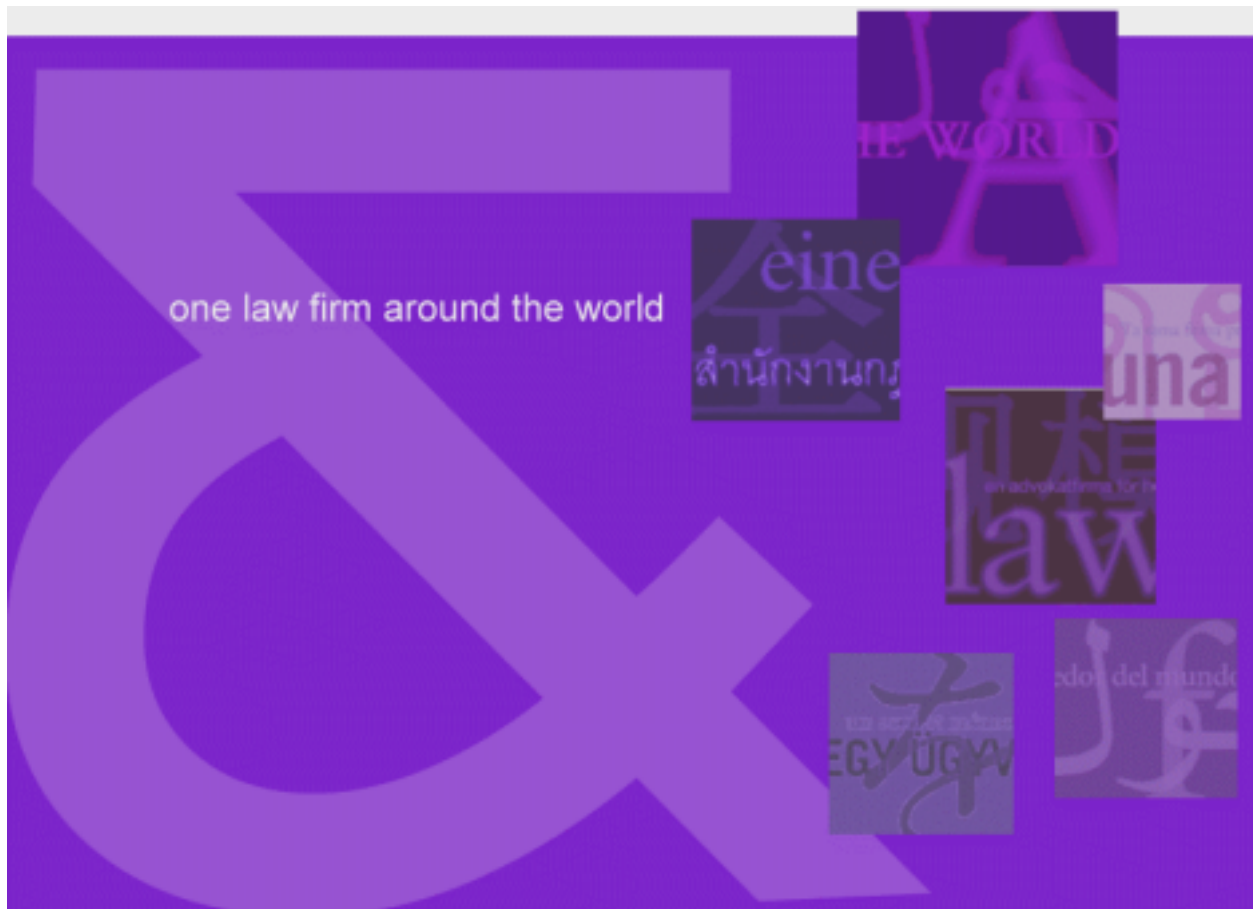


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Japan External Trade Organization  
**WORLD TRADE ORGANIZATION &  
U.S. TRADE ISSUES**

*FEBRUARY 2003*



*Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.*

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## SUMMARY OF REPORTS

### U.S. Trade and WTO Perspectives

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#### Six Former USTRs Offer Their Perspectives on U.S. Trade Policy

The Center for Strategic and International Studies (“CSIS”) on February 7, 2003, hosted its third annual seminar featuring six former United States Trade Representatives (“USTRs”). USTRs who served under various Presidential administrations from 1971-2000, presented their perspectives on a wide range of U.S. trade objectives, as summarized below:

- **William Eberle (Ford)** – Warned of dangers of U.S. protectionism, including the recent Farm Bill and suggested approaches such as wage insurance to build support for trade.
- **Carla Hills (Bush)** – Described “competitive liberalization” in bilateral, regional and multilateral trade talks, and emphasized that the US is ready to negotiate at all levels.
- **Charlene Barshefsky (Clinton)** – Spoke on trade liberalization as an approach to curbing terrorism and stated that the Middle East is a “blind spot” in U.S. trade policy.
- **William Brock (Reagan)** – Discussed prospects for the FTAA, and emphasized that the relationship with Brazil should be strengthened before the US falls behind the EU.
- **Mickey Kantor (Clinton)**– Described US-EU relations, and in particular the dispute on biotechnology and the EU’s moratorium on approval of GMOs.
- **Clayton Yeutter (Reagan)** – Emphasized the importance of meaningful agricultural liberalization in the Doha Round. He also stated the US needs to address its own protectionism, including trade remedy measures.

The USTRs in general believe that the prospects for trade liberalization are good despite the challenges at home and abroad. They also stated that the climate for trade negotiations is far more complex than in the past. Nevertheless, they were confident that the Bush Administration would seek liberalization at all levels, including through bilateral, regional, and WTO negotiations. The 108<sup>th</sup> Congress convened on January 7, 2003, with Republicans controlling both chambers

#### USTR Zoellick Testimony at House Ways and Means: Seeks WTO Compliance and Competitive Liberalization Strategy

United States Trade Representative Robert Zoellick on February 26, 2003 testified before the House Ways and Means Committee regarding the Bush Administration’s 2003 international trade agenda.

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Zoellick addressed the following issues:

- ***U.S. FTA Strategy:*** The US will continue to pursue bilateral, regional and multilateral trade initiatives. Zoellick updated the Committee on the status of various negotiations, particularly the Doha Round. He stressed the need to make significant progress on agricultural subsidies.
- ***FSC/ETI:*** Zoellick warned that the United States must comply with the ruling soon because the European Union will not hold off indefinitely on retaliation.
- ***Chile and Singapore FTAs:*** Zoellick stated that the text of the Singapore FTA would be made public in early March and the text of the Chile FTA would be made public in late March or early April. Zoellick emphasized that Members of Congress and cleared advisors have had access to the text for several months but that the texts cannot be released to the general public until the “legal scrub” is complete.

In terms of trade, Congress will focus on its oversight role during the 108<sup>th</sup> Congress. It remains unclear how much time and energy Congress will be able to dedicate to trade issues with the focus on national security and domestic economic and social issues.

### **USTR Zoellick Testimony to Senate Finance: Senators Question Zoellick on Agriculture and GMO Dispute, China Compliance and FTA Strategy**

USTR Robert Zoellick’s testimony before the Senate Finance Committee on March 5, 2002 regarding the Administration’s trade and WTO agenda closely resembled his testimony before the House Ways and Means Committee on February 26. Zoellick elaborated on the Administration’s “competitive liberalization” strategy of pursuing liberalization at all levels including FTAs and the WTO. He also provided a brief update on China compliance efforts after a recent trip to China.

Finance Committee members pressed Zoellick on matters including WTO dispute settlement, China’s compliance with the WTO, bilateral disputes with Mexico and the Administration’s FTA strategy. Chairman Grassley (R-Iowa) and Sen. Baucus (D-Montana) both demanded that Zoellick indicate whether and when the US would bring a WTO dispute on the EU GMO moratorium. Zoellick refused to specify a date, which angered Baucus. Baucus also questioned the Administration’s criteria for FTA partners and suggested more FTAs with Asia and the Middle East. Senators also expressed concerns on agricultural issues, including bilateral disputes with China and Mexico, and pessimism towards concluding negotiating modalities at the WTO.

### **Senator Baucus, Representative Thomas and Panelists Discuss US-EU Trade Relationship; WTO Concerns**

The American Enterprise Institute, a conservative think tank based in Washington, hosted on February 13, 2003, a conference on “Tax, Trade and Cowboy Capitalism in the United States and Europe” which discussed, among issues, the outlook for the US-EU trade relationship. Senate Finance Committee Ranking Member Max Baucus (D-Montana) and House Ways and

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Means Committee Chairman Bill Thomas (R-California) were featured speakers. Other panelists speaking on trade issues include the former head of the EC delegation in Washington Hugo Paemen, Patrick Messerlin of the Institut d'Etudes Politiques de Paris, and Ellen Frost of the Institute of International Economics.

Hugo Paemen and Patrick Messerlin suggested that a decentralization of negotiations at the WTO rather than a "single undertaking" would be a more effective approach to achieving results. Ellen Frost pointed out that trade has become more politicized in Congress and warned that increasing resort to litigation at the WTO could undermine the US-EU trade relationship. Senator Baucus stated that Congress is not pleased that the EU has raised damaging cases against the US at the WTO, and supported a less litigious approach to dispute settlement in the future. Baucus also suggested a new approach to resolving the FSC/ETI dispute, such as a manufacturing income exclusion. Representative Thomas, however, did not express much enthusiasm for the idea and prefers wider reform of the U.S. foreign tax code.

### **Senate Finance Committee Approves Miscellaneous Trade Bill; Resolution Criticizes Harbinson Draft on Agriculture Modalities at the WTO**

On February 27, 2003, the Senate Finance Committee approved the Miscellaneous Trade and Technical Corrections Act of 2003, which would reduce or suspend duties on more than 300 different products. The bill also includes a sense of the Senate resolution, criticizing the agriculture modalities framework recently released by Stuart Harbinson, Chairman of the WTO Agriculture Negotiations Committee.

The full Senate must now consider the bill, but reportedly Senator Richard Shelby (R-Alabama) has placed a hold on it. Therefore, analysts remain uncertain about when consideration by the full Senate will occur.

## **WTO Working Bodies**

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### **WTO TRIPS Council Makes Progress on Implementation Issues; Delays Persist on Geographical Indications and Public Health Issues**

The WTO TRIPS Council at its first formal meeting this year, on February 18-21, made some progress on implementation-related issues; however, Members held limited discussions on geographical indications (*i.e.* establishment of a multilateral system of notification and registration for wines and spirits) and failed to break the impasse on the TRIPS and Public Health Declaration (*i.e.* more flexible rules on compulsory licensing by developing countries in the pharmaceutical sector).

Regarding implementation issues of concern to developing countries, Members agreed to a notification system on incentives they provide to promote technology transfer to least-developed countries and almost reached agreement to extend the moratorium on non-violation complaints involving TRIPS. The discussion on extending protection for geographical indications to products other than wines and spirits was excluded from the agenda, despite strong opposition from some countries.

More worrisome, the deadlock on TRIPS and Public Health persists despite efforts by about two dozen trade ministers meeting in Tokyo the week prior to move forward on the issue. An agreement has not been reached since the deadline passed in December 2002, and the issue is of particular concern to developing countries facing health crises. Further delays could threaten progress in other WTO negotiations and preparations for the Cancun Ministerial Conference in September 2003.

## WTO Dispute Settlement

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### Panel Presents Conflicting Views on Next Steps After WTO Ruling Against U.S. “Byrd Amendment”

The Global Business Dialogue on February 13, 2003, hosted a panel discussion on the “Byrd Amendment, What’s Next?” – after the recent WTO Appellate Body ruling against the Continued Dumping and Subsidy Offset Act of 2002 (“CDSOA” or “Byrd Amendment”).<sup>1</sup>

Panelists made the following points about the Byrd Amendment:

(i) *Lewis Liebowitz, Partner at Hogan & Hartson* – Supported WTO findings, and cited reasons why the law is flawed domestic policy.

(ii) *Terence Stewart, Partner at Stewart & Stewart* – Criticized WTO findings against the law as overstepping WTO authority, and dismissed some factual allegations.

(iii) *Paul Bailey, Canadian Embassy* – Hoped that the US would demonstrate leadership at the WTO by complying through repeal of the law.

(iv) *Petros Sourmelis, EC Delegation* – Urged the US to comply quickly since the law threatens to undermine the trading system, including WTO negotiations of the new Round.

(v) *Kathleen Hatfield, Office of Senator Byrd* – Asserted that the law will not be repealed and the WTO findings are a “symptom of a larger problem” at the WTO.

(vi) *Greg Mastel, Democratic Counsel, Senate Finance Committee* – Cited that there exists little support in Congress to repeal the law, or comply with other WTO rulings.

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<sup>1</sup> United States – Continued Dumping and Subsidy Offset Act of 2000, WT/DS217,234/AB/R, dated 16 January 2003 (adopted 27 January 2003).



The Bush Administration announced its intent to repeal the Byrd Amendment in the next budget appropriations bill. Defenders of the law, however, insist that Congress is not keen to repeal the law and prefer a negotiated settlement. Thus, imminent compliance is far from certain.

## **US Proposes Repeal of 1916 Antidumping Act to Comply with WTO; EC Considers Alternatives to WTO Retaliation**

During the visit of EC Commissioner Pascal Lamy to Washington on March 3-4, USTR and several Members of Congress pledged to comply with WTO findings against the 1916 Antidumping Act and other disputes, including a renewed effort to repeal the 1916 Act. The US has struggled with compliance on the 1916 Act since losing the dispute in 2000, and Congress has introduced legislation seeking repeal before without much success. Reportedly, the EC is considering alternatives to WTO retaliation including a controversial proposal to allow EU parties to recover damages in EU courts arising from the 1916 Act.

## **Regional Trade Agreements**

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### **Special Report: Bush Administration Pushes Forward on FTAs**

On August 6, 2002, President Bush signed the Trade Act of 2002, which renewed Trade Promotion Authority (TPA) or “fast track” for the first time since 1994. Since then, the Bush Administration has concluded free trade negotiations with Chile and Singapore and initiated negotiations with Morocco, Central America, the Southern African Customs Union (SACU), and Australia.

In this report, we provide an overview of the free trade agreements (FTAs), which the United States has negotiated or is currently negotiating. In addition, we highlight the 2003 Trade Policy Agenda and the 2002 Annual Report of the President of the United States on the Trade Agreements Program, which the Administration recently submitted to Congress.

### **U.S. and Chilean Governments Notify Congresses of FTA; U.S.-Chile FTA Will Have Positive Impact on FTAA Negotiations**

Both the U.S. and Chilean Governments recently notified their Congresses of their intention to enter into a Free Trade Agreement (FTA). For Chile, the expectation is that the Chilean Congress will approve the FTA, although some issues may arise. In the US, the President is expected to sign the FTA in May, after a 90-day period of Congressional review. Analysts expect the FTA to enter into force on January 1, 2004.

Chilean and U.S. officials have welcomed the FTA with enthusiasm for the positive impact they expect it to have on the ongoing negotiations for the Free Trade Area of the Americas (FTAA). Moreover, the U.S.-Chile FTA gives the United States an agreement that can be used as a model in future bilateral negotiations.

Assistant United States Trade Representative (USTR) Regina Vargo has stated that the Bush Administration would soon release the text of the FTA, but that it will release the text of the

U.S.-Singapore FTA first. At present, lawyers for the United States and Chile are conducting the “legal scrub” of the FTA.

### **US Puts Forth Ambitious Market-Access Offer in FTAA Negotiations**

On February 11, 2003, the United States Trade Representative (USTR) announced the U.S. market access proposal to eliminate tariffs and trade barriers in the negotiations for the Free Trade Area of the Americas (FTAA). In its proposal, the US would eliminate its import duties on the majority of industrial and agricultural imports from the FTAA countries immediately upon entry into force of the agreement.

The US characterized the proposal as setting an important benchmark in the market access negotiations and demonstrating U.S. leadership in this critical phase of negotiations. The United States and Brazil will co-chair the Miami FTAA Ministerial Meeting in November 2003.

### **FTAA Public Comments Emphasize Opposition to Antidumping Negotiations**

Comments submitted to USTR on the second FTAA draft text focus on the market access, antidumping, and intellectual property chapters. An overwhelming number of comments oppose an antidumping chapter in the FTAA, citing remarks made by Members of Congress warning the Administration not to weaken U.S. trade remedy laws. Comments generally support retaining national duty drawback programs and the NAFTA approach for rules of origin.

The heavily bracketed second draft complicated efforts by the private sector to provide detailed comments in some cases. In addition, some submissions note that countries still can submit proposals, which means the draft text does not necessarily reflect all positions.

### **U.S. Private Sector Concerned About Intellectual Property and Government Procurement in US-South Africa FTA Negotiations**

On November 15, 2002, USTR published a notice in the Federal Register (67 FR 69295), announcing that the interagency Trade Policy Staff Committee requested public comments and would hold a public hearing on the proposed U.S.- SACU FTA.

Many public comments focused on intellectual property rights (“IPR”) and urged U.S. negotiators to use the Singapore and Chile FTAs as models for the SACU negotiations. Other comments addressed government procurement, market access, and services. Negotiators are scheduled to launch negotiations in April 2003.



## REPORTS IN DETAIL

### U.S. TRADE AND WTO PERSPECTIVES

#### Six Former USTRs Offer Their Perspectives on U.S. Trade Policy

##### *SUMMARY*

The Center for Strategic and International Studies (“CSIS”) on February 7, 2003, hosted its third annual seminar featuring six former United States Trade Representatives (“USTRs”). USTRs who served under various Presidential administrations from 1971-2000, presented their perspectives on a wide range of U.S. trade objectives, as summarized below:

- **William Eberle (Ford)** – Warned of dangers of U.S. protectionism, including the recent Farm Bill and suggested approaches such as wage insurance to build support for trade.
- **Carla Hills (Bush)** – Described “competitive liberalization” in bilateral, regional and multilateral trade talks, and emphasized that the US is ready to negotiate at all levels.
- **Charlene Barshefsky (Clinton)** – Spoke on trade liberalization as an approach to curbing terrorism and stated that the Middle East is a “blind spot” in U.S. trade policy.
- **William Brock (Reagan)** – Discussed prospects for the FTAA, and emphasized that the relationship with Brazil should be strengthened before the US falls behind the EU.
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The USTRs in general believe that the prospects for trade liberalization are good despite the challenges at home and abroad. They also stated that the climate for trade negotiations is far more complex than in the past. Nevertheless, they were confident that the Bush Administration would seek liberalization at all levels, including through bilateral, regional, and WTO negotiations.

##### *ANALYSIS*

#### **I. William Eberle Warns of U.S. Protectionism**

##### **A. Presentation by Ambassador Eberle**

William Eberle, USTR during the Nixon and Ford Administrations from 1971-1975, warned of the dangers of U.S. protectionism and suggested approaches to gain support for liberalization. He cited as recent examples of protectionism the Farm Bill and steel safeguards. He urged the Administration to

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“rise above” pressures from domestic industries like steel, textiles and others that seek to impose trade barriers. He added that the recent Farm Bill will make it harder for USTR to pursue liberalization at all levels, and that the Bill results in “great risks” to U.S. trade policy due to the importance of the issue to many trading partners.

Eberle stated that although competition arising from liberalization results in some job displacement, the benefits to the US far outweigh the costs in the long term. He cited as a “myth” that free trade results in growing job loss, including in hi-tech jobs. He believes that technology is moving fast enough that the US is able to increase, not lose jobs in a competitive environment. He added that higher-paying jobs overseas also benefits U.S. interests since foreign workers will have more income to spend on U.S. products and services.

#### B. Comments by Former USTRs

- Eberle and other USTRs suggested an increase in general wage insurance as a means to build support for trade liberalization. Eberle added that individual states have considerable authority on the issue of unemployment, so it is important to coordinate with them to build support for liberalization. Barshefsky stated there is a need to remove distinctions to receiving wage insurance, and suggested making the criteria more general.
- Hills cited a study by the Brookings Institute on wage insurance that suggests providing insurance across the spectrum, and estimates that 5 percent unemployment would cost about \$4 billion. She added that any wage insurance plans must encourage workers to find new jobs, even if they are paid less (*e.g.* highly-paid steel workers often have problems finding high-paid work).
- Kantor emphasized that Trade Adjustment Assistance (“TAA”) was broadened in order to build support for Trade Promotion Authority (“TPA”) renewal, and to build credibility for liberalization. He agreed that wage insurance is an “interesting idea.”

#### C. Question and Answer Period

- In response to a question about growing protectionism in Asia, including through the use of currency controls, Brock remarked that currency controls are “self-defeating.” Hills added that Asian countries are depressing their currency due to anxiety over China, whose currency is linked to the dollar. The dollar’s decline is making Chinese exports even more competitive.
- Eberle remarked that U.S. priority should be on developing intellectual capital, especially in the fields of science and engineering. He cited that many Chinese engineers are trained in the US and are much more cost-competitive when they return home. The long-term implications for the U.S. economy are significant if the US falls behind in these areas.

