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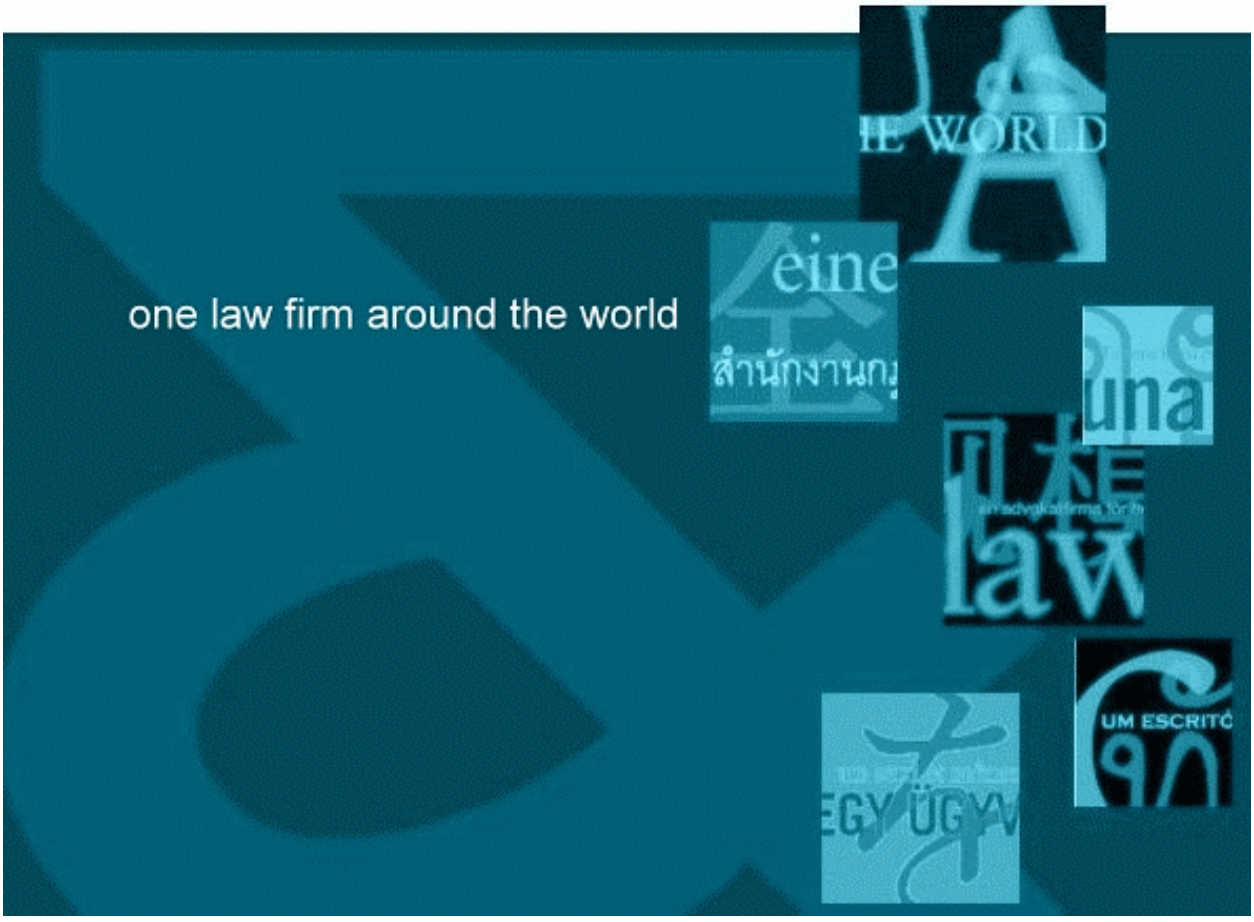

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

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DAUSTR (China) Freeman briefs US-China Business Council of WTO Compliance

The recently appointed Deputy Assistant US Trade Representative for China Charles Freeman gave an off-the-record briefing on Chinese WTO compliance efforts for members of the US China Business Council on June 12, 2002. Participants of the briefing included representatives from express delivery companies, grain trading concerns, and legal and investment consulting firms.

Freeman's key points include:

- USTR's reorganization on Asia responsibilities;
- The rift between expectation vs. reality on China's WTO compliance; and
- China's implementation difficulties in Beijing and Geneva, including the transitional review mechanism ("TRM")

Freeman also provided a detailed timeline for China's transitional review mechanism, and the USTR's preparations for its China-compliance report which is due to Congress on December 11, 2002.

US Recognizes Russia as a Market Economy; Improves Outlook for WTO Accession

On June 7, 2002, the U.S. Commerce Department announced its decision to revoke Russia's status as a non-market economy (NME). This decision effectively alters the way in which the Commerce Department will calculate dumping margins for Russian companies involved in U.S. antidumping proceedings. Revocation of Russia's NME status also means that American industries, under U.S. trade law, now can file countervailing duty complaints against Russian exporters.

The U.S. decision to revoke Russia's NME status follows the European Union's own announcement on May 24 that EU member countries will recognize Russia as a market economy in EU dumping proceedings.

The U.S. and EU decisions will benefit Russia's continuing effort to join the World Trade Organization.

Doha Series Panel on "Truth & Consequences: Environment and Investment in the WTO"

Participants at a seminar co-sponsored by the Global Business Dialogue, the Washington International Trade Association, and the National Foreign Trade Council on June 12, 2002 discussed the status of environment and investment issues in the WTO. Entitled "Developing the Doha Agenda," the symposium is the sixth in a ten-part series of seminars on WTO negotiations.

The focus of the environment panel was Multilateral Environmental Agreements ("MEAs") and their relationship to WTO rules. Overall, participants on the environment panel were optimistic that WTO members could reach a consensus to bridge differences between MEAs and WTO

rules in order to avoid potential disputes. In particular, the European Union has taken the lead to bring the environment issue to the forefront of negotiations in the Doha Development Agenda. Participants were hopeful that their presentations could serve as a catalyst for discussions at the September 2002 World Summit for Sustainable Development to be held in Johannesburg, South Africa. The Summit represents an important platform for governments, NGOs and environmentalists to disseminate their views and opinions regarding making the relationship of trade, the environment and economic development.

The focus of the investment panel centered upon efforts to launch negotiations on investment rules at the WTO. The USTR official indicated support for a staged approach to WTO negotiations on investment that would limit the agreement initially to areas such as nondiscrimination and transparency. The European Commission official, however, supported a more ambitious approach to investment rules in the WTO, and believes there should be higher standards at the multilateral level than currently existing at the bilateral levels.

Congressional-Executive Commission on China Reviews China's Implementation of WTO Commitments

On June 6, 2002 Bush Administration officials presented their findings on China's WTO compliance efforts to the Congressional-Executive Commission on China. They agreed that while China has taken significant steps to reduce tariff and non-tariff barriers and repeal many laws and regulations in accordance with its WTO obligations, it is still too early to make an accurate assessment whether or not China will honor its WTO commitments.

The Commission urged the Administration to make a "deadline time-line" for specific WTO commitments to use as a benchmark for judging China's implementation level and performance. In response, Administration officials noted that the GAO would publish a report in October 2002 that analyzes China's progress on WTO implementation.

Rule of Law in China Seminar

On June 21, 2002, the Global Business Dialogue, Inc. hosted a colloquium on "China, Law and the WTO: Perspectives on an Evolution." The colloquium featured short presentations by four China trade experts, with a question & answer period following each speaker. The nature of the briefing was off the record.

The four speakers were:

- **Ira Wolf** – Representative of the Congressional Executive Commission on China

- **Charles Freeman** – Recently appointed Deputy United Stated Representative for China, Taiwan, Hong Kong and Macau

- **Richard Ferris** - Director and Co-Chair of the International Section of the law firm Beveridge & Diamond, P.C.

- **Hongjun Zhang** - Senior Consultant with the International Section of Beveridge & Diamond, P.C.

WTO Working Bodies

Update on Negotiations of WTO Rules: Antidumping, Subsidies and Regional Trade Agreements

The large majority of WTO Members in Doha overcame considerable resistance by the United States and reached agreement on negotiations on the Anti-Dumping ("AD") and Subsidies and Countervailing Measures ("SCM") agreements. In addition, Members agreed to launch negotiations on regional trade agreements and fishery subsidies (the latter not discussed below).

Paragraph 28 of the Doha Declaration reads (emphasis added):

In the light of experience and of the increasing application of these instruments by members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants. In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase. In the context of these negotiations, participants shall also aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries. We note that fisheries subsidies are also referred to in paragraph 31.

We discuss below the status since Doha of negotiating proposals on the agreements on antidumping and subsidies, and disciplines on regional trade agreements.

Discussion on Reform of the WTO Decision Making Process

For several years there has been debate about the need to reform the working procedures and even the mandate of the World Trade Organization. This has been prompted in large part by the spectacle of major public embarrassments, notably the dispute over the selection of a new Director-General in 1999 and the failure of the Seattle Ministerial Conference in the same year. However the basic issues are less dramatic, though perhaps more serious, than these unusual crises would suggest, and they will not go away. The advent of a new Director-General, Dr Supachai, in September, is stimulating more debate and speculation, because he can be expected to have his own ideas on the management of the WTO as an organization and of the multilateral trading system itself. This note explores some of the issues confronting Member governments.

Post-Doha Developing Country Positions on Trade & Environment

Since the launch of the New Round at Doha, three WTO members have submitted proposals to the WTO's Committee on Trade and Environment ("CTE") under the Environment mandate of the Doha Ministerial Declaration ("the Declaration"). The European Communities and Argentina tabled proposals falling under the scope of paragraph 31(i) of the Declaration. A proposal from India under paragraph 32(i) of the declaration addresses the effects of environmental measures on market access, particularly in relation to developing countries.

The CTE held its first special negotiating session on March 22, 2002, where WTO Members raised for discussion, items under the Environment mandate of the Declaration. The debate was driven largely by a controversial paper submitted by the European Communities ("EC"), which outlines some preliminary ideas on the relationship between WTO rules and multilateral environmental agreements ("MEAs"). In May Argentina submitted a proposal on the subject in advance of the next special session of the CTE scheduled for July 11 and 12. We provide below an analysis of the Member country proposals submitted to the CTE since the launch of the new round. The analysis is divided into two parts; the first, presenting proposals submitted under paragraph 31(i) of the Doha Declaration including the EC's paper and the reactions it provoked among developing country Members and the second, proposals submitted under paragraph 32(i) of the Declaration.

Meeting of the Working Party on Russia Accession to the WTO

The Working Party on Russian accession to the WTO concluded its latest meeting on 20 June, having made modest, useful, but not dramatic progress. There have been some highly negative press reports, notably referring to comments by a senior official of the European Commission to the effect that the accession is stalling because of lack of progress on financial and telecommunications services, but the general view of delegates attending the meeting, and of the WTO Secretariat, is that this pessimistic assessment is exaggerated.

WTO Deputy Director General Andrew Stoler Briefing

WTO Deputy Director-General Andrew Stoler on June 19, 2002, briefed members of the Washington International Trade Association ("WITA") on the state-of-play of Doha round negotiations. Stoler was generally optimistic that the new round of negotiations could be concluded on time and that U.S. leadership will be critical. In particular, Stoler emphasized the importance of securing Trade Promotion Authority ("TPA") to establish U.S. negotiating credibility, and especially in light of unpopular U.S. actions on steel safeguards and the new Farm Bill.

WTO Dispute Settlement

Overview of WTO Panel Proceedings Against U.S. Steel Safeguards

World Trade Organization ("WTO") Members are moving forward with consultations and dispute proceedings concerning the U.S. Section 201 steel safeguards measures, including at the Dispute Settlement Body (“DSB”) and Committee on Safeguards. At the DSB meeting on June 14, the (second) panel requests by Japan and Korea resulted in the establishment of a combined panel, along with the earlier panel establishment at the request of the European Communities ("EC") on June 3, 2002. Furthermore, other WTO Members including China, Switzerland and Norway intend to make second requests for panels, which are expected to be established on June 24. These panel requests are likely to be combined and the complaints of all parties heard by a single panel. We provide below a summary of the consultations and dispute proceedings thus far concerning U.S. steel safeguards.

Regional Trade Agreements

U.S.-Central American FTA Talks Near Commencement

In comments made to the Inter-American Dialogue on June 14, Costa Rican Foreign Trade Minister Alberto Trejos suggested that **t**he US and five Central American nations could launch free trade agreement (FTA) negotiations before the end of 2002. The five pertinent Central American nations are:

- Costa Rica
- El Salvador
- Guatemala
- Honduras
- Nicaragua

Trejos' comments refer to U.S. President Bush's January 2002 announcement that the United States would explore an FTA with the five Central American nations, and follow Costa Rican President Abel Pacheco's recent meetings at the White House. Trejos and four Central American colleagues - Miguel Lacayo of El Salvador, Arturo Montenegro of Guatemala, Juliette Handal of Honduras, and Marco Antonio Narvaez of Nicaragua – also participated in a discussion at the Inter-American Development Bank in which they compared notes with officials who had already negotiated bilaterally with the US.

Central American officials are enthusiastic about the potential FTA. Such an agreement would guarantee long-term access to the U.S. market for Central America's exports of agricultural and manufactured goods, including textiles and garments. As a region, Central America sends over 40 percent of its exports to the US.

REPORTS IN DETAIL

U.S. PERSPECTIVES

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Submissions from the distribution and financial services industries indicate a positive outlook toward further liberalization in foreign markets and urge USTR to seek the greatest possible liberalization. Beyond seeking traditional improvements on market access and national treatment, these industries attach great importance to the streamlining of the regulatory regimes of their trading partners. Also, the U.S. hotel and lodging industry seeks broad and deep commitments from all Members in all areas relating to the lodging industry, and in all travel and tourism sectors.

On the other hand, the higher education and public library associations seek to ensure that GATS negotiations do not undermine their own ability to provide services in the US. In particular, they seek to ensure that negotiations do not alter their independent status and their right to receive subsidies from various levels of government.

The U.S. maritime industry reiterates its long-standing position of strongly opposing the inclusion of any maritime matter under the WTO negotiations.

USTR intends to release its first set of services proposals by the WTO's initial deadline for requests on June 30, 2002.

ANALYSIS

I. Professional Services (Legal Services and Public Library Services)

The American Bar Association (ABA) requested an extension until August 21, 2002 to submit comments, due to the complexity of the issues it plans to address and the time required by its internal procedures to approve such a submission. The ABA mentioned that its comments will be focused on issues relating to ensuring a competitive environment for U.S. and foreign lawyers.

The American Library Association (ALA) emphasized the critical role of America's public libraries to provide valuable services, which is essential to America's basic social goals

and to the proper functioning of a democratic and open governmental system. Currently, American public libraries rely upon government assistance of various kinds such as free use of building space; funding of operations and tax exemptions by local and state governments; special postage rates; and subsidized access to modern telecommunications and information services by the federal government.

ALA emphasized that government support is essential to public libraries' ability to provide their core services. ALA is concerned that many features of the GATS may be difficult to reconcile with government support for public libraries. Thus, it calls upon USTR to ensure that government support for core public library services does not become subject to GATS disciplines, even though private libraries are listed on the U.S. GATS schedule. ALA also seeks to ensure that the GATS will not interfere with the ability of public libraries to serve America's schools and communities.

II. Distribution Services

Wal-Mart believes that the retail industry and its ancillary industries will benefit substantially from greater trade liberalization. Wal-Mart seeks substantial improvement of liberalization in retail, sourcing, and distribution sectors in large economies which are likely to attract U.S. foreign investment.

In particular, improvement should target: (1) reducing limitations on the trade of pharmaceuticals, agricultural goods, cosmetics, food items, and other consumables; (2) reducing limitations on investment such as limitations on equity participation; capital flows; use and acquisition of land and real estate; size limitations on individual stores; numeric limits on the number of stores; and geographic limitations on store location; and (3) simplifying and expediting the process for movement of natural persons. Wal-Mart also seeks the greatest possible liberalization of trade rules on those services ancillary to retail, such as commission services for product sourcing, inventory management, etc.

In addition, Wal-Mart supports the following approaches to facilitate distribution services: (1) encourages USTR to prepare for negotiations on trade facilitations; (2) seeks to streamline and make more transparent licensing regimes, certifications, standards, testing and labeling; (3) seeks easily administrated and transparent tariffs and customs rules, and especially rules of origin; and (4) seeks zero-for-zero tariff negotiations on consumer items.

III. Education Services

Regarding higher education, the American Council on Education (ACE) and the Council for Higher Education Accreditation (CHEA) generally believe that their members have not experienced substantial problems in providing services in other countries. Rather, their primary interest in the new round is to ensure that any future agreement will not alter the fundamental structure of the U.S. higher education sector.

In particular, their objectives can be summarized as ensuring: (1) the autonomy of the

U.S. higher education institutions and accreditation agencies is not diminished by the GATS; (2) the US undertakes no obligation that would require U.S. entities (government or private) to subsidize foreign higher education institutions or students attending such institutions; and (3) that any commitments would not undermine the current discretion of accreditation organizations and quality assurance agencies to determine which institutions and programs will be eligible for a review and the outcome of such reviews.

IV. Financial Services

The Financial Services Forum (FSF) emphasized that the U.S. financial services industry stands to gain substantially from the liberalization of financial services trade. Although some progress has been made in liberalizing the financial services sector within WTO, including the 1997 Financial Services Agreement, many countries still restrict market access to non-resident firms.

FSF pointed out that since 1997, regulatory practice of both emerging and developed markets in the financial services industry has developed unevenly and often at odds with market access and national treatment commitments of WTO Members. Therefore, FSF seeks to secure commitments from Members on providing genuine market access to foreign firms on a non-discriminatory basis, and especially commitments on regulatory transparency. FSF also broadly supports the agendas of the Coalition of Service Industries (CSI) and the Securities Industry Association (SIA) for the new round on financial services.

FSF's additional objectives include: (1) featuring capacity building as a priority issue to encourage developing countries to liberalize and ensure compliance with WTO commitments; (2) allocation of additional resources by the U.S. government, in the form of qualified personnel, to assist in WTO financial services negotiations; and (3) encourage WTO Members to schedule additional commitments in financial services according to the Understanding on Commitments in Financial Services.

The American Insurance Association, American Council of Life Insures, Coalition of Service Industries, Council of Insurance Agents and Broker, International Insurance Council and Reinsurance Association of America made a joint submission promoting the centerpiece of the insurance industry's objective of the adoption of a "model schedule" – prepared by industry officials since 1998.

The model schedule proposes improvement in traditional market access and national treatment commitments, and additional commitments on transparency, non-discriminatory regulations and "best practices" principles. The associations believe that the adoption of the model schedule would complement existing and future market access and national treatment commitments. Adoption of the model schedule by WTO Members would be crucial to the ability of U.S. insurance providers to compete globally on a greater scale and will benefit consumers and the Members themselves. The associations strongly urge USTR to include the model schedule in full in its initial negotiating requests, and to ensure that it will not be diminished or addressed only in general terms.

The associations also seek elimination of specific barriers that exist in many countries, and has submitted such a list of barriers to USTR.

New York Life International in its submission emphasized the importance of "best practices" in regulation as a complement to market access and national treatment commitments. New York Life International placed high priority on integrating the industry's proposed model schedule into USTR requests of trading partners.

V. Tourism Services

The American Hotel & Lodging Association (AHLA) seeks broad and deep commitments from all trading partners in all areas relating to the lodging industry, as well as the travel and tourism sectors. AHLA listed specific barriers faced by its member companies in eight foreign markets.

AHLA cited typical barriers as: (1) government review/approval/re-negotiation of contracts such as management agreements and franchise agreements; (2) restrictions on repatriation of profits; (3) limits on the equity share that foreign companies may hold in joint ventures; (4) regulations that are obscure, discriminatory, or apply in practice only to foreign companies; (5) quota requirements on the hiring of local personnel; and (6) restrictions on the ability of companies to bring U.S. managers into a country.

VI. Maritime Transportation Services

The United States Maritime Coalition reiterated their long-standing position of opposing inclusion of maritime services under WTO and GATS negotiations. The position is shared by the entire American maritime industry including carriers, seafarers, and shipyards. The industry believes that U.S. cabotage laws provide important security, economic, commercial, environmental, and safety benefits to the United States. Therefore, there is little reason to re-open the requirement on U.S-built ships as providing maritime services (the Jones Act was grandfathered during the Uruguay Round), nor should any other aspect of internal shipping, auxiliary services, access to and the use of port facilities and domestic maritime transportation services be covered by the GATS.

The American Waterways Operators, which represents the inland and coastal tugboat, towboat and barge industry, believes that because of the contributions it makes to U.S. national security, economic, environment, and safety interests, the US should neither make nor accept an offer that would undermine the Jones Act – the statutory foundation of domestic maritime policy. The association is also concerned about proposals by WTO Members to consider maritime services as part of another services sector, such as energy or logistics services, and believes that maritime issues should only be considered in the framework of the maritime transport services sector.

