13, 2007, and an arbitral tribunal is expected to issue a decision in that case by the end of February.

USTR Requests Comments on Foreign Countries' IPR Practices for Special 301 Report

In a January 16, 2008 Federal Register (FR) notice, the Office of the United States Trade Representative (USTR) requested written submissions from the public for its annual "Special 301" annual report on the adequacy and effectiveness of US trading partners' intellectual property rights (IPR) protections (73 FR 2958). The deadline for submissions from the public is February 11, 2008, but the deadline for written submissions from foreign governments is February 29, 2008.

Pursuant to Section 182 of the Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988 and the Uruguay Round Agreements Act (enacted in 1994) ("Special 301"), USTR must annually identify those countries that deny adequate and effective IPR protections. According to the report, "countries that have the most onerous or egregious acts, policies, or practices and whose acts, policies, or practices have the greatest adverse impact on the relevant US products" are designated as "Priority Foreign Countries." Priority Foreign Countries are potentially subject to an investigation under the Section 301 provisions of the Trade Act of 1974, under which the United States may impose trade sanctions against foreign countries that maintain acts, policies and practices that violate, or deny US rights or benefits under, trade agreements, or are unjustifiable, unreasonable or discriminatory and burden or restrict US commerce. As part of its Special 301 duties, USTR has created a "Priority Watch List" and "Watch List." Placement of a trading partner on either 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

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attention concerning the problem areas." Additionally, under Section 306, USTR monitors a country's compliance with bilateral intellectual property agreements that are the basis for resolving an investigation under Section 301. USTR may apply sanctions if a country fails to "satisfactorily" implement an agreement.

USTR requests written submissions from the public concerning foreign countries' acts, policies, and practices that are relevant to the decision whether particular trading partners should be identified under section 182 of the Trade Act. USTR will use submitted comments to help it identify countries that deny adequate and effective protection of IPR or deny fair and equitable market access to US persons who rely on IP protection. Comments should include a description of the problems experienced and the effect of the foreign acts, policies, and practices on US industry. The comments should also provide all necessary information for assessing the effect of the acts, policies, and practices. Any comments that include quantitative loss claims should be accompanied by the methodology used in calculating such estimated losses. All comments should be addressed to Jennifer Choe Groves, Director for Intellectual Property and Innovation and Chair of the Special 301 Committee, Office of the United States Trade Representative. Within one business day of receipt, non-confidential submissions will be placed in a public file open for inspection and copying at USTR, and may be made available on USTR's web site.

GAO Report: Impact of US Sanctions Against Iran in Furthering US Objectives "Unclear" and Requires Further Review

In December 2007, the US Government Accountability Office (GAO) published a report on the effectiveness of US sanctions against Iran ("Iran Sanctions: Impact in Furthering US Objectives Is Unclear and Should Be Reviewed," GAO-08-58, December 2007). In its report, the GAO reviewed US sanctions targeting Iran and their implementation, reported sanction impacts and factors limiting sanctions. GAO assessed trade and sanction data, information on Iran's economy and energy sector and US and international reports on Iran in writing the report.

According to the GAO report, US agencies have implemented numerous sanctions against Iran since 1987. The Department of Treasury oversees a ban on US trade and investment with Iran and the Department of State administers laws that sanction foreign parties engaging in proliferation or terrorism-related activities with Iran. Both Treasury and State can also use financial sanctions to freeze the assets of targeted parties and reduce their access to the US financial system.

US officials have stated that the US sanctions program against Iran has slowed foreign investment in Iran's petroleum sector and denied parties involved in Iran's proliferation and terrorism activities access to

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the US financial system. According to the GAO, however, "other evidence raises questions about the extent of reported impacts." Specifically, the GAO report concluded that:

- Since 2003, Iran has signed contracts reported at about USD 20 billion with foreign firms to develop its energy resources;
- Sanctioned Iranian banks can fund their activities in currencies other than the dollar;
- Although Iran halted its nuclear weapons program in 2003, according to the November 2007 National Intelligence Estimate, it continues to enrich uranium, acquire advanced weapons technology and support terrorism; and
- US agencies do not systematically collect or analyze data demonstrating the overall impact and results of their sanctioning and enforcement actions.

According to the GAO, "Iran's global trade ties and leading role in energy production make it difficult for the United States to isolate Iran and pressure it to reduce proliferation and support for terrorism." The GAO recommends that the US Congress consider requiring the National Security Council, in collaboration with key agencies, to: (i) assess data on Iran sanctions and complete an overall baseline assessment of sanctions; (ii) develop a framework for ongoing assessments; and (iii) periodically report the results to Congress.

