

# **Final Environmental Review**

## **United States - Colombia Trade Promotion Agreement**

**Office of the U.S. Trade Representative**

## Executive Summary

Pursuant to authority delegated by the President in Executive Order 13277 (67 *Fed. Reg.* 70305) and consistent with Executive Order 13141 (64 *Fed. Reg.* 63169) and its guidelines (65 *Fed. Reg.* 79442), the Office of the United States Trade Representative (USTR) submits this Final Environmental Review of the United States - Colombia Trade Promotion Agreement (CTPA), in accordance with section 2102(c)(4) of the Trade Act of 2002 (Trade Act).

On November 18, 2003, in accordance with section 2104(a) of the Trade Act, U.S. Trade Representative Robert B. Zoellick notified the Congress of the President's intent to enter into negotiations for a free trade agreement with the Andean Countries of Colombia, Peru, Ecuador and Bolivia. The formal launch of negotiations took place on May 18, 2004 with Colombia, Peru and Ecuador. A trade capacity building group met in parallel with the negotiating groups. The United States and Colombia concluded negotiations on February 27, 2006, and the CTPA was signed on November 22, 2006.

On May 10, 2007, the Administration and the bipartisan leadership of Congress agreed on a path forward for Congressional consideration of a number of free trade agreements, including the CTPA. This agreement included proposed changes in the CTPA to address Congressional concerns related to a number of elements of the agreement, including with respect to the Environment Chapter. On June 28, 2007, the United States and Colombia signed a protocol of amendment modifying the CTPA.

The environmental review process examines possible environmental effects that may be associated with the CTPA. In identifying and examining these possible effects, the Administration drew on public comments submitted in response to notices in the *Federal Register* (69 *Fed. Reg.* 19261, April 12, 2004, and 70 *Fed. Reg.* 10463, March 3, 2005), comments provided at public outreach events held in Colombia and a variety of sources of published information. The review also draws on the environmental and economic expertise of federal agencies. Consistent with Executive Order 13141 and its Guidelines, the focus of the review is on potential impacts in the United States. Additionally, this review includes consideration of global and transboundary effects.

### Findings

1. In this Final Environmental Review, the Administration has concluded that changes in the pattern and magnitude of trade flows attributable to the CTPA will not have any significant environmental impacts in the United States. Based on existing patterns of trade and changes likely to result from provisions of the CTPA, the impact of the CTPA on total U.S. production through changes in U.S. exports appears likely to be small. As a result, the CTPA is not expected to have significant direct effects on the U.S. environment. While it is conceivable that there may be instances in which the economic and associated environmental impacts are concentrated regionally or sectorally in the United States, we could not identify any such instances.
2. In considering whether provisions of the CTPA could affect, positively or negatively, the ability of U.S. federal, state, local or tribal governments to enact, enforce or maintain

environmental laws and regulations, the Administration took into account the full range of CTPA obligations, including those related to services, sanitary and phytosanitary (SPS) measures and technical barriers to trade (TBT), as well as provisions of the CTPA Environment Chapter and related dispute settlement provisions. We concluded that the CTPA will not adversely affect the ability of U.S. federal, state, local or tribal governments to regulate to protect the U.S. environment, and that these and related CTPA provisions should have positive implications for the enforcement of environmental laws and the furtherance of environmental protection in both the United States and Colombia.

3. This review also carefully examined the provisions of the Investment Chapter and their environmental implications. We were unable to identify any concrete instances of U.S. environmental measures that would be inconsistent with the CTPA's substantive investment obligations. We do not expect the CTPA to result in a significantly increased potential for a successful challenge to U.S. environmental measures under the CTPA's investor-state mechanism.

4. As compared to the expected effects in the United States, the CTPA may have relatively greater effects on the economy of Colombia. In the near term, however, net changes in production and trade are expected to be relatively small because exports to the United States from Colombia already face low or zero tariffs. Longer term effects, through investment and economic development, are expected to be greater but cannot currently be predicted in terms of timing, type and environmental implications.

5. The CTPA may have positive environmental consequences in Colombia by reinforcing efforts to effectively enforce environmental laws, accelerating economic growth and development through trade and investment, promoting sustainable development of natural resources and disseminating environmentally beneficial technologies. The public submissions process established by the Environment Chapter has significant potential to improve environmental decision-making and transparency in Colombia and to inform capacity-building activities.

6. Through increased economic activity in Colombia, the CTPA may have indirect effects on the U.S. environment, for example through effects on habitat for wildlife, including migratory species. This review examined a range of these possible impacts, but did not identify any specific, significant consequences for the U.S. environment. Nevertheless, the possibility of such effects requires ongoing monitoring. Monitoring of conditions in the U.S. environment will continue as an element of existing domestic environment programs. Monitoring of environmental conditions in Colombia will be enhanced as a component of an Environmental Cooperation Agreement (ECA) between the United States and Colombia.

7. The CTPA provides a context for enhancing cooperation activities to address both trade-related and other environmental issues. As a complement to the CTPA, the United States and Colombia concluded an ECA that will enhance the positive environmental consequences of the CTPA. The ECA establishes a comprehensive framework for developing cooperative activities. An Environmental Cooperation Commission, consisting of high-level officials with environmental responsibilities from each Party, will oversee implementation of the ECA. The CTPA encourages the development of environmental performance measures and tasks the Environmental Affairs Council established by the Environment Chapter with reviewing the

progress of cooperative activities. The United States and Colombia are currently developing a Plan of Work that will identify specific areas of cooperation and provide more detail on how the ECA's benchmarking and monitoring provisions will be implemented.

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## **I. LEGAL AND POLICY FRAMEWORK**

### **A. The Trade Act of 2002**

The Trade Act of 2002 (Trade Act) establishes a number of negotiating objectives and other priorities relating to the environment. As relevant here, the Trade Act contains three sets of objectives: (i) overall trade negotiating objectives; (ii) principal trade negotiating objectives; and (iii) promotion of certain priorities, including associated requirements to report to Congress.

Environment-related overall trade negotiating objectives include:

- (1) ensuring that trade and environmental policies are mutually supportive and seeking to protect and preserve the environment and enhance the international means of doing so, while optimizing the use of the world's resources (section 2102(a)(5)); and
- (2) seeking provisions in trade agreements under which parties to those agreements strive to ensure that they do not weaken or reduce the protections afforded in domestic environmental and labor laws as an encouragement for trade (section 2102(a)(7)).

In addition, the Trade Act establishes the following environment-related principal trade negotiating objectives:

- (1) ensuring that a party to a trade agreement with the United States does not fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the parties, while recognizing a party's right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to prioritize allocation of resources for environmental law enforcement (sections 2102(b)(11)(A)&(B));
- (2) strengthening the capacity of U.S. trading partners to protect the environment through the promotion of sustainable development (section 2102(b)(11)(D));
- (3) reducing or eliminating government practices or policies that unduly threaten sustainable development (section 2102(b)(11)(E));
- (4) seeking market access, through the elimination of tariffs and non-tariff barriers, for U.S. environmental technologies, goods and services (section 2102(b)(11)(F)); and
- (5) ensuring that environmental, health or safety policies and practices of parties to trade agreements with the United States do not arbitrarily or unjustifiably discriminate against U.S. exports or serve as disguised barriers to trade (section 2102(b)(11)(G)).

The Trade Act also provides for the promotion of certain environment-related priorities and associated reporting requirements, including:

- (1) seeking to establish consultative mechanisms among parties to trade agreements to strengthen the capacity of U.S. trading partners to develop and implement standards for the protection of the environment and human health based on sound science and reporting to the Committee on Ways and Means and the Committee on Finance (“Committees”) on the control and operation of such mechanisms (section 2102(c)(3));
- (2) conducting environmental reviews of future trade and investment agreements consistent with Executive Order 13141 and its relevant guidelines, and reporting to the Committees on the results of such reviews (section 2102(c)(4)); and
- (3) continuing to promote consideration of multilateral environmental agreements and consult with parties to such agreements regarding the consistency of any such agreement that includes trade measures with existing exceptions under Article XX of the GATT 1994 (section 2102(c)(10)).

On May 10, 2007, the Administration and the bipartisan leadership of Congress agreed on a path forward for Congressional consideration of a number of free trade agreements, including the CTPA. This agreement included proposed changes in the CTPA to address Congressional concerns related to a number of elements of the agreement, including with respect to the Environment Chapter.

## **B. The Environmental Review Process**

The framework for conducting environmental reviews of trade agreements is provided by Executive Order 13141–*Environmental Review of Trade Agreements* (64 *Fed. Reg.* 63169) and the associated Guidelines (65 *Fed. Reg.* 79442). The Order and Guidelines are available on USTR’s website at [http://www.ustr.gov/Trade\\_Sectors/Environment/Section\\_Index.html](http://www.ustr.gov/Trade_Sectors/Environment/Section_Index.html).

The purpose of environmental reviews is to ensure that policymakers and the public are informed about reasonably foreseeable environmental impacts of trade agreements (both positive and negative), identify complementarities between trade and environmental objectives and help shape appropriate responses if environmental impacts are identified. Section 5(b) of Executive Order 13141 provides that “as a general matter, the focus of environmental reviews will be impacts in the United States,” but “[a]s appropriate and prudent, reviews may also examine global and transboundary impacts.” Reviews are intended to be one tool, among others, for integrating environmental information and analysis into the fluid, dynamic process of trade negotiations. USTR and the Council on Environmental Quality (CEQ) jointly oversee implementation of the Order and Guidelines. USTR, through the Trade Policy Staff Committee (TPSC), is responsible for conducting the individual reviews.

