International Trade

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I. Introduction

2007 proved to be a busy, yet largely inconclusive, year for international trade. The World Trade Organization (WTO) welcomed Tonga as its 151st member, but Russia and Ukraine failed to complete their accessions. The WTO Doha Round negotiations saw intensive activity in the area of agriculture, non-agricultural market access, and rules, including the introduction of several draft texts. Although WTO Members achieved some convergence in several areas, numerous disagreements remained, especially between developed and developing countries. The United States negotiated a Free Trade Agreement (FTA) with Korea, but Congress was not able to ratify this bilateral deal in 2007. FTAs previously concluded with Colombia and Panama likewise remained pending, although the U.S.-Peru FTA was signed into law. Legislation to re-authorize Trade Adjustment Assistance and other trade-related bills were stalled.

The WTO Dispute Settlement Body was occupied with disputes on zeroing, import restrictions, subsidies, trade remedies, and implementation of prior decisions. 2007 also saw a remarkable escalation of WTO disputes between the United States and China. U.S. administrative trade remedies litigation was still down in 2007, but the Department of Commerce (DOC) made two critical decisions, which, however, remained open to modification through appeal or administrative policy-making. The first was the decision to investigate, contrary to prior practice, a request that countervailing duties be imposed against coated free sheet paper products of a non-market economy (China). The Court of International Trade (CIT) refused to enjoin DOC from conducting the investigation, but left the door open for a future court to rule against the imposition of countervailing duties. The second was the decision to accept petitioner's allegation of targeted dumping and to use zeroing as a consequence in the antidumping (AD) investigation of coated free sheet paper from Korea. The DOC, however, cautioned that its decision was limited only

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to the specific case and requested public comments regarding the application of the targeted dumping methodology. This policy-making was not completed in 2007. Finally, the CIT and the Court of Appeals for the Federal Circuit (CAFC) issued some interesting decisions, including a re-affirmation of the permissibility of zeroing in administrative reviews.

II. Negotiation Developments

The expiration of Trade Promotion Authority (TPA) on June 30 shaped most of the trade negotiations in 2007. Without renewal, the Bush Administration lost its power to conclude trade negotiations and subject an agreement to an up or down vote, without amendment, in Congress.[1]

A. WTO Negotiations

1. *Accession Negotiations*

Tonga became the 151st member of the WTO on July 27, 2007.[2] While Comoros was the only country to file a new accession application this year,[3] twenty-nine other countries with pending applications continued to make progress towards accession in 2007.[4] Expectations that Russia would accede in 2007 were disappointed by the continued intellectual property concerns from the United States,[5] the failure to conclude multilateral negotiations in several sensitive areas, and the objections of several WTO Members.[6] Although Ukraine moved closer to WTO accession, its hopes for accession in 2007 were also dashed due to a late disagreement with the E.U. over its export taxes on metals.[7]

2. *Doha Development Agenda*

Despite attempts, the Doha Development Agenda was not revived in 2007. Due to the collapse of the negotiations in 2006,[8] 2007 started with "quiet negotiations" by WTO

1. *See* U.S. Department of State, Fact Sheet: Trade Promotion Authority (Aug. 23, 2002), http://www.state.gov/g/oes/rls/fs/2002/12953.htm (last visited Mar. 28, 2008).

2. *See* Press Release, World Trade Organization, Tonga Becomes the 151st Member of the WTO (July 27, 2007), *available at* http://www.wto.org/english/news_e/pres07_e/pr488_e.htm.

3. *See* Press Release, World Trade Organization, General Council Establishes Working Party for the Comoros (Oct. 9, 2007), *available at* http://www.wto.org/english/news_e/news07_e/comoros_oct07_e.htm.

4. *See* World Trade Organization, Summary Table of Ongoing Accessions, http://www.wto.org/english/thewto_e/acc_e/status_e.htm (last visited Mar. 28, 2008).

5. *See* Office of the U.S. Trade Representative, 2007 Special 301 Report at 23-24, *available at* http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_Special_301_Review/asset_upload_file230_11122.pdf (released Apr. 30, 2007). Russia was again named on the Special 301 Report because of concerns related to "infringing optical media and minimally-restrained Internet piracy"; *see also* Press Release, Office of the U.S. Trade Representative, SPECIAL 301 Report (Apr. 30, 2007), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2007/April/SPECIAL_301_Report.html.

6. *See Russian WTO Accession Advanced; Completion Before 2009 in Doubt*, Inside U.S. Trade, Nov. 2, 2007.

7. *See* Daniel Pruzin, *Ukrainian WTO Accession on Hold as EU Raises Objections over Export Tax*, Int'l Trade Daily (BNA), Nov. 28, 2007.

8. *See* Gabriela Carias-Green et al., *International Trade*, 41 Int'l Law. 229, 230-31 (2007).

Members.[9] WTO Director-General Pascal Lamy announced by spring of 2007 that negotiations were back in full-swing,[10] but negotiations stalled again in June when the G-4 talks collapsed in Potsdam.[11] Throughout 2007, Members continued to table their own proposals while criticizing those made by other Members as well as draft texts prepared by chairpersons of the negotiating groups. In the agricultural sector, a major stumbling block for the Doha Round, the Agriculture Committee Chairman issued two "challenges" papers on April 30 and May 25, a Revised Draft Modalities text on July 17,[12] and by the end of the year was "encouraged" by progress in the negotiations.[13] Indeed, the two major players, the United States and the E.U., have achieved significant convergence, with the E.U. indicating that agricultural tariff cuts proposed in the Revised Draft Modalities were "manageable" and the United States signaling that it could accept a spending cap on trade-distorting subsidies between $13 billion and $16.4 billion.[14]

In Non-Agricultural Market Access (NAMA) negotiations, the Chairman also issued Revised Draft Modalities on July 17,[15] but little progress has been achieved since that time due to a sharp divide between developed and developing countries on the depth of cuts of industrial tariffs by poor nations.[16] On November 30, 2007, the Chair of the Negotiating Group on Rules circulated Draft Consolidated Texts on AD and SCM (Subsidies and Countervailing Measures) Agreements that would allow certain forms of zeroing in antidumping proceedings,[17] but immediately came under fire from all sides.[18] Overall, concrete progress in Agriculture, NAMA, and Rules negotiations remained elusive at the end of 2007, but there was a growing sense that a global trade deal was possible.[19]

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9. *See* Gary G. Yerkey, *Serious 'Substantive' Obstacles Remain to Reviving WTO Talks, U.S. Official Says*, INT'L TRADE DAILY (BNA), Jan. 18, 2007.

10. *See* World Trade Organization, Lamy: "We Have Resumed Negotiations Fully Across the Board," Feb. 7, 2007, http://www.wto.org/english/news_e/news07_e/gc_dg_stat_7feb07_e.htm; *see also* Daniel Pruzin, *Lamy Announces Doha Talks Back in 'Full Negotiating Mode'*, INT'L TRADE DAILY (BNA), Feb. 1, 2007.

11. *See* Daniel Pruzin, *Doha's Future in Doubt as G-4 Talks Collapse; U.S., EU Blame Brazil, India*, INT'L TRADE DAILY (BNA), June 22, 2007.

12. *See* World Trade Organization, Chairperson's texts 2007, http://www.wto.org/english/tratop_e/agric_e/chair_texts07_e.htm (last visited Jan. 4, 2008).

13. *See* Daniel Pruzin, *Falconer 'Encouraged' by Progress in Latest Round of Farm Trade Talks*, INT'L TRADE DAILY (BNA), Dec. 4, 2007.

14. *See* Daniel Pruzin, *Mandelson Reacts Positively to Draft Texts for Doha, Says Ag Tariff Cuts Manageable*, INT'L TRADE DAILY (BNA), July 25, 2007; Daniel Pruzin, *Trade Officials Welcome U.S. Signal of Flexibility on Farm Tariff Reductions*, INT'L TRADE DAILY (BNA), Sept. 20, 2007.