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Free Trade Agreements

Free Trade Agreements Highlights

President Bush Pushes Free Trade Agreements in State of Union Address

On January 28, 2008, President Bush delivered his final State of the Union address and urged Congress to approve the three pending Free Trade Agreements (FTAs) with Colombia, Panama and South Korea by the end of the year. President Bush stated that many products from these economies enter the United States duty-free but that many US products face steep tariffs in these three markets. According to President Bush, the three FTAs will provide the United States access to nearly 100 million customers while simultaneously promoting the United States' strategic interests. President Bush used the US-Colombia FTA as an example and stated that if Congress fails to pass the Colombia agreement, "[the United States] will embolden the purveyors of false populism in [the Western] hemisphere."

The President's mention of the pending FTAs in his State of the Union address indicates that trade has become a priority issue for the Administration during its last few months in office. President Bush has not yet submitted implementing legislation for any of the three pending FTAs, however, because of the current political climate. Both House Ways and Means Committee Chairman Charles Rangel (D-NY) and Senate Finance Committee Chairman Max Baucus (D-MT) have indicated that the pending trade agreements are not at the top of their respective committees' agendas. Each of the agreements also suffers from contentious issues that could interfere with final passage.

On the US-Colombia FTA, members of Congress remain concerned with Colombia's record of human rights violations and violence against labor leaders. Of the three pending FTAs, the Administration seems to be pushing for Congressional approval of the Colombia agreement next and has devoted some of its resources over the past several months in obtaining more Congressional support for the FTA. The Administration, since October 2007, has organized several Congressional delegation visits to Colombia where members of Congress have met with Colombian officials regarding some of their concerns, including labor and human rights. Government sources have noted that these delegation visits have managed to convince some members of Congress that Colombia has made strides in improving its human rights record, but it remains to be seen if the Administration can count on a large enough amount of Congressional support for the agreement.

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Although the US-Panama FTA itself does not face much Congressional opposition, the September 1, 2007 election of Pedro Miguel Gonzalez Pinzon as President of Panama's National Assembly has affected the agreement's chances of approval. Gonzalez Pinzon has an outstanding warrant for his arrest in the United States for the June 1992 slaying of US Army Sgt. Zak Hernandez Laporte and the attempted murder of Sgt. Ronald Marshall outside Panama City. Gonzalez Pinzon has denied any involvement in the crimes and was acquitted in a trial in Panama in 1997. This political issue, however, has garnered statements from key members of the US Congress, such as Chairman Baucus, that until the Panamanian government addresses the issue, the agreement stands little chance of passage in the US Congress.

Like the other agreements, the US-Korea (KORUS) FTA does not enjoy firm Congressional support. Several US automakers have complained that the KORUS FTA does not sufficiently address non-tariff barriers (NTBs) to auto trade in the Korean market. US labor unions have also indicated their opposition to the agreement because they feel that the KORUS FTA offers weak protections for workers' rights and the environment. Korea has also not yet fully opened its borders to US beef. As long as the Korean market remains closed to imports of US beef, key members of Congress, including Chairman Baucus, will oppose the agreement. The new Korean President, Lee Myung-bak, elected in December 2007, appears to be more business-oriented and has indicated his support of the KORUS FTA. He has also indicated that Korea may open its market to US beef products soon, perhaps by Spring 2008, which may provide enough momentum for Congressional approval of the agreement. Government sources have indicated that the Bush Administration would likely submit implementing legislation for the FTA to Congress once Korea opens its borders to US beef.

The Bush Administration is likely to use its remaining months in office to lobby for Congressional approval of each of these FTAs, especially in light of the weakened US economy. President Bush, who already faces low approval ratings, would like to see Congress approve these three pending agreements by the end of 2008 so that he can leave his office having implemented several FTAs. Although it remains unclear just when the Administration will deliver implementing legislation for these agreements to the Congress for its consideration, the Administration's lobbying efforts will likely increase over the next several months. Congressional passage or disapproval of whichever agreement the President decides to submit to Congress first will provide a good litmus test for the other two agreements and will indicate to the Administration whether it is a good time to submit the other agreements to members of Congress for their ultimate approval.

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United States and Ghana Meet Under TIFA

On January 15, 2008, officials from the United States and Ghana met in Washington, DC under the fifth meeting of the United States-Ghana Trade and Investment Council. The United States and Ghana created the Trade and Investment Council in 1999 pursuant to the United States-Ghana Trade and Investment Framework Agreement (TIFA). The United States and Ghana signed the TIFA in February 1999. Deputy United States Trade Representative (DUSTR) John Veroneau led the US delegation and Deputy Minister of Trade and Industry Gifty Konadu led the Ghanaian delegation.