The environmental review process provides opportunities for public involvement, including an early and open process for determining the scope of the environmental review (“scoping”). Through the scoping process, potentially significant issues are identified for in-depth analysis, while issues that have been adequately addressed in earlier reviews, or are less significant, are

eliminated from detailed study.

The Guidelines recognize that the approach adopted in individual reviews will vary from case to case, given the wide variety of trade agreements and negotiating timetables. Generally, however, reviews address two types of questions: (i) the extent to which positive and negative environmental impacts may flow from economic changes estimated to result from the prospective agreement; and (ii) the extent to which proposed agreement provisions may affect U.S. environmental laws and regulations (including, as appropriate, the ability of state, local and tribal authorities to regulate with respect to environmental matters).

## **II. BACKGROUND**

Colombia has a population of about 43.6 million and a gross national income of \$104.5 billion (see table 1, annex II for detailed data). The U.S. trade relationship with Colombia is currently conducted in the framework of unilateral trade preferences. Congress enacted the Andean Trade Preferences Act (ATPA) in 1991 to promote regional economic development and to provide economic alternatives for the illegal drug trade, promote domestic development, and thereby solidify democratic institutions. In renewing and expanding the ATPA in 2002, as the Andean Trade Promotion and Drug Eradication Act (ATPDEA), Congress further stressed enhancement of trade with the United States as an alternative means for reviving and stabilizing the economies in the Andean region. The ATPDEA renewed and amended the ATPA to provide duty-free treatment for certain products previously excluded under the ATPA. The ATPA, as amended, was set to expire on December 31, 2006. Since then, Congress has extended the program three times, and currently it is set to expire on December 31, 2008.

### **A. Economy in Colombia**

Colombia's free market economy, the third-largest in South America, has major commercial and investment ties to the United States. Well-endowed with minerals and energy resources, Colombia has the largest coal reserves in Latin America and is second to Brazil in hydroelectric potential. The discovery of two billion barrels of high-quality oil, about 125 miles east of Bogotá, has enabled Colombia to become a net oil exporter. Another major export commodity for Colombia is coffee. Colombia was the world's second largest producer of coffee in 2002 and for many years, coffee was the principle contributor to export earnings. Though its share in total exports revenue has declined, due in large part to the volatile international price fluctuations in the coffee sector, coffee contributed almost US\$1,448 million in 2006 to Colombia's economy, about 6% of export income.

#### *The Drug Economy*

While the exact figure is unknown, it is estimated that coca cultivation generates many hundreds of millions of dollars in revenue. Colombia is the world's leading supplier of refined cocaine and a growing source for heroin. More than 90 percent of the cocaine that enters the United States is produced, processed or transshipped in Colombia. To combat this, Colombia is engaged in a broad range of narcotics control activities that include aerial spraying of herbicide and manual



eradication. Supported by the United States, Colombia has attempted to keep coca, opium poppy and cannabis cultivation from expanding.

The ATPA, as amended, is designed to reduce production and exports of narcotics to the United States by allowing broader access to U.S. markets to provide incentives to farmers and others to engage in legitimate economic activities. The CTPA builds significantly on this effort. Alternative development programs in Colombia, which the United States also supports, provide former drug-crop producers with alternative sources of income.

## **B. Environment in Colombia<sup>1</sup>**

Colombia is the fifth-largest country in Latin America by area and the third-largest by population. Colombia is one of the most biologically rich countries in the world, with 21 distinct vegetation zones, five major watersheds, enormous wetlands, plentiful lakes, a dense network of rivers and rich deposits of underground water. With over 741,000 river beds, Colombia has the world's fourth largest flow of water relative to its surface area. About 46 percent of Colombia's land is covered by forests, along with 14 million hectares of agricultural land and 19 million hectares of grazing land. There are substantial mineral reserves as well, including one of the world's largest deposits of oil discovered in recent decades, one of the world's largest open coal mines and significant deposits of emeralds, nickel and natural gas.

Over the past fifty years, Colombia has taken significant strides in protecting its environment, including restructuring its legal and regulatory landscape, undertaking policy initiatives, strengthening its capacity for natural resource management and environmental protection, and improving environmental quality. The focus of Colombia's management framework with respect to its environment has been on three main priorities: (1) river basin management and conservation of water resources, (2) reforestation, and (3) conservation of biodiversity.

Despite these advances, Colombia continues to face a series of environmental challenges. These include water and air pollution, land degradation and vulnerability to natural disasters. Many of Colombia's natural resources face pressure from rapid population growth, mineral extraction, hydroelectric projects, increasingly intensive agriculture production and accelerating urbanization.

Colombia faces significant challenges with respect to water pollution, water treatment and sewage disposal. Water pollution results from untreated residential, agricultural and industrial

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<sup>1</sup> Information for this section was drawn from the following sources: República de Colombia, Ministerio de Ambiente, Viviendo, y Desarrollo Territorial, Sistema Nacional Ambiental, Normatividad Ambiental (available at <http://web.minambiente.gov.co/normatividad/>); UNEP, Latin American and Caribbean Region, "Cumbre de Johannesburgo 2002, Reseña de Colombia" (available at <http://www.un.org/esa/agenda21/natlinfo/>); Bureau of National Affairs, International Environment Reporter, "Colombia," Vol. 216, No. 178, pp. 0101-0301, Washington, D.C., 2002; and The World Bank, Environmentally and Socially Sustainable Development Department, Latin America and Caribbean Region, "Republic of Colombia: Mitigating Environmental Degradation to Foster Growth and Reduce Inequality," February 25, 2006.

wastes, as well as unchecked effluents from illegal drug production. As recently as 2002, about 95 percent of Colombian municipalities did not treat sewage, but rather dumped wastes directly into rivers. As a result of these practices, the Magdalena River, the country's largest, is in crisis, and its traditional fishing economy is threatened. Colombia is making an effort to address some of the water pollution issues facing the country. In early 2004, the government secured a \$28 million loan from the Inter-American Development Bank for protection of river basins, and is also in the process of completing arrangements for a World Bank loan to help establish a nationwide water-management system. Colombia has also made progress in the area of wastewater treatment with the construction of new treatment plants in the cities of Medellín and Bucaramanga.

Air pollution is also a widespread and serious problem, notably in Colombia's cities. Additionally, Colombia faces a variety of problems associated with deforestation and land degradation, including erosion, salinization and increased vulnerability to natural disasters such as floods, landslides, droughts and earthquakes. Colombia's biodiversity is being threatened by rapid changes in land use. According to the Colombian Institute of Exact, Physical and Natural Sciences, Colombia has lost 30 percent of its biological diversity in recent decades.<sup>2</sup> In 2000, the Institute estimated that deforestation had affected about 70 percent of the Andean zone, and that about one-third of Colombia's vegetative cover had disappeared in the last 30 to 40 years. Colombia is working to reverse this trend and has focused on conservation of biodiversity and renewable natural resources as environmental priorities in development planning. As an example of results, the system of national parks and forestry reserves now encompasses nearly one-quarter of the national territory.

The illegal drug trade adds to Colombia's environmental problems. Cultivation, processing and distribution of illegal drugs leads to land-clearing, soil erosion, deforestation and the dumping of chemicals into streams. Coca, poppies and marijuana require special terrain and climate conditions and, as a result, cultivation is concentrated in formerly undisturbed rainforest regions, especially in the basins of rivers in the southeastern part of Colombia that flow into the Amazon River. Pollution from heroin production is acute in the highland regions, which are crucial headwaters and reserves for Colombia's fresh water system. Contamination also spreads to large lowland zones, where rivers supply water to 70 percent of the country.

### *Legal Regime and Regulation*

Colombia has some of the most comprehensive and up-to-date environmental regulations in Latin America. Since the early 1950s, Colombia's environmental management framework has been based largely on regional agencies. National environmental management in Colombia began in 1952 with the creation of the Division of Natural Resources within the Ministry of Agriculture. The Division's mission is to ensure the rational development of natural resources such as forests and fisheries. Under the Division's leadership, Colombia established its first forest conservation regulations and seven sizable protected areas were created.

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<sup>2</sup> See: <http://www.accefyn.org.co> for additional information (contents in Spanish).

The first of Colombia's regional development corporations (*Corporaciones Autónomas Regionales*, CARs), was created to promote integrated regional economic development. From 1954 to 1993, these CARs promoted regional economic development, pursuing a wide range of activities, including energy generation and transmission projects, road infrastructure and erosion control. In 1961, the National Congress established the Corporation for the Magdalena Valley and Northern Colombia (*Corporación del Valle del Magdalena y Norte de Colombia*, CVM), which specialized in natural resources conservation, establishment and management of national parks, and reforestation. Between 1968 and 1993, the federal government's environmental responsibilities were carried out by the Institute for Development of Renewable Natural Resources (INDERENA). A Presidential Decree in 1968 transformed the CVM into INDERENA by merging it with the Division of Renewable Natural Resources in the Ministry of Agriculture. INDERENA's principal responsibilities were management of the National Parks System and promotion of investment projects in fisheries and reforestation.