15. *See* Negotiating Group on Market Access, *Chairman's Introduction to the Draft NAMA Modalities*, JOB(07)/126 (July 17, 2007), *available at* http://www.wto.org/english/tratop_e/markacc_e/markacc_chair_texts07_e.htm.

16. Daniel Pruzin, *WTO NAMA Revised Draft Text to Slip as Doha Round Talks Continue to Stall*, INT'L TRADE DAILY (BNA), Nov. 6, 2007.

17. *See* Negotiating Group on Rules, *Draft Consolidated Chair Texts of the AD and SCM Agreements*, TN/RL/W/213 (Nov. 30, 2007).

18. *See* Daniel Pruzin, *WTO Rules Chairman Under Fire for Zeroing Provisions in Draft Text*, INT'L TRADE DAILY (BNA), Dec. 13, 2007.

19. *See* Greg Rushford, *Elephant in the Room*, WALL ST. J. ASIA, Dec. 14, 2007; World Trade Organization, "We Are Closer to Our Goal but it is not yet Done"—Lamy, Dec. 18, 2007, http://www.wto.org/english/news_e/news07_e/tnc_chair_report_dec07_e.htm.

B. Bilateral/Regional Negotiations

There were significant bilateral FTA developments in 2007. The Bush Administration signed the U.S.-Panama Trade Promotion Agreement (TPA) on June 28, 2007,[20] and concluded the U.S.-Korea Free Trade Agreement (KORUS) just before the expiration of Trade Promotion Authority (TPA) on June 30, 2007.[21]

Negotiations in the U.S.-Malaysia FTA were put on hold in early spring when the parties realized that, among other issues, they had vast differences over Malaysia's government procurement policies.[22] Although the Administration conceded it would be unable to complete negotiations by the expiration of TPA, the two sides continued to meet in 2007 and expressed hope that an FTA could be completed by 2008.[23]

Talks were also held in the U.S.-UAE FTA in June 2007, which were "intended to help lay the groundwork for resuming bilateral free trade agreement negotiations."[24] The U.S.-Thailand and the U.S.-SACU FTAs did not make any further progress in 2007.

The longstanding debate regarding the effects of proliferation of Regional Trade Agreements (RTAs) on the WTO intensified in 2007, prompting a WTO-sponsored conference and forum dedicated to this topic.[25] This debate also featured prominently in the WTO's *World Trade Report 2007*, which discussed the implications of RTA formation from the point of view of economic theory and contrasting views on whether RTAs are stumbling or building blocks for the WTO.[26] As a part of an effort to meet the challenge of regionalism, the Negotiating Group on Rules developed, and the WTO General Council adopted, a Transparency Mechanism, which provides for early announcement, notification, and other transparency procedures for RTAs.[27]

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20. *See* Press Release, Office of the U.S. Trade Representative, United States and Panama Sign Trade Promotion Agreement (June 28, 2007), *available at* http://ustr.gov/Document_Library/Press_Releases/2007/June/United_States_Panama_Sign_Trade_Promotion_Agreement.html.

21. *See* Press Release, Office of the U.S. Trade Representative, United States and the Republic of Korea Sign Landmark Free Trade Agreement (June 30, 2007), *available at* http://ustr.gov/Document_Library/Press_Releases/2007/June/United_States_the_Republic_of_Korea_Sign_Lmark_Free_Trade_Agreement.html.

22. *See* Jonathan Hopfner, *U.S., Malaysia See Limited Progress on FTA; Weisel Says Conclusion Before April Unlikely*, Int'l Trade Daily (BNA), Feb. 13, 2007.

23. *See* Jonathan Hopfner, *Despite Signs of Trouble, Officials Aim To Complete U.S.-Malaysia FTA Next Year*, Int'l Trade Daily (BNA), July 18, 2007.

24. Gary G. Yerkey, *U.S., UAE Hold Talks With Aim of Resuming Free Trade Negotiations*, Int'l Trade Daily (BNA), July 6, 2007.

25. *See* World Trade Organization, Conference on "Multilateralising Regionalism," http://www.wto.org/english/tratop_e/region_e/conference_sept07_e.htm (last visited Mar. 28, 2008); *see also* World Trade Organization, WTO Forum: Are RTAs Stepping Stones or Obstacles to the Trading System?, http://www.wto.org/english/forums_e/debates_e/debate3_e.htm (last visited Mar. 28, 2008).

26. *See* World Trade Organization, *World Trade Report 2007: Six Decades of Multilateral Trade Cooperation: What have we learnt?* at 138-41, 304-20 (Dec. 2007), *available at* http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report07_e.pdf.

27. *See* WTO General Council, *Transparency Mechanism for Regional Trade Agreements: Decision of 14 November 2006*, WT/L/671 (Dec. 18, 2006).

III. WTO and NAFTA Dispute Settlement Activity

The WTO dispute settlement proceedings in 2007 continued to focus largely on claims under the Agreement on Subsidies and Countervailing Measures (SCM Agreement), the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (AD Agreement), and the General Agreement on Tariffs and Trade (GATT). The number of new complaints brought in 2007 was consistent with the average of the two preceding years, with thirteen new disputes initiated in the year.[28] 2007 also marked an escalation of WTO disputes between the United States and China, with the initiation of four new disputes.[29]

In WTO dispute settlement decision-making, 2007 was somewhat more active than 2006, with the issuance of five Appellate Body Reports and ten Panel Reports.[30] These reports concerned mostly trade remedies cases, disputes under the GATT, and disputes over implementation of previous Panel and Appellate Body decisions.

Finally, a significant change in the composition of the seven-member WTO Appellate Body was announced in 2007, with Jennifer Hillman (United States) and Lilia Bautista (Philippines) replacing Yasuhei Taniguchi (Japan) and Merit Janow (United States) as of December 10, 2007, and Shotaro Oshima (Japan) and Yuejiao Zhang (China) replacing Georges Abi-Saab (Egypt) and A.V. Ganesan (India) as of June 1, 2008.

A. WTO Panel and Appellate Body Reports

1. *U.S.—Zeroing (Japan) and U.S.—AD Measures on Shrimp (Ecuador)*

The zeroing saga continued to play out in WTO Dispute Settlement in 2007, with two different decisions addressing this issue. In January 2007, the Appellate Body ruled for the first time in *US—Zeroing (Japan)* that the use of zeroing under the transaction-to-transaction methodology in original investigations is "as such" inconsistent with Articles 2.4.2 and 2.4 of the AD Agreement.[31] The Appellate Body reasoned that dumping and margins of dumping cannot be found to exist at the transaction-specific level, but are rather the result of an aggregate analysis. Therefore, an investigating authority cannot disregard the results of transaction-specific comparisons in which export prices are above normal value.[32] The Appellate Body also found that the use of zeroing in administrative and new

28. World Trade Organization, Chronological List of Disputes Cases, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Mar. 28, 2008).

29. The United States brought three new complaints against China in 2007: Request for Consultations by the United States, *China—Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments*, WT/DS358/1 (Feb. 7, 2007); Request for Consultations by the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/1 (Apr. 16, 2007); and Request for Consultations by the United States, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/1 (Apr. 16, 2007). China brought one complaint against the United States: Request for Consultations by China, *United States—Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China*, WT/DS368/1 (Sept. 18, 2007).

30. *See* WorldTradeLaw.net, Total Reports and Awards Circulated Each Year, http://www.worldtradelaw.net/dsc/database/reportcount.asp (last visited Mar. 28, 2008).

31. *See* Appellate Body Report, *United States—Measures Relating to Zeroing and Sunset Reviews*, ¶¶ 138, 147, 190(b), WT/DS322/AB/R (Jan. 9, 2007).

