WORLD TRADE ORGANIZATION

&

REGIONAL TRADE AGREEMENTS

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CIT Remand in *Usinor v. United States* Could Affect WTO Challenges to ITC Sunset Reviews

On April 29, 2002, the U.S. Court of International Trade (CIT) in New York issued a decision in Usinor v. United States (Slip Op. 02-39) that could greatly impact the standard the U.S. International Trade Commission (ITC) uses in conducting its five-year sunset reviews of existing antidumping (AD) and countervailing duty CVD) orders. The outcome may make it more worthwhile to participate actively in ITC sunset reviews and may increase the chances for revoking existing AD/CVD orders in ITC sunset reviews. The outcome also may increase the chances that countries challenging ITC sunset reviews at the WTO will prevail.

Panelists Discuss WTO Negotiations on Market Access for Industrial Goods

Panelists from the USTR, EC and private sector on April 24, 2002, discussed approaches and prospects for WTO industrial market-access negotiations in a seminar entitled "Is Zero a Good Number? – Industrial Tariffs in the Doha Round."

- Chris Padilla, Kodak and the National Foreign Trade Council (NFTC)
- Zhong Chuanshui, Embassy of China, Washington DC
- Paul Moore and Sarah Sipkins, USTR Office of Multilateral/WTO Affairs
- Ed Gresser, Progressive Policy Institute
- Renaud Lassus, Delegation of the European Commission, Washington DC

The seminar on industrial market access was the third in a ten-part series of seminars on the new WTO trade round, hosted by the Global Business Dialogue (GBD), National Foreign Trade Council (NFTC), and Washington International Trade Association (WITA).

USTR Ambassador Deily Briefing on Doha Negotiations

Ambassador Linnet F. Deily, the United States Trade Representative (USTR) to the World Trade Organization (WTO) provided a briefing on the progress in Geneva of the global round of trade negotiations launched at the Doha Ministerial ("Doha Round").

Deily's remarks were brief and mentioned the following:

- Positive outlook in Geneva among negotiators and diplomats;
- The role of capacity building and technical assistance in the context of the Doha Development Agenda;
- The expanded role of developing countries in the current round of negotiations;
- The effect of the steel safeguard disputes on the negotiating agenda; and
- Progress of Russia's WTO accession

The seminar entitled "Geneva Issues and Atmosphere" was held on May 2, 2002, in Washington and was the fourth in a ten-part series of seminars on the new WTO trade round, hosted by the Global Business Dialogue (GBD), National Foreign Trade Council (NFTC), and Washington International Trade Association (WITA).

USTR Receives Numerous Public Comments on WTO Doha Negotiations

The Office of the United States Trade Representative ("USTR") received 145 submissions as of May 19, 2002, in its latest request for public comment on "The Doha Multilateral Trade Negotiations and Agenda in the World Trade Organization." The number of comments is substantial and more numerous than typical for negotiations.

USTR received submissions from a wide range of U.S. industries, non-government organizations, associations and other groups which commented on the five main areas under negotiation in the new trade round and other issues:

- ***Agriculture*** – tariffs; tariff rate quotas; subsidies and domestic support.
- ***Industrial goods*** – tariff and non-tariff barriers.
- ***Services*** – Sectors including distribution, financial, telecom, tourism and others.
- ***Intellectual property*** – public health and access to essential medicines; geographical indications.
- ***Rules/disciplines*** – Antidumping and subsidy negotiations; regional trade agreements; and multilateral environment agreements.

- ***Other issues*** – development; environment; competition and investment policy; and other.

We have included a list of the 145 submissions as categorized by major negotiating issue and sub-sectors of interest. (We are in the process of preparing a detailed report analyzing all comments.)

Doha-Series Panel on "Shared Services: The WTO Services Negotiations"

Participants at the WTO Services Negotiations symposium held on May 23, 2002 in Washington, DC, provided analysis of upcoming GATS commitment negotiations. Overall, participants stressed the limited nature of services commitments thus far and the need for further liberalization in services trade, especially by developing countries. In particular, regulatory burdens on services were targeted as a key issue for upcoming negotiations. Participants laid out the justification for additional liberalization and removal of regulatory obstacles to freer trade in services, and identified key areas for discussion during the next stage of Doha Round negotiations.

SPECIAL UPDATE: TRADE PROMOTION AUTHORITY LEGISLATION

Senate Approves Trade Bill Including TPA, TAA, ATPA, and GSP

Yesterday the United States Senate approved the omnibus trade bill by a vote of 66-30, after weeks of debate on the bill. Senators offered a number of amendments to the bill, several of which were adopted and the majority of which were rejected or withdrawn from consideration. The most contentious amendment, the so-called Dayton-Craig amendment, is called a "killer amendment" by opponents, and almost certainly will be removed in the House-Senate conference of the trade bills. Observers speculate that the House-Senate conference will be long and contentious and that the President will not have the trade bill on his desk until at least August.

For your convenience, we have compiled a chart below summarizing the amendments offered to the trade bill.

Senate Passage of Trade Bill Sets Stage for Difficult House-Senate Conference

The United States Senate approved the omnibus trade bill, which includes Trade Promotion Authority (TPA), on May 23. This report analyzes the provisions in the final Senate bill regarding:

- Labor and environmental standards,
- Investor-state provisions,
- Intellectual Property Rights Protection,
- Textiles, and
- Trade Remedy Laws.

Now that the Senate has approved the trade bill, it must be conferenced with the House bill. Analysts expect the House-Senate conference to be difficult and long, although the abbreviated Congressional calendar may expedite the process.

WTO WORKING BODIES

WTO Completes Trade Policy Review of Mexico

WTO Members concluded the Trade Policy Review (TPR) of Mexico on April 16, 2002. In general, the TPR Body (TPRB) recognized that Mexico has implemented a successful trade and liberalization process, but highlighted that there are still some areas of concern including:

- ***Foreign Investment:*** Some specific areas remain limited to investments exclusively by Mexicans, or require majority of Mexican capital, or require prior approval by the Mexican government to exceed the 49 percent of capital stock.

- ***Differential Treatment in Trade Tariffs:*** Falling trade tariffs for MFN partners have not improved in the same proportion as for Mexico's FTAs partners.

- ***Transparency:*** WTO's concerns focus on customs procedures, WTO consistency of special import regimes such as Maquila and PITEX, anti-dumping measures, and local content requirements in the automotive industry, among others.

- ***Government Procurement:*** Legislation discriminates in favor of national suppliers or suppliers from FTAs partners.

Next WTO Ministerial in Cancun, Mexico; Update on April Trade Negotiations Committee

World Trade Organization ("WTO") Members decided on May 13, to hold the next Ministerial Conference in Cancun, Mexico, from September 10-14, 2003 ("Cancun Ministerial"). The Cancun Ministerial is shaping up to be a crucial meeting at which WTO Members will likely decide on how to move negotiations forward on key issues, including:

- ***"Singapore issues"*** – Decide on modalities for negotiations on investment rules, competition policy; trade facilitation and transparency in government procurement, on which a decision to negotiate in principle was taken at Doha**.**

- ***Services*** – "Offer" stage to commence by March 2003; possible "early harvests" for certain sectors, and decision on emergency safeguards.

- ***Industrial goods/textiles*** – Address tariff and non-tariff barriers to industrial goods; possible (if delayed) establishment of negotiating "modalities"; decision on whether to expedite market access for textiles.

- ***Agriculture*** – Assess negotiations on tariffs, subsidies, domestic support and non-trade concerns. Possible extension to export credits, biotechnology standards.

- ***Intellectual property*** – Review measures taken for public health/access to essential medicines, including compulsory licensing; status of geographical indications.

- ***WTO rules*** – Assess state of work on disciplines on antidumping and subsidies; regional trade agreements; fishery subsidies; and dispute settlement reform (if delayed).

- ***Implementation –*** Review difficulties faced by developing countries arising from implementation of WTO commitments; technical assistance, including difficult "outstanding issues" cited prior to the Doha Ministerial.

- ***Environment*** – Review relationship between WTO rules and multilateral environment agreements; eco-labeling.

- ***Accessions*** – Possible accession of Russia; Central Asian states, and others.

Also, WTO Members at the latest meeting of the Trade Negotiations Committee (TNC) on April 24, failed to establish timeframes for negotiations on industrial market-access and observer status. Members will revisit these issues prior to, or by the next "stock-taking" session of the TNC scheduled for July 18-19.

WTO DISPUTES

Some WTO Members Willing to Hold off Retaliatory Measures Against U.S. Steel Safeguard Measures; Panels Likely to be Established

WTO members intending to retaliate against the safeguard measures the United States imposed on 20 March had to submit notifications to the WTO Goods Council not later than 17 May. Due to the 30 days notification period this was the last date allowing the retaliation to come into effect by the end of the 90-day period following the imposition of the U.S. safeguard measures, i.e. 18 June.

The European Union notified the Goods Council on 14 May that it intended to impose annual retaliatory tariffs of up to $364 million on U.S. imports. The state of play with regard to other WTO member that had indicated their intention to retaliate is as follows:

- On 17 May Japan forwarded to the WTO its own list targeting USD 4.88 million in retaliatory duties on U.S. imports. However, Japan announced it is willing to postpone the actual imposition of duties provided the United States proposes a satisfactory compensation offer over the next month.

- Brazil, South Korea, Australia and New Zealand entered into a procedural agreement with the United States to extend the 90-day period, thereby reserving their rights to impose retaliatory measures at a later stage.

- China, Norway and Switzerland notified the Council on Trade in Goods that they intended to retaliate after the Dispute Body had ruled against the U.S. safeguard measures or three years from the effective date of the US measure, whichever came earlier.

- Other countries that held consultations with the United States on possible compensation but have yet to submit retaliation notifications or request extended deadlines to submit such requests, are Malaysia, Bulgaria, and Taiwan. They did not announce their intentions by the end of the working day of the WTO on May 17.

- Hungary imposed provisional safeguard measures on certain steel imports.

Furthermore, the EU Japan, South Korea, China, Norway, Brazil, Switzerland, and New Zealand requested consultations with the United States on its steel tariffs under the WTO Dispute Settlement Understanding. The EU's request for a panel is expected to be approved on June 3, and other countries are likely to join the same dispute. Previously, at a meeting of the Dispute Settlement Body (DSB) on 22 May, the United States blocked the request of the European Union for the formation of a WTO panel to judge the WTO compliance of the "Definitive safeguard measures on imports of certain steel products" that the United States imposed in March.

WTO Rules Against Chilean Price Band System and Safeguard Measures

On May 3, 2002, in a complaint brought by Argentina, a World Trade Organization ("WTO") panel ruled against (1) Chile's price band system and safeguard measures relating to certain agriculture products; and (2) Chile's safeguard measures on wheat, wheat flour and edible vegetable oils.

The ruling has significant implications, both legal and practical. From a legal standpoint, the Panel report sets forth its definitive interpretations, under both the Agreement on Agriculture and Article II:1(b) of GATT 1994, of the phrases "ordinary customs duties" and "other duties or charges," as well as holding that a Member's failure to list "other duties and charges" in a separate column on its tariff schedules may constitute a violation of the substantive obligations of Article II:1(b).

From a practical perspective, the ruling is likely to weaken Chile's negotiating position in current FTA negotiations with the United States and with the Mercosur bloc. The US and Mercosur countries have criticized price band systems utilized by Chile, the Andean countries and elsewhere. Moreover, the fact that this dispute was resolved before a WTO panel is in itself significant, inasmuch as Argentina could have raised the dispute under the Mercosur-Chile FTA dispute settlement mechanism. The fact that Argentina chose not to proceed in that forum could lead to further weakening of regional dispute mechanisms.

Certain Developing Country Comments and Proposals Regarding Reform of the WTO Dispute Settlement Understanding (DSU)

WTO Members agreed with the launch of the Doha Round to negotiate improvements to the Understanding on Rules and Procedures Governing the Settlement of Disputes ("Dispute Settlement Understanding" or "DSU").

We agree to negotiations on improvements and clarifications on the Dispute Settlement Understanding. The negotiations should be based on the work done thus far as well as any additional proposals by Members and aim to agree on improvements and clarifications not later than May 2003, at which time we will take steps to ensure that the results enter into force as soon as possible thereafter.

To date, three DSU reform proposals have been circulated by WTO Members. The submissions consist of (1) the EU proposal for DSU reform (TN/DS/W/1) circulated on March 5; (2) Thailand's proposal that the number of Appellate Body Members be increased by at least two to four persons, circulated on March 20 (TN/DS/W/2); and (3) the request on March 21 for re-circulation of a joint proposal from Thailand and the Philippines regarding amendments to Article 22.7 of the DSU (TN/DS/W/3). On May 7, 2002, the WTO circulated a submission by India providing comments and posing questions regarding the EU DSU reform proposal (TN/DS/W/5).

We summarize below the recent proposals from Thailand and the Philippines, and India's follow-up submission to the EU proposal.

WTO Establishes Panel on Mexican Telecommunication Services

On April 17, 2002 the WTO Dispute Settlement Body (DSB) established the first panel to date dealing exclusively with the General Agreement on Trade in Services ("GATS") on the long-running dispute between Mexico and the United States regarding telecommunication services.

Since August 2000, the United States has asserted that Mexico has failed to satisfy its commitments under the Agreement on Basic Telecommunications (ABT), and particularly the Reference Paper on Anti-competitive Practices ("Reference Paper"). The US suspended the panel proceedings for almost two years based on progress made by Mexico. Mexico's telecommunications monopoly Telmex; however, has refused to abide by proposed reforms intended to facilitate competition, including interconnection rates and the independence of the regulator Cofetel.

A panel soon will be composed and will proceed towards a decision by October 2002. The US and Mexico can suspend the panel deliberations at any time, and might do so if a settlement is reached.

REGIONAL TRADE AGREEMENTS

U.S. and Brazil Officials Cite Cooperation on FTAA and WTO Negotiations Despite U.S. Agriculture and Steel Policies

The U.S. and Brazilian deputy trade ministers on May 21, 2002 at a US-Brazil Chamber of Commerce seminar in Washington indicated that the two countries were working together constructively on FTAA and WTO negotiations. They also presented a positive view of the bilateral trade relationship as cooperative, despite disagreements over steel and agriculture.

The US and Brazil will co-chair the FTAA negotiations beginning in November. The US and Brazil will intensify discussions on how exactly the chairmanship will proceed, especially given the political transition in Brazil. The Brazilian representative noted that the co-chairmanship likely will be "challenging," but he expects positive results. The officials also cited success in recent cooperative efforts on the WTO Doha Development Agenda.

REPORTS IN DETAIL

U.S. PERSPECTIVES

ITC Commissioner Hillman Explains Unique Aspects of Steel 201 Case, Highlighting WTO Implications

SUMMARY

Commissioner Jennifer Hillman of the U.S. International Trade Commission ("ITC") on April 24, 2002, addressed a meeting of the Women in International Trade in Washington. Hillman provided insight into the complications the ITC faces with the WTO challenge to the U.S. Section 201 steel safeguards; and discussed briefly the ITC's structure and purpose.

ANALYSIS

Commissioner Jennifer Hillman of the U.S. International Trade Commission ("ITC" or "the Commission") on April 24, 2002, addressed a meeting of the Women in International Trade in Washington. President Clinton appointed Hillman to the ITC in 1998.

Hillman discussed briefly the structure and purpose of the ITC. She also discussed the implications of the WTO challenges by the EU, China and other countries against the U.S. Section 201 steel safeguards.

I. Hillman Outlines ITC's Structure and Duties

Hillman began by explaining the structure and primary duties of the ITC.

A. Structure

- ***Quasi-judicial/semi-independent agency*** – The ITC is a unique agency both within the federal government and vis-à-vis US trading partners. Hillman described the ITC as a quasi-judicial agency that is semi-independent. Commissioners are appointed to slots that run in nine-year terms. Commissioners may be reappointed only if they originally filled a slot that had already surpassed the half-way point in its nine-year term.

- ***Bi-party/nonpartisan membership*** – The Commission is equally divided between three Democrats and three Republicans, and the Chairmanship rotates every two years. The Commission is designed this way to ensure its nonpartisanship and independence from political influences on Capitol Hill and the White House.

B. Duties

The ITC's primary duties are as follows:

- ***AD/CVD cases*** – Decides if material injury to domestic industry has occurred in the context of antidumping and countervailing duty cases. According to Hillman, the ITC has seen an explosion of these types of cases in recent years. The average number of cases per year has gone from around 20 to 66 cases during Hillman's tenure. In 2001, 116 cases were filed with the ITC.

- ***Safeguard (Section 201) cases*** – Decides safeguard cases under Section 201. Hillman noted that the recent steel section 201 dispute has pushed safeguard cases into the spotlight, whereas five years ago the statute was virtually unused.

- ***Intellectual property (Section 337) cases*** – Decides unfair trade cases, usually couched in intellectual property, under Section 337. If the ITC finds that a patent, copyright or trademark violation has occurred or that another form of unfair trade has occurred, the ITC can order a ban of all future imports of the subject product. She mentioned that the Section 337 caseload has doubled in recent years.

- ***Trade/economic effects studies*** – Conducts research studies independently or pursuant to requests from the U.S. Trade Representative (USTR) or Congress. These studies analyze the economic effects of proposed trade agreements, proposed changes in trade laws, etc. Hillman predicts that the ITC will be tasked with even more of these studies as the Administration explores possible bilateral trade agreements with an increasing number of countries.