Under INDERENA's leadership, Colombia made a number of important advances in environmental management, including the 1969 Forestry Law and the 1974 National Code for Renewable Natural Resources and Environmental Protection, a comprehensive statute that remains Colombia's most important statute for managing environmental and natural resources. The Code has 340 articles covering water, air, solid and hazardous waste, soil, flora and fauna, and it was one of the first environmental protection laws in the world to incorporate pollution fees and environmental impact assessments. Under the Code, INDERENA shared environmental responsibilities with the ministries of Health, Public Works, Defense and Energy, the National Planning Department, regional governments ("*departamentos*") and municipal authorities.

During the 1980s, Colombia designed and implemented air and water pollution control regulations. The 1991 Constitution and Law 99 of 1993 established both the National Environmental System (*Sistema Nacional Ambiental*, SINA) and the Ministry of Environment (*Ministerio del Medio Ambiente*, MMA). The Constitution contains 23 articles related to environmental protection and also sets up a structure for regional and local participation in environmental management. In 2003, functions of the former Ministry of Economic Development (mainly water, sanitation and housing) were transferred to the Ministry of Environment.

Of additional note with respect to Colombia's environmental regulations is the revised Forestry Law, signed in May 2006 by President Uribe. This law is expected to foster a more secure regulatory environment to develop plantation and natural forests, preserve the territorial rights of Afro-Colombian and indigenous communities over communally-owned forests and provide these groups with opportunities to reap increased and sustainable benefits from forest resources.

### **C. U.S. – Colombia Goods Trade**

The United States is the principal trading partner for Colombia, receiving more than 40 percent of Colombia's exports, while Colombia is currently the 26<sup>th</sup> largest export market for U.S. goods. Table 2 (annex II) summarizes United States goods trade with Colombia.

Between 2003 and 2007, U.S. exports to Colombia increased 128 percent, to \$8.5 billion. The United States is the largest single exporter to Colombia. Major U.S. exports include: non-electrical machinery; electrical machinery; organic chemicals; cereals; plastics; optical, photographic, medical and measuring instruments; and aircraft and parts. Exports to Colombia account for more than half of U.S. exports to the Andean region. Excluding Canada and Mexico, Colombia is the largest purchaser of U.S. agricultural exports in the Western Hemisphere.

U.S. imports from Colombia in 2007 totaled \$9.4 billion. Major products include petroleum and derivatives, coffee, live plants and cut flowers, and jewelry and precious stones. The stock of U.S. foreign direct investment (FDI) in Colombia in 2006 was approximately \$4.80 billion, concentrated largely in the manufacturing, mining and wholesale sectors.

## **III. THE UNITED STATES-COLOMBIA TRADE PROMOTION AGREEMENT**

### **A. Overview of the United States – Colombia Trade Promotion Agreement**

The CTPA is expected to enhance our efforts to strengthen democracy and support for the fundamental values in Colombia and the Andean region such as, respect for internationally recognized worker rights, greater respect for the rule of law, sustainable development and government accountability.

Since 1991, Colombia has benefited from unilateral trade preferences under the ATPA, as amended by the ATPDEA, that allow many of its goods to enter the United States duty free. The CTPA makes preferential access to the U.S. market for Colombian goods permanent and makes trade between the two countries a two-way street. The CTPA is a comprehensive trade agreement addressing areas such as trade in services, investment, trade-related aspects of intellectual property rights, government procurement and trade-related environmental and labor matters.

The CTPA consists of a preamble and the following 23 chapters and associated annexes: initial provisions and general definitions; national treatment and market access for goods; textiles and apparel; rules of origin procedures; customs administration and trade facilitation; sanitary and phytosanitary measures; technical barriers to trade; trade remedies; government procurement; investment; cross-border trade in services; financial services; competition policy; telecommunications; electronic commerce; intellectual property rights; labor; environment; transparency; administration and trade capacity building; dispute settlement; exceptions; and final provisions. The complete text of the CTPA, related annexes and side letters, and summary fact sheets are available on USTR's website at

[http://www.ustr.gov/Trade\\_Agreements/Bilateral/Colombia\\_TPA/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_TPA/Section_Index.html).

Based on the scoping process (see Section IV), public comments and developments since the Interim Review, the following is a summary of the CTPA provisions most relevant to this Final Environmental Review. The provisions of the Environment Chapter are described in Section III.B.

#### *Market Access for Goods*

Tariff commitments by the United States and Colombia (the Parties) provide immediate benefits for both Parties. More than 80 percent of U.S. exports of consumer and industrial products to Colombia will become duty free immediately upon entry into force of the CTPA and 85 percent will be duty free within five years. Most remaining tariffs will be eliminated within ten years of entry into force. As previously noted, under the ATPA as amended by the ATPDEA, many products from Colombia already enter the United States duty free. The CTPA will consolidate those benefits and make them permanent, so that nearly all non-textile consumer and industrial products made in Colombia will enter the United States duty free immediately on entry into force of the CTPA.

#### *Customs Procedures and Rules of Origin*

The CTPA sets out methods for valuing products used to qualify for preferential treatment under certain product-specific rules of origin. The CTPA includes specific obligations on customs procedures to ensure compliance with laws governing importation. The CTPA requires the Parties to provide transparency and efficiency in administering customs procedures, with commitments to publish laws and regulations and ensure procedural certainty and fairness. The CTPA also includes a commitment to share information to combat illegal trans-shipment of goods.

#### *Sanitary and Phytosanitary Measures*

The United States and Colombia reaffirm their commitments under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures. The CTPA also creates a process for enhanced cooperation and coordination among the Parties on sanitary and phytosanitary issues.

#### *Technical Barriers to Trade*

The United States and Colombia reaffirm their commitments to the WTO Agreement on Technical Barriers to Trade (TBT), and the CTPA creates a process for enhanced cooperation and coordination on technical regulations and standards.

### *Intellectual Property Rights*

The Intellectual Property Rights (IPR) Chapter provides for strong protection of copyrights, patents, trademarks and trade secrets, including enhanced enforcement and non-discrimination obligations for all types of intellectual property. Through the copyright provisions, Parties will address the challenge of providing protection in the digital environment of the Internet and provide important protection for performers and producers of phonograms. Under the CTPA, the Parties will provide strong protections for trademarks and limit the grounds for revoking a patent. The Chapter provides for streamlined trademark filing processes and improved protection of trademark owners' rights.

### *Services*

The CTPA permits substantial market access across the entire services regimes (based on the "negative list" approach), subject to limited exceptions. Colombia has agreed to exceed its commitments made in the WTO, and to dismantle significant services and investment barriers. The CTPA requires the Parties to provide national treatment and most-favored-nation (MFN) treatment to each other's services suppliers. Regulatory authorities must use open and transparent administrative procedures, consult with interested parties before issuing regulations, provide advance notice and comment periods for proposed rules and publish all regulations.

### *Investment*

The CTPA establishes a secure, predictable legal framework for U.S. investors operating in Colombia. The CTPA imposes major obligations pertaining to non-discrimination (national treatment and MFN treatment), expropriation, free transfers related to covered investments, prohibition on the use of performance requirements, minimum standard of treatment, and limitations on requirements on senior managers. The CTPA also provides a mechanism for investor-State dispute resolution, including a commitment to consider the establishment of an appellate or similar mechanism to review awards made by tribunals under the CTPA.

### *Government Procurement*

The CTPA will provide a more predictable procurement environment for U.S. suppliers. Parties have committed to using open, transparent and non-discriminatory procurement procedures. The Chapter includes requirements for advance public notice of procurement opportunities and provision of tender documentation to all interested suppliers in a timely fashion, as well as timely and effective bid review procedures.

### *Transparency*

The Transparency Chapter requires Parties to ensure that laws, regulations, procedures and administrative rulings on matters covered by the CTPA are published or otherwise made available to the public. In addition, the Chapter requires Parties whenever possible to publish advance notice of proposed measures and provide a reasonable opportunity for interested parties

to comment. Further, the Chapter requires Parties to establish and maintain procedures for review and appeal of administrative actions regarding matters covered by the CTPA.

### *Trade Remedies*

The TPA includes provisions governing imposition of bilateral safeguard measures and states that the Parties maintain their respective rights and obligations under the WTO Safeguards Agreement. The CTPA also establishes procedures for safeguard measures on agricultural and textile goods.

### *Labor*

The CTPA Labor Chapter reaffirms the Parties' obligations as members of the International Labor Organization (ILO) commits the Parties to adopt and maintain in their laws and practice the core internationally-recognized labor rights, as stated in the 1998 ILO Declaration on Fundamental Principles and Rights at Work, and including a prohibition on the worst forms of child labor. The CTPA further provides that neither Party may waive or otherwise derogate from the laws that implement this obligation in a manner affecting trade or investment between the Parties. The Chapter commits each Party to effectively enforce its labor laws related to the fundamental rights in addition to those related to acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. Procedural guarantees ensure that workers and employers will continue to have fair, equitable and transparent access to labor tribunals. All obligations in the Chapter are subject to the same dispute settlement procedures and enforcement mechanisms as obligations in other chapters of the CTPA. The Parties also establish a mechanism for further cooperation on labor matters.