The Trade and Investment Council monitors trade and investment relations and facilitates US-Ghana dialogue on commercial and investment opportunities in both countries. The Council also identifies and works to remove impediments to trade and investment flows between the United States and Ghana. At the fifth meeting of the Council, US and Ghanaian officials discussed cooperation in the World Trade Organization (WTO), implementation of the African Growth and Opportunity Act (AGOA), export diversification, intellectual property (IP) protection and enforcement, trade capacity building and technical assistance, and infrastructure issues.

TIFAs are limited trade agreements that establish joint councils of trade and economic officials to discuss trade issues. Under US trade policy, TIFAs are usually the first step towards the initiation of formal bilateral or regional Free Trade Agreement (FTA) negotiations. The next step in the process would be for the countries to enter into a Bilateral Investment Treaty (BIT), which protects the rights of foreign subsidiaries and investors in the countries' home markets. According to USTR, two-way trade between the United States and Ghana totaled USD 572 million in the first eleven months of 2007, a 31 percent increase over the same period in 2006. US exports to Ghana during this period totaled USD 385 million whereas US imports from Ghana totaled USD 187 million. US imports from Ghana included petroleum, apparel, yams, cassava, cocoa paste, and wood ornaments.

The fifth meeting of the United States-Ghana Trade and Investment Council indicates that USTR is continuing its plans to increase its involvement with sub-Saharan African states. In 2006, USTR indicated that the United States plans to explore new Bilateral Investment Treaties (BITs) and TIFAs with African countries even though it is not yet ready to initiate formal Free Trade Agreement (FTA) negotiations with any African TIFA and BIT partners. US BITs and TIFAs typically indicate that the United States is considering future FTAs with the BIT and TIFA partners. In this case, however, the mid-2007 expiry of Presidential Trade Promotion Authority (TPA) limits USTR's ability to formally initiate and complete any new FTA negotiations. USTR's meetings with sub-Saharan African states under various TIFAs and BITs likely point to the United States' desire to keep these economies interested in strengthening commercial

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and trade linkages with the United States so that if and when the US Congress grants the President TPA, USTR can move forward on its trade initiatives (such as future FTAs) with these economies.

The United States could also be maintaining a running dialogue with African trading partners in order to respond to the increased presence of other global competitors in the region, such as China. The US Export-Import Bank, for example, has reported that China's growing commercial presence in Africa, and low participation by US companies in the region, present challenges to US commercial interests. The Export-Import Bank has encouraged the development of mechanisms to foster cooperation between the United States and Africa, including forums that address trade, financing and other issues. USTR may view the US-Ghana TIFA – and other TIFAs and BITs in the region – as an effective mechanism to foster increased cooperation on trade and commercial issues *and* respond to the increased presence of competitors in Africa.

President Bush Issues Proclamation Adjusting ROOs Under US-Chile, US-Singapore FTAs; Adjustments Effective Feb. 2008

In a January 8, 2008 Federal Register (FR) notice, President Bush published a Presidential Proclamation that adjusts the rules of origin (ROO) under the US-Chile and US-Singapore Free Trade Agreements (FTAs). Section 1206(a) of the Omnibus Trade and Competitiveness Act of 1988 (19 U.S.C. 3006(a)) authorizes the President to proclaim modifications to the US Harmonized Tariff Schedule (HTS), based on the recommendations of the US International Trade Commission, if he determines that: (i) the modifications are in conformity with US obligations under the International Convention on the Harmonized Commodity Description and Coding System (the "Convention") and (ii) do not run counter to the national economic interest of the United States.

The modifications and technical rectifications to the HTS set forth in the Proclamation will be effective with respect to goods entered, or withdrawn from warehouse for consumption, on the thirtieth day after the date of publication of the Proclamation in the FR (*i.e.*, on February 8, 2008).