- ***Trade data/information*** – Provides trade information services. The ITC is the "keeper, updater, and purveyor" of the Harmonized Tariff Schedule (HTS). The ITC also maintains a user-friendly data web of US trade data.

- ***Policy support*** – Provides trade policy support to the USTR in negotiations and in dispute settlement processes. For example, the ITC defends U.S. safeguards decisions and provides advice and support to Congress on the economic effects of changes to U.S. tariff levels.

II. Hillman Highlights Unique Aspects of Steel 201 Safeguards Case

Hillman explained that the recent steel 201 safeguards case is one of the largest and most unusual cases ever considered by the ITC. According to Hillman, the case is unusual for two main reasons:

(1) Executive initiation – The domestic steel industry did not initiate the case; the Bush Administration initiated the proceedings; and

(2) Expanded coverage – The case covered a very broad array of products. Products classified under 612 different HTS numbers were covered.

Hillman explained that the steel 201 case involved two phases: (1) determination of serious injury; and (2) recommendation of remedies.

- Phase 1: The ITC determined if injury to domestic industry had occurred. First the Commission had to decide how it would group the steel products, which ultimately affects how data is analyzed. The ITC decided to group some products together and to consider other products individually.

  In total, the ITC considered steel products classified under 33 product groups. Hillman explained that the President has the legal authority to impose a safeguard remedy only on those products that the ITC decides have caused injury. For this reason, the ITC's decision is very important.

- Phase II: The ITC recommends remedies if it finds injury to the domestic industry. In terms of remedies, Hillman explained that the domestic industry generally asks that the Commission assign quotas, which are much more trade restrictive than tariff increases. Foreign producers, on the other hand, normally request tariff increases. In this case, the exact opposite occurred – foreign producers sought quotas; domestic producers sought tariff increases.

Hillman noted that another unique aspect of the steel 201 case is that President Bush ultimately decided to impose tariffs that were higher than those recommended by the ITC for most products. The ITC's recommendations are usually considered the ceiling, and the President often decides on lower tariffs. Again, this was not the case.

Hillman also provided some "fun facts" on the steel 201 case:

- 66 parties formally filed notices of appearance in the case.
- The case covered $20 billion in imports.
- There were 11 days/96 hours of hearings, including statements by 70 Members of Congress and more than 35 CEOs.
- More than 400 briefs were filed in the case.

- The ITC scans all documents that are filed into its on-line document system. Normally the ITC scans an average of 20,000 pages per month. In the month of July 2001 alone (height of case filings), the ITC scanned more than 160,000 pages.

III. Hillman: WTO Challenges Create Dilemma for ITC

Hillman explained that the 201 decisions may not be appealed in U.S. courts, unlike regular antidumping and countervailing duty determinations, because they are discretionary decisions made by the President. They can, however, be challenged in the World Trade Organization (WTO). In fact, a number of US trading partners, most notably the European Union (EU), China and Japan, have already initiated dispute proceedings. (Commissioner Hillman's comments notwithstanding, parties have lodged appeals in the court attacking the section 201 steel ruling).

A. Questionable EU Interpretation of Article 8.3

Hillman in particular questioned the EU's response to the U.S. safeguard action, and its interpretation of Article 8.3 of the WTO Safeguard Agreement. Article 8.3 allows countries to maintain a safeguard for three years without offering compensation to countries affected by the safeguard, under certain conditions. The EU, however, believes that this exemption applies only when a safeguard is imposed as a result of "an absolute increase in imports." The EU questions the time period and methodology used by the ITC in its investigation on whether an absolute increase in imports of steel products actually has occurred. Thus, the EU argues that since Article 8.3 conditions are not satisfied, the EU and other affected parties are (i) entitled to immediate compensation by the US; and (ii) authorized to impose retaliatory measures against the US immediately.

Hillman believes that the EU is interpreting Article 8.3 in a "very unique way." In particular, she disputes the EU's criticisms of the ITC's methodology in deciding the 201 case. The US also questions the EU's unilateral response under Article 8.3. She noted that the dispute is complicated by the fact that no legal precedent exists on interpretations of Article 8.3.

Hillman also argued that no one will dispute the fact that there was an absolute increase in steel imports in the five-year period, which is always used in ITC investigations. She believes that the EU's interpretation is ultimately an attempt to decide what the time period should be for safeguards investigations.

B. Implications of WTO Disputes on Safeguards

Hillman explained that the WTO has ruled against U.S. safeguard actions in previous disputes brought against the US (on lamb, wheat gluten and line-pipe steel). The WTO findings in these previous cases and the recent challenges to the steel 201 safeguards will likely create a dilemma for the ITC.

Hillman stated that the ITC needs guidance from Congress and the Administration on how it can conduct investigations and decide cases pursuant to US law – and at the same time act

in a WTO-consistent manner. She stated that the ITC is well aware of WTO findings against its practices, but the Commission only interprets and applies existing US laws and would have a difficult time changing its practices to comport with WTO requirements if they differ with US law. She noted that the situation is complicated by the fact that it is very difficult to get Congress to amend U.S. laws at all, and especially so in situations where Congress feels that it is being (wrongfully) forced to act by the WTO.

OUTLOOK

Hillman's discussion highlighted the ITC's growing concern of the possibility of additional WTO findings against ITC's practices – and particularly its methodology in safeguard proceedings. She acknowledged that the findings already call into question certain ITC practices, but the ITC is rather powerless to respond. A longer-term solution would require either modifications to U.S. trade remedy laws by Congress, or a renegotiation of certain WTO Agreements.

Recently in the US, there is growing concern among trade circles that WTO rulings against the US on yet another safeguard proceeding (involving the domestically powerful steel industry) could further erode public and Congressional support for free trade and the multilateral trading system. Members of Congress, most notably Sen. Baucus (D-Montana), have been vocal in asserting that the WTO findings are "unfair" against the US. Congress also has delayed efforts to modify U.S. laws in other trade remedy proceedings, including the much less controversial dispute over the U.S. 1916 Antidumping Act (and separately, the more complicated findings against U.S. foreign sales corporations). Clearly, Congress is not keen to modify U.S. laws in the event of negative findings arising from additional disputes, including against steel 201 safeguards and the Byrd Amendment.

The prospects for a resolution in the steel 201 dispute between the US and its trading partners is further dimmed by recent actions by the EU, and possibly other countries, to protect their market from possible trade diversion. As Hillman suggested, the EU has a novel interpretation of Article 8.3 which remains untested by WTO jurisprudence. It should be pointed out, however, that other WTO Members likely will not consider the EU's interpretation as being "novel." In any event, the implications of the U.S. steel safeguard actions threaten to expand the trade war to sectors beyond steel – and could further erode support for the multilateral trading system.

CIT Remand in *Usinor v. United States* Could Affect WTO Challenges to ITC Sunset Reviews

SUMMARY

On April 29, 2002, the U.S. Court of International Trade (CIT) in New York issued a decision in Usinor v. United States (Slip Op. 02-39) that could greatly affect the standard the U.S. International Trade Commission (ITC) uses in conducting its five-year sunset reviews of existing antidumping (AD) and countervailing duty CVD) orders. The outcome may make it more worthwhile to participate actively in ITC sunset reviews and may increase the chances for revoking existing AD/CVD orders in ITC sunset reviews. The outcome also may increase the chances that countries challenging ITC sunset reviews at the WTO will prevail.

ANALYSIS

I. Background on the Sunset Review Investigation Appealed

The cut-to-length plate sunset review was considered by the ITC in a grouped review along with the existing AD and CVD orders on cold-rolled steel and corrosion-resistant/coated steel. These AD/CVD orders all stemmed from the "Big Steel" AD/CVD cases in 1993. The various sunset reviews followed different paths on appeal to the court. Therefore, it is believed that any consideration by the ITC on remand will be limited to only the cut-to-length plate portion of the grouped sunset review.

II. Substantive Issue on Appeal

The U.S. statute, WTO Antidumping Agreement and Subsidies Agreement all require that, in sunset review investigations, the ITC must determine whether revocation of an AD or CVD order in existence for five or more years would be "likely" to lead to a recurrence or continuation of material injury to the domestic industry producing the product. An affirmative determination by the ITC continues an existing AD/CVD order.

The central issue in the court case was the ITC's interpretation of the statutory standard for conducting sunset reviews. White & Case lawyers, on behalf of Belgian cut-to-length plate steel producer Duferco Clabecq, argued that the ITC did not apply the proper standard - specifically, that the ITC failed to properly construe the term "likely" under 19 U.S.C. § 1675. W&C attorneys argued that the term "likely" in the statute should be interpreted to have its plain and ordinary meaning of "probable." The ITC attorneys argued that provisions of the Statement of Administrative Action (i.e., the authoritative legislative history accompanying the statute) require that the term "likely" be interpreted as something other than "probable."

The court rejected the ITC's argument and agreed with the White & Case lawyers, stating: "The SAA cannot change the words of the statute." The court adopted many of the arguments presented by the White & Case attorneys and ordered that "[o]n remand, the Commission must apply the common meaning of 'likely' – that is, probable – in conducting the relevant sunset review analyses."

III. Other Issues in the Case

The other parties to the appeal, the German producers of cut-t-length plate and the other producer of cut-to-length plate in Belgium, raised different issues than the challenge to the ITC's interpretation of the term "likely." The court affirmed the ITC as to these issues, except that it included in its remand the German producers' argument that the ITC did not base parts of its determination on substantial evidence – e.g., on the higher standard of whether a recurrence of injury is "probable," substantial evidence did not support portions of the ITC's determination.

OUTLOOK

Among the hundreds of sunset reviews that have been conducted by the ITC, this is the only court challenge to the ITC's interpretation of the term "likely" and the proper standard in sunset reviews of which we are aware. Several other appeals brought by White & Case on behalf of other clients in other sunset review investigations are still under consideration by either the CIT or a NAFTA panel or were stayed at the CIT pending the result of this court case. Judge Restani's opinion is expected to have a very positive impact on these cases.

Over the years, the ITC has applied a standard that made it increasingly difficult for foreign producers, importers and end users to prevail in sunset reviews and terminate long-standing AD/CVD orders. Some parties may have simply determined that participation in ITC sunset reviews was futile. It is hoped that the court's ruling will change all of that and render the ITC proceedings more favorable to parties seeking to terminate existing AD/CVD orders.

The court's ruling also may affect any WTO challenges that have been filed concerning ITC and DOC sunset review procedures and standards, and encourage new disputes. In particular, Japan recently requested consultations with the U.S. on the sunset review determination on corrosion-resistant steel and the continuation of the AD order in that case. One aspect of that challenge is the standard for finding injury "likely" to continue or recur. Ultimately, as a result of further challenges, the United States might seek to clarify the "likely" standard in the context of current WTO negotiations of the Antidumping and Safeguards Agreement.

Panelists Discuss WTO Negotiations on Market Access for Industrial Goods

SUMMARY

Panelists from the USTR, EC and private sector on April 24, 2002, discussed approaches and prospects for WTO industrial market-access negotiations in a seminar entitled "Is Zero a Good Number? – Industrial Tariffs in the Doha Round."

- Chris Padilla, Kodak and the National Foreign Trade Council (NFTC)
- Zhong Chuanshui, Embassy of China, Washington DC
- Paul Moore and Sarah Sipkins, USTR Office of Multilateral/WTO Affairs
- Ed Gresser, Progressive Policy Institute
- Renaud Lassus, Delegation of the European Commission, Washington DC

The seminar on industrial market access was the third in a ten-part series of seminars on the new WTO trade round, hosted by the Global Business Dialogue (GBD), National Foreign Trade Council (NFTC), and Washington International Trade Association (WITA).

ANALYSIS

I. Chris Padilla of Kodak/NFTC Presents on "Zero-Tariff Initiative"

Chris Padilla of Kodak and representing the NFTC discussed the NFTC's tariff initiative on "Why Zero is a Good Number" – which encourages WTO Members to reduce all industrial tariffs by 2020.[1]

A. Four Major Reasons to Reduce Tariffs

Padilla cited four main reasons to pursue tariff liberalization:

(1) Benefits developing countries: Most tariffs are paid by developing countries to each other ("South-South" trade). Developing countries need to reduce tariffs in order to facilitate trade, thereby reducing production costs and encouraging foreign investment. Still, they face high tariffs in developed countries for their key export items.

Padilla emphasized that tariffs, although dramatically reduced under the Uruguay Round commitments, remain a major issue. Surprisingly, however, trade among developed countries ("North-North" trade) accounts for only $18 billion. On the other hand, South-South trade is a large and growing trend in global trade, but tariff payments are high at

[1] The NFTC paper "Why Zero is a Good Number" was prepared in April 2002. (Please let us know if you would like a copy.)

about 71 percent of total payments by developing countries, or $57 billion annually (about four times higher than among developed countries). Padilla also cited Oxfam International's recent study, which was rather critical of remaining barriers in developed countries to developing countries' trade – but did not highlight Padilla's point, that South-South barriers should be a focus of attention.

(2) Tackle "residual" tariffs: An estimated $16 billion is still paid by developed countries to each other ("North-North" trade) on tariffs. Developed countries also face high tariffs in developing countries. Padilla believes these tariffs "don't protect anything" and are mostly characterized as a "basic necessities tax" – and burden poor consumers.

Padilla showed a slide of a typical student with back-to-school supplies – in order to point out the imbalances created by the "basic necessities tax." For example, 47 percent of total US tariffs collected derive from clothes and shoes, although they comprise less than 7 percent of imports (e.g. jeans at 16.4 percent; shoes up to 48 percent; backpack 18.3 percent). He added that unfortunately, the hardest hit segment of U.S. society is single mothers who often are the largest market for these items.

(3) Half-way point/danger of FTAs: It is estimated that the percentage of duty-free trade is growing. Presently, duty-free trade represents about 42 percent of global trade. Padilla cautioned about the "web" of free trade agreements (FTAs) – which can make trade more complex, create distortions, and second-class status for poor countries.

Padilla showed a map reflecting major regional free trade agreements, expected between 2002 to 2020. The regions of the world which are not parties to FTAs (or in the near future) include South Asia and Africa, which could benefit from tariff reduction and increased development.

(4) Political bargaining: Tariff reduction is part of a "grand political bargain" to pursue reductions in high tariffs in developed and developing countries. Tariff reduction should be considered a good thing, especially for developing countries.

Padilla discussed generally the NFTC's main objectives or "Getting to Zero":

> ***(i) Immediate reduction, or by 2005***: Many sectors, representing close to 80 percent of global trade, are ready for immediate elimination – or by the Doha Round's expected conclusion in 2005;
>
> ***(ii) Gradual reduction, next 5-10-15 years***: Equal, annual reductions over the next 5, 10 and 15 years, for more sensitive products representing about 20 percent of global trade; accounting for S&D treatment to developing countries;

B. <u>Questions</u>

Padilla also responded to several questions, including whether the Information Technology Agreement ("ITA") model could be followed. He responded positively, saying a

gradual approach could be taken, as followed in the ITA. He also mentioned that certain U.S. industries are ready to pursue zero tariff reductions, including distilled spirits, forestry and paper, gems and jewelry and processed foods.

II. USTR Officials Describe Start of Geneva Process; Need for Fundamentals

USTR officials Paul Moore and Sarah Sipkins of the Office for Multilateral/WTO Affairs, handling industrial negotiations in the WTO and accessions, discussed U.S. approaches to WTO negotiations.

A. Moore Discusses Start of Process, Issues to Consider

Moore began by saying the WTO process was just beginning and WTO Members were now in the information gathering process. For example, the USTR expects to receive numerous comments from U.S. industries by May 1, the deadline cited in the Federal Register. The USTR also expects to receive in August a study prepared by the U.S. International Trade Commission (ITC) on the economic effects of WTO liberalization (updated from a 1999 study). The ITC is also preparing a study on benefits of exports to U.S. industries, which is expected by the end of the year.

Moore stated that the Geneva process began recently at a formal meeting in Geneva, held April 10-11, which considered negotiating timeframes, including on setting modalities. (As reported, the meeting reflected disagreements over whether to establish modalities in March 2003, which the US, EU and other developed countries support – or later in the year, as advocated by some developing countries). He mentioned that the WTO will hold a seminar at the end of May on examining approaches to tariff liberalization. He also stated that a key deficiency facing negotiators is the lack of adequate data on tariffs. Such data on tariffs and trade is necessary to develop negotiating proposals.

Moore emphasized that there is a strong desire among developing countries to take a more active role in current negotiations. These countries, however, face considerable resource constraints – including on their ability to send representatives to Geneva for negotiating sessions. In addition, developing countries often depend on tariffs for government revenues (up to 50 percent of national budgets) and as unofficial sources of income. Thus, their desire to reduce tariffs may be hampered. Nevertheless, many realize the benefits of pursuing liberalization, especially in light of the erosion of competitiveness resulting from preferential agreements (e.g. Caribbean Basin Initiative (CBI), Africa Growth and Opportunity Act (AGOA), among others).

Moore concluded by pointing out the need to consider not only tariff liberalization, but non-tariff barriers.

B. Sipkins Emphasizes Need to Prepare Fundamentals

Sipkins began by speaking of the increased complexity in current negotiations, including a larger and more active WTO membership. She cited three main issues:

(1) Build consensus: Need to encourage common denominators to move forward;

(2) Improve education: Further education on benefits of liberalization, including quantification of benefits from the Uruguay Round; and

(3) Expand capacity: Increase participation in the negotiating process.