32. *See id.* ¶ 137.

shipper reviews is "as such" inconsistent with Articles 2.4, 9.3 and 9.5 of the AD Agreement because it results in anti-dumping duties in excess of the exporter's or foreign producer's margin of dumping.[33] Finally, the Appellate Body ruled that the United States acted inconsistently with Article 11.3 of the AD Agreement when it made likelihood-of-dumping findings in two sunset reviews based on margins of dumping calculated in previous administrative reviews with the use of zeroing.[34]

Also in January 2007, the Panel in *US—AD Measure on Shrimp (Ecuador)* ruled that the United States' application of zeroing under the weighted-average-to-weighted-average methodology in that dumping investigation was inconsistent with Article 2.4.2 of the AD Agreement.[35] This dispute is significant because the United States did not contest Ecuador's claims of inconsistency.[36] On August 15, 2007, the United States revoked the anti-dumping order at issue in this dispute, as the re-calculation of the margins of dumping without zeroing resulted in *de minimis* margins.[37]

2. *Brazil—Retreaded Tyres*

In June 2007, a WTO Panel found, in response to a complaint by the European Communities (EC), that certain measures prohibiting the importation and marketing of retreaded tyres (tires) in Brazil were inconsistent with Article XI:1 and not justified under Article XX(b) of the GATT.[38] The Panel initially found that Brazil's import prohibition on retreaded tyres was provisionally justified under Article XX(b) because it was necessary to protect human and animal life and health from risks arising from the accumulation of waste tyres.[39] The Panel, however, concluded that Brazil's import ban on retreaded tyres was applied inconsistently with the chapeau of Article XX because injunctions issued by domestic courts permitted the importation of used tyres in amounts that "significantly undermined" the accomplishment of the import ban's objectives.[40]

On December 3, 2007, the Appellate Body upheld the Panel's finding that the import ban on retreaded tyres imposed by Brazil was provisionally justified under Article XX(b) as necessary to protect human and animal life and health from risks associated with the accumulation of waste tyres. As a key element in Brazil's comprehensive policy to manage waste tyres, the import ban was "apt to make a material contribution" to the reduction in the accumulation of waste tyres in Brazil, and no reasonably available alternatives existed.[41] The Appellate Body, however, reversed the Panel's findings under the chapeau of

33. *See id.* ¶¶ 148-169.

34. *See id.* ¶¶ 182-186.

35. *See* Panel Report, *United States—Anti-Dumping Measure on Shrimp from Ecuador*, ¶ 8.1. WT/DS335/R (Jan. 30, 2007).

36. *See id.* ¶ 4.2.

37. *See* Implementation of the Findings of the WTO Panel in United States—Antidumping Measure on Shrimp from Ecuador: Notice of Determination Under Section 129 of the Uruguay Round Agreements Act and Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp from Ecuador, 72 Fed. Reg. 48,257 (Aug. 23, 2007).

38. *See* Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶¶ 7.357 and 8.1(a), WT/DS332/R (June 12, 2007).

39. *See id.* ¶ 7.215.

40. *See id.* ¶¶ 7.306, 7.310, 7.349.

41. *See* Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶¶ 150, 183, WT/DS332/AB/R (Dec. 3, 2007).

Article XX on the grounds that the exemption from the import ban afforded to retreaded tyres originating in MERCOSUR (The Southern Common Market) and import of used tyres under court injunctions result in "arbitrary or unjustifiable discrimination" and "disguised restriction on international trade" within the meaning of the chapeau of Article XX.[42]

3. *Japan—DRAMS (Korea)*

On July 13, 2007, the Panel in *Japan—DRAMS (Korea)* ruled on a complaint by Korea regarding Japan's imposition of definitive countervailing duties on imports of Dynamic Random Access Memories ("DRAMS").[43] The Panel found that Japan's Investigating Authority (JIA) did not have a proper basis for finding "entrustment or direction" under Article 1.1(a)(1)(iv) of the SCM Agreement in relation to Hynix's December 2002 restructuring program.[44] The Panel also ruled that JIA acted inconsistently with Articles 1.1(b) and 14 of the SCM Agreement when it determined the December 2002 restructuring conferred a benefit to Hynix and when it improperly calculated the amount of the benefit conferred to Hynix by virtue of the October 2001 and December 2002 restructurings.[45] In relation to certain non-recurring subsidies provided under the October 2001 restructuring, the Panel found that JIA acted inconsistently with Article 19.4 of the SCM Agreement by levying countervailing duties in 2006 on imports that it had found not to be subsidized at the time of imposition.[46]

On November 28, 2007, the Appellate Body reversed the Panel's findings concerning "entrustment or direction" under Article 1.1(a)(1)(iv). The Appellate Body clarified that, rather than basing its finding solely on the issue of whether the creditors' participation in Hynix's financial restructurings was commercially reasonable, the Panel should have examined, as did the JIA, whether the evidence in its totality supported a finding of entrustment or direction.[47]

The Appellate Body also reversed the Panel's finding regarding the benefit calculation method used by the JIA under the chapeau of Article 14 of the SCM Agreement. The Appellate Body upheld the other Panel findings appealed by the parties.[48]

4. *Other Disputes*

Three additional decisions were issued by WTO Panels in 2007. In *Turkey—Rice*, the United States successfully challenged certain import restrictions on rice imposed by Turkey. The Panel found that Turkey acted inconsistently with Article 4.2 of the Agreement on Agriculture by denying or failing to grant licenses to import rice outside the tariff rate quota because this constituted a "quantitative import restriction" and a "discretionary im-

42. *Id.* ¶¶ 227, 233, 247.

43. *See* Panel Report, *Japan—Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/R (July 13, 2007).

44. *See id.* ¶ 7.247.

45. *See id.* ¶¶ 7.315, 8.1.

46. *See id.* ¶ 8.1.

47. *See* Appellate Body Report, *Japan—Countervailing Duties on Dynamic Random Access Memories from Korea*, ¶¶ 139, 141, WT/DS336/AB/R (Nov. 28, 2007).

48. *See id.* ¶¶ 195, 200, 280.

port licensing," which Article 4.2 required to be converted into ordinary customs duties.[49] The Panel also found that Turkey's domestic purchase requirement treated imported rice less favorably than domestic rice, contrary to GATT Article III:4.[50]

In *Mexico—Steel Pipes and Tubes*, Guatemala successfully challenged Mexico's imposition of a definitive anti-dumping measure on imports of black and galvanized steel pipes and tubes. The Panel found the investigation should not have been initiated for lack of sufficient evidence on dumping and injury, overturned many aspects of Mexico's injury and causation determinations, and faulted Mexico for improperly relying on facts available.[51] In *EC—Salmon*, the Panel issued a mixed ruling, finding the EC acted inconsistently with the AD Agreement in incorrectly defining the domestic industry, and erred in certain aspects of its margins of dumping calculations and of its injury analysis. The Panel also found the EC acted consistently with the AD Agreement in correctly defining the product under investigation, in applying facts available for certain non-cooperating companies, and in correctly assessing duties following the imposition of the final measure.[52]

B. WTO Disputes Regarding Implementation

1. *US—Gambling (Article 21.5—Antigua)*

On March 30, 2007, the Panel in *US—Gambling (Article 21.5—Antigua)* upheld Antigua's claim that the United States had failed to implement the Dispute Settlement Body's (DSB) recommendations and rulings in the original *US—Gambling* dispute. In the original dispute, the Appellate Body found the exemption provided to domestic suppliers of betting services for horse racing resulted in the United States' prohibition on the cross-border supply of gambling and betting services being applied inconsistently with the chapeau of Article XIV of GATS. The Article 21.5 Panel reasoned the United States had not introduced any "measures taken to comply" with the DSB's recommendations and rulings in the original dispute[53] and also rejected the United States' contention that its measures had been consistent all along. The United States did not appeal this Panel Report, and it was adopted at the DSB meeting of May 22, 2007.