OUTLOOK

The recent public submissions received by USTR will influence U.S. negotiating proposals on services and other sectors, but are one of many factors leading up to the preparation of U.S. proposals. In some areas like financial, communications, or professional services, U.S. negotiating proposals will reflect a consultative process with industry, NGOs, Congress and various government agencies with authority over domestic regulation. Furthermore, some industries and companies have submitted specific barriers lists which remain confidential and will factor into several U.S. requests for market access in services. Nevertheless, particular industries such as maritime and education services are either outright hostile to GATS negotiations, or weary that negotiations will undermine their right to provide services in the US.

Some WTO Members including the US will release their initial requests by June 30, 2002. Members will begin reviewing these requests at the next "services week" of negotiations, to take place in Geneva starting July 15.

WTO Delays Retaliatory Sanctions as US Searches for ETI/FSC Fix

SUMMARY

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In Congress and the Administration, efforts are underway to rewrite the ETI regime. Any concrete action will likely begin in the House Ways and Means Committee, where various options are being explored. Chairman Bill Thomas (R-California) could introduce legislation in early July, but it still appears doubtful that Congress will send the President a bill this year. One wild card factor may be the issue of corporate inversions. If legislation addressing corporate inversions starts to move on a fast track in the house, ETI legislation could move in tandem with this legislation.

ANALYSIS

I. Background on ETI/FSC

On January 14, 2002 the WTO Appellate Body ruled that the US Extraterritorial Income Exclusion Act (ETI) violates WTO trade rules, in effect deeming the tax regime an illegal export subsidy. The US ETI law was enacted in late 2000 in response to EU complaints to the WTO about its predecessor regime, which was known as the Foreign Sales Corporation ("FSC"). Now that both the FSC and ETI have been struck down by the WTO, the United States is working to develop a new means to level the playing field for US multinationals. There are time pressures, as the European Union is pushing for hefty retaliatory trade sanctions against the United States. A WTO decision on the amount of sanctions has been postponed twice, but the threat remains.

U.S. and EU officials are engaged in talks to resolve the ETI dispute, hopefully permanently. Although the European Union has asked the WTO to green-light about $4 billion in retaliatory trade sanctions on US products, the deadline for doing so has already been pushed back twice to allow some breathing room for the United States to come up with a tax regime that can pass muster with the WTO. (The United States insists that any retaliatory sanctions should be in the range of $1 billion.) The last deadline for a WTO decision on retaliatory measures was June 17, 2002. The new deadline is now set for mid-July. But this deadline may also be postponed by the parties to the dispute, especially if Congress continues to show some resolve in fixing the ETI to make it WTO compliant.

In the United States, the WTO dispute over fixing the ETI regime is increasingly becoming intertwined with other international tax issues, including corporate inversions, tax shelters and the over-arching concern that U.S. tax treatment of overseas income is so onerous that U.S. companies face a competitive disadvantage. Witnesses and lawmakers at Congressional hearings on overseas tax shelters and inversions frequently note that broad

international tax reforms are needed to address the fact that many U.S. companies are looking for better tax treatment abroad. The loss of ETI would obviously exacerbate the problem.

II. Recent Efforts to Fix ETI/FSC

Recently House Ways and Means Committee Chairman Bill Thomas indicated that he may soon offer legislation to replace or fix the ETI in time for Congress' return from the Fourth of July recess. He has also argued that a holistic approach to international tax issues is needed to ensure a proper policy balance is achieved, which some believe may point toward a simultaneous push for an ETI fix and changes to the tax treatment of inversion transactions. Rep. Jim McCrery (R-Louisiana), Chairman of the House Ways and Means Subcommittee on Select Revenue Measures, suggested as much at a June 13 hearing on ETI solutions. Democrats asking about corporate inversions frequently sidetracked that hearing.

On the Senate side, Finance Committee Chairman Max Baucus (D-Montana) may hold a hearing on the issue, but he has expressed doubts that his committee will actually consider an ETI legislative fix. Likewise, Glenn Hubbard, chair of the White House Council of Economic Advisors has said that there is probably not enough time to get it done this year.

So far, the apparent resolve among key policymakers in Congress and the Administration to fix or replace the ETI has satisfied the European Union. EU Trade Commissioner Pascal Lamy says he is "pleased" with the progress and that he understands the complexities involved.

OUTLOOK

Any legislative changes to the ETI regime that Congress ultimately makes will likely come at a cost to at least some of its current beneficiaries. Chairman Thomas has reportedly predicted that up to 20 percent of the current ETI users would feel the pinch.

The House Ways and Means Committee will likely take the lead in fixing the ETI. The Bush Administration has not endorsed a specific reform measure nor is it expected to put forward a replacement model, opting instead to work with House tax writers on a WTO-compliant bill. One possible option that has generated some discussion is a legislative proposal put forward by Rep. Amo Houghton (R-New York), who chairs the Ways and Means Subcommittee on Oversight. His bill (H.R. 4151) would repeal ETI while making a number of changes to the tax treatment of US multinational income to counteract the ETI benefit loses. The changes include improved interest allocation rules and a permanent subpart F exception for "active financing" income. The total tax benefit for multinationals would roughly equate the loss of ETI, or about $4 billion.

Since Congress has already tried to tinker with the FSC to make it WTO compliant and failed, a different approach along the lines of Houghton's bill may be the only way to preserve as much of the ETI benefits as possible without inviting another WTO challenge from the European Union – or worse, immediate and hefty retaliation.

DAUSTR (for China) Freeman briefs US-China Business Council of WTO Compliance

SUMMARY

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Freeman's key points include:

- USTR's reorganization on Asia responsibilities;
- The rift between expectation vs. reality on China's WTO compliance; and
- China's implementation difficulties in Beijing and Geneva, including the transitional review mechanism ("TRM")

Freeman also provided a detailed timeline for China's transitional review mechanism, and the USTR's preparations for its China-compliance report which is due to Congress on December 11, 2002.

ANALYSIS

I. Freeman Joins USTR After Reorganization

Freeman joined the USTR recently in April 2002 after the China office was reorganized. This briefing came upon his return from China and from a series of hearings before Congress.

Freeman cited the USTR's reorganization process, including the departure of Assistant USTR Jeffery Bader and how the China office is now part of the office for Japan and East Asia. He mentioned the reorganization as a slight obstacle to being able to respond effectively to the requests of Congress and other constituencies. Once complete, however, the reorganization should result in a more focused resource base on China compliance issues.

II. Status of China's Compliance Efforts

Freeman provided a status report on China's WTO compliance efforts and U.S. efforts to pressure China to comply. Freeman's sense was that China's compliance was going just as expected – not very smoothly at all. Freeman stated his surprise at the level of delay and obstruction at the highest levels of Chinese government. (We also cite the dispute over U.S. soybeans as an example of implementation difficulties.)

A. China's Difficulties with Compliance

He cited major difficulties facing China's implementation as:

- ***Institutional learning curve*** – The Chinese delegation in Geneva (many who arrived recently) have limited exposure to, and understanding of the workings of the multilateral system. Although technically strong, the Chinese delegates appear overwhelmed by the requirements of the WTO process. The controversial Transitional Review Mechanism is, Freeman suggested, an example of how Chinese expectations have led to confusion. Apparently, China thought its responsibility under the TRM would be to hand over quantities of trade data to the WTO on an appointed date (at the end of 2002), and not to answer specific policy questions on an ongoing basis. Freeman stated that he had heard a great deal of confusion from Chinese officials about the culture of the multilateral system in Geneva and are unsure how to factor in national pride when they perceived they were being singled out.

- ***Overlapping authority*** – According to Freeman, China has recently issued a report ranking the relative importance of all its various Ministries. MOFTEC was ranked 28th on that list. Add to this the fact that various Ministries are promulgating parallel and often contradictory regulation. Thus, implementation can get very complicated and territorial. For USTR, this situation makes even routine inquires to China difficult. Freeman mentioned, however, that it was difficult to tell how much of China's delay is genuine or strategic in nature.

- ***Political exhaustion*** – Freeman stressed that MOFTEC had expended considerable political capital in the accession process, and now lacked capacity to push through difficult implementation issues.

B. Dispute Over U.S. Soybean Exports

The dispute over China's ban on U.S. exports of genetically modified (GMO) soybeans highlights China's difficulties with compliance. The dispute is an example of bureaucratic confusion over China's WTO commitments, and illustrates Freeman's remarks about different Chinese ministries having layers of contradictory requirements.

China has blocked U.S. exports of GMO soybeans since March 20, 2002, citing health reasons. In response, a team of U.S. officials, comprising USTR, State Department and Department of Agriculture officials, visited China in late May 2002, but failed to resolve the matter completely. U.S. officials were able to secure information on China's interim import certificates regime for genetically modified organisms. However, they were unable to obtain from the Chinese a comprehensive list of requirements for proper approvals.

China's Ministry of Agriculture issued its GMO law in May 2001, and shortly thereafter issued detailed implementation rules. In May 2002, the Ministry of Health issued its own rules, effective July 1, 2002, and claims authority to authorize GMO products for consumer markets. While the Ministry of Agriculture regulations require testing in China, the Ministry of Health regulations forbid the import of even small quantities required for testing purposes.

The approvals that are secured last for only 90 days. China's accession commitments require approval certificates to last at least six months.

III. Transitional Review Mechanism and UTR Report on China Compliance Efforts

A. China Clashes with WTO Members Over TRM

China and WTO Members have clashed in Geneva over the functioning of the Transitional Review Mechanism ("TRM"). China agreed as part of its WTO accession to the TRM, which subjects China to annual reviews for eight years, with a final review taking place in the 10th year. Since joining, China has objected to WTO Members' raising compliance shortcomings at WTO bodies on services, agriculture, market access and other meetings. China argues that such discussions are only appropriate for the annual compliance review.

China has also objected to U.S. efforts to detail procedures for the annual review. The US has proposed that China submit pertinent implementation information at least 90 days before the various subsidiary body meetings. Under the proposed U.S. timetable, WTO members would be allowed to submit questions up to 60 days before the review. China would, in turn, be required to respond at least 30 days before the review.

China argues that such procedures have already been laid out in the accession documents. Paragraph 18 of China's Protocol of Accession calls for the General Council to review China's compliance with its accession commitments based on reports submitted by subsidiary bodies.

Freeman cautioned U.S. business not to be too surprised by China's response to compliance efforts in Geneva. He stated that China did not expect to provide value-added responses, but simply raw and opaque data. Although other key WTO members back the U.S. call for greater transparency, China has reacted most defensively towards the US.

Recently, China was questioned at the June 4-5 meeting of the WTO Services Council on the compliance of its banking, insurance and express delivery regulations. In express delivery, for instance, China has recently limited the size of packages that can be delivered by foreign express courier companies such as Federal Express. The representative of Federal Express at the Freeman briefing questioned him on this issue and Freeman's discussions with China Post on the matter.

B. USTR Report on China's Compliance Efforts

Freeman also mentioned that USTR will deliver its report on Chinese WTO compliance to Congress on December 11, 2002. USTR is to issue a Federal Register notice calling for comments in early July 2002, and will hold hearings in September 2002.

OUTLOOK

Although Freeman provided candid and insightful comments on China's compliance, he remained guarded in making predictions or veering from the Administration's policy line. He

also claimed, for instance, that the U.S. positions on steel and agriculture were entirely defensible and had had no impact on the multilateral system in Geneva – despite China's immediate reaction in requesting a panel dispute on U.S. steel safeguards.

Freeman underpinned his remarks with an encouragement, both to business and Congress, to be patient with China as it struggled with its commitments. Freeman assured those present that the USTR's office would be assertive in addressing China's compliance. Freeman also mentioned that Congress tended to prevent USTR from pursuing the bigger picture of compliance by insisting on smaller instances of non-compliance.

Freeman also pointed out that the Chinese were getting mixed messages from the US, and that China could sense that businesses weren't too unified on the issue of China compliance. Increasingly, the US seeks to encourage the EU and Japan to shoulder more responsibility in taking China's compliance efforts to task at the multilateral level.

Freeman's call for patience echoes the remarks made by other Administration officials, including recently by Undersecretary of Commerce for International Trade Grant Aldonas at the session of the Congressional-Executive Commission meeting[1] on June 6. Aldonas attributed the slow implementation to a relatively low level of commitment to the process at the ground level, and the struggle for authority among Chinese government ministries.

[1] The Congressional-Executive Commission consists of members from both chambers of Congress, as well as executive branch official. Created as part of the 2000 China permanent normal trade relations legislation (P.L. 106-286), the Congressional-Executive Commission is co-chaired by Senator Max Baucus (D-Mont.) and Representative Douglas Beureuter (R-Neb.).

US Recognizes Russia as a Market Economy; Improves Outlook for WTO Accession

SUMMARY

On June 7, 2002, the U.S. Commerce Department announced its decision to revoke Russia's status as a non-market economy (NME). This decision effectively alters the way in which the Commerce Department will calculate dumping margins for Russian companies involved in U.S. antidumping proceedings. Revocation of Russia's NME status also means that American industries, under U.S. trade law, now can file countervailing duty complaints against Russian exporters.

The U.S. decision to revoke Russia's NME status follows the European Union's own announcement on May 24 that EU member countries will recognize Russia as a market economy in EU dumping proceedings.

The U.S. and EU decisions will benefit Russia's continuing effort to join the World Trade Organization.

ANALYSIS

I. Background

The Commerce Department initiated the review on the revocation of Russia's NME status on September 26, 2001 following a request filed by two Russian steel companies - Novolipetsk Iron and Steel Corporation and JSC Severstal - with the support of the Russian government. The Commerce Department invited interested parties in December 2001 to submit comments regarding any relevant facts that the U.S. government should consider in evaluating Russia's viability as a market economy.

The Commerce Department obtained significant information from both U.S. and Russian interested parties, opposing and supporting the request, as well as from other sources including the European Bank for Reconstruction and Development, the International Monetary Fund, the World Bank, and the Organization for Economic Cooperation and Development. Rebuttal comments were submitted in late January 2002. Several law firms representing major U.S. integrated steel producers, mini mills, and U.S. nitrogen producers submitted comments opposing Russia's NME revocation request.

In addition, Russia's three largest steel producers submitted comments to bolster the Russian government's NME revocation request.

II. Rationale and Consideration of NME Revocation

Under U.S. trade law, foreign parties may request a revocation of a non-market economy country's status for the purposes of antidumping proceedings. Upon such a request, the Commerce Department is obligated to conduct an investigation to establish if the country in question can be granted market economy (ME) status. U.S. trade law stipulates that in

conducting this investigation the Commerce Department must consider six criteria. Those criteria are as follow:

- Currency convertibility;
- Free bargaining for wages;
- Foreign investment;
- Government ownership or control of production;
- Government control over the allocation of resources; and
- Other factors, considered appropriate.

If the request is made within the context of an ongoing antidumping investigation, the timeline of this investigation dictates the deadlines for the Commerce Department's determination whether or not to grant ME status. If the request is filed separately however, as was the case with Russia's ME request, the Commerce Department does not face any specific deadlines.

III. Effects on U.S. Unfair Trade Investigations Against Russian Exporters

The Commerce Department's decision will have two major influences on U.S. unfair trade proceedings against Russian exporters:

- Antidumping investigations - the Commerce Department will begin using Russian data when evaluating prices and costs in future antidumping investigations, and will no longer rely on surrogate country price and cost information.

- Countervailing duty investigations – the decision subjects Russia to U.S. countervailing duty law. Under this law the US may impose countervailing duties to offset the injury caused by subsidized imports. Non-market economies are generally exempted from the countervailing duty law on presumption that "pervasive state control in non-market economies makes it impossible to establish an effective benchmark against which the Commerce Department could measure whether a particular government action created a countervailable subsidy."

IV. Application of New Status

The Commerce Department's decision to treat Russia as a market economy is retroactive to April 1, 2002. However, the decision memo states that any ongoing antidumping investigations involving Russia will remain subject to non-market economy dumping margin calculation methodologies (because the periods of investigation pre-date the April 1 effective date). Finally, the decision memo states that for any ongoing antidumping duty orders against Russian products "the non-market economy based rates will remain in place until they are changed as a result of a review, pursuant to section 751 of the Act, of a sufficient period of time after April 1, 2002."

V. Implications for WTO Membership

The Commerce Department's decision to grant Russia ME status likely will increase the momentum for Russia's bid to join the World Trade Organization (WTO). Russian and U.S. sources agree that while the decision serves as a "supportive push" for WTO membership, it also serves to single out inherent weaknesses within the Russian economy and could prompt the Russian government to deal with issues such as banking reform and labor mobility.

However, some House and Senate members criticized the Commerce Department's decision, noting that it could weaken U.S. influence in Russia's WTO accession negotiations. They also indicated that they would "watch carefully" Russia's progress and then determine whether or not to extend normal trade relations (NTR) status to Russia.

OUTLOOK

The Commerce Department's decision to grant Russia ME status represents a major victory for Russia's foreign policy as it could facilitate Russia's bid to join the WTO. The decision also increases the chances for Russian respondents in antidumping investigations to secure more favorable duty margins because market economy calculations are usually more favorable than non-market economy calculations.

Non-market economy revocation for Russia also means that negotiating existing antidumping suspension agreements with the U.S. Government could be renegotiated under market economy terms. In addition, existing dumping orders on Russian products, including ferrovanadium and solid urea, now could be reviewed under a market economy calculation methodology. However, the April 1 effective date of Russia's ME status means that Russian exporters will have to ship these products for a significant period after April 1. Therefore, any reviews of existing dumping will not take place in the near term.

Doha Series Panel on "Truth & Consequences: Environment and Investment in the WTO"

SUMMARY

Participants at a seminar co-sponsored by the Global Business Dialogue, the Washington International Trade Association, and the National Foreign Trade Council on June 12, 2002 discussed the status of environment and investment issues in the WTO. Entitled "Developing the Doha Agenda," the symposium is the sixth in a ten-part series of seminars on WTO negotiations.

The focus of the environment panel was Multilateral Environmental Agreements ("MEAs") and their relationship to WTO rules. Overall, participants on the environment panel were optimistic that WTO members could reach a consensus to bridge differences between MEAs and WTO rules in order to avoid potential disputes. In particular, the European Union has taken the lead to bring the environment issue to the forefront of negotiations in the Doha Development Agenda. Participants were hopeful that their presentations could serve as a catalyst for discussions at the September 2002 World Summit for Sustainable Development to be held in Johannesburg, South Africa. The Summit represents an important platform for governments, NGOs and environmentalists to disseminate their views and opinions regarding making the relationship of trade, the environment and economic development.

The focus of the investment panel centered upon efforts to launch negotiations on investment rules at the WTO. The USTR official indicated support for a staged approach to WTO negotiations on investment that would limit the agreement initially to areas such as nondiscrimination and transparency. The European Commission official, however, supported a more ambitious approach to investment rules in the WTO, and believes there should be higher standards at the multilateral level than currently existing at the bilateral levels.

ANALYSIS

On June 12, 2002, the Global Business Dialogue, the Washington International Trade Association, and the National Foreign Trade Council sponsored a symposium on the growing importance of environment and investment issues in the new round of WTO negotiations. The symposium is the sixth in a ten-part series of seminars on WTO negotiations. Speakers included:

- Ms. Jennifer Haverkamp, Assistant United States Trade Representative for Environment and Natural Resources
- Mr. Petros Sourmelis, Counselor, Head of Trade Section at the European Commission Delegation to the United States
- Mr. William Krist, Senior Policy Scholar at the Woodrow Wilson Center
- Mr. Paul Hagen, International Environment Law Attorney, Beveridge and Diamond

- Mr. Joseph Papovich, Assistant United States Trade Representative for Services, Investment and Intellectual Property
- Mr. Felipe Lopeandia, Chilean Ministry of Foreign Affairs
- Dr. Stephan Canner, Vice President for Investment Policy, U.S. Council for International Business
- Mr. Renaud Lassus, Delegation of the European Commission on Trade

I. ENVIRONMENT PANEL

A. Haverkamp Articulates U.S. Perspective on Environmental Issues and the WTO

Assistant USTR Haverkamp began the discussion by highlighting U.S. objectives in the Doha negotiations. Looking back to November 2001, Haverkamp outlined the four objectives that USTR successfully accomplished in Doha:

(i) Reaffirm objectives of sustainable development;

(ii) Highlight the need for win-win scenarios, especially in the areas of agriculture, fish subsidies, and WTO-MEA cooperation;

(iii) Build upon environmental reviews especially in the areas of capacity building, eco-labeling, TRIPs, and market access; and

(iv) Promote the newly strengthened role of the WTO Committee on Trade and Environment.

Evolving Relationship Between the WTO and MEAs

Haverkamp stressed the need to examine more closely the differences and similarities between MEAs and WTO rules. While enhanced cooperation between the two is desirable, the real question becomes how to treat those countries that are parties to an MEA or to the WTO, but not subject to the rules of both. Haverkamp noted that while the potential for conflict between the WTO and MEAs is low, there have been several cases in the WTO regarding unilateral country environmental actions that raise concern, such as the 1991 GATT tuna-dolphin dispute between Mexico and the United States over a U.S. law to protect dolphins from injury in tuna nets.