Sipkins highlighted the fundamental need currently concerning the lack of available tariff and trade data. This data is required for further analysis, including quantifying the benefits of trade liberalization. The situation will improve as better software is developed to analyze data. Also, other institutions including the World Bank and UNCTAD have valuable databases which can assist the process. She also emphasized the need to address non-tariff barriers, including licensing, discriminatory standards, and other restrictions.

III. China's Zhong States China is Clarifying Position

Zhong Chuanshui, Commercial Counselor at the Chinese Embassy in Washington, discussed China's perspectives on WTO tariff negotiations, saying that the government has yet to define its position on tariffs, or other issues due to its recent membership. He cited the NFTC proposal and said its timeframe coincides with APEC Members' efforts to eliminate tariffs by 2010 (for developed country Members) and 2020 (for developing country Members). He also said China believes that tariff reductions of existing partners were "far from enough."

Zhong explained that China has pursued ambitious tariff reductions as part of its WTO accession, and is committed to reduce tariffs on most sectors. China also seeks lower tariffs from its trading partners, including for textiles, footwear, leather and other products. He also expressed concerns about non-tariff measures, saying they affect about 20 percent of Chinese exports, for example discriminatory including licensing, quotas and other barriers. In particular, he cited antidumping measures as problematic and too often used as a substitute for liberalization.

IV. Ed Gresser of Progressive Policy Institute Discusses Need to Reform U.S. Tariff Policy

Ed Gresser of the Progressive Policy Institute (and formerly of USTR) discussed a study he prepared on "America's Hidden Tax on the Poor: The Case for Reforming U.S. Tariff Policy."[2] He began by expressing surprise at the uproar over the steel safeguard issues – citing that these measures are only temporary, with tariffs ranging from 8 – 30 percent – and the lack of outrage over tariffs on a wide range of everyday goods.

Gresser described the U.S. approach to tariffs, stating that over the past 30 years, they are considered less important as a source of revenue. Now, most exist to protect certain domestic industries from competition – and in general, the US has managed to satisfy most industries through a balance of support. Overall, U.S. tariffs are low, accounting for about $19 billion or 1.6 percent of total trade (out of $1.2 trillion).

[2] The PPI paper "America's Hidden Tax on the Poor: The Case for Reforming U.S. Tariff Policy" was prepared in March 2002. (Please let us know if you would like a copy.)

Nevertheless, Gresser pointed out the imbalance in tariffs on certain products, including footwear and clothing (about 14.4 percent average, accounting for a disproportionate $9 billion in tariffs). He also cited an imbalance in tariff rates skewed towards cheaper products, compared with lower tariffs for equivalent luxury items. He cited an example of utensils and other consumer goods, and how the poor segments of society pay more in tariffs for cheaper products (polyester, plastics, etc.) vs. more expensive items (silk, silverware, etc.).

He asserted that two unfortunate consequence result from these tariff imbalances:

(1) Lower-income, single families hurt most – Lower-income and single-parent families, especially households headed by single mothers, are hardest hit by high tariffs.

(2) Developing countries hit hardest – Developing countries usually make cheaper goods and as a result, tend to be more affected than developed countries. He cited, for example, Mongolia pays 40 times higher tariffs than Norway; Bangladesh more than France; and Cambodia with $152 million in tariffs vs. Singapore with $96 million.

Gresser argued that high tariffs in the US, including those protecting sensitive sectors like the apparel industry, simply have not worked. He cited a huge loss of jobs in the apparel industry, despite the high levels of tariff protection. In addition, the US is not "uniquely bad" in its tariff policy. For example, others like the EU also maintain high tariffs in sensitive sectors. Furthermore, developing countries "don't treat each other that well" – and end up paying a lot of money to each other in tariffs, echoing Padilla.

Gresser concluded by suggesting three approaches to correct disparities in tariff policy:

(1) Domestic approach: Tariff policy should be treated as tax policy.

(2) Preferences to developing countries: Preferential arrangements like the CBI and AGOA help to alleviate tariff burdens on developing countries; however, their proliferation could result in confusion.

(3) WTO accord: A global agreement on binding tariff reductions is preferable.

V. EC's Lassus Presents EC Approach to Tariff Reduction

Renard Lassus of the Delegation of the European Commission in Washington spoke on the EU approach to tariff negotiations. He began by saying that "zero" is a good objective for tariff liberalization, but within certain parameters. Overall, much unfinished business is left from the Uruguay Round, and WTO Members should move towards zero tariffs. He suggested a balanced approach that would take account of other priorities – including non-tariff measures, other areas under negotiation, and new areas under consideration (e.g. investment and competition policy) that factor into the overall trade and investment environment.

Lassus highlighted three main issues:

(1) Improve market access for developing countries: Market access for developing countries needs to be improved. The EU, for example, has offered least-developed countries "everything but arms" duty-free access to its market. The mandate for liberalization provides flexibility to developing countries for "less than full reciprocity" – which could provide some transition periods for liberalization. There is a need to emphasize liberalization in South-South trade.

(2) FTAs and preferential arrangements: WTO liberalization should remain a priority, and preferences offered under FTAs should be compatible. Also, the EU extends unilateral preferences through its ACP and GSP arrangements. Additional preferences are offered to least-developed countries.

(3) Single undertaking: Progress needs to be achieved in overall negotiations – through a "single undertaking" incorporating other priority issues, and not by tariff reduction alone. Although the EU is not particularly against "early harvests" of particular sectors, such side deals could threaten progress in other areas under negotiation.

Lassus summed up the EU's approach as follows:

(i) Seek elimination of all tariffs, tariff peaks, tariff escalation and export duties;

(ii) Discourage sectoral exemptions which would shelter particular sectors; and

(iii) Approach modalities with flexibility (e.g. formula approach, gradual liberalization or other approaches).

VI. Question and Answer Period

A. Industry Data and Capacity Building Efforts

USTR's Moore responded to a rambling question, regarding industry data and capacity building efforts. He explained that certain industries lack sufficient data, including for goods related to services (e.g. environment, energy, etc.) In addition, he believes that capacity building efforts should be centralized. He also pointed out that the WTO has received more funds to provide technical assistance ($30 million Swiss francs) to developing countries.

B. Developing Countries Reticence on Time Frames

USTR's Moore and the EU's Lassus responded to a question on recent reticence by some developing countries to set timeframe for negotiations. Lassus emphasized the need to move as quickly as possible, considering the ambitious schedule for negotiations. Moore pointed out there is no disagreement on an end date, so Members must work back and establish clear timeframes. He also reported discussions were ongoing (on negotiating modalities).

C. Reciprocity for Developing Countries

Moore responded to a question on whether developing countries will be pressured to offer fully reciprocity. He responded that developing countries are very different and not all should be accorded similar flexibility, for example, Brazil as opposed to Haiti.

D. Support for NFTC Proposal

Padilla responded to a question on the level of support for the NFTC's zero tariff liberalization proposal. He explained that the NFTC was just beginning its "sales effort" and, therefore, had much work to do domestically, as well as selling the message to trading partners.

For example, NFTC is working with sensitive industries in the US to encourage them to rethink their position on industrial tariffs. Among trading partners, NFTC members have met with delegations in Geneva to encourage support. Some positive responses have come from the EU, New Zealand, Australia and Canada. NFTC plans to speak with China, which as a huge producer would benefit from lower tariffs in its export markets. Since China has already lowered many of its tariffs as a part of its WTO accession, it is an important ally in pushing for lower tariffs globally.

OUTLOOK

Speakers generally agreed that WTO negotiations on industrial market access are beneficial to both developed and developing countries – including through complete elimination of tariffs, and tackling non-tariff barriers. Since WTO Members have just begun the negotiating process, industry groupings such as the NFTC are also keen to aid in the education process, and will attempt to persuade both sensitive domestic industries as well as trading partners on the merits of tariff liberalization.

Officials from USTR and the EC were optimistic that WTO negotiations would proceed as scheduled, despite recent disagreements in Geneva regarding time frames for establishing negotiating modalities. Clearly, some developing countries including India and some in Africa and Asia, are not convinced of the need to pursue ambitious tariff liberalization (perhaps due to domestic resistance to loss of tariff revenue, and protection of sensitive industries). Nevertheless, most WTO Members certainly appear open to gradual tariff reductions, if not in most sectors. In addition, China is a key player in the WTO – which has yet to clarify its negotiating position on many issues under negotiation.

It appears increasingly clear that negotiations on industrial goods will be linked to progress in other issues of priority to developing countries, including agricultural liberalization. Some Members like the EU and Japan prefer to handle all issues as a "single undertaking" in order to balance interests – and likely, to alleviate pressure from their sensitive industries. Others, including some developing countries prefer a more limited agenda, which builds in greater flexibility for developing country approaches to liberalization. In any case, both developed and developing countries recognize that tariff liberalization is only one aspect of achieving an optimal trade (and investment) climate.

USTR Ambassador Deily Briefing on Doha Negotiations

SUMMARY

Ambassador Linnet F. Deily, the United States Trade Representative (USTR) to the World Trade Organization (WTO) provided a briefing on the progress in Geneva of the global round of trade negotiations launched at the Doha Ministerial ("Doha Round").

Deily's remarks were brief and mentioned the following:

- Positive outlook in Geneva among negotiators and diplomats;
- The role of capacity building and technical assistance in the context of the Doha Development Agenda;
- The expanded role of developing countries in the current round of negotiations;
- The effect of the steel safeguard disputes on the negotiating agenda; and
- Progress of Russia's WTO accession

The seminar entitled "Geneva Issues and Atmosphere" was held on May 2, 2002, in Washington and was the fourth in a ten-part series of seminars on the new WTO trade round, hosted by the Global Business Dialogue (GBD), National Foreign Trade Council (NFTC), and Washington International Trade Association (WITA).

ANALYSIS

I. Briefing by USTR Ambassador to the WTO Linnet Deily

Ambassador Deily on May 2, 2002, provided a briefing on the progress in Doha Round negotiations in a seminar entitled "Geneva Issues and Atmosphere." The seminar is the fourth in a series on Doha Round negotiations hosted by the Global Business Dialogue (GBD), National Foreign Trade Council (NFTC), and Washington International Trade Association (WITA).

A. Deily Cites Progress in Negotiations

Deily began her remarks by stating that WTO Members have made "record time" thus far in negotiations, especially when measured against progress in the Uruguay Round negotiations.

Deily explained that all WTO decisions are taken by unanimous consent, and coalitions and alliances among WTO Members change regularly by topic or issue. She believes the constant melding of views encourages progress on difficult issues, particularly considering the increasingly vocal role played by developing countries.

Despite this progress, Deily noted that the "heavy lifting" of actual negotiations has yet to begin in most areas. Nonetheless, she emphasized that the United States is fully committed to

the January 2005 deadline for completion of the Round. Deily believes that three years is an adequate amount of time to complete negotiations, but she highlighted the necessity of keeping negotiations moving on schedule.

B. Mexico Ministerial and Target Dates

Deily stated that WTO Members will establish by the end of May the date for the 2003 Ministerial Meeting (anticipated to take place in Fall 2003), to be held in Mexico. Once the date is set for the Mexico meeting, it will serve as a helpful benchmark for negotiations. She also emphasized that the Mexico Ministerial in 2003 will not just be a stock-taking exercise, but will serve as a critical juncture in which tough decisions must be made.

For example, certain areas like agriculture, services and intellectual property rights (TRIPs Decision), have key deadlines that must be met, for example on the establishment of negotiating modalities (or approach). In regards to agriculture, she is confident that the setting of modalities will be completed by the March 2003 deadline. She also noted that the dispute settlement review, which has a separate deadline of May 2003, is moving ahead. Considering the many important decisions that must be made, she noted that the trade community expects the Mexico Ministerial to be much more than simply a mid-term review.

Overall, Deily believes that the Doha Round of negotiations must be broad-based enough so that all countries receive an equal share of benefits. The aim is to have a significant portion of the WTO membership feel the same sense of balance at the end of the Round as they did in Doha when the Ministerial Declaration was signed. In general, she reported that the mood in Geneva is positive, and that negotiators returned from Doha with a high level of enthusiasm for the new round.

C. Capacity Building Efforts

In terms of capacity building efforts, Deily stated that the WTO is planning technical assistance seminars in Geneva and throughout the world. She pointed out, however, that the WTO is not a development institution and that other international organizations are ready to assist in that context (*e.g.* World Bank, UNCTAD, regional development banks).

Deily explained that the United States also is spending time and effort on capacity building initiatives. In addition, the U.S. business community has expressed interest in supporting negotiations. She has heard from other delegations that their respective business communities are also interested in providing assistance.

D. Question and Answer Period

(i) Steel Safeguards

In response to a question on whether the dispute over U.S. steel safeguards has affected Deily's day-to-day routine in Geneva, Deily responded that the dispute, although significant, has not derailed the Doha negotiations.

She also mentioned that diplomats in Geneva were following the debate in Congress over Trade Promotion Authority (TPA) – and that securing TPA would help increase US credibility in negotiations.

(ii) Developing Country Delegations

In response to a question on Deily's interaction with developing country delegations, Deily responded that she spent a great deal of her time in Geneva with representatives from developing countries. In particular, Deily mentioned that she was particularly impressed by the delegations of Korea, Brazil, India, South Africa and Kenya.

II. Deily Remarks on Russian Accession

Deily spoke briefly on the status of Russia's accession to the WTO, and was less optimistic on the prospects. She indicated that the current Russian market-access offers are, by and large, unacceptable to the US. Having both recently returned from Moscow, and attended the most recent WTO Working Party on Russian accession (the week of April 22), she stated that the Russian government realizes that its proposals fall short of WTO Members' expectations for its membership.

Deily stated in particular that most WTO Members of the Working Party expressed the need for Russian commitments on reducing customs barriers, lifting restrictions on services providers, and eliminating subsidies. She expressed hope that the Russian negotiators would return to Geneva in mid-June for an intensive (and more productive) session of the next Working Party, equipped with high-level instructions from capital. She noted that the WTO accession process provides a good opportunity for Russia to realize many of its pending reforms.

Deily responded to a question from the legal representative of Stolichnaya Vodka, who expressed concern that the Russian government might nationalize investments in violation of WTO requirements. She stated that she could not address the issue specifically, but noted that there exists high-level political support in Russia for WTO accession. It was unlikely, she added, that the government would risk upsetting trading partners and investors at such a crucial stage of accession negotiations.

Deily concluded by saying that Russian accession will be a key issue in discussions during President Bush's visit to Moscow in mid-May.

OUTLOOK

Deily provided a fairly optimistic outlook of the state-of-play of negotiations in Geneva, and highlighted that many of the WTO negotiating bodies are proceeding well. She did not, however, discuss the more problematic issues that have arisen – including disagreements on timeframes for industrial market access negotiations; scope of negotiations on WTO rules and the environment; and difficult decisions ahead on textiles liberalization (July 2002) and compulsory licensing provisions (end 2002), among other issues. In addition, WTO Members

are questioning U.S. credibility in negotiations due to the proposed substantial increases in subsidies in the Farm Bill; and implications of the Section 201 steel safeguards.

Nevertheless, WTO negotiations in certain sectors will soon move quickly – including with the start of the "request" phase for services negotiations (beginning June 2002), setting of modalities for agriculture and goods trade (anticipated by March 2003), and dispute settlement reform, among other issues. No doubt, the Mexico Ministerial in 2003 will require strong leadership from the US and other key WTO Members in order to provide momentum to conclude negotiations by the ambitious target of 2005.

USTR Receives Numerous Public Comments on WTO Doha Negotiations

SUMMARY

The Office of the United States Trade Representative ("USTR") received 145 submissions as of May 19, 2002, in its latest request for public comment on "The Doha Multilateral Trade Negotiations and Agenda in the World Trade Organization." The number of comments is substantial and more numerous than typical for negotiations.

USTR received submissions from a wide range of U.S. industries, non-government organizations, associations and other groups which commented on the five main areas under negotiation in the new trade round and other issues:

- ***Agriculture*** – tariffs; tariff rate quotas; subsidies and domestic support.
- ***Industrial goods*** – tariff and non-tariff barriers.
- ***Services*** – Sectors including distribution, financial, telecom, tourism and others.
- ***Intellectual property*** – public health and access to essential medicines; geographical indications.
- ***Rules/disciplines*** – Antidumping and subsidy negotiations; regional trade agreements; and multilateral environment agreements.
- ***Other issues*** – development; environment; competition and investment policy; and other.

We have included a list of the 145 submissions as categorized by major negotiating issue and sub-sectors of interest. (We are in the process of preparing a detailed report analyzing all comments.)

ANALYSIS

The USTR on March 19, 2002, issued the latest in a series of requests in the *Federal Register* for public comment arising from WTO negotiations. Prior requests were released in preparation for sectoral negotiations on agriculture and services trade (launched in January 2000), and in preparation for the WTO Doha Ministerial in November 2001. The recent request was the first to be issued after the launch of a new global trade round at Doha.

In the request, the Trade Policy Staff Committee ("TPSC" – a body coordinated by USTR) requested comments from interested parties by May 1, 2002. USTR recently made available some of the public comments it has received. (Some comments that contain sensitive negotiating information will not be released publicly.) USTR and other government agency members of the TPSC intend to incorporate the comments in their formulation of the U.S.

government's negotiating positions at the WTO.

We list below the 146 submissions received as of May 19, 2002, and as categorized by major negotiating issue and sub-sectors of interest. (We are in the process of preparing a detailed report which will provide an analysis of all comments.)