### *Dispute Settlement*

The CTPA contains a dispute settlement mechanism. The mechanism sets high standards of openness and transparency, requiring public hearings and the public release of Parties' legal submissions. It provides opportunities for interested third parties, such as non-governmental organizations, to submit views. The Chapter includes an enforcement mechanism whereby if a Party fails to comply with an arbitral panel decision and the Parties cannot reach a mutually acceptable solution, the Parties may have recourse to compensation, trade sanctions, or the payment of a monetary assessment.

### *Exceptions*

For certain chapters, the Parties agreed to incorporate into the CTPA Article XX of the GATT 1994 and Article XIV of the GATS. The Parties understand that the measures referred to in Article XX(b) of the GATT 1994 include environmental measures necessary to protect human, animal, or plant life or health, and that Article XX(g) of the GATT 1994 applies to measures relating to the conservation of living and non-living exhaustible natural resources. The Parties also understand that the measures referred to in Article XIV(b) of GATS include environmental measures necessary to protect human, animal, or plant life or health. Nothing in the CTPA shall

be construed to compel a Party to reveal confidential information or information contrary to its essential security interests or prevent it from applying measures that it considers necessary to its essential security interests.

### *Trade Capacity Building*

Building on the Parties' experience with the Trade Capacity Building (TCB) process during the CTPA negotiations, the CTPA creates a Committee for Trade Capacity Building for the purpose of defining and identifying priority needs so that Colombia can effectively implement commitments and maximize the long-term benefits of free trade.

## **B. The Environment Chapter and Related Environmental Provisions**

Following guidance in the Trade Act and the bipartisan agreement between the Administration and Congress, the CTPA Environment Chapter requires a Party: (1) to strive to maintain high levels of environmental protection and to strive to improve those levels; (2) to effectively enforce its environmental laws and to adopt, maintain and implement laws and all other measures to fulfill its obligations under specified multilateral environmental agreements (MEAs) to which both Colombia and the United States are party ("covered agreements"); and (3) not to waive or otherwise derogate from environmental laws in order to attract trade or investment, except where the waiver or derogation is pursuant to a provision in law providing for waivers or derogations and is not inconsistent with the Party's obligations under a covered agreement. All obligations in the Chapter are subject to the same dispute settlement procedures and enforcement mechanisms as obligations in other chapters of the CTPA.

To assist in the administration and implementation of the CTPA Environment Chapter, the Parties agree to establish an Environmental Affairs Council to oversee the implementation of the Environment Chapter. This Council will be composed of high-level government officials from each Party. It will meet within the first year of the CTPA's entry into force, and annually thereafter unless the Parties agree otherwise.

The CTPA Environment Chapter encourages a comprehensive approach to environmental protection. Provisions on procedural guarantees promote good environmental governance by obliging each Party to provide appropriate and effective remedies for violations of its environmental laws and to ensure that environmental enforcement proceedings comply with due process, and are open to the public except where the administration of justice requires otherwise. These procedural guarantees are accompanied by provisions that encourage incentives and other voluntary mechanisms to protect the environment, including market-based incentives. Provisions on the relationship between the CTPA and multilateral environmental agreements (MEAs) acknowledge the importance of effective domestic implementation of MEAs to which the United States and Colombia are both party and the contributions that the CTPA Environment Chapter and the ECA can make to achieve the goals of those MEAs. In accordance with the bipartisan agreement, the CTPA further provides that in the event of an inconsistency between a Party's obligations under the CTPA and a covered agreement, that the Party shall seek to balance its obligations under both agreements. The Environment Chapter also provides for consultation,



as appropriate, with respect to environmental issues of mutual interest.

### *Public Submissions Process*

The CTPA contains a public submissions process that will allow members of the public to raise concerns regarding each Party's enforcement of its environmental laws. The CTPA's public submission provisions are similar to the public submissions process established in the Dominican Republic – Central America – United States Free Trade Agreement (CAFTA-DR). In both cases, the provisions are modeled on Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC), but contain a number of improvements to the NAAEC. Combined with other elements in the environment package (*e.g.* robust environmental cooperation and capacity building under the ECA, see Section VII *infra*), the public submissions process should significantly contribute to improved environmental governance and transparency in Colombia.

Under the CTPA, any person of a Party may file a submission alleging that a Party is failing to enforce its environmental laws with a designated "secretariat or other appropriate body," and the secretariat will review the submission in light of specified criteria.<sup>3</sup> In comparison with the NAAEC, the CTPA makes it easier for a meritorious concern to be addressed by providing that the secretariat will prepare a factual record if any member of the Council requests that it do so. (Under the NAAEC, a two-thirds vote of the Parties is required.) The CTPA also provides that the Council will review any factual record prepared in light of the objectives of the Environment Chapter and the ECA and may make recommendations to the ECA's Environmental Cooperation Commission concerning matters addressed in the factual record that are relevant to potential environmental cooperation. This provision represents an important innovation to the NAAEC, which does not contain such a provision.

Further details of the submissions process, including measures to ensure effective public participation in that process in furtherance of CTPA environment package goals, will be established through working arrangements to be developed by the Parties.

### *Biological Diversity*

The TPA's Environment Chapter includes an article whose objective is to enhance efforts to protect biological diversity. Both Colombia and the United States are classified as "mega-diverse" countries, meaning that they, along with 15 other countries, possess more than 70 percent of the world's biological diversity. Therefore, the Parties recognize the importance of conservation and sustainable use of biological diversity and affirm that they are committed to promoting and encouraging conservation and sustainable use of biological diversity and all its components and levels, including plants, animals and habitat. The importance of public participation on biological diversity issues is also recognized.

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<sup>3</sup> The CTPA's public submissions procedure is not available to U.S. persons wishing to raise concerns regarding U.S. enforcement of U.S. environmental laws, because such persons already have available to them other remedies including the procedures under Articles 14 and 15 of the NAAEC.

#### **IV. PUBLIC AND ADVISORY COMMITTEE COMMENTS**

To determine the scope of this review, the Administration considered information provided by the public and solicited comments through notices in the Federal Register and at a public hearing. Section IV.A summarizes public comments. In addition to providing guidance on the scope of the environmental review, any information, analysis and insights available from these sources were taken into account throughout the negotiations and were considered in developing U.S. negotiating positions.

Pursuant to Trade Act requirements (section 2104(e)), advisory committees, including the Trade and Environment Policy Advisory Committee (TEPAC), submitted reports on the CTPA to the President, USTR and Congress within 30 days after the President notified Congress of his intent to enter into the agreement. The TEPAC report is summarized in section IV.B.

##### **A. Public Comments**

This review was formally initiated by publication of a notice in the *Federal Register*, which requested public comment on the scope of a review of the proposed free trade agreement with the Andean countries of Colombia, Ecuador and Peru (see 69 *Fed. Reg.* 19261, April 12, 2004). A notice in the *Federal Register* also requested public comments on the overall negotiation and announced a public hearing on the proposed free trade agreement (see 69 *Fed. Reg.* 7532, February 17, 2004). Comments and testimony addressing environmental issues received in response to that notice were taken into account in the preparation of this final environmental review. Further public comment was requested in response to an Interim Environmental Review of the proposed free trade agreement with Colombia, Ecuador and Peru (see 70 *Fed. Reg.* 10463, March 3, 2005). Comments responding to the *Federal Register* notices were made in the context of a proposed free trade agreement with Colombia, Ecuador and Peru and, as such, typically made reference to one or more of the three countries. In the preparation of this Final Environmental Review of the CTPA we drew on all submissions to the extent that they included applicable comments.

We received two sets of comments on the scope for the review of the proposed free trade agreement with Colombia, Ecuador and Peru (one of which was a joint submission on behalf of five organizations), and five sets of comments (including one joint submission) on the Interim Review of the proposed free trade agreement with Colombia, Ecuador and Peru. Annex I lists all organizations from which comments were received.<sup>4</sup>

Comments on the Interim Environmental Review generally confirmed that its scope covered the relevant issues to be considered. One comment highlighted the possibilities the CTPA offers to improve the assistance provided to Colombia in its fisheries management and dolphin

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<sup>4</sup> All comments on scope for the proposed U.S.-Andean Trade Promotion Agreement are summarized in the Interim Review, available at [http://www.ustr.gov/Trade\\_Sectors/Environment/Environmental\\_Reviews/Section\\_Index.html](http://www.ustr.gov/Trade_Sectors/Environment/Environmental_Reviews/Section_Index.html).

conservation activities. Further information on progress made in this area since the submittal of the comments can be found in Section V.B.5. Some comments emphasized the importance of protection of migratory birds, guarding against invasive species and reducing threats to biological diversity. Comments were also received that highlighted structural and policy changes in Colombia's Ministry of Environment, Housing, and Territorial Development and described how these changes are expected to improve environmental protection. A number of the comments also recognized the value of the opportunities offered by the environmental cooperation mechanism, negotiated in parallel and designed to complement the CTPA, and provided specific recommendations for additional cooperation activities. Such activities and projects include promoting wild bird conservation and strengthening implementation and compliance with international treaties, such as the Convention on International Trade in Threatened and Endangered Species (CITES). Further efforts to enhance implementation of and compliance with CITES obligations, as well as strengthen both capacity and constituencies for the long-term management of protected areas, will be identified through the ECA.