I. US-Chile FTA

According to the FR notice, Presidential Proclamation 7746 (December 30, 2003) implemented the US-Chile FTA with respect to the United States, and included staged reductions in duty rates under the FTA as well as the schedule of US duty reductions with respect to originating goods set forth in the agreement. Following implementation of the US-Chile FTA, President Bush issued Proclamation 8097 in order to ensure the continuation of the staged reductions in duty rates included in Proclamation 7746 for originating goods from Chile; Proclamation 8097 modified certain tariff categories under the US-Chile FTA

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to conform to the Convention. These changes to the Convention differ slightly from the national tariff schedules of the United States and Chile, and consequently, the ROOs set out in Annex 4.1 of the US-Chile FTA must be changed to ensure that the tariff and certain other treatment accorded under the agreement to originating goods will continue to be provided under the tariff categories that were modified in Proclamation 8097. Section 202 of the US-Chile FTA provides certain rules for determining whether a good is an originating good for the purposes of implementing tariff treatment under the agreement, and also authorizes the President to proclaim the ROOs set out in the agreement and any subordinate tariff categories necessary to carry out the agreement. President Bush has thus determined that the modifications to the HTS proclaimed pursuant to section 202 of the US-Chile FTA Act are necessary or appropriate to ensure the continuation of tariff and certain other treatment accorded originating goods under tariff categories modified in Proclamation 8097 and to carry out the duty reductions proclaimed in Proclamation 7746. The modifications to the ROO under the US-Chile FTA appear in Annex I of the FR notice.

II. US-Singapore FTA

According to the FR notice, Presidential Proclamation 7747 (December 30, 2003) implemented the US-Singapore FTA with respect to the United States, and included staged reductions in duty rates under the FTA as well as the schedule of US duty reductions with respect to originating goods set forth in the agreement. Following implementation of the US-Singapore FTA, President Bush issued Proclamation 8097 in order to ensure the continuation of the staged reductions in duty rates included in Proclamation 7747 for originating goods from Singapore; Proclamation 8097 modified certain tariff categories under the US-Singapore FTA to conform to the Convention. These changes to the Convention differ slightly from the national tariff schedules of the United States and Singapore, and consequently, the ROOs set out in Annexes 3A and 3B of the US-Singapore FTA must be changed to ensure that the tariff and certain other treatment accorded under the agreement to originating goods will continue to be provided under the tariff categories that were modified in Proclamation 8097. Section 202 of the US-Singapore FTA provides certain rules for determining whether a good is an originating good for the purposes of implementing tariff treatment under the agreement, and also authorizes the President to proclaim the ROOs set out in the agreement and any subordinate tariff categories necessary to carry out the agreement. President Bush has thus determined that the modifications to the HTS proclaimed pursuant to section 202 of the US-Singapore FTA Act are necessary or appropriate to ensure the continuation of tariff and certain other treatment accorded originating goods under tariff categories modified in Proclamation 8097 and to carry

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out the duty reductions proclaimed in Proclamation 7747. The modifications to the ROO under the US-Singapore FTA appear in Annex II of the FR notice.

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Multilateral

WTO Panel Report: United States - Zeroing (Mexico)

Summary

Decision: A World Trade Organization (WTO) Panel has issued a mixed ruling in a challenge by Mexico to US "zeroing" practices. The Panel agreed that zeroing during original anti-dumping investigations was WTO-inconsistent. However - despite clear Appellate Body authority to the contrary - the Panel upheld the use of zeroing during administrative reviews. The Panel stated that it had "no option but to respectfully disagree with the line of reasoning developed by the Appellate Body."

Significance of Decision / Commentary: This decision raises fundamental issues regarding the role of Appellate Body jurisprudence in WTO panel proceedings, and the extent to which panels are able to disregard such precedents.

At issue in this dispute was the contentious US practice of "zeroing" in determining the "margin of dumping", i.e., the magnitude or amount of the dumping. Where the export price of a good 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 so-called "negative dumping margins", i.e., when the export price of the product is higher than the price in the exporting country. Under zeroing, the investigating authority will 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 otherwise may not apply at all.

The Panel in the present case agreed that zeroing was WTO-inconsistent during original investigations. Indeed, the United States did not offer any substantive defense to Mexico's claims on this issue.

However, the Panel upheld the use of zeroing during reviews. Under the US retrospective duty assessment system, definitive anti-dumping duties are not assessed upon entry into the United States of a good subject to an anti-dumping order. Instead, a cash deposit is required, and the definitive duties are determined during the annual administrative reviews of the order that may be requested of the US Department of Commerce (USDOC). The Appellate Body has twice ruled that zeroing during reviews is WTO-inconsistent, in the 2006 case of US – Zeroing (EC) and in its 2007 ruling in US – Zeroing (Japan).

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The Panel in the present case provided a full and accurate summary of the prior Appellate Body decisions on zeroing during administrative reviews. The Panel did not seek to minimize or distinguish such prior jurisprudence. Instead, it simply stated that it disagreed with the prior Appellate Body rulings and would not follow them for that reason. The Panel deserves credit for its candor. However, its basic decision to disregard prior, directly relevant Appellate Body precedent is undesirable, and such actions jeopardize the predictability of the WTO dispute settlement system.