## II. **Carla Hills Emphasizes Liberalization at All Levels**

#### A. Presentation by Ambassador Hills and Comments by USTRs

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Carla Hills, USTR during the George H. W. Bush Administration from 1989-1993 described “competitive liberalization” – the simultaneous pursuit of bilateral, regional, and multilateral trade talks, as a wise strategy being pursued aggressively by the current Administration. She acknowledged that although the WTO is the most important forum for negotiations, the US would also pursue liberalization objectives through the FTAA and FTAs.

Hills cited that after the failure of the Seattle Ministerial in 1999, opposition to liberalization declined after September 11, 2001, after which world leaders made a commitment to step up poverty reduction as a means of maintaining security and stability. This momentum helped to launch the Doha Development Agenda in November 2001, which has as its focus developing country priorities. She believes that after the Uruguay Round, many developing countries feel they did not secure hoped-for gains, including reductions in agricultural subsidies and tariff peaks. The US is not as “sinful” as others, but still has concessions to offer. She cited, for example, that Norway and Mongolia paid the same amount of tariffs to the US (\$23 million annually) and many developing countries can’t compete in agricultural exports since the US, EU and Japan subsidize farmers collectively about \$1 billion a day. She warned that the new Round will fail if poor countries are not integrated into the trading system.

As for multilateralism vs. regional approaches, Hills asserted that the US must seek further liberalization at all levels to keep the momentum going. She stated that although some believe that regional agreements can be trade-diverting, regional trade agreements (“RTAs”) are mostly trade-creating. She cited the NAFTA as an example of rapid growth internally, and encouraged Asian countries to open up unilaterally in order to stay competitive. She believes that U.S. FTA and FTAA negotiations will encourage Doha negotiations and spur weak growth in Latin America.

Regarding Latin America, despite economic and political crises, Hills believes it is “absolutely” the right time to encourage trade liberalization through FTAs and the FTAA. She stated that “open markets are good policy in bad times” and will help create a more secure region. She acknowledged, however, that some Latin America negotiating priorities target the most sensitive U.S. sectors, including sugar, steel, textiles, and orange juice. She believes that the US could agree to lower protections for these industries gradually, but must first build the political will to do so.

Regarding timing, Hills believes that 2007 and not 2005 is the “magic date” for completing Doha and FTAA negotiations. She cited that the U.S. Farm Bill is up for renewal in 2006; TPA expires in 2007; and the next Franco-German agreement on the Common Agriculture Policy is due in 2007. Although the US prefers the current deadline of 2005, she thinks 2007 is more realistic.

#### B. Comments by Former USTRs

- Kantor remarked that the US needs to take up the EU challenge in regards to Brazil as President “Lula” has agreed to expedite negotiations with the EU. He said that without Brazil, there is no FTAA and hopes the US will not ignore Brazil. Hills responded that the US is actively engaging Brazil and is persuading Brazil that it must liberalize for its own good. She cited that Brazil has a low export to GDP ratio; investment is dropping and the situation is “unsustainable.” She added that even though Lula’s rhetoric during the campaign was anti-market, he is moving to the middle and is willing to negotiate. Brock stated that since Brazil and the US are co-

chairs of FTAA negotiations for the next two years, there should be an active dialogue. He agreed that the linchpin is the U.S. relationship with Lula.

- Barshefsky stated that Brazil views itself as more European, and therefore amenable to EU offers to step up negotiations. She believes that some of Brazil's priorities will be difficult for the US politically, especially in an election year. For example, orange juice is important to California and Florida; steel and textiles are important to the Mid-West, Rust Belt and Southern states. She questioned whether the Administration would tackle these issues.

#### C. Question and Answer Period

- In response to a question about the sensitivity of agriculture in the U.S.-Australia FTA negotiations, Kantor remarked that the negotiations will be "heavy on tactics" in order to find creative approaches to addressing sensitive issues like agricultural subsidies. The FTA should also help "sequence discussions" with Europe in WTO negotiations.
- In response to a question on possible strategies to build support and alliances with developing countries, Barshefsky stated that some countries like India and Brazil are speaking together due to their discontent with the previous Round, and the current (slow) pace of negotiations. At the same time, the EU and US, along with Japan and Korea, need to take a stronger leadership role in dealing with issues like agricultural subsidies. She added that technical assistance is a way to encourage support from poorer countries. She also said the US has not properly responded to the HIV/AIDS epidemic and other public health crises, which she believes is a "readily addressable" trade issue. In particular, she warned that without an agreement soon on the TRIPs and Public Health Decision (on compulsory licensing), the delay will damage the Round.

### III. **Charlene Barshefsky Proposes Comprehensive Middle East Trade Policy**

#### A. Presentation by Ambassador Barshefsky and Comments by USTRs

Charlene Barshefsky, USTR during the Clinton Administration from 1997-2000, spoke on trade liberalization as an approach to combating terrorism. She described the post-WWII atmosphere of a war-ravaged world, and how international economic integration, including through the IMF, World Bank and GATT institutions, helped to restore peace and stability. For example, this framework helped Japan and Germany revive their economies and subsequently nations in Asia, Latin America and Central Europe.

Barshefsky pointed out that the Muslim Middle East, however, has regressed and is now the least integrated region in the world, even less so than sub-Saharan Africa. She noted that the lack of economic integration in the Middle East is ironic, considering it was among the most integrated regions of the world in the past. In fact, the states in the Muslim Middle East trade less and impose higher barriers toward each other than those in sub-Saharan Africa. The result is a fragmented region, and an island of economic isolation within the world. The situation has been getting worse as the region experienced a 25 percent drop in GDP; exports the least amount of value-added goods in the world; and

has become more dependent on commodities like oil. For example, in 1970 Egypt and South Korea were at the same level of development; Egypt's economy has not grown much since while Korea's economy expanded twenty-fold. Another irony is that despite the launch of the new Round in Doha, Qatar – most of the large economies in the region (8 out of 11) are not part of the WTO.

Barshefsky warned that with the decline in economic growth, coupled with other factors like a doubling in population – the region is “not a recipe for stability.” She stated that more of the world would resemble the Middle East today had it not been for pursuit of liberalization. She pointed out that opponents of globalization often miss a fundamental point – that the primary objectives of international economic integration are to maintain peace and stability. Thus, further economic integration of the Muslim Middle East would help to achieve these goals and combat terrorism.

Despite the grim outlook, Barshefsky said there are positive signs including Jordan's pursuit of liberal trade and investment policies. Jordan joined the WTO in 2000, signed the US-Jordan FTA and encouraged investment from Israel. The FTA for example, allowed Jordan to increase exports to the US from \$16 million in 1996 to \$400 million in 2002 – an increase of 40,000 new jobs. However, some countries like Egypt have rejected preference programs with the US if it involves Israel – which could serve as a potential engine for the regional economy (e.g. QIZ industrial zones). The recent launch of an FTA with Morocco is encouraging, but more FTAs risk increasing fragmentation in the region.

Barshefsky asserted that the region has been a “blank spot” in U.S. trade policy, and she believes that the US should pursue a more activist, and comprehensive engagement with the region. She suggested that a comprehensive approach would be more effective than FTAs, for example. Examples of successful comprehensive trade initiatives include the African Growth and Opportunity Act (“AGOA”) – which expanded exports from \$360 million in 1996 to \$1.2 billion in 2002, and the Caribbean Basin Initiative (“CBI”). The Middle East could benefit from a broad duty-free program from the US, and by lowering its own barriers to trade within the region and others countries.

#### B. Comment by Former USTRs; Question and Answer Period

- In response to a question about the willingness of Middle East countries to engage (due to cultural or other reasons), Barshefsky responded that the US should take the initiative independently by offering unilateral preferences. Of course, it will be up to the Middle East to take advantage of such trade preferences. Eberle added that the Middle East is not fully aware of its potential, and there is a lack of government initiative in promoting trade. Hills said she is optimistic the Administration is willing to embrace the Middle East, as evidenced by FTA negotiations with Morocco, and possibly Egypt. Kantor lamented that the Egyptian economy has declined, and the government has made little overtures to engage with Israel economically. He believes a U.S.-Egypt FTA would be useful, and encouraged a high level of engagement with Egypt and to deal with the Palestine-Israel conflict. Barshefsky emphasized that the region is “combustible” and the US must take risks in order to spur economic growth and promote stability.
- In response to a question on whether the US has the political will to offer preferences like textiles quotas, considering the limited liberalization for Pakistan – Barshefsky emphasized that all USTRs present have “avoided the issue” – and did not fully

address protectionism in the textiles industry. She noted that liberalization in textiles is a very difficult political issue, but the US must assess its priorities – and relaxing some quotas is a “low price to pay” for increased security. Hills added that there is a need to educate the American public about the burdensome effects of barriers including tariffs and quotas, which could help build support for liberalization in sensitive sectors like textiles.

- In response to question on export controls and their effectiveness in enhancing security, Kantor said that these arguments have become more contentious as technology advances. He stated that “the horse is out of the barn” and supports a more open export policy.

#### **IV. William Brock Cites Difficult Negotiations with Brazil on FTAA**

##### **A. Presentation by Ambassador Brock**

William Brock, USTR during the Reagan Administration from 1981-1985, discussed prospects for the FTAA and approaches to strengthening the relationship with Brazil in particular. Brock began by saying that Zoellick has a more difficult task than any previous USTR due to security concerns, increasing disillusion towards trade by the public, Congress and developing countries, and economic crisis in areas like Latin America.

Brock cited the current crisis in Venezuela as an important indicator of support for liberal policies since the struggle is between workers and non-workers, rather than rich vs. poor. Segments of society are rebelling against the government due to economic stagnation and misguided policies. In Brazil, President Lula has toned down the anti-market rhetoric and appears open to engagement with the US. Brock was also encouraged by the conclusion of the U.S.-Chile FTA and the launch of FTA negotiations with Central American.

Brock commented that the US has a difficult time in negotiating with Brazil since Brazil's priority sectors are of “enormous political sensitivity” for the US, including agriculture. He suggested the U.S. political leadership needs to “think larger” on trade issues. Nevertheless, politicians everywhere need to be sensitive to their political bases and can't go farther without building support for their policies. He suggested a TAA-like program including a larger insurance scheme that functions more like a “safety net” and less like a welfare program. Brock also warned that 2004 is a difficult year for the FTAA due to the elections and that the South is competitive (considering its sensitivities in textiles and agricultural sectors). Furthermore, the Agreement on Textiles and Clothing (“ATC”) will expire and all quotas must be phased out. The impending rapid growth of textiles exports to the US, at the expense of domestic industries, could make it difficult to build support for liberalization. Thus, Zoellick will need to build all the support he can in order to conclude the FTAA.

##### **B. Comments by Former USTRs**

- Kantor agreed that 2004 will be a very difficult year to conclude the FTAA due to U.S. presidential and other elections. He was not too optimistic about the current deadline.



- Barshefsky explained that in 2004 with the phase-out of textiles quotas, the re-ordering of exporting countries will be more significant than the actual increase of exports. For example, countries with preferences in the Caribbean and Africa, as well as Mexico stand to lose market share to more competitive exporters in China and Southeast Asia. Brock commented that the perception of absolute growth of exports in 2004 is greater than the actual substance. Brock added that the real test is to establish an effective “safety net” to cushion the negative effects of liberalization in the short-term, or else political discontent could derail trade negotiations.

C. Question and Answer Period

- In response to a question about the relevance of APEC and how to prioritize among the FTAA and FTAs, the USTRs emphasized the need to reinforce Asia trade policy. Kantor stated that USTR “can’t do everything” but should work towards reviving APEC, and reengaging with the rest of the region. Barshefsky added that the Administration’s two major “blank spots” are the Middle East and Asia. She believes there is ample opportunity to conclude the FTAA, and “Doha finishes when it finishes” – but Asia on the other hand, is critical and needs a comprehensive policy.
- In response to a question on the importance of the Central American FTA, Brock believes it will serve as a building block towards completing the FTAA. Kantor and Block agreed it was an important agreement, despite past skepticism.

V. **Mickey Kantor Attacks EU Moratorium on GMOs**

A. Presentation by Ambassador Kantor

Mickey Kantor, USTR during the Clinton Administration from 1993-1996, spoke on US-EU relations, and in particular about the dispute over EU Member States’ delays in approving genetically modified organisms (“GMOs”). Kantor began by emphasizing the importance of the trans-Atlantic relationship, as each is the leading trading partner and source of investment for the other. US-EU leadership on trade issues (though not by itself) is critical to the successful conclusion of the Doha negotiations. He also noted that bilateral trade disputes harm the overall relationship, including U.S. efforts to build political support for possible military action against Iraq. In fact, the US-EU dialogue sometimes can get “drowned in rhetoric” on disputes like bananas, beef, foreign sales corporations, and biotechnology.

Kantor spent most of his presentation on the US-EU dispute on biotechnology, and criticized the *de facto* moratorium on approvals of 13 GMO varieties by EU Member States for the past five years. He argued that the moratorium is not based on science, as required by the WTO’s Sanitary and Phytosanitary Agreement (“SPS”). He cited the EU’s own exhaustive study that presented no scientific evidence that bioengineered products are dangerous to health, and in fact could be healthier. He pointed out that EC officials have recognized the fact that the moratorium is not justified and inconsistent with WTO rules. Despite their acknowledgment, he said the EC is “not standing up to Member States” and the issue is politically driven. As a result of these delays, Kantor said that the US might soon raise a formal dispute against the EC at the WTO.



Kantor suggested three options for the EU to avoid a WTO dispute: (i) sue Member States for not implementing their regulations; (ii) end the moratorium and base approval decisions on sound science; and (iii) respect the established timeframe for approvals; the same standards must be applied. Kantor was also convinced that the WTO would rule against the EU moratorium. He pointed out that USTR Zoellick was “vociferous” in his support for an end to the moratorium, and was confident the Administration would act soon if approval delays persist.

(Note: Yeutter spoke immediately after Kantor.)

## **VI. Clayton Yeutter Criticizes Farm Bill; Optimistic on WTO Agriculture Negotiations**

### **A. Presentation by Ambassador Yeutter**

Clayton Yeutter, USTR during the Reagan Administration from 1985-1989, emphasized the importance of meaningful agricultural liberalization in the Doha Round, as well as FTAA and FTAs negotiations. (Yeutter arrived late due to the snow storm.)

Yeutter commented that WTO agriculture negotiations have not made much progress towards the next stage (modalities by March 2003), based on Chairman Stuart Harbinson’s recent compilation of proposals. He described Members’ positions as “wide” and criticized the Franco-German agreement last Fall which froze EU spending, but does not mandate reductions. He stated that the US does not have its “act together” either because of the Farm Bill – which is a “regressive” policy. He added that the US also has several “sacred cows” (sensitive areas) such as sugar and dairy. Nevertheless, the US has tried to restore its credibility through an ambitious proposal last summer that proposes ambitious liberalization, and is more aligned with the Cairns Group countries.

Yeutter predicted that apart from tariffs, other significant barriers can impede market access for agriculture, including abuse of trade remedy and food safety measures. He remarked, somewhat surprisingly, that the US is “naïve to believe” that the Round will succeed without significant reform in the Antidumping Agreement. In fact, he asserted that there is “plenty of room for improvement” in the Agreement in order to curb growing abuses by Members of trade remedy measures. He referred to Kantor’s speech on biotechnology and believes that the EU’s moratorium is a situation where “politics trumps science.” He feared that other Members would seek to replicate such measures as disguised barriers to trade.

Regarding the prospects for WTO negotiations on agriculture, Yeutter predicted a better chance of reform in this Round than in the Uruguay Round. He cited five major reasons for his optimism:

**(i) *Effective Chairman*** – Expressed confidence in Stuart Harbinson’s ability to draft and negotiate a deal; he’s an “honest broker and talented negotiator.”

**(ii) *US-EU positions converging*** – Believes that the US and EU positions are moving closer, in particular on the issue of decoupling subsidies and support from production.

**(iii) *Growing budget pressure*** – Cited that with EU enlargement, the EU is hard pressed to provide generous support to agriculture. In the US, the growing deficits and security costs will also add pressure to reduce subsidies, and since the Farm Bill passed during a time of surplus.

(iv) *Developing country participation* – Believes developing countries are “more serious than ever” to engage in the process and seek significant liberalization. Also stated that developing countries should liberalize their markets to each other.

(v) *Rules framework in place* – Pointed out that the Uruguay Round “started from scratch” while there is a negotiating foundation in place this time. He cited the Agriculture Agreement’s Article 20’s four pillars of seeking liberalization in subsidies, domestic support, market access and addressing non-trade concerns.

Yeutter remarked that this Round must result in progress as “sweetheart deals don’t last” (e.g. Blair Accord), and all Members must learn to compete fairly. He noted that developing countries are unable to compete with the EU or US, which have vast budgets to subsidize and support exports. He also felt some Members have played “dirty tricks” and abuse current disciplines, including tariff rate quotas; the movement of support to non-actionable boxes (e.g. green and blue box subsidies); and unjustified barriers arising from food safety concerns.

Yeutter also raised the need to realize progress on trade facilitation, ensure that FTAs do not discriminate and improve disciplines on discriminatory investment barriers. He cited that the few disciplines exist in investment and that the issue has been “ignored too long.”

#### B. Comments by Former USTRs; Question and Answer Period

- In response to a question on EU criticism of a “US U-turn” on agriculture support, Yeutter criticized the Farm Bill and said there was no international basis for the Bill (for example, to level the playing field with Europe). Rather, Members of Congress wanted to get their share of the budget surplus at the time to build constituent support. He warned that the Bill has diminished U.S. negotiating credibility. In general, he said that subsidies to agriculture reduce international competitiveness and are “cannibalized in land value.” He cited as an example the high cost of farmland in Japan and that most farmers are old.
- Brock, Kantor and Yeutter discussed the need for international cooperation to develop a legitimate body that can determine science-based standards for agricultural products. Kantor said the EU is developing its own food agency, but commented that the US regulator the Food and Drug Administration (“FDA”) is not keen to give up its approval authority. Yeutter commented that the Codex Alimentarius should play such a role for certain standards, but the body has become politicized and slow to reaching agreement.
- The Deputy Representative of the European Commission in Washington (Gerard Depayre) commented that there exists a “loss of confidence” by the European public toward food safety issues, and that the EU must restore this confidence. Considering the sensitive public mood, he stated that the EU cannot force acceptance of GMOs and “science is not always accurate” – and referenced the precautionary principle. Depayre also cited the recent trip of Agriculture Commissioner Franz Fischler and said that he shared Yeutter’s optimism that this Round would result in progress. He referenced the recent EC submissions to the WTO, and said that the EC did have

room to pursue a flexible approach on agriculture contrary to reports that stated otherwise.

### ***OUTLOOK***

The former USTRs were candid in their remarks and suggested new approaches to U.S. trade policy. For example, Eberle and Yeutter criticized the Farm Bill and even the abuse of trade remedy laws (Yeutter). Brock encouraged the Administration to “think larger” in tackling sensitive domestic sectors in FTAA and other negotiations. Barshefsky suggested a comprehensive approach towards the Middle East on trade policy, but without explicit reference to establishing formal ties with Iran and Libya. She also pointed out that the former USTRs have all “ignored textiles” but that domestic protection should be addressed, especially if liberalization can enhance security objectives abroad. Kantor spent most of his presentation attacking the EU moratorium on GMOs, and admitted his criticism is due both to affiliation with Monsanto (he is on the Board of Directors of the biotechnology giant) and free trade principles. Hills was openly skeptical of the 2005 deadline for FTAA and Doha negotiations, and believes that 2007 is more realistic. Overall, the session provided a useful exchange of views among the former USTRs – many of whom remain active in the U.S. trade policy process (often on behalf of private clients).

The former USTRs agreed that USTR Zoellick faces a more difficult political climate than they had during their terms, both at home and abroad. For example, bipartisan support for trade in Congress has declined over the years, and Congress has become more hostile to the WTO due to a series of dispute findings against U.S. laws and practices. At the regional level, FTAA negotiations are becoming more complex after the change of Administration in Brazil. At the WTO, developing countries are far more active than during the Uruguay Round – which will make negotiations more challenging. Moreover, U.S. credibility is under attack due to real or perceived intransigence on developing country priorities including agriculture, special and differential treatment and public health concerns. Nevertheless, they were optimistic that the Administration would move forward with its liberalization objectives at all levels, including bilateral, FTAA and WTO negotiations.

## **USTR Zoellick Testimony at House Ways and Means: Seeks WTO Compliance and Competitive Liberalization Strategy**

### *SUMMARY*

United States Trade Representative Robert Zoellick on February 26, 2003 testified before the House Ways and Means Committee regarding the Bush Administration's 2003 international trade agenda.