## **B. Advisory Committee Report**

Under Section 135(e) of the Trade Act of 1974, as amended, advisory committee reports must include advisory opinions as to whether and to what extent an agreement promotes the economic interests of the United States and achieves the applicable overall and principal negotiating objectives set forth in the Trade Act of 2002. The reports must also include advisory opinions as to whether an agreement provides for equity and reciprocity within the sectoral or functional area of the particular committee. The advisory committee reports are available at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Colombia\\_FTA/Reports/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Reports/Section_Index.html)

A majority of TEPAC members supported the conclusion that the CTPA provides adequate safeguards to ensure that Congressional environmental objectives will be met. The report reiterates TEPAC's view that public participation helps ensure that an agreement and its provisions operate as intended, while guaranteeing more effective enforcement of environmental laws. The TEPAC majority also noted the inclusion of enhanced public participation mechanisms and that the CTPA's investment provisions demonstrate continued improvements, as compared to earlier free trade agreements. A majority of members also expressed the view that trade agreements can create opportunities to enhance environmental protection. TEPAC noted, however, that trade can create and amplify adverse externalities that require enhanced regulatory oversight. In this sense the TEPAC majority recognized the enhanced public participation provisions of the CTPA and noted that the public submission process in the CTPA includes a requirement that dispute resolution panels accept submissions from civil society. With respect to dispute settlement provisions, the TEPAC majority described monetary assessments provided for under the CTPA of up to \$15 million for a violation of the obligation to effectively enforce environmental laws as an "adequate compromise." A majority of TEPAC members also supported the signing of the Environmental Cooperation Agreement (ECA) yet expressed concern that the ECA lacks specificity regarding areas of cooperation and affords little guidance on the areas that might be addressed. TEPAC also expressed concerns regarding the availability of funds for activities to be undertaken through the ECA.

A minority of TEPAC members raised concerns, including: (1) increasing trade does not necessarily imply a need for greater regulatory oversight of environmental issues and (2) the biological diversity provision failed to recognize the benefits that Colombia can derive from efficiency gains and higher yields from its resources through property rights and technological advances.

### **C. Public Outreach in Colombia**

In addition to providing opportunities for written comments and testimony in response to notices in the *Federal Register*, the U.S. Government held public meetings in Colombia with the objective of improving communication on CTPA-related issues with environmental organizations, the private sector and leaders of indigenous groups.<sup>5</sup> These meetings were held in Bogotá in November of 2004 and provided an opportunity to raise questions and express concerns. Participants in the meetings represented a wide variety of local, regional and international organizations. The United States worked closely with the Colombian government to ensure that civil society was actively consulted and engaged during the negotiation of the Environment Chapter of the CTPA and the associated ECA.

## **V. POTENTIAL ECONOMICALLY-DRIVEN ENVIRONMENTAL IMPACTS**

### **A. Potential Impacts in the United States**

The impact of the CTPA on total U.S. production through changes in U.S. exports appears likely to be very small. Exports to Colombia currently account for about 0.65 percent of total U.S. exports (see Table 2, Annex II) and a very small portion of total U.S. production. Nevertheless, Colombia is an important market for some U.S. producers and exporters. Increases in U.S. exports of agricultural and industrial goods to Colombia are expected as a result of the CTPA's reductions in market access barriers. However, any associated increases in U.S. production will represent a very small change in the aggregate U.S. economy.

Although small changes in production and exports in environmentally-sensitive sectors could provide a basis for concern regarding the CTPA's direct environmental effects in the United States, no instances warranting such concerns were identified and none were raised in public comments on the Interim Review (see Section IV.A). Based on this information and analysis, the Administration has concluded that changes in the pattern and magnitude of trade flows and production attributable to the CTPA will not have any significant environmental impacts in the United States, and in fact, the CTPA may result in positive environmental consequences. For example, the CTPA's provisions on rules of origin and market access may contribute to increased trade in remanufactured products and, as a consequence, provide some environmental benefits through energy and material savings, and the minimization of solid waste. Liberalization of services can be expected to have an economic impact in the United States although here, too, the effect of the CTPA is likely to be small, and we could not identify any

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<sup>5</sup> Similar events were held in Peru and Ecuador as part of the free trade agreement negotiations with those countries.

environmentally sensitive sectors in the United States likely to be affected by such impacts. The United States already allows substantial access to foreign service providers, including in environmentally sensitive areas (*e.g.*, tourism, maritime shipping and services incidental to energy distribution).

## **B. Transboundary and Global Issues**

While the environmental impacts of expected economic changes in the United States attributable to the CTPA are expected to be minimal, the Administration examined a large number and wide variety of environmental issues with potential global and transboundary impacts in determining the scope of this review. These were provisionally identified through public comments in response to a notice in the *Federal Register* (see Section III.A) and through an open-ended scoping process among agencies with environment, trade and economic expertise. We subsequently eliminated topics from further and more detailed analysis when initial findings revealed that there was no identifiable link to the CTPA. The following topics warranted further consideration.

### **1. Economically-driven Environmental Effects in Colombia**

As compared to its effects in the United States, the CTPA may have relatively greater impacts on the economy of Colombia and, through those impacts, effects on its environment. In the short term, however, we do not expect a significant increase in Colombian production or exports to the United States. Significant trade preferences and market access are already provided by the ATPDEA and, as a result, we do not anticipate that the CTPA will cause a rapid and significant increase in industrial or agricultural development.

To the extent that the CTPA has significant effects on the economy of Colombia, over time, the environmental effects may be both positive and negative. The CTPA may further increase investment, trade and production in Colombia, which may be associated with further pressure on the environment. On the other hand, some new investment may bring environmentally-beneficial technologies and production methods, as well as higher standards for private sector environmental performance. Activities developed under the ECA will support these as well as other positive environmental outcomes. In addition, proposed commitments in the CTPA, such as those to effectively enforce environmental laws, should have a positive effect, especially when coupled with capacity-building and environmental cooperation activities. The CTPA also is likely to contribute to increases in per capita income and, through this, to greater demand for environmental regulation in Colombia over time.

## 2. Endangered Species

The United States and Colombia contain some of the world's greatest concentrations of biological diversity in species of birds, mammals, insects, reptiles, amphibians and plants, as well as genetic diversity of important food crops such as the potato. Species diversity in Colombia is found across all of the country's ecosystems, including lowland tropical rainforests, Andean mountain ecosystems, cloud forests, grasslands and coastal and marine ecosystems.

Colombia is an exporter of products of wild flora and fauna, but a substantial amount of this trade is regulated under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). CITES is an agreement designed to provide for cooperation to prevent international trade in specimens of wild animals and plants from threatening their survival. CITES is implemented by its parties through domestic laws and regulations. Trade in CITES-listed species requires the exporting country to certify that the specimen was legally harvested and (in the case of CITES Appendix I and II) that harvest was not detrimental to the survival of the species.

The United States and Colombia are parties to CITES. In the United States, CITES is implemented through the Endangered Species Act of 1973 (ESA); the ESA provides protection that goes beyond obligations under CITES including, in some cases, for species with ranges outside the United States. In the United States, the ESA prohibits the import, export, taking, or selling in interstate commerce of any protected species without a permit.

The CITES National Legislation Project directs the CITES Secretariat to evaluate each party's legislation to ensure that it meets the requirements for implementation of the Convention.<sup>6</sup> Based on the review conducted by the CITES Secretariat, both Colombia and the United States were placed in Category 1, the category for parties whose legislation is found to be adequate to effectively implement the obligations of CITES.

Given the legal protections for wildlife and endangered species in effect in both the United States and Colombia, the CTPA appears unlikely to contribute to an increase in illegal trade of wildlife or endangered species. Instead, the CTPA may help to reduce illegal trade by facilitating exchange of information about patterns of and potential or actual problems with illicit wildlife trade. Provisions related to customs cooperation have the potential to enhance cooperation on a variety of trade-related matters, including related to combating illegal wildlife trade and CITES enforcement.

In general, concerns related to CITES-regulated species are appropriately addressed within the framework of CITES and through cooperation between the U.S. CITES Management Authority (the U.S. Fish and Wildlife Service) and the National Marine Fisheries Service and counterparts in Colombia. The CTPA provides opportunities to reinforce these efforts through provisions of

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<sup>6</sup> The review of legislation is based on four key requirements for national legislation: (1) designation of at least one Management Authority and one Scientific Authority; (2) prohibition of trade in specimens in violation of the Convention; (3) penalties for trade in violation of the Convention; and (4) authority to confiscate specimens illegally traded or possessed. Further information is available at: <http://www.cites.org>

the Environment Chapter such as the commitment to effectively enforce environmental laws and through cooperative activities carried out through the ECA.

### 3. Migratory Birds

Migratory and resident species of birds are a critically important global resource. In the United States and in the Andean region, birds pollinate flowers, remove insect pests and weed seeds from many important commercial food crops and forest product species, and are a critical component of nature-based tourism that generates hundreds of millions of dollars in economic activity. Nevertheless, many bird species face both direct and indirect threats to survival, many of which are human-caused.