Following the issuance of the Panel Report, on May 4, 2007, the United States withdrew its services commitments related to gambling and betting services from its GATS schedule, pursuant to Article XXI:1(b) of the GATS. This was the first time that a WTO Member invoked Article XXI of the GATS to modify its services schedule. In response, Antigua, Australia, Canada, Costa Rica, the EC, India, Japan, and Macao resorted to Article XXI:2 of the GATS and engaged with the United States in negotiations for "compen-

49. *See* Panel Report, *Turkey—Measures Affecting the Importation of Rice*, ¶¶ 7.121, 7.134, 7.138 and 8.1, WT/DS334/R (Sept. 21, 2007).

50. *See id.* ¶¶ 7.241, 8.3.

51. *See* Panel Report, *Mexico—Anti-Dumping Measures on Steel Pipes and Tubes from Guatemala*, ¶ 8.1, WT/DS331/R (June 8, 2007).

52. Panel Report, *European Communities—Anti-Dumping Measure on Farmed Salmon from Norway*, ¶¶ 8.1-8.2, WT/DS337/R (Nov. 16, 2007).

53. *See* Panel Report, *United States—Measures Affecting the Cross Border Supply of Gambling and Betting Services—Recourse to Article 21.5 of the DSU by Antigua and Barbuda*, ¶¶ 7.1, 6.38, WT/DS285/RW (Mar. 30, 2007).

satory adjustment."[54] At the time of this writing, these negotiations had not been concluded.

In parallel, in June 2007 Antigua requested that the DSB authorize suspension of concessions and other obligations under the GATS and the TRIPS Agreement against the United States for its failure to comply with the DSB's rulings and recommendations in *US—Gambling*. The United States objected to Antigua's retaliation request and referred the matter to arbitration under Article 22.6 of the Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).[55] The arbitration award, circulated in late 2007, provided that the level of nullification or impairment of benefits for which Antigua could request the DSB's authorization to suspend concessions was $21 million.[56] Although this amount was much smaller than the $3.443 billion requested by Antigua, the arbitrator found it was not practicable or effective for Antigua to suspend concessions in the same sector and under the same WTO agreement as the one under which the violation occurred.[57] Consequently, the arbitrator found that Antigua could seek to suspend concessions under the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement.[58] This was the second instance of authorization of the right to seek cross-sectoral retaliation in WTO history.

2. *US—OCTG Sunset Reviews (Article 21.5—Argentina)*

In April 2007, the United States was successful, to a certain extent, in its appeal of the Panel's decision in *US—OCTG Sunset Reviews (Article 21.5—Argentina)*. The Appellate Body reversed the Panel and found that Section 751(c)(4) of the Tariff Act and Section 351.218(d)(2) of the United States Code of Federal Regulations brought the United States into compliance with Article 11.3 of the AD Agreement. The Appellate Body reasoned that by requiring an exporter wishing to waive participation in a sunset review to file a statement that it is likely to dump if the order were revoked, these provisions allowed for a sunset review determination that was based on "positive evidence" rather than on mere assumption.[59] The Appellate Body, however, upheld the Panel's finding that the revised sunset review determination lacked a sufficient factual basis and was therefore inconsistent with Article 11.3 of the AD Agreement.

3. *Other Disputes Regarding Implementation*

Decisions on two more disputes concerning implementation of the DSB's recommendations under Article 21.5 of the DSU were issued in 2007. In May 2007, the Appellate Body in *Chile—Price Bands (Article 21.5—Argentina)* upheld the Panel's findings that

54. *See U.S. Extends Gambling Negotiations on Compensation with Claimants*, INSIDE U.S. TRADE, Oct. 26, 2007.

55. *See* Request by the United States for Arbitration Under Article 22.6 of the DSU, *United States—Measures Affecting the Cross Border Supply of Gambling and Betting Services*, WT/DS285/23 (July 24, 2007).

56. *See* Decision by the Arbitrator, *United States—Measures Affecting the Cross Border Supply of Gambling and Betting Services—Recourse to Arbitration by the United States Under Article 22.6 of the DSU*, ¶ 6.1, WT/DS285/ARB (Dec. 21, 2007).

57. *Id.* ¶¶ 1.5, 4.118.

58. *Id.* ¶ 4.119.

59. *See* Appellate Body Report, *United States—Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina (Article 21.5—Argentina)*, ¶ 121, WT/DS268/AB/RW (Apr. 12, 2007).

Chile's amendments to its price band system on imports of wheat and wheat flour fell short of introducing compliance with Article 4.2 of the Agreement on Agriculture because the implementing measure constituted a border measure "similar to" "variable import levies" and "minimum import prices" that should have been converted into ordinary customs duties under that provision.[60] In *Korea—Certain Paper (Article 21.5—Indonesia)*, the Panel found that Korea had failed to implement the DSB's rulings and recommendations in the original case. The Panel reasoned that Korea acted inconsistently with Article 6.8 and Annex II of the AD Agreement in its use of facts available, and with Article 6.2 of the AD Agreement by failing to give the Indonesian exporters an opportunity to comment on the injury re-determination.[61]

C. NAFTA Panel Report

In *Carbon & Certain Alloy Steel Wire Rod from Canada*, a binational panel constituted under Article 19 of the North American Free Trade Agreement ("NAFTA panel") addressed the issue of whether it is bound by decisions of the CAFC.[62] The issue was one of first impression for a NAFTA panel. The DOC argued that it was allowed to apply zeroing in administrative reviews because the CAFC has held in prior decisions that such zeroing continues to remain permissible.[63]

The NAFTA panel concluded that it is not bound by the U.S. circuit court decisions because the words "a court of importing Party" in Chapter 19 of NAFTA[64] "mean neither the CIT nor the Federal Circuit . . . [but] a generic or virtual United States court reviewing final Commerce determinations."[65] The Panel then considered several international doctrines that DOC claimed allowed the continued use of zeroing. The Panel concluded that "[i]t would be unseemly in the present circumstances to prefer discretion of an administrative agency over compliance with the law of nations, particularly the WTO Agreements."[66] The Panel remanded the case back to DOC to re-calculate Mittal's dumping margins without zeroing.[67]

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60. *See* Appellate Body Report, *Chile- Price Band System and Measures Relating to Certain Agricultural Products (Article 21.5—Argentina)*, ¶ 254, WT/DS207/AB/RW (May 7, 2007).

61. *See* Panel Report, *Korea—Anti-Dumping Duties on Imports of Certain Paper from Indonesia (Article 21.5—Indonesia)*, ¶¶ 6.57, 6.79, 7.1-7.4, WT/DS312/RW (Sept. 28, 2007).

62. *See* Decision of the Panel, *In the Matter of: Carbon and Certain Alloy Steel Wire Rod from Canada*, USA-CDA-2006-1904-04 (Nov. 28, 2007) at 11 [hereinafter NAFTA Panel Decision], *available at* http://www.worldtradelaw.net/nafta19/wirerod-dumping-nafta19.pdf.

63. *Id.* at 22.

64. NAFTA Article 1904.2 provides that in determining whether an antidumping or countervailing duty determination is in accordance with the law, a NAFTA panel should consider "judicial precedents to the extent that a court of the importing Party . . . would rely on such materials . . . ." North American Free Trade Agreement art. 1904.2, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

65. NAFTA Panel Decision, *supra* note 62, at 21.

66. *Id.* at 38.

67. *Id.* at 40.

IV. U.S. Trade Remedy Cases

In 2007, the initiation of twenty-eight antidumping (AD) and nine countervailing duty (CVD) cases represented a resurgence from the pattern of recent years.[68] In some of these cases, the DOC reached important policy decisions reversing, to some extent, its prior practice. The CIT and CAFC also rendered some significant decisions.