Zoellick addressed the following issues:

- ***U.S. FTA Strategy:*** The US will continue to pursue bilateral, regional and multilateral trade initiatives. Zoellick updated the Committee on the status of various negotiations, particularly the Doha Round. He stressed the need to make significant progress on agricultural subsidies.
- ***FSC/ETI:*** Zoellick warned that the United States must comply with the ruling soon because the European Union will not hold off indefinitely on retaliation.
- ***Chile and Singapore FTAs:*** Zoellick stated that the text of the Singapore FTA would be made public in early March and the text of the Chile FTA would be made public in late March or early April. Zoellick emphasized that Members of Congress and cleared advisors have had access to the text for several months but that the texts cannot be released to the general public until the "legal scrub" is complete.

In terms of trade, Congress will focus on its oversight role during the 108<sup>th</sup> Congress. It remains unclear how much time and energy Congress will be able to dedicate to trade issues with the focus on national security and domestic economic and social issues.

### *ANALYSIS*

Yesterday United States Trade Representative Robert Zoellick testified before the House Ways and Means Committee regarding the Bush Administration's 2003 international trade agenda.

House Ways and Means Committee Chairman Bill Thomas (R-California) and Representative Phil Crane (R-Illinois), Chairman of the Trade Subcommittee, praised Zoellick's leadership on trade. Crane said he looks forward to developing the implementing legislation for the Chile and Singapore agreements "sooner rather than later."

#### **I. Levin Delivers Blistering Critique of Bush Trade Policy**

Representative Sander Levin (D-Michigan), Ranking Member of the Trade Subcommittee, delivered a lengthy opening statement criticizing the Bush Administration's trade policy. We summarize his criticisms below.

- ***Lack of bipartisanship:*** The Administration and Congress must work to reestablish bipartisanship in developing U.S. trade policy.

- **FSC/ETI dispute:** The Administration has failed to correct the flaw that disadvantages U.S. exporters.
- **Tariff proposals:** The Administration's "grandiose" proposals to eliminate all tariff barriers ignore non-tariff barriers, which are the primary impediment to U.S. exports.
- **Release of FTAs:** Levin criticized the Administration for its "penchant for secrecy" and called on the Administration to make the Chile and Singapore FTA texts public. Levin interprets the 90-day Congressional consultation period provided for in TPA to mean that the text of an agreement should be made public during the same time period.

Levin recommended that the US grant permanent normal trade relations (PNTR) to Russia, while ensuring a meaningful role for Congress in accession negotiations. He stated that he would introduce legislation next week along with Rangel and Senate Finance Committee Ranking Member Max Baucus (D-Montana) (*Please see W&C February 6, 2003 Report*).

Regarding the TRIPs and public health debate, Levin believes that coverage should be broadened beyond infectious epidemics.

## II. Zoellick Outlines Trade Agenda for 2003

Zoellick highlighted the Administration's trade successes to date, including the launch of the Doha Round, China WTO accession, forward momentum on the Free Trade Area of the Americas (FTAA), steel 201 safeguards, the U.S.-Jordan FTA, the completion of the Chile and Singapore FTAs, and the launch of a number of new bilateral FTA negotiations.

Zoellick thanked the Committee for its assistance in moving the Administration's agenda. He noted that although Members do not always agree with the Administration, their insights are beneficial. Despite criticisms of partisan rancor overshadowing the trade agenda, Zoellick believes he has delivered on his promises to the Minority. During Zoellick's confirmation hearing, Democrats told him that they needed the steel 201 case, labor and environmental provisions in FTAs, and completion of the Jordan and Vietnam agreements. Now he will try to work with the Minority on the issues Levin set forth in his opening statement.

### A. Doha Round

Zoellick noted that the target date for completion of the Doha Round remains January 1, 2005, although many observers believe the Round will not be completed by 2005. Zoellick stated that with Congress' help, the United States has set the pace of the market access negotiations by presenting two ambitious proposals.

#### 1. Agriculture

The United States has proposed the elimination of agricultural subsidies, and Zoellick hopes the European Union and Japan will "come along." He made it clear that without significant movement on agricultural subsidies, the Doha Round could falter. Zoellick stated that the U.S. proposals demonstrate "U.S. willingness to cut if the rest of the world does."

Chairman Thomas asked for Zoellick's assessment of the agriculture modalities text that Agriculture Council Chairman Stuart Harbinson recently circulated among WTO Members. Although he commended Harbinson's effort, Zoellick said the text is "not ambitious enough" because it eliminates agricultural subsidies in nine years, as opposed to the U.S.-proposed five years. Zoellick believes Harbinson went too far in trying to compromise with Japan and the EU.

## 2. TRIPs and Public Health

With regard to the TRIPs and Public Health debate, Zoellick stated that the United States is frustrated at the lack of consensus in Geneva. He suggested that one problem is what he characterized as "the gap of trust that some not poor countries will try to take our patents."

### ***B. Services***

Zoellick noted the increasing importance of services trade to the United States--80% of U.S. jobs are services-related, while services comprises only 20% of U.S. trade.

Zoellick hopes to dispel the belief that the United States is trying to push privatization through services liberalization, but emphasized that if countries privatize their services sectors, U.S. firms should have the same opportunities as other firms.

### ***C. Free Trade Area of the Americas***

Zoellick noted that the FTAA negotiations are moving into a key phase with the United States and Brazil co-chairing the negotiations. The United States is trying to set the pace, as countries are making concrete offers. Despite his optimism, Zoellick stated, "There is no doubt there's hard bargaining ahead."

### ***D. Bilateral Free Trade Agreements***

Critics argue that the Bush Administration lacks a clear strategy with respect to bilateral FTAs, but Zoellick explained that FTAs (i) "level the playing field" for the United States vis a vis the European Union or Canada; (ii) create a competitive dynamic to liberalize; and (iii) encourage countries to look at domestic reforms as a means of securing an FTA with the United States. In addition, the Administration hopes to use FTAs with Central America and the Southern African Customs Union (SACU) to encourage regional integration and to create allies in both the WTO and the FTAA.

#### 1. Singapore and Chile FTAs

The Administration looks to FTAs to set important new benchmarks like those set in e-commerce, intellectual property rights protection, and labor and environmental provisions in the Chile and Singapore FTAs.

Zoellick noted the Chile FTA (i) leveled the playing field with the European Union and (ii) demonstrated that the US can complete an ambitious agreement with a Latin American country, which will provide momentum for both the CAFTA and the FTAA.



Zoellick noted the Singapore FTA contains important provisions regarding customs transparency and transshipment and provisions to ensure open competition with Singapore's government linked corporations (GLCs). In response to a question from Crane regarding market access for chewing gum in the Singapore FTA, Zoellick stated that the US secured a partial opening of the sector in the final stages of negotiations. The Administration consulted with Wrigley, and they were happy with the results, however, they are now concerned about implementation. Zoellick has encouraged Wrigley to discuss implementation issues with Singapore, and stated that he hopes the situation will someday improve (Singapore maintains an import ban on chewing gum).

Zoellick noted that Members of Congress and cleared advisors have had access to the texts for several months but that the texts cannot be released to the general public until the "legal scrub" is complete. He emphasized that he does not have "thousands of lawyers working for me," so they need to ensure that all of the differences are resolved before the texts are released. Zoellick stated that the Chile text will be made public in late March or early April, and the Singapore text will be released in early March.

## 2. Pending FTAs

Zoellick outlined the prospective schedule for pending FTAs:

- **CAFTA:** End of 2003. Ranking Member Charles Rangel (D-New York) as well as Representative Xavier Becerra (D-California) urged the USTR to bring the Dominican Republic into the negotiations for the CAFTA. Becerra and Levin also urged the Administration to strive for stronger labor provisions in the CAFTA than it did in the Chile and Singapore FTAs.
- **Morocco:** End of 2003.
- **SACU:** End of 2004.
- **Australia:** End of 2004.

Crane encouraged Zoellick to pursue FTAs with Egypt and New Zealand, which the U.S. Chamber of Commerce named among their "top-ten most coveted FTAs," and asked if there were any current plans to launch other new FTAs. Zoellick responded that USTR lacks the resources to negotiate any other FTAs at the moment. He noted that the US is working with Egypt under the auspices of the U.S.-Egypt Trade and Investment Framework Agreement (TIFA) to overcome impediments to U.S. investment and to work on compliance with its WTO obligations. Zoellick called an FTA with New Zealand a possibility, but it is "not on the front burner."

### *E. China and Taiwan WTO Compliance*

Zoellick noted that there is still tremendous work to be done in ensuring China's and Taiwan's compliance with their WTO commitments, despite the significant progress already made. In particular, the United States remains concerned with agriculture, intellectual property rights protection, and certain services sectors where implementation is inadequate or has yet to occur.



### ***F. Russia PNTR and WTO Accession***

The Administration continues to urge Congress to grant permanent normal trade relations (PNTR) to Russia in advance of its accession to the WTO. Although the US will intensify efforts to negotiate Russia's WTO accession, Zoellick noted that Russia's recent blocking of certain U.S. agricultural products is problematic. Nonetheless, he believes that there is much to be gained from bringing Russia into the WTO.

### ***G. Trade with Cuba***

Rangel argued that the United States should open trade relations with Cuba in the same way that it has with China as well as former Communist countries like Russia and Vietnam. Rangel suggested that the Administration is unwilling to open trade relations with Cuba because it fears losing Florida's electoral votes in the 2004 Presidential election (the large and politically powerful Cuban-American community in Florida opposes lifting the trade embargo with Cuba and traditionally votes Republican).

Zoellick emphasized that he always must take into account both the economic and political aspects of trade issues and that Cuba is not a lone case in this regard. It is clear that the Administration is completely unwilling to change its current policy toward Cuba, and analysts do not envisage a shift in the foreseeable future.

### ***H. WTO Dispute Settlement***

The United States must comply with adverse WTO rulings, like the FSC/ETI ruling, so that U.S. trading partners will also live up to their commitments. Zoellick stated that the US will also work this year to address compliance with the Byrd Amendment ruling, the 1916 Act, the "Irish Music" copyright violation, and hot-rolled steel, among others.

In addition, the US hopes to resolve various pending trade disputes this year, including telecommunications and sweeteners with Mexico, softwood lumber with Canada, beef with the European Union, and apples with Japan. The Administration will also continue to work with Congress and the U.S. agriculture industry to determine the most expeditious way to deal with the EU's moratorium on GMOs.

### ***I. FSC/ETI***

In response to a question from Chairman Thomas regarding the ability of the US "to negotiate away the FSC problem," Zoellick stated that EU Trade Commissioner Pascal Lamy's interest is in compliance, not retaliation. Nonetheless, Zoellick believes the EU will not hold off on retaliation forever. In fact, the European Commission yesterday circulated a proposed retaliation list to its Member States. Zoellick commended Thomas for the leadership he has shown by introducing legislation to repeal the ETI and called his bill a good first start. Zoellick urged companies that benefit from the ETI to offer suggestions for compliance. He concluded, "My bottom line is we need to fix it and soon."

Rangel urged Zoellick to seek guidance from the Department of Treasury regarding the FSC/ETI issue and to work with the Committee to develop a bipartisan solution. Rangel suggested that "the EU will not see it as progress if the Chairman introduces a bill that will be caught in partisanship."

***J. Conflict Diamonds***

The Administration will work with Congress to implement the Kimberley Process (*Please see W&C February 6, 2003 Report*). Chairman Thomas, who has championed the issue, stated that the Committee would move legislation immediately upon receiving the WTO waiver.

***OUTLOOK***

The Administration has set forth an ambitious trade agenda for 2003, and Congress will likely focus on its oversight role of the variety of pending bilateral, regional, and multilateral negotiations. Although Congress will address some trade issues, analysts note that trade is not among Congress' current priorities, as the agenda is largely focused on national security and domestic economic and social issues.

Members of Congress and Zoellick alike seem most concerned with addressing compliance with the WTO ruling on the FSC/ETI, although neither the Administration nor Congress has devised a definitive solution. Without a solution, Zoellick told Members, "your industries will start feeling that four billion dollar retaliation." It remains unclear when the US will deal definitively with the issue, as an overhaul of the U.S. tax code could prove time-consuming and contentious.

Zoellick and the Administration will continue to face criticisms for non-transparency and secrecy with regard to negotiations and negotiating texts in particular. The Chile and Singapore FTAs will serve as tests of both the Administration's willingness to fulfill its TPA consultation and approval obligations and Congress' ability to develop implementing legislation for ambitious trade agreements.

## **USTR Zoellick Testimony at Senate Finance: Senators Question Zoellick on Agriculture and GMO Dispute, China Compliance and FTA Strategy**

### *SUMMARY*

USTR Robert Zoellick's testimony before the Senate Finance Committee on March 5, 2002 regarding the Administration's trade and WTO agenda closely resembled his testimony before the House Ways and Means Committee on February 26. Zoellick elaborated on the Administration's "competitive liberalization" strategy of pursuing liberalization at all levels including FTAs and the WTO. He also provided a brief update on China compliance efforts after a recent trip to China.

Finance Committee members pressed Zoellick on matters including WTO dispute settlement, China's compliance with the WTO, bilateral disputes with Mexico and the Administration's FTA strategy. Chairman Grassley (R-Iowa) and Sen. Baucus (D-Montana) both demanded that Zoellick indicate whether and when the US would bring a WTO dispute on the EU GMO moratorium. Zoellick refused to specify a date, which angered Baucus. Baucus also questioned the Administration's criteria for FTA partners and suggested more FTAs with Asia and the Middle East. Senators also expressed concerns on agricultural issues, including bilateral disputes with China and Mexico, and pessimism towards concluding negotiating modalities at the WTO.

### *ANALYSIS*

USTR Robert Zoellick on March 5, 2003 testified before the Senate Finance Committee on the Bush Administration's trade and WTO agenda. Zoellick's testimony closely resembled his testimony before the House Ways and Means Committee on February 26, which included a summary of the Administration's trade successes to date, the current status of ongoing WTO and FTA negotiations and discussion on the US "competitive liberalization" strategy. (*Please see February 27, 2003 Report*).

#### **I. Committee Urges Dispute on EU GMO Moratorium and Scrutiny of WTO Dispute Settlement and Compliance; Not Optimistic on WTO Agriculture Modalities**

##### **A. Grassley Not Optimistic on Agriculture Modalities**

Chairman Grassley (R-Iowa) commented that he is pessimistic about countries meeting the March 31 deadline for deciding on modalities for the WTO agriculture negotiations. He believes the impasse on the negotiations is due to the refusal of Japan, the EU and other countries to commit to reductions on agriculture support.

##### **B. Baucus Criticizes WTO Dispute Settlement; Suggests Domestic Review**

Zoellick emphasized that complying with adverse WTO rulings serves the national interest.

Baucus (D-Montana) noted that US wins at the WTO have been "minor" while the losses have been "major." Baucus questioned why the US does not challenge the EU FTAs in the WTO, noting that many of them exclude agriculture.

Baucus contends that WTO panels undermine US laws. He suggested that the US appoint judges to consider WTO decisions to determine whether they are correct. Baucus note that his suggestion (he is

considering legislation to establish a “Baucus Commission” to review WTO decisions) is not a “three strikes” proposal necessarily (in reference to the “Dole Commission” approach to possible US withdrawal from the WTO), but something to ensure that the US is being treated fairly.

C. Senators Pressure Zoellick to Initiate GMO Case Against the EU

Grassley and Baucus both criticized the Administration for not aggressively pursuing a WTO case against EU’s biotech policies in the WTO. Grassley urged the administration to “do something and do it soon”. Baucus criticized Zoellick for not responding to his question on when the Administration would bring a WTO GMO case or to his question on who in the administration is preventing a WTO dispute on the GMO issue.

Zoellick responded by saying that the EU should lift the moratorium. He believes the “bigger issue” is how to make the case for GMOs and their benefits, instead of framing the GMO issue strictly as a legal issue. Zoellick wants to build a coalition of countries on the GMO issue, and noted that USTR had gained some support from other WTO Members.

Baucus countered that the US does not need to build a coalition and asserted that other countries already side with the US. He pressed Zoellick to give a deadline of when the US would bring a WTO case, which led to a heated exchange. Zoellick refused to specify a deadline for a WTO case and the exchange ended with Baucus saying that he “hears a lot of words” from Zoellick but little action.

D. China and Taiwan WTO Compliance Efforts Mixed

Zoellick noted that China and Taiwan’s WTO compliance efforts have been mixed. He said that during his recent meetings with Chinese officials he emphasized the importance of solving the disputes on soybeans and tariff rate quotas (“TRQs”). Zoellick made it clear to his Chinese counterparts that the US will not hesitate to bring the issues to the WTO.

1. Concerns on Agriculture Compliance

Grassley expressed concerns about the way China allocates its agricultural tariff-rate quotas, China’s biotechnology regulations and its potential impact on US soybean exports, and other problems with implementation of its WTO commitments.

2. Discriminatory VAT on Semiconductors

Sen. Bingaman (D-New Mexico) expressed concerns about Chinese taxes applied to semiconductors, which is one of the products produced in his home state of New Mexico. The value added tax (“VAT”) on semiconductors produced in China differs from the amount of VAT paid on imported semiconductors.

Zoellick responded that this is a violation of National Treatment and said that he raised this issue with Chinese officials during his recent visit to China. He said the officials argued that U.S. investors producing semiconductors in China were being treated the same as Chinese companies producing semiconductors in China. Zoellick said that this initial response “was not good enough” and he will continue to press the issue with the Chinese.

## **II. Perspectives on US-Mexico Trade Relationship**

### **A. Maquilas and Textiles Industry Face Increased Competition from China**

Bingaman, who represents a state on the US-Mexico border, stated his concern about the seemingly dramatic shift of companies from the maquilas in Mexico to China, which adversely affects employment in the region. He asked Zoellick whether his understanding of his situation is correct and if so, how does the US plan to deal with the issue in both the maquilas and the Central America FTA negotiations.

Zoellick responded that when quotas on apparel are lifted in 2004 (as part of the Agreement on Textiles and Clothing), Mexico and the Central American countries will face competition from China as their preferences will be eroded. (Mexican maquilas currently are the major supplier of textiles and apparel to the US.) The US is trying to help countries in the Western Hemisphere compete, but competition is inevitable as the Western Hemisphere and China seek to attract companies to source material from their countries.

### **B. Dispute on High Fructose Corn Syrup (HFCS) “Out of Control”**

Grassley said that the dispute on high fructose corn syrup (“HFCS”) is “taking a toll on the US corn industry” and hurting the sweetener industry. Grassley noted that the issue hurts the credibility of NAFTA and, therefore, future trade initiatives by harming industries that supported NAFTA.

Zoellick responded that the HFCS problem has “gotten out of control.” The US and Mexico have not reached an agreement yet, but they have made some progress and Zoellick is committed to solving the problem.

### **C. Dispute on Pork Products Persists**

Grassley said he thinks the US-Mexico pork dispute is politically motivated and asserted that Mexican pork producers have benefited from NAFTA and therefore do not need protection from the Mexican government.

Zoellick acknowledged that there are a number of US-Mexico agriculture disputes including on pork products, which he believes is a result of the final implementation stages of NAFTA (and Mexico’s lingering protection of certain industries facing competition). Zoellick indicated that he is committed to resolving the pork dispute. He added that the US pork industry is very competitive and has supported the US trade agenda.

## **III. Skepticism on US FTA Criteria**

Baucus questioned the Administration’s criteria for choosing FTA partners, asking why the US is not negotiating FTAs with countries that present better commercial opportunities to US businesses, such as Asian countries. He said that the Administration should consider FTA partners that offer more economic opportunity for US businesses rather than choosing FTA partners for other reasons that “escape me”. Baucus also suggested the US should look at the Middle East.

#### **IV. Support for Normal Trade Relations with Laos and Russia**

##### **A. Zoellick Supports NTR for Laos**

In his testimony, Zoellick supported normal trade relations for Laos – among the last Asian countries not to enjoy this status.

##### **B. Zoellick Urges Repeal of Jackson-Vanik for Russia**

One Senator asked about legislation to repeal the Jackson-Vanik provision for Russia, noting that Sen. Lugar (R-Indiana) plans to reintroduce legislation soon.

Zoellick said Jackson-Vanik is seen in Russia as a relic of the Cold War. Zoellick dismissed criticism that passage of Jackson-Vanik would decrease U.S. negotiating leverage during WTO accession negotiations. He noted that there are 28 WTO accession negotiations in the WTO and none of them require a congressional vote except Russia. Zoellick urged Members to support Lugar's efforts.

Grassley supports graduating Russia from Jackson-Vanik, but noted that other concerns such as Russia's safeguard action on poultry products, tariff rate quotas on beef and pork imports, and energy issues create an "unfavorable political dynamic in the Congress for moving legislation forward."