The Panel correctly stated that it was not technically bound by the prior Appellate Body decisions. However, since the inception of the WTO, a key role of the Appellate Body has been to render decisions that provide interpretive guidance to all Members, not just the litigants, on the meaning of various provisions of the covered agreements. As the Appellate Body has stated, adopted reports "create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute." It has also stressed that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same."

In the current dispute, the Panel disregarded these principles, saying that "concern over the preservation of a consistent line of jurisprudence" did not override its obligation under Article 11 of the WTO Dispute Settlement Understanding (DSU) to conduct an "objective assessment" of the matter before it. Yet there is no inherent inconsistency between following authoritative Appellate Body jurisprudence and a Panel's obligations under DSU Article 11. Indeed, one of the Panel's responsibilities under DSU Article 11 is to assess "the applicability of and conformity with the relevant covered agreements." Any assessment by a panel of the applicability of a covered agreement, or the conformity of a measure with that agreement, should be made in light of the interpretative guidance of the Appellate Body in prior disputes. The approach adopted by the Panel in the present case would reduce the Appellate Body to a tribunal that provides sui generis rulings in individual disputes, which would be a major departure from the well-established expectations of WTO Members.

The Panel's ruling on the WTO-consistency of zeroing during reviews is very likely to be reversed on appeal. At the same time, the Appellate Body will likely have to respond, at least implicitly, to the Panel's assertions that the Appellate Body's reasoning on this issue "does not have a solid textual basis in the relevant treaty provisions." It will likely have to address this point by providing additional analysis on why zeroing during reviews is inconsistent with US obligations under the Anti-Dumping Agreement.

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Report

Types of zeroing challenged by Mexico

In the present case, Mexico brought both "as such" and "as applied" challenges to two types of measures: "model zeroing in investigations" and "simple zeroing in periodic reviews." Although the United States objected that such terms did not appear either in US law or in the Anti-Dumping Agreement, the Panel stated that it used such terminology simply for reference. The Panel also rejected the US argument that such zeroing procedures did not exist in US law.

In general terms, "model zeroing", is the method under which the USDOC made 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 zeroed (*i.e.*, disregarded) any negative dumping margins when it aggregated the results of these multiple comparisons to calculate a weighted average margin of dumping. The USDOC discontinued this kind of zeroing in February 2007.

Under "simple zeroing", 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.

Model zeroing in investigations found to breach Article 2.4.2 of the Anti-Dumping Agreement

The model zeroing procedures for investigations, which the Panel found were in existence at the time the Panel was established, were repealed by the USDOC after the commencement of this dispute. Consistent with prior WTO jurisprudence, the Panel found that it could make findings on Mexico's "as such" claims regarding model zeroing in investigations, but that it would not make any recommendation regarding "a measure that no longer exists."

The United States did not make any substantive defense to Mexico's claims regarding the WTO-inconsistency of model zeroing in investigations. The Panel noted that the United States "does not appear to contest Mexico's claim on this issue."

The Panel recalled that model zeroing in investigations had been found to be WTO-inconsistent "in all dispute settlement proceedings in which it was challenged". The Panel said that Article 2.4.2 of the Anti-Dumping Agreement provides in part that the existence of margins of dumping during the investigation phase is normally established on the basis of a comparison of "all comparable export transactions." The Panel stated that it agreed with the Appellate Body's ruling in the *US – Softwood Lumber V* that the

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phrase "all comparable export transactions" required the investigating authorities to "take into consideration the weighted average of prices of all comparable export transactions in their dumping determinations in investigations" and that "[m]odel zeroing runs counter to this requirement…."

The Panel therefore found that model zeroing breached Article 2.4.2 of the Agreement both "as such" and "as applied." As noted above, as the USDOC had stopped using model zeroing in investigations, the Panel made no recommendation for the "as such" violation.

Role of prior jurisprudence: "we have no option but to respectfully disagree with…the Appellate Body"

The Panel began its analysis of zeroing in reviews by noting that in *US – Zeroing (EC)* and *US – Zeroing (Japan)*, the Appellate Body "reversed the decisions of both panels and found simple zeroing in periodic reviews to be WTO-inconsistent." The Panel stated that it was not, strictly speaking, bound by those prior decisions. It reasoned that "[i]n principle, a panel or Appellate Body decision only binds the parties to the relevant dispute."