In addition, she noted that there are more than 200 MEAs currently in effect; some with no dispute-settlement provisions or only basic structures, and some with extensive procedures for resolving disputes. The continual evolution of MEA dispute settlement provisions could present a problem, Haverkamp says with WTO dispute settlement rules.

Haverkamp then raised the importance of coordination at the national level to facilitate increased understanding to maintain the credibility of both the WTO and MEAs so that neither compromises the tenets of the other. She suggested the implementation of a Federal Register Notice process to allow for the continual acceptance of comments to USTR to ensure this maintenance of credibility. Haverkamp also discussed the role of the WTO Committee on Trade and Environment ("CTE") within the scope of environment, services, and goods liberalization. The CTE is unique within the WTO as it is the only structure solely dedicated to environmental issues. While primarily focusing on definitional issues, such as the definition of an environmental good, the CTE's other role is to serve as a forum where members can exchange views on the implications and developmental aspects of environmental issues in both MEAs and the WTO.

Finally, Haverkamp addressed the upcoming World Summit on Sustainable Development in Johannesburg, South Africa. She asserted it would be a key event to address NGO concerns, to revisit the environmental decisions of Monterrey and Doha, and to reassert a U.S. focus on development, promoting the idea that 'trade liberalization does alleviate poverty.'

B. Sourmelis Outlines EU Perspective on Environmental Issues and the WTO

EC official Sourmelis emphasized the importance of environmental issues for the EU and its citizens. He equated the protection of the environment to the maintenance and promotion of sound global governance, and stressed that EU leadership in Doha played a pivotal role in convincing many WTO members to take up environmental related issues in the new round of negotiations.

While the EU has taken the lead on bringing environmental issues to the forefront of WTO negotiations, Sourmelis asserted that real success depends on a better understanding of the frameworks of the roughly 200 existing MEAs. He stated that improved and transparent interaction among WTO members and MEA representatives would serve to clarify existing misgivings that WTO trade rules negatively affect the ability of MEAs to deal with global environmental problems. Given the fact that MEAs and the WTO have evolved separately and have different objectives, Sourmelis believes that the new round affords ample time to begin clarifying global trade rules to ensure they do not infringe on important MEAs.

Finally, Sourmelis pointed out that a better, more transparent, understanding of both MEA and WTO rules can enable developing countries to recognize that trade liberalization and environment protection are both important values that can coexist.

Results from Doha

Looking back to the results at Doha, Sourmelis called for a reexamination of the CTE to assess the differences between the more ambitious EU versus U.S. environment initiatives. The EU clearly compromised its environment position during Doha and Sourmelis noted that while "cooperation requires compromise," the EU plans to take full advantage of everything that came out of Doha. Finally, Sourmelis asserted that while it is difficult to predict what sort of outcome might emerge from future negotiations, he remains optimistic.

C. Krist Stresses Importance of MEA and WTO Compatibility

Krist of the Woodrow Wilson Center warned of the increased potential for conflict between international trade rules in the WTO and the international environmental rules in MEAs. Similar to Sourmelis, Krist agreed that the legal systems in MEAs and the WTO are very different. While equally valid systems, they rarely intersect and frictions arise only about 2 percent of the time. He praised the effectiveness of MEAs such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol). Both CITES and the Montreal Protocol have 175 signatories and have rather sophisticated tools to encourage compliance from both parties and non-parties. Still, Krist stressed that the "ad hoc" nature of many MEAs should be strengthened and clarified to better address issues of compliance and dispute settlement.

Areas of Potential Conflict

Krist highlighted the following WTO rules as potential conflict areas with MEAs:

- Most Favored Nation (MFN)[2] – many MEAs stipulate that their members must apply more restrictive trade provisions to non-parties than to members.

- National Treatment [3] – some MEAs include "production process method requirements" ("PPMs") that may conflict with the "like product" requirement set out in Article III:2. Most interpret the term "like products" to refer to two goods that similar, or directly competitive as substitutes. For example, the Montreal Protocol would likely apply to a machinery product or semiconductor with ozone depleting substance. However, the WTO would likely consider the finished products as "like" and therefore prohibit trade discrimination based upon how the product was made.

- Quota, Import and Export License Prohibitions [4] – some MEAs impose license requirements that could conflict with WTO rules. According to Article XI, the WTO disciplines discriminatory quotas and import/export licenses.

However, Krist noted that Article XX (General Exceptions) of the GATT could serve as a "loophole" to interface with MEAs as it specifies exemptions from GATT obligations under certain conditions. Article XX, for instance, stipulates that nothing in the WTO Agreements shall prevent the adoption of enforcement of measures "necessary to protect human, animal or plant life or health." In addition, he quoted the opening of the Marrakesh Agreement, which in effect states that trade and economic "endeavors" should seek to both "protect and preserve the environment."

[2] Article I, GATT 1994.
[3] Article III (2), GATT 1994.
[4] Article XI, GATT 1994.

Approaches to Addressing Conflicts Between MEAs and WTO Rules

Krist mentioned some of the solutions proposed by various groups to address possible conflicts between the WTO and MEAs. He touched upon three approaches:

(i) NGO Approach: Initially raised by the World Wildlife Fund, this approach works from the premise that trade measures pursuant to MEAs should be considered consistent with WTO rules – in effect, the WTO should defer to MEAs. Krist criticized this approach as weak due to the vague nature of many MEAs as well as the real risk of "green protectionism," where environmental protection is used as an excuse for protectionist trade barriers.

(ii) EC Approach: A WTO member must prove that any MEA measure in question satisfies the requirements set forth in the Article XX exception to WTO rules. The EC approach would reverse this "burden of proof" in effect requiring the WTO member (complainant) to prove the measure inconsistent with Article XX. Krist believes that while innovative, this approach does not adequately address the environmental concerns that WTO rules supersede those of MEAs.

(iii) Laissez-Faire Approach: Backed by the United States, India, Brazil and others, this approach would allow the dispute settlement process to evolve naturally between MEAs and WTO rules. It is based upon the fact that no cases have to date been brought to the WTO concerning an MEA (directly, at least); that the WTO is working towards a better understanding of environmental issues; and that the concerns of developing countries regarding a further clarification of the WTO-MEA relationship could be detrimental to progress. Krist, however, noted that this approach ignores the concerns of environmental groups and some WTO members that a future conflict between the WTO and MEAs is inevitable.

D. Hagen Provides Pragmatic Assessment of MEAs

Hagen, a private attorney at Beveridge and Diamond, who represents U.S. business interests in MEA negotiations, closed out the environment panel by providing a rather pragmatic assessment of MEAs. He reassessed the Doha Declaration's position on trade and the environment, and expressed optimism that at least one of the 21 subjects agreed upon at Doha addresses the relationship between WTO agreements and MEAs. He offered several proposals for increased U.S. Government participation in, and understanding of the economic significance of many MEAs of which the US is not a party. Hagen stressed that over the last decade environmental issues have attracted an ever-increasing level of attention from governments. At the time of the 1992 Rio Summit, the US was a participant in 50 environment-related institutions and fora, whereas by the beginning of 2002, the US participated in nearly 180.

Hagen noted that the US is not a signatory to very many MEAs; however, he cited several examples where the US worked through other countries to achieve desired results, i.e. Climate Change and the Bio-safety Protocol. Hagen asserted that traditionally the international trade community has not appreciated the important relationship between environmental issues

and the global trade agenda; however, he was optimistic that negotiations initiated at Doha could change this.

Negotiations on Key Environmental Issues Achieved at Doha

Hagen mentioned that WTO Ministers agreed at Doha to hold negotiations on the following five trade and environment issues:

(i) Relationship and compatibility between trade obligations in MEAs and existing WTO rules: Ministers agreed to assess the applicability of WTO rules to those members that are parties to MEAs with trade provisions.

(ii) Measures for the regular exchange of information and ideas between MEA and WTO officials: At present, the CTE holds annual or bi-annual meetings with MEA secretariats to discuss trade-related provisions and ways to enhance cooperation and understanding.

(iii) Criteria for obtaining observer status in the WTO: At present, the WTO prohibits observer status for international governmental organizations, such as MEAs. There are seven requests for observer status in the CTE; however, these will remain pending until a final "observer criteria" is established. (*Please see related previous reports on the issue of observer status.*)

(iv) Elimination or reductions of non-tariff and tariff barriers to environmental goods and services: Ministers agreed to hold negotiations that address these issues to improve environmental protection and facilitate trade in such goods. Examples of environmental goods and services are air filters or consultancy services on wastewater management.

(v) Improvement and clarification of WTO rules relating to fishery subsidies: Ministers called for negotiations to clarify the controversy surrounding fisheries subsidies, which many consider a trade distortion and an affront to marine ecosystems. Hagen noted that the decision to incorporate fishery subsidies into the declaration represents a major coup for environment supporters.

Hagen noted that while the CTE has proposed some mutually acceptable solutions concerning the relationship between WTO rules and MEAs, WTO Members have been unable to agree within the CTE upon compromise solutions. He stressed that the U.S. Government should take a leadership role to engage constructively with WTO and MEA members to work toward practical solutions. Hagen ended the session with an optimistic outlook toward the status of current negotiations already undertaken as well as upcoming preparations for the Fifth Ministerial Conference in Cancun, Mexico in September 2003.

II. INVESTMENT PANEL

A. AUSTR Papovich Articulates U.S. Perspective on Investment in the WTO

AUSTR Papovich introduced the topic of investment and the WTO by saying, it is "not what the WTO can do, but can the WTO do anything" regarding investment. This less than optimistic introduction seems to summarize the U.S. position on incorporating investment issues into broader WTO rules.

Papovich asserted that the US is considering a staged approach to WTO negotiations on investment, tackling first the issues of nondiscrimination and transparency. This limited approach suggests the 'less than optimistic' U.S. position that a comprehensive investment agreement, currently supported by Japan and the European Union, would maintain high standards on investment rights, especially in light of widespread resistance from developing countries. The US faced similar trials during the negotiations for the now defunct Multilateral Agreement on Investment (MAI) at the OECD. Regardless of the type and scope of any final agreement, Papovich predicted that a rigorous debate would occur at the Cancun Ministerial in 2003 about whether WTO members are even ready to launch negotiations on investment. He was optimistic that some limited form of negotiations would commence.

U.S. Goals regarding an Investment Agreement

Papovich noted that the US supports an initial investment agreement that would build confidence among WTO members on a step-by-step basis. This approach would narrow the topics for new negotiations, but would not preclude WTO members from tackling more difficult topics in a later round of negotiations. He emphasized the need to move slowly and thoughtfully as the US did with tariffs in GATT negotiations. Papovich hinted that an investment agreement might focus on a few of the goals outlined in pending trade promotion authority legislation, including transparency, non-discrimination, and the elimination of performance requirements and restrictions on the transfer of funds. The area of performance requirements is bound to draw criticism from many WTO members who support the current language in the Agreement on Trade Related Investment Measures (TRIMS).

Looking toward Cancun 2003

Papovich stressed that U.S. trade officials would discuss with U.S. businesses and trading partners to identify priority areas regarding investment. The business community has doubts that high standards and guaranteed protection for U.S. companies are possible in a broad WTO-style agreement, especially as these very issues are some of the most contentious in bilateral free trade agreement negotiations. Many U.S. businesses, however, are pleased that the Doha Declaration does not explicitly address the elements of a future investment agreement, as did an earlier draft proposed by General Council Chairman Stuart Harbinson. WTO member countries eventually agreed to revisit whether to launch investment negotiations, contingent on an "explicit consensus" for the modalities of the negotiations at the Cancun Ministerial.

These elements, which include non-discrimination, transparency and development provisions, are simply mentioned as areas for clarification for the Cancun Ministerial by the Working Group on Trade and Investment. Finally, Papovich stressed that investment was not a priority issue for the US in the new round negotiations.

B. Lopeandia Highlights Chilean Approach to Investment Negotiations

Mr. Lopeandia of the Chilean Embassy explained that during the early 1990s, Chile developed a dynamic negotiating policy, enabling the Government to conclude 48 bilateral agreements. He highlighted in particular the following successes in Chilean trade policy since 1996: (i) entered second stage of FTA with Canada; (ii) concluded market access provisions concerning NAFTA Chapter 11; and (iii) launched FTA negotiations, including investment proposals, with Mexico, Korea, the United States and the European Union.

Lopeandia asserted that if the scope of an investment agreement were limited to foreign direct investment that creates long-term productive assets in a country, it would be easier to gain support from WTO members. He stated that negotiations should strike a balance between liberalization and domestic regulations among members. In addition, he added that the right to regulate should connect to commitments on transparency, especially since this type of linkage is already included in many bilateral investment treaties.

C. Canner Presents Rather Pessimistic U.S. Business Perspective

Mr. Canner of the U.S. Council for International Business presented a rather pessimistic view as to whether the WTO process could lead to a broad, "asset-based," agreement on investment, especially in light of any guarantees of national treatment upon an investor's entry into a foreign country. He noted that so far WTO negotiations were not addressing the issues important to American businesses, such as compensation for expropriation and the ability of investors to sue for compensation arising from breaches of guarantees regarding fair and equitable treatment for investors.

Canner cited the failure to negotiate the Multilateral Agreement on Investment (MAI) as one reason why many U.S. business executives were not looking toward the WTO for a comprehensive investment agreement. While he agreed with Papovich that a staged approach to investment issues was preferable, he stated that there should be a commitment "up front" by all parties to ensure a comprehensive agreement with high standards. The primary challenge, according to Canner, is to get language that will lead to high standards, such as the language in NAFTA Chapter 11. In addition, he praised the current language in the House and Senate versions of TPA, noting that although the language is not identical, it sustains high standards. He also agreed that the amendment put forward by Senator Kerry (D-Massachusetts) would have amended the bill's language on investor-state dispute settlement, in essence weakening the high standards.

D. Lassus Defends EU Push for Investment Agreement

EC official Lassus began by stating that the WTO is the right forum for negotiating rules on investment and for clarifying rules for business. While he admitted that there were some real concerns, he strongly advocated that addressing these concerns in a multilateral setting is better than negotiating on a bilateral basis. Lassus reiterated some of the concerns shared by the US and other WTO members regarding investment. He noted adding investment to the WTO could

(i) weaken existing bilateral commitments; (ii) impede the creation of new bilateral investment treaties; (iii) increase the likelihood of disputes; and (iv) reduce company rights.

Nevertheless, he stressed that the substance of GATS already sets a precedent that could lead to investment rules on nondiscrimination and transparency. Lassus added that bringing investment into the WTO would require using "state-to-state dispute mechanisms to resolve disputes," thus changing the manner in which investors can sue for compensation under Bilateral Investment Treaties (BITs) – a welcome change for many EU businesses. WTO talks could consolidate provisions of BITs, he noted, in a multilateral framework that covered investment in a variety of sectors including agriculture, fisheries and manufacturing. In addition, he strongly disagreed that a comprehensive investment agreement would discourage WTO members from negotiating BITs with higher standards, especially as many WTO members have already negotiated bilateral agreements in the area of IPR, services and tariffs that go beyond WTO standards.

OUTLOOK

The latest in the Doha series panels debated some of the most contentious issues in the WTO, including the relationship between international environmental standards and WTO rules – and whether to launch negotiations on investment rules (and competition policy, among the four "Singapore issues") at the Cancun Ministerial. The panelists indicated that considerable differences remain among WTO Members and their constituents, both private sector and NGOs, on whether the WTO is the appropriate forum to handle regulatory issues dealing with the environment and investment.

Regarding the environment, the Doha Declaration does contain specific language on pursuing further work on MEAs and WTO rules. This work seems to be directed at understanding more about the framework of the more than 200 MEAs, and is less inclined to make radical changes to WTO provisions, such as Article XX of GATT. Regarding investment, U.S. interests are clearly skeptical of whether the WTO is the appropriate forum to pursue an ambitious agreement on investment. In light of the failed experience of the MAI at the OECD – among mostly like-minded developed countries, it appears even more difficult to reach an ambitious agreement at the WTO – with its more diverse membership, on the appropriate "high standards" sought by multinational investors. Private companies also fear an erosion of investor rights contained in bilateral investment treaties if WTO members pursue a less ambitious approach at the multilateral level. Nevertheless, the issues of environment, and to some extent investment, will be subject to greater scrutiny during the new round of negotiations.

Congressional-Executive Commission on China Reviews China's Implementation of WTO Commitments

SUMMARY

On June 6, 2002 Bush Administration officials presented their findings on China's WTO compliance efforts to the Congressional-Executive Commission on China. They agreed that while China has taken significant steps to reduce tariff and non-tariff barriers and repeal many laws and regulations in accordance with its WTO obligations, it is still too early to make an accurate assessment whether or not China will honor its WTO commitments.

The Commission urged the Administration to make a "deadline time-line" for specific WTO commitments to use as a benchmark for judging China's implementation level and performance. Administration officials noted that the GAO would publish a report in October 2002 that analyzes China's progress on WTO implementation.

ANALYSIS

I. Background on Congressional Executive Commission on China

The Congressional-Executive Commission on China ("Commission") held a hearing on June 6 regarding the status of China's efforts to comply with its World Trade Organization (WTO) obligations. The mandate of the Commission is to monitor human rights, the development of the rule of law in China, and the influence of these issues on broader matters such as national security, environment, labor, and trade.

The Commission is comprised of 23 members: nine Senators, nine members of the House of Representatives, and five senior Administration officials appointed by the President.[5] The Commission is required to submit an annual report to the President and the Congress. The Commission's first report is due in October 2002.

II. Panel Testimony on China's Compliance Efforts to Date

Co-chair of the Commission, Senate Finance Committee Chairman Max Baucus (D-Montana) along with other commissioners heard testimony from two panels.

(i) The first panel consisted of Deputy United States Trade Representative (USTR) Jon Huntsman, Undersecretary of Commerce for International Trade Grant Aldonas, and

[5] House Commission members include Reps. Jim Leach (R-Iowa), David Dreier (R-Calif), Frank Wolf (R-Va), Joe Pitts (R-Pa), Sander Levin (D-Mich), Marcy Kaptur (D-Ohio), Nancy Pelosi (D-Calif) and Jim Davis (D-Fla). Besides Sen. Baucus, Senate Commission members include Sen. Carl Levin (D-Mich), Dianne Feinstein (D-Calif), Byron Dorgan (D-ND), Evan Bayh (D-Ind), Chuck Hagel (R-Neb), Robert Smith (R-NH), Sam Brownback (R-Kans) and Tim Hutchinson (R-Ark). Also represented are senior members of the departments of State (Lorne Craner, Paula Dobriansky and Jim Kelly), Commerce (Grant Aldonas) and Labor (D. Cameron Findlay).

Government Accounting Office (GAO) Managing Director for International Affairs & Trade Susan Westin.

(ii) The second panel consisted of Chairman of the American Chamber of Commerce in Beijing Chris Murck, Professor of Law at the University of Washington Donald Clarke and AFL-CIO Consultant Jeff Fiedler.

While the Administration officials stressed that it is still "too soon to tell" when it comes to making an accurate assessment regarding China's WTO implementation efforts, they commended China's efforts to date, noting that the next phase is to ensure that China follows through with its commitments. Aldonas reminded the Commissioners that the "primary goal" in the commercial bilateral relationship between China and the United States remains "early, transparent, and measurable progress on compliance" of WTO commitments. In addition, he noted that the addition of five commercial officers to the Department of Commerce's (DOC) China desk and monthly interagency (USTR, DOC, State and others) meetings to address WTO compliance and U.S. business concerns serve to help identify and address problems with China's implementation.

With respect to the improvement of labor and human rights, Aldonas emphasized the strong connection between WTO compliance and the development of the rule of law in China. While there is disagreement within the Commission over the extent to this linkage, Senators Baucus and Levin stressed that the role of the Commission should be to encourage China in its development of the rule of law and internal infrastructure to meet WTO requirements.

Huntsman noted that China's leadership seems both willing and ready to take on the challenge of its WTO obligations; however, the United States must accept that there will be "bumps along the way" and work to encourage, rather than criticize, China's efforts. While China's leadership seems ready to tackle the challenges inherent in its WTO commitments, the country faces many challenges both from provincial and municipal governments outside the scope of Beijing's influence that could resist the Capital's directives to comply with WTO obligations. Still, Huntsman pointed out that China has substantially reduced tariffs on industrial and agricultural goods, begun to remove non-tariff trade barriers, and repealed many non-WTO compliant laws and regulations. He asked the Commission for patience and to take into account both the practical and cultural adjustments required of China to progress with its WTO commitments.

OUTLOOK

The first annual GAO report is planned for October 2002. Westin noted that the report would assess China's progress to implement WTO obligations and chart the development of the rule of law as it relates to both business and human rights issues since China's formal accession to the WTO last December. She reiterated the position of both Huntsman and Aldonas by saying that China is still only six months into the WTO implementation process and, therefore, it is "too soon to tell" just how well China is doing.