#### **V. Criticism of Administration Efforts to Support the Steel Sector**

Sen. Rockefeller (D-West Virginia) harshly criticized the administration for not doing enough for the steel sector. He characterized the steel 201 decision as a "moderate technical move" taken reluctantly by the administration at the last moment. He alleged that the administration exempted many countries almost immediately and others followed, thereby undermining the effectiveness of the safeguard. He asserted that the administration brags that it has done all it can do on steel, but really it has done all that it *wants* to do.

#### **VI. Criticism of Cuba Embargo**

Baucus criticized the Cuba embargo, adding the lifting the embargo would result in significant opportunities for US agriculture and other businesses. He noted that he realizes there is political interest in maintaining the embargo, but said that it makes "no sense". Sen. Lincoln (D-Arkansas) agreed with Baucus' comments.

Zoellick has stated before that the administration must take into account both the economic and political aspects of trade issues and that Cuba is not a lone case in this regard. It is clear that the administration is completely unwilling to change its current policy toward Cuba (due to domestic politics in Florida, for example), and analysts do not envisage a shift in the foreseeable future.

#### **VII. Other Issues**

##### **A. Sensitivity of Sugar Negotiations**

Sen. Breaux (D-Louisiana) insisted that negotiations on sugar should be handled at the WTO instead of in bilateral negotiations, since it is a sensitive sector in the US. Zoellick responded that there is a major effort on agriculture in the WTO, and bilateral negotiations provide additional leverage for



progress in the WTO. Zoellick recognized that the sweetener industry would like the sector to be excluded from some negotiations, but warned that if the sector is excluded, other sectors also will ask to be excluded.

B. USTR Resources Sufficient?

Lincoln asked Zoellick whether USTR has sufficient resources to address Congressional trade concerns given the enormous amount of work at USTR and the limited resources. Zoellick responded that USTR is committed to addressing domestic issues and that negotiations at all levels will provide leverage to accomplish US goals at the WTO. He did not comment specifically on the lack of resources, and it is known that USTR is among the few agencies to receive a budget increase in the Administration's proposed budget.

C. US-Canada Lumber Dispute Outcome

Sen. Smith (R-Oregon) asked Zoellick about possible outcomes to the US-Canada lumber dispute. Zoellick said that the Commerce Department and USTR are working on the issue.

D. SPS Outstanding in Chile FTA

Grassley asked whether Chile and the US will finish an agreement on sanitary and phytosanitary ("SPS") issues before the administration sends implementing legislation to Congress on the FTA. Zoellick said that the US and Chile are making progress, but there is still work to be done.

E. IPR Protection Questions

Smith noted that he would submit questions to Zoellick on intellectual piracy problems abroad.

F. Legislation on Kimberly Process Concerning Conflict Diamonds

Grassley noted that he is working on legislation regarding the Kimberly Process on conflict diamonds. The Administration is supportive of implementing the process.

### ***OUTLOOK***

Senator's concerns raised during the hearing were predictable and reflect their constituents' interests, including on agriculture and steel. Senators commented less than House Members last week on the Administration's FTA strategy, and Baucus expressed some skepticism toward the criteria for FTA partners. Grassley and others on the Committee were not optimistic on progress in WTO agriculture negotiations, and pressed Zoellick to ensure China's WTO compliance in agriculture and other sectors. Rockefeller, not surprisingly criticized the Administration's weakening of the steel safeguard through exclusions, and will probably blast the WTO if the panel finds against the U.S. safeguard later this Spring.

Grassley and Baucus jointly criticized the Administration's reluctance to challenge the EU's moratorium on GMOs. It is somewhat surprising that Zoellick is being pressured so adamantly to initiate a case against the EU on GMOs, despite the negative implications for the overall US-EU relationship. Baucus lately has been very critical of EU disputes against the US, and appears intent on



raising a high-profile dispute against the EU. Zoellick reportedly favors initiating a WTO dispute, but has been rebuffed by the White House's efforts to enlist allies in Europe in its campaign against Iraq. Due to the Administration's foreign policy objectives, it is not anticipated that the US will initiate the case anytime soon.

## **Senate Finance Committee Approves Miscellaneous Trade Bill; Resolution Criticizes Harbinson Draft on Agriculture Modalities at the WTO**

### *SUMMARY*

On February 27, 2003, the Senate Finance Committee approved the Miscellaneous Trade and Technical Corrections Act of 2003, which would reduce or suspend duties on more than 300 different products. The bill also includes a sense of the Senate resolution, criticizing the agriculture modalities framework recently released by Stuart Harbinson, Chairman of the WTO Agriculture Negotiations Committee.

The full Senate must now consider the bill, but reportedly Senator Richard Shelby (R-Alabama) has placed a hold on it. Therefore, analysts remain uncertain about when consideration by the full Senate will occur.

### *ANALYSIS*

On February 27, 2003, the Senate Finance Committee approved the Miscellaneous Trade and Technical Corrections Act of 2003, which provides for:

- Temporary duty suspension for more than 300 products, mostly chemicals.
- Duty-free treatment for hand-made carpets from GSP- beneficiary countries. This primarily benefits Pakistan. Other beneficiaries include Nepal, Egypt, Turkey, and Morocco.
- Minor technical amendments to the Andean Trade Preference Act (ATPA), the African Growth and Opportunity Act (AGOA), and the Caribbean Basin Trade Partnership Act (CBTPA).
- A restoration of NTR (Normal Trade Relations) status to Serbia and Montenegro (formerly Yugoslavia).
- A sense of the Senate resolution that calls for increased access to world markets for U.S. farmers, ranchers, and agricultural producers within the context of the World Trade Organization (WTO) agricultural negotiations. The resolution also criticizes the agriculture modalities framework that Stuart Harbinson, Chairman of the WTO Agriculture Negotiations Committee, recently proposed, and urges the Administration not to agree to the proposal “until it is significantly improved.” Senate Finance Committee Chairman Charles Grassley (R-Iowa) and Senator Kent Conrad (D-North Dakota) sponsored the resolution.
- Provisions to enhance and strengthen the protection of U.S. intellectual property rights abroad. The provisions would harmonize the intellectual property rights criteria in the ATPA, GSP, and CBTPA with the criteria in other U.S. trade laws, specifically Special 301.

Unlike last year's version, the Miscellaneous Trade and Technical Corrections Act of 2003 does not create Qualified Industrial Zone (QIZ) for Turkey linked to the U.S.-Jordan Free Trade Agreement. The Administration included similar benefits in a separate aid package for Turkey.

During every Congress, the Senate Finance Committee and the House Ways and Means Committee prepare miscellaneous trade bills to provide for temporary suspensions of duties on certain products and to make minor technical amendments to trade laws. Because these bills must pass by unanimous consent, the Committees collect and review them in consultation with the public and with the Administration to ensure that they are not contentious. The Committees will not include measures that create significant revenue losses, operate retroactively, suspend the duty on a domestically-produced product, or are otherwise contentious.

During the 107<sup>th</sup> Congress, the House approved the Miscellaneous Trade and Technical Corrections Act of 2002 (HR5385) (*Please see W&C October 8, 2002 Trade Alert*), but the Senate blocked passage of the bill, due to opposition from Senators Jeff Sessions (R-Alabama) and Richard Shelby (R-Alabama), who demanded a provision on socks, Senator Jay Rockefeller (D-West Virginia), who demanded a provision on health care for steelworkers, and Senator Jesse Helms (R-North Carolina), who also expressed concerns regarding the textile provisions in the bill.

### ***OUTLOOK***

The full Senate must now consider the bill, but reportedly Senator Richard Shelby (R-Alabama) has placed a hold on it, demanding a provision clarifying the treatment of socks under the CBTPA. Therefore, analysts remain uncertain about when consideration by the full Senate will occur.

## Senator Baucus, Representative Thomas, and Panelists Discuss US-EU Trade Relationship; WTO Concerns

### SUMMARY

The American Enterprise Institute, a conservative think tank based in Washington, hosted on February 13, 2003, a conference on “Tax, Trade and Cowboy Capitalism in the United States and Europe” which discussed, among issues, the outlook for the US-EU trade relationship. Senate Finance Committee Ranking Member Max Baucus (D-Montana) and House Ways and Means Committee Chairman Bill Thomas (R-California) were featured speakers. Other panelists speaking on trade issues include the former head of the EC delegation in Washington Hugo Paemen, Patrick Messerlin of the Institut d’Etudes Politiques de Paris, and Ellen Frost of the Institute of International Economics.

Hugo Paemen and Patrick Messerlin suggested that a decentralization of negotiations at the WTO rather than a “single undertaking” would be a more effective approach to achieving results. Ellen Frost pointed out that trade has become more politicized in Congress and warned that increasing resort to litigation at the WTO could undermine the US-EU trade relationship. Senator Baucus stated that Congress is not pleased that the EU has raised damaging cases against the US at the WTO, and supported a less litigious approach to dispute settlement in the future. Baucus also suggested a new approach to resolving the FSC/ETI dispute, such as a manufacturing income exclusion. Representative Thomas, however, did not express much enthusiasm for the idea and prefers wider reform of the U.S. foreign tax code.

### ANALYSIS

#### I. Senator Baucus Criticizes EU Disputes with US; Representative Thomas Cool to Baucus Approach to FSC/ETI Compliance

Senate Finance Committee Ranking Member Max Baucus (D-Montana) and House Ways and Means Committee Chairman Bill Thomas (R-California) spoke at different sessions on the US-EU relationship including the status of compliance concerning the WTO FSC/ETI dispute and the possible dispute against the EU’s moratorium on genetically-modified organisms (“GMOs”).

##### A. Baucus Critical of EU Disputes; Suggest Less Litigious Approach in the WTO

Senator Baucus cited that US-EU trade relationship is the largest in the world at \$375 billion annually, and therefore cooperation is essential to facilitate the bilateral relationship as well as global trade matters. He warned, however, that the US-EU relationship is being undermined because the EU has “bombarded the US with WTO challenges” including contentious disputes on the FSC/ETI regime, Byrd Amendment, steel safeguards and others.

Baucus criticized the EU’s agriculture policies, including the Common Agriculture Policy (CAP) and the moratorium on approval of new GMOs. Concerning subsidies, he cited that the EU in the 1970s was a major importer of agriculture, but because of the CAP, it has become the world’s largest exporter – which has cost U.S. farmers billions in lost exports. He asserted that the EU has turned a “deaf ear” to complaints about the CAP. Concerning the moratorium on GMOs, he had “little doubt” that the US would challenge the moratorium at the WTO and remarked that EU standards should be based on “science, not science fiction.” He asserted that since EU rhetoric on GMOs is spreading to

other countries, it is “time to raise a dispute” as it would discourage such practices. He also criticized the Administration for deferring too much to foreign policy and not raising the dispute for legitimate trade reasons.

Regarding the FSC/ETI dispute, Baucus emphasized that the EU complaint opened a “Pandora’s box” and should not have been raised in the first place. He compared the EU bringing the dispute to a hypothetical situation where the US challenged the CAP regime, saying that these types of disputes would force fundamental changes to long-established policies. He argued that Congress should not have to “shoulder the burden” of re-writing U.S. tax policy. He added that tax breaks to U.S. and EU companies are becoming unbalanced since EU companies receive rebates on value-added taxes paid for products they export. (The US levies income taxes on worldwide income, and does not provide such rebates.)

Baucus indicated that he is considering a new approach to compliance and expressed less resistance towards a possible repeal of the regime. He suggested replacing the ETI with a new manufacturing income exclusion or an expansion of the research and development tax credit, or both. A manufacturing income exclusion presumably would allow businesses to avoid taxes on some portion of income derived from the sale of manufactured goods, but Baucus declined to elaborate. He commented that he might introduce a bill to repeal the ETI regime “if we needed it.” In the past, Baucus had urged a negotiated settlement and not repeal. Still, Baucus said he was “baffled by the Administration’s reluctance to defend the regime.”

Baucus concluded his remarks by saying that the US and EU too often resort to litigation at the WTO, rather than a negotiated settlement. He suggested that both sides place a new emphasis on consultations rather than litigation as an approach to resolving future disputes. He also mentioned that he is moving forward legislation to set up a “Baucus Commission” that would review WTO decisions, which he believes are often flawed, “not fair” and go beyond the mandate of WTO rules. He stated that an independent judicial review of WTO decisions would help build support for free trade in Congress and the American public, and improve transparency.

#### B. Thomas Pursues Wider Reform of FSC/ETI Regime

Representative Thomas, speaking earlier at the morning session, had dismissed Baucus’ idea of a manufacturing tax break. He seeks wider reform in the foreign tax code, and intends to repeal the ETI regime as part of the process. He mentioned that he plans to reintroduce his plan in March or April this year after he completes work on a tax cut package. He agreed that the tax system differences between the US and the EU are unfair (in reference to VAT rebates to EU companies), but remarked “that is a different battle for a different day.”

## II. **Panelists’ Perspectives on US-EU Trade Relationship**

The panel on the “US and EU: Laggards or Leaders?” featured speakers who commented on the trans-Atlantic trade relationship. Claude Barfield of AEI moderated the discussion and began by saying that agriculture will be the critical issue to the success of the current Round. He referred to a recent paper by (Negotiating Group on Agriculture) Chairman Stuart Harbinson on agriculture modalities, and said that the EU and Japan are still far from agreement with the paper. In addition, other issues should be considered including the “highly legal” atmosphere into which the WTO has evolved. He suggested that it is preferable to resolve certain disputes through diplomacy, rather than litigation.

*Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.*

A. Former EC Representative Hugo Paemen Suggests Decentralized Approach to WTO Negotiations

Hugo Paemen, formerly head of the EC delegation in Washington and now a senior advisor to the law firm Hogan and Hartson, provided a historical overview of the GATT/WTO rounds and commented on the need for US-EU leadership in trade. Paemen said that the seven GATT/WTO rounds occur in cycles, usually “seven rich years followed by seven lean years.” He remarked that “there is no substitute for negotiations” to expand market access and improve rules; and that dispute settlement is not “the only show in town.” A critical element to the success of a round is US-EU leadership; although the atmosphere has become more complex as developing countries are more active than in past rounds. Paemen remarked that this round, the Doha Development Agenda, has a much greater focus on integration of developing countries into the global trading system. Unfortunately, negotiations on issues of interest to developing countries has been slow – including delays on reaching agreements on special and differential treatment and public health/access to essential medicines (both originally scheduled for December 2002).

Paemen remarked that the traditional approach of a “single undertaking” in WTO negotiations is no longer as necessary or efficient. Instead, he suggested decentralization of negotiations as a more pragmatic approach to negotiating individual issues. He acknowledged that the EU is more fond of the “all or nothing approach” due to political reasons, but believes this approach often needlessly delays conclusion of certain issues, and the round as a whole.

Paemen lamented that WTO governance has diminished and commented that the institution is becoming more like a “UN-type organization.” He described examples of weak governance, including the fight over the leadership and splitting terms as “silly.”

B. Ellen Frost Warns of Decline in Political Support for Trade

Ellen Frost, a former staff member in Congress and in past administrations and now at the Institute of International Economics in Washington, praised the dramatic integration between the US and EU economies, but warned that the growing number of contentious disputes is harmful to the bilateral relationship. She stated that the US and EU are sometimes “leaders and laggards” and now often “litigators” due to the increase in WTO disputes on FSC/ETI, steel safeguards, Byrd Amendment and others. Disputes aside, the US and EU economies have become increasingly integrated over the past ten years. Bilateral investment is about \$1.6 trillion, with 53 percent of total U.S. investment in the EU, and 72 percent of total EU investment in the US. The trade relationship is equally important, and accounts for the largest volume in the world.

Frost remarked that agriculture is the *sin qua non* issue and “elephant in the room” that must be dealt with to conclude the WTO Round successfully. She believes both the EU and US have yet to convince other Members, including many developing countries that they are intent on liberalization in the sector. She added that it is more crucial than ever to demonstrate leadership and “shared responsibility” to move forward on agriculture and other issues.

Frost cited three observations on the US-EU trade relationship:

(1) *Trade is more political* – Believes that since the first Bush Administration, trade has become a more politically charged issue. Pointed out the decline in bipartisan support for trade in Congress and the growing trend by domestic interests to “bash foreigners” to seek protection.

(2) *Decision-making processes* – Cited asymmetries between U.S. and EU decision-making processes (e.g., U.S. Congress more active on trade policy; lobbyists more active in the US than EU; prominence of national security concerns over other issues in the US-EU relationship).

(3) *Litigious environment* – Pointed out the growing, but damaging trend by the US and EU to resort to WTO litigation rather than a negotiated settlement.

### C. Patrick Messerlin Critical of EU Approach to Agriculture

Patrick Messerlin of the Institut d’Etudes Politiques de Paris, described the US-EU relationship as a mix of “good and bad” and said that both parties are evolving in their approach to trade. He believes that the US will continue to pursue FTAs while the EU is less willing to negotiate new FTAs. He cited that the EU already has many “big FTAs” in place, and will have a more difficult time negotiating more FTAs like with Brazil due to sensitive agricultural issues.

Messerlin criticized the EU approach to agriculture negotiations, and believes that the EU is using the WTO to settle its domestic issues. He said the U.S. proposal on agriculture is far more liberal than the EU despite the U.S. increase of subsidies through the Farm Bill. For example, the U.S. approach to decoupling subsidies from production will be difficult for the EU, although the EU is trying to move forward on the issue.

Messerlin stated that because of over 40 years of protection of the agriculture sector in Europe, there now exists little or no support among the industry for export-oriented, free-trade policies. He pointed out that in the US, many sectors of the industry are supportive of free trade and act to counterbalance protectionist sentiments. The situation in the EU, however, is devoid of such counterbalancing forces. Even the NGOs, which should support more liberal market access policies (in support of developing country concerns), are more supportive of EU farmers for environmental reasons.

Messerlin also cited a lack of leadership among EU countries on reducing agriculture subsidies, for example, the UK has opposed increased subsidies, but has not acted strongly against the issue. Nevertheless, the addition of new Member States including six large countries should increase pressure on the EU to liberalize due to budgetary constraints. Overall, he was optimistic that the political pressure of enlargement, combined with WTO negotiations, would result in a more competitive market.

Messerlin discussed briefly other US-EU trade issues, including steel safeguards and services liberalization. On safeguards, he criticized the U.S. measures and said the EU “amplified the mess” by initiating its own safeguards, including against new Member States. On services, he believes that the EU could liberalize some sectors further and stated that technology, not policy – enabled the EU to resolve some of its regulatory matters. He also supported Paemen’s idea that a “single undertaking” approach is not as preferable as in the past and could delay conclusion of the Round, perhaps for ten years.



#### D. Questions to Participants

A participant asked the panelists about other contentious issues that could affect the Round, including the effects of textiles liberalization. Paemen responded that the EU textiles industry has “practically accepted” that barriers will be lifted (in 2005), but believes this is not the case in the US. He believes the US needs to make a greater effort on other barriers besides quotas, including on tariffs.

#### ***OUTLOOK***

Senator Baucus and other speakers warned that the US-EU trade relationship is not as cooperative as it should be, despite the growing trade and investment between the trans-Atlantic partners. The speakers also emphasized that strong US-EU leadership is essential not only for bilateral relations, but in order to conclude the current Round of WTO negotiations. The issue of agriculture subsidies in particular will be crucial to the success for the Round. The EU has been criticized for its lack of progress in this regard, but there are positive signs that the EU will be pressured to liberalize the sector, especially as a result of EU enlargement. The US also must demonstrate a commitment to liberalization after sending mixed signals with the Farm Bill and a forward-looking proposal at the WTO.

Speakers also warned that the increase in litigation between the US and EU at the WTO would undermine the bilateral relationship since these disputes often involve controversial matters. These matters have forced changes to long-standing policies such as the ETI/FSC regime, or politically sensitive issues like the Byrd Amendment and EU food/health safety policies. Senator Baucus warned that more findings against the US, such as on steel safeguards, would undermine support in Congress for the WTO. He and others encouraged the need to consider alternative approaches, especially negotiation and consultation. At the same time, Baucus urged more vigorous action against the EU moratorium on GMOs. Thus, WTO dispute settlement has proven to be a double-edged sword. The US and the EU as the most frequent users of dispute settlement can challenge discriminatory policies to their liking, but often their own sensitive policies come under attack.

## WTO WORKING BODIES

### WTO TRIPS Council Makes Progress on Implementation Issues; Delays Persist on Geographical Indications and Public Health Issues

#### *SUMMARY*

The WTO TRIPS Council at its first formal meeting this year, on February 18-21, made some progress on implementation-related issues; however, Members held limited discussions on geographical indications (*i.e.* establishment of a multilateral system of notification and registration for wines and spirits) and failed to break the impasse on the TRIPS and Public Health Declaration (*i.e.* more flexible rules on compulsory licensing by developing countries in the pharmaceutical sector).