At the same time, the Panel noted the Appellate Body's pronouncement in *Japan – Alcoholic Beverages II* that adopted panel reports "create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute." In *US – Shrimp (Article 21.5 – Malaysia)*, the Appellate Body held that this principle applied to adopted Appellate Body reports as well. Moreover, in *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body stated that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same."

The Panel acknowledged that this case law indicated that "even though the DSU does not require WTO panels to follow adopted panel or Appellate Body reports, the Appellate Body *de facto* expects them to do so to the extent that the legal issues addressed are similar." Nonetheless, similar to the approach taken by the Panel in *US – Zeroing (Japan)*, the present Panel reasoned that "concern over the preservation of a consistent line of jurisprudence should not override a panel's task to carry out an objective examination of the matter before it through an interpretation of the relevant treaty provisions in accordance with the customary rules of interpretation of public international law." Therefore, the Panel decided that "we have no option but to respectfully disagree with the line of reasoning developed by the Appellate Body regarding the WTO-consistency of simple zeroing in periodic reviews." It reasoned that in light of its

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obligation under DSU Article 11 to carry out an objective examination of the matter, it "felt compelled to depart from the Appellate Body's approach…."

Simple zeroing in periodic reviews upheld: a "competitive disincentive to engage in fair trade could not have been intended"

Turning to the substance of the issue, the Panel noted that the Appellate Body's rulings on the WTO-inconsistency of simple zeroing in reviews was premised on two assumptions: (i) that the definition of "dumping" had to be established for the product as a whole; and (ii) a determination of dumping in all anti-dumping proceedings, including in reviews, had to be made in respect of each exporter or foreign producer subject to the proceeding. According to the Panel, "[i]t follows that dumping cannot be calculated on a transaction-specific basis; it has to be based on all exports of the subject product made in the period of review from the exporter or the foreign producer subject to the proceeding." However, the Panel disagreed with both assumptions.

On the issue of "product as a whole" the Panel stated that:

> [T]he expression "product as a whole" does not appear in the text of Article 2.1 of the Agreement or Articles VI:1 and VI:2 of the GATT 1994. It has been developed in WTO dispute settlement. We are not convinced that the treaty provisions cited by Mexico, on which the Appellate Body based its reasoning, necessarily compel a definition of "dumping" based on an aggregation of all export transactions.

The Panel stated that "the Appellate Body did not explain how the texts of Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement necessarily require the interpretation that the words "product" or "products" used in the definition of "dumping" may only be interpreted as referring to the product under consideration as a whole, not to individual export transactions." It added that it was "troubled by the fact that the principal basis of the Appellate Body's reasoning in the zeroing cases seems to be premised on an interpretation that does not have a solid textual basis in the relevant treaty provisions." The Panel was of the view that a good faith interpretation of the ordinary meaning of Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement "does not exclude an interpretation that allows the concept of dumping to exist on a transaction-specific basis."

The Panel also disagreed with the Appellate Body's reasoning that dumping has to be calculated with respect to individual exporters or foreign producers. The Panel said that "the obligation to pay anti-dumping duties is not incurred on the basis of a comparison of an exporter's total sales, but on the basis of an individual sale between the exporter and its importer. It is therefore a transaction-specific liability."

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The Panel concluded that "it is at least a permissible interpretation of Article 9.3 of the Agreement that the concept of dumping may be interpreted on an importer-specific basis." It therefore rejected Mexico's claim that Article 9.3 "necessarily requires dumping determinations in duty assessment proceedings to be specific to individual exporters or foreign producers." The Panel also advanced textual support for its interpretations of the relevant treaty provisions.

The Panel concluded its analysis by stating that accepting Mexico's claims with respect to zeroing in review "would lead to undesirable results." It reasoned that:

> If, while calculating in a periodic review the amount of the duty to be paid by a given importer, the authorities have to take into account the export prices paid by other importers importing from the same exporter or foreign producer, this would have unfair consequences in the market. In this situation, importers with high margins of dumping would be favoured at the expense of importers who do not dump or who dump at a lower margin. In such situations, importers importing at dumped prices would pay less than their true margin of dumping because of other importers refraining from importing at dumped prices. We agree with the United States that "[t]his kind of competitive disincentive to engage in fair trade could not have been intended by the drafters of the Antidumping Agreement and should not be accepted ... as consistent with a correct interpretation of Article 9.3".

The Panel also considered that "imposing on the investigating authorities an obligation to take into consideration the prices of non-dumped imports while calculating the amount of the liability in a periodic review would, in our view, also preclude the achievement of the function of anti-dumping duties, *i.e*. removing the injurious effect of dumping."