Rule of Law in China Seminar

SUMMARY

On June 21, 2002, the Global Business Dialogue, Inc. hosted a colloquium on "China, Law and the WTO: Perspectives on an Evolution." The colloquium featured short presentations by four China trade experts, with a question & answer period following each speaker. The nature of the briefing was off the record.

The four speakers were:

- **Ira Wolf** – Representative of the Congressional Executive Commission on China
- **Charles Freeman** – Recently appointed Deputy United Stated Representative for China, Taiwan, Hong Kong and Macau
- **Richard Ferris** - Director and Co-Chair of the International Section of the law firm Beveridge & Diamond, P.C.
- **Hongjun Zhang** - Senior Consultant with the International Section of Beveridge & Diamond, P.C.

ANALYSIS

I. Ira Wolf Urges Stronger Freedoms

The first speaker was Ira Wolf, who currently works with the Congressional Executive Commission on China (Commission). Wolf has previously worked over 14 years in the Asia Pacific at both Motorola and Kodak companies. He has also held key USTR positions responsible for the Asia Pacific region.

In his current work at the Commission on China, Wolf is closely monitoring China's progress on improving its rule of law. Wolf believes rule of law is critical because it is the underlying foundation for both international trade and human rights—the two primary interests of the Commission. To evaluate China's rule of law development, Wolf considers political and religious freedom, freedom of the Internet, commercial rule of law, and protections for lawyers and prisoners.

II. Charles Freeman Comments on WTO Implications

Charles Freeman is the new Deputy Assistant USTR for China, Taiwan, Hong Kong and Macau. Freedman has previously worked for the Asia Foundation, the International Herald Tribune and members of the U.S. Congress.

- Freeman suggested that China might have joined the WTO in order to use the foreign pressure to coerce domestic constituencies to change and liberalize.

- When asked about how well China was implementing its accession concessions, Freeman claimed the process was proceeding as well as was realistically possible. Freeman reported that he felt that the top levels of the Chinese government were putting a good faith effort into implementing China's WTO provisions. However, Freedman reiterated that the USTR would seek total and complete enforcement of all of China's commitments.

- The areas where Freeman was most concerned about China's performance were agriculture and intellectual property rights.

- Freeman noted that China's WTO delegation was very talented. However, they were still adjusting to the medium of multilateral interaction. As far as Geneva diplomacy is concerned, China remains in the learning phase.

III. Richard Ferris and Hongjun Zhang, PhD Comment on Environment and Health Laws

Richard Ferris is the Director and Co-Chair of the International Section of the law firm Beveridge & Diamond, P.C. Ferris has advised the Chinese government, multinational corporations, and trade associations on environmental and health law.

Hongjun Zhang is Senior Consultant with the International Section of Beveridge & Diamond, P.C. He was formerly a Director with the Environmental Protection and Natural Resources Conservation Committee of China's National People's Congress.

Ferris and Zhang co-wrote an article entitled "The Challenges of Reforming an Environmental Legal Culture: Assessing the Status Quo and Looking at Post-WTO Admission Challenges for the People's Republic of China".

Ferris and Zhang spoke about how China's environmental and health laws were still in a relatively nascent level of development. This is partly because the Chinese are still working to improve its ability to draft clear and enforceable laws. Also, progress has been slowed by China's general lack of legal transparency. Finally, China does not yet have the resources or capacity to research and evaluate all the information necessary to passing effective health and environmental laws.

OUTLOOK

While experts are generally pleased with the progress China has made in its WTO implementation efforts, almost all agree that much work remains. A benchmark for China's development and one of its most pressing concerns is the continual improvement of its rule of law system.

WTO WORKING BODIES

Update on Negotiations of WTO Rules: Antidumping, Subsidies and Regional Trade Agreements

SUMMARY

The large majority of WTO Members in Doha overcame considerable resistance by the United States and reached agreement on negotiations on the Anti-Dumping ("AD") and Subsidies and Countervailing Measures ("SCM") agreements. In addition, Members agreed to launch negotiations on regional trade agreements and fishery subsidies (the latter not discussed below).

Paragraph 28 of the Doha Declaration reads (emphasis added):

In the light of experience and of the increasing application of these instruments by members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants. In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase. In the context of these negotiations, participants shall also aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries. We note that fisheries subsidies are also referred to in paragraph 31.

We discuss below the status since Doha of negotiating proposals on the agreements on antidumping and subsidies, and disciplines on regional trade agreements.

ANALYSIS

Antidumping Agreement

Negotiations on the Antidumping Agreement aim at "clarifying and improving" disciplines "while preserving the basic concepts, principles and effectiveness" of these agreements and at the same time preserving "their instruments and objectives." The last reference was added at the insistence of the United States, which intends to preserve, to the furthest extent possible, its domestic trade remedy laws (or "instruments").

Negotiations will also take into account the needs of developing and least-developed countries. It was agreed that in the initial negotiating phase, participants would indicate which provisions of these two agreements they think should be the subject of clarification and improvement in the second phase of negotiations.

Developed and developing countries alike are interested in pursuing negotiations on AD and SCM issues. In fact, developing countries are becoming more frequent users of antidumping actions – a point stressed by the United States during Doha Ministerial preparations.

Recently, Brazil, Chile, Colombia, Costa Rica, Hong Kong, China, Israel, Japan, Korea, Mexico, Norway, Singapore, Switzerland, Thailand and Turkey, referred to as the Negotiating Group on Rules ("NGR" or "Group"), offered the following 12 proposals in an effort to clarify and improve the existing WTO antidumping ("AD") disciplines.

Given the negotiating mandate, it should be clear that most proposals seek clarification and improvement of existing disciplines and do not seek to add or eliminate entire provisions or concepts. Moreover, although all participants agreed to indicate which provisions of the agreements merited clarification and improvement, the proposals of the NGR represent the most significant proposals thus far.

India and Brazil have also provided specific proposals. Where they are distinct from the NGR proposals, they have been indicated. China, which has not submitted a proposal, has been vocal in its criticism of current WTO disciplines on trade remedies (since it is often a target). China has pursued its first WTO dispute case against U.S. Section 201 steel safeguards – safeguards, however, are not explicitly part of the Doha Round mandate.

We address in particular developing country priorities in the antidumping negotiations, which at times coincides with developed countries' objectives. A general theme throughout the discussion below is the search by developing countries to reduce the ability of investigating authorities to make arbitrary decisions.

Therefore, many of the proposals often seek elaboration of existing criteria or clear benchmarks or thresholds. Practical experience since the Uruguay round, however, indicates that these mechanisms are easily circumvented. Thus, in the end, developing countries may opt instead for delineating specific time periods as the preferred mechanism for controlling investigating authorities.

Note that the order of the proposals is not indicative of developing country negotiating priorities but rather mirror the order utilized in the AD agreement itself.

A. Sales in the "Ordinary Course of Trade:" AD Article 2.2.1

Fundamentally, this proposal of the NGR seeks to set more exact and representative guidelines for investigating authorities that the Group hopes will curtail investigating authorities' ability to arbitrarily find sales to be outside the "ordinary course of trade."

Article 2.2.1 is the applicable provision the Group proposes clarifying. Article 2.2.1 establishes that sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit costs of production plus other costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the investigating authorities determine that such sales:

a. are made within an extended period of time (normally one year but shall in no case be less than six months);

b. are made in substantial quantities (weighted average selling price of the transactions under consideration for the determination of the normal value is below the weighted average per unit costs, or the volume of sales below per unit costs represents not less than 20 per cent of the volume sold in transactions under consideration for the determination of the normal value); and

c. are at prices which do not provide for the recovery of all costs (prices which are below per unit costs at the time of sale are below weighted average per unit cost) within a reasonable period of time.

The Group is seeking specific clarification on the definition of "extended period of time" and whether the investigating authorities should be allowed to disregard sales below cost even when prices in the domestic market of the exporting country provide for the recovery of all costs during the period of the dumping investigation.

Comment:

The Group hopes that the result of having more exact and representative standards will be a greater number of low priced home market or third country market sales being found to be within the ordinary course of trade and, thus, being factored in for price comparison purposes. These "qualifying" home or third country market sales will have the direct effect of lowering dumping margins since their inclusion will lower normal value and thus decrease the weighted average margins. The Group also hopes that more exact and representative standards will tolerate two common business realities. These involve either a start-up company or a company introducing a new product. In both scenarios, there may be a temporary period in which a company may sell below the cost of production until their unit costs begin to fall. Eventually, after the start-up period, the company begins to sell at prices above the cost of production and recovers all start-up costs that were initially incurred. It should be noted that U.S. antidumping law provides for the start-up company scenario so developing countries may use their experience with the U.S. to guide their negotiations on this point.

Finding a greater number of low priced home market or third country market sales to be within the ordinary course of trade will have the immediate effect of lowering margins of dumping.

B. <u>Constructed Value: AD Article 2.2.2</u>

This proposal of the NGR seeks to set guidelines that are less discretionary when investigating authorities must resort to calculating constructed values. By its nature, the calculation of constructed value involves the "creation" by investigating authorities of a value to which export prices will be compared. This proposal seeks to keep this "creation" process in check by limiting discretionary authority.

Article 2.2.2 provides for three discretionary options for calculating profits as well as administrative, selling and general costs ("SG&A") if such amounts cannot be determined based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. Thus, to the NGR the current AD Agreement does not provide clear guidance for the use of information used to calculate constructed value. To the Group, the failure to elaborate on a general principle leads to anomalous results and merits "clearer, more comprehensive and representative criteria when calculations of constructed value are made."

Comment:

When investigating authorities calculate constructed value there are various assumptions or preferences of the investigating authorities that can increase the dumping margin. In U.S. practice, for example, calculations of interest expenses and foreign exchange gains and losses also allow for discretionary authority. The Group hopes that by setting more precise and predictable standards investigating authorities' discretion will be limited. Thus, constructed value prices may result that, when compared to export prices, will contribute to more predictable dumping margins.

C. Cyclical Markets: Article 2.4

This proposal of the NGR seeks to set guidelines for investigating authorities that more accurately reflect market realities. Markets, and especially commodity markets, are not constant and prices can fluctuate markedly. Often, due to market fluctuations, it will appear to investigating authorities that foreign producers are dumping their merchandise if the market cycle is not considered.

The NGR proposal proclaims that antidumping rules should reflect market realities. To the Group, Article 2.4 makes clear as a general principle that any comparison between prices must be "fair." Specifically, Article 2.4 states, "A fair comparison shall be made between the export price and the normal value." Yet, to the Group, there are many instances, particularly in the perishable goods sector, where authorities apply unreasonable mechanical rules at the expense of fairness. The NGR specifically seeks clarification regarding whether industries should be considered to be "dumping" in down months, even though prices will quite predictably increase in a few months due to cyclical demand factors. The Group also seeks clarification on whether it makes sense to punish exporters who happen to be located in regions with different seasonal cycles, so that high supply and lower prices can occur at times when there may be seasonal shortages in other markets. To this end the Group believes that since many perishable goods are critical sources of foreign revenue for developing countries, it does not make sense to ignore the basic principle of a "fair comparison" to create artificial dumping margins.

Comment:

Often domestic petitioners file dumping petitions to coincide with downturns in the market cycle in order to strengthen their injury argument. Given the cyclical nature of certain markets, the NGR considers it unfair to allow petitioners to carve out the favorable portion of a

market cycle while ignoring those portions that are unfavorable. By improving the AD agreement by taking into account market cycles, the NGR hopes to preclude investigating authorities from basing their decisions on limited information. The NGR hopes to avoid other market phenomena by this proposal as well. Again, since some markets are cyclical, dumping margins can be hugely distorted since a sale of Product A could enter the home market of the producer or exporter at the peak of a market cycle at a corresponding high price while an identical sale of Product A could enter the investigating authority's market at the bottom of the market cycle at a corresponding low price. This scenario would produce substantial - and unfair to the NGR in the larger market cycle context - dumping margins.

This proposal is also related to the proposal on "zeroing." In this context, investigating authorities may find "positive" dumping during the low points in a market cycle and find negative dumping during the high points in the same market cycle. See "Prohibition of Zeroing" below for a more detailed discussion of this issue. Large agricultural countries in the southern hemisphere such as Argentina are likely to pursue the issue of cyclical markets given the cyclical nature of agricultural markets and the opposite growing season.

The major users of the dumping rules - the U.S. and the EU – would oppose a proposal that would bind their investigating authorities to factoring broader market cycles for dumping calculations as well as injury purposes, even though market cycles are often considered. Mandatory consideration of broader market cycles would eliminate some of the control petitioning parties have in structuring a petition for relief or at a minimum would make the process more difficult. Acceptance of this type of proposal, therefore, at a minimum would create more uncertainty of success for petitioning industries with respect to selecting a favorable period of investigation.

D. Prohibition of Zeroing: Article 2.4.2

As mentioned briefly above, this proposal of the NGR seeks to set guidelines for investigating authorities that recognizes negative dumping margins. That is, situations in which export prices are higher than home market prices. The negative dumping margins offset any positive dumping margins that may exist and, overall, there may be no dumping. If the investigating authorities ignore the negative dumping margins, then the singling out and consideration of the positive dumping margins alone creates dumping where none would otherwise exist.

To the NGR, average dumping margins by definition should be based on the average of all comparisons, including those that generate negative margins. The Panel and Appellate Body ("AB") in *Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* have ruled that zeroing practice is inconsistent with Article 2.4.2. Therefore, to the NGR Article 2.4.2 should be clarified so as to explicitly rule out zeroing and thus, codify the AB finding in *Bed Linen from India*.

Comment:

Essentially, countries that utilize zeroing provide relief to petitioners for any and all instances of positive dumping regardless of whether there have been instances of negative dumping. The clear effect of adopting the above proposal would be more findings by investigating authorities of no or *de minimis* dumping. The primary users of the antidumping disciplines, especially the U.S., would surely oppose this proposal precisely because it would not allow investigating authorities to grant relief for any and all instances of dumping. The EU has announced its intention to review past cases for all instances of zeroing whereas the U.S. remains resistant to prohibitions on zeroing.

E. Cumulative Assessment of Injury: Article 3.3

Countries that have made frequent use of their antidumping laws have received much criticism for abuse of the cumulation provision of Article 3.3. The NGR and others have given up on an outright prohibition of cumulation and have opted instead for imposing additional constraints on when cumulation is appropriate.

For example, the NGR seeks to clarify the concept of "conditions of competition" as it applies to cumulation. Article 3.3 of the current AD Agreement recognizes the general principle of cumulatively assessing injury, if the authorities determine, among other factors, that a cumulative assessment of the effects of imports is appropriate in light of (1) the conditions of competition among the imported products and (2) the conditions of competition between the imported products and the domestic like product. To the NGR, however, the Agreement does not establish what factors should be analyzed in making a "conditions of competition" determination. As a result, according to the Group, inappropriate determinations related to the "conditions of competition" can be made.

The NGR, therefore, proposes that specific factors should be considered in evaluating the conditions of competition among the imported products and between such products and the domestic like product.

Comment:

The foundation of the NGR's proposal is that each country has a right to a separate finding that its product, as imported, is or is not causing injury. Therefore, to the NGR, cumulation should occur only in extraordinary circumstances. In the U.S. system, however, only a "reasonable overlap" of competition is necessary to cumulate countries. Given this relaxed standard, developing countries that ship small volumes of imports are often targets of cumulation and, thus, are certain to press for improvements in the cumulation provisions. If successful, the standard would become more demanding and a more substantial finding of actual competition between products would be required in order for the products to be treated as identical in terms of their ability to cause injury. Developing countries are also apt to be more suspicious of any U.S. or EU proposals on cumulation in the Doha Round as it was not expected that the U.S. and EU would use the cumulation provision in the manner that they have since conclusion of the Uruguay Round.

Most countries that use their dumping laws frequently will be reluctant to include additional "conditions of competition" factors to control their decisions on cumulation, as cumulating many countries with small volumes of imports is often the only manner in which domestic industries are able to show injury. Even if adopted, however, a requirement that certain specific factors be considered when making a conditions of competition determination could have little practical effect if investigating authorities are allowed to cumulate based on a single specific factor deemed "determinative." Given this reality, developing countries may attempt to narrow their cumulation proposal to imports from developing countries or they may propose that cumulation of imports from a particular country be prohibited when imports from that country comprise less than 3 percent of *market share*.

Alternatively, developing countries may wish to consider arguing that cumulation be made discretionary, rather than mandatory, on a consistent basis regardless of whether countries are making "present injury" or "threat of injury" determinations, and regardless of the type of investigation at issue. For example, under U.S. law, cumulation is discretionary for threat determinations, yet mandatory for present injury determinations. Even with regard to present injury determinations, cumulation is mandatory in the context of an initial determination of injury, but discretionary in the context of a sunset review. It is at best an open question, however, whether developing countries would be better off if cumulation were made discretionary in all contexts, as such a scheme might open the door to more politically based decisions.

F. Causal Relationship between Dumping and Injury: Article 3.5

Similar to the proposals on "Ordinary Course of Trade" and "Constructed Value," the NGR seeks to establish more rigorous procedures and criteria in an effort to curtail discretion in the investigative process.

To the NGR, the AD Agreement does not sufficiently describe methodologies for establishing a causal relationship between dumping and injury, apart from the basic principle provided in Article 3.5 of the Agreement. They point out that, in practice, investigating authorities too often impose AD measures even when factors other than dumping are the more important causes of the injury being experienced by the domestic industry.

Therefore, the Group proposes that the obligations set forth in Article 3.5 should be rigorously observed and that, moreover, Article 3.5 merits further elaboration. Specifically, the NGR seeks to improve and clarify the Agreement by developing the procedures and criteria utilized to analyze the causal relationship between imports and injury. Thus the Group seeks to ensure that, even in the presence of other factors, a causal relationship will be found only when there is a clear and substantial link between the dumped imports and the injury.

Comment:

At a minimum, the effect of attempting to disentangle multiple causes in an injury investigation could lead to increased reliance on statistical models. The effort to establish a quantifiable link between injury and imports often leads to use of a statistical construct – usually, a "but for" analysis. Currently in the U.S., no USITC Commissioner utilizes consistently a "but-

for" analysis**.** These models, however, rely on assumptions made by the investigating authorities concerning economic factors such as supply and demand elasticities and, therefore, are not infallible. Nonetheless, it can be argued that it becomes much more difficult to make undisguised political decisions regarding the existence of injury if an investigating authority is forced to utilize statistical models and justify the results of those models in their opinions.

G. Threat of Material Injury: Article 3.7

The NGR hopes to specify additional "threat of material injury" factors to be considered in the same manner as Article 3.4 articulates the impact factors that the investigating authorities *must* examine for purposes of finding present injury. Currently, Article 3.7 sets out only four factors that the investigating authorities *should* consider. In essence, the NGR seeks to clarify and improve the description of the factors to be considered so that investigating authorities have more concrete guidance in their determinations.

Comment:

Injury findings based on threat alone are often tenuous. The proposal seeks, therefore, to make the prospective nature of any threat analysis less discretionary and more predictable in an effort to keep deficient cases from going forward. Indeed, many cases based on threat of injury alone would very likely fail if investigating authorities were obliged to conduct a more rigorous analysis in making their threat determinations. Much like the proposal on cumulation, however, even if adopted, the specification of factors to be considered could have little practical effect if investigating authorities are allowed to consider any one of these factors to be determinative, thereby creating a threat of injury where none may exist.

H. Threshold Under Article 5.8

This proposal of the NGR should be understood in light of the previous proposals on calculation of constructed value, cyclical markets, and zeroing. If the *de minimis* levels on negligible volumes and dumping are raised while proposals on constructed value, cyclical markets, and zeroing drop developing countries' import volumes and dumping margins then more developing countries may escape investigations under the *de minimis* provisions.

To the NGR, because dumping margin calculation methodologies employ numerous assumptions, the current 2 per cent dumping margin *de minimis* level is not sufficient to reflect the high degree of variance and uncertainty resulting from crude methodologies. The NGR adds that because the volume of total imports is often small the current 3 per cent negligible volume threshold is not sufficient to justify injury. Therefore, the NGR proposes to raise the current *de minimis* and negligibility thresholds under Article 5.8. The Group, however, does not propose specific target thresholds. This proposal is moderate in contrast to the proposal from India. India is proposing to raise the *de minimis* dumping level to 5 percent and to scrap completely the 7 percent collective threshold for negligible imports.

Comment:

The Article 5.8 *de minimis* proposal is a major priority for developing countries. Much of the motivating force behind the NGR's Article 5.8 proposal derives from the perception that developing countries are unfairly treated with respect to the *de minimis* import volume provision. For example, U.S. petitioners routinely abuse this provision. In the hot-rolled steel petitions that were filed against 20 countries, some countries were included only to take advantage of the 7 percent negligibility exception.