Regarding implementation issues of concern to developing countries, Members agreed to a notification system on incentives they provide to promote technology transfer to least-developed countries and almost reached agreement to extend the moratorium on non-violation complaints involving TRIPS. The discussion on extending protection for geographical indications to products other than wines and spirits was excluded from the agenda, despite strong opposition from some countries.

More worrisome, the deadlock on TRIPS and Public Health persists despite efforts by about two dozen trade ministers meeting in Tokyo the week prior to move forward on the issue. An agreement has not been reached since the deadline passed in December 2002, and the issue is of particular concern to developing countries facing health crises. Further delays could threaten progress in other WTO negotiations and preparations for the Cancun Ministerial Conference in September 2003.

#### *ANALYSIS*

##### **I. TRIPS Council Struggles with Controversial Issues**

On February 18, 19, and 21 the WTO TRIPS Council struggled to deal with a number of controversial issues at its regular and special sessions in Geneva. Members made some progress on implementation-related issues, but little or no progress on controversial issues including geographical indications (“GIs”) and the TRIPS and Public Health Declaration (“Public Health”).

The Council encountered controversy from the start, including a delay over adoption of the agenda due to Bulgaria’s objection that the agenda excluded discussion of GIs for products other than wines and spirits. Bulgaria threatened to block work in the Council and negotiations in agriculture if the issue of extending GIs was withdrawn from the agenda. Bulgaria, along with the EU, are *demandeurs* of the extension of GIs to food products (Bulgaria wants international protection for “yogurt”). Members finally agreed to discuss the issue of extending GIs at an “informal” meeting and limited discussion of GIs in the formal meeting, as outlined by Article 23 of the TRIPS Agreement. Members also agreed that questions related to “other outstanding implementation issues” (paragraph 12 of the Doha Declaration) such as extension of GIs, should be referred to the Trade Negotiations Committee (TNC) for further guidance.<sup>2</sup>

<sup>2</sup> Paragraph 12 b) of the Doha Work Program provides that relevant WTO bodies will report to the TNC on these issues by the end of 2002 for appropriate action.

On other business, the Council elected Singapore's Ambassador Vanu Gopala Menon as the new Chairman for 2003. Menon replaces Mexican Ambassador Eduardo Perez Motta as Chairman.

## **II. Progress Made on Implementation-Related Issues**

The Council made some progress on implementation-related issues of concern to developing countries, including on technology transfer notification and on non-violation complaints.

### **A. Technology Transfer Notification Established**

Members agreed to a notification system under Article 66.2 of the TRIPS Agreement which requires developed countries to submit annual reports on the incentives they grant their domestic enterprises and institutions to promote and encourage technology transfer to least-developed countries ("LDCs").<sup>3</sup> The TRIPS Council thus complied with the Doha mandate (paragraph 11.2 of the Implementation Decision) to help enable LDCs create a sound and viable technological base. Several Members, including Australia, the EC, Japan, Norway, Switzerland, and the US, submitted information on their technology transfer programs to LDCs.

### **B. Moratorium on Non-violation Complaints Within Reach**

Members almost reached consensus on adopting a proposal from Argentina, Brazil, Egypt, India and Peru among others (15 countries total), to continue the moratorium on GATT Article XXIII (b) and (c) "non-violation complaints" in the context of the TRIPS Agreement.<sup>4</sup>

A non-violation complaint could arise when a Member nullifies or impairs the rights of another party through its an action which does not violate the WTO Agreements. (These types of cases have been rare in GATT/WTO jurisprudence as most disputes involve "violation complaints.") Article 64:4 of TRIPS established a five-year moratorium on non-violation complaints from the entry into force of the WTO Agreements, which expired in 2000. Members agreed at Doha to extend this moratorium and directed the TRIPS Council to review the issue before making recommendations to the Cancun Ministerial.

The EC said it supported the moratorium in principle, but needs to study it further. The US rejected the extension of the moratorium as its intellectual property industries are supportive of the right to raise non-violation complaints, but appears isolated in its position.

## **III. Delays Persist on Major Issues of Public Health and GIs**

Members failed to break the deadlock on the two major issues on the agenda: the implementation of Paragraph 6 of the Doha Declaration on TRIPS and Public Health (on compulsory licensing); and the establishment of a multilateral system of notification and registration for geographical indications for wines and spirits.

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<sup>3</sup> Document IP/C/28.

<sup>4</sup> Document IP/C/W/385, October 31, 2002. Two other documents with background information were circulated during the meeting: a Note by the Secretariat (IP/C/W/349, June 19, 2002) and a Note by the President (JOB (02)/66, June 21, 2002).

A. TRIPS and Public Health Deadlock Continues

WTO Members have yet to break the impasse over realizing compulsory licensing provisions for countries with insufficient or lack of manufacturing capacity in the pharmaceutical sector, as mandated by the Declaration on TRIPS and Public Health reached at Doha. According to the Declaration, Members shall find an “expeditious solution” to this problem and report to the General Council before the end of 2002.<sup>5</sup> Active negotiations took place in the TRIPS Council during 2002 and Members were close to reaching an agreement in December.

On December 16, 2002, Council Chair Eduardo Perez Motta put forward a compromise draft text<sup>6</sup> that most Members could support, except for the US. Motta's text states, *inter alia*, that the new rules on compulsory licensing should be used to address “public health problems as recognized in paragraph 1 of the [Doha] Declaration” without defining a list of eligible diseases or countries.<sup>7</sup> The US objects to an open-ended agreement that does not list diseases or the eligible importing countries. The US argues that the Motta text does not focus on the problems faced by African countries and the text could result in wealthier developing countries (*e.g.* generic drug manufacturers like Brazil, China and India) undermining patent rights for non-essential health concerns.

The Council had hoped to gain momentum on the Public Health issue after the Tokyo Mini-Ministerial held on February 14-16, but the two dozen trade ministers in Tokyo failed to break the impasse. The US, which is seen as the key to a deal, offered some flexibility in Tokyo by agreeing to an open-ended scope of diseases if only African countries are eligible to import generic medicines. The US strategy is to separate the position of African countries from that of developing countries with manufacturing capability. Brazil also presented a proposal on eligibility of importers, but both the US and Brazilian proposals failed to gain much support.

At the February 18 TRIPS Council meeting, Members acknowledged that there had been no progress since December 2002. Brazil did not insist on the informal proposal it had floated in Tokyo, which essentially attempted to shift the focus of discussion away from the range of diseases covered by asking the World Health Organization to help assess whether importing countries could manufacture the drugs themselves. The EC and Japan also submitted alternative proposals for breaking the deadlock<sup>8</sup>,

<sup>5</sup> Declaration on the TRIPS Agreement and Public Health, Paragraph 6, WT/MIN(01)/DEC/W/2, November 14, 2001. A major limitation in compulsory licensing under Article 31 (f) of the TRIPS Agreement is the requirement that a product made under a compulsory license *be supplied predominantly to the licensee's domestic market*, unless the license was issued to remedy anti-competitive practices (Article 31 (k) of the Agreement). This means in practice that a large number of developing and least developed country Members cannot effectively grant such licenses because they lack or have insufficient capacity to manufacture medicines. At the same time, they cannot import generic medicines manufactured under a compulsory license by another Member because Article 31(f) requires that production must be predominantly for the domestic market.

<sup>6</sup> JOB (02) 217, December 16, 2002.

<sup>7</sup> Paragraph 1 states: "We recognize the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics."

<sup>8</sup> JOB (03)/9 (EU proposal); JOB (03)/19 (Japan's proposal). The EU proposes a list of 22 diseases, mainly endemic to Africa, to which the new compulsory licensing rules would automatically apply. In addition, poor countries could ask for the rules to be applied to other public health problems that they face in consultation with the WHO advising whether a disease constitutes a public health problem warranting coverage. Japan proposes a list of diseases that would automatically be covered by the

but they were rejected by developing country Members because they endorsed the US approach to limit the scope of the solution to specific diseases.

Chairman Perez Motta told Members that he was not in a position to put forward a new solution to establishing the range of eligible diseases or countries. Members agreed to revert back to the December 16 text as the basis for further negotiations, although they did not show much enthusiasm for the original Motta text either. Kenya, on behalf of the African Group, said that if Members are unable to find an overall solution, they should at least try to find a regional solution for Africa.

Several countries including the US, the EU, Switzerland, Canada, and Turkey stated that they initiated unilaterally moratoriums on disputes against Members which export medicines to developing countries or LDCs that do not have pharmaceutical manufacturing capacity. The moratoriums are intended to minimize the effects of the impasse until a decision is reached. The US submitted its formal announcement although other Members have yet to do so. It is also not clear whether the various moratoriums refer to all Members or only developing country Members that export to other developing country or LDCs. The US moratorium does not seem to distinguish between potential exporting Members and essentially restricts the eligible diseases to recognized health crises like HIV/AIDS.<sup>9</sup>

B. Registration of GIs for Wines and Spirits: Negotiations at an Impasse, Draft Text Forthcoming

Negotiations on geographical indications took place at the special session of the TRIPS Council, and Members' positions remained unchanged for the most part. Members are considering the establishment of a multilateral system of notification and registration of GIs for wines and spirits, and are under pressure to extend the system to other products. The Secretariat submitted to the Council a compilation of various positions on GIs.<sup>10</sup>

The *demandeurs*, the EC, Bulgaria, Hungary, Switzerland, Czech Republic, Sri Lanka and others, advocate the establishment of a mandatory notification and registration system for GIs. The "new world wine producers" Argentina, Australia, Canada, Chile, the US, and others (not only wine producers), believe that a mandatory system would confer exclusive extraterritorial rights to registered GIs. Instead, these countries propose a voluntary notification and registration system which would improve transparency and would not create any extraterritorial rights. The EC, in particular, would benefit from a mandatory system that excluded products from other countries which have been marketed for many years, even centuries, under trademarks similar to GIs in the EU (*e.g.* champagne, scotch, etc.) Many countries apart from the wine producers oppose the EC's proposal for a mandatory system because they fear a potential extension of GI protection to other products (*e.g.* food products), which could affect them.

The Korean Ambassador Eui Yong Chung, Chairmain of the special session, said he would circulate a first draft agreement for GIs on his own responsibility "well before" the next special session

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agreement. It also allows additional diseases to be added to the list at the request of a Member, subject to approval by the WTO's TRIPS Council.

<sup>9</sup> IP/C/W/396/Corr.1, February 10, 2003.

<sup>10</sup> TN/IP/W/7, February 18, 2003.

on April 24-25. While the *demandeurs* welcomed the Chairman's initiative, their opponents urged caution, arguing that positions were still far apart and it is too early in the process to begin discussing a first draft. The opponents argued that the situation was not comparable to agriculture negotiations where there exists consensus for the Chairman (Harbinson) to circulate a negotiating draft text, and where the deadline for modalities is fast approaching.

As discussed earlier, the Council agreed to meet informally in order to placate Bulgaria's demand to discuss extension of GIs to products other than wines and spirits. These discussions are even more controversial than the current discussion on GIs since some countries feel that they would involve a wider range of products that could be subject to some level of registration.

#### IV. Other Agenda Items

The Council discussed other issues relating to the Doha agenda as well as review of Member's domestic intellectual property protection laws, as mentioned briefly below.

- **Other items mandated by Doha:** No progress made on other outstanding items mandated by the Doha agenda, including on (i) the relationship between the TRIPS Agreement and the Convention on Biological Diversity; and (ii) the protection of traditional knowledge and folklore.
- **Reviews of national IP laws:** Several Members, including China, Taiwan, Cuba, Guyana and Tunisia, responded to questions from other Members on their IP laws and their compliance with the TRIPS Agreement.
- **Notification of domestic laws:** 19 Members have not notified their domestic IP laws to the TRIPS Council. Moreover, notifications from several other Members were incomplete.

#### OUTLOOK

TRIPS negotiations, like other Doha agenda issues, are encountering delays as Members reach agreement on relatively non-controversial issues but are struggling with the most sensitive issues. The most high-profile issue is the Public Health debate, and it is becoming more damaging as delays at the WTO persist. The US is considered as isolated on the issue, but is trying to downplay its resistance to an agreement through a moratorium on WTO disputes related to compulsory licensing and a significant increase in funding to fight AIDS/HIV (the Bush Administration announced it would seek \$15 billion for the next five years, to fight the epidemic in African and Caribbean countries). The moratoriums by the US and other countries, however, do not specify eligible countries and appear limited to defined health crises – but are only meant as a temporary fix until an agreement is reached.


The US in particular is drawing a distinction between the position of African countries, who have the moral initiative on the matter and that of developing countries with generic manufacturing capability. The US strategy appears to gain some momentum, as evidenced by Kenya's plea that the WTO reach at least a regional agreement applicable to Africa if an overall solution is not within reach.

Continuing failure to reach agreement on the issues of Public Health and GIs would affect other negotiations in the Doha Round and could undermine preparations for the Cancun Ministerial. For example, developing countries who are keen to push the Public Health issue are threatening to block



progress in issues of interest to developed countries, *e.g.* market access on industrial products and services, and modalities for the Singapore issues of investment and competition, among others.

In another scenario, the linkage on progress between GIs and the agriculture negotiations is becoming more evident. With certain exceptions, the major blocs of countries are similar in both negotiations, although their roles vary from one to the other. On the one hand, the Cairns Group, the US (the “new world wine producers”) and many developing countries favor the *status quo* in the international regime for GIs, and seek major agriculture reform that targets EU farm subsidies in particular. On the other hand, the EC and its allies have suggested, including during the latest TRIPS Council meeting, that they might block agriculture negotiations if their concerns on GIs are not accommodated. In any event, the lack of progress in the agriculture negotiations (which face a March deadline on modalities) could threaten to delay negotiations in all other areas including TRIPS. Thus, the linkages among the Doha agenda issues are becoming more evident as the Cancun Ministerial approaches.



## WTO DISPUTE SETTLEMENT

### Panelists Present Conflicting Views on Next Steps After WTO Ruling Against U.S. “Byrd Amendment”

#### SUMMARY

The Global Business Dialogue on February 13, 2003, hosted a panel discussion on the “Byrd Amendment, What’s Next?” – after the recent WTO Appellate Body ruling against the Continued Dumping and Subsidy Offset Act of 2002 (“CDSOA” or “Byrd Amendment”).<sup>11</sup>

Panelists made the following points about the Byrd Amendment:

(i) *Lewis Liebowitz, Partner at Hogan & Hartson* – Supported WTO findings, and cited reasons why the law is flawed domestic policy.

(ii) *Terence Stewart, Partner at Stewart & Stewart* – Criticized WTO findings against the law as overstepping WTO authority, and dismissed some factual allegations.

(iii) *Paul Bailey, Canadian Embassy* – Hoped that the US would demonstrate leadership at the WTO by complying through repeal of the law.

(iv) *Petros Sourmelis, EC Delegation* – Urged the US to comply quickly since the law threatens to undermine the trading system, including WTO negotiations of the new Round.

(v) *Kathleen Hatfield, Office of Senator Byrd* – Asserted that the law will not be repealed and the WTO findings are a “symptom of a larger problem” at the WTO.

(vi) *Greg Mastel, Democratic Counsel, Senate Finance Committee* – Cited that there exists little support in Congress to repeal the law, or comply with other WTO rulings.

The Bush Administration announced its intent to repeal the Byrd Amendment in the next budget appropriations bill. Defenders of the law, however, insist that Congress is not keen to repeal the law and prefer a negotiated settlement. Thus, imminent compliance is far from certain.

#### ANALYSIS

### I. Lawyers to Industries Debate WTO Consistency and Next Steps

#### A. Liebowitz Criticizes Byrd Amendment Criteria

Lew Liebowitz, Partner at the Washington law firm of Hogan and Hartson, and a leading figure who rallied against the Byrd Amendment, defended the WTO findings and said that the Byrd

<sup>11</sup> United States – Continued Dumping and Subsidy Offset Act of 2000, WT/DS217,234/AB/R, dated 16 January 2003 (adopted 27 January 2003).

Amendment is bad public policy. He believes that the WTO correctly determined that the law provides a non-allowable remedy inconsistent with WTO rules, which is “common sense.”

Liebowitz pointed out that the domestic situation is different today than the time of the law’s unusual passage in 2000 (attached to an agriculture appropriations bill) since the federal surplus no longer exists. Thus, the government is more cautious over how to spend, or not to spend money. He emphasized that the Byrd Amendment is about money, and a lot more than anticipated by its drafters – about \$250 million annually thus far, and not the \$39 million estimated by the Congressional Budget Office. He supported the Administration’s proposal to repeal the law in the next appropriations bill. He cited the letter by 70 senators expressing concern over the Byrd Amendment (dated February 4, 2003) as an attempt to buy time through negotiations, and is not necessarily a defiant action.

Liebowitz suggested three approaches to move forward:

(1) **Repeal** – An outright repeal of the law would be the “cleanest” approach, and government revenue could be better spent elsewhere.

(2) **Retain** – The retention of the law would invite retaliation, and could threaten to stalemate WTO negotiations of the new Round.

(3) **Alternatives** – Concerned parties should seek other solutions to assist domestic interests that are hurt by competition.

Liebowitz criticized the Byrd Amendment as an example of bad public policy. He stated that the law subsidizes events that happened prior to its passage, and encourages more antidumping actions. Moreover, the criteria for receiving Byrd Amendment funds is flawed and not based on need. The money does not go to workers and does not effectively address injury to the domestic producers. For example, the Amendment was inserted at the last minute into an agriculture appropriations bill, and had mentioned the protection of tomato farmers. So far, tomato farmers have gained no money, and other industries in less need have reaped significant payments.

Liebowitz noted that Customs just released information on payouts, and cited some examples of the flawed criteria for receiving these funds. He said payouts are based on the “qualified factors of expenditures” companies incur. One company, Candlelight of Lancaster, PA, claimed \$1.2 billion in “qualified factors” but its annual revenue is only \$300 million. Nevertheless, Candlelight received \$15 million out of \$18 million available in funds collected from an antidumping case on candles from China. Another company, AK Steel claimed \$11 billion in “qualified factors” when it’s revenue is only \$300 million. These examples indicate that the law is “not asking for the right information.”

Liebowitz concluded by asserting that the Amendment has “perverse effects” on the trade remedy process. For instance, the Amendment discourages suspension agreements since petitioners would rather seek money collected from dumping actions than settle. He added that many petitions are now crafted so that some funds will come in so companies can later seek these funds. He also warned that payments will probably increase because of big money cases like the U.S.-Canada softwood lumber dispute, from which Customs has already collected \$570 million. The temptation is strong for domestic industries to seek these funds rather than compete fairly.

## B. Terence Stewart Blasts WTO Findings

*Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.*

Terrence Stewart, Partner at the Washington law firm of Stewart and Stewart and a frequent counsel to U.S. petitioners, including those seeking Byrd Amendment funds, blasted WTO findings against the law as flawed reasoning and overstepping WTO authority. He began by criticizing Liebowitz's paper and reasoning, and asserted that "virtually every point is factually incorrect."

Stewart disagreed with the WTO findings overall, but did note that the Appellate Body dismissed some of the allegations against the Byrd Amendment. For example, the Appellate Body dismissed the panel's findings that the Amendment encourages the filing of petitions. The panel also rejected the allegation that the law discourages suspension agreements; he also cited that tomato producers actually have agreed to another suspension agreement.

Stewart's most serious concern is that the findings go beyond the competence of the WTO bodies. He stated that WTO rules clearly allow Members to provide subsidies so long as they are consistent with GATT Article XVI and the SCM Agreement. The Byrd Amendment provides a non-specific subsidy that is not actionable, and therefore consistent with WTO rules. He noted there is no disagreement in regards to the consistency of the financial contribution, but the finding that the U.S. funding mechanism for collected duties is an action not allowed by the Antidumping Agreement is "breathhtaking." Moreover, the duties are not paid by foreigners but by the U.S. import community. He does not believe that foreign producers refund the importers for the dumping duties paid, and thus have little basis to complain that they are paying for the Byrd Amendment. He argued that the Appellate Body is "out of control" and created new obligations that do not exist.

## II. Embassy Representatives Urge Quick Compliance

### A. Canada's Paul Bailey Expects Repeal

Paul Bailey of the Canadian Embassy supported the WTO findings and expects that the US will continue to provide a leadership role in the WTO by repealing the Byrd Amendment. He agreed with the WTO findings that the law provides a remedy other than envisioned by the WTO Agreements. Bailey commented that the recent letter by 70 Senators in support of the law is an indicator of the strong interest of the U.S. Congress in trade remedy laws. He also cited TPA renewal as another example of this interest, and how the Dayton-Craig amendment gained prominence. Thus, he believes repeal of the Byrd Amendment will not be an easy task.