I. General Trade Associations

1. American Association of Exporters and Importers
2. Consuming Industries Trade Action Coalition
3. National Foreign Trade Council
4. U.S. Council for International Business

II. Agricultural Producers and Products

A. General Associations/Companies

5. AgTrade Coalition
6. American Farm Bureau Federation
7. Biotechnology Industry Organization
8. California Farm Bureau Federation
9. CoBank (Farm Credit System)
10. Croplife America
11. Florida Department of Agriculture & Consumer Services
12. Kraft Foods Intl., Miller Brewing Intl. & Philip Morris Intl.
13. Monsanto
14. National Food Processors Association
15. North Dakota Farmers for Profitable Agriculture
16. Tricon Global Restaurants (KFC, Pizza Hut & Taco Bell)

B. Commodities, Fruits & Vegetables

17. American Dehydrated Onion & Garlic Association
18. American Oilseed Coalition
19. American Peanut Coalition
20. American Potato Trade Alliance
21. American Sugar Alliance
22. Apricot Producers
23. Blue Diamond (Almond) Growers
24. The California Cherry Advisory Board
25. California Cling Peach Board
26. California Pear
27. California Table Grapes
28. Chocolate Manufacturers Association & National Confectioners Association
29. Florida Citrus Mutual
30. Florida Fruit & Vegetable Association
31. Florida Tomato Exchange
32. National Barley Growers Association
33. National Cotton Council

34. National Potato Council
35. North Dakota Wheat Commission
36. Sun Maid Growers of California
37. U.S. Grain Council
38. U.S. Wheat Associates
39. USA rice Federation
40. Nebraska Wheat Board

C. Dairy, Fish and Livestock

41. Cheese Importers Association of America, Inc.
42. Hill's Pet Nutrition, Inc.
43. National Cattlemen's Beef Association
44. National Fisheries Institute
45. National Pork Producers Council
46. Pet Food Institute
47. Ranchers-Cattlemen Action Legal Fund
48. United Egg Producers & United Egg Association
49. USA Poultry & Egg Export Council
50. Musco Food Corporation

D. Floral, Liquor, and other Goods

51. Campbell Soup Company
52. Cucina Classica Italiana, Inc.
53. Distilled Spirits Council of the U.S.
54. The Fertilizer Institute
55. Floral Trade Council
56. Gallo Brokerage (specialty foods)
57. Savello USA, Inc. (specialty foods)
58. Shinoda Floral Inc.
59. Sweetener Users Association
60. Trebon European Specialties USA (specialty foods)
61. Wine Institute & California Association of Wine Grape Growers

III. Industrial Manufacturers

A. General Associations

62. Joint Industry Group
63. Manufacturers Alliance/MAPI
64. National Association of Manufacturers

B. Automotive/Equipment/Other Manufactures

65. American Forest & Paper Association
66. American International Automobile Dealers Association
67. Avon Products, Inc.
68. Caterpillar (construction equipment)

69. Daimler Chrysler Corp. (automotive)
70. Hallmark Cards (greeting cards)
71. John Deere (agriculture/construction equipment)
72. Libbey Inc. (glasswear)
73. Mattel Inc. (toys)
74. Outdoor Power Equipment Institute, Inc. (lawn equipment)
75. Paint Applicator Division of the American Brush Manufacturers Association
76. Toy Industry
77. United Technologies Corporation (electronics/industrial products)

C. Steel/Chemicals/Plastics

78. Alcoa (aluminum producer)
79. American Chemistry Council
80. American Iron & Steel Institute
81. American Phosphate Trade Committee
82. American Restaurant China Council`
83. ANSAC (soda ash producer)
84. Bethlehem Steel Corp, National Steel Corp., & U.S. Steel Corp.
85. Celanese (chemical/plastic/fiber producer)
86. Committee on Pipe and Tube Imports
87. Nucor Corp.
88. Rhodia Inc. (specialty chemicals)
89. Shrieve Chemical Products, Inc.
90. Southern Tier Cement Committee
91. Specialty Steel Industry of N.A.
92. Timken Co. (bearings/steel producer)
93. Torrington Co. (bearings producer)
94. United Steelworkers of America
95. U.S. Producers of Soda Ash

D. Electronics/IT Products

96. Advanced Medical Technology Association (AdvaMed)
97. American Watch Association
98. Industry Sector Advisory Committee (ISAC5) on Electronics and Instrumentation
99. Information Technology Association of America
100. IPC - Association Connecting Electronics Industries (IPC)
101. Micron Technology
102. National Electrical Manufacturers Association (NEMA)
103. Philip Electronics NA
104. Pulse/Technitrol, Inc. (electronics)
105. Semiconductor Industry Association
106. Thomson Multimedia Inc. (television manufacturer)

E. Textiles, Apparel and Footwear

107. American Textile Manufacturers Institute

108. American Yarn Spinners Association, Inc.
109. Association of Nonwoven Fabric Industry
110. Footwear Distributors & Retailers of America
111. Levi Strauss & Co.

IV. Services Providers

A. General Associations

112. Coalition of Services Industries

B. Professional Services

113. American Bar Association
114. American Library Association

C. Distribution/Transport/Maritime Services

115. American Waterways Operators
116. Grocery Manufacturers of America
117. International Mass Retail Association
118. U.S. Maritime Coalition
119. Walmart

D. Financial Services

120. American Insurance Association, American Council of Life Insurers, Council of Insurance Agents & Brokers, International Insurance Council & Reinsurance Association of America, Coalition of Service Industries
121. Financial Services Forum
122. New York Life International

E. Telecommunications/Network Services

123. AOL Time Warner
124. AT&T Corp.
125. Comptel
126. EDS Corp.
127. IBM, EDS, Oracle Corp., Intel, Sun Microsystems, Inc., Hewlet-Packard Co., & Verisign
128. Information Technology Industry Council
129. Verizon

F. Education Services

130. American Council on Education
131. Council for Higher Education

G. Tourism Services

132. American Hotel & Lodging Association

V. Intellectual Property Rights

133. Business Software Alliance
134. Mid-America Sales Co. (geographical indications)
135. Novartis Corp.
136. Pharmaceutical Research and Manufacturers of America (PhRMA)
137. Software & Information Industry Association

VI. Non-Government Organizations (Environment/Consumer)

138. Center of Concern
139. Defenders of Wildlife
140. Global Alliance for Trade Efficiency
141. National Retail Federation
142. Public Citizen
143. Wine, Beer & Spirits Committee of Global Alliance for Trade Efficiency and the International Federation of Wine and Spirits

VII. Other

144. Crowell & Moring LLP (competition policy)
145. Industry Sector Advisory Committee (ISAC 14) on Small/Minority Business
146. State of Alaska, Office of the Governor

Doha-Series Panel on "Shared Services: The WTO Services Negotiations"

SUMMARY

Participants at the WTO Services Negotiations symposium held on May 23, 2002 in Washington, DC, provided analysis of upcoming GATS commitment negotiations. Overall, participants stressed the limited nature of services commitments thus far and the need for further liberalization in services trade, especially by developing countries. In particular, regulatory burdens on services were targeted as a key issue for upcoming negotiations. Participants laid out the justification for additional liberalization and removal of regulatory obstacles to freer trade in services, and identified key areas for discussion during the next stage of Doha Round negotiations.

ANALYSIS

On Thursday, May 23, 2002, the Global Business Dialogue, the Washington International Trade Association, and the National Foreign Trade Council sponsored a symposium on the WTO Services Negotiations under the GATS. The symposium is the fifth in a ten-part series of seminars on WTO negotiations. Speakers included:

- Mr. Joseph Papovich, Assistant United States Trade Representative for Services, Investment and Intellectual Property
- Mr. Richard Self, Former USTR GATS negotiator and Senior Advisor, Akin, Gump, Strauss, Hauer & Feld, Washington, DC
- Mr. Edward Yau, Director-General, Hong Kong Economic and Trade Office, Washington, DC
- Ms. Anna Snow, Senior Adviser (Trade Section), Delegation of the European Commission
- Mr. J. Robert Vastine, President, Coalition of Service Industries
- Mr. Kevin Mulvey, Assistant Vice President of Corporate and International Affairs, American International Group, Inc. (AIG)
- Mr. Steven Stewart, Director of Public Affairs, Governmental Procurement, IBM

I. USTR Presents Overview of GATS Accomplishments and Challenges for New Negotiations

Mr. Papovich kicked off the panel discussion by discussing the progress of GATS negotiations thus far and the direction such negotiations would take in the next few years. Papovich underscored the importance of GATS as the basic framework agreement, and characterized the present challenge as one of adding more countries, more sectors, and addressing regulatory barriers. While downplaying the importance of country-by-country

agreements under GATS, Papovich highlighted the framework agreement as a tremendous accomplishment in and of itself and as a means by which further negotiations could take place. Moreover, Papovich also pointed out the considerable progress that had been made in sectoral liberalization by effectively opening market access, including regulatory practices, through the Telecom and Financial Services Agreements. However, in spite of all this progress, Papovich characterized that most WTO Members' commitments thus far reflect a "standstill" of the current market situation, and less a case of improving on existing barriers.

A. Interests of Developing Countries in Services Negotiations

Looking ahead, Papovich indicated that the services negotiations would progress step-by-step towards greater liberalization through successive rounds. Papovich noted that 115 proposals on areas for new negotiations have been made by 40 countries – 30 of them, interestingly, developing countries. While he suggested that GATS had been traditionally characterized as a developed countries' agreement, Papovich asserted that developing countries are now realizing interests in these issues, particularly on Mode 4 issues dealing with movement of personnel. Developing countries have also started to express interests in various services sectors – including energy, tourism, telecom, and financial services – which, according to Papovich, "pleases USTR."

B. Importance of Services Negotiations for the US

As the largest services exporter in the world, the US stands most to gain from a more open services economy among nations. Focusing on US interests in GATS, Papovich stressed the importance of services negotiations to USTR. He contended that economic growth and development depends on access to services sectors abroad, and indicated that USTR sees services as front and center in the Doha Round. Papovich provided statistics that buttressed this concern:

- 80 percent of US private sector GDP consists of services;
- 80 percent of US employment is services-related;
- Services exports provide four million jobs;
- 1999 sales of services abroad amounted to $338 billion; and
- Every single state in the US was involved, for example, in some form of data or software services export

C. Timeframe for Services Negotiations.

On the Geneva process, Papovich emphasized that the Doha Ministerial Declaration reaffirmed the March 2001 negotiation guidelines and reiterated objectives in GATS Article XIX (on "Progressive Liberalization"). In particular, Papovich summarized the negotiations timeframe for commitments:

- June 30, 2002 – initial deadline for submission of initial bilateral "requests" or commitments on liberalization by WTO members;

- March 31, 2003 – deadline for submission of initial formal "offers" resulting from bilateral negotiations among WTO members on requests; and

- End of 2004 – finalization of negotiations (assumes initial offers are deemed inadequate by requesting countries and additional negotiation is necessary) to meet January 1, 2005 deadline for the end of the round.

Papovich indicated that USTR has prepared requests for submission on June 30th. In the process of preparing these requests, USTR has put trading partners on notice over the past two years that it would seek deeper and wider negotiations on liberalization. Also, Papovich stated that USTR had been seeking domestic private sector input both formally and informally and had received a great deal of information from interested parties. USTR has used this information to develop requests for submission on June 30th that will guide negotiations for the next two years.

D. Key Goals and Political Obstacles.

In sum, Papovich stressed the need to use these negotiations:

(i) Broaden participation in services negotiations;

(ii) Roll back restrictions on services trade;

(iii) Build on the Telecom and Financial Services Agreements; and

(iv) Address regulatory obstacles to services trade.

As a post-script, Papovich mentioned an amendment introduced by Senator Corzine that would have directed USTR not to seek privatization of "essential public services" such as the military and education. Papovich noted this as an example of political decisionmakers trying to constrain what USTR asks for. Papovich stressed that USTR is not seeking privatization of essential public services, but noted that different people may disagree as to the definition of "essential public services." (U.S. industry coalitions have opposed the amendment.)

E. Questions

1) Would the Doha Round result in another plurilateral agreement?

Papovich suggested that he did not think there was a need for an additional plurilateral agreement, but that, in any event, it was too early to tell at this time. Alternatively, Papovich emphasized the need for bilateral negotiations, which, he admitted, are limited by the positivist approach to services where not every country will necessarily take commitments.

2) Is there a need for an explicit understanding that cross-border trade in services includes delivery over the Internet or other forms of e-commerce?

Papovich said no. "Commitments are commitments regardless of physical means." He suggested that electronic means of delivery, including Internet, were understood as included in overall commitments.

3) Are the EU and Japan on board with the US services agenda?

Papovich indicated that both Japan and, particularly, the EU were positive and eager to negotiate on broadening liberalization. Papovich suggested that there may be substantial differences among these parties in other areas of the WTO, but not in services.

4) When is the next Ministerial meeting in Mexico, and has Mexico become more flexible and open to the WTO process?

Papovich announced that the next Ministerial would be in Cancun, Mexico, in mid-September (September 10-14, 2003). He claimed to be very impressed with the current Mexican administration on trade matters, and stated that Mexico has played a much more active role in the WTO lately.

5) Where might the US be on the defensive in services negotiations? Would such areas include maritime and movement of personnel?

Papovich stated that USTR had no proposals to make on maritime issues and was waiting to look at relevant requests. With respect to movement of personnel, Papovich suggested that this was a more complicated issue where the US in fact has interests. Undoubtedly, these issues have been further complicated since 9/11. He also indicated that USTR had to be sensitive to the concerns of INS in addressing Mode 4 matters. He expected USTR to receive requests on this issue, and indicated that this issue has also been a factor in FTA negotiations with Singapore and Chile.

II. Panel Moderator Self Raises Regulatory and Mode 4 Issues

Richard Self, Senior Advisor at the law firm of Akin Gump (and formerly senior USTR official on services) served as moderator of a panel which included representatives from the EU, Hong Kong and private sector representatives. Self pointed out two issues of relevance that merited closer attention:

- ***Non-discriminatory regulations.*** Self noted that individual sector regulations, applicable both to foreign and domestic services suppliers, often pose a serious obstacle to liberalization. Service suppliers in certain services sectors want regulators to treat all suppliers in a non-discriminatory, less onerous way. Self cited as a problem the discriminatory nature of government oversight, which affects how all services providers, foreign and domestic, are regulated. Moreover, Self noted that

progress on this issue would raise problematic sovereignty and political concerns. Nevertheless, Self noted that liberalization is possible, offering the example of the FCC's lead in paving the way for telecom liberalization. He also suggested this regulatory issue is relevant to many other sectors, including energy.

Methods (Modes) of supply. Self noted two particular areas of concern here:

- *Internet.* E-commerce concerns are much more relevant now than during the Uruguay Round. Treatment of e-commerce poses serious strategic issues for the private sector.

- *Mode 4.* There is a measure of agreement between developed and developing countries on this issue. Developed countries have interests in promoting the movement of professionals and making visa regimes more flexible in this regard. Developing countries seek more flexibility in categories of "skilled" workers. However, accommodating the particular interests of both developed and developing countries would prove to be very difficult, according to Self.

III. Yau Provides Hong Kong's Perspective on Liberalization.

Mr. Edward Yau, Director-General of the Hong Kong Economic Trade Office in Washington, stressed Hong Kong's desire for deeper and broader liberalizations in services trade worldwide.

A. Hong Kong's Strong Interest in Services Liberalization.

Yau stated that Hong Kong sees services negotiations as an important part of the WTO process. He indicated that services have become increasingly significant to economic growth, and that Hong Kong is a strong exporter of services. Along these lines, Yau suggested that it was in Hong Kong's self-interest to promote an equitable group system on services trade liberalization.

B. How Did Hong Kong Arrive at That Position?

Hong Kong is a small but open economy dependent on liberalization of trade in services. The territory has no natural resources except its people and its harbor. Yau pointed out that Hong Kong is the world's 10th largest trading entity in goods and services. Moreover, for the last 20 years, Hong Kong has experienced a major transition from a manufacturing-based economy to a services-dominated economy comprising 85 percent of GDP. Yau attributed this outcome to Hong Kong's open trading regime. As an example, Yau described Hong Kong's buy-back of its exclusive telecom franchise in 1998 and its subsequent licensing of multiple competitors in that market as key example of Hong Kong's unilateral efforts at opening markets. Yau contended that, as a result, Hong Kong had the most open telecom market in the world. This example, argued Yau, suggests that liberalization of trade in services brings about an improved infrastructural platform for economic growth. Yau also indicated that this point was particularly relevant for developing countries concerned about the negative impact of liberalization.

C. Hong Kong's Goals and Concerns in Services Negotiations.

Hong Kong's story emphasizes how a small economy can benefit from liberalization. Yau stated that Hong Kong's overarching goal for negotiations was the furthering of a transparent, rule-based, equitable trading system:

- *Transparent* – Trading rules must guarantee market access for services;
- *Rule-based* – Trading rules must engender certainty for market participants and investors; and
- *Equitable* – Trading rules must create a level-playing field that is credibly fair.