However, raising the *de minimis* levels alone could have little practical effect since investigating authorities can always find rationales to increase the dumping margins above any threshold. Obviously, the higher the threshold the more difficult it will become to find a rationale to increase the margins. This would apply to the 3 percent negligibility provision for injury as well. If investigating authorities are able to find rationales to maintain dumping margins above *de minimis*, then this proposal could have the effect of raising developing countries' dumping margins from 3.1 percent to 5.1 percent (i.e. just above *de minimis*). In light of this reality, developing countries may propose instead a definite time period for measuring any *de minimis* level. This would apply to the 3 percent negligibility provision for injury as well.

Or developing countries may narrow any proposal to developing countries alone – that is, a special and differential treatment provision under Article 5.8 for developing countries. The proposal might be similar to the provision in Article 9.1 of the Safeguards Agreement. Article 9.1 provides for the exclusion of developing countries whose imports are less than 3 percent of total imports of the product, unless all such countries subject to simultaneous investigations exceed 9 percent. This approach would not necessarily provide any relief. It could simply lead complainants to include even more "small" countries in AD cases, simply in order to satisfy the 9 percent threshold. Some developing countries that otherwise would have escaped being named in petitions might be included simply because petitioners will need enough "small" countries to satisfy the 9 percent threshold.

I. Facts Available: Article 6.8

The "facts available" proposal of the NGR may prove to be one of the most difficult. The reality of the use of "facts available" is that investigating authorities are confronted in every investigation with distinguishing between good faith efforts to provide information and deception and subterfuge. The AD Agreement provides for the use of "facts available" as a tool to facilitate investigating procedures. To the NGR, this methodology, however, is often used to penalize producers or exporters who cannot submit certain data or who cannot submit certain data within the strict timetables established. This can be particularly frustrating to developing countries that often do not have the ease of access to statistics that is the norm in developed countries. The NGR feels that now, in the Doha Round, it is appropriate to elaborate more stringent rules to provide more clarity to discipline the excessive use of "facts available."

Comment:

The Panel and Appellate Body in *U.S. – Hot Rolled Steel from Japan* have ruled that even in circumstances in which a respondent country submits late information, the investigating authorities cannot reject the information and use "facts available" if the information is provided

"within a reasonable period." Therefore, developing countries may seek to clarify Article 6.8 so as to explicitly limit the use of "facts available" in light of the findings in *U.S. – Hot Rolled Steel from Japan.*

In the end, it may be impossible to establish standards that aid investigating authorities in distinguishing correctly between good faith efforts and deception. Developing countries may be more successful at obtaining increased opportunities to provide information especially if the information required is not vital for the calculation of the dumping margin. Thus, instead of achieving greater regulation of investigating authorities' instinct for identifying truthfulness, developing countries may instead receive increased opportunities to provide information before investigating authorities resort to "facts available" and "adverse facts available."

J. Lesser Duty Rule: Article 9.1

In essence, this proposal of the NGR seeks to give life to Article 9.1, the lesser-duty rule.

Article 9.1 states that if a duty is imposed that "the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry." To the NGR, AD duties are specifically designed to counteract injury being suffered by the domestic industry. Therefore, the NGR proposes that it is not appropriate to apply AD duties that are higher than necessary to counteract injury. The NGR further proposes that it would be more appropriate to adjust the dumping margin to reflect the degree of underselling.

Comment:

Article 9.1 of the current AD Agreement encourages, but does not require the importing country to apply the "lesser duty" rule - a duty no higher than that necessary to offset any injury being suffered by the domestic industry. If the proposal is accepted that the dumping margin reflect the degree of underselling then one of the practical effects will be that the dumping margin will be calculated by comparing import prices to domestic prices with the difference setting the duty. It is not clear if the NGR is proposing a mandatory application of the "lesser-duty" rule. India and Brazil, on the other hand, are clearly proposing a mandatory application of the "lesser-duty" rule.

The NGR may be successful in convincing the EU to accept some type of lesser-duty rule since the EU already applies the lower of the dumping margin or the injury margin.

K. Sunset of Anti-Dumping Orders: Article 11.3

From the outset it should be noted that the sunset review negotiations during the Uruguay round nearly caused a collapse of the round. Thus, negotiations on the sunset review provisions of the AD agreement in the Doha round should prove equally contentious.

The NGR and the primary AD users have a fun0amental disagreement on the purpose of the sunset provisions. To the NGR, there must be an end to *de facto* continuation of AD orders. The general rule in the current AD Agreement is that anti-dumping orders should be terminated

after 5 years. The NGR argues that, in practice, however, an expansive use of the exception turns the continuation of the order into a *de facto* practice. The Group feels that this practice can no longer be justified and specifically points out that the absence of exports alone cannot be deemed to establish the likelihood that injurious exports will resume in the future. Furthermore, to the Group, neither can mere allegation or remote possibility be enough to establish the likelihood continued injury. In sum, the NGR proposal seeks an end to *de facto* continuation of AD orders.

Comment:

Because Article 11.3 of the Agreement already contains rather bold language requiring termination of AD orders after 5 years, developing countries may end up fighting for a clarification and improvement of the "likely to lead to continuation or recurrence of dumping and injury" standard. Currently, the U.S. approach is to continue orders unless it is demonstrated that it is "impossible" for injury or dumping to recur. Both the USITC and the U.S. Department of Commerce issue affirmative sunset review determinations if injury or dumping is "possible." The European Commission has a similar approach. One approach that may be successful for developing countries is to clarifying that the "likely" standard of Article 11.3 is not a "possible" standard but a "probable" standard. Certainly, a proposal requesting a mandatory termination after 5 years - on its face - appears to be outside the scope of the negotiating mandate.

Moreover, there have also been proposals on prohibiting back-to-back AD investigations (e.g. no investigations within one year of termination of an order). The primary AD users will be under tremendous pressure domestically to reject any combination of proposals on modifying the sunset provisions as well as a prohibition on back-to-back AD investigations.

One final open issue upon which the AD Agreement is silent is whether cumulation is permitted in sunset reviews. A clarification on this point appears to fit within the scope of the negotiating mandate.

L. Public Interest: Article 6.12

Fundamentally, this proposal of the NGR seeks to give life to Article 6.12 and would force investigating authorities to consider the greater public interest before application of an AD duty.

The current AD Agreement imposes no substantive obligations on the authorities to take the broader public interest into account. The NGR proposal is to strengthen the current AD Agreement in order to ensure that relevant information pertaining to the public interest is taken into account in a more substantive manner. Specifically, the NGR is proposing that the investigating authorities take into account the interests of the other economic sectors affected by the AD measure.

Comment:

Since Article 6.12 already includes "public interest" considerations, the proposal falls within the parameters of the negotiating mandate (i.e. clarifying and improving disciplines while preserving the basic concepts, principles and effectiveness of the Agreements and their instruments and objectives). Article 6.12 states that authorities must provide opportunities for industrial users and representative consumer organizations "to provide information which is relevant to the investigation regarding dumping, injury and causality." The EC law goes even further. So the EC might not oppose, at least in principle, a proposal to include users and consumers as "interested parties."

Although the USITC and USDOC are not specifically required under U.S. law to consider the harm to consumers and end users that the implementation of AD measures will have, these agencies are required to provide public notice and to permit any party, including consumers and end users, to participate in the proceeding by filing briefs and testifying at agency hearings. However, the ITC does not necessarily seek the consumers' and end users' view point on how the imposition of any AD measure would harm them, but rather seeks information such as: how, whether and under what circumstances imports and domestic products are substitutable, interchangeable or fungible, and compete with each other in the U.S. market; information on prices of imports and domestic products; and other similar information relating to material injury *to the domestic industry*. If the objective is to include a "public interest" consideration in the AD Agreement to require administering authorities to take into account any adverse impact that the imposition of AD measures will have on consumers and end users, developing countries are apt to do so without providing consumers and end users status that must be interpreted under U.S. law as "interested party" status (*i.e.*, access to confidential information under administrative protective orders ("APO") and rights to challenge the USITC and USDOC determinations in a court of law).$

II. Agreement on Subsidies and Countervailing Measures (SCM)

From the outset it should be noted that the NGR and individual countries exhausted a great deal of effort in the development of their AD proposals for the Doha Round. The same cannot be said of the Subsidy and Countervailing Measures (SCM) proposals. Indeed, the SCM proposals from India constitute the universe of SCM proposals thus far and are the proposals that are analyzed below.

As with the AD proposals, recall that the negotiating mandate states that the aim of the negotiations is to clarify and improve the AD and SCM disciplines while preserving the basic concepts and principles of these agreements while at the same time taking into account the needs of developing and least-developed countries.

India is one of the few Members to have made proposals on SCM disciplines. India argues that there are several disadvantages faced by industries in developing countries as compared to their counterparts in developed countries. Examples include the high cost of capital, low level of infrastructure development, inadequate integration and organization of the economy, and poorly developed information networks. Consequently, India argues that it is recognized that the state must assume a more active and positive role in assisting its industry and thus the

SCM agreement has provided for certain special and differential treatment ("S&D") for developing countries.

However, India continues, the experience since the establishment of the WTO has shown that the S&D provisions have been inadequate to meet the concerns of developing countries.

Specifically, states India, the WTO agreements have been inadequate in ensuring that developing countries secure a share in the growth in international trade. To India, this is in part due to the imposition of countervailing duties against products originating in developing countries in a large number of cases. India cites to the fact that out of the 67 cases in which various countries undertook countervailing duty action during the period from January 1, 1995 to June 30, 2001, more than 65 percent of those actions were against developing countries.

In light of the above, India argues that it must be recognized that certain subsidies are crucial to the process of industrialization and to the economic and social development of developing countries. India proposes, therefore, that the provisions of Article 27 be re-evaluated so as to address the needs of developing countries regarding subsidies. Specifically, India proposes:

A. SCM Article 27.10

A new provision should be added in Article 27.10 to provide for countervailing duties on imports from developing countries being restricted only to that amount by which the subsidy exceeds the *de minimis* level.

Given the current *de minimis* levels for developing and least developed countries, developing countries' subsidies would be compared against a 2 percent subsidy baseline and least developed countries' subsidies would be compared against a 3 percent subsidy baseline.

B. SCM Article 27.10(b)

Article 27.10 (b) shall be amended to provide for countervailing duties not being imposed in the case of imports from *developing countries* where the *total* volume of imports is negligible, i.e. 7 per cent of total imports.

The negligibility threshold in the AD agreement is 3 percent for individual country import volumes and 7 percent for aggregate import volumes. This proposal is narrower in that it only would apply to total import volumes from developing countries. However, as stated in the commentary to the AD Article 5.8 proposals above, raising the *de minimis* levels alone could have little practical effect since investigating authorities can always find rationales to increase the dumping margins above any threshold. Thus, India and other developing countries may propose instead a definite time period for measuring any *de minimis* level.

C. SCM Article 27.2

Article 27.2 shall be amended so that the prohibition in Article 3.1 (a) does not apply to export subsidies granted by developing countries where they account for less than 5 per cent of the f.o.b. value of the product.

This proposal by India may be outside the AD/SCM negotiating mandate because the proposal seeks an additional exception be included to Article 27.2.

D. SCM Article 27.11

Article 27.11 shall be amended to provide for the *de minimis* level of subsidization below which countervailing duty shall not be imposed in case of imports from developing countries being raised above 3 per cent.

E. SCM Article 27.3

Article 27.3 shall be amended so that the prohibition of paragraph 1(b) of Article 3 shall not apply to developing country Members. The reference to expiry of this flexibility after five/eight years from the date of entry into force of the WTO Agreement shall be deleted. It should also be clarified that the provisions of the amended Article 27.3 shall be applicable notwithstanding the provisions of any other agreement in the WTO acquis.

This proposal by India also may be outside the AD/SCM negotiating mandate because the proposal seeks that a requirement be deleted from Article 27.3 and the addition of a new requirement.

III. Regional Trade Agreements

Developing and developed countries alike are divided in their perspectives towards disciplines on regional trade agreements ("RTAs"), which has been slated for negotiations in the Doha Declaration.

Paragraph 29 reads:

"We also agree to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations shall take into account the developmental aspects of regional trade agreements."

In particular, debate centers upon the "substantially all trade" provision of GATT Article XXIV. Developing countries have benefited from more flexible provisions applicable to RTAs under the "Enabling Clause." For example, they are not subject to the WTO's periodic examination of RTAs. Mercosur, ASEAN, the Gulf Cooperation, South African Development Community (SADC), among others, for instance, have generally favored more relaxed disciplines on RTAs.

Some developed countries like Japan and Korea have favored stronger disciplines on RTAs because they are not parties to RTAs. Recently, however, both Japan and Korea have started pursuing RTAs and appear to be softening their positions in the WTO.

Thus far, only Australia has made a proposal on reform of disciplines on RTAs. The Australian proposal emphasizes the need for "clarifying and improving disciplines and procedures" as mandated under paragraph 29 of the Doha Declaration. In relation to developing countries, Australia calls upon Members to consider:

- The extent to which agreements covered by the Enabling Clause should be subject to the provisions of GATT Article XXIV; and

- The relationship between various WTO rules on RTAs (GATT Article XXIV and its understanding, GATS Article V, Enabling Clause)

Australia addresses procedural concerns suggesting that Members take up for discussion issues such as notification requirements, legal status of Committee on Regional Trade Agreement (CRTA) examination reports and requirements of periodic reporting, with an aim of improving the effectiveness of the CRTA. Additionally, Australia's proposal calls for clarification of concepts central to the systemic debate including *inter alia* "substantially all the trade" (GATT Article XXIV), "substantial sectoral coverage" (GATS Article V), "other regulations of commerce" (GATT Article XXIV) and "substantially all discrimination" (GATS Article V) including scope of the lists of regulations permitted. The proposal also enlists for consideration certain general issues regarding the enlargement of RTAs and related issues such as the need to develop provisions on preferential rules of origin.

OUTLOOK

Although the passage of Trade Promotion Authority (TPA) in U.S. Congress remains an issue (*Please see related report*) USTR Zoellick has defended domestically the U.S. decision to agree to the rules negotiations by portraying them as an opportunity for the US to reverse WTO panel interpretations that did not lend sufficient weight to U.S. Commerce Department and International Trade Commission decisions

The WTO will hold its next ministerial conference in Cancun from Sept. 10-14, 2003. The Cancun Ministerial will coincide approximately with the midpoint of the Doha negotiations. The Negotiating Group on Rules will meet in Geneva on July 8-10, October 16-18, and November 25-27, 2002.

Discussion on Reform of the WTO Decision-Making Process

SUMMARY

For several years there has been debate about the need to reform the working procedures and even the mandate of the World Trade Organization. This has been prompted in large part by the spectacle of major public embarrassments, notably the dispute over the selection of a new Director-General in 1999 and the failure of the Seattle Ministerial Conference in the same year. However the basic issues are less dramatic, though perhaps more serious, than these unusual crises would suggest, and they will not go away. The advent of a new Director-General, Dr Supachai, in September, is stimulating more debate and speculation, because he can be expected to have his own ideas on the management of the WTO as an organization and of the multilateral trading system itself. This note explores some of the issues confronting Member governments.

ANALYSIS

I. The External Dimension

Since the Seattle Conference in December 1999 the multilateral trading system embodied in the WTO has come under unprecedented hostile public criticism from Non-Governmental Organizations and from opponents of the "globalization" of which the WTO and some other international organizations are seen as representatives and agents. In the more extreme view, trade liberalization itself is attacked as being detrimental for developing countries, but there are also specific charges: that the WTO is undemocratic or even hostile to democracy; that its procedures are secretive; that it responds to the dictation of the major economic powers or even of multinational companies and is therefore inimical to the interests of developing countries. The legitimacy of the system is called into question.

Where such criticism comes from the avowed enemies of the market-based multilateral system not much can be done at the level of the WTO to counter it: the governments which have created and sustained the system over more than 50 years must accept the responsibility to defend it vis-à-vis their public opinion, or to change it. But some of the criticism is intended to be constructive, and might give rise to practicable reforms. The need is to improve public understanding of the need for multilateral trade rules and to improve relations with NGOs and other representatives of civil society, including Parliaments. This entails greater transparency. There will be no early agreement to open the bulk of WTO meetings, or dispute settlement proceedings, to NGOs or the general public, if only because many developing countries would resist the entry of NGOs which they see as representing the concerns of richer Northern societies. But it should be possible to open more regular meetings and to hold more public symposia on specific issues, or generally for NGOs, as in April this year. Even more rapid publication of all documents, more regular consultation with Parliamentarians and provision of more information to counter false portrayals of the system are also needed.

In the last resort, however, the argument for open trade must be carried by the responsible governments in capitals. They are the only guarantors of the legitimacy of the system, since their

function is to represent the interests of all their citizens. Reform at the Geneva level will be concerned essentially with the internal dimension.

II. The Internal Dimension

The experience of recent years shows that there are four major interrelated issues which member governments will have to deal with as they seek to improve the efficiency of the trading system and of the Organization itself:

- the problem of decision making, stemming from the increasing difficulty of reaching consensus among an ever-larger and more diverse membership;
- the lack of a central policy-making or steering function;
- the problem of inclusiveness or democratic governance, which is also sometimes represented as the danger of marginalization of the smallest members;
- the trend towards law-making through dispute settlement rather than through negotiation, which itself reflects the difficulty of reaching agreement in negotiations and which threatens to overload the dispute settlement system.

III. Decision-Making Process

There is a very wide perception that the WTO's decision-making processes are outdated and cumbersome, and that the problem will get worse as the number of Members, now 144, rises inexorably towards 170. Because virtually all new Members, and about 80% of the total membership, are developing countries, this can be seen as a result of the increasing participation of developing countries in the decision-making process and of their growing assertiveness, but it also reflects the sheer difficulty of finding consensus among so many countries.

The participation of developing countries in the WTO decision-making process has become far more effective and important in recent years, but the issue of inclusiveness remains a source of tension between Members, while the difficulty of reaching consensus has on certain occasions in the last three years threatened to paralyse the system.

Virtually all decisions in the WTO are taken by consensus, which is defined as the absence of formal opposition from any Member present in the relevant meeting to the proposal submitted. Although the rules of procedure provide for voting where consensus cannot be reached, and on the grant of waivers, voting on disputed issues has been extremely rare throughout the history of GATT and the WTO. Even the crisis of disagreement over the appointment of the Director-general in 1999, with the membership evenly divided, was resolved without voting, and waivers are not put to the vote unless full agreement is virtually certain. The United States have been strongly opposed to the use of voting, and other developed countries have almost always agreed with them. All Members would probably agree that the imposition of new legal obligations on unwilling countries by a vote would be extremely dangerous, and probably fatal for the Organization.

The standard practice has been and still is for disputed issues to be the subject of consultations, sometimes formal but very often informal, in which a solution which can be presented to the relevant body for decision is worked out. This, rather than the chairing of formal meetings, is the key role of Chairpersons, who decide with whom to consult and can also ask the Secretariat to consult on their behalf. Formal decisions are not normally sought until agreement has been reached informally. In preparing the texts submitted to Ministers at Doha the Chairman of the General Council consulted almost all members individually. In the preparation for the Seattle Conference, by contrast, it was never possible to move beyond debate in plenary meetings, and no draft Declaration could be developed. This alone would have been enough to condemn Seattle to failure. The role of the Director-General in relation to contentious issues has also been that of a conciliator, seeking consensus in informal consultations among the delegations most concerned in what became known as the Green Room process.

These informal processes have come under increasing criticism, partly because the larger membership makes any selective grouping harder to justify and partly because of the insistence on the "Member-driven" nature of the Organization.

Nevertheless, the increasing difficulty of reaching consensus on important issues has prompted the question whether the consensus rule can continue to be regarded as sacrosanct. Disparities between Members, in terms of relative size, wealth and involvement in trade are greater than ever. Many developing countries, having very small administrations and trade policy resources, tend to oppose new departures or initiatives which may lead to increased obligations or administrative burdens. Consensus was reached at Doha on the launching of new negotiations, but only after many months of near deadlock, and at the cost of further difficult decisions which will be needed at the Cancun Ministerial Conference in September 2003. Further administrative decisions needed after Doha, on negotiating structures and chairmanships, entailed more long and difficult consultations, all of which carry costs in terms of delay and distraction from substantive work.

Some delegates and observers are giving thought to possible reforms of the WTO's decision-making procedures. On 24 April India submitted to the General Council, on behalf of 15 developing countries, a paper (WT/GC/W/471) on the preparatory process in Geneva and negotiating procedures at Ministerial Conferences. The proposals it contains would have the effect of strengthening the consensus rule, for example by requiring consensus before a draft declaration is sent forward to Ministers, thus removing the right of a chairman to send forward a draft on his own responsibility. On this basis it would almost certainly have been impossible to forward a draft to Doha. Prior consensus in Geneva would also be required for the appointment of "facilitators". (The work of eight Ministers selected by the Chair as facilitators on key issues at Doha was a major contribution to the success of the meeting, but there were subsequent complaints about the manner of their selection.) It is also proposed that texts submitted should contain no compromise proposals by the Chair, but only agreed language or the listing of different options. All consultations, both in Geneva and at Ministerial conferences, should be open to all Members – i.e. not selective – although it is hinted that there might be other consultations which would not be part of the formal preparatory process.