In the United States, 836 migratory bird species are currently protected under the Migratory Bird Treaty Act (MBTA), of which some 132 neo-tropical migratory species migrate through or depend on the tropical Andes for wintering habitat, including Colombia. The region is recognized widely as one of the highest global priorities for conservation investment, since it holds exceptionally high biodiversity and is suffering from acute habitat loss. Declines in the populations of many of these species have been a cause for growing concern. Twenty-nine are listed by the U.S. Fish and Wildlife Service (2002) as “Birds of Conservation Concern” and according to the 2004 IUCN Red List, five are of global conservation concern: Buff-breasted Sandpiper (*Tryngites subruficollis*), Elegant Tern (*Sterna elegans*), Olive-sided Flycatcher (*Contopus borealis*), Golden-winged Warbler (*Vermivora chrysoptera*), and Cerulean Warbler (*Dendroica cerulea*).

Deforestation (including clearing for agricultural production and development) and forest degradation (including unsustainable timber production) are among the greatest threats to birds and their habitats. Forest cover has been significantly reduced or degraded in Colombia, and it continues to face relatively high rates of deforestation.

Production for export, including export to the United States, is a factor in deforestation. For example, coffee is a major export crop for Colombia whose production has significant impacts on habitat for migratory birds. Efforts are being made to encourage the expanded use of “bird-friendly” production methods (such as shade-grown coffee) in order to protect existing habitat and eliminate the use of bird-deadly pesticides, herbicides and fertilizers.

The tariff provisions of the CTPA are not likely to have an impact on migratory bird habitat because U.S. applied tariffs on most products, including those linked to deforestation and forest degradation, are already low or at zero. Although the tariff-related production and trade effects appear likely to be small, it is more difficult to predict the effects of the CTPA on investment in the sector. For example, investment may increase as a consequence of a variety of factors that create a more stable and predictable investment climate. The environmental effects of investment in sectors such as agriculture, whose activities may affect migratory bird habitat, may be either positive or negative.

There may be opportunities to address migratory bird issues in connection with the CTPA, for

example through cooperative activities. Recent cooperative activities addressing a number of concerns related to migratory birds are outlined in Annex I of the Interim Environmental Review of the proposed United States – Andean free trade agreement (with Colombia, Ecuador and Peru).<sup>7</sup>

#### **4. Invasive Species**

Public comments and interagency analysis identified invasive species as an environmental concern related to the CTPA.<sup>8</sup> Commodity trade can provide pathways for invasive species, and the introduction of invasive species can result in harmful effects on the environment and economy of the host country. The United States and Colombia face and recognize risks associated with invasive species.<sup>9</sup>

The risk of introduction of invasive species varies across traded commodities.<sup>10</sup> Colombia is an exporter of some products associated with a relatively higher risk of introducing invasive species. For example, Colombia accounts for a large proportion of all U.S. imports of fresh cut flowers, as well as U.S. imports of foliage, other plant parts besides flowers, and live ornamental fish.

The CTPA does not alter either country's regulatory framework for managing the introduction of invasive species. The CTPA also does not alter related regulations, such as those prohibiting or regulating agricultural and other trade for the purpose of protecting against the introduction of agricultural pests or diseases.

This review identified a baseline risk that invasive species may move between Colombia and the United States. However, the CTPA's likely effect on this risk appears to be small, particularly in light of that fact that in the near term, the CTPA is not expected to lead to a significant increase in Colombia's goods exports to the United States (see Section V.B.1 *supra*), including in products associated with a higher risk of introduction of invasive species.<sup>11</sup> Additionally, the CTPA may decrease the risk of introduction of invasive species through increased cooperation and consultation between the Parties.

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<sup>7</sup> Available at: [http://www.ustr.gov/Trade\\_Sectors/Environment/Environmental\\_Reviews/Section\\_Index.html](http://www.ustr.gov/Trade_Sectors/Environment/Environmental_Reviews/Section_Index.html)

<sup>8</sup> The term "invasive species" refers to species not native to a particular ecosystem that are intentionally or unintentionally introduced as a result of human activities and cause, or are likely to cause, harm to ecosystems, economic systems or human health.

<sup>9</sup> For the United States, Executive Order 13112 (February 3, 1999) established the Invasive Species Council and commits federal agencies to conducting research on invasive species issues, taking reasonable actions to discourage the introduction of these species into the United States and elsewhere and to undertaking international cooperation aimed at addressing this issue.

<sup>10</sup> Trade-related pathways that involve a risk of invasive introductions include the movement of vehicles used in transporting commodities (e.g., ballast water in ships), or the transport of products and packaging that contain potentially invasive organisms (e.g., grains that contains weed seeds). Some invasive species are also introduced on ornamental plants, fruits, aquarium fish, and through other commonly traded products. Associated pests and pathogens may arrive as "hitch-hikers" in shipments of biological materials.

<sup>11</sup> Imports of fresh cut flowers and foliage already enter duty free as a consequence of the ATPA as amended.



## 5. Tuna/Dolphin

Public comments raised concerns that the CTPA could weaken efforts to protect dolphin populations in the eastern tropical Pacific Ocean (ETP) from the adverse affects of commercial fishing.

The Inter-American Tropical Tuna Commission (IATTC), established by international convention in 1950, is responsible for the conservation and management of fisheries for tunas and other species taken by tuna-fishing vessels in the eastern Pacific Ocean. The IATTC provides the Secretariat for the Agreement on the International Dolphin Conservation Program<sup>12</sup> (AIDCP), a legally-binding multilateral agreement which entered into force in February 1999. AIDCP aims to: progressively reduce incidental dolphin mortalities in the tuna purse-seine fishery to levels approaching zero through the setting of annual limits; seek ecologically sound means of capturing large yellowfin tunas not in association with dolphins; and ensure the long-term sustainability of tuna stocks in the Agreement Area, as well as that of related marine resources, taking into consideration the interrelationship among species in the ecosystem. The United States is a member of the AIDCP; Colombia applies the Agreement provisionally but is not party.

During the June 2004 multilateral AIDCP and IATTC meetings in Lima, Peru, Colombia was denied “cooperating non-party” status under the terms of the IATTC and AIDCP Joint Working Group on Fishing by Non-Parties. Colombia’s refusal to cooperate with the IATTC’s 2004 fishery closure for purse-seine vessels was cited as a particular concern, as well as in the 2005 Joint Working Group on Fishing by Non-Parties.<sup>13</sup> In the course of the CTPA negotiations the United States emphasized the importance of multilateral conservation efforts such as the AIDCP and stressed the importance of Colombian cooperation with IATTC. Colombia has expressed a willingness to better control its tuna fishery and to change its status from a non-cooperating non-Party to a cooperating non-Party under the IATTC. Colombia has also indicated its willingness to ratify the IATTC in the near future.

The provisions of the CTPA do not alter or supersede the provisions of the IATTC or the standards of compliance and process of consultation to promote dolphin conservation. On the contrary, through the commitments to effectively enforce environmental laws (including those related to implementation of commitments under the IATTC), the CTPA is expected to complement and reinforce existing fisheries management and dolphin conservation activities.

## 6. Shrimp/Turtle

Colombia hosts important nesting, foraging and migrating populations of five species of sea turtles. All species of sea turtles are endangered and listed under the U.S. Endangered Species Act as well as CITES Appendix I (the most protective listing). The inshore and nearshore Pacific waters of Colombia provide large areas of important foraging habitat for green turtles,

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<sup>12</sup> <http://www.iattc.org/IDCPENG.htm>

<sup>13</sup> <http://www.iattc.org/PDFFiles2/JWG-4-Minutes-Jun-05.pdf>

while the nearshore and offshore waters provide important foraging habitat for olive ridleys. In addition, the Caribbean coast of Colombia hosts important nesting populations of leatherbacks, green turtles, hawksbills and a remnant nesting population of loggerhead turtles and also provides expansive areas of foraging habitat for these three species.

All sea turtles, except the flatback sea turtle, are protected by the U.S. Endangered Species Act. One of the main threats to their survival is incidental mortality in nets used by shrimp trawlers. In response, the U.S. Government issued voluntary guidelines in 1987 and, subsequently, a mandatory requirement that domestic shrimp trawlers use turtle-excluder devices (TEDs) in their nets. These devices allow larger animals to escape the nets and significantly reduce turtle mortality in shrimp fishing. Starting in 1989, the United States extended turtle conservation efforts to include other shrimp-producing countries in the wider Caribbean/western Atlantic region, with the objective of reducing incidental mortality to rates comparable to those of the U.S. domestic fishery.

Section 609 of Public Law 101-162 requires the Department of State to make annual certifications to the Congress for countries that meet the requirements of Section 609 in terms of sea turtle protection for commercial shrimp trawl fisheries. Any country that is not certified may not export commercially-harvested shrimp and shrimp products to the United States. This import restriction does not affect shrimp and shrimp products from aquaculture or artisanal fisheries. The standard for certification is that the sea turtle protection program in that country must be comparable in effectiveness to the program in effect in the United States. In South America, this trade restriction has been in place for countries with shrimp fisheries in the Pacific Ocean since 1996. Certification decisions are based in part on bi-annual verification visits conducted by Department of State and National Marine Fisheries Service personnel to observe compliance and enforcement. Meeting the standard for certification means adopting a regulatory program for the mandatory use of TEDs and a credible enforcement program to ensure the use of the devices, or adopting a program governing the incidental taking of sea turtles that is of comparable effectiveness to the TEDs-based program in effect in the United States. On April 28, 2006, the Department of State certified 37 countries, including Colombia, as meeting the requirements set by Section 609 of P.L. 101-162 for continued export of shrimp to the United States.