Yau then outlined specific goals and areas of concern that WTO Members should address in negotiations:

- *Recognition of "autonomous liberalization"* – Yau indicated that Hong Kong supports a binding rule-based approach to services agreements. He recognized the concerns of developing countries over binding commitments (and desire to receive credit for autonomous liberalization), but emphasized the need to promote constructively binding commitments to liberalize trade in services. In doing so, Yau suggested that Hong Kong could act as a constructive middleman, narrowing the gap between developed and developing countries on disagreements over binding commitments.
- *Commitments in multiple sectors* – Liberalization in one sector cannot be complete without commitments in related sectors, according to Yau. Cross-sectoral liberalization was necessary, he argued, to promote efficiency and "one-stop-shopping." Failure to liberalize related sectors would discourage commercially meaningful liberalization.
- *Domestic regulations* – Yau stated that Hong Kong supports the work of the GATS Working Party charged with looking at "disciplines" for domestic regulatory activity. Yau suggested that disciplines applying to the regulation of service sectors should be horizontal - across sectors - rather than based on a sector-specific approach (*e.g.* GATS Article VI approach). Yau contended that there should be greater discipline over internal regulatory structures, and that regulations "should not be more burdensome than necessary."
- *MFN exemptions* – Yau contended that, generally, exemptions to the MFN principle should be removed, and current MFN exemptions registered by WTO members should not exceed 10 years. Hong Kong itself has registered no MFN exemption in its commitments. Yau argued that such exemptions posed serious barriers to liberalization.

IV. Snow Articulates EU Goals; Addresses Participation by Developing Countries and Privatization

Anna Snow, Senior Adviser (Trade Section) of the Delegation of the European Commission in Washington indicated that services constitutes the single most important market for the EU, comprising two-thirds of GDP and employment and half of incoming and outgoing foreign direct investment. She articulated four objectives of the EU in upcoming services negotiations:

1) Greater market opening coupled with disciplines;

2) Meaningful market access;

3) A transparent and predictable regulatory environment that provided legal certainty; and

4) Liberalization of trade services consistent with sustainable development

In addition to these four objectives, Snow pointed out the EU's interest in "unfinished business" on emergency safeguards, subsidies, and government procurement.

Snow then raised the importance of participation by developing countries in services negotiations. While recognizing the need for developing countries to have flexibility under GATS, she asserted that it was nonetheless in the interest of developing countries to make substantive commitments. Snow suggested that substantive commitments would provide a more secure environment in developing countries for investors.

Finally, Snow addressed the public provision of services, stating that the EU has always taken a neutral position on privatization. Snow stressed that GATS was designed to be flexible and not interfere with governments' right to regulate. However, in recognizing the importance of liberalization, Snow underscored the difficulty of balancing the promotion of competition with the need for a government to intervene.

V. Questions for Government Officials

1) Is there a need to define e-commerce under GATS?

Snow asserted that there is no such thing as an e-commerce sector. She suggested that negotiators needed to look at all services sectors that can facilitate e-commerce, but not look at e-commerce as a sector. The two relevant issues on e-commerce, according to Snow, were classification and market access, both of which have to be evaluated on their own merits.

2) What has the response of WTO members been to Hong Kong's proposal to add "logistics services" as a cluster of services that should be negotiated?

Yau said that it was too early to assess the response. However, he stated that the proposal addresses an emerging services sector and that negotiators should find a way to discuss related sectors jointly in negotiations.

VI. Private Sector Perspectives

A. CSI's Vastine Addresses Cross-cutting Issues in Services

Robert Vastine, President of the Coalition of Service Industries (CSI) laid out the justification for pursuing greater services liberalization worldwide. He asserted that the US official surplus in trade services – currently $82 billion – has leveled off in recent years because of the relative lack of serious liberalization efforts abroad. Vastine stressed that greater liberalization amounted to a national security imperative. He argued that there is already a tremendous propensity among foreign consumers to buy U.S. services, so that potential benefits to the US from further liberalization would be enormous.

Vastine identified four cross-cutting issues affecting all services sectors:

1) ***Transparency in domestic regulations –*** Vastine argued that regulators are able to undermine GATS commitments unless there is more transparency in regulatory processes. He stated that transparency was taken for granted in the US, where agencies must abide by the APA's prior comment and notice regime. He asserted that the US was alone in this notion of transparency, particularly with respect to regulators' acknowledgement and deliberate consideration of private sector comments. Japan and the EU think they have a comparable form of transparency, according to Vastine, but, in fact the EU in particular has taken a position far different than US-style form of regulatory transparency. Alternatively, Vastine noted that the "least burdensome" test of regulatory oversight was not viable in the US.

2) ***Personnel mobility –*** Vastine briefly mentioned the possibility of negotiations of three-year visas for multiple entries to allow intra-company transfers of professionals.

3) ***E-commerce*** – Vastine indicated that e-commerce issues posed interesting regulatory problems, particularly with respect to electronic transactions of securities. He stated that the WTO commitments should be technology-neutral and that financial services trade commitments should apply to Internet trading. Furthermore, Vastine urged that negotiations should not result in measures that would force investors to roll-back investments because stated commitments might be less generous than rights currently enjoyed in those sectors.

4) ***Safeguards –*** Vastine indicated that there was a commitment in GATS to negotiate an emergency services safeguards structure, but that the commitment merely required negotiation and did not necessarily require adoption. These negotiations have been ongoing, but deadlines have been repeatedly postponed. CSI's position is that such safeguards would be extremely dangerous. Vastine argued that adoption of services safeguards would raise a whole host of problems. He suggested that developing countries

would not want the US to use these safeguards against their "supply" of professional services personnel, pointing out India as a particular example.

B. AIG's Mulvey Discusses Prospects for the Insurance Industry

Kevin Mulvey, Assistant Vice President of Corporate and International Affairs, American International Group, Inc. (AIG), discussed the WTO liberalization process as it affects insurance services.

1) Weaknesses of GATS Approach – Mulvey underscored the fact that, thus far, services agreements have only achieved a standstill at best with respect to existing regulatory obstacles. Mulvey did not characterize that as a success. Moreover, he indicated that GATS itself was not an optimal framework for services negotiations, principally because of its "positive list" approach. He noted that services schedules are very modest and that there exist real dangers of countries binding their commitments at levels disadvantageous to existing practice. For example, foreign financial services firms would find a binding that required a country to allow them to hold at least 25 percent equity in domestic financial services ventures potentially disadvantageous if current practice permitted 40 percent equity ownership. If domestic politics were to demand a roll-back of foreign-owned equity shares from 40 to 25 percent via regulation, foreign investors would have little recourse since this roll-back would not be a violation of the country's commitments.

2) Need for International Private-Sector Cooperation – An important development of the 1995 negotiations (conclusion of Uruguay Round), according to Mulvey, was the realization among U.S. services firms that without broader support among nations, the US would not get very far in its services agenda. Both developed and developing nations had to realize interests in these sectors. As a result, U.S. services industries established closer ties with private sector industries abroad through entities such as the Financial Leaders Group. These industries developed common approaches to encourage negotiators to develop a coordinated approach.

Mulvey outlined goals that the insurance industry would pursue in the upcoming services negotiations, including advocacy of a "model schedule":

- ***Market Access and National Treatment*** – In particular, Mulvey stressed the need to allow foreign insurers to do business using whatever corporate form makes business sense. Indelibly related to market access, burdensome regulatory regimes hampers pricing flexibility and marketing efforts. Mulvey stated that highly onerous regulations create a glass ceiling for foreign insurers and stifle innovation, thereby effectively removing access.

- ***Modernization of the Regulatory Environment, Not Deregulation*** – Finally, Mulvey indicated that the insurance industry is not actually pushing for complete deregulation in its services agenda. There is a clear need, Mulvey admitted, to protect consumers and establish capital requirements. At the micro level, consumer confidence has to be maintained, he argued. At the macro level, the soundness of the financial system is

critical, he added. However, Mulvey further suggested that, within the regulatory system, market forces should be permitted to play a role. Accordingly, regulators in countries with underdeveloped regulatory systems would not find this balance easy to strike. Mulvey stressed that the insurance industry wanted modernization of the regulatory system, not deregulation.

C. IBM's Stewart Discusses Technology Sector's Priorities

Steven Stewart, Director of Public Affairs, Governmental Procurement, of IBM discussed the technology sector's priorities for WTO negotiations.

1) Importance of Services Negotiations to Technology Sector – Mr. Stewart indicated that 60 percent of IBM's revenue comes from outside the US. IBM generates more revenue from services than from hardware, according to Stewart: 43 percent in services, 38 percent in hardware, and the remainder from software and financial investments. This is a significant change from an earlier era, where IBM used to generate about 70 percent of its revenue from hardware.

2) Key Concerns of Technology Sector – Stewart suggested that the technology sector was different, in that there were currently few barriers to trade in computer-related services. However, Stewart stressed that this sector seeks to avoid future barriers to market access and national treatment. Additionally, another concern was how to fit e-commerce into current commitments. He emphasized the need for commitments to be technology-neutral. Also, he stated that commitments should cover e-commerce transactions across sectors. While admitting there was a general understanding that electronic transactions are covered in commitments, Stewart suggested that time will tell whether or not that understanding will persist.

In particular, Stewart outlined what IBM would like to see in services negotiations with respect to e-commerce:

- General enabling and liberalization of services necessary to conduct e-services transactions;
- Liberalization of any services that can be delivered electronically;
- Liberalization of digital products, particularly treatment of software as a good or service. There are various ways of delivering software. Stewart emphasized that whatever its classification or delivery method, the focus should be on its treatment. Computer services industries do not want to worry about different GATS rules applying to software depending on its treatment as a good or service;
- Elimination of IT tariffs; and
- Strong intellectual property protection.

With respect to computer-related services, Stewart stated that there were good commitments in place, but there was a strong need to bring more countries on board. Stewart suggested that commitments are needed with respect to computer services delivered via the Internet, as well as offline services such as data center and repair services. Moreover, Stewart underscored the extensive overlap between IT consulting and traditional management consulting, and stated that negotiations should not get caught up in distinguishing nominal categories that are essentially quite similar.

3) No Revisions to CPC Codes – On the issue of whether or not CPC codes were out of date, Stewart indicated that IBM had looked at that issue and had concluded that, at least in computer services, revisions to CPC codes were not necessary. Functional definitions in existence were adequate, according to Stewart. He suggested that it was possible to map new services to current CPC codes. While certain terms like "Internet" and "web-hosting" are not in the CPC codes, their functional equivalents are there.

4) Importance of Technology to Developing Countries – Of the four white papers on computer services before the WTO, three were from developing countries – Costa Rica, India, and the MERCOSUR countries. In particular, Stewart noted that India presented enormous cross-border trade potential over the Internet.

VII. Questions for Private Sector Panelists

1) What is the leverage for developing countries to liberalize services?

Mulvey addressed reluctance to liberalization by developing countries due to their fear of economic dislocation. Mulkey indicated that the industry would accept a staged approach to liberalization in developing countries in order to overcome political pressure in those countries over time and permit transitional measures to help displaced workers.

2) What is the role of reference papers in promoting transparency?

Mr. Self replied that adoption of reference papers among subsets of WTO members might be more effective at achieving greater transparency. Specifically, he noted the likelihood that all 144 WTO member countries would reach consensus on any number of transparency issues was very low. He also suggested that certain types of transparency measures, like advance comment on proposed regulations, lend themselves particularly well to negotiations in all sectors.

3) How can pro-liberalization arguments like those offered by Hong Kong persuade developing countries to recognize their interests in liberalization and make binding commitments? Are there problems with binding commitments that might make a "best practices" approach more attractive?

Mulvey countered that binding commitments (vs. "best practices) foster a higher level of confidence and that, consequently, developing countries should appreciate that such commitments have a material impact on the willingness of foreign investors to risk capital in their countries. However, Mulvey also indicated that binding commitments themselves are not

enough to attract investment – other factors matter as well. He added it would take time to educate developing countries on their interests in liberalization.

4) Are there discussions regarding subsidization of services?

Panelists responded that there was no discussion of it currently, and that services are generally less subsidized than goods, except for transportation services.

OUTLOOK

Panelists were generally optimistic that both developed and developing countries have considerable interests at stake to participate actively in services negotiations. Developed countries seek to expand market access in many sectors and clarify horizontal concepts, for example, to account for electronic commerce trade. Developing countries are also keen on improving access for labor mobility, as well as certain sectors.

Launched in 2000, the two years of negotiation thus far have focused on preparatory work, including GATS disciplines. Starting in June 2002, the market-access stage of "requests" will commence. The US, EC and other developed countries intend to submit extensive request lists covering many sectors and countries – due to their strength in services exports. It remains uncertain; however, whether many developing countries will also seek market access in their priority export markets – since many place as higher priority expanding market access for their industrial and agricultural products. Evidently, U.S. industries and others will seek to ally with counterparts in other countries to seek improvement of the *status quo ante* – which is clearly seen as not optimal.

Despite the relative optimism, progress in GATS negotiations will ultimately be linked to developments in other sectors including agriculture and industrial negotiations, which lately have become more problematic due to rising use of steel safeguards and increases in U.S. agriculture subsidies. Nevertheless, the next WTO negotiating sessions on services, scheduled for July 15-26 in Geneva, will begin to consider many market access and other "requests" – and should serve as a barometer of WTO Members' commitment to liberalization.

SPECIAL UPDATE: TRADE PROMOTION AUTHORITY LEGISLATION

Senate Approves Trade Bill Including TPA, TAA, ATPA, and GSP

SUMMARY

Yesterday the United States Senate approved the omnibus trade bill by a vote of 66-30, after weeks of debate on the bill. Senators offered a number of amendments to the bill, several of which were adopted and the majority of which were rejected or withdrawn from consideration. The most contentious amendment, the so-called Dayton-Craig amendment, is called a "killer amendment" by opponents, and almost certainly will be removed in the House-Senate conference of the trade bills. Observers speculate that the House-Senate conference will be long and contentious and that the President will not have the trade bill on his desk until at least August.

For your convenience, we have compiled a chart below summarizing the amendments offered to the trade bill.

ANALYSIS

After another long day of debate and votes on pending amendments to the omnibus trade bill, late last night the United States Senate voted on final passage of the bill. The Senate, which is historically more supportive of free trade than the House, approved the omnibus trade bill by a vote of 66-30, as compared to the one-vote margin in the House TPA vote. The vote count is as follows:

- Yes: Allard, Allen, Baucus, Bayh, Bennett, Biden, Bingaman, Bond, Breaux, Bunning, Burns, Cantwell, Carper, Chafee, Cleland, Cochran, Collins, Craig, Crapo, Daschle, Dayton, DeWine, Domenici, Edwards, Enzi, Feinstein, Fitzgerald, Frist, Graham, Gramm, Grassley, Hagel, Harkin, Hatch, Hutchinson, Hutchison, Inhofe, Jeffords, Kerry, Kohl, Kyl, Landrieu, Lieberman, Lincoln, Lott, Lugar, McCain, McConnell, Miller, Murkowski, Murray, Nelson (FL), Nelson (NE), Nickles, Roberts, Santorum, Smith (NH), Smith (OR), Snowe, Specter, Stevens, Thomas, Thompson, Voinivich, Warner, and Wyden.

- No: Akaka, Boxer, Byrd, Campbell, Carnahan, Clinton, Conrad, Corzine, Dodd, Dorgan, Durbin, Ensign, Feingold, Gregg, Hollings, Johnson, Kennedy, Leahy, Levin, Mikulski, Reed, Reid, Rockefeller, Sarbanes, Schumer, Sessions, Stabenow, Thurmond, Torricelli, Wellstone.

In the chart below, we highlight the amendments to the trade bill on which the Senate debated and voted. In addition, Senators offered a number of amendments that were later withdrawn or ruled to be not germane to the bill. The following amendments, among others, were withdrawn from consideration:

- An amendment to enforce U.S. trade laws (Grassley)

- An amendment to require the Secretary of Labor to create a TAA program for certain service workers (Boxer)

- An amendment to consider the impact of trade on women (Boxer)

- An amendment to require the ITC to announce section 202 investigations to the Secretary of Labor (Bayh)

- An amendment to require publicly traded companies to disclose any relationship with certain countries or foreign-owned corporations (Byrd)

- An amendment to guarantee that Industry Sector Advisory Committees (ISAC) adequately reflect the producing sectors (Hollings)

- An amendment to cancel a country's preferential tariff benefits for any tariff program (excluding NAFTA) if the country in question fails to comply within 30 days with an extradition request from the U.S. government (Hollings)

AMENDMENTS TO SENATE TPA BILL				
Type of Amendment	**Affected Sector/Constituency (if applicable)**	**Sponsor(s)**	**Description**	**Outcome**
TPA Amendment	Transparency of NAFTA Dispute Panels	Byron Dorgan (D-North Dakota)	The amendment would require the US to amend Chapter 11 of the North American Free Trade Agreement (NAFTA) to require transparency in NAFTA dispute panels, within twelve months of the enactment of the trade bill.	Adopted by voice vote.
TPA Amendment	Investor-State Provisions	Max Baucus (D-Montana)	The amendment would require US trade negotiators to ensure that foreign investors do not receive greater rights (legal property protection) than US investors. Baucus offered the amendment in an effort to assuage the concerns of Senator John Kerry (D-Massachusetts), but Kerry ultimately offered his own investor-state amendment.	Adopted 98-0.
TPA Amendment	Trade Remedy Laws	Mark Dayton (D-Minnesota) and Larry Craig (R-Iowa)	The amendment is designed to prevent the weakening of US trade remedy laws through the negotiation of new trade agreements. The amendment would allow, but does not require, Congress to debate the portions of trade agreements that affect trade remedy laws (antidumping, countervailing, and safeguards), while the rest of the trade agreement would receive "fast track" consideration.	Adopted by voice vote. The Bush Administration adamantly opposes the amendment. Secretary of Commerce Donald Evans, Secretary of Agriculture Ann Veneman, and United States Trade Representative (USTR) Robert Zoellick sent a letter to Senate Finance

AMENDMENTS TO SENATE TPA BILL				
Type of Amendment	**Affected Sector/Constituency (if applicable)**	**Sponsor(s)**	**Description**	**Outcome**
			receive "fast track" consideration. Originally, the amendment would have required a 60-vote "supermajority" by the Senate to approve the provisions that affect trade remedy laws. Dayton's office confirms that after consultations with the Bush Administration, the amendment has been changed to require only a simple majority (or 51 votes).	Committee Chairman Max Baucus (D-Montana) stating that they would "strongly recommend to the President that he veto legislation that included this amendment." Opponents of the amendment argue that it would effectively remove trade remedy laws from the Doha Round of negotiations. Informed observers fear that other WTO Members might try to remove other areas from the Doha negotiations as a result of the amendment. A Senate Finance Committee source speculates that in an eventual House-Senate conference of the trade bill, the Dayton-Craig amendment will "almost certainly" be dropped from the bill.
TPA Amendment	TPIPs/Intellectual Property Rights	Edward M. Kennedy (D-Massachusetts)	The amendment would grant additional benefits in the area of intellectual property rights protection. The amendment makes support for the	Adopted by voice vote.