These proposals reflect the concerns of some delegations, known as the "like-minded group," about the processes which led to the Doha result, and perhaps about the result itself. Though they refer only to Ministerial meetings, the same principles could be applied more widely, and if implemented they would increase the difficulty of work in the WTO by removing most of the flexibility and power of initiative now available to the DG and to Chairpersons, limited though that is. It is very unlikely indeed that there could be agreement on them, but they are a significant contribution to the debate about the "governance" of the WTO which will intensify in anticipation of the advent in September of the new Director-General, Dr Supachai, who can be expected to have his own ideas on these questions. A further contribution will come from the Advisory Group appointed by Director-General Mike Moore in July 2001, which is expected to publish views on these and related issues in the next few months.

In this debate delegations interested in speeding up or unblocking the decision-making process will ask themselves if it is in fact unthinkable to decide certain issues by voting. Accepting that legal obligations could not be imposed by a vote, is it possible that matters of procedure or the management of the system could be so decided? Such matters as the appointment of the DG or the launching of negotiations, even the approval of the Budget, might come into this category. But the case of the Budget exemplifies the key problem: would voting take place on a trade-weighted or a simple majority basis? The US, Japan and the 15 member states of the EU, together contribute some 65% of the WTO Budget, because contributions are trade-weighted; it is hardly conceivable that they could accept budgetary decisions by simple majority. But trade-weighted voting would be opposed by many developing countries for obvious reasons.

IV. Democratic Governance

The proposals made by India and other developing countries, described above, reflect a continuing suspicion that the system is too responsive to the wishes of the major trading powers, a suspicion which persists despite the very effective manner in which developing countries have maintained their positions - in relation to the implementation of obligations undertaken in the Uruguay Round, for example. The danger of insistence on formal procedures and consensus, however, is that it can have highly "undemocratic" results, in which the wishes of the great majority of Members are frustrated by one or two, and the economic stakes involved play no part. Consensus entails the right of veto, and at the Doha Conference India itself was able, though isolated, to impose conditions on the agreement to negotiate on investment and competition which may yet make it impossible to start effective negotiations at the next Ministerial, in Cancun. To remain relevant the system has to confront new problems and needs, but there is an inevitable conflict between the wish of the major traders to move forward, the defensive concerns of others and the limited capacity of the smaller developing countries, in particular, to negotiate and implement new obligations. Too often these tensions are played out in tests of will or brinkmanship, when what is needed is dialogue on the medium-term needs of the system.

Lack of specialized resources limits the ability of many developing countries to participate fully in the work of the WTO and to draw full benefits from WTO agreements. It is this, rather than any discrimination against them, which accounts for the "marginalization" of many small countries in the system. This explains the heavy emphasis throughout the Doha

agreements on capacity-building in developing countries, partly as a *quid pro quo* for their acceptance of the major programme of work and negotiations in the Doha Agenda. Voluntary contributions totalling more than SF30 million in 2002 have been pledged to finance this work, but the greater constraint, and it is very severe, is the capacity of the Secretariat to staff and manage capacity-building on this scale.

V. Lack of a Policy Steering Function

Unlike some other international organizations such as the IMF and the World Bank, the WTO has no executive or steering committee of limited membership in which policy can be discussed in a non-committal manner. This was seen as a serious lack from the early years of the GATT, and in 1976, after long consultations, a committee known as the Consultative Group of 18 was established with the objective of bringing very senior officials from capitals regularly to Geneva to discuss strategy and issues of high policy. The Group worked effectively until 1985 but was then allowed to lapse. It was a consultative, not a decision-making body, but it made recommendations to the full membership on a number of important issues, and they were generally acted upon. The agenda of the Uruguay Round of multilateral negotiations was largely developed in the CG18. The clear need for a more collegiate and less confrontational approach to the development of strategy has revived interest in the concept of a high-level consultative committee, but to get agreement on the principle, and still more on the membership, would be a major problem.

The membership of the CG18 was a mixture of permanent members and rotation among "constituencies", and it was always a delicate issue. To set up such a group now would probably involve even more difficult negotiations than in 1975, but the need for regular discussion of strategy among high policy makers is just as pressing – perhaps more so. It has been met in part, in recent years, by informal meetings outside the WTO, of a similar group of countries, sometimes at high official level and known as the "Invisibles", and more recently in "mini-Ministerials". These have been useful, but they have no official status, no reporting back or making of recommendations to the full membership and no follow-through by the Secretariat. They demonstrate the truth that if consultations or negotiations cannot take place inside the WTO, they will happen outside, with less legitimacy and less transparency. The great difficulty of reviving such a body would of course be the objection in principle to exclusivity of any kind.

The lack of a steering body in the WTO is compounded by the weakness of the Secretariat, whose formal powers have always been minimal and whose ability to influence events, while still important, has been weakened by insistence on the "Member-driven" nature of the Organization and the trend towards greater formality. The appointment of two Directors-General, Moore and Supachai, for periods of only three years, following a four-year term for Renato Ruggiero and one of 18 months for Peter Sutherland, has also weakened that office; the DG needs the weight of experience behind him, as well as the prestige of political stature, to be able to contribute effectively to policy-making and peace-keeping. He cannot acquire this experience if his term in office is shorter than that of the average Ambassador. Agreement on more efficient procedures for the appointment of the DG and on a clarification and strengthening of his role, including a greater power of initiative, are urgently needed.

The Secretariat is also too small; fewer than 200 of its 550 staff work in "policy" jobs, in the widest sense, and the demands on them, resulting from the larger Membership and wider responsibilities of the Organization and above all from the hugely increased demand for capacity-building assistance to developing countries, are not sustainable long-term without substantially increased resources.

VI. Law-making Through Dispute Settlement.

The strengthening of the WTO dispute settlement system in the Uruguay Round, inter alia through the creation of the Appellate Body, has been an undoubted success. More than 100 disputes have been dealt with, including major conflicts such as those on EC restrictions on hormone-treated beef and the US Foreign Sales Corporations law, and developing countries are using the system more than ever before. 21 panels are currently active on other cases. But this success has raised concern among some Members at what is seen as a trend towards law-making by panels or the Appellate Body rather than by the Membership in negotiations. It is certain that the WTO system has become more legalistic; it was the purpose of the Uruguay Round reforms to make decisions in dispute settlement more mandatory, less subject to delay and negotiation, and the system now works much more like a judicial than a diplomatic process. This is particularly true of the Appellate Body, with its seven permanent members and strong supporting staff, and the Body has occasionally been accused of creative interpretation of the law. This accounts to some extent for the perception of the growth of "a culture of lawyers" to which the EC in particular has been sensitive; the EC has traditionally favoured a more flexible approach to dispute settlement, stressing conciliation rather than litigation, than the US.

The growing influence of dispute settlement is also a reflection of the consensus problem. So long as the Membership is unable to clarify the law in negotiation, points of interpretation will necessarily go to panels and the Appellate Body for judgment. Consultations on trade and the environment, an area which has given rise to important disputes, have continued for years without result. Hence the importance of the Doha agreement to negotiate on the relationship between WTO rules and trade obligations in multilateral environmental agreements.

It was also agreed at Doha to negotiate on improvements and clarification of the Dispute Settlement understanding, but the deadline for conclusion of May 2003 proposals for reform have been submitted by the EU, Thailand and the Philippines. The most substantial proposals are those of the EU, which advocates moving to a system of permanent panelists to enhance the professionalism of panel proceedings and to escape the growing difficulty of finding qualified ad hoc panelists from countries not involved in the dispute in question. The EU also seeks to promote agreement on compensation, as opposed to the suspension of concessions, in the event of failure to implement a panel report, and to increase transparency by opening certain parts of the panel proceedings to the public. It also makes proposals for regulation of the submission of *Amicus Curiae* briefs and on nine other amendments of the DSU and proceedings under it. Thailand has proposed enlarging the Appellate Body and the EU that its members should be full-time appointments for a specified period.

The EU's proposals have been subjected to detailed questioning by India in a submission which touches upon virtually every aspect of them, and which illustrates the difficulty which will

be encountered in trying to amend the DSU. Amendment is however necessary. In reforming the Dispute Settlement procedures in the Uruguay Round, WTO Members in fact created an International Trade Court, without recognizing that they had done so and without providing the necessary resources. Panels are still selected essentially from among Geneva delegates, who do this very demanding work, unpaid, in addition to their normal work, under pressure of short deadlines which no national court system is required to meet. Finding qualified people to serve as panelists from among countries with no involvement in the case in question is increasingly difficult. Secretariat resources for the support of panels are also greatly overstretched.

Post-Doha Developing Country Positions on Trade & Environment

SUMMARY

Since the launch of the New Round at Doha, three WTO members have submitted proposals to the WTO's Committee on Trade and Environment ("CTE") under the Environment mandate of the Doha Ministerial Declaration ("the Declaration"). The European Communities and Argentina tabled proposals falling under the scope of paragraph 31(i) of the Declaration. A proposal from India under paragraph 32(i) of the declaration addresses the effects of environmental measures on market access, particularly in relation to developing countries.

The CTE held its first special negotiating session on March 22, 2002, where WTO Members raised for discussion, items under the Environment mandate of the Declaration. The debate was driven largely by a controversial paper submitted by the European Communities ("EC"), which outlines some preliminary ideas on the relationship between WTO rules and multilateral environmental agreements ("MEAs"). In May Argentina submitted a proposal on the subject in advance of the next special session of the CTE scheduled for July 11 and 12. We provide below an analysis of the Member country proposals submitted to the CTE since the launch of the new round. The analysis is divided into two parts; the first, presenting proposals submitted under paragraph 31(i) of the Doha Declaration including the EC's paper and the reactions it provoked among developing country Members and the second, proposals submitted under paragraph 32(i) of the Declaration.

ANALYSIS

Negotiations on relationship between existing WTO rules and specific trade obligations set out in MEAs (paragraph 31(i), Doha ministerial declaration)

I. Background

The Doha Ministerial Declaration mandates under paragraph 31 the work program on Trade and Environment within the new round of trade negotiations. Under this provision, WTO Members agreed:

To launch *negotiations immediately* on only three environmental issue-areas:

(i) The relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question (Para 31(i))

(ii) Procedures for regular information exchange between MEA Secretariats and the relevant WTO Committees, and the criteria for the granting of observer status (Para 31(ii))

(iii) The reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services (Para 31(iii))

Highlights

- Strong disagreements persisted until the very end in Doha on how environment should be dealt with in the final Declaration. The final text is a delicate compromise between the EU's insistence on launching negotiations and the other Members' rejection.

- The EU gained a last minute concession on negotiations of WTO rules and MEAs. EU Member States insisted on receiving some concession on their priority as their efforts to gain an ambitious agenda for investment, competition, and labour issues were rejected. Also, the EU was unable to gain specific language providing for negotiations on environmental standards such as the "precautionary principle".

- The text of the Doha mandate contains many "qualifications" that intend to limit the impact of negotiations and the work programme. These are as follows:

  (i) Members agree to negotiations on items under paragraph 31 "*without prejudging their outcome"* This last-minute wording served to reach a compromise between the contending parties.

  (ii) The negotiations on the relationship between MEAs-WTO "*shall not prejudice the WTO rights on any Member that is not a party to the MEA in question";*

  (iii) *Relationship between MEAs and WTO rules*: As part of the compromise, the EU accepted the US proposal that would prevent the modification of current agreements to introduce environmental considerations or the clarification of legal precedence between the WTO and the MEAs. Para. 32 provides:

  > "*The outcome of this work as well as the negotiations carried out under paragraph 31(i) and (ii) …shall not add to or diminish the rights and obligations of Members under existing WTO agreements, in particular the Agreement on the Application of Sanitary and Phytosanitary Measures, nor alter the balance of these rights and obligations….*"

In particular, the express reference to the SPS Agreement is a warning to the EU, which has been unsuccessfully seeking to introduce the precautionary principle in different agreements or to modify the existing precautionary approach in the SPS Agreement. The US, the Cairns Group, and many developing countries have been opposing this initiative since the EU lost on this issue in the *Hormones* case.

It is difficult to prejudge if the outcome of the negotiations would be to create a presumption of primacy of one set of rules over the other. Under the current system, a WTO

member imposing trade restrictions under a MEA has to prove that it is not violating WTO rules by showing its measures qualify for an exemption under GATT Article XX.

- The Doha mandate narrows down the scope of negotiations on the relationship between MEAs and WTO rules implicit in the following language:

  (i) Relationship of "*specific*" trade obligations in MEAs with "*existing*" WTO rules. Negotiations cannot cover measures a government may take that are not actually called for in the MEAs.

  (ii) Negotiations "*shall not prejudice the WTO rights of any Member that is not a party to the MEA in question*." The results of any negotiation can therefore only apply to Members that are both party to a given MEA and the WTO. Some environmental groups, such as Greenpeace, have criticized this qualification alleging that it could in fact prove to be a powerful disincentive for getting countries to sign on to the MEAs. For instance, the US is not party to the Convention on Biodiversity (and its Protocol on Biosafety). As an example of conflict involving two Members, we recall the recent dispute between Chile and the EU related to some Chilean measures affecting the transit and importation of swordfish. The conflict was finally settled but in the meantime, two competing dispute settlement proceedings were initiated: one in the WTO, by the EU; and the other in the framework of the Convention of the Law of the Sea, by Chile.[6] However, most of the challenges on environmentally based trade restrictions in the WTO taken by a member that is also a signatory to an MEA have come from countries not signatories to the MEA.

II. Post-Doha Developments

A. EC Paper on MEAs

The special session of the CTE held on 22 March, began discussions around the three sub-paragraphs of the Doha environmental mandate in para 31. The debate was driven largely by an EC submission outlining some preliminary ideas on para 31(i) on the relationship between MEAs and WTO rules. The EC paper seeks to garner consensus among WTO Members on the following key points:

1. the extent to which "specific trade obligations" should be considered to be automatically in conformity with WTO.

2. MEA's as an element of interpretation of WTO law in disputes involving non-Parties.

[6] WT/DS193/1

3. principles that should govern the relationship between WTO rules and MEAs;

The paper calls for clarification on how the WTO Agreements relate to MEAs and offers the EC's initial perspective on "specific trade obligations" in MEAs and "among parties" as provided in 31(i). Towards this end, it seeks an agreed definition of an MEA within the WTO aimed at a clarification of the circumstances under which specific trade obligations set out in an MEA should be given explicit recognition under WTO rules.

- "Specific Trade Obligations": The EC identifies for discussion in the CTE, four broad categories of measures arising from trade obligations under MEAs. It calls on Members to analyze the categories mentioned below in order to determine how to distinguish between "specific" and "non-specific" trade obligations.

  1 Trade measures explicitly provided for and mandatory under MEAs

  2 Trade measures neither explicitly provided for nor mandatory under the MEA itself but consequential of the '*obligation de rèsultat*' of the MEA. The MEA in this case, provides a list of potential policies and measures that Parties could implement to meet their obligations.

  3 Trade measures not identified in the MEA which has only an '*obligation de rèsultat*' but that Parties could decide to implement in order to comply with their obligations. In this case as opposed to that under ii), the MEA does not provide a list of potential policies and measures that Parties could implement to meet their obligations.

  4 Trade measures not required in the MEA but which Parties can decide to implement if the MEA allows parties to adopt stringent measures in accordance with international law.

- "Among Parties":

The EC stresses that disputes arising among parties to the MEA should be resolved within the MEA's dispute settlement body, if such an entity exists. In the event that the case is taken to the WTO DSB, the WTO panel should take due account of the MEA while addressing the case. The EC goes further to argue that WTO panels should take into consideration trade obligations pursuant to MEAs also in the context of disputes involving non-parties. According to the EC, the jurisprudence of the Appellate Body in environment-related cases strongly suggests that the conclusion of an MEA could well be a key element to determine the justification of certain measures under Article XX of the GATT.

- "Relationship between MEAs and WTO rules":

The EC posits that the relationship between MEAs and WTO rules in a global governance context should be based *inter alia* on the following principles:

1. MEAs and WTO are equal bodies of international law

2. WTO rules should not be interpreted in "clinical isolation" from other bodies of international law and without considering other complementary bodies of international law, including MEAs

B. WTO Member Reactions to EC Paper

Several WTO Members criticized the EC paper. The US, Australia, Malaysia among others argued that the EC sought to extend the scope of mandated negotiations beyond para 31(i) of the Doha declaration to include both party as well as non-party issues. The Doha text limits the applicability of talks to MEA parties. Australia and Thailand considered the WTO/MEA relationship sound and therefore did not consider a change in WTO rules necessary in this area. The United States posited that while it viewed the existing MEA/WTO relationship as being good, it was however, open to identify areas in which incremental improvements could be made but "did not seek an overhaul of either regime". The US was not convinced that measures pursuant to MEAs should be exempted from the requirements of Article XX of the GATT.

C. The Argentine Proposal

Argentina's submission largely provides its position on the issues raised in the EC paper, taken up for discussion at the Committee on Trade and Environment March special session. Argentina argues that the mandate of the Doha Declaration is more "precise and specific" than that addressed by the CTE in its agenda. Argentina points out that the Doha declaration mandates negotiations on the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs) rather than the relationship between the trade measures for environmental purposes including those pursuant to MEAs in general. The negotiations are therefore not mandated to cover non-mandatory trade measures, non –trade obligations and non-specific trade obligations in an MEA. Furthermore, paragraph 31(i) limits the scope of negotiations to the applicability of such existing WTO rules as among parties to the MEA in question. The rights of a WTO member that is not party to the MEA in question will therefore not be prejudiced.

Argentina specifies the following:

- Existing WTO rules and Specific Trade Obligations:

Argentina argues that Doha mandate addresses the provisions of MEAs that contain "specific trade obligations", which should be understood as follows:

1. *Obligation* means a provision which prescribes "the enforceability of an act or omission imposed by a rule of law"

2. *Trade* refers to action related to an import or export operation

3. *Specific* obligations are those that have been explicitly identified as mandatory within the framework of an MEA. Objectives that may be established as mandatory but which can be achieved by employing different measures, however should not be considered specific. In such a case, only the outcome is explicitly identified by the MEA while the measures used to achieve it are left to the discretion of the parties. Argentina argues that such obligations fall outside the scope of the Doha mandate.

➢ Applicability of existing WTO rules among parties to the MEA in question

Argentina posits that the relationship between the specific trade obligations pursuant to MEAs and WTO rules must be determined on the basis on certain criteria. It draws attention to criteria used by WTO Panels and Appellate Bodies in addressing situations where several legal rules were applicable to a single issue. These are as follows:

- Complementarity/ Principle of cumulation: concurrent obligations in two different but complementary agreements, if not mutually exclusive, should be adhered to simultaneously.

- Express derogation: This represents a situation where compliance with an obligation in one agreement, which would violate the provisions of the other international agreement, is covered by an express exception in the latter.

- Conflict: A conflict arises in a situation where compliance with an obligation in one agreement violates the provisions of another international agreement and the two cannot be reconciled.

Argentina posits that a consideration of the above criteria could help define the complementarity of a particular "specific trade obligation" with WTO rules.

➢ Definition of Multilateral Environmental Agreements

Argentina considers that MEAs should cover strictly those agreements that are:

- Currently in force;

- Negotiated and signed under the aegis of the United Nations, its specialized agencies or the United Nations Environment Programme (UNEP), have attained a certain degree of universality;

- Open to accessions.

➢ WTO Members not a Party to an MEA

The Doha Declaration mandates that the negotiations on the relationship between existing WTO rules and "specific trade obligations" would be limited in scope to the applicability of such

WTO rules as among the parties to a MEA at issue. Argentina notes that while the rights of members not a party to an MEA would not be prejudiced, those of members that are a party to an MEA would be diminished to the extent that that they are required to comply with specific trade obligations inconsistent with WTO rules. Argentina argues that such an outcome would alter the conditions in which a WTO Member consented to be bound by an MEA. The legal effect of such an outcome would involve modifying the scope of the specific trade obligations in the MEA.

"The Effects Of Environmental Measures On Market Access, Especially In Relation To Developing Countries"(Paragraph 31(i), Doha Ministerial Declaration)

III. [Background]

While members agreed to *negotiations* on item 31(i) of the Declaration, they agreed to "*pursue work*" on inter alia, items under para 32.

Paragraph 32 reads:

"We instruct the Committee on Trade and Environment, in pursuing work on all items on its agenda within its current terms of reference, to give particular attention to:

(i) the effect of environmental measures on market access, especially in relation to developing countries, in particular the least-developed among them, and those situations in which the elimination or reduction of trade restrictions and distortions would benefit trade, the environment and development;

(ii) the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights; and

(iii) labeling requirements for environmental purposes.

Work on these issues should include the identification of any need to clarify relevant WTO rules. The Committee shall report to the Fifth Session of the Ministerial Conference, and make recommendations, where appropriate, with respect to future action, including the desirability of negotiations. The outcome of this work as well as the negotiations carried out under paragraph 31(i) and (ii) shall be compatible with the open and non-discriminatory nature of the multilateral trading system, shall not add to or diminish the rights and obligations of Members under existing WTO agreements, in particular the Agreement on the Application of Sanitary and Phytosanitary Measures, nor alter the balance of these rights and obligations, and will take into account the needs of developing and least-developed countries."