Bailey remarked that the US has a "good track record" on compliance, and must continue to lead by example; otherwise, the integrity of the WTO and global trading system is at risk. He urged the US to comply because the law is bad policy, and the situation will get worse if the law is copied by other countries and proliferates globally. He asserted that the law encourages rent-seeking activity among domestic industries and creates an "unhealthy trap."

Bailey emphasized that although Canada is not a major target of the law currently, this situation could change significantly due to the softwood lumber dispute. Last year, Canada's export products represented only one percent of Byrd funds, or about \$5 million. This figure could rise dramatically because of the 27 percent duties assessed on about \$6 billion in annual lumber exports. He believes this huge pool of money will tempt the U.S. lumber industry to seek Byrd funds rather than compete on a "level playing field."

### B. EC's Petros Sourmelis Cites Systemic Reasons for Compliance

*Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.*

Petros Sourmelis, EC Delegation representative in Washington, supported the WTO findings and emphasized the importance of U.S. compliance for systemic and other reasons:

- ***Systemic concerns*** – Provoked the largest dispute at the WTO, involving 11 co-complainants. Members clearly have systemic concerns about the law, and its potential to undermine the trading system.
- ***Credibility of DSU/WTO*** – The US had pushed for binding dispute settlement, and should help reverse the growing pattern of non-compliance by Members.
- ***Clarification of AD/SCM actions*** – WTO findings clarified permissible responses to dumping and countervailing actions, and the Byrd Amendment approach is not a remedy envisioned by the WTO Agreements. He also believes that the WTO findings do not create new rules.
- ***Unfair double penalty*** – The law imposes an unfair double penalty on exporters who face both duties and subsidization provided to their competitors. The subsidy amount is significant at about half a billion in payments thus far.
- ***Doha negotiations*** – Believes that compliance in dispute findings is important to move forward US-EU cooperation in Doha negotiations.

Sourmelis cited the Administration's proposal to repeal the law in the next budget appropriations legislation, and hoped that the US will continue to demonstrate leadership in the compliance process. He was skeptical of the prospects for a negotiated settlement, as suggested by the letter from 70 Senators. He emphasized that repeal of the law is the "only viable option."

### **III. Senate and Finance Counsel Warn Repeal of Byrd Not Imminent**

#### **A. Kathy Hatfield Asserts Law Will Not Be Repealed**

Kathy Hatfield, of the Office of Senator Robert Byrd (D-West Virginia) criticized the WTO findings as overstepping WTO authority and asserted that the Byrd Amendment will not be repealed. She stated that the law is "here to stay" and believes that the US is not in violation of "invalid WTO obligations" which it never accepted. She argued that no WTO Member should be told how AD or CVD duties are spent. She emphasized that WTO rules permit subsidies to producers, so long as these payments are not specific or actionable, as in the case with this law. The WTO decision disregards the AD and SCM Agreements and is "alarming."

Hatfield said the findings against the Byrd Amendment are a clear indication that the WTO has overstepped its bounds. She said the US and WTO Members did not create an "international micro manager accountable to none" which would question the regulatory discretion of Members' administrative authorities such as the DOC or ITC. She cited an article in *Foreign Affairs* by former Deputy USTR Sue Esserman, who believes that WTO intervention has "gotten out of hand" and that Members must reassert their control over the system. Hatfield claimed that the recent findings against the Byrd Amendment and other US practices as "rouge decisions that must be corrected." Thus, the US must "stop the madness" by WTO dispute bodies.

Hatfield claimed that the WTO is inconsiderate and does not realize its decisions have a “devastating impact on real people.” She said that Congress has no higher priority than to keep American companies alive, and that the Byrd Amendment is crucial for some companies, especially in a weak economy. She cited as an example a raspberry farm in Washington state that is being undermined by dumped Chilean raspberries, and needs Byrd funds to survive. The money is well spent by investment in additional training and resources.

**B. Greg Mastel Cites Lack of Support in Congress for WTO Compliance**

Greg Mastel, recently counsel to Senator Max Baucus (D-MO) and now Democratic staff member in the Senate Finance Committee, criticized the WTO findings against the Byrd Amendment and warned that there is little support in Congress to comply with this decision and other recent WTO rulings. He said the Byrd Amendment is a “symptom of a larger problem” at the WTO, which has overstepped its authority on “dozens” of decisions involving trade remedy actions. He claimed the Byrd Amendment is the most apparent abuse, but other wrong decisions include Section 201 decisions, FSC/ETI, and hot-rolled steel case, among others.

Mastel stated that although Congress supported a binding dispute settlement system during the Uruguay Round, the current sentiment is far more hostile. He cited a “widely shared view” in Congress that the US is under attack at the WTO, and thus an anti-WTO sentiment is growing. Nevertheless, he acknowledged that there is not much understanding in Congress of what the WTO does either. He described the mood in Congress as a “low boil” that is in danger of becoming “high boil” – especially if the WTO rules against the US on steel safeguards and Canadian lumber, anticipated later in the Spring.

Mastel described upcoming legislation by Senator Max Baucus as a means to reassert authority over the WTO, known as the “Baucus Commission.” The Baucus Commission is loosely based on the Dole Commission and its “three strikes approach.” The Baucus Commission would mandate that U.S. judges review WTO decisions to ensure the appropriate interpretation of WTO rules.

Mastel concluded by saying that there is “no chance of repeal” of the Byrd Amendment. He explained that the letter by 70 Senators is a strong indication of the lack of support for repeal. He described the mood in Congress as “almost no interest” in moving forward legislation to comply with the Byrd Amendment, or many other WTO findings for that matter.

**IV. Questions from Audience**

- Regarding a question about the time-frame for compliance, Bailey responded that typical WTO disputes usually take up to 15 months (“reasonable period of compliance” in DSU Article 21.3(c)), but hoped the US would comply as soon as possible.
- Regarding a question about the possibility of retaliation, Mastel responded that he would “bet his house there is no chance of repeal [of the law].” He believes the chance of retaliation is low, but is not sure how trading partners will react.
- In a follow-up question on the possible form of retaliation (qualitative vs. quantitative), Bailey and Sourmelis hoped that the US would comply through repeal of the law, and were not considering retaliation at this stage. Bailey stated that other



countries “look to the US for leadership” and thus the US would set a bad example if it did not comply when it loses.

- Regarding a question on other forms of assistance to the domestic industry, Mastel replied that trade adjustment assistance (TAA) has been increased with passage of TPA and is not “paltry.”
- Regarding a question on next steps, Field remarked that Congress is waiting for the Administration to respond to the letter from 70 Senators – which it should do prior to the next DSB meeting (the US must provide a compliance report within 30 days after the adoption of a report, or by February 27, 2003).
- Mastel and Sourmelis exchanged views on US and EU compliance, and lack of compliance on prominent dispute cases like the EU’s hormone-treated beef ban. Mastel remarked that the EU did not have a flawless record of compliance. Sourmelis pointed out that the EU faced retaliation for its lack of compliance, and had taken steps to introduce legislation to comply.

### **OUTLOOK**

The US will no doubt have a difficult time complying with the Byrd Amendment ruling, even though the Administration and complainants agree that repeal is the preferred course of action. Supporters of the law insist that the sentiment in Congress has turned hostile to the WTO as a result of the rash of findings against U.S. laws and practices. Supporters cite the letter from 70 Senators as a strong indication of the political hurdles the Administration will face in seeking repeal of the law, despite the pressure to cut spending in a weak economy.

The longer the US delays compliance, the chances of retaliation grow – both quantitative as well as qualitative. Complainants cite significant revenue disbursed (and growing), but trading partners face technical difficulties in determining actual amount of retaliation. A greater danger is that WTO Members will retaliate by replicating the Byrd amendment provisions and reimburse domestic industries from money collected from antidumping and countervailing duties. The proliferation of Byrd Amendment type provisions is regrettable, as it would probably encourage rent-seeking behavior over fair competition. This situation would severely undermine the global trading system.

## **US Proposes Repeal of 1916 Antidumping Act to Comply with WTO; EC Considers Alternatives to WTO Retaliation**

### ***SUMMARY***

During the visit of EC Commissioner Pascal Lamy to Washington on March 3-4, USTR and several Members of Congress pledged to comply with WTO findings against the 1916 Antidumping Act and other disputes, including a renewed effort to repeal the 1916 Act. The US has struggled with compliance on the 1916 Act since losing the dispute in 2000, and Congress has introduced legislation seeking repeal before without much success. Reportedly, the EC is considering alternatives to WTO retaliation including a controversial proposal to allow EU parties to recover damages in EU courts arising from the 1916 Act.

### ***ANALYSIS***

#### **I. EU Criticizes US Over Persistent Delays on 1916 Act Compliance**

EC Commissioner Pascal Lamy during his visit to Washington on March 3-4 criticized the US for its persistent delays over compliance with outstanding WTO disputes, including the long-standing complaint on the 1916 Antidumping Act (“1916 Act”). USTR and some Members of Congress pledged to comply with WTO findings against the 1916 Act, including through introduction of new legislation to repeal of the Act. Although the 1916 Act is obscure and rarely used, some U.S. industries have invoked the law recently to the dismay of WTO Members.

The US has struggled for the past three years to implement WTO findings against the 1916 Act – a dispute the EC and Japan raised against the US in 1999 and 2000, respectively.<sup>12</sup> WTO arbitration of “reasonable period of time” for compliance required that the US comply by July 26, 2001 – which was extended to December 31, 2001. The US notified the WTO on December 18, 2001 that it had submitted legislation to repeal the Act and terminate all pending actions under the Act. The US, however, failed to comply due to the lack of movement in Congress. As a result, the EC and Japan proposed retaliation through the form of equivalent legislation to the 1916 Act against imports from the US. The US objected to this form of retaliation, and the DSB referred the matter to arbitration in accordance with Article 22.6 of the DSU. The parties suspended arbitration on February 27, 2002, based on renewed U.S. efforts to repeal the 1916 Act and to terminate cases pending under the Act.

In the past year, the US has again stepped up efforts to comply and on April 23, 2002 reported to the WTO that a bill had been introduced in the US Senate which would repeal the 1916 Act and apply to all pending court cases. The EC and Japan have emphasized that proceedings against some of their companies have resumed and urged the US to comply in order to prevent their companies from incurring significant expenses to defend themselves under the 1916 Act. The EC cited that legislation introduced by Representative Henry Hyde (R-IL) in June 2002 would repeal the 1916 Act, but would not affect pending cases. The EC and Japan argued that compliance must include repeal and termination of pending cases. At the Dispute Settlement Body meeting on January 28, 2003, the US reiterated that it

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<sup>12</sup> See WT/DS136,162/AB/R, adopted 26 September 2000.

would move forward legislation repealing the 1916 Act and terminate all pending court cases. The EC and Japan again expressed their frustration at the persistent delays over U.S. compliance.

## II. Representative Sensenbrenner Proposes Repeal of 1916 Act

Upon the urging of Representative Bill Thomas (R-CA), Chairman of the House Ways and Means Committee, James Sensenbrenner (R-WI), Chair of the Judiciary Committee made a renewed effort to repeal the 1916 Act by introducing legislation to this effect on March 4, 2003 (H.R. 1073).

The legislation is brief and only addresses repeal of the law:<sup>13</sup>

“SECTION 1. REPEAL OF ANTIDUMPING PROVISION OF REVENUE ACT OF 1916.

(a) REPEAL- Section 801 of the Act entitled 'An Act to increase the revenue, and for other purposes', approved September 8, 1916 (15 U.S.C. 72), is repealed.

(b) EFFECT OF REPEAL- The repeal made by subsection (a) shall not affect any action under section 801 of the Act referred to in subsection (a) that was commenced before the date of the enactment of this Act and is pending on such date.”

The legislation, however, does not clarify whether the US will terminate pending cases before U.S. courts involving the 1916 Act. The EU and Japan are demanding that U.S. compliance include repeal and termination of pending cases. Sensenbrenner’s legislation, similar to legislation introduced by Representative Hyde last June, is expected to encounter opposition from Members of Congress that are not keen to comply with a series of WTO findings against the US.

## III. EC Considers Alternatives to WTO Retaliation on 1916 Act

The EC, reportedly, has pressured the US to comply with the 1916 Act by threatening to proceed with a controversial regulation that would allow EU parties to recover any damages caused by application of the 1916 Act through EU courts.

The EC proposes that recovery of damages could include seizure and sale of assets of U.S. companies who have holdings in the EU. The EC proposal, if formalized, is certain to provoke a bitter reaction by the US as undermining remedies provided by the WTO's dispute settlement system, *i.e.* compensation and retaliation.

## OUTLOOK

Recent U.S. efforts to expedite compliance on the 1916 Act and other disputes indicate that the US is taking EC complaints seriously as possible EC retaliation looms on several disputes. For instance, the EC on February 26, 2003, issued a revised retaliation list affecting \$4 billion in U.S. exports arising from lack of U.S. compliance on the FSC/ETI dispute. The 1916 Act in contrast, is rather arcane and not a practical remedy for most U.S. industries. Nevertheless, some U.S. companies have initiated cases recently to the dismay of the EC, Japan and other WTO Members. Moreover, repeal of the 1916 Act

<sup>13</sup> H.R. 1073, introduced and referred to the Judiciary Committee on March 4, 2003. Representative Sensenbrenner (for himself and Mr. Thomas).

despite its limited use remains politically sensitive. Many Members of Congress will probably resist repeal as they did with previous legislation to this effect.

Meanwhile, the EC and its Member States have not made public their proposal to use EU courts to recover damages arising from the 1916 Act. For the moment, it seems like the EC threat is another bargaining chip to expedite US compliance. The danger is that the EC's controversial approach to retaliation essentially undermines the WTO system and could backfire – thus dampening efforts to repeal the 1916 Act and terminate pending cases. On the other hand, this new threat combined with possible EC retaliation in the FSC/ETI dispute could provoke Congress to take compliance seriously. In any event, the mood in Congress towards compliance with WTO findings is not encouraging due to the rash of dispute findings against the US.

## REGIONAL TRADE AGREEMENTS

### Special Report: Bush Administration Pushes Forward on FTAs

#### *SUMMARY*

On August 6, 2002, President Bush signed the Trade Act of 2002, which renewed Trade Promotion Authority (TPA) or “fast track” for the first time since 1994. Since then, the Bush Administration has concluded free trade negotiations with Chile and Singapore and initiated negotiations with Morocco, Central America, the Southern African Customs Union (SACU), and Australia.

In this report, we provide an overview of the free trade agreements (FTAs), which the United States has negotiated or is currently negotiating. In addition, we highlight the 2003 Trade Policy Agenda and the 2002 Annual Report of the President of the United States on the Trade Agreements Program, which the Administration recently submitted to Congress.

#### *ANALYSIS*

##### **I. U.S. Congress Renews TPA; US Concludes Pending FTAs and Launches New FTAs**

Before President Bush signed the Trade Act of 2002 on August 6, 2002, the United States had concluded Free Trade Agreements (FTAs) with Israel (April 22, 1985), Canada and Mexico (NAFTA) (December 17, 1992), and Jordan (October 24, 2000). The US had also agreed to negotiate FTAs with Chile (November 29, 2000) and Singapore (November 16, 2000), and launched negotiations for these FTAs in December 2000.

According to TPA, the United States Trade Representative (USTR) must:

- Notify Congress of its intention to negotiate at least 90 days before initiating FTA negotiations. In the case of Chile and Singapore, USTR was required to notify Congress of the ongoing negotiations as soon as possible after the enactment of the Trade Act.
- Conduct environmental reviews of future FTAs.
- Conduct reviews of the impact of future FTAs on U.S. employment.
- Submit a report regarding labor rights of the countries with which the US is negotiating FTAs and describe the extent to which these countries have in effect laws governing exploitative child labor.
- Request at least 90 days before entering into an FTA that the International Trade Commission (ITC) prepare a report assessing the likely impact of the FTA on the U.S. economy as a whole and on specific industry sectors. The ITC must submit this report to the USTR and to Congress by a maximum of 90 days after entering into the FTA.

- Notify Congress at least 90 days before entering into an FTA of its intention to enter into the FTA.
- Submit to Congress, within 60 days after entering into the agreement, a description of the changes to existing laws that would be required in order for the US to be in compliance with the agreement.
- Submit to Congress, after entering into an agreement, (i) a copy of the final text, (ii) a draft of an implementing bill, (iii) a statement of any administrative action proposed to implement the agreement and (iv) the supporting information. Then Congress votes up-or-down on the implementing bill. If Congress approves the implementing bill, it is enacted into law.

Furthermore, USTR must consult regularly and upon their request with the Congressional Oversight Group (COG), formed in September 2002, as well as with the Senate Finance Committee, the House Ways and Means Committee, and other Committees that the President deems appropriate.

Since the passage of the Trade Act of 2002, the Administration has:

- Concluded negotiations with Chile (December 11, 2002) and Singapore (January 17, 2003),
- Launched negotiations with Morocco (January 21, 2003) and Central America (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua: January 27, 2003), and
- Announced its intention to initiate negotiations with the Southern African Customs Union (SACU: Botswana, Lesotho, Namibia, South Africa, Swaziland: November 4, 2002) and Australia (November 15, 2002).

We highlight below the status of these negotiations.



TPA Provision	<u>90-Day Notification period of intention to initiate negotiations on an FTA</u>	<u>Environmental review</u>	<u>Employment Impact Review</u>	<u>Labor Rights Reports</u>	<u>ITC Report on Economic Effects</u>	<u>90-Day Notification period of intention to enter into an FTA</u>
FTA Partner(s)						
<u>Chile</u>	USTR notified Congress on October 1, 2002 <sup>14</sup>	-Initiated December 14, 2000 (65 FR 78253)  -USTR requested comments on the draft environmental review by November 21, 2001 (66 FR 56366)	Initiated on October 21, 2002 (67FR 64692)	-Initiated on February 26, 2003  -Comments due by March 28, 2003 (68 FR 8928)	-Initiated on April 23, 2001 (66 FR 21180) <sup>15</sup>	President notified Congress on January 30, 2003
<u>Singapore</u>	USTR notified Congress on October 1, 2002 <sup>16</sup>	-Initiated November 29, 2000 (65 FR 71197)  -USTR requested comments on the draft environmental review by September 20, 2002 (67 FR 53035)	-Initiated on October 21, 2002 (67 FR 64693)	-Initiated on January 28, 2003  -Comments due by February 27, 2003 (68 FR 4239)	-Initiated on February 19, 2002 (67 FR 8821) <sup>17</sup>	President notified Congress on January 30, 2003
<u>Morocco</u>	-USTR notified Congress on October 1, 2002	Initiated on November 22, 2002	-Initiated on February 7, 2003	--	-Initiated on September 13, 2002	

<sup>14</sup> The USTR announced its intention to initiate negotiations with Chile in the Federal Register on December 14, 2000 (65 FR 78253).

<sup>15</sup> The ITC initiated an economic review of the elimination of tariffs on agricultural products in the U.S.-Chile FTA on July 9, 2002 (67 FR 45542)

<sup>16</sup> The USTR announced its intention to initiate negotiations with Singapore in the Federal Register on November 29, 2000 (65 FR 71197).

<sup>17</sup> ITC initiated an economic review of the elimination of tariffs on agricultural products in the U.S.-Singapore FTA on July 2, 2002 (67 FR 45543).