A. Administrative Determinations

1. *Certain Activated Carbon from China*

In the *Activated Carbon* investigation,[69] most of the issues were of a technical nature, relating to the precise calculation of the dumping margin. The two main methodological issues before the DOC were: (1) whether it was proper for the DOC to apply its newly announced zeroing policy, when it earlier had indicated the new policy would only apply to new petitions and not ongoing investigations; and (2) whether the DOC was justified in using a facts-available approach for respondents (or their affiliates) who had not fully participated in the investigation.[70] The DOC determined that it was allowed to use its new zeroing methodology on the basis that its prior announcement of how it would proceed was not final.[71] It also determined that it would use adverse facts available for numerous suppliers and affiliated companies of the respondents, but that respondents' failures to provide information were not sufficient to warrant a total adverse facts-available approach. Instead, the DOC valued numerous individual inputs using the adverse facts available.[72] When the International Trade Commission issued a 6-0 affirmative determination, the DOC issued an affirmative AD order.

2. *Certain Polyester Staple Fiber from China*

Certain Polyester Staple Fiber from China[73] was one of the first cases to be decided after the DOC announced it would modify its approach to "zeroing." Zeroing refers to the DOC's long-standing practice of calculating dumping margins by assigning zero to all instances where the U.S. sale is made for more than normal value instead of treating these instances of negative margins as an offset to other instances of dumping. As a result of a recent WTO case, the DOC announced that it would abandon zeroing in original investi-

68. *See* U.S. Int'l Trade Comm'n, *Import Injury Investigations Case Statistics (FY1980-2006)* 7, 43 (Jan. 2008), *available at* http://www.usitc.gov/trade_remedy/Report-01-08-PUB.pdf.

69. *See* Final Determination of Sales at Less than Fair Value: Certain Activated Carbon from the People's Republic of China, 72 Fed. Reg. 9508 (Mar. 2, 2007); Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Certain Activated Carbon from the People's Republic of China (Feb. 23, 2007), *at* http://ia.ita.doc.gov/frn/summary/PRC/E7-3693-1.pdf [hereinafter Activated Carbon Issues and Decision Memorandum].

70. *See* Activated Carbon Issues and Decision Memorandum, *supra* note 69, at cmts. 4, 7, 10-12, 20, & 27.

71. *Id.* at cmt. 4.

72. *Id.* at cmts. 7, 10-12, 20, and 27

73. *See* Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances: Certain Polyester Staple Fiber from the People's Republic of China, 72 Fed. Reg. 19,690 (Apr. 19, 2007);Investigation of Certain Polyester Staple Fiber from the People's Republic of China: Issues and Decision Memorandum (Apr. 10, 2007), *available at* http://ia.ita.doc.gov/frn/summary/PRC/E7-7386-1.pdf [hereinafter Polyester Fiber Issued and Decision Memorandum].

gations, but not in administrative reviews, where final dumping duties are actually calculated.[74] Despite the announcement of this new policy, its application in the context of a specific case drew heated comments from both sides, with the petitioners arguing the DOC should not implement the decision but rather leave it to Congress, and the respondents arguing the DOC should bring its practice into compliance with the WTO ruling. Both sides also argued on whether applying the new rule would amount to a retroactive application, since the new policy would be applied in an investigation that was initiated before the DOC announced its new policy in December of 2006.[75]

The DOC sided with the respondents. It determined the application of a new zeroing policy was not retroactive in that it did not "impair any rights Petitioners possessed at the time of the filing of the petition."[76] Although the DOC acknowledged it had previously stated it would apply the new zeroing rule only to new investigations initiated on or after implementation of the WTO's zeroing determination, the DOC determined that it had the authority to "reassess its policies, and apply a new policy to a pending case," which it determined it would do here because it was adopting a new "interpretation of the statute."[77]

3. *Lemon Juice from Argentina and Mexico*

Both the investigations of lemon juice from Argentina and Mexico were settled on the basis of suspension agreements. Reflecting the approach taken in several other recent investigations, the parties agreed to a suspension agreement that would allow the continuing sale of the subject merchandise without ongoing dumping.[78] Respondents agreed they would provide the DOC with information regarding selling prices in the United States and a relevant comparison market (either the home market or a third-country market, as appropriate) and their costs of production, which the DOC would use to set a normal value. Because each foreign signatory agreed it would "make any necessary price revisions to eliminate completely any amount by which the normal value . . . of this merchandise exceeds the U.S. price of its merchandise," the agreements provided certainty as to pricing for the respondents while ensuring that any dumping would be eliminated for the U.S. industry.[79] The agreements provide for the annual reset of the calculated normal value, based upon the submission of new information by individual respondents.[80]

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74. *See* Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77,722 (Dec. 27, 2006).

75. *See* Polyester Fiber Issues and Decision Memorandum, *supra* note 73, at cmt. 1.

76. *Id.*

77. *Id.*

78. *See* Suspension of Antidumping Duty Investigation: Lemon Juice from Argentina, 72 Fed. Reg. 53,991 (Sept. 21, 2007) [hereinafter Lemon Juice from Argentina Suspension Agreement]; Suspension of Antidumping Duty Investigation: Lemon Juice from Mexico, 72 Fed. Reg. 53,995 (Sept. 21, 2007) [hereinafter Lemon Juice from Mexico Suspension Agreement].

79. *See* Lemon Juice from Argentina Suspension Agreement, *supra* note 78, at 53,992; Lemon Juice from Mexico Suspension Agreement, *supra* note 78, at 53,996.

80. *Id.*

4. *Agency Policy Initiatives in Coated Free Sheet Paper*

a. Application of CVD Law Against NMEs

In 2007 the DOC, for the first time, found that CVD could be imposed against non-market economies (NMEs), such as China, in *Coated Free Sheet Paper from the People's Republic of China*.[81] Following the initiation of this CVD case, the Government of China filed an interlocutory appeal to the CIT challenging initiation, but the Court found that it lacked jurisdiction.[82]

The Government of China argued strenuously against the imposition of CVD duties on the basis that: (1) so long as the DOC continued to treat China as a NME for AD purposes, it had no authority to apply the CVD law to China; (2) the CAFC had ruled, in *Georgetown Steel v. United States*,[83] that the "countervailing duty law was not intended to be applied against NME countries," an interpretation the DOC "has consistently applied"; and (3) Congressional action subsequent to *Georgetown Steel* confirms that Congress believed that the case "remains controlling precedent."[84] Petitioners countered that the DOC's prior position was not compelled by the statute, leaving the DOC with the discretion to adopt a different interpretation should it be appropriate.[85]

The DOC agreed with the petitioners. According to the DOC, there was nothing in the statute that would limit application of the CVD law to market economies. In support, the DOC noted that the CAFC, in *Georgetown Steel*, had specifically stated that the DOC had "broad discretion in determining the existence of a 'bounty' or 'grant' under the law."[86] The DOC also disagreed that Congress had blessed the CAFC's *Georgetown Steel* ruling, noting that in several instances Congress had set forth its understanding that Chinese subsidy programs were countervailable, including through statements that the WTO Subsidies and Countervailing Measures Agreement would apply to Chinese subsidies.[87] Finally, with regard to the argument that the DOC was adopting contradictory approaches by treating China as a NME for dumping purposes and the equivalent of a market economy for CVD purposes, the DOC responded that the two issues had nothing to do with each other—the use of a NME methodology "simply reflects the desire not to use knowingly distorted prices when constructing normal value."[88]

The DOC provided further clarification regarding the tension in its approach in the AD determination involving the same product. There, the DOC stated that while it agrees "that China's economy no longer resembles a Soviet-style command economy and that this evolution permits the application of the CVD law to China," it nonetheless "disagrees that this evolution necessitates granting China market economy status, a reversal of

81. *See* Coated Free Sheet Paper From the People's Republic of China: Amended Preliminary Affirmative Countervailing Duty Determination, 72 Fed. Reg. 17,484 (Apr. 9, 2007).

82. *See infra*, pt. IV.B.5.

83. 801 F.2d 1308 (Fed. Cir. 1986).

84. *See* Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 72 Fed. Reg. 60,645 (Oct. 25, 2007);Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Coated Free Sheet from the People's Republic of China (Oct. 17, 2007) at cmt. 1, *available at* http://ia.ita.doc.gov/frn/summary/PRC/E7-21046-1.pdf.