AMENDMENTS TO SENATE TPA BILL				
Type of Amendment	**Affected Sector/Constituency (if applicable)**	**Sponsor(s)**	**Description**	**Outcome**
			Declaration on the TRIPs (Trade Related Aspects of Intellectual Property Rights) Agreement on Public Health adopted at the World Trade Organization Ministerial Meeting in Doha a principal negotiating objective of the United States.	
TPA Amendment	Labor Impact Assessments of Trade Agreements	Paul Wellstone (D-Minnesota)	The amendment would require a more rigorous labor impact assessment of trade agreements than the assessment currently prescribed in the TPA bill. Labor impact studies submitted to the House Ways and Means Committee and the Senate Finance Committee would have to take into account the impact of trade agreements on job security; the level of compensation of new jobs and existing jobs; the displacement of employment; and the regional distribution of employment. Baucus supported the amendment because "it improves an already good piece of legislation." Grassley also pledged his support although he believes it emphasizes the negative impact of trade.	Adopted by voice vote. Grassley stated that in an eventual House-Senate conference, the amendment would have to be balanced with the positive aspects of trade.
TPA Amendment	Negotiating Objective for Textiles	John Edwards (D-North Carolina)	The amendment would add a principal negotiating objective for trade in textiles and apparel to the TPA bill. The	Adopted by a vote of 66-33.

AMENDMENTS TO SENATE TPA BILL				
Type of Amendment	**Affected Sector/Constituency (if applicable)**	**Sponsor(s)**	**Description**	**Outcome**
			language of the amendment mirrors the TPA language for agriculture negotiations. Edwards believes that adding negotiating objectives for textiles and apparel to the TPA bill would help "level the playing field" for the US textile and apparel industry. Baucus called it a good amendment, especially for Edwards' state because the US textile market is much more open than the textile markets of some US trading partners.	
TPA Amendment	PNTR for Russia	Charles Grassley (R-Iowa)	The amendment expresses Congress' support for the Bush-Putin summit. It also expresses the sense of Congress that it would consider terminating Jackson-Vanik with regard to Russia in an "appropriate and timely manner." The Grassley amendment is a revision of an amendment originally offered by Senator Sam Brownback (R-Kansas) that would have granted Permanent Normal Trade Relations (PNTR) to Russia on the eve of the Bush-Putin summit. Brownback withdrew his original amendment because he realized that he did not have enough votes, but he still hopes that Congress will "pick up the pace" on PNTR for Russia. In	Adopted by unanimous consent.

AMENDMENTS TO SENATE TPA BILL				
Type of Amendment	**Affected Sector/Constituency (if applicable)**	**Sponsor(s)**	**Description**	**Outcome**
			the course of debate, Baucus stated that it would not be appropriate to grant PNTR to Russia until further progress is made in its accession to the WTO. Senator Joseph Biden (D-Delaware), who chairs the Senate Foreign Relations Committee, stated that although he supports further extending US relations with Russia, Congress must keep in mind that "while Russia is moving along, it is not there yet." Biden highlighted the Russian embargo on US poultry, which is an important industry in his state. Biden concluded that "unless they (Russia) start to act responsibly," the US simply cannot end Jackson-Vanik	
TPA Amendment	Principal Negotiating Objective for Auto Trade	Carl Levin (D-Michigan)	The amendment would make reducing foreign trade barriers to US automobiles and auto parts a principal negotiating objective.	Adopted by voice vote.
TPA Amendment	Human Rights and Democracy	Paul Wellstone (D-Minnesota)	The amendment creates a principal negotiating objective regarding human rights and democracy to obtain provisions in trade agreements that require parties to strive to protect internationally recognized civil, political, and human rights.	Adopted by voice vote.

AMENDMENTS TO SENATE TPA BILL				
Type of Amendment	**Affected Sector/Constituency (if applicable)**	**Sponsor(s)**	**Description**	**Outcome**
TPA Amendment	Searches of Outbound Mail	Jon Corzine (D-New Jersey)	The amendment would allow the US Customs Service to open outbound mail to search for contraband.	Adopted by voice vote.
TPA Amendment	Appropriations for Customs Service	James Jeffords (I-Vermont)	The amendment would authorize appropriations for certain staff in the Customs Service.	Adopted by voice vote.
TPA Amendment	Labor and Environmental Standards	Joseph Lieberman (D-Connecticut)	The amendment would allow retaliatory sanctions for the violation of labor and environmental provisions in trade agreements. Lieberman believes that the TPA language on labor and environmental standards, as currently written, is "illogical, inappropriate and wrong." He believes that the current language creates a self-defeating standard because it says that the US will never enforce labor and environmental provisions in trade agreements to which it is a party. Lieberman argues that there would be an outcry from trading partners if the US included similar language on enforcement of agriculture, intellectual property, or services agreements. Baucus argued that the amendment would undermine the so-called Jordan standard (the labor and environmental provisions codified in the US-Jordan Free Trade Agreement). Baucus explained that the Jordan standard is incorporated into the TPA bill and that	Rejected 54-44.

AMENDMENTS TO SENATE TPA BILL				
Type of Amendment	**Affected Sector/Constituency (if applicable)**	**Sponsor(s)**	**Description**	**Outcome**
			it is the core basis from which the US should proceed on deciding how labor and environmental provisions should be included in trade agreements. Grassley noted that the Jordan standard is the most progressive stance the US has ever taken on labor and environmental provisions in trade agreements and the Lieberman amendment would upset the delicate bipartisan balance struck by the House and the Senate Finance Committee in that regard.	
TPA Amendment	Specific Trade Negotiating Objectives	Dick Durbin (D-Illinois)	The amendment would replace the negotiating objectives in the TPA bill with 70 pages of specific negotiating objectives that opponents believe would "tie the Administration's hands" in trade negotiations. Durbin developed the amendment, which contains enhanced labor and environmental provisions and increased Congressional consultations, with Members of the House Ways and Means Committee, Ranking Member Charles Rangel (D-New York) and Representative Sander Levin (D-Michigan). Baucus called the Durbin amendment "a killer amendment that would totally undermine the provisions of this bill"	Rejected 69-30.

AMENDMENTS TO SENATE TPA BILL				
Type of Amendment	**Affected Sector/Constituency (if applicable)**	**Sponsor(s)**	**Description**	**Outcome**
			and urged Senators to vote against it.	
TPA Amendment	Labor Standards	Christopher Dodd (D-Connecticut) and Joseph Lieberman (D-Connecticut)	The amendment would add language on labor rights contained in the US-Jordan FTA to TPA bill. Baucus urged his colleagues to oppose the amendment, noting that the Jordan standard on labor already exists in the current TPA bill. Baucus argued that the TPA bill should not contain the exact same language, since each trade negotiation and each trading partner is different. Baucus stressed the need for a TPA bill that allows the President some flexibility to negotiate agreements instead of mandating a "cookie-cutter approach" to all future negotiations. Senator Phil Gramm (R-Texas) also stressed the need for flexible provisions. Gramm emphasized that the Jordan agreement deals with a country that has a relatively insignificant trading relationship with the US, and that future negotiations with larger countries, such as the EU, would be very different. In addition, Gramm noted that the US-Jordan FTA was a politically motivated agreement, which served an important foreign policy objective – it was not intended as a significant trade agreement.	Rejected 52-46.

AMENDMENTS TO SENATE TPA BILL				
Type of Amendment	**Affected Sector/Constituency (if applicable)**	**Sponsor(s)**	**Description**	**Outcome**
TPA Amendment	Investor-State	John Kerry (D-Massachusetts)	The amendment would offer protection to U.S. companies from business discrimination claims by foreign trading partners, ensuring that no foreign investor would have greater rights than a U.S. investor. The amendment stems from what Kerry views as a weakness in Chapter 11 of the North American Free Trade Agreement (NAFTA). Chapter 11 permits companies to present their disputes concerning government actions that harm investments to an independent panel. Senate Finance Committee Chairman Max Baucus voiced his strong disagreement with the Kerry amendment, noting that the current trade bill already "levels the playing field" for investors, and that foreign investors do not enjoy more rights than American investors. Kerry countered that his amendment does not threaten the capacity of investor-state relationships to be protected under reciprocal treaties. He further noted that the language in Chapter 11 poses a legitimate concern to U.S. business groups. Senator Phil Gramm (R-Texas),	Rejected 56-40.

AMENDMENTS TO SENATE TPA BILL				
Type of Amendment	**Affected Sector/Constituency (if applicable)**	**Sponsor(s)**	**Description**	**Outcome**
			however, stated that the business community is opposed to the Kerry amendment. He reminded the Senate that not once since World War II has the United States lost a case for failing to protect private property or investment. Gramm stressed that the Kerry amendment would undermine the protection of hundreds of millions of dollars invested abroad because of the inherent reciprocal nature of the agreement. He ended by saying, "Whatever we do in America will apply in Mexico, in Africa, in developing countries in Asia - we are going to hurt American businesses abroad."	
TPA Amendment	Labor Standards	Robert Torricelli (D-New Jersey)	The amendment would have changed the TPA language on labor standards to ensure that parties to trade agreements ensure that their domestic laws are ILO-consistent and that trade agreements do not weaken, reduce, or waive their labor laws as an encouragement of trade, among other requirements.	Rejected by voice vote.
TPA Amendment	Trade in Services	Jon Corzine (D-New Jersey)	The amendment would prohibit trade agreements from being used to privatize public services. The amendment would establish as a principal negotiating objective that trade agreements should not include a commitment by the United	Rejected 49-47.

AMENDMENTS TO SENATE TPA BILL				
Type of Amendment	**Affected Sector/Constituency (if applicable)**	**Sponsor(s)**	**Description**	**Outcome**
			States to privatize significant public services such as national security, Social Security, public health and safety, and education. Although Corzine supports expanded trade in services, he offered the amendment to protect the role of Congress and elected State and local officials in determining the nature and scope of significant public services. Corzine believes that his amendment would protect against the risk that the US privatizing key public services outside of legally constituted processes.	
TPA Amendment	AD/CVD Orders	Bill Nelson (D-Florida)	The amendment would prohibit the US from negotiating the reduction of tariffs on commodities on which there is an existing antidumping duty (AD) or countervailing duty (CVD) order. Nelson proceeded to read off a list of current duty orders and told Senators that their industries and commodities markets would not be protected unless they protect the current AD and CVD orders through the adoption of his amendment. Nelson named the following products in particular: steel, cement, salmon, antifriction ball bearings from Singapore, and honey and	Rejected 60-38.

AMENDMENTS TO SENATE TPA BILL				
Type of Amendment	**Affected Sector/Constituency (if applicable)**	**Sponsor(s)**	**Description**	**Outcome**
			hot-rolled carbon steel flat products from Argentina. Senator Phil Gramm (R-Texas), who opposes the amendment, stated that he is always amazed when he hears people say they are free traders and then they seek to protect their commodities. Gramm called the Nelson amendment a protectionist amendment that would remove from the negotiating table all of the products/sectors on which current duty orders exist. Gramm emphasized that it would be counterproductive to take all of these products/sectors off the table because the basic premise of the trade bill is to increase trade and competitiveness. Gramm believes that the Nelson amendment would be a "body-blow to our efforts to negotiate agreements with countries like Chile and other major agricultural countries" and that it "guts the very notion of TPA."	
TPA Amendment	Congressional Oversight Group	Robert C. Byrd (D-West Virginia)	The amendment would change the composition of the Congressional Oversight Group on trade to be 11 Senators and 11 Representatives who are not members of the House Ways and Means Committee and the Senate Finance Committee. Under current law, the Group is	Rejected 66-32.

AMENDMENTS TO SENATE TPA BILL				
Type of Amendment	**Affected Sector/Constituency (if applicable)**	**Sponsor(s)**	**Description**	**Outcome**
			comprised of members of the Ways and Means and Finance Committees, which already have primary jurisdiction over trade. Byrd believes that a broader range of Senators and Representatives should be allowed to exercise more direct influence over trade policy.	
TPA Amendment	Procedural Disapproval of Resolutions	Robert C. Byrd (D-West Virginia)	The amendment would make it easier for individual Senators to offer disapproval resolutions to revoke fast-track procedures for trade agreements without the approval of the Senate Finance Committee. Under the TPA bill, even if a Senator offers a disapproval resolution, it must be approved by the Senate Finance Committee before the full Senate can consider it.	Rejected 66-32.
TPA Amendment	Wheat Trade with Canada	Byron Dorgan (D-North Dakota)	The amendment would require the USTR to respond to the unfair wheat trade 301 case with Canada by creating (i) an implementation plan for specific trade remedies to provide relief to US wheat farmers unfairly affected by the practices of the Canadian Wheat Board by October 1, 2002 and (ii) a specific time table to seek long-term reform of the Canadian Wheat Board.	Withdrawn.

AMENDMENTS TO SENATE TAA BILL				
Type of Amendment	**Affected Sector/Constituency (if applicable)**	**Sponsor(s)**	**Description**	**Outcome**
TAA Amendment	Customs User Fees	Jon Kyl (R-Arizona)	The amendment would prohibit Customs User fees from being used to pay for the TAA package. The amendment also states that Customs User fees can be used solely to fund the operations of the Customs Service, given the increasing responsibilities Customs has to help fight the war on terrorism.	Adopted by unanimous consent.
TAA Amendment	Wage Insurance	Judd Gregg (R-New Hampshire)	The amendment would eliminate the wage insurance provisions from the Trade Adjustment Assistance (TAA) portion of the trade bill. According to the current bill, workers over 50 years of age would be eligible for wage insurance if they took a lower paying job after being displaced from their current position. Democrats stressed that the program is a "pilot program" and that Congress would have the right to continue the program if it is successful, or to eliminate the program if it is unsuccessful. Republicans argued, however, that the program provided too many opportunities for people to abuse the system by collecting government assistance for unintended uses. Republicans characterized the wage insurance provisions as socialistic, and Senator Fred Thompson (R-Tennessee) stated that the wage	Rejected 58-38.

AMENDMENTS TO SENATE TAA BILL				
Type of Amendment	**Affected Sector/Constituency (if applicable)**	**Sponsor(s)**	**Description**	**Outcome**
			insurance program is enough to make even the "European leftists blush." As expected, Senate Finance Committee Chairman Max Baucus (D-Montana) and Ranking Member Charles Grassley (R-Iowa) urged their colleagues to oppose the amendment so that the carefully crafted TAA compromise would remain in tact	
TAA Amendment	Short-Term Low Interest Loans for Trade-Displaced Workers	George Allen (D-Virginia)	The amendment would provide short-term low interest loans to help workers who lose their jobs as a result of trade and cover their mortgage payments while they search for new employment.	Rejected 50-49 (with Vice President Dick Cheney stepping in to break the tie).
TAA Amendment	TAA for Textile and Apparel Workers	Ernest Hollings (D-South Carolina)	The amendment would extend TAA benefits to textile and apparel workers who lose their jobs or who have lost their jobs since the start of 1999.	Rejected.
TAA Amendment	TAA for Maritime Workers	Mary Landrieu (D-Louisiana)	The amendment would extend TAA to maritime workers. The amendment was directed toward those workers who were directly affected by the steel 201 decisions, including port workers in Landrieu's native New Orleans.	Rejected 50-46.

AMENDMENTS TO SENATE ATPA AND GSP BILLS				
Type of Amendment	**Affected Sector/Constituency (if applicable)**	**Sponsor(s)**	**Description**	**Outcome**
ATPA/GSP Amendment	Additional Criteria for ATPA and GSP Beneficiary Status	Kay Bailey Hutchinson (R-Texas)	The amendment to the renewals of Andean Trade Preferences Act (ATPA) and the Generalized System of Preferences (GSP) would make beneficiary country status contingent upon a country's support for the US-led war on terrorism	Adopted by unanimous consent.
ATPA Amendment	Temporary Duty Suspension for Certain Wool Products	Dick Durbin (D-Illinois)	The amendment would suspend the duties on certain wool products by two years to 2005.	Adopted by voice vote.