The provisions of the CTPA will not affect the trade restriction included in Section 609, or the manner in which the Department of State assesses and makes decisions on the effectiveness of foreign governments in their implementation and enforcement of their domestic laws related to protection of sea turtles. The CTPA is expected to provide opportunities to reinforce efforts to protect turtles through proposed obligations to effectively enforce environmental laws and through environmental cooperation activities aimed at turtle conservation.

## **7. Marine and Coastal Ecosystems**

Coastal and marine ecosystems in Colombia are rich in biological diversity and living marine resources, providing critical habitats for migratory marine species of importance to the United States. For instance, migration routes for some species of whales include waters off the Pacific

Coast of Colombia. Coral reefs in the southern area of the Caribbean are affected by marine pollution, as well as other factors such as resource extraction, tourism, mining and coastal development. Some of the most serious threats to coral reefs are a result of sediment in runoff linked to logging, land clearing and agriculture. Nutrients from untreated sewage in high population centers also are a significant problem, as is oil pollution, including from ship traffic.

The CTPA is not expected to have direct effects on coastal and marine ecosystems in Colombia. However, increased cooperation between the Parties as a result of the CTPA and the ECA may result in the improved management and conservation of these critical coral reef ecosystems. The CTPA may also provide a number of opportunities to enhance ongoing efforts to address concerns related to coastal ecosystems, including mangrove habitats. One such opportunity is the International Wetlands Convention (Ramsar). The United States and Colombia are parties to Ramsar. In a recent decision, Ramsar urges parties to suspend the creation and promotion of new aquaculture facilities and the expansion of current aquaculture activities that would be harmful to coastal wetlands until environmental and social impact of such activities are determined, and measures can be enacted to establish a sustainable system of aquaculture.<sup>14</sup> The Parties, through the environmental cooperation activities of the CTPA, will seek to enhance implementation of this Ramsar decision.

## **VI. Potential Regulatory Impacts**

### **A. Regulatory Review**

Consistent with Executive Order 13141 and its Guidelines, this review included consideration of the extent to which the CTPA might affect U.S. environmental laws, regulations, policies or international commitments. Within the range of CTPA obligations, those related to investment, services and TBT can have particular significance for domestic regulatory practices concerning the environment, health and safety. Previous environmental reviews, including the interim and final reviews for the Jordan, Chile, Singapore, Morocco, Australia, Dominican Republic – Central America, Bahrain, Oman and Peru free trade agreements, have considered potential impacts on the U.S. regulatory regime with respect to all of these obligations and have found that the respective trade agreements were not anticipated to have a negative impact on U.S. legal or regulatory authority or practices. Further, the reviews noted the potentially positive impact that the agreements could have on the U.S. environmental regulatory regime as a result of the agreements' commitments to effectively enforce U.S. environmental laws, strive to not waive U.S. environmental laws to attract trade or investment, and ensure that U.S. environmental laws and policies provide for high levels of environmental protection.

Based on this previous analysis, and given that the core obligations in these areas are similar to those undertaken in the previous free trade agreements, the Administration concluded that the CTPA will not have a negative impact on the ability of U.S. government authorities to enforce or maintain U.S. environmental laws or regulations.

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<sup>14</sup> See Ramsar Resolution VII.21 (available at [http://www.ramsar.org/key\\_res\\_vii.21e.htm](http://www.ramsar.org/key_res_vii.21e.htm)).

For a more in-depth analysis of general free trade agreement commitments and their potential regulatory impacts in the United States, see the previous reviews at [http://www.ustr.gov/Trade\\_Sectors/Environment/Environmental\\_Reviews/Section\\_Index.html](http://www.ustr.gov/Trade_Sectors/Environment/Environmental_Reviews/Section_Index.html).

## **B. Investment**

Investment provisions in free trade agreements were a matter of intense debate during Congress' consideration of the Trade Act. The central question was the appropriate balance that should be struck between protecting the rights of U.S. investors abroad and preserving the ability of the federal government and state and local governments to regulate with respect to health, safety and the environment.

In the Trade Act, Congress recognized that securing a stable investment climate and a level playing field for U.S. investment abroad are important objectives of U.S. trade policy. By fostering economic growth and job creation, investment can bring important benefits, including potential benefits to the environment: as wealth grows and poverty decreases, more resources become available for environmental protection, with potential benefits for developing countries, particularly as they develop constituencies in favor of increased environmental protection. Congress, however, also gave weight to concerns that arbitral claims brought by investors against governments (through "investor-State" arbitration) could be used inappropriately to challenge U.S. domestic laws and regulations, including those concerning the environment. As the Conference Report accompanying the Trade Act states: "[I]t is a priority for negotiators to seek agreements protecting the rights of U.S. investors abroad and ensuring the existence of a neutral investor-State dispute settlement mechanism. At the same time, these protections must be balanced so that they do not come at the expense of making U.S. Federal, State, and local laws and regulations more vulnerable to successful challenges by foreign investors than by similarly situated U.S. investors."<sup>15</sup>

The Trade Act strikes a balance between these two goals by recommending U.S. trade negotiating objectives that clarify several substantive investment obligations of particular concern (notably, provisions on expropriation and "fair and equitable treatment"). The objectives seek to ensure that foreign investors in the United States are not accorded greater substantive rights than U.S. investors in the United States, while also securing for U.S. investors abroad core protections that are comparable to those that would be available to them under U.S. law. Other objectives in the Trade Act addressed concerns that investor-State arbitration be conducted efficiently and arbitral tribunals interpret substantive obligations in a consistent and coherent manner. After enactment of the Trade Act, the Administration consulted extensively with Congress and with the business community and environmental non-governmental organizations (NGOs) to clarify provisions and develop new procedures and to ensure that those provisions fully satisfied the Trade Act's objectives. These provisions were ultimately incorporated into each of the free trade agreements we have negotiated pursuant to Trade Act authority.

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<sup>15</sup> See H.R. Rep. No. 107-624, at 155 (2002).

Previous environmental reviews of free trade agreements have examined the investment provisions in detail, particularly those clarifications and improvements as compared with provisions in free trade agreements negotiated prior to the Trade Act, such as those of NAFTA Chapter 11.<sup>16</sup> We concluded that the investment provisions should not significantly affect the U.S. ability to regulate in the environmental area.<sup>17</sup> In this review, we have re-examined that conclusion in light of public and advisory committee comments and our most recent experience.

### ***Relevant CTPA Investment Provisions***

The CTPA Investment Chapter includes the following substantive clarifications and procedural innovations with relevance to the environment. These provisions were developed based on careful consideration of Trade Act guidance and consultations with interested constituencies:

- *Expropriation.* The expropriation provisions have been clarified in an annex to ensure that they are consistent with U.S. legal principles and practice, including a clarification that non-discriminatory regulatory actions designed and applied to protect the public welfare (including environmental protection) do not constitute indirect expropriation “except in rare circumstances.” To determine whether an indirect expropriation has occurred, the annex directs tribunals to examine several factors, which derive from the analysis of the U.S. Supreme Court in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the seminal case on regulatory expropriation. The annex also clarifies that only tangible or intangible property rights or interests in an investment are subject to the CTPA’s obligations with respect to expropriation.
- *Minimum standard of treatment/“fair and equitable treatment.”* The minimum standard of treatment obligation, including the obligation to provide “fair and equitable treatment” and “full protection and security,” is clarified to provide that these concepts do not require treatment in addition to or beyond that contained in customary international law, and do not create additional rights. Specifically, “fair and equitable treatment” is defined to include the obligation not to “deny justice” in criminal, civil or administrative adjudicatory proceedings, in accordance with “due process” protections provided in the principal legal systems of the world, including that of the United States. An annex gives further guidance concerning the Parties’ understanding of the term “customary international law.”
- *Increased transparency in the investor-State mechanism.* The CTPA provides that all substantive documents submitted to or issued by an arbitral tribunal shall promptly be made public and that hearings are open to the public, subject to provisions ensuring the

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<sup>16</sup> See, for example, final reviews of the Singapore, Chile and Morocco free trade agreements, the CAFTA-DR and the Peru TPA.

<sup>17</sup> Full text of the investment chapters for the concluded agreements is available at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html). Additional information can also be found in the interim and final environmental reviews available at:

[http://www.ustr.gov/Trade\\_Sectors/Environment/Environmental\\_Reviews/Section\\_Index.html](http://www.ustr.gov/Trade_Sectors/Environment/Environmental_Reviews/Section_Index.html)

protection of classified and business confidential information. It also expressly authorizes *amicus curiae* submissions, allowing the public to present views on issues in dispute.