	<p>1, 2002</p> <p>-TPSC hearing held on November 21, 2002</p> <p>(67 FR 63187)</p>	<p>(67 FR 70476)</p>	<p>-Comments due by March 28, 2003</p> <p>(68 FR 6529)</p>		<p>-Hearing held on October 10, 2002</p> <p>(67 FR 59312)</p>	
<u>Central America</u>	<p>-USTR notified Congress on October 1, 2002</p> <p>-TPSC hearing held on November 19, 2002</p> <p>(67 FR 63954)</p>	<p>Initiated on November 22, 2002</p> <p>(67 FR 70475)</p>	--	--	<p>-Initiated on September 16, 2002</p> <p>-Hearing held on October 18, 2002</p> <p>(67 FR 59312)</p>	
<u>SACU</u>	<p>-USTR notified Congress on November 4, 2002</p> <p>-TPSC hearing held on December 16, 2002</p> <p>(67 FR 69295)</p>	--	--	--	<p>-Initiated on November 20, 2002</p> <p>-Hearing held on January 28, 2003</p> <p>(67 FR 70757)</p>	
<u>Australia</u>	<p>-USTR notified Congress on November 13, 2002</p> <p>-TPSC hearing held on January 15, 2003</p> <p>(67 FR 76431)</p>	--	--	--	<p>-Initiated on December 20, 2002</p> <p>-Hearing held on January 15, 2003</p> <p>(67 FR 79149)</p>	

	<u>Next Steps</u>	<u>Negotiating Structure</u>	<u>Expected Challenges</u>
COUNTRY			
<u>Chile</u>	<ul style="list-style-type: none"> <li>-USTR expects to release the text of the FTA by the beginning of April 2003. USTR will release a detailed summary on March 7, 2003.</li> <li>-President Bush will probably sign the FTA in early May 2003.</li> <li>-Congress could delay vote on implementing legislation until fall 2003.</li> <li>-Goal is to pass FTA by the end of 2003 with the FTA entering into force on January 1, 2004.</li> </ul>		
<u>Singapore</u>	<ul style="list-style-type: none"> <li>-USTR expects to release the text of the FTA March 2003.</li> <li>-President Bush will probably sign the FTA in late April or early May 2003.</li> <li>-Congress could delay vote on implementing legislation until fall 2003.</li> <li>-Goal is to pass FTA by the end of 2003 with the FTA entering into force on January 1, 2004.</li> </ul>		
<u>Morocco</u>	<ul style="list-style-type: none"> <li>-A second round will take place during the week of March 24, 2003, in Morocco</li> <li>-Goal is to reach agreement by the end of 2003.</li> </ul>	<p>USTR scheduled 10 negotiating rounds for 2003, involving 11 negotiating groups: (i) textiles, (ii) market access, (iii) labor, (iv) environment, (v) IPP, (vi) government procurement, (vii) services, (viii) investment, (ix) legal issues, (x) customs, and (xi) agriculture</p> <p>-Negotiators will progress on all fronts simultaneously.</p>	<p>Agriculture; IPR; financial services; labor and environment; government procurement at the local level; customs; technical assistance.</p>
<u>Central America</u>	<ul style="list-style-type: none"> <li>-A second negotiating round took place on February 24-28, 2002, in Cincinnati, Ohio, where USTR made initial proposals on investment, e-commerce, IPR, services, dispute settlement, rules of origin for textiles.</li> <li>-Initial offers on market access will be made in the fourth round, scheduled for Miami in April</li> </ul>	<ul style="list-style-type: none"> <li>-Nine negotiating rounds in 2003, involving five negotiating groups: (i) market access, (ii) investment and services, (iii) government procurement and intellectual property, (iv) labor and environment, (v) institutional issues such as dispute settlement</li> </ul>	<ul style="list-style-type: none"> <li>-Market access for industrial, consumer, and agricultural goods; labor rights; temporary entry for workers; dispute settlement.</li> <li>-Labor likely will be one of the last issues to be resolved.</li> </ul>

	<p>the fourth round, scheduled for Miami in April 2003. A third round is scheduled for San Salvador on March 31, 2003.</p> <p>-Goal is to reach agreement by the end of 2003.</p>	<p>-Central America is negotiating as a bloc.</p>	
<u>SACU</u>	<p>-A first round of negotiations will take place in April 2003, in South Africa</p> <p>-Goal is to reach agreement by the end of 2004.</p>	<p>-Negotiating chapters will likely be similar to other FTAs</p> <p>-SACU will negotiate as a bloc.</p>	<p>Agriculture; IPR, e-commerce, government procurement.</p>
<u>Australia</u>	<p>-First round of negotiations will take place during the week of March 17, 2003, in Canberra, Australia</p> <p>-Expectation is that it will take until the end of 2004 to reach an agreement.</p>	<p>-The negotiating structure has not yet been determined.</p>	<p>Agriculture, audio-visual rules (IPR), investment, public health programs and quarantine rules.</p>

## **II. Trade Advisory Committees Save Labor Committee Support Singapore and Chile FTAs**

On February 28, 2003, the United States Trade Representative (USTR) received reports from the 31 trade policy advisory committees, regarding the recently completed free trade agreements (FTAs) with Chile and Singapore. In their reports, the majority of these committees support the agreements, finding that they promote the economic interests of the US and achieve the negotiating objectives set out in the Trade Act of 2002. The Labor advisory committee's report was, however, critical of the agreements. On the same day, the USTR transmitted the reports to the President and Congress.

Congress established the trade policy advisory committee system in the Trade Act of 1974, as a way to give interested parties from outside the government input in U.S. trade negotiations and to provide the government with a body of private sector experts with whom they could develop an ongoing dialogue (*Please see W&C report November 7, 2002*). Following the Trade Act of 2002 and subject to Trade Promotion Authority (TPA), the advisory committees have to prepare reports on proposed trade agreements.

The reports are available at [www.ustr.gov](http://www.ustr.gov).

## **III. US Considers Other FTAs**

Many other countries have expressed the desire to negotiate an FTA with the United States. USTR officials have noted that USTR lacks the resources to initiate other FTA negotiations in the immediate future, but insists that it will continue to pursue trade liberalization on the bilateral, regional and multilateral fronts to promote competitive liberalization.

We highlight below some of the countries that have expressed an interest in an FTA with the United States.

### ***Andean Community***

In a February 4, 2003, statement, trade ministers of Bolivia, Colombia, Ecuador, and Peru, said that they would seek bilateral FTAs with the US. On February 11, 2003, USTR Zoellick responded that, while the US is willing to discuss an FTA, the Administration urges the Andean countries to focus their efforts on advancing the negotiations towards the Free Trade Area of the Americas (FTAA).

***ASEAN (Association of South East Asian Nations: Burma, Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, the Philippines, Thailand, Vietnam, Singapore)***

On October 26, 2002, President Bush announced the Enterprise for ASEAN Initiative (EAI) to the ASEAN leaders, which has the ultimate goal of creating a network of bilateral FTAs with the ASEAN countries. These FTAs would be developed at a pace comfortable to the parties concerned, and the model would be the FTA with Singapore.

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### ***Bahrain***

On February 10, 2003, USTR stated that the U.S.-Bahrain Trade and Investment Framework Agreement (TIFA) works to lay the groundwork for a possible FTA.

### ***The Dominican Republic***

In 2002 the Dominican Republic sought to participate in the U.S.-Central America FTA (CAFTA) but has been excluded from the negotiations. Some Members of Congress, including House Ways and Means Committee Ranking Member Charles Rangel (D-New York), continue to call on the Administration to include the Dominican Republic in the CAFTA.

### ***Egypt***

An Egyptian delegation led by Foreign Trade Minister Youssef Boutros- Ghali made another push for an FTA with the US on a visit to Washington during the week of February 3, 2003. The Administration has shown an increasing interest in an FTA with Egypt, stating that it wants to continue using the TIFA format to broaden the bilateral trade relationship. Nonetheless, the Administration is looking for further signs of Egypt's willingness to conduct economic reforms, including full compliance with its WTO obligations, and of its ability to secure domestic support for those reforms.

### ***Korea***

Korea has expressed an interest in an FTA with the US, but the US reportedly is unresponsive. On January 9, 2001, the ITC instituted an investigation of the likely economic impact of an FTA with Korea (66 FR 4859), but made no recommendations on whether to initiate negotiations.

### ***New Zealand***

Both the US and New Zealand have expressed their interest in negotiating an FTA since 2001, but until now, attempts to launch negotiations with New Zealand separately or with New Zealand and Australia as a joint initiative have failed.

During the week of January 27, 2003, New Zealand Minister of Agriculture Jim Sutton urged the Administration to include New Zealand in a potential FTA with Australia, but the US so far only has committed to consider a preferential agreement with New Zealand.

### ***Taiwan***

On February 11, 2002, the ITC instituted an investigation of the likely economic impact of an FTA with Taiwan (67 FR 6276), which they submitted to the USTR on October 17, 2002. The ITC held a public hearing on May 13, 2002, in conjunction with the study. The report made no recommendations on whether to initiate negotiations and, although Taiwan is eager to launch negotiations, the US reportedly has been unresponsive.



#### **IV. Administration Submits 2003 Trade Agenda and 2002 Annual Report to Congress**

On February 28, 2003, the Administration submitted to Congress the 2003 Trade Policy Agenda and the 2002 Annual Report of the President of the United States on the Trade Agreements Program, summarizing the accomplishments of 2002 and outlining the trade initiatives for this year.

The Trade Agenda mirrors USTR Robert Zoellick's recent testimony before the House Ways and Means and Senate Finance Committees (*Please see W&C February 27 and March 6, 2003 Reports*), in which he stated that the Administration would focus on *inter alia* the following:

- WTO compliance of China and Taiwan;
- Russia's accession to the WTO;
- Advancing the negotiations for the Free Trade of the Americas (FTAA) and pending bilateral negotiations with Central America, Southern Africa, Australia, and Morocco;
- Resolving the following trade disputes: (i) telecommunications with Mexico, (ii) softwood lumber with Canada, (iii) beef with the European Union; and
- Complying with adverse WTO ruling, including the FSC/ETI ruling.

#### ***OUTLOOK***

USTR is still completing the "legal scrub" of the FTAs with Chile and Singapore. The definitive text of the FTA with Singapore should be available to the public this month. USTR will release a more detailed summary of the Chile FTA tomorrow. Analysts expect USTR to focus this year on the pending bilateral, FTAA, and WTO negotiations. Although the US likely will pursue bilateral negotiations with other countries, analysts do not expect any new FTA initiatives in the near future due to the limited resources available at USTR.

Congress will focus during the 108th Congress on its oversight role, holding hearings to discuss the status of negotiations as well as trade disputes. Some Members of Congress have been critical of the Administration for what they view as non-transparency in conducting its trade agenda. Therefore, analysts expect Congress to "test" the Administration when it sends its first FTAs completed post-TPA, the Chile and Singapore agreements, to Congress for a vote. Although there may be some contentious debate, analysts expect the Republican-controlled Congress to approve the agreements.

## **U.S. and Chilean Governments Notify Congresses of FTA; U.S.-Chile FTA Will Have Positive Impact on FTAA Negotiations**

### ***SUMMARY***

Both the U.S. and Chilean Governments recently notified their Congresses of their intention to enter into a Free Trade Agreement (FTA). For Chile, the expectation is that the Chilean Congress will approve the FTA, although some issues may arise. In the US, the President is expected to sign the FTA in May, after a 90-day period of Congressional review. Analysts expect the FTA to enter into force on January 1, 2004.

Chilean and U.S. officials have welcomed the FTA with enthusiasm for the positive impact they expect it to have on the ongoing negotiations for the Free Trade Area of the Americas (FTAA). Moreover, the U.S.-Chile FTA gives the United States an agreement that can be used as a model in future bilateral negotiations.

Assistant United States Trade Representative (USTR) Regina Vargo has stated that the Bush Administration would soon release the text of the FTA, but that it will release the text of the U.S.-Singapore FTA first. At present, lawyers for the United States and Chile are conducting the "legal scrub" of the FTA.

### ***ANALYSIS***

#### ***U.S. and Chilean Governments Notify Congresses of FTA***

The Government of Chile notified the Chilean Congress of its intention to enter into a Free Trade Agreement (FTA) with the United States, and is currently educating Members of Congress about the details of the FTA. Although some Members expressed concerns about the budgetary effects of the tariff-elimination, the implications of the FTA on certain agricultural sectors, and the participation of civil society in the approval of the agreement, analysts expect the Chilean Congress to approve the FTA.

On February 14, 2003, Chilean Ambassador to the United States Andres Bianchi expressed a similar optimism about securing the approval of the Chilean Congress, during a roundtable discussion on the U.S.-Chile FTA, sponsored by the North-South Center, in Washington, DC. Bianchi pointed out that the FTA with the United States is of crucial importance to Chile because (i) it brings total trade liberalization with the US; (ii) it comes right after the conclusion of Chile's FTAs with the EU and South Korea; and (iii) it introduces a number of innovations.

On January 30, 2003, President Bush notified the U.S. Congress of his intention to enter into the FTA with Chile. This started a 90-day time period during which the U.S. Congress will review the agreement, before the President signs it. In his message to Congress, Bush stated that the Administration hopes to work with Congress in developing the implementing legislation, on which Congressional Members will cast an up-or-down vote. Although Senate Finance Committee Chairman Charles Grassley (R-Iowa) suggested that Congress could scrutinize the

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FTA due to the agriculture provisions, most analysts expect Congress to approve the FTA by fall 2003.

### ***U.S.-Chile FTA Will Have Positive Impact on FTAA Negotiations***

Chilean trade officials say that the conclusion of the FTA negotiations between Chile and the US will give momentum to the ongoing negotiations for a Free Trade Area of the Americas (FTAA). Chilean officials have pointed out that although Chile has trade agreements in place with most countries in the Western Hemisphere, Chile puts special interest in the FTAA because (i) the FTAA will be a more comprehensive agreement which includes issues that the other Chilean trade agreements do not include, and (ii) because the Western Hemisphere is Chile's main market for value-added products, and the FTAA would allow Chile to increase its exports of those products.

With the conclusion of the U.S.-Chile FTA, the US has also gained credibility in its efforts toward the FTAA. Moreover, the U.S.-Chile FTA gives the United States an agreement that can be used as a model in future negotiations. On February 14, 2003, Assistant United States Trade Representative (USTR) Regina Vargo stated at the North-South Center that for the negotiations with Central America as well as for the FTAA, the US is striving for the same characteristics of (i) comprehensiveness, (ii) transparency, (iii) innovative labor and environmental standards, (iii) and modern legislation concerning e-commerce, that distinguish the FTA with Chile from other FTAs the US has concluded in the past.

### ***OUTLOOK***

An FTA with the US holds a lot of advantages for Chile and will increase the Chilean GDP by 0.92%. Nonetheless, Ambassador Bianchi thinks that, in order to profit from these advantages, Chile must put forth the effort to conduct its economic policy, as the agreement requires. Bianchi considers this to be the biggest challenge for his country.

AUSTR Vargo stated that the Bush Administration would soon release the text of the FTA, but that it will release the text of U.S.-Singapore FTA first. She did not give a specific date, but assured the audience that the Administration would release the text "many weeks before" the President signs the agreement, which he will do at the earliest on May 1, 2003. To exemplify why the Administration does not want to release the text until the "legal scrub" is complete, Vargo explained that U.S. copyright interest groups have raised a problem with an intellectual property rights provision in the FTA, requiring the Administration to review the text to make sure that the language in question does not present a problem. If it does, the Administration will have to review the text once more, and possibly change the text.

At present, lawyers for the United States and Chile are conducting the "legal scrub" of the FTA.

## **US Puts Forth Ambitious Market-Access Offer in FTAA Negotiations**

### *SUMMARY*

On February 11, 2003, the United States Trade Representative (USTR) announced the U.S. market access proposal to eliminate tariffs and trade barriers in the negotiations for the Free Trade Area of the Americas (FTAA). In its proposal, the US would eliminate its import duties on the majority of industrial and agricultural imports from the FTAA countries immediately upon entry into force of the agreement.

The US characterized the proposal as setting an important benchmark in the market access negotiations and demonstrating U.S. leadership in this critical phase of negotiations. The United States and Brazil will co-chair the Miami FTAA Ministerial Meeting in November 2003.

### *ANALYSIS*

On February 11, 2003, the United States Trade Representative (USTR) announced the U.S. market access proposal to eliminate tariffs and trade barriers in the negotiations for the Free Trade Area of the Americas (FTAA). In its proposal, the US would eliminate its import duties on the majority of industrial and agricultural imports from the FTAA countries immediately upon entry into force of the agreement. In addition, the U.S. offer includes broad access to its services, investment, and government procurement sectors. With regard to textiles and apparel imports, the US would offer duty-free treatment five years after the agreement enters into force, provided that other countries reciprocate.

The US characterized the proposal as setting an important benchmark in the market access negotiations and demonstrating U.S. leadership in this critical phase of negotiations. In order to encourage other FTAA countries to make similarly ambitious market access proposals, the U.S. offer extends only to those FTAA countries that have put forth offers of their own.

The U.S. offer covers consumer and industrial goods, agriculture, services, investment, and government procurement. It takes into account the wide variety of economies and levels of development by providing different rates of reductions in trade barriers throughout the region.

In its announcement, USTR notes that Congress and the trade advisory groups have been consulted extensively regarding the proposal.

Highlights of the U.S. offer include:

- About 65% of U.S. imports of consumer and industrial goods from the Western Hemisphere (not already covered by NAFTA) would be duty-free immediately upon the entry into force of the FTAA. Sectors covered include chemicals, construction and mining equipment, electrical equipment, energy products, environmental products, information technology, medical equipment, non-woven fabric, paper, steel, and wood products.
- All duties on consumer and industrial products would be eliminated by 2015.

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- Imports of textiles and apparel would be duty-free five years after entry into force of the agreement, provided reciprocation from other countries.
- About 56% of agricultural imports would be duty-free immediately upon entry into force of the agreement, with others being eliminated within 5 years, 10 years, or longer, depending on the country.
- The US has put forth a negative-list approach with regard to services and investment, such that market access opportunities would be provided broadly.
- Companies in FTAA countries could compete for U.S. government procurement contracts on equal footing with firms in NAFTA countries.

USTR notes that its market access offer in the FTAA negotiations is designed to mesh with its initiatives in the Doha Round, particularly its "Tariff-Free World 2015" proposal put forth last year in Geneva.

### ***OUTLOOK***

The United States and Brazil will co-chair the Miami FTAA Ministerial Meeting in November 2003.

## **FTAA Public Comments Emphasize Opposition to FTAA Antidumping Negotiations**

### ***SUMMARY***

Comments submitted to USTR on the second FTAA draft text focus on the market access, antidumping, and intellectual property chapters. An overwhelming number of comments oppose an antidumping chapter in the FTAA, citing remarks made by Members of Congress warning the Administration not to weaken U.S. trade remedy laws. Comments generally support retaining national duty drawback programs and the NAFTA approach for rules of origin.

The heavily bracketed second draft complicated efforts by the private sector to provide detailed comments in some cases. In addition, some submissions note that countries still can submit proposals, which means the draft text does not necessarily reflect all positions.

### ***ANALYSIS***

We summarize below the comments submitted to USTR on the FTAA second draft text regarding market access, rules of origin, customs, standards, antidumping and countervailing duties, and telecommunications. USTR requested comments on the second FTAA draft text in the Federal Register on December 27, 2002 (FR79231).

The draft text is available on the USTR website at [www.ustr.gov](http://www.ustr.gov).

The following businesses and associations submitted comments:

- National Association of Manufacturers (“NAM”)
- Verizon
- United Steelworkers of America (“USWA”)
- The Torrington Company, a producer of precision bearings and motion control components and assemblies. It is a subsidiary of Ingersoll-Rand and a supplier to the motor vehicle and machine tool industries.
- Timken, a U.S. producer of tapered roller bearings, ball bearings, cylindrical bearings and various steel mill products.
- The law firm of Stewart and Stewart
- The law firm of Preis, Kraft & Roy
- American Forest & Paper Association (“AF&PA”)
- The law firm of Collier Shannon Scott
- Comstock & Theakston, Inc.

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- Committee on Pipe and Tube Imports (“CPTI”)
- Dewey Ballantine, on behalf of the Coalition for Fair Lumber Imports
- The American Association of Exporters and Importers (“AAEI”)
- Dewey Ballantine and Skadden, Arps, Slate, Meagher & Flom, on behalf of Bethlehem Steel Corporation, National Steel Corporation and U.S. Steel Corporation
- The Canadian Steel Producers Association, the Mexican Steel Producers Association, and American Iron and Steel Institute

### ***Market Access***

**NAM** calls for the elimination of tariffs immediately upon entry into force of the FTAA in the following manufacturing sectors, among others: chemicals, construction and mining equipment, copper alloy brass mill products, electrical equipment, energy products, information technology and electronics products, medical equipment, paper products, pharmaceuticals, printing, publishing and converting technologies, steel products, wood machinery and wood products.

**NAM** urges the elimination of government price controls and reference pricing that hinder access to foreign markets.

**Torrington** notes that U.S. tariff reductions on bearings should proceed under the longest staging schedule. Torrington is aware the U.S. position generally favors five- and ten-year periods, but recommends that a 15-year phase-out be applied.

**Bethlehem Steel, National Steel and U.S. Steel** warn that proposals in the draft text on global safeguard actions would “undermine the ability of the United States to respond to damaging import surges through global safeguard actions”. They note, as examples, proposals to exempt all FTAA countries from global safeguard actions under certain circumstances and provide even greater exemptions to the Hemisphere’s many developing countries.

**Torrington** insists that the proposed global safeguard in the market access chapter (proposed Article 10) weakens safeguard rules by creating exemptions for FTAA member countries. Torrington stresses that the global safeguard and draft chapter on dumping are “non-starters.”

**Timken** urges U.S. negotiators to limit any reduction of bearing tariffs (HTS 8482) to a minimum phase-out period of 15 years.

**Timken** notes that there are a variety of proposals for the maximum duration of an FTAA safeguard, but Timken supports a three-year period as the maximum. In addition, Timken supports the limitation of a remedy to tariffs so long as the FTAA incorporates a tariff snapback provision. Timken believes that an FTAA safeguard action should be available as long as there

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is an FTAA instead of being available only as a transitional mechanism for the first ten years of an FTAA.

**AF&PA** seeks the elimination of all tariffs on wood and paper products immediately upon implementation of the agreement.