The Panel therefore ruled that simple zeroing in periodic reviews was WTO-consistent both "as such" and "as applied."

The Report of the Panel in *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* was released on December 20, 2007.

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Multilateral Highlights

WTO Members Call for Complete Ban on Zeroing in Doha Rules Negotiations

On January 24, 2008, several World Trade Organization (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 Proposal"). According to press sources, the 16 Members were Chile, Colombia, Hong Kong, India, Indonesia, Israel, Japan, Mexico, Norway, Pakistan, Singapore, South Africa, South Korea, Switzerland, Taiwan, and Thailand. The Negotiating Group on Rules convened from January 21-25, 2008 to discuss aspects of Chairman Guillermo Valles' November 30, 2007 draft text on suggested antidumping disciplines; the draft text included provisions on zeroing. A group of Members, led by the "Friends of Anti-dumping Negotiations" (FANs) group), had criticized the draft text for allowing zeroing methods in specified instances. The January 24 Proposal called for the insertion into of a provision the text of the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Antidumping Agreement") banning the use of zeroing methods.

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. 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 antidumping duties which may not otherwise apply at all.

The WTO Appellate Body previously ruled against US Department of Commerce (DOC) zeroing methods 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). On December 20, 2007, however, a dispute settlement Panel ruled in *United States - Final Anti-dumping Measures on Stainless Steel from Mexico* (DS344) upheld the use of zeroing during administrative reviews. In so doing, the Panel expressed that it had "no option but to respectfully disagree with the line of reasoning developed by the Appellate Body." WTO sources have opined that the Appellate Body will likely reverse the Panel's findings on appeal.

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The Proposal represents a setback for US negotiators in Geneva, who are facing mounting pressure from the US Congress to negotiate the permissibility of zeroing into the Antidumping Agreement. In a December 19, 2007 letter to United States Trade Representative (USTR) Susan Schwab, Ranking Member of the House Committee on Ways and Means Jim McCrery (R-LA) and Ranking Member of the House Subcommittee on Trade Wally Herger (R-CA) urged US negotiators in Geneva to heed the obligation codified in the Bipartisan Trade Promotion Authority Act of 2002 to "avoid agreements that lessen the effectiveness of domestic and international [antidumping] disciplines." The Proposal also undermines Chairman Valles' attempt to flesh out consensus between Members on what has become a difficult set of negotiations. On January 25, 2008, Chairman Valles reportedly remarked at the close of proceedings within the Negotiating Group on Rules that no "constructive alternatives" emerged from the talks. The Negotiating Group on Rules is meeting again from January 28-February 1, 2008 to discuss aspects of the rules draft text on suggested subsidy and countervailing measure disciplines, including provisions on the issue of fishery subsidies.

Doha Agriculture Chair Releases Eight Additional Working Papers on Market Access

On January 4, 2008, Chairman of the Doha Committee on Agriculture Crawford Falconer released eight additional Working Documents related to agricultural market access. Falconer had released eight earlier texts in late 2007: four Working Documents on "Domestic Support" circulated on December 21, 2007, and four Working Documents on "Export Competition" circulated in November 2007. These 16 Working Documents are the result of intensive negotiations on the Revised Draft Modalities for Agriculture paper that Falconer distributed on August 1, 2007. The Market Access Working Documents include legal language that would be incorporated into the text of a final Doha Agreement on the following disciplines: (i) Tiered Formula for Tariff Reductions; (ii) Sensitive Products; (iii) Tariff Escalation; (iv) Tariff Simplification; (v) Tariff Quotas; (vi) Special Agricultural Safeguard (SSG); (vii) Special Products; and (viii) Recently Acceded Members (RAMs). We highlight here several of the main provisions of the Market Access Working Documents:

Tiered Formula for Tariff Reductions. Committee on Agriculture Working Document No. 9 retains the same numerical thresholds contained in the August 2007 Revised Draft. According to the Tiered Formula, World Trade Organization (WTO) Members will reduce their final bound tariffs in equal installments over five years in the following manner:

- Where the final bound tariff or *ad valorem* equivalent is 0-20 percent, developed country Members will reduce their tariffs by 48-52 percent. Where the final bound tariff is 0-30

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percent, developing country Members will reduce their tariffs by two thirds of the 48-52 percent figure;

- Where the final bound tariff or *ad valorem* equivalent is 20-50 percent, developed country Members will reduce their tariffs by 55-60 percent. Where the final bound tariff is 30-80 percent, developing country Members will reduce their tariffs by two thirds of the 55-60 percent figure;
- Where the final bound tariff or *ad valorem* equivalent is 50-75 percent, developed country Members will reduce their tariffs by 62-65 percent. Where the final bound tariff is 80-130 percent, developing country Members will reduce their tariffs by two thirds of the 62-65 percent figure;
- Where the final bound tariff or *ad valorem* equivalent is greater than 75 percent, developed country Members will reduce their tariffs by 66-73 percent. Where the final bound tariff is greater than 130 percent, developing country Members will reduce their tariffs by two thirds of the 66-73 percent figure.