85. *Id.*

86. *Id.*

87. *See id.*

88. *Id.*

the presumption of state control, or automatic market oriented enterprise treatment."[89] According to the DOC, the preservation of a "significant role for the state in the economy," as well as "limits the PRC government has placed on the role of market forces," are "sufficient to preclude China's designation as a market economy under the U.S. antidumping law."[90]

Although the DOC spent considerable time in the *Coated Paper* final determination dealing with the tension between its traditional AD NME methodology and its new determination to apply the CVD law to NMEs like China, it apparently felt the need to solicit additional input on its practice. The DOC requested comments on whether it needs to revisit its antidumping duty methodology in light of its change to its CVD practice,[91] but has not yet responded to the comments, which were submitted on December 10, 2007. The expectation is that the DOC will continue to look for a way to finesse the issue, probably by evaluating whether it is appropriate to apply the antidumping non-market economies (NME) methodology on a case-by-case basis.

The DOC also solicited comments on the application of its NME methodology regarding what criteria it should use when choosing a "surrogate country" for valuing inputs.[92] The DOC has not issued its new policy, but telegraphed its preference to expand its selection criteria to take into account more than the level of overall economic development, as is its current practice.

b. Targeted Dumping

In the *Coated Free Sheet Paper from Korea* AD investigation, the DOC for the first time accepted the allegation of and found targeted dumping.[93] Targeted dumping occurs when there is a pattern of export prices (or constructed export prices) that differ significantly among purchasers, regions, or periods of time.[94] Some see targeted dumping as an alternative to zeroing because where targeted dumping is found, the DOC is authorized to compare transaction-specific export prices to weighted-average normal values, while disregarding individual transactions that produce negative dumping margins.

Respondents in *Coated Free Sheet Paper from Korea* vigorously opposed the application of targeted dumping as proposed by the petitioners. First, respondents argued the DOC should not accept the allegation of targeted dumping without applying rigorous statistical analysis to find a "pattern" of "significant" price differences, such as the analysis in the

89. *See* Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the People's Republic of China, 72 Fed. Reg. 60,632 (Oct. 25, 2007); Issue and Decision Memorandum for the Final Determination in the Less-Than-Fair-Value Investigation of Coated Free Sheet paper from the People's Republic of China (PRC) (Oct. 17, 2007) at cmt. 1, *available at* http://ia.ita.doc.gov/frn/summary/PRC/E7-21041-1.pdf.

90. *Id.*

91. *See* Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise; Request for Comment, 72 Fed. Reg. 60,649 (Oct. 25, 2007).

92. *See* Surrogate Country Selection in Proceedings Involving Non-Market Economy Countries; Request for Comment, 72 Fed. Reg. 40,842 (July 25, 2007).

93. *See* Notice of Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the Republic of Korea, 72 Fed. Reg. 60,630 (Oct. 25, 2007); Issues and Decision Memorandum for the Final Determination of the Less-Than-Fair-Value Investigation of Coated Free Sheet Paper from the Republic of Korea (Oct. 17, 2007 cmts. 1-8, *available at* http://ia.ita.doc.gov/frn/summary/korea-south/E7-21035-1.pdf [hereinafter CFS Paper from Korea Issues and Decision Memorandum].

94. 19 U.S.C.A. § 1677f-1(d)(1)(B)(i) (1999).

Certain Pasta from Italy remand redetermination.[95] Second, respondents argued the DOC should reject petitioner's 2 percent threshold for a finding of "significant" price differences.[96] Finally, the respondents protested against the DOC's decision to use zeroing when aggregating the dumping margins calculated for U.S. sales to the targeted regions or customers, and then again when aggregating the margins for targeted and non-targeted U.S. sales.[97] Petitioners disagreed with respondents and argued that the DOC's approach is required by law.

The DOC also disagreed with respondents. With regard to the acceptance of the allegation of targeted dumping, the DOC found that the methodology used in *Certain Pasta from Italy* remand was case-specific and not applicable, and that petitioners had demonstrated a clear pattern of significant price differences.[98] The DOC also found that price differences observed in this case were significant.[99] Finally, the DOC concluded that offsetting the targeted groups' dumping margins with the non-targeted groups' dumping margins would be contrary to the purpose of the statute and regulations.[100] Nevertheless, the DOC noted its findings were case-specific, and it "accept[ed] the petitioner's targeting allegation without endorsing the petitioner's test standards and procedures as a general practice."[101] Concurrently with the final determination, the DOC requested public comments on targeted dumping methodology.[102] These comments were received on December 10, 2007, but the policy-making has not been completed.

c. The International Trade Commission's Decision

Ironically, despite the precedent-setting nature of the case, the petitioners in *Coated Free Sheet Paper* did not achieve orders that would have imposed AD or CVD tariffs. The International Trade Commission (ITC) found that coated free sheet paper is primarily sold in two forms—web rolls and sheets. Because imports were "largely confined to the smaller sheet segment" of the market while U.S. production was largely confined to other products, the Commission determined that "the overall degree of competition between subject imports and the domestic like product is limited,"[103] which meant that the increase in imports over the period of investigation, which was not particularly high, was not causing material injury. When this was combined with the relatively decent performance of the U.S. industry toward the end of the investigation period, as shown by certain financial indicators, the Commission concluded that

> [i]n light of the improvements in many of the factors having a bearing on the state of the domestic industry's condition, and the absence of any correlation between the

95. *See* CFS Paper from Korea Issues and Decision Memorandum, *supra* note 93, at cmt. 1.
96. *See id.* at cmt. 3.
97. *See id.* at cmt. 7.
98. *See id.* at cmt. 1.
99. *See id.* at cmt. 7.
100. *See id.* at cmt. 3.
101. *See id.* at cmt. 2.
102. *See* Targeted Dumping in Antidumping Investigations; Request for Comment, 72 Fed. Reg. 60,651 (Oct. 25, 2007).
103. *See* Coated Free Sheet Paper from China, Indonesia, and Korea, USITC Pub. 3965, Inv. Nos. 701-TA-444-446 (Final), 731-TA-1107-1109 (Final) (Dec. 2007) at 13, *available at* http://hotdocs.usitc.gov/docs/pubs/701_731/pub3965.pdf.

> modest increase in subject import levels and the industry's performance, we conclude that the subject imports did not have an adverse impact on the condition of the domestic industry during the period examined.[104]

The Commission also found no threat of material injury, primarily because there was no substantial amount of excess capacity to be used to increase future exports and no indication that subject imports would expand beyond the small sheet products market to compete with the U.S. industry's production for the far larger roll market.[105]

B. Court of International Trade Cases

1. *Nucor Corp. v. United States*

In *Nucor Corp. v. United States*, the CIT examined whether a domestic producer could be considered a "party to the proceeding" under 28 U.S.C. § 2631(c) simply by being a passive participant. Nucor claimed that it was involved in the proceedings at the DOC because it entered a notice of appearance, regularly monitored the status of the proceeding, reviewed all documents submitted or issued in the proceeding, participated in discussions with the other parties regarding case strategy, and because the DOC implicitly recognized Nucor's status as a party by making business proprietary information of the other parties and the DOC's calculations available to Nucor's representatives. The Court, however, found this involvement did not satisfy any reasonable construction of the "party to the proceeding" requirement.[106] Since Nucor did not participate in the proceeding leading to the Final Results, Nucor lacked standing to bring a case under 19 U.S.C. § 1516a. As a result, the Court dismissed its application for a preliminary injunction and the appeal in its entirety.

2. *Corus Staal BV v. United States*

In *Corus Staal BV v. United States*, the CIT examined the potential conflict between 19 U.S.C. § 1673 (which covers the imposition of antidumping duties) and WTO determinations regarding zeroing. The Court found that as a general rule, the DOC cannot impose antidumping duties without a valid determination of dumping under the statute.[107] The statute that governs the implementation of WTO decisions, however, explicitly states that revocation of an antidumping order applies prospectively on a date specified by the USTR.[108] The Court found that the statutory guidelines for implementing a WTO decision supersede section 1673.