TECHNICAL AMENDMENT TO SENATE TRADE BILL				
Type of Amendment	**Affected Sector/Constituency (if applicable)**	**Sponsor(s)**	**Description**	**Outcome**
Technical Amendment	Appropriations	Robert C. Byrd (D-West Virginia)	The amendment would make technical changes to the bill that would ensure that the trade bill would not make any direct appropriations of funds.	Adopted by voice vote.

OUTLOOK

Now that the Senate has passed the trade bill, it will have to be reconciled with the House bill in a House-Senate Conference Committee. Analysts expect the conference to be long and contentious as the two bodies work out the differences between the two bills. The major difference between the two TPA bills is the Dayton-Craig amendment that was adopted by the Senate. The Bush Administration has threatened to veto the trade bill if it includes the Dayton-Craig amendment. Observers, however, believe that the amendment will be one of the first things to be removed from the bill in conference. Senate sources add that Senate Majority Leader Thomas Daschle (D-South Dakota) has stated that he would still support the trade bill if the Dayton-Craig amendment were removed in conference. Reportedly, Senate Finance Committee Chairman Max Baucus (D-Montana) and Ranking Member Charles Grassley (R-Iowa), co-sponsors of the trade bill, have already agreed to remove the "killer amendment" in conference.

The conference also must tackle differences between the Senate and House versions of TAA and ATPA. Observers believe that the President will not have a trade bill on his desk until at least August.

In recent days, the House has been working on a supplemental appropriations bill. Sources indicate that the House has worked out a solution to the so-called DeMint letter through the supplemental appropriations bill. If this is the case, the House Leadership would be able to bring trade bills to the House floor for consideration, not only clearing the way for an eventual vote on the trade bill conference report but also for full House consideration of the Export Administration Act (EAA) and PNTR for Russia.

Senate Passage of Trade Bill Sets Stage for Difficult House-Senate Conference

SUMMARY

The United States Senate approved the omnibus trade bill, which includes Trade Promotion Authority (TPA), on May 23. This report analyzes the provisions in the final Senate bill regarding:

- Labor and environmental standards,
- Investor-state provisions,
- Intellectual Property Rights Protection,
- Textiles, and
- Trade Remedy Laws.

Now that the Senate has approved the trade bill, it must be conferenced with the House bill. Analysts expect the House-Senate conference to be difficult and long, although the abbreviated Congressional calendar may expedite the process.

ANALYSIS

I. Labor and Environmental Standards

In terms of labor and environmental standards, the Senate adopted a relatively minor amendment, of the several that were offered, to strengthen the TPA language on labor and environmental standards. This amendment, offered by Senator Paul Wellstone (D-Minnesota), would require a more rigorous labor impact assessment of trade agreements, taking into account the impact of trade agreements on job security; the level of compensation of new jobs and existing jobs; the displacement of employment; and the regional distribution of employment. During floor debate on the trade bill, Senate Finance Committee Chairman Max Baucus (D-Montana) and Ranking Member Charles Grassley (R-Iowa) were especially hesitant of any changes to the "careful bipartisan balance" that had been struck on labor and environmental language. Although the Wellstone amendment does not deal directly with labor standards, Grassley was quick to point out that it would have to be "balanced" in the House-Senate conference.

The Senate defeated a number of amendments that would have strengthened and enhanced the TPA language on labor and environmental standards. The most contentious of these amendments was one offered by Senator Joseph Lieberman (D-Connecticut) that would have allowed retaliatory sanctions for the violation of labor and environmental provisions in trade agreements. Lieberman offered the amendment because he believes that the TPA language on labor and environmental standards creates a self-defeating standard because it says that the US will never enforce labor and environmental provisions in trade agreements to which it is a

party. Lieberman argues that there would be an outcry from trading partners if the US included similar language on enforcement of agriculture, intellectual property, or services agreements.

Baucus argued that the amendment would undermine the so-called Jordan standard (the labor and environmental provisions codified in the US-Jordan Free Trade Agreement). Baucus explained that the Jordan standard is incorporated into the TPA bill and that it serves as the core basis from which the US should proceed on deciding how labor and environmental provisions should be included in trade agreements. Grassley noted that the Jordan standard is the most progressive stance the US has ever taken on labor and environmental provisions in trade agreements and the Lieberman amendment would upset the delicate bipartisan balance struck by the House and the Senate Finance Committee in that regard.

As for other failed amendments,

- Senator Dick Durbin (D-Illinois) attempted to substitute the TPA principal negotiating objectives with specific negotiating objectives developed in consultation with Members of the House Ways and Means Committee, Ranking Member Charles Rangel (D-New York) and Representative Sander Levin (D-Michigan).

- Senators Christopher Dodd (D-Connecticut) and Joseph Lieberman (D-Connecticut) also offered an amendment that would have added the exact language on labor rights contained in the US-Jordan FTA to the TPA bill. Baucus noted that the amendment was redundant, as the TPA bill already contains the Jordan standard on labor and environmental provisions. Baucus argued that the TPA bill should not contain the exact same language, since each trade negotiation and each trading partner is different. Baucus stressed the need for a TPA bill that allows the President some flexibility to negotiate agreements instead of mandating a "cookie-cutter approach" to all future negotiations.

II. Investor-State Provisions

In the months leading up to the full Senate consideration of TPA, press reports abounded with speculation on an investor-state amendment to be offered by Senator John Kerry (D-Massachusetts). Kerry decided to author an investor-state amendment due to concerns he has with Chapter 11 of the North American Free Trade Agreement (NAFTA). Chapter 11 permits companies to present their disputes concerning government actions that harm investments to an independent panel.

Baucus attempted to assuage Kerry's concerns by offering his own amendment that would require US trade negotiators to ensure that foreign investors do not receive greater rights (legal property protection) than US investors. Baucus believes that the TPA language and his amendment sufficiently "level the playing field" for investors, and that foreign investors do not enjoy more rights than American investors.

The Senate adopted the Baucus amendment 98-0, but Kerry ultimately offered his investor-state amendment. The Senate rejected Kerry's amendment 56-40. The Kerry amendment would have offered protection to U.S. companies from business discrimination

claims by foreign trading partners, ensuring that no foreign investor would have greater rights than a U.S. investor.

Although the Senate adopted the Baucus amendment, the substance of the TPA language on investor-state relations remains largely unchanged, as the Baucus amendment serves more to clarify the language than to change or intensify its meaning.

III. Intellectual Property Rights Protection

The TPA language on intellectual property rights protection remains unchanged aside from an amendment by Senator Edward M. Kennedy (D-Massachusetts) that would make support for the Declaration on the TRIPs (Trade Related Aspects of Intellectual Property Rights) Agreement on Public Health adopted at the World Trade Organization Ministerial Meeting in Doha a principal negotiating objective of the United States. Senator Kennedy spoke briefly about the amendment, and then the Senate adopted it by voice vote. Aside from the Kennedy amendment, Senators made few, if any, mentions of intellectual property rights protection in trade agreements.

IV. Textiles

The Senate adopted by a vote of 66-33 an amendment offered by Senator John Edwards (D-North Carolina) that adds a principal negotiating objective for trade in textiles and apparel to the TPA bill. The language of the amendment mirrors the TPA language for agriculture negotiations. Edwards' intent in offering the amendment was to help "level the playing field" for the US textile and apparel industry.

Some analysts speculate that adding principal negotiating objectives for textiles helps Senators in states with big textile industries support TPA and trade liberalization in general while looking out for their constituents' best interests. This support is especially crucial, analysts argue, in light of the upcoming elections.

V. Trade Remedy Laws

The Senate adopted one amendment that deals with changes to trade remedy laws. Much like the Kerry investor-state amendment, the press has been awash with stories about the so-called Dayton-Craig amendment. The Bush Administration and high-technology exporting companies, in particular, adamantly oppose the amendment, which they have dubbed a "killer amendment." Secretary of Commerce Donald Evans, Secretary of Agriculture Ann Veneman, and United States Trade Representative (USTR) Robert Zoellick sent a letter to Senate Finance Committee Chairman Max Baucus (D-Montana) stating that they would "strongly recommend to the President that he veto legislation that included this amendment." The Senate adopted the amendment by voice vote.

The amendment, offered by Senators Mark Dayton (D-Minnesota) and Larry Craig (R-Iowa), an unlikely combination, is designed to prevent the weakening of US trade remedy laws during the negotiation of new trade agreements. The amendment allows, but does not require, Congress to debate the portions of trade agreements that affect trade remedy laws (antidumping,

countervailing, and safeguards), while the rest of the trade agreement would receive "fast track" consideration. Originally, the amendment would have required a 60-vote "supermajority" by the Senate to approve the provisions that affect trade remedy laws. Dayton's office has confirmed that after consultations with the Bush Administration, the amendment was changed to require only a simple majority (or 51 votes).

Opponents of the amendment argue that it would effectively remove trade remedy laws from the Doha Round of negotiations. Informed observers fear that other WTO Members might try to remove other areas from the Doha negotiations as a result of the amendment.

In light of the intense opposition to the amendment both domestically and abroad, many analysts as well as Senate sources, speculate the Dayton-Craig amendment will be one of the first items to be dropped in conference. In fact, Senate Majority Leader Thomas Daschle (D-South Dakota) has stated that he would support a trade bill conference report that does not include the Dayton-Craig amendment. In conference, Daschle may try to gain concessions from the House on Trade Adjustment Assistance by offering to drop the Dayton-Craig amendment.

OUTLOOK

In general, the make-up of the conference committee, including the number of conferees, can vary. In theory, conferees are expected to uphold their body's (House or Senate) position on legislative measures during House-Senate conference committee negotiations. According to a Senate Finance Committee source, one concrete rule is that there must be one more conferee from the majority party than the minority party. In addition, conferees include the Chairman and Ranking Member of the committees of jurisdiction (in this case the Senate Finance Committee and the House Ways and Means Committee) and then other members of the committee by seniority. Analysts speculate that Senate conferees will include Baucus, Grassley, Daschle, and perhaps Breaux, who helped broker the TAA compromise, and Gramm, who was active in the Senate trade debate. Thomas and Rangel likely would serve as House conferees. As yet, the conferees have not been named, but the Senate Finance Committee source believes they will be named within the next week.

It still is unclear how quickly the conference will proceed. However, we expect the conference to be difficult. In addition to the contentious issues involved, the personalities of the conferees and the signs from the leadership of each party are sure to influence the conference process. Gramm, during the Senate debate, criticized the leadership of both parties for failing to uphold the compromise struck by both parties to limit and defeat amendments so the bill could proceed expeditiously through the Senate. If the leadership fails to keep its Members "in line" through the conference process, then the debate surely will be long and difficult.

The only concrete indication as to how the conference may proceed is from Ways and Means Committee Chairman Bill Thomas (R-California), who stated after the Senate passage of TPA, "The conference process should begin immediately so that the bill can be signed into law before the fourth of July." It remains to be seen whether his Senate colleagues agree.

Once the conferees conclude a conference report, the full House and Senate still must approve the final version resulting from the conference. It is expected, although not assured, that both Houses will follow their leadership's recommendations to approve the report.

One factor that will influence the timing of the conference and the floor votes is other pending legislation. Both the House and Senate are considering supplemental appropriations bills, and the Senate has yet to tackle a budget bill, both of which tend to be difficult and contentious. However, many Members of Congress are eager to return to their home states to campaign for the November elections, which could result in speedier congressional action on existing matters. In addition, the Congressional calendar is abbreviated with the current Memorial Day recess (May 27-31) and the upcoming Independence Day recess (July 1-5) and the month-long August recess (August 5-September 2).

WTO WORKING BODIES

Next WTO Ministerial in Cancun, Mexico; Update on April Trade Negotiations Committee

SUMMARY

World Trade Organization ("WTO") Members decided on May 13, to hold the next Ministerial Conference in Cancun, Mexico, from September 10-14, 2003 ("Cancun Ministerial"). The Cancun Ministerial is shaping up to be a crucial meeting at which WTO Members will likely decide on how to move negotiations forward on key issues, including:

- ***"Singapore issues"*** – Decide on modalities for negotiations on investment rules, competition policy; trade facilitation and transparency in government procurement, on which a decision to negotiate in principle was taken at Doha**.**

- ***Services*** – "Offer" stage to commence by March 2003; possible "early harvests" for certain sectors, and decision on emergency safeguards.

- ***Industrial goods/textiles*** – Address tariff and non-tariff barriers to industrial goods; possible (if delayed) establishment of negotiating "modalities"; decision on whether to expedite market access for textiles.

- ***Agriculture*** – Assess negotiations on tariffs, subsidies, domestic support and non-trade concerns. Possible extension to export credits, biotechnology standards.

- ***Intellectual property*** – Review measures taken for public health/access to essential medicines, including compulsory licensing; status of geographical indications.

- ***WTO rules*** – Assess state of work on disciplines on antidumping and subsidies; regional trade agreements; fishery subsidies; and dispute settlement reform (if delayed).

- ***Implementation –*** Review difficulties faced by developing countries arising from implementation of WTO commitments; technical assistance, including difficult "outstanding issues" cited prior to the Doha Ministerial.

- ***Environment*** – Review relationship between WTO rules and multilateral environment agreements; eco-labeling.

- ***Accessions*** – Possible accession of Russia; Central Asian states, and others.

Also, WTO Members at the latest meeting of the Trade Negotiations Committee (TNC) on April 24, failed to establish timeframes for negotiations on industrial market-access and observer status. Members will revisit these issues prior to, or by the next "stock-taking" session of the TNC scheduled for July 18-19.

ANALYSIS

I. From the Port of Doha to the Resort of Cancun

A. Launch of the "Doha Development Round"

WTO Members launched the "Doha Development Agenda" ("Round") at the Fourth Ministerial Conference in Doha, Qatar in November 2001. The Round is scheduled to conclude by January 1, 2005. To facilitate the process, WTO Members established the Trade Negotiations Committee (TNC) to oversee special negotiating sessions held in five major WTO bodies and their subsidiary bodies:

(i) GATS Council – services sectors; GATS rules and disciplines.

(ii) Committee on Trade in Goods – industrial goods, textiles;

(iii) Committee on Trade in Agriculture – agriculture liberalization; non-trade concerns.

(iv) TRIPs Council – public health and compulsory licensing; geographical indications.

(v) Negotiating Group on Rules – GATT disciplines on antidumping, subsidies, and regional trade agreements (RTAs).

(vi) Other – Dispute Settlement Body for dispute settlement reform; Committee on Trade and Environment for multilateral environment agreements (MEAs); ecolabeling.

B. Cancun Chosen for Fifth Ministerial Conference

WTO Members meeting as the General Council on May 13 accepted Mexico's proposal to host the Fifth Ministerial Conference in Cancun, Mexico, from September 10-14, 2003. Cancun was one of two final candidate cities, and eventually Mexico favored it over Acapulco. Mexico cited its easier accessibility and more numerous hotel and conference facilities.

The date of the Ministerial reflects a compromise between the position of developed countries, who sought an earlier date of March 2003, and some developing countries, who sought a later date due to their more cautious approach to negotiations. The Cancun Ministerial is anticipated as a key "stock-taking" session to assess current negotiations, and should add momentum to concluding all negotiations by January 1, 2005.

II. Disagreements Arise at Trade Negotiations Committee Meeting

The latest meeting on April 24 of the Trade Negotiations Committee (TNC) – the body overseeing new round negotiations - resulted in disagreements over timeframes for industrial market access negotiations and observer status to negotiations. The TNC's two main agenda items were: (i) reports of the negotiating bodies; and (ii) approval of observers to negotiations. The TNC also considered a submission by several developing countries on proposed reforms to the Ministerial process.

The two key areas of disagreements are:

- ***Time frame for industrial negotiations*** – Establishing a deadline for deciding "modalities"[3] – or how to conduct industrial market access negotiations. Disagreement arose between the developed countries who preferred a decision on modalities by March 2003 vs. India, China and some African countries who preferred a later date in 2003.

- ***Observer status to WTO negotiations*** – Decision on which intergovernmental organizations would be eligible for observer status at certain WTO negotiations. Contention centers upon eligibility of the Arab League.

A. Industrial Market Access Timeframes Postponed

The Doha Ministerial Declaration did not set a date for decision on modalities for industrial market access – unlike for agriculture and services (by March 31, 2003). Developed countries including the United States, Canada, Japan and the European Communities (EC) sought to align the date for industrial market access with other negotiations – by March 31, 2003.

Some key developing countries, however, resisted the earlier date and sought a date later in 2003. India spearheaded a proposal backed by countries such as China, Egypt and Kenya to establish July 31, 2003 as the deadline for modalities. The chairman of the market access group proposed a compromise deadline of April 30, 2003, but this date was rejected.

Two days prior to the TNC on April 22, India submitted a proposal suggesting December 31, 2002 as the deadline for proposals on modalities. The chairman proposed a compromise date of October 15, 2002 for proposals on modalities. Developing countries assert that more time is required to submit proposals on modalities and still disagree on the deadline for modalities for industrial market access. The issue will be revisited, perhaps prior to the July TNC meetings.

[3] Negotiation modalities establish the procedures and channels for negotiations, including numerical targets and formulas.