Small, vulnerable economies (SVEs) will be entitled to moderate tariff cuts by a further 10 *ad valorem* percentage points in each band.

Sensitive Products. Committee on Agriculture Working Document No. 10 retains the same numerical thresholds contained in the August 2007 Revised Draft. According to the Working Document, Members will be free to designate 4-6 percent of their tariff lines as Sensitive Products. However, Members may extend this range to a 6-8 percent threshold in specified circumstances. Developing country Members may designate tariffs lines as Sensitive Products by up to one third more than either threshold. Members may deviate from the Tiered Formula with respect to Sensitive Products by a minimum of one third, half or a maximum of two thirds of the reduction that would otherwise be required under the Tiered Formula.

Tariff Quotas. Committee on Agriculture Working Document No. 13 improves upon the August 2007 Revised Draft. Falconer noted in the Revised Draft that disciplines on bound in-quota duties remain "to be precisely negotiated," whereas tariff quota administration is "an important issue" that requires "further intensive work to arrive at a draft." According to the Working Document, the final reductions of bound in-quota tariffs will be no less than the default sensitive deviation rate of cut in the respective band within which the relevant item falls plus 20 percent. In-bound quotas are to be eliminated in equal installments over a five year period.

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SSG. Committee on Agriculture Working Document No. 14 deviates from the numerical thresholds contained in the August 2007 Revised Draft. Falconer suggested in the Revised Draft that developed country Members reduce the number of tariff lines eligible for the SSG by a minimum of 50 percent at the start of the implementation period, and continue thereafter to make reductions in equal annual installments. The Working Document does not refer to a 50 percent threshold, but suggests a four year period for "full elimination of the SSG by developed country Members." According to the Working Document, the quantity trigger for invoking SSG requires that over three years:

- The domestic consumption of imports has increased by at least 25 percent above a minimum threshold of 10 percent; and
- The ratio of imports to domestic consumption has increased by 0.35 or more.

The Working Document suggests that developing country Members either be fully exempted from these SSG disciplines, or be required to adhere to them with at least one third more flexibility in applicable numerical trigger thresholds.

Special Products. Committee on Agriculture Working Document No. 15 improves upon the August 2007 Revised Draft. Falconer stated in the Revised Draft that disciplines on Special Products were "clearly a fundamental element of the modalities," but were "simply not yet developed well enough to go to precise text without that being either meaningless . . . or being an artificial construct with no underlying consensus in the Membership." According to the Working Document, "the number of Special Products will be greater than the number of Sensitive Products that a developing Member may have." The Working Document cites a range of 6-9 percent of tariff lines for Special Products based on a 5.3-8 percent estimated range of tariff lines for Sensitive Products. The Working Document also addresses the possible creation of a "Super-Special" Product sub-category.

The Market Access Working Documents display a turnaround in Doha agriculture proceedings. Falconer had warned on October 19, 2007 that agriculture negotiations were at an impasse, and he indefinitely delayed the release of a revised agriculture text due mid-November 2007. However, on December 3, 2007, Falconer stated that he was "quite encouraged by the degree of progress" WTO Members have made in recent weeks. The additional working papers indicate that the Agriculture Committee and negotiators are working behind the scenes and attempting to move the stalled talks forward. WTO Members have noted their willingness to complete a final Doha Agreement by the end of 2008. Addressing contentious issues in the agriculture talks would certainly provide a kick-start to the stalled talks, and Falconer's issuance of the working documents so early in 2008 shows that he intends to draft a

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final agriculture text by the "end-2008" deadline. Falconer will reportedly start preparing a revised agriculture text in mid to late January, and at that stage, WTO Members will likely have a better understanding of where the agriculture negotiations stand and if it is possible to complete a final Doha Agreement – with a comprehensive agriculture chapter that address all Members' demands – by the end of the year.

The Working Documents are available at:
http://www.wto.org/english/tratop_e/agric_e/chair_workdoc_nov07_e.htm.

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