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104. *Id.* at 20. Commissioner Lane was the only dissenting vote.

105. *See id.* at 25.

106. *See* Nucor Corp. v. United States, 516 F. Supp. 2d 1348, 1351 (Ct. Int'l Trade 2007).

107. *See* Corus Staal BV v. United States, 515 F. Supp. 2d 1337, 1346 (Ct. Int'l Trade 2007); 19 U.S.C.A. §§ 1673, 1673d(c) (1999); 19 C.F.R. § 351.212 (2007).

108. *See* 19 U.S.C.A. § 3538(c) (2005).

3. *Chengde Malleable Iron General Factory v. United States*

In *Chengde Malleable Iron General Factory v. United States*,[109] the CIT examined the issue of whether translation errors in questionnaire responses to the DOC were ministerial errors that can be corrected after the final determination, or more severe, non-correctable errors. According to the statute, "the term 'ministerial error' includes errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which [the DOC] considers ministerial."[110] After the final results were issued in an administrative review, the importer informed the DOC that its translator had made an error, which was responsible for a large percentage of the antidumping margin, and requested that the DOC correct the error. The Court found the importer had the duty to prepare its own data accurately and had multiple chances to correct the mistake before publication of the final results.[111] An error in calculation by the importer is therefore not a "ministerial error." The CIT reasoned that administrative finality outweighs a belated concern for accuracy.

4. *Parkdale International Ltd. v. United States*

In *Parkdale International Ltd. v. United States*, the CIT considered the validity of the DOC's interpretation of its regulations regarding the assessment of antidumping duties on imports brought into the United States by resellers unaffiliated with the foreign producer. The DOC applied a new resellers policy imposing an "all others" antidumping rate on foreign producers in an administrative review because foreign producers were unaware of the ultimate destination of the products. The Court upheld the new policy, finding it consistent with the regulation on the grounds that the resellers' entries were covered by the request for review and the resellers were the first in the commercial chain to know the ultimate destination of the subject merchandise.[112]

5. *Government of the People's Republic of China v. United States*

In *Government of the People's Republic of China v. United States*, the plaintiff, the Chinese government, filed a request for a preliminary injunction to enjoin the DOC from conducting a CVD investigation of coated free sheet paper from China. It argued the DOC had no authority to conduct a CVD investigation against an NME. The CIT dismissed the case, finding that it lacked jurisdiction to hear it.[113] The Court ruled that "it is not clear that [the DOC] is prohibited from applying CVD law to NMEs,"[114] and noted that in *Georgetown Steel Corp. v. United States*,[115] the CAFC only affirmed the DOC's decision not to apply CVD law to an NME in that particular case.[116] As a result, the CIT found

109. *See* Chendge Malleable Iron Gen. Factory v. United States, 505 F. Supp. 2d 1367 (Ct. Int'l Trade 2007).

110. 19 U.S.C. § 1675(h) (1999); 19 C.F.R. § 351.224(f) (2007).

111. *See Chendge*, 505 F. Supp. 2d at 1373-74.

112. *See* Parkdale Int'l Ltd. v. United States, 508 F. Supp. 2d 1338, 1349 (Ct. Int'l Trade 2007).

113. *See* Gov't. of the People's Republic of China v. United States, 483 F. Supp. 2d 1274, 1275, 1280 (Ct. Int'l Trade 2007).

114. *Id.* at 1282.

115. *Georgetown*, 801 F.2d at 1308.

116. *Gov't. of the People's Republic of China*, 483 F. Supp. 2d at 1282.

that the DOC's initiation of the CVD investigation against China was not "patently ultra vires," but recognized that a later court may determine that the statute favors plaintiff's position.[117]

C. Court of Appeals for the Federal Circuit

1. *SKF USA, Inc. v. United States*

In *SKF USA, Inc. v. United States*, the CAFC examined whether a case before the CIT is moot after the relevant entries have been liquidated. The CAFC found that the CIT lost its ability to order the reassessment of duties at a different rate once the duties were liquidated.[118] The Court vacated the judgment of the CIT and remanded with instructions to dismiss because the action was rendered moot, as the duties had already been liquidated.

2. *Corus Staal BV v. United States*

In *Corus Staal BV v. United States*, the CAFC examined an appeal by a foreign producer challenging the use of zeroing in its administrative review. The producer argued the DOC's new policy regarding zeroing should be applied retroactively. The Court found the DOC's new policy regarding zeroing was only to be applied prospectively.[119] Further, the Court held that zeroing is a permissible methodology in administrative reviews because the DOC, in announcing that it would no longer use zeroing to calculate antidumping margins in investigations, stated the new policy would not apply to any other proceeding.[120]

D. United States Supreme Court

JTEKT Corp. filed a petition for certiorari arguing, that the final results of an administrative review of an antidumping order covering their product were in violation of the United States' treaty obligations, as construed by the WTO in light of the WTO rulings condemning the use of the zeroing methodology by the DOC.[121] The petition for certiorari was denied on October 29, 2007.[122] This denial leaves in place the CAFC's rulings that zeroing is permissible in administrative reviews.[123]

V. Legislative Activity

Very little progress was made on trade legislation in 2007. The Bush Administration wrapped up negotiations for free trade agreements with Peru, Colombia, Panama, and Korea, but Congress only agreed to consider the Peru agreement. Trade preferences for Andean countries—including Peru, Colombia, Bolivia and Ecuador—were extended, but

117. *Id.*
118. *See* SKF USA, Inc. v. United States, 512 F.3d 1326, 1332 (Ct. Int'l Trade 2007).
119. *See* Corus Staal BV v. United States, 502 F.3d 1370, 1374 (Fed. Cir. 2007).
120. *Id.* at 1374-75.
121. *See* Brief for the United States in Opposition at 11, JTKET Corp. v. United States, No. 06-1632 (Sept. 21, 2007).
122. *See JTKET Corp.*, 128 S. Ct. at 486 (denying petition for writ of certiorari).
123. *See, e.g., supra* Part IV.D.2; *supra* note 119.

only through the beginning of 2008, to allow time for consideration of the Peru and Colombia trade pacts. Finally, reauthorization of the Trade Adjustment Assistance programs passed the House, but stalled in the Senate as other items crowded the calendar and time ran out for consideration before the end-of-year recess.

A. Free Trade Agreements

In 2007, the new Democratic majority in the House pushed for and got changes in the scope of free trade agreements. After months of negotiation, Congressional Democrats and the Bush Administration agreed that enforceable labor and environmental standards would be added to pending trade agreements before Congress would vote on them.[124] The new labor and environmental standards were subsequently included in the Peru, Colombia, Panama, and Korea pacts signed before the expiry of trade promotion authority, setting the stage for expedited consideration by Congress.[125]

As of December 2007, however, Congress had approved only one of the four pending trade agreements. Implementing legislation for the United States-Peru Trade Promotion Agreement was passed by the House on November 8, 2007, and by the Senate on December 4, 2007. On December 17, 2007, President Bush signed the Agreement into law.[126] The Agreement will not go into effect until the President determines that Peru has taken measures necessary to comply with its obligations under the Agreement.[127]

The fate of the three remaining agreements with Colombia, Panama, and Korea is unclear. Faced with concerns regarding violence against trade unionists in Colombia, charges that the President of the Panamanian National Assembly murdered a U.S. serviceman, and barriers to U.S. beef imports in Korea,[128] President Bush has yet to submit implementing legislation for congressional consideration. Whether President Bush will do so in 2008 will likely depend on the resolution of these issues.