Summary of Dates for Sectoral Negotiations

Sector	Start Date	Modalities by	Draft Commitments	Stocktaking	Deadline
Agriculture	Early 2000	March 31, 2003	By 5th Ministerial (2003)	5th Ministerial	January 1, 2005
Services	Early 2000	March 2001	Requests: Starting June 30, 2002 Offers: Starting March 31, 2003	5th Ministerial	January 1, 2005
Industrial goods	January 2002	Undetermined (March to July 2003)	Undetermined	5th Ministerial	January 1, 2005

B. Observer Status In Suspension

WTO Members also clashed over which intergovernmental organizations would be granted observer status to certain WTO negotiations. Many Islamic countries supported the candidacy of the Arab League – which was opposed by the United States and Israel because the Arab League's charter calls for a trade boycott of Israel. The conflict has held up the observer status of other intergovernmental organizations such as the World Bank and the International Monetary Fund (IMF).[4]

Moreover, some Members are concerned that these organizations might influence the outcome of negotiations and are generally resistant to accepting any observers. India noted that paragraph 48 of the Doha Ministerial Declaration specifically mentioned to whom the negotiations were open and intergovernmental organizations are not included.[5] The issue will be revisited at the July TNC meetings.

[4] The World Bank, IMF, and Arab League, as well as the African, Caribbean and Pacific Secretariat (ACP) and the Organization for Economic Cooperation and Development (OECD) have asked for observer status to the TNC and other negotiating bodies; the United Nations Environmental Program (UNEP) has requested observer status to the Special Sessions of the Committee on Trade and Environment (CTE).

[5] Paragraph 48 of the Doha Declaration states: "Negotiations shall be open to:

(i) all members of the WTO; and (ii) States and separate customs territories currently in the process of accession and those that inform members, at a regular meeting of the General Council, of their intention to negotiate the terms of their membership and for whom an accession working party is established.

C. Proposed Reform of Ministerial Process

Several developing countries, including Cuba, the Dominican Republic, Egypt, Honduras, India, Indonesia, Jamaica, Kenya, Malaysia, Mauritius, Pakistan, Sri Lanka, Tanzania, Uganda, and Zimbabwe, issued a joint paper calling for reform of the WTO's Ministerial Conference procedures.

The proposed reforms generally address:

- Geneva as the permanent location for all future Ministerial Conference meetings.
- Standardization of Ministerial Conference procedures.

Regarding Geneva as a permanent location for future Ministerial meetings, these delegations asserted that it was unduly costly for developing countries to send delegations to such varied locations in the past as Singapore, Geneva, Seattle, and Doha.

Regarding procedures for each Ministerial Conference, these countries expressed displeasure that the preparatory process is not standardized. For example, they cite that in the lead up to the Doha Ministerial, General Council Chairman Stuart Harbinson put forward draft ministerial declarations without the consensus of the WTO's decision-making body, the General Council.

In addition, these countries proposed that chairpersons of informal consultation processes in and prior to ministerial conferences be selected by the membership in Geneva, as opposed to the current practice of having the conference chairperson select them. They also insisted that negotiating sessions should not be limited to the largest or select countries and that ministers should be allowed to attend meetings accompanied by at least two officials.

III. Upcoming Events

A. OECD Ministerial and Mini Ministerial

Trade ministers from most developed WTO Members will gather at the OECD Ministerial Meeting in Paris on May 15-16, and are expected to discuss cooperation on WTO negotiations. WTO Director-General Moore intends to brief OECD trade ministers on WTO developments, including on technical cooperation and capacity building for developing countries.

Moore also anticipates that key WTO Members will hold a "mini-ministerial" soon after Moore hands over the leadership of the WTO to Supachai Panitchpakdi in September 2002. The mini-ministerials are frequently held in preparation for a Ministerial Conference, and most recently in Singapore and Mexico City prior to the Doha Ministerial.

Decisions on the outcomes of the negotiations shall be taken only by WTO members."

B. July TNC "Stock Taking": Timeframes, Textiles and Technical Assistance

The next TNC meeting will be held July 18-19, and will serve as a critical "stock taking" session to review issues including timeframe for negotiations, market access for textiles and technical assistance, among others. Moore urged Members at the April TNC to formulate a checklist of issues in preparation for the next TNC meeting in July. Moore also mentioned that, in an effort at maintaining procedural continuity, he may ask his successor Supachai to take part in the next TNC meeting since Supachai will replace Moore as the head of the TNC on September 1, 2002.

Regarding timeframes, the next session could address outstanding timeframes for negotiations on industrial market access and environment issues. The EC is reportedly linking the timeframes for environment negotiations (a priority issue) to agreement in other areas.

Regarding textiles, the Doha Implementation Decision calls for a decision by July 31, 2002 on two outstanding areas that would facilitate market access by developing countries (*i.e.* growth-on-growth methodology and favorable quotas for smaller developing countries).

Regarding technical assistance, despite the 30 million Swiss franc Global Trust Fund established to shore up developing countries' capacity to participate effectively in the new round, some developing countries are hesitant in requesting technical assistance on issues where they resist initiating new multilateral negotiations (*e.g.* investment rules and competition policy).

The July TNC will also consider the issue of observer status and reform of Ministerial Conference procedures, among other items to be determined.

OUTLOOK

Thus far, WTO negotiations on the new round have proceeded relatively well at the technical level. Most negotiating bodies have set out schedules for the year and have already held meetings in which new proposals were considered. Some issues like services are much farther along – moving into the "request" stage of market-access negotiations; others, like environment, have yet to finalize their meeting schedules.

Nevertheless, underlying political tensions are becoming more apparent, especially among developed and developing countries – as seen in recent disagreements over the timeframes for industrial market access negotiations. These tensions are expected to arise once more as Members approach the deadline on contentious issues of textiles market access (by July 2002) and other outstanding implementation issues.

Furthermore, although publicly refuted by USTR officials (*See report on Linnet Deily's presentation to the Global Business Dialogue*), there is growing concern among WTO Members over the credibility of the United States and its commitment to trade liberalization. The U.S. National Foreign Trade Council (NFTC) has remarked that its recent efforts to pitch a zero-tariff approach in Geneva has been rebuffed by key developing countries – who instead highlighted

their concerns about U.S. safeguard on steel and proposed substantial increases in subsidies in the new U.S. farm bill. Still, the growing prospects for passage of trade promotion authority (TPA) should reinforce perceptions of U.S. commitment to trade liberalization.

In addition, some observers have expressed concern over the recent proposals made by some developing countries on procedures for future ministerial conferences. Although these proposals aim to increase transparency and participation in the decision-making process, the procedures, if implemented, could be highly disruptive. For instance, if the Chairman of the General Council is required to seek prior consensus from Members before tabling proposals – the process might resemble the deadlock that arose during the Seattle Ministerial preparations. Also, the prohibition of selective consultations would impair the negotiating process. These proposals, and the difficulties that arose over negotiating modalities for industrial market access negotiations, show that the commitment of some countries to the negotiations is grudging, and that the Cancun Ministerial will not be easy meeting.

The selection of Cancun and the date of the next Ministerial now sets in motion key benchmarks for concluding the global round by 2005. The success of the Cancun Ministerial will require strong leadership in the Ministerial preparations from the United States and EC, key developing countries, and non-government/private interests – in order to refute skeptics within domestic constituencies and among negotiating partners.

WTO Completes Trade Policy Review of Mexico

SUMMARY

WTO Members concluded the Trade Policy Review (TPR) of Mexico on April 16, 2002. In general, the TPR Body (TPRB) recognized that Mexico has implemented a successful trade and liberalization process, but highlighted that there are still some areas of concern including:

- ***Foreign Investment:*** Some specific areas remain limited to investments exclusively by Mexicans, or require majority of Mexican capital, or require prior approval by the Mexican government to exceed the 49 percent of capital stock.

- ***Differential Treatment in Trade Tariffs:*** Falling trade tariffs for MFN partners have not improved in the same proportion as for Mexico's FTAs partners.

- ***Transparency:*** WTO's concerns focus on customs procedures, WTO consistency of special import regimes such as Maquila and PITEX, anti-dumping measures, and local content requirements in the automotive industry, among others.

- ***Government Procurement:*** legislation on this regard discriminates in favor of national suppliers or suppliers from FTAs partners.

ANALYSIS

On April 16, the WTO completed the TPR of Mexico.[6] To conduct this TPR, the WTO's full membership in the TPRB analyzed the WTO Secretariat report and the policy statement by the Mexican Government. These reports included all issues related to Mexico's trade policies such as domestic laws and regulations, institutional framework, preferential agreements, economic needs, and international environment.

I. Report by the Secretariat

A. Mexico's Successful Liberalization Policy

Mexico has succeeded in using trade and foreign investment as tools for improving its economic growth. Especially the engagement of Mexico in various FTAs and in a deregulation process has served to move away from inward-looking policies.

Mexico has also participated actively in the multilateral trading system, has strongly supported the launching of the Doha Development Agenda, and will host the WTO´s fifth Ministerial Conference.

[6] The main goal of TPRs is to conduct a periodic examination of trade policies and practices of WTO members in order to monitor significant trends, which may have an impact on the global trading system.

B. Investment

Mexico's trade policy has established investment regulations both in multilateral and preferential agreements. Nevertheless, some specific areas remain limited to investments exclusively by Mexicans, or require majority of Mexican capital, or require prior approval by the Mexican government to exceed the 49 percent of capital stock. Furthermore, there are still some sectors in Mexico that remain inefficient due to the lack of competition and to the existing trade and investment barriers. Such sectors include hydrocarbons, air and maritime transport services, and electricity. Recently, WTO members have risen concerns about competition policy in the telecommunications market, and in domestic transport, which remains to a large extent closed to foreign investment.

C. Differential Treatment

Regardless of the positive outcomes from Mexico's liberalization process, this development has stressed the differential treatment of Mexico towards its FTAs partners[7] compared with the rest of WTO members that have not signed FTAs with Mexico. Falling trade barriers for MFN partners have not improved in the same proportion as for Mexico's FTAs partners. This development could lead to a distortion in trade.

In fact Mexico's average MFN tariff increased in three percentage points since its previous TPR in 1997. Although this measure was temporary and was not applicable to FTAs partners, WTO members requested Mexico's phasing out such increase. Particularly members questioned the recent increase in import duties for steel products.

D. Transparency

WTO members requested Mexico to increase transparency in various areas including:

- Some customs procedures and practices such as the price reference mechanism that aims to avoid under-invoicing practices; import licensing procedures; and, non-preferential rules of origin.
- Existing gap between bound rates and applied tariffs.
- Tariff quotas applicable to agricultural products.
- WTO consistency of special import regimes such as Maquila and PITEX.

[7] Since 1997 Mexico has enforced new FTAs with Chile, the EFTA, the EU, Israel, Nicaragua, and the Northern Triangle (El Salvador, Guatemala, and Honduras). In 2001 Mexico started plans to negotiate FTAs with Japan and Singapore, among others.

- Local content requirements in the automotive industry. In 2001, Mexico requested and obtained an extension for the eliminations of its WTO-inconsistent TRIMs in the automotive sector.

- Protection of intellectual property rights.

- Anti-dumping measures, which although have decreased are still high in number. Members encouraged Mexico to align its procedures with multilateral rules.

E. Government Procurement

Members suggested Mexico signing the WTO's Government Procurement Agreement since domestic government procurement legislation discriminates in favor of national suppliers or suppliers from FTAs partners.

II. Report by the Mexican Government

A. Tariffs

Since 1997 Mexico continued opening its economy both unilaterally and through regional agreements. The Mexican Government implemented in 2001 the Sectoral Promotion Programs (PPSs) aiming to make inputs available for industrial production at competitive prices by importing these inputs for both the export and domestic market at minimum tariff rates. Also, these PPSs have helped Mexican firms to remain competitive in face of the changes in the Maquiladora regime since 2001.

B. Customs Procedures

The Mexican Government has implemented a customs modernization program that includes investment in infrastructure and the automation of customs procedures, which has resulted in a reduction in clearance times. The Government has also implemented a control procedure to reinforce verification of compliance with customs procedures.

C. Investment

Mexico has amended the Foreign Investment Law in order to reduce the number of activities restricted to foreign investment:

- Since January 1, 1999 foreign investors are able to hold up to 100 percent of the capital stock of Mexican companies involved in the manufacture and assembly of parts for the automobile industry, as well as in the construction of public works without prior authorization by the Foreign Investment Commission.

- Also, since 1999 foreign investors are able to hold 100 percent of capital of holding companies that control financial groups, multi-banking institutions, securities firms and specialist stock-market firms. Accordingly, amendments to the Stock Market Law and Investment Company Law in 2001 eliminated the requirement for a minority foreign

investment share in portfolio management companies and the 49 percent limit on the share of foreign direct investment in the fixed capital of investment firms.

- Since January 1, 2001 foreign investors can own up to 51 percent in the share capital of international land transport of passengers, tourists and cargo between points within Mexico, as well as administrative services for passenger bus stations and auxiliary services.

D. Intellectual Property

In 2001 Mexico signed six industrial property agreements that the World Intellectual Property Organization administers. Also the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) entered into effect in Mexico on January 1, 2000.

E. Competition Policy

From Januay 1997 to December 2000 the Federal Competition Commission accepted 1,994 documents on mergers, acquisitions, privatizations, and monopolistic practices, among others.

F. Regulatory Improvement

In 2000 the Congress approved amendments to the Federal Administrative Procedures Law by creating the Federal Regulatory Improvement Commission (COFEMER), a body responsible for the regulatory improvement policy. In 2000 and 2001 the COFEMER improved more than 600 preliminary draft regulations.

G. Government Procurement

Mexico created the government procurement system COMPRANET to facilitate the participation of companies in the government procurement processes, by providing information regarding the federal government demand for goods, services, leasing, and public works.

OUTLOOK

Although WTO members recognized that there still persist structural problems in Mexico's trade policy, they highlighted that this Mexico as an example of the benefits that trade and investment liberalization can bring.

The main concerns are the conflict that can arise between preferential and MFN liberalization, as well as the existing barriers for foreign investment and reduced competition in various sectors such as electricity, telecommunications and hydrocarbons.

WTO DISPUTE SETTLEMENT

Some WTO Members Willing to Hold off Retaliatory Measures Against U.S. Steel Safeguard Measures; Panels Likely to be Established

WTO members intending to retaliate against the safeguard measures the United States imposed on 20 March had to submit notifications to the WTO Goods Council not later than 17 May. Due to the 30 days notification period this was the last date allowing the retaliation to come into effect by the end of the 90-day period following the imposition of the U.S. safeguard measures, i.e. 18 June.

The European Union notified the Goods Council on 14 May that it intended to impose annual retaliatory tariffs of up to $364 million on U.S. imports. The state of play with regard to other WTO member that had indicated their intention to retaliate is as follows:

- On 17 May Japan forwarded to the WTO its own list targeting USD 4.88 million in retaliatory duties on U.S. imports. However, Japan announced it is willing to postpone the actual imposition of duties provided the United States proposes a satisfactory compensation offer over the next month.

- Brazil, South Korea, Australia and New Zealand entered into a procedural agreement with the United States to extend the 90-day period, thereby reserving their rights to impose retaliatory measures at a later stage.

- China, Norway and Switzerland notified the Council on Trade in Goods that they intended to retaliate after the Dispute Body had ruled against the U.S. safeguard measures or three years from the effective date of the US measure, whichever came earlier.

- Other countries that held consultations with the United States on possible compensation but have yet to submit retaliation notifications or request extended deadlines to submit such requests, are Malaysia, Bulgaria, and Taiwan. They did not announce their intentions by the end of the working day of the WTO on May 17.

- Hungary imposed provisional safeguard measures on certain steel imports.

Furthermore, the EU Japan, South Korea, China, Norway, Brazil, Switzerland, and New Zealand requested consultations with the United States on its steel tariffs under the WTO Dispute Settlement Understanding. The EU's request for a panel is expected to be approved on June 3, and other countries are likely to join the same dispute. Previously, at a meeting of the Dispute Settlement Body (DSB) on 22 May, the United States blocked the request of the European Union for the formation of a WTO panel to judge the WTO compliance of the "Definitive safeguard measures on imports of certain steel products" that the United States imposed in March.

ANALYSIS

I. Extensions for Brazil, South Korea, Australia and New Zealand

On 14 May the United States concluded an agreement with Brazil and South Korea, allowing the two countries to consider during a much longer period whether to impose retaliatory measures on U.S. imports. Under the agreement, the 90-day period will be considered to expire on 19 March 2005 in the case of South Korea and 20 March 2005 in the case of Brazil. On 16 May the United States concluded similar agreements with Australia and New Zealand. Both countries got deadline extensions until March 20, 2005. The dates coincide with the expiration of the steel tariffs, which took effect on 20 March and are scheduled for three years.

South Korea was among the most fervent critics of the U.S. move and conducted negotiations with the United States on possible compensations. However, South Korea received an exemption from the tariffs for products shipped by its producer Posco to USS-POSCO Industries (UPI), its joint venture with United States Steel Corp. and therefore lost its incentive to pursue the issue. Posco is among the world's largest producers and its shipments to UPI account for more than 95 percent of the company's exports to the United States.

Australia also received an exemption, which the country's prime minister said would exempt approximately 85 percent of its steel exports from the U.S. tariffs.

Brazil however has not received an exemption yet for its companies. Brazilian-U.S. bound steel exports amounted to 2.2 million tons in 2001.

II. Retaliation by China, Switzerland, and Norway

China, Norway and Switzerland notified the WTO that they intended to retaliate against U.S. steel safeguard tariffs. However, the three countries said they would postpone the imposition of any measures until the WTO decides whether the U.S. tariffs are in violation of the WTO Safeguards Agreement or three years from the effective date of the US measure, whichever came earlier. This decision is a small victory for the United States. Washington has warned