**AF&PA** is concerned that any safeguard measures, among other things, are applicable during the transition period only and limited to tariffs.

### *Rules of Origin*

Regarding rules of origin, **Torrington** generally supports the NAFTA approach.

**NAM** proposes the following rules of origin provisions:

- Creation a single, uniform set of FTAA rules of origin.
- Government and industry officials should coordinate to determine how rules of origin can best be applied during the FTAA transition period to avoid disruptions in trade patterns and confusion over which rules apply.
- Allowing cumulation for purposes of establishing hemispheric origin.
- A simplified, consistent and standardized approach in determining origin, marking, and labeling requirements for hemispheric products is an absolute necessity.
- Using the tariff-shift approach and curbing the use of value content tests and tracing.

**Timken** notes that, overall, the NAFTA approach is the preferred goal for rules of origin.

**AF&PA** believes that NAFTA rules of origin should serve as a model for the FTAA origin rules and that the FTAA rules should replace the multitude of sub-regional rules.

**AAEI** recognizes the complexities of NAFTA-like regional value content (“RVC”) rules of origin regimes, but understands that tariff shift preference rules may not answer the needs of all companies. Therefore, FTAA negotiators should consider offering the option of choosing either RVC or tariff shift. RVC rules should be simplified in the FTAA.

### *Customs*

**NAM** urges FTAA countries to:

- Immediately implement a two-step entry process that separates the release of merchandise from final payment of duty.

- Establish an advance-rulings regime and institute a process for reviewing and appealing decisions.
- Eliminate all non-tariff charges not dedicated to offsetting the cost of processing imports on goods traded within the Hemisphere, including consular fees and related charges.
- Prohibit export and import price requirements, import licensing conditioned on the fulfillment of a performance requirement, voluntary export restraints and discriminatory export taxes not allowed under the WTO.
- Establish simple procedures for the temporary admission of goods related to business travel.
- Consistently apply customs rules, the lack of which has led to arbitrary valuation decisions.
- Streamline and harmonize customs clearance practices.

**Preis, Kraft & Roy** urges the existing draft consolidated text of Article 5.1 on Market Access be revised to grant full drawback rights to U.S. exporters pursuant to the duty drawback program as established under 19 U.S.C 1313. Preis, Kraft & Roy criticizes the NAFTA restrictions on duty drawback and emphasize that, “Nowhere within the FTAA should drawback be restricted, limited or otherwise eliminated for U.S. manufacturers or exporters when exporting to FTAA member companies.”

**Comstock & Theakston** contends that measures that restrict any country’s duty drawback programs should not be made part of the FTAA. The FTAA must not affect existing duty drawback programs.

**AAEI** calls for omitting the issue of duty drawback from the FTAA negotiations, thereby allowing each member country the freedom to continue its own duty drawback program.

**AAEI** also suggests FTAA negotiators expand on the NAFTA provisions on trade documentation and preference certifications by allowing basic export documentation, filed under penalty of law in the exporting country, to be used with the endorsement of importers as the import clearance information in the country in the country of import.

The **USWA** encourages the US to seek immediate harmonization of steel tariffs with those of the US if an FTAA is concluded.

### ***Standards***

NAM suggests the following standards proposals:

- Restrict mutual recognition agreement (“MRAs”) for non-federally regulated products.

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- Encourage the use of voluntary standards over mandatory government regulations.
- International conformity assessment should be voluntary and market-driven, featuring national treatment for imports, with cooperative testing agreements as appropriate between pertinent testing bodies in respective countries.
- Affirm that the definition of “international standards” in the WTO Technical Barriers to Trade accord is not restricted to only IEC, ISO and ITU standards, but should also include widely-used norms such as some North American safety standards and safety installation practices.

### *Antidumping and Countervailing Duties*

**USWA** is concerned about i) the lack of “meaningful” provisions addressing labor and environmental issues, and ii) the chapter on Subsidies, Antidumping and Countervailing Duty Measures, which “violates all aspects of the U.S. negotiating objectives as it would significantly weaken the ability of injured industries and their workers to seek or obtain meaningful relief”.

**Timken** strongly opposes the creation of a special antidumping and countervailing duty regime in the FTAA.

**Stewart and Stewart** characterizes the proposed text on antidumping and countervailing duties a “non-starter” and insists that the US should not agree to a separate antidumping regime in the FTAA. Stewart and Stewart opposes the creation of a repository for information regarding the dumping regimes of the FTAA countries and the provision of technical assistance to assist countries in fulfilling their WTO obligations.

**AF&PA** opposes any differential treatment for developing countries as a whole in antidumping/countervailing duty proceedings.

**Collier Shannon Scott** discourages USTR from including any chapter in the FTAA on subsidies, antidumping and countervailing duties.

**CPTI** notes that, for the FTAA process to have a chance of enactment, the U.S. government should make clear to its negotiating partners that continuation of talks in antidumping is counterproductive to the objective of moving the FTAA forward.

**The Coalition for Fair Lumber Imports** insists that the FTAA must not contain any new rules that constrain the use of trade remedy measures that are authorized by the WTO agreements.

**The Canadian Steel Producers Association, the Mexican Steel Producers Association, and American Iron and Steel Institute** agree there must be no AD/CVD weakening of any kind in the FTAA.

**Bethlehem Steel, National Steel and U.S. Steel** warn that it would be impossible for an FTAA to be in the U.S. national interest, or to enjoy the support from the steel and other manufacturing industries if any of the proposals in the antidumping and countervailing duties chapter were accepted. Proposals for “special treatment” of FTAA originating goods subject to AD/CVD investigations should also be vigorously resisted.

### *Telecommunications*

**Verizon** notes that it reserves comments on the specific text until further negotiation, since the second draft text is bracketed in its entirety and the Services Chapter does not yet address the telecommunications sector. Verizon in its comments suggests general desirable outcomes for a telecommunications section and the treatment of intellectual property rights.

Other associations that submitted comments include:

- Transparency International-USA
- Commonwealth of Puerto Rico
- Charles Hunnicutt on behalf of the North Dakota Wheat Commission
- Libbey, producer of glass tableware, ceramic dinnerware and consumer housewares in North America
- The Center for Policy Analysis on Trade and Health
- Distilled Spirits Council of the United States
- International AntiCounterfeiting Coalition, Inc.
- International Trademark Association
- Computer & Communications Industry Association
- Business Software Alliance
- American Dehydrated Onion and Garlic Association
- Americans for Tax Reform
- American Library Association
- American Oilseed Coalition
- American Sugar Alliance
- Bumblebee Seafoods

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- Grocery Manufacturers of America
- Hemispheric Social Alliance
- ISAC 10
- National Pork Producers Council
- Northwest Horticultural Council
- Nucor Corp and Ames True Temper
- Ranchers-Cattlemen Action Legal Fund-United Stockgrowers of America
- Sweetener User Association
- US Grains Council

## **U.S. Private Sector Concerned About Intellectual Property and Government Procurement in US-South Africa FTA Negotiations**

### ***SUMMARY***

On November 15, 2002, USTR published a notice in the Federal Register (67 FR 69295), announcing that the interagency Trade Policy Staff Committee requested public comments and would hold a public hearing on the proposed U.S.- SACU FTA.

Many public comments focused on intellectual property rights (“IPR”) and urged U.S. negotiators to use the Singapore and Chile FTAs as models for the SACU negotiations. Other comments addressed government procurement, market access, and services. Negotiators are scheduled to launch negotiations in April 2003.

### ***ANALYSIS***

Pursuant to the United States Trade Representatives’ (USTR) request for public comments on November 15, 2002, on the FTA between the United States and the Southern African Customs Union (SACU: Botswana, Lesotho, Namibia, South Africa, and Swaziland) (67 FR 69295), 37 companies and associations submitted comments.

We highlighted the comments submitted by the following companies and associations:

- The National Electrical Manufacturers Association (“NEMA”), the largest trade association representing the interests of U.S. electrical industry manufacturers.
- The Coalition of Service Industries (“CSI”), a coalition of U.S. service companies and trade associations seeking to achieve market access in all modes of supply in all negotiating forums.
- The Air Courier Conference of America (“ACCA”), the trade association representing the express delivery services industry.
- The Africa Trade Policy Working Group (“ATPWG”), a coalition of member and affiliate organizations throughout the U.S. that focus on U.S. policy toward Africa.
- The American Federation of Labor and Congress of Industrial Organizations (“AFL/CIO”).
- The International Mass Retail Association (“IMRA”), the world’s leading alliance of retailers and their product and services suppliers.
- The International Countervailing Coalition (“IACC”), the largest multinational organization representing exclusively the interests of companies concerned with IP enforcement.
- The Shieldalloy Metallurgical Corporation (“Shieldalloy”), a U.S. producer of manganese-aluminium compacted products.

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- The Pharmaceutical Research and Manufacturers of America (“PhRMA”), an association representing America’s research- based pharmaceutical and biotechnology companies.
- The Business Software Alliance (“BSA”), representing the leading software and computer companies in the U.S..
- The Elkem Metals Company (“Elkem”) and Globe Metallurgical Inc. (“Globe”), domestic producers of silicon metal.
- The Motion Picture Association of America (“MPA”), a trade association representing seven of the largest producers and distributors of filmed entertainment.
- The Federal Express Corporation (“FedEx”).

### **Market Access**

**IMRA** supports the FTA if it provides simple rules of origin. They oppose the continued use of the “Yarn Forward” rule of origin for wearing apparel, and they recommend the negotiators to adopt the rules of origin of the Israel FTA. They further want the FTA to provide additional duty reductions on the exports of textiles and wearing apparel from the SACU, as well as commercially meaningful benefits for wearing apparel imports into the U.S., but they oppose all changes to existing U.S. law on parallel imports.

**Shieldalloy** recommends that the U.S. maintain the current duty on all unwrought manganese imports from South Africa classified under subheading 8111.00.45 of the Harmonized Tariff Schedule of the U.S. (HTSUS). They support the uniform multilateral elimination of the duty on **all** articles of unwrought manganese from **all** foreign sources, submitting that this is the only way to modify the current tariff treatment that would be equitable to all U.S. producers and consumers.

**Elkem and Globe** recommends that the U.S. maintain the current duty on all silicon imports from South Africa classified under subheading 2804.69.50 of the HTSUS, and this because of (i) the conditions of competition in the U.S. silicon market, (ii) the current severely depressed and vulnerable condition of the U.S. silicon metal industry, (iii) the role that low-priced South African imports have played in contributing to this condition, and (iv) the rapid and direct impact reducing or eliminating the tariff will have on the U.S. producers’ operations.

**MPA** calls on negotiators to address issues relating to temporary entry of film crews and equipment. They also seek commitments that will provide certainty and predictability to ensure market access, national treatment, and an open investment environment in (i) all forms of television transmission services, (ii) film and home video entertainment production services, (iii) film and home video distribution services, (iv) motion picture exhibition services, (v) retail and wholesale services for the physical and digital delivery of home video entertainment, (vi) home video entertainment leasing and rental services, and (vi) advertising services. Hereby, they seek zero tariffs in (i) cinematographic film, (ii) home video entertainment, (iii) all products, equipment and props used in the production of motion pictures, (iv) promotional materials for

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filmed entertainment, and (v) electronic transmission. They also seek a commitment that customs valuation will be based solely on the value of the carrier medium.

**Nema** seeks tariff elimination for all electrical products. They also suggest that, on a Most Favored Nation (MFN) basis, the U.S. Government consider the elimination of its “nuisance duties” (duties of 3% or less) on primary batteries.

**BSA** wants all five SACU countries, as part of the FTA, to sign and implement the WTO Information Technology Agreement (ITA). They seek the elimination or phase out of all tariffs and non-tariff measures applied to information technology products, as well as a commitment that the customs valuation of digital product imports will be based solely on the value of the carrier medium.

### Standards

**Nema** supports expanding free trade in electrical products through FTAs, but opposes the negotiation of inter-governmental Mutual Recognition Agreements (MRAs) for unregulated electrical products. They want the FTA to include compliance with all WTO Technical Barriers to Trade (TBT) requirements, as well as acceptance that the definition of “international standards” in the WTO TBT treaty should also include widely- used norms such as some North American standards and safety installation practices that meet TBT guidelines. They further want acceptance that voluntary, market- driven standards and conformity assessment should be encouraged over mandatory government regulations, whereby they consider non- discriminatory, international conformity assessment by means of one standard/one test appropriate.

### Services

**CSI** wants the FTA to require stronger participation in the ITA, which lowers tariffs on inputs used to build networks and devices to access networks for e- commerce. They also seek the commitment that customs valuation for digital products imports will be based solely on the value of the carrier medium.

**Nema** supports energy services liberalization, and recommends using a negative list approach for the services negotiations.

**FedEx** emphasizes that it is essential that the FTA adopt their definition of express delivery services, which recognizes these services as a distinct service sector. The negotiators should also address barriers relating to the customs clearance of goods in the SACU, and adopt several substantive liberalization obligations for the express delivery services. Each party should make clear that they are extending full national treatment and market access in the express delivery services sector to one another, and each country should also agree to maintain measures that prohibit anti-competitive behavior in the express delivery services sector.

**ACCA** considers the liberalization of trade in express delivery services as a top priority for the FTA, and seeks the elimination of all barriers and restrictions in the areas of customs, postal services, ground transportation, operational control, licensing, access to radio frequencies, and ownership.

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**AFL/CIO** wants the FTA to contain a broad, explicit carve-out for important public services. There should be no pressure on governments to open their key public services to more private competition, or to lock in any existing private competition in these sectors. Services rules should be negotiated sector by sector, and should preserve the ability of national, state and local governments to regulate private service providers in the public interest. Services of rules on temporary entry should not be included in the FTA absent significant improvements in our H1B system.

**BSA** wants the SACU countries to focus their efforts on the liberalization of information technology services, and thinks the U.S. should insist that the U.S.-SACU FTA take a “top-down” approach to schedule services commitments. They consider it important that each country commits to full market access and national treatment for all information technology services, and that no exceptions be scheduled in the Computer and Related Services sector. They are also concerned about the growing potential for trade-distorting subsidies in this last area, and think the FTA should contain strong disciplines on subsidies to ensure a level playing field for U.S. services suppliers.

### **E- Commerce**

**CSI** wants the FTA to (i) include the provisions on digital products of the U.S.-Singapore FTA, (ii) contain trade-liberalizing provisions addressing e-commerce issues, and (iii) provide binding principles supporting the maintenance of open markets for e-commerce.

**ACCA** wants each country to (i) create a constituency of its e-commerce users, (ii) adhere to MFN and National Treatment principles with respect to e-commerce, (iii) pursue a stable, transparent, fair, and flexible regulatory framework, and (iv) harmonize and streamline revenue codes for goods purchased through e-commerce. The FTA should ensure (i) that taxes on e-commerce products are not more onerous than those on products acquired through traditional commerce, (ii) that each country’s taxation policy is consistent with internationally agreed principles, and (iii) that express operators are not the collection mechanism for taxes on e-commerce transactions.

**AFL/CIO** requests that the FTA explicitly exempt existing state sales tax regimes and, more generally, non-discriminatory taxation, from any new disciplines on e-commerce.

**BSA** notes that the FTA should contain a high quality chapter on e-commerce, with obligations that (i) ensure clarity and predictability in the international trade rules for e-commerce, (ii) prevent the arising of barriers to e-commerce, and (iii) preserve the current liberal trading environment for digital products. A key goal must be to ensure that software delivered electronically receives the same benefits and concessions than software traded on a physical medium currently enjoys under existing WTO agreements.

**MPA** wants the FTA to guarantee national treatment and full market access with respect to e-commerce. They thereby think that the FTAs with Chile and Singapore should serve as a model.

### **Intellectual Property Protection**

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**Nema** wants the FTA to include commitments of full adherence to trade-related aspects of intellectual property rights (TRIPS), including better legal and administrative means to pursue cases of trademark infringement.

**CSI** thinks the FTA should (i) fully liberalize the distribution of IP based content, (ii) ensure compliance with existing IPR accords, and (iii) provide implementation and enforcement of TRIPS, (iv) copyright term extension, (v) TRIPS plus levels of commitments for IP with limitations on liability for Internet service providers as regards copyright protection, and (vi) additional higher level commitments consistent with the WIPO digital treaties.

**ATWPA** fears that the FTA will force the SACU to enhance WTO obligations within the TRIPS agreement to favor patent holders.

**AFL/CIO** wants the FTA to clarify the TRIPS exception, ensuring that the agreement considers public health crises as national emergencies and that if a government uses this exception it will not be subject to sanctions under the FTA or any other trade law.

**IMRA** urges U.S. negotiators not to use FTA negotiations to create new restrictions on parallel imports under the guise of IP protection.

**IACC** thinks that the SACU has to improve its IP laws and related enforcement efforts, and that it should focus its efforts on (i) implementation enforcement of the Counterfeit Goods Act, (ii) improved border enforcement, focusing on imported products, and (iii) training and educating officials, judges, and legislators who have enforcement, jurisdictional and/or policy-making responsibilities for IP.

**MPA** wants an FTA with an IPR chapter that (i) achieves standards higher than those in TRIPS and consistent with the level of protection in the Chile and Singapore FTA, (ii) includes the obligations in the WIPO Copyright and Performances and Phonograms Treaties (WCT and WPPT), (iii) ensures the application of full national treatment without the possibility of reservations, (iv) includes modern and effective enforcement provisions, (v) extends the term of copyright protection, and (vi) addresses border enforcement and subsistence in copyright .

**PhRMA** sees the FTA as an appropriate follow-up on to the AGOA trade program. They think SACU members should first demonstrate full implementation of the TRIPS Agreement. They also recognize that capacity building is essential to provide the necessary infrastructure for SACU members. For the FTA, they hope that the U.S. negotiators will pursue commitments similar to the ones they secured in the FTAs with Chile, Singapore, and Jordan.

**BSA** wants the FTA to ensure that the SACU implements and enforces the highest standards of IP protection, as established in the FTA with Singapore.

### **Debt and Finance**

**AFL/CIO** thinks that the FTA must allow the SACU to regulate the flow of speculative capital in order to protect its economy, as well as address the possibility of massive currency devaluations and the impact of these devaluations on fair competition in the region. Both

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countries should also include debt relief measures that allow the SACU to fund education, health care, and infrastructure needs, and there should be an increase in U.S. development assistance to the region.

### **Government Procurement**

**Nema** emphasizes the need for openness and transparency in government procurement.

**AFL/CIO** thinks that the FTA should exclude procurement rules that serve important public policy aims such as an environmental protection, local economic development and social justice, and respect for human rights and workers' rights.

**BSA** supports using the FTA process to make the SACU countries adhere to the disciplines of the WTO's Agreement on Government Procurement (GPA). They want the FTA to ensure that U.S. trading partners procure software on its merits, and not simply the model of its development. Also, they want full coverage of services in the government procurement obligations of the FTA, and they aim to ensure that the government procurement chapter applies to procurement of IT services.

### **Investment**

**AFL/CIO** objects to the inclusion of investment measures modeled on NAFTA Chapter 11. They think the FTA should contain a broad carve-out that allows governments to regulate corporate behavior to protect the public interest, and that investment rules should rely on government-to-government rather than investor-to-state dispute resolution.

### **Labor and Environment**

**Nema** calls for full consultation with the business community on this matter.

**AFL/CIO** opposes using the same labor language as the FTAs with Chile and Singapore, and urges the U.S. to include binding and enforceable commitments to respect internationally recognized workers' rights in the core of the FTA, and to provide SACU with the resources and technical assistance necessary to meet these obligations.

### **Transparency**

**AFL/CIO** thinks both countries should inform their citizens on what the draft FTA proposals are, which ones their government supports and opposes and, once they concluded the agreement, which would be the dispute resolution measure.

The following businesses and organizations also submitted comments:

- Apricot Producers of California
- U.S. Association of Importers of Textiles and Apparel (USA- ITA)

- California Cling Peach Board (the Board)
- Foundation for Democracy in Africa
- Northwest Horticultural Council (NHC)
- Africa- America Institute (AAI)
- National Milk Producers Federation and U.S. Dairy Export Council (NPMF & USDEC)
- American Sugar Alliance (ASA)
- Southern Africa Africare
- American Textile Manufacturers Association (ATMI)
- Distilled Spirits Council of the U.S. (DISCUS)
- Consumers for World Trade (CWT)
- Blue Diamond Growers
- Ferroalloys Association (TFA)
- Bumble Bee Seafoods
- National Pork Producers Council (NPPC)
- International Labor Rights Fund (ILRF)
- SMART
- American Yarn Spinners Association (AYSA)
- Levi Strauss & Company (LS&CO.)
- National Confectioners Association & Chocolate Manufacturers Association (NCA/CMA)
- Grocery Manufacturers of America (GMA)
- ANSAC
- Mauritius Sugar Syndicate (MSS)

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