B. Regional Trade Preference Programs

Under the Andean Trade Preference Act (ATPA), the United States extends special duty treatment to imports from Bolivia, Colombia, Ecuador, and Peru that meet domestic con-

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124. *See* House Committee on Ways and Means, *Congressional Leaders Joined Administration Officials to Announce an Agreement on a New Trade Policy for America* (May 10, 2007), http://waysandmeans.house.gov/news.asp (follow "News" hyperlink; then follow "Press Releases–110th Congress" hyperlink).

125. Trade Promotion Authority (TPA, formerly known as "fast track"), which allowed for expedited consideration of trade agreements, expired June 30, 2007. *See* Bipartisan Trade Promotion Authority Act of 2002, Pub. L. No. 107-210, § 2103(c)(1)(B), 116 Stat. 1006 (codified as amended at 19 U.S.C.A. § 3803 (2005)). The United States-Peru Trade Promotion Agreement was signed on April 12, 2006, and subsequently amended on June 24 and 25, 2007; the United States-Colombia Trade Promotion Agreement was signed on November 22, 2006, and subsequently amended on June 28, 2007; the United States-Panama Trade Promotion Agreement was signed on June 28, 2007; and the United States-Korea Free Trade Agreement was signed on June 30, 2007. *See generally* Office of the U.S. Trade Representative, *Bilateral Trade Agreements, available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html.

126. *See* The Library of Congress, THOMAS, Major Congressional Actions on H.R.3688, http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR03688:@@@R (last visited Mar. 17, 2008); United States-Peru Trade Promotion Agreement Implementation Act, Pub. L. No. 110-138, § 101(b), 121 Stat. 1455 (2007).

127. *See* United States-Peru Trade Promotion Agreement Implementation Act, *supra* note 126.

128. *See Side Issues Stall Action on Trade Agreements; Pacts with 4 Nations Are Worth Billions to Farmers in U.S.*, CHICAGO TRIB., Dec. 1, 2007, at C1.

tent and other requirements.[129] Set to expire on June 30, 2007,[130] the trade preferences were extended for all four countries until February 29, 2008.[131] The free trade agreements with Peru and Colombia, if and when implemented, would replace the preference program for those countries. Continuation of preferences for the remaining Andean countries—Bolivia and Ecuador—could be jeopardized by Congressional concerns on issues such as treatment of U.S. investors.[132]

C. Trade Adjustment Assistance

The Trade Adjustment Assistance program (TAA) provides assistance to qualifying workers who lose their jobs as a direct result of increased imports or shifts to production outside the United States. Older workers may be eligible to receive assistance under a companion program, Alternative Trade Adjustment Assistance for Older Workers (ATAA).[133] Both programs were set to expire on September 30, 2007, but were extended through December 31, 2007.[134]

Legislation to extend these programs through fiscal year 2012 was passed by the House on October 31, 2007.[135] The House bill would also, among other things, extend eligibility to service and public sector workers; allow entire industries, as opposed to individual companies, to qualify; and increase the advance warning that employers are required give to workers who will lose their jobs due to a mass layoff or plant closing.[136] The Senate did not pass a TAA/ATAA bill,[137] but the Labor Department promised to continue funding the program through 2008.[138]

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129. The Andean Trade Preferences Act went into effect on December 4, 1991. Pub. L. No. 102-182, 105 Stat. 1236. Later, it was renewed and modified under the Andean Trade Promotion and Drug Eradication Act on August 6, 2002. Pub. L. No. 107-210, 116 Stat. 1023 (codified as amended at 19 U.S.C.A. §§ 3201-3202 (2005)).

130. Legislation was enacted in the 109th Congress to extend the trade preferences until June 30, 2007. *See* Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 7002, 120 Stat. 3194 (2006).

131. *See* An Act to Extend the Authorities of the Andean Trade Preference Act Until February 29, 2008, Pub. L. No. 110-42, § 1, 121 Stat. 235 (2007).

132. *See Administration Supports 'Short-Term' ATPDEA Extension for All*, Inside U.S. Trade (June 8, 2007).

133. The Trade Adjustment Assistance program (TAA) for workers was originally authorized as part of the Trade Act of 1974. Pub. L. No. 93-618, 88 Stat. 1978 (1974). The Trade Act of 2002 subsequently established the Alternative Trade Adjustment Assistance for Older Workers program (ATAA) and reauthorized and expanded TAA. *See* Trade Act of 2002, Pub. L. No. 107-210, 116 Stat. 933 (codified as amended at 19 U.S.C.A. § 2271 (2004)).

134. *See* Trade Adjustment Assistance Program- Extension; An Act to Extend the Trade Adjustment Assistance Program Under the Trade Act of 1974 for Three Months, Pub. L. No. 110-89, § 1, 121 Stat. 982 (2007).

135. *See* The Library of Congress, Thomas, *Major Congressional Actions on H.R.3920*, http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR03920:@@@R (last visited Mar. 17, 2008).

136. *See* H.R. Rep. No. 110-414, pt. 1, at 1-9 (2007).

137. *See* Trade and Globalization Adjustment Assistance Act of 2007, S. 1848, 110th Cong. (2007). Similar to the House bill, the Senate bill also would extend eligibility to service and public sector workers and expand eligibility to include workers within an entire industry or occupation.

138. *See Baucus Secures Dept. of Labor Promise to Continue Labor Adjustment Assistance As Wrangling Over Unrelated Provisions Blocks Extension of Program for American Workers*, Senate Committee on Finance News Release (Dec. 19, 2007), http://finance.senate.gov/press/Bpress/2007press/prb121907d.pdf.

D. Look Ahead to 2008

Over the course of the coming year, Congress will likely tackle a series of contentious legislative initiatives involving trade issues. One set of proposals likely to see action in 2008 is consideration of undervaluation of foreign currency vis-à-vis the U.S. dollar as actionable under the AD and/or CVD laws. In 2007, two Senate bills addressing currency valuation were successfully voted out of committee,[139] and the House Ways and Means Committee has indicated that it will take up pending currency legislation in 2008.[140] Congress also will likely take up trade enforcement legislation, including proposals to codify the DOC's authority to apply the CVD law to NME countries, limit presidential discretion in section 421 China safeguard measures and establish the position of a chief trade enforcement officer in the Office of the United States Trade Representative.[141] Other pending but unresolved trade-related issues that Congress will likely address in 2008 include import safety[142] and climate change.[143] Finally, the House and Senate both passed farm bills in 2007, including provisions on agricultural subsidies,[144] but farm programs had to be temporarily extended to early 2008 to allow conference committee negotiators time to work out compromise language.[145] In short, 2008 looks to be a busy and exciting year for trade initiatives in Congress.

139. *See* Currency Exchange Rate Oversight Reform Act of 2007, S. 1677, 110th Cong. (2007); Currency Reform and Financial Markets Access Act of 2007, S. 1677, 110th Cong. (2007).

140. *See Levin Sees China Bill Next Year, No Action on Colombia, Korea FTAs*, Inside U.S. Trade (Dec. 14, 2007).

141. *See, e.g.*, Trade Enforcement Act, S. 1919, 110th Cong. (2007); Nonmarket Economy Trade Remedy Act of 2007, H.R. 1229, 110th Cong. (2007).

142. *See, e.g.*, CPSC Reform Act, S. 2045, 110th Cong. (2007); A Bill to Amend the Agricultural Marketing Act of 1946 to Require Country of Origin Labeling for Processed Food Items, S. 2095, 110th Cong. (2007); International and Domestic Product Safety Act, S. 2256, 110th Cong. (2007).

143. *See, e.g.*, America's Climate Security Act, S. 2191, 110th Cong. (2007).

144. *See* Farm, Nutrition and Bioenergy Act of 2007, H.R. 2419, 110th Cong. (2007); The Library of Congress, Thomas, *Major Congressional Actions on H.R.2419*, http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR02419:@@@R (last visited Mar. 17, 2008).

145. *See Farm Bill Awaits Contentious Conference over Funding, Payment Limits*, Inside U.S. Trade (Dec. 21, 2007).