- Members instruct the Committee on Trade and Environment (i) to give particular attention to three specific issue-areas of its current agenda; (ii) to include the identification of any need to clarify relevant WTO rules; (iii) to make

recommendations to the Fifth Ministerial Conference with respect to future action, "*including the desirability of negotiation"*.

- Recommendations from the CTE to the Fifth Ministerial Conference should be with respect to **"*any*" future action**, including the ***desirability of negotiations***. Therefore, the mandate stresses the consideration of any possible options, ***not only negotiations.***

- With regard to the three highlighted issues of the work Programme:

➢ The particular attention to the ***effect of environmental measures*** on market access should be "*especially in relation to developing countries, in particular least-developed countries*". This language was added in the final version of the Doha Declaration, which could be interpreted as an acknowledgment that normally developed countries' environmental standards become a trade restriction to developing countries' exports.

A. Proposal from India

India perceives the emerging trend of environmental policies and requirements as adversely affecting the market access of developing countries. India's proposal dated 21 May 2002, to the Committee on Trade and Environment, on the need to maintain market access given the progression towards environment-related, non-tariff barriers, was supported by several developing countries. India argues that a range of environmental standards and regulations have the effect of undermining market access by increasing the costs of compliance, which are particularly high for developing and least-developed countries. India proposes that the following measures be taken in order to diminish the negative impact environmental regulations may have on the market access of developing countries:

➢ *Environmental measures based on science, transparency and equity:* Developing country producers should be allowed to participate at an early stage in the design of environmental requirements.

➢ *Longer compliance time-frames:* Products of export interest to developing countries should be accorded longer time fames for compliance.

➢ *Recognition of equivalence:* In the case of local environmental problems, standards should acknowledge that while the importing country can achieve the environmental objectives only through certain prescribed environmental measures, the exporting country could achieve similar or greater environmental objectives by some other measures. Exceptions should therefore be provided to such measures, which are equivalent with environmental measures in the importing country.

➢ *Compensation for negative effects of environmental measures:* Additional market access should be provided for those products whose access is undermined by environmental regulations.

- *Flexibility in restrictions on use of tropical timber and Eco-packaging requirements:* India proposes that eco-packaging regulations in developed countries recognize certain environmentally sound and biodegradable packaging materials, including those made from wood, used in South Asia so that these materials will be exempt from recycling and take-back obligations.

- *Identification by developing countries of sector-specific examples of environmental regulations that impact exports*

India therefore calls for the development and application of environmental requirements in a way that would minimize the adverse effects on market access for developing countries, while still achieving the objectives of environmental policies.

OUTLOOK

India's proposal on the effect of environmental measures on market access was supported by several developing countries such as Brazil, Egypt, Korea, Malaysia, Pakistan, the Philippines, Peru, Thailand and Venezuela. These countries emphasized the importance of paragraph 31 of the Doha Declaration to developing countries, given the impact of environmental measures on their exports. Developing country support for paragraph 32(i) of the Doha Declaration, therefore stems from their concern for the implications that the negotiations on the relationship between WTO rules and trade measures pursuant to MEAs, may have for their exports.

The presumption of legal precedence between WTO rules and MEAs is a source of anxiety for developing countries, who suspect that some countries may abuse "specific trade obligations" set out under MEAs in order to restrict trade and protect domestic industry under the guise of environmental protection. They therefore perceive the EC and its supporters' attempt to seek explicit recognition for trade obligations pursuant to MEAs under WTO rules as an attempt to legitimize trade restrictive measures under WTO rules. Developing countries like Argentina would therefore want as narrow a reading as possible of what constitutes "specific trade obligations" under MEAs so as to minimize the legal cover under WTO rules that countries like the EC may want to obtain for such measures.

The Doha mandate however clearly states that current agreements would not be modified in the course of negotiations to introduce environmental considerations or the clarification of legal precedence between the WTO and the MEAs.

Further discussion on the relationship between MEAs and WTO rules is expected in forthcoming sessions of the CTE. The second special session of the CTE is scheduled for July 11-12 and the third on October 8-9. The EC has requested a fourth session.

Meeting of Working Party on Russia Accession to the WTO

SUMMARY

The Working Party on Russian accession to the WTO concluded its latest meeting on 20 June, having made modest, useful, but not dramatic progress. There have been some highly negative press reports, notably referring to comments by a senior official of the European Commission to the effect that the accession is stalling because of lack of progress on financial and telecommunications services, but the general view of delegates attending the meeting, and of the WTO Secretariat, is that this pessimistic assessment is exaggerated.

ANALYSIS

The Working Party was able to agree a useful schedule of activities for the second half of the year, including plurilateral information exchanges on five major issues: agriculture; services; TRIPS (intellectual property rights); Technical Barriers to Trade and Sanitary and Phyto-Sanitary Measures; and energy/subsidies. It was also agreed to revise and re-issue the draft report of the Working Party, on the basis of inputs to be made in July. There will be a stock-taking meeting in October and a further formal meeting of the Working Party, probably in December.

There was some criticism in the meeting of Russia's failure to provide responses to some 60 pages of requests for information submitted by Members, but since the last of these requests were submitted, by the US, only one week before the meeting, replies in time for this meeting were hardly to be expected.

Nevertheless, the pace of work does give cause for concern, particularly given the hopes which have been expressed that the accession process might be completed at the WTO's 5th Ministerial Conference in Cancun in September 2003. Two major tasks must be successfully performed for that to be possible – the completion of negotiations on Russia's market access commitments on goods and services, and the heavy programme of reform of Russian legislation to bring it into conformity with WTO rules. In both areas progress is slower than had been hoped. Russia had given indications that a substantial proportion of the outstanding legislative interventions would be completed by the Duma by July, but this now seems extremely unlikely. This in turn may threaten the Russian Government's objective of having the complete legislative package approved by the Duma in May-June next year.

Even so, there has been more progress on the legislative front than in the market access negotiations, which are very far from completion, and where major disagreements persist over agriculture and services. Among several difficult services issues, Russia is seeking to maintain a limit of 49% on foreign ownership of telecommunications companies, and a 25% limit in life-insurance, and is arguing that it must protect its agricultural sector so long as others continue to subsidize their agriculture.

The course taken in the late stages of the accession of China, which was to focus efforts on market access, leaving the revision of China's legislation until after its accession, will not be followed in Russia's case; both elements will have to be completed satisfactorily before

accession. The EU's formal recognition of Russia as a market economy on 29 May is a helpful development, but it is a further indication that this will be a "normal" accession, without the special regime of implementation and surveillance created for China. In turn, this means that Russia will be expected to accommodate its trade regime to WTO requirements before joining.

OUTLOOK

On a visit to Russia last week the Director General of the WTO, Mike Moore, was reported as saying that Russia might accede in the first half of 2003, but he also said that he was sure it would be done within the next three years. The truth no doubt lies somewhere between these estimates, but it is clear that a massive effort will be necessary to secure accession by the time of the Cancun meeting.

WTO Deputy Director General Andrew Stoler Briefing

SUMMARY

WTO Deputy Director-General Andrew Stoler on June 19, 2002, briefed members of the Washington International Trade Association ("WITA") on the state-of-play of Doha round negotiations. Stoler was generally optimistic that the new round of negotiations could be concluded on time and that U.S. leadership will be critical. In particular, Stoler emphasized the importance of securing Trade Promotion Authority ("TPA") to establish U.S. negotiating credibility, and especially in light of unpopular U.S. actions on steel safeguards and the new Farm Bill.

ANALYSIS

WTO Deputy Director General Stoler on June 19, 2002, briefed members of the Washington International Trade Association ("WITA") on the state-of-play of Doha round of negotiations.

Stoler was in Washington to participate in a training programme, mainly for Latin American negotiators involved in Free Trade Area of the Americas (FTAA) negotiations, organized by the Organisation of American States (OAS) and Georgetown University.

Stoler expressed optimism towards the success of the Doha Round by the scheduled deadline. He emphasized, however, that the US must secure renewal of trade promotion authority ("TPA" formerly known as "fast track") in order to ensure the successful conclusion of the round.

I. Multilateral Role of TPA

Stoler began by emphasizing that the trade community in Geneva was focused on developments in Washington. In particular, key U.S. trading partners in the WTO were relying on the Bush Administration to establish it multilateral credibility by securing TPA. Without TPA, Stoler cautioned that many WTO members might simply choose not to engage in negotiations as seriously as they would have otherwise. Stoler pointed out that the ripple-effect of the lack of TPA is compounded in the Doha Development Agenda since there are about 60 more participants now than during the Uruguay Round.

Stoler also cautioned that instead of playing a leadership role in the talks, the US has been perceived as acting unilaterally by imposing steel safeguards and increasing support to agriculture in the controversial Farm Bill.

II. State-of-Play of Doha Talks

Stoler assured WITA members that after the US secures TPA, the Doha talks would proceed apace to their scheduled conclusion at the end of 2004. In contrast to the Uruguay Round, the Doha Development Agenda focuses chiefly on improving market access and not on

drawing up new rules. Stole compared the scope and strategies of the Doha Development Agenda to that of the Information Technology Agreement or the Basic Telecoms Agreement. He noted that with this focus on market access, a critical mass of countries could forge and then multilateralize agreements in key sectors and issues.

Stoler also noted that in order to bolster support of recent WTO Members and least-developed countries (LDCs), and to allow them to participate more fully in the negotiations, the WTO is investing in unprecedented levels of technical assistance. He claimed that this factor could play a significant role in achieving the eventual success of the negotiations.

Aside from the TPA debate, Stoler predicted that the next critical event would be the next WTO Ministerial meeting scheduled for Cancun, Mexico, Sept. 10-14, 2003. The Cancun Ministerial will discuss the status of negotiations from industrial goods, agriculture and services, and the controversial "Singapore issues" including investment and competition policy. Members must decide whether to launch negotiations on the Singapore issues at the next Ministerial.

III. Market Access for Non-Agricultural Products

Stoler mentioned that the next meeting of the Trade Negotiation Committee (TNC), scheduled for July 18-19, will be the last under the stewardship of current Director General Mike Moore. In the run-up to that meeting, India and some African nations continue to oppose a joint U.S. and EU proposal to set a timetable for agreement on the modalities for the negotiations on non-agricultural (industrial) products. Ideally, this issue should be resolved before the TNC meeting, but Stoler indicated that resolution by the next TNC seems increasingly unlikely.

The hardening position by certain developing countries on non-agricultural market access modalities could provoke developed countries to become more flexible in agriculture and services negotiations. In agriculture, Stoler indicated that both the U.S. Farm Bill and the EU's Common Agricultural Policy (CAP) were difficult positions for developing countries to accept in the context of the Doha Developing Agenda.

When asked about any possible solutions to the controversy over observer status at the negotiating committees, Stoler conceded that they were unlikely to be resolved in the near future.

IV. Chinese Transitional Review Mechanism ("TRM")

Stoler pointed out that although China was playing a constructive role in the WTO, it still must make a great deal of adjustment. China currently has the fourth largest trade mission to the WTO – with 22 professional staff, but many have recently arrived from capital.

China's upcoming formal transitional review mechanism ("TRM") meetings could test its multilateral commitment. Under the TRM, 16 WTO bodies starting in September will examine specific aspects of China's trade regime. The WTO bodies will then submit their findings to the General Council, which it turn will issue a report in December 2002.

OUTLOOK

Stoler clearly emphasized the importance of U.S. leadership in new round of negotiations, and particularly renewal of TPA as a demonstration of U.S. credibility. Furthermore, he warned the trade community that recent U.S. steel safeguards and the Farm Bill has discouraged many WTO Members. Thus, a renewal of TPA could not come at a better time. Regarding timing, the House and Senate are struggling over different drafts of TPA legislation, but any immediate or short-term progress is unlikely. Still, Congress is attempting to conclude the TPA debate before the summer recess in August. Otherwise, Congressional elections in the fall of 2002 will make renewal of TPA even more difficult.

Stoler also commented that the arrival of Supachai Panitchpakdi as the new Director-General, starting September 1, 2002, should influence the pace of negotiations. Supachai will be at the WTO secretariat full-time in a transitional capacity from mid-July. Stoler praised Supachai's selection of Stuart Harbinson, the respected former General Council Chairman from Hong Kong, China, as his Chief of Staff. He also stated that although staff-changes in the Secretariat are likely with the new stewardship, Supachai will almost certainly maintain the number of deputy directors-general (DDG) at four. There is much speculation as to whether any current DDGs, including Stoler, will remain during Supachai's term.

WTO DISPUTE SETTLEMENT

Overview of WTO Panel Proceedings Against U.S. Steel Safeguards

SUMMARY

World Trade Organization ("WTO") Members are moving forward with consultations and dispute proceedings concerning the U.S. Section 201 steel safeguards measures, including at the Dispute Settlement Body ("DSB") and Committee on Safeguards. At the DSB meeting on June 14, the (second) panel requests by Japan and Korea resulted in the establishment of a combined panel, along with the earlier panel establishment at the request of the European Communities ("EC") on June 3, 2002. Furthermore, other WTO Members including China, Switzerland and Norway intend to make second requests for panels, which will are expected to be established on June 24. These panel requests are likely to be combined and the complaints of all parties heard by a single panel. We provide below a summary of the consultations and dispute proceedings thus far concerning U.S. steel safeguards.

ANALYSIS

I. WTO Panels on U.S. Safeguards Combined

The WTO Dispute Settlement Body ("DSB") on June 14, 2002, agreed to combine the second panel requests by Japan and Korea with the panel established on June 3 by the EC concerning the U.S. Section 201 steel safeguard measures. The EC, Japan, Korea, Mexico, Turkey and Venezuela joined as third parties.

At the DSB meeting, the US also blocked the first panel requests by Norway and Switzerland, and previously on June 7 had blocked China's first request for a panel. These three WTO Members intend to raise their second requests at the DSB meeting on June 24 – which will automatically establish a panel. It is likely that these later panel requests will be combined into one panel, including the EC, Japan, and Korea.

Also at the meeting, the EC criticized the US for delaying the dispute proceedings by blocking the first-time panel requests by other WTO Members. The US responded by saying that the EC on nine separate occasions had blocked first-time requests for panels, and was entitled to exercise its rights under the Dispute Settlement Understanding ("DSU").

II. Summary of Actions at the WTO

We summarize below the current status of the WTO Members' actions thus far on consultations and panel proceedings concerning the U.S. safeguards and EC provisional safeguards, and the projected timeframe for future actions.

- Annex I – Overview of actions thus far in the various WTO bodies;
- Annex II – Actions taken at the Committee on Safeguards;

- Annex III and IV – DSB developments in regard to panel and Appellate Body's proceedings; and

- Annex V – Actions against EC provisional safeguards.

ANNEX I: General Overview of WTO Actions on U.S. Steel Safeguards

Country	Committee on Safeguards				Dispute Settlement Body	
	Date of Request of Consultations[7]	**Request to suspend concessions**	**Agreed solution for extension of the 90-day period for submitting a request on the suspension of concessions**	**Provisional Safeguard Measure imposed against the USA**	**Consultations Request**	**Panel Request**
EC	7 March, 2002	Suspension of concessions requested to the CTG on 14 May, 2002	Not necessary, already requested suspension of concessions	27 March, 2002, effective as of 29 March, 2002[8]	7 March, 2002.	First request for the establishment of a panel dated 7 May was blocked by the US. The second request, resulted in the decision of the DSB on 3 June to establish a panel.

[7] As of the publication of the Presidential Proclamation.

[8] Related to this provisional safeguards measure, consultations were requested by Japan (27 March, 2002), Korea (2 April, 2002), United States (5 April, 2002), Slovenia (11 April, 2002), and Brazil (15 April, 2002). **Consultations with Japan were held on 10 April 2002 and with Brazil on 3 May 2002.** (G/SG/42/*).
The US requested to hold consultations under DSB procedures. Japan requested to join the consultations. Please refer to Annex V.

Country	Committee on Safeguards				Dispute Settlement Body	
	Date of Request of Consultations[7]	**Request to suspend concessions**	**Agreed solution for extension of the 90-day period for submitting a request on the suspension of concessions**	**Provisional Safeguard Measure imposed against the USA**	**Consultations Request**	**Panel Request**
Japan	6 March, 2002	Suspension of concessions requested to the CTG on 17 May, 2002	Not necessary, already requested suspension of concessions	Not yet requested	20 March, 2002	First request dated 21 May 2002 was blocked by the US at the DSB meeting of 3 June, 2002. **Second request on June 14. The DSB agreed that the Panel established on 3 June 2002 at the request of the EC would also examine the complaints by Korea and Japan.**

Country	Committee on Safeguards				Dispute Settlement Body	
	Date of Request of Consultations[7]	**Request to suspend concessions**	**Agreed solution for extension of the 90-day period for submitting a request on the suspension of concessions**	**Provisional Safeguard Measure imposed against the USA**	**Consultations Request**	**Panel Request**
Korea	7 March, 2002	Not yet requested	On 14 May, 2002, Korea and US agreed the period for requesting the suspension of concessions shall expire on 19 March, 2005.	Not yet requested	20 March, 2002.	First request dated 21 May, 2002, as blocked by the US at DSB meeting 3 June, 2002. **Second request on June 14. The DSB agreed that the Panel established on 3 June 2002 at the request of the EC would also examine the complaints by Korea and Japan.**

Country	Committee on Safeguards				Dispute Settlement Body	
	Date of Request of Consultations[7]	**Request to suspend concessions**	**Agreed solution for extension of the 90-day period for submitting a request on the suspension of concessions**	**Provisional Safeguard Measure imposed against the USA**	**Consultations Request**	**Panel Request**
China	14 March, 2002	Suspension of concessions requested to the CTG on 17 May, 2002	Not necessary, already requested suspension of concessions	Yes, notified on 20 May, 2002, in place as of 24 May, 2002.[9]	26 March, 2002	**On 27 May, 2002, China circulated request for establishment of a panel. The request was blocked by the US at DSB meeting of 3 June 2002, but will be raised again at the DSB meeting of 24 June.**
Switzerland	26 March, 2002	Suspension of concessions requested to the CTG on 17 May, 2002	Not necessary, already requested suspension of concessions.	Not yet requested	3 April, 2002	**On 4 June, 2002, Switzerland circulated request for establishment of a panel which was blocked by the US at DSB meeting of 14 June 2002, but will be raised again at the DSB meeting of 24 June..**

[9] On 24 May, 2002, Japan requested immediate consultations with China on its provisional safeguard measures. **China suggested to hold consultations in Beijing on June 17, 2002. Korea requested consultations on 30 May 2002, which tend to be hold in Beijing on June 20, 2002.** (G/SG/49).

Country	Committee on Safeguards				Dispute Settlement Body	
	Date of Request of Consultations[7]	**Request to suspend concessions**	**Agreed solution for extension of the 90-day period for submitting a request on the suspension of concessions**	**Provisional Safeguard Measure imposed against the USA**	**Consultations Request**	**Panel Request**
Norway	12 March, 2002	Suspension of concessions requested to the CTG on 16 May, 2002	Not necessary, already requested suspension of concessions.	Not yet requested	4 April, 2002	**On 4 June, 2002, Norway circulated request for establishment of a panel which was blocked by the US at DSB meeting of 14 June 2002, but will be raised again at the DSB meeting of 24 June.**

Country	Committee on Safeguards				Dispute Settlement Body	
	Date of Request of Consultations[7]	**Request to suspend concessions**	**Agreed solution for extension of the 90-day period for submitting a request on the suspension of concessions**	**Provisional Safeguard Measure imposed against the USA**	**Consultations Request**	**Panel Request**
Australia	4 March, 2002[10]	Not yet requested	On 16 May, 2002, Australia and US agreed the period for requesting the suspension of concessions shall expire on 20 March, 2005.	Not yet requested	Not yet requested	Not yet requested
New Zealand	5 March, 2002[11]	Not yet requested	On 16 May, 2002, New Zealand and US agreed the period for requesting the suspension of concessions shall expiree on 20 March, 2005.	Not yet requested	14 May, 2002	Not yet requested

[10] Australia requested consultations regarding possible imposition of safeguards and reserving its rights on holding consultations if the safeguards are proclaimed, what happened one day later.

[11] New Zealand requested consultations regarding possible imposition of safeguards and reserving its rights on holding consultations if the safeguards are proclaimed, what happened one day later.