- *Elimination and deterrence of frivolous claims.* The CTPA includes an expedited procedure to allow for the dismissal of frivolous claims (based on Rule 12(b)(6) of the Federal Rules of Civil Procedure, *i.e.*, the claimant has failed to state a claim upon which relief may be granted) and for the dismissal of claims based on jurisdictional objections. It also expressly authorizes awards of attorneys' fees and costs after a tribunal decides, as a preliminary question, whether to dismiss a claim for lack of jurisdiction or for failure to state a claim on which relief may be granted.
- *Promoting consistency and coherence of arbitral decisions.* The CTPA allows interim review of draft tribunal decisions by litigants and by the non-litigating Party. The litigants may comment on the draft decision. In addition, the Investment Chapter contemplates the establishment of an appellate mechanism to review arbitral awards. Within three years after the date of the entry in force of the CTPA, the Parties will consider whether to establish a bilateral appellate mechanism to review arbitral awards.

In addition to these improvements developed specifically in response to the Trade Act, the CTPA includes several provisions, similar to those in previous agreements, that accommodate the flexibility that environmental regulators need to do their job and demonstrate the Parties' intent that the investment obligations should be interpreted in a manner consistent with each Party's right to regulate in the environmental area:

- *National treatment and MFN treatment for investors and their investments "in like circumstances."* As in earlier U.S. bilateral investment treaties (BITs) and in NAFTA Chapter 11, the national treatment and MFN obligations of the CTPA apply to investors "in like circumstances." This means that domestic regulation (including environmental regulation) may, in furtherance of non-discriminatory policy objectives, distinguish between domestic and foreign investors and their investments, as well as among investors of different countries and their investments, without necessarily violating the national treatment and MFN obligations. For example, regulators in appropriate circumstances may apply more stringent operating conditions to an investment located in a wetland, or in a more heavily polluted area, than to an investment located in a less environmentally sensitive area.
- *Relationship to other provisions.* The CTPA includes provisions making clear that in the event of any inconsistency between the Investment Chapter and any other chapter (such as the Environment Chapter), the other chapter will prevail to the extent of the inconsistency. While the United States does not believe there to be any inconsistencies between the Investment Chapter and any other Chapter, this provision clarifies the Parties' wishes with respect to the relationship between different chapters. The CTPA Investment Chapter also provides that nothing in the chapter shall be construed to prevent

a Party from taking measures otherwise consistent with the Investment Chapter to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns. Further, in the Environment Chapter each Party recognizes that it is inappropriate to weaken its environmental laws as a means of attracting investment.

### ***Potential Environmental Regulatory Impacts***

We have been unable to identify any concrete instances of U.S. environmental measures that would be inconsistent with the CTPA's substantive investment obligations, and none have been called to our attention by commenters. No claims have ever been brought against the United States under the almost 40 BITs that are currently in effect or under any of our free trade agreements other than the NAFTA. In the fifteen years that the NAFTA has been in effect, only thirteen cases have been brought against the United States by Canadian or Mexican investors. The United States has prevailed in all of the cases that have been decided to date.

We also considered the views of the TEPAC and other commenters on investment issues (see Section IV). The TEPAC majority concluded that the clarifications to the TPA's investment provisions were an improvement over those in NAFTA Chapter 11 (particularly the clarification of the meaning of "indirect expropriation"), although the majority noted that some concepts could be further clarified. The majority also found that these clarifications reduced the possibility of a successful claim relating to a U.S. environmental measure. In addition, the majority noted other provisions that provide important protections for environmental regulation: the provision that another chapter (such as the Environment Chapter) would prevail over the Investment Chapter in the event of an inconsistency; the provision that nothing in the Investment Chapter should be construed to prevent a Party from taking measures otherwise consistent with the Chapter to regulate investment in an environmentally sensitive manner; clarifications of the minimum standard of treatment obligation; and the national treatment and MFN treatment obligations. Some members in a minority found that the CTPA provisions did not provide sufficient protection for U.S. environmental regulation, while other members in the minority expressed concerns that investment protections had been inappropriately weakened.

Based on the above considerations, and given that U.S. environmental measures can be challenged in U.S. courts under current law, we do not expect the CTPA to result in a significantly increased potential for a successful claim relating to such measures under the CTPA's investor-State mechanism. The CTPA's innovations as compared with NAFTA Chapter 11 should further reduce the risk that arbitral tribunals will misapply the investment provisions of the CTPA.<sup>18</sup> We will, however, continue to review the potential impact of investment provisions on environmental measures as we implement this agreement and free trade agreements with similar provisions.

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<sup>18</sup> A recent paper that reviews experience under NAFTA Chapter 11 can be found at [http://www.cec.org/pubs\\_docs/documents/index.cfm?varlan=english&ID=1825](http://www.cec.org/pubs_docs/documents/index.cfm?varlan=english&ID=1825).



## VII. ENVIRONMENTAL COOPERATION

As discussed in Section I.A, the Trade Act establishes that a principal U.S. negotiating objective is to strengthen the capacity of our trading partners to protect the environment through the promotion of sustainable development. In addition, the Trade Act instructs negotiators to seek to establish consultative mechanisms among parties to trade agreements to strengthen the capacity of U.S. trading partners to develop and implement standards for the protection of the environment and human health based on sound science.

The United States and Colombia share common concerns and similar responsibilities for protecting and conserving the environment and have a long history of cooperation to address environmental challenges. The United States and Colombia also have a common interest in promoting global environmental improvement and protection and in using science and technology to address environmental challenges.

The negotiation of the CTPA presented opportunities to encourage and foster development of private sector initiatives to promote the goals of the agreement, including innovative partnerships among governments, NGOs, international financial institutions and commercial interests. All of these activities support implementation of the provisions of the CTPA by building capacity within governments, at all levels, to protect the environment in concert with the strengthening of trade and investment.

In conjunction with the negotiation of the CTPA, the United States and Colombia negotiated an ECA similar to those negotiated in parallel with the Chile and Peru free trade agreements and the CAFTA-DR.<sup>19</sup> As previously noted, the ECA provides for a Commission to oversee the implementation of cooperative activities under the ECA. The Commission will consist of high-level officials from the United States (the Commission member for the United States will be a high-level official from the U.S. Department of State) and Colombia, as well as any other Andean country for which an environmental cooperation agreement providing for Commission participation is in force with the United States. Through the development of a Work Program, the Commission will guide and identify goals and objectives, as well as specific areas for cooperation that are consistent with the national priorities. The Commission will meet within one year after its establishment and as appropriate thereafter.

The ECA makes specific provision for the development of performance measures to assist the Commission in examining and evaluating the progress of specific cooperative programs, projects and activities in meeting their intended goals. The ECA also outlines the Commission's role in seeking and considering input from relevant local, regional and international organizations to assist it in monitoring the progress of cooperative activities. The ECA contemplates the Commission developing the Work Program in a manner that complements the activities undertaken pursuant to the Peru ECA.

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<sup>19</sup> Additional information is available at <http://www.state.gov/g/oes/env/tr/>.



The ECA identifies short-, medium- and long-term cooperation activities that include: environmental governance and capacity-building; strengthening conservation and sustainable use of natural resources; promoting economic incentives and flexible mechanisms for conservation; technology transfer, with particular emphasis on efficient production processes and technologies, strengthening the capacity to implement multilateral environmental agreements to which both Parties are party; promoting the development and implementation of domestic initiatives on environmental goods and services; and building capacity to promote public participation in environmental and natural resources decision-making and enforcement, including public access to information.

The ECA is an important mechanism for the United States and Colombia to achieve shared goals and objectives and comply with the obligations undertaken in the CTPA Environment Chapter. The Administration is working closely with Congress to identify adequate and stable funding sources for potential cooperative activities under the ECA.

## **ANNEX I – Organizations Providing Comments<sup>20</sup>**

### **Received in response to 69 *Fed. Reg.* 19261 (April 12, 2004)**

- Natural Resources Defense Council, Center for International Environmental Law, Defenders of Wildlife, Friends of the Earth, Oxfam (joint submission)
- American Sugar Alliance

### **Received in response to 70 *Fed. Reg.* 10463 (March 3, 2005)**

- American Bird Conservancy
- American Sugar Alliance
- Government of Colombia
- Humane Society
- Defenders of Wildlife, Friends of the Earth, Sierra Club, Center for International Environmental Law, Earthjustice (joint submission)

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<sup>20</sup> See Section IV for additional information.

## ANNEX II — Data Tables

**Table 1—Population, economic and trade data for Colombia and the United States in 2005**

	Population <i>Millions</i>	Gross National Income			Exports of goods and services	
		Total, nominal <i>Billion US\$</i>	Per capita <i>US\$/capita</i>		Total <i>Billion US\$</i>	As a share of GDP <i>Percent</i>
			Nominal	PPP <sup>a</sup>		
Colombia	45.6	104.5	2,290	7,420	23.7	22.0
United States	296.4	12,434.4	43,560	43,560	1,258.4	10.0

<sup>a</sup> Purchasing Power Parity.

Sources: World Bank, World Development Indicators, 2007.

**Table 2—United States goods trade with Colombia, 2004-2007**

*Billion dollars*

Trading partner	United States exports				United States imports			
	2004	2005	2006	2007	2004	2005	2006	2007
Colombia	4.5	5.5	6.7	8.5	7.3	8.8	9.3	9.4
All trading partners	818.8	906.4	1,037.3	1,162.7	1,469.7	1,673.5	1,855.3	1,942.9
Share to/from Colombia (percent)	0.55	0.61	0.65	0.73	0.49	0.53	0.50	0.48

Source: U.S. Department of Commerce

Data available at: <http://www.ita.doc.gov/td/industry/otea/>