Country	Committee on Safeguards				Dispute Settlement Body	
	Date of Request of Consultations[7]	Request to suspend concessions	Agreed solution for extension of the 90-day period for submitting a request on the suspension of concessions	Provisional Safeguard Measure imposed against the USA	Consultations Request	Panel Request
Brazil	11 March, 2002	Not yet requested	On 14 May, 2002, Brazil and US agreed the period for requesting the suspension of concessions shall expire on 20 March, 2005.	Not yet requested	21 May, 2002	Not yet requested
Taiwan, Penghu, Minmen and Matsu	25 March, 2002	Not yet requested	Not yet requested	Not yet requested	Not yet requested	Not yet requested
Malaysia	8 March, 2002	Not yet requested	Not yet requested	Not yet requested	Not yet requested	Not yet requested
Bulgaria	19 March, 2002	Not yet requested	Not yet requested	Not yet requested	Not yet requested	Not yet requested
Hungary		Not yet requested	Not yet requested	Yes, effective as from 3 June	Not yet requested	Not yet requested

ANNEX II: Actions in the Committee on Safeguards on U.S. Steel Safeguards

Countries	Consultations Prior to the Presidential Decision	Consultations post Presidential Decision	Date of the Request to the CTG on suspension of concessions[12]	Other relevant communications other than the request to suspend concessions and request of imposition of provisional safeguard measures	Date of the notification before taking provisional safeguards measures	Termination of provisional safeguard measures
EC	EC accepted consultations on 7 February, 2002. Consultations held in Washington DC, on 13 February. (G/SG/40/Suppl.1) US reported to the CTG on these consultations, considering them valid under Article 12.3, what was opposed by the EC. (G/SG/40/Suppl.2)	On 7 March, the EC requested consultations in light of the Presidential Decision, reserving its rights as to whether the Presidential Proclamation provided sufficient opportunity for adequate consultations under Article 12.3. (G/SG/40/Suppl.8). Provisional safeguard measures imposed on 27 March, 2002.[13]	14 May, 2002 (G/C/10 G/SG/43)		It has been notified on 27 March, 2002, and it has been effective since 29 March, 2002[14] (G/SG/N/6/EEC/1)	Six months as of introduction.

[12] This requested shall be submitted 30 days after consultations have started but not later than 90 days since the measure has been applied.

[13] Japan and the EC held consultations on 10 April, 2002 on the provisional measures the EC was applying.

[14] Related to this provisional safeguards measure, consultations were requested by Japan (27 March, 2002), Korea (2 April, 2002), United States (5 April, 2002), Slovenia (11 April, 2002), and Brazil (15 April, 2002). **Consultations with Japan were held on 10 April 2002 and with Brazil on 3 May 2002.** (G/SG/42/*).

Countries	Consultations Prior to the Presidential Decision	Consultations post Presidential Decision	Date of the Request to the CTG on suspension of concessions[12]	Other relevant communications other than the request to suspend concessions and request of imposition of provisional safeguard measures	Date of the notification before taking provisional safeguards measures	Termination of provisional safeguard measures
Japan	On 4 March, Japan reserved its rights to have consultations prior to the application of the measure under Article 12.3. (G/SG/40/Suppl.4)	On 6 March, Japan requested new consultations, in light of the recent published Presidential Decision. (G/SG/40/Suppl.7)	17 May, 2002 (G/C/15 G/SG/44)		Not yet notified	
China		On 14 March, China reserved its rights to have consultations prior to the application of the measure, under Article 12.3. It also raised the question that the period between the proclamation of the decision and its entering into force is very short, prejudicing the time to have adequate consultations. (G/SG/40/Suppl.12)	17 May, 2002 (G/C/17 G/SG/46)		20 May, 2002, and in place since 24 May, 2002.[15] (G/SG/N/6/CHN/1)	Six months as of introduction.
Switzerland		On 26 March, Switzerland reserved its rights to have consultations under Article 12.3. (G/SG/40/Suppl.16)	On 17 May, 2002. (G/C/18 G/SG/47)		Not yet notified	

[15] On May 24, 2002, Japan requested immediate consultations with China on its provisional safeguard measures. **China suggested to hold consultations on June 18, 2002 in Beijing. Korea requested consultations on 30 May 2002; China suggested to hold consultations on June 20, 2002.** (G/SG/49)

Countries	Consultations Prior to the Presidential Decision	Consultations post Presidential Decision	Date of the Request to the CTG on suspension of concessions[12]	Other relevant communications other than the request to suspend concessions and request of imposition of provisional safeguard measures	Date of the notification before taking provisional safeguards measures	Termination of provisional safeguard measures
Norway		On 12 March, Norway reserved its rights to have consultations prior to the application of the measure, under Article 12.3. (G/SG/40/Suppl.11)	On 16 May, 2002. (G/C/16 G/SG/45)		Not yet notified	
Korea	Something missing 4 and 5 February . Korea argued that these consultations were not those requested under the Article 12.3, as they were held under circumstances where the US had not provided information on the measure it intended to apply. Korea requested holding consultations as soon as the Presidential measure was in force. (G/SG/40/Suppl.3)	7 March (G/SG/40/Suppl.9)		On 14 May, US and Korea have communicated to the CTG that the 90-day period should be considered to expire on 19 March 2005. In view of that, it maintains rights to apply provisional safeguards measures in the future. (G/C/12 G/SG/N/12/USA/7 G/SG/N/12/KOR/1)	Not yet notified	

Countries	Consultations Prior to the Presidential Decision	Consultations post Presidential Decision	Date of the Request to the CTG on suspension of concessions[12]	Other relevant communications other than the request to suspend concessions and request of imposition of provisional safeguard measures	Date of the notification before taking provisional safeguards measures	Termination of provisional safeguard measures
Australia	On 4 March, Australia signaled its interest in entering into consultations regarding possible imposition of a safeguard measure. Moreover, in case the US decided to impose these measures, Australia reserved its rights to hold consultations prior to application. (G/SG/40/Suppl.5)			On 16 May, Australia and US communicated to the CTG agreement that the 90-day period should expire on 20 March 2005, and Australia maintains right to apply provisional safeguards measures in the future. (G/C/14 G/SG/N/12/USA/9 G/SG/N/12/AUS/2)	Not yet notified	
New Zealand	On 5 March, New Zealand signaled its interest in entering into consultations regarding possible imposition of a safeguard measure. Moreover, in case the US decided to impose these measures, New Zealand reserved its rights to hold consultations prior to application. (G/SG/40/Suppl.6)			On 16 May, New Zealand and US have communicated to the CTG agreement that the 90-day period should expire on 20 March 2005, and New Zealand maintains right to apply provisional safeguards measures in the future. (G/C/13 G/SG/N/12/USA/8 G/SG/N/12/NZL/1)	Not yet notified	

Countries	Consultations Prior to the Presidential Decision	Consultations post Presidential Decision	Date of the Request to the CTG on suspension of concessions[12]	Other relevant communications other than the request to suspend concessions and request of imposition of provisional safeguard measures	Date of the notification before taking provisional safeguards measures	Termination of provisional safeguard measures
Brazil	On 25 January Brazil accepted consultations and reserved its rights on further consultations. First consultation held in Washington on March 1st.	On 11 March, Brazil requested further consultations in light of the Presidential Proclamation. (G/SG/40/Suppl.10)		On 14 May, Brazil and US communicated to the CTG agreement that the 90-day period should expire on 20 March 2005, and Brazil maintains right to apply provisional safeguards measures in the future. (G/C/11 G/SG/N/12/USA/6 G/SG/N/12/BRA/2)	Not yet notified	
Malaysia		On 8 March Malaysia reserved its rights to have consultations, under Article 12.3 and raised the question that the period between the proclamation of the decision and its entering into force is very short, prejudicing the time to have adequate consultations. (G/SG/40/Suppl.13)			Not yet notified	
Bulgaria		On 19 March, reserved rights under Article 12.3. (G/SG/40/Suppl.15)			Not yet notified	
Hungary					In place since 3 June, 2002	Six months as of introduction

Countries	Consultations Prior to the Presidential Decision	Consultations post Presidential Decision	Date of the Request to the CTG on suspension of concessions[12]	Other relevant communications other than the request to suspend concessions and request of imposition of provisional safeguard measures	Date of the notification before taking provisional safeguards measures	Termination of provisional safeguard measures
Taiwan, Penghu, Kinmen and Matsu		On 25 March, 2002, Taiwan has requested consultations under Article 12.3. (G/SG/40/Suppl.17)			Not yet notified	

ANNEX III: WTO Panel Proceedings on U.S. Steel Safeguards

Country	Request for Consultation	First request for establishment of Panel	DSB Meeting when first request was raised	Second request for establishment of Panel - automatically leads to establishment	Likely Agreement on Panelists	Likely date of Establishment of the panel	Likely date for issuing the report	Extension requested[16]	Likely date of circulation	Likely date of consideration of report at a DSB meeting for adoption or appeal[17]
EC DS248[14]	March 7, 2002[18]	May 7, 2002	May 22nd, 2002	Request made and Panel granted at June 3rd, 2002 DSB meeting[19]	By July 23rd, 2002.	Likely starting date of the panel is 15 July 2002.	December 2002		December 2002	January's 2003 meeting. The panel report can be either appealed by one of the parties, or adopted by the DSB. If appealed, it shall pass to the Appellate Body procedure (see annex IV).

[16] In several recent cases, the panelists have requested extensions. The same request is likely to occur in this case, especially if the same group of panelists is maintained in all the disputes, as the time frame for oral hearings tends to be longer than in normal cases.

[17] Only possible 20 days after the panel report was circulated.

[18] The following countries have requested to join consultations: Japan (March 14, 2002), Switzerland (March 15, 2002), Korea (March 14, 2002), Norway (March 21, 2002), Venezuela (20 March, 2002), Canada (15 March, 2002), Mexico (22 March, 2002), China (21 March, 2002), New Zealand (25 March, 2002). On 11 April, the US has accepted the proposed requests to join consultations.

[19] Third party rights requested by: Brazil, Chinese Taipei, Switzerland, Norway, Japan, Korea, Thailand, Canada, China, **Mexico, Turkey and Venezuela**.

Country	Request for Consultation	First request for establishment of Panel	DSB Meeting when first request was raised	Second request for establishment of Panel - automatically leads to establishment	Likely Agreement on Panelists	Likely date of Establishment of the panel	Likely date for issuing the report	Extension requested[16]	Likely date of circulation	Likely date of consideration of report at a DSB meeting for adoption or appeal[17]
Japan DS249[20]	20 March, 2002[21]	21 May[t], 2002.	3 June, 2002.	In the 14 June, 2002 DSB meeting. The DSB agreed that the Panel established on 3 June 2002 at the request of the EC would also examine the complaints by Korea and Japan.	By July 23rd, 2002.	Likely starting date of the panel is 15 July 2002.	December 2002		December 2002	January's 2003 meeting. The panel report can be either appealed by one of the parties, or adopted by the DSB. If appealed, it shall pass to the Appellate Body procedure (see annex IV).

[20] Pursuant to an agreement between the EC, Japan and Korea and in accordance with Article 9.1 of the DSU, the DSB agreed that the panel established on 3 June 2002 at the request of the EC will also examine complaints by Korea and Japan.

[21] The following countries requested to join consultations: Norway (27 March, 2002), New Zealand (5 April , 2002), and Mexico (5 April, 2002). The US has accepted the requests on 11 April, 2002.

Country	Request for Consultation	First request for establishment of Panel	DSB Meeting when first request was raised	Second request for establishment of Panel - automatically leads to establishment	Likely Agreement on Panelists	Likely date of Establishment of the panel	Likely date for issuing the report	Extension requested[16]	Likely date of circulation	Likely date of consideration of report at a DSB meeting for adoption or appeal[17]
Korea DS251[14]	20 March, 2002[22]	21 May[t], 2002.	3 June, 2002.	In the 14 June, 2002 DSB meeting, The DSB agreed that the Panel established on 3 June 2002 at the request of the EC would also examine the complaints by Korea and Japan.	By July 23rd, 2002.	Likely starting date of the panel is 15 July 2002.	December 2002		December 2002	January's 2003 meeting. The panel report can be either appealed by one of the parties, or adopted by the DSB. If appealed, it shall pass to the Appellate Body procedure (see annex IV).
China DS252	26 March, 2002[23]	27 May, 2002	7Th June, 2002	Likely in the 24 June 2002 DSB meeting.	By 3 September, 2002.	End of September	March 2003		March 2003	DSB April 2003 meeting.
Switzerland DS253	3 April, 2002[24]	4 June, 2002	14th June, 2002	Likely in the 24 June 2002 DSB meeting.	By 3 September, 2002.	End of September	March 2003		March 2003	DSB April 2003 meeting.

[22] The following countries requested to join consultations: Norway (27 March, 2002), Japan (27 March , 2002), New Zealand (9 April , 2002) and Mexico (April 5, 2002). The US accepted the requests on 11 April, 2002.

[23] The following countries have requested to join consultations: Japan (4 April, 2002) and New Zealand (April 5, 2002). The US accepted the requests on 17 April , 2002.

[24] The following countries requested to join consultations: New Zealand (11 April, 2002), and Japan (15 April, 2002). The US accepted the requests on 3 May, 2002.

Country	Request for Consultation	First request for establishment of Panel	DSB Meeting when first request was raised	Second request for establishment of Panel - automatically leads to establishment	Likely Agreement on Panelists	Likely date of Establishment of the panel	Likely date for issuing the report	Extension requested[16]	Likely date of circulation	Likely date of consideration of report at a DSB meeting for adoption or appeal[17]
Norway DS254	4 April, 2002[25]	4 June, 2002	14th June, 2002	Likely in the 24 June 2002 DSB meeting.	By 3 September, 2002.	End of September	March 2003		March 2003	DSB April 2003 meeting.
New Zealand DS258	14 May, 2002[26]									
Brazil DS259	21 May, 2002[27]									

[25] The following countries requested to join consultations: New Zealand (11 April, 2002) and Japan (15 April, 2002). The US accepted the requests on May 3, 2002.

[26] The following countries requested to join consultations: the EC (24 May, 2002) and Japan (27 May, 2002).

[27] The following countries requested to join consultation: the EC (24 May, 2002) and Japan (27 May, 2002). Consultations will be held on 13 June, 2002.

ANNEX IV: Projected Appellate Body Proceedings on U.S. Steel Safeguards[28]

Countries	Likely Date of the Notification to Appeal	Likely Date of the Appellate Body Report (60 days after notification)	Extension required (No more than 90 days allowed).	Likely Date of circulation of the Appellate Body Report	Likely Date of adoption of Panel and Appellate Body's Report (No less than 30 days after circulation)
EC DS248	**January 2003.**	**March 2003.**		**Mid March 2003**	**DSB meeting of late April 2003.**
Japan DS249	**January 2003.**	**March 2003.**		**Mid March 2003**	**DSB meeting of late April 2003.**
Korea DS251	**January 2003.**	**March 2003.**		**Mid March 2003**	**DSB meeting of late April 2003.**
China DS252	**March 2003**	**May 2003**		**Mid May 2003**	**DSB meeting of late June 2003.**
Switzerland DS253	**March 2003**	**May 2003**		**Mid May 2003**	**DSB meeting of late June 2003.**
Norway DS254	**March 2003**	**May 2003**		**Mid May 2003**	**DSB meeting of late June 2003.**

[28] This time line is not considering any eventual extension.

ANNEX V: WTO Actions Against EC Provisional Safeguards

Country	Request for Consultation	First request for establishment of Panel	DSB Meeting when first request was raised	Second request for establishment of Panel - automatically leads to establishment	Likely Agreement on Panelists	Likely date of Establishment of the panel	Likely date for issuing the report	Extension requested[29]	Likely date of circulation	Likely date of consideration of report at a DSB meeting for adoption or appeal[30]
USA DS260[31]	**5 June 2002**									

[29] In several recent cases, the panelists have requested extensions. The same request is likely to occur in this case, especially if the same group of panelists is maintained in all the disputes, as the time frame for oral hearings tends to be longer than in normal cases.

[30] Only possible 20 days after the panel report was circulated.

[31] **Japan requested to join consultations on 11 June 2002.**

REGIONAL TRADE AGREEMENTS

U.S.-Central American FTA Talks Near Commencement

SUMMARY

In comments made to the Inter-American Dialogue on June 14, Costa Rican Foreign Trade Minister Alberto Trejos suggested that **t**he US and five Central American nations could launch free trade agreement (FTA) negotiations before the end of 2002. The five pertinent Central American nations are:

- Costa Rica
- El Salvador
- Guatemala
- Honduras
- Nicaragua

Trejos' comments refer to U.S. President Bush's January 2002 announcement that the United States would explore an FTA with the five Central American nations, and follow Costa Rican President Abel Pacheco's recent meetings at the White House. Trejos and four Central American colleagues - Miguel Lacayo of El Salvador, Arturo Montenegro of Guatemala, Juliette Handal of Honduras, and Marco Antonio Narvaez of Nicaragua – also participated in a discussion at the Inter-American Development Bank in which they compared notes with officials who had already negotiated bilaterally with the US.

Central American officials are enthusiastic about the potential FTA. Such an agreement would guarantee long-term access to the U.S. market for Central America's exports of agricultural and manufactured goods, including textiles and garments. As a region, Central America sends over 40 percent of its exports to the US.

ANALYSIS

While Trejos mentioned a potential start date for the FTA negotiations of November 2002, he cautioned that this could be optimistic. The Office of the United States Trade Representative (USTR) has not officially pronounced any starting date. Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua have conducted technical workshops with the US in 2002 with a potential FTA in mind.

I. FTAA Strategy

An eventual U.S.-Central America FTA would also make the current negotiations for the Free Trade Area of the Americas (FTAA) look more realistic. Designed to create a hemispheric free trade zone among 34 democracies, the FTAA is scheduled for completion by January 1, 2005. The Bush administration has been complementing its FTAA efforts by pursuing an expanding circle of hemispheric free trade by increments.

The 2005 deadline looks increasingly difficult in the face of open Brazilian skepticism, the Argentine economic meltdown, and difficulties with Congress in securing approval of TPA.

Although Central America already has duty-free access for a wide range of exports under the Caribbean Basin Trade Recovery Act (CBTRA), an FTA would signify reciprocal access for U.S. imports to Central American markets. Domestically, Central American producers are concerned that competition from U.S.-originating duty-free imports may cause significant employment losses if adequate transitional measures are not established.

Technical Preparation

The technical workshops have broad coverage, including market access, labor issues, property rights, the environment, e-commerce, and sanitary and phytosanitary measures. Although not considered legal negotiations, the preliminary exchanges have revealed an initial sense of what the final FTA could look like.

The workshops indicate both parties' commitment to making an FTA possible. While U.S. multilateral and bilateral credibility has been somewhat dented by the recent developments in steel, the farm bill, and the inability to secure TPA, the notion of a U.S.-Central America FTA remains politically important throughout the hemisphere. A fifth series of technical workshops will be held in Washington, D.C., in July 2002.

II. The Role of TPA

Despite acknowledging the importance of Trade Promotion Authority (TPA) (*Please see related report* – Deputy Director-General Andrew Stoler briefs WITA), Trejos indicated that the passage of TPA would affect simply the speed at which the FTA could be concluded, not whether or not it would happen.

The Bush administration has been hesitant to begin new bilateral or regional trade talks before the definitive approval of TPA. The US did not, for instance, extend the offer of an FTA to CARICOM at a meeting held in the Bahamas in early February 2002.

The multilateral priorities of the USTR for 2002 include:

- The passage of Trade Promotion Authority
- Conclusion of free trade agreements with Chile, Singapore, and Central America
- Securing developing countries' participation in the Doha round of WTO negotiations

While both the both the House and the Senate have passed their respective versions of TPA bills, no comprehensive text has been issued. It is unlikely the issue of TPA will be resolved before the July recess.

III. Domestic Limits and Complications

A U.S.-Central America trade agreement will not be easy to accomplish. Costa Rica, for example, has "constitutionally mandated" monopolies in the telecom, insurance, and electricity distribution sectors. While the three industries may be broached in the context of the negotiations, opening these sectors will eventually require constitutional reform.

Costa Rican reservations in the service sector are sure to rile U.S. private sector concerns, for which the service sector, particularly telecommunications, in Central America is among the most attractive. For the US, removing items from discussion and potential inclusion in an FTA will set a poor precedent for the outcome of the FTAA negotiations. Conversely, Costa Rica has argued that while it is not in a position to open these sectors immediately, it may be in the context of the more staggered FTAA negotiations.

Other potential complications include agriculture, environment, labor, intellectual property and textiles. Trejos also mentioned that Costa Rica is seeking technical assistance on issues like phytosanitary barriers and technical inspections.

Furthermore, following the Costa Rican elections earlier in 2002, the domestic process of passing trade agreements has gotten more complicated due to the emergence of two new political parties. These increasingly influential parties add uncertainty to the mix of opinion in Congress. The Costa Rican Congress is soon to decide whether to accept or reject outright an FTA with Canada. The outcome of that vote will indicate the current mood among lawmakers in Costa Rica.

OUTLOOK

Additionally, negotiating with the US will require a united front of the five Central American governments. The technical workshops have revealed a fundamental consistency in their initial position. This may be an important factor once the negotiations begin in earnest. The Central American countries have negotiated jointly on free trade agreements prior to this occasion, for example, with Mexico and Canada. El Salvador, Guatemala, Nicaragua, and Honduras are scheduled to have a full customs union by the end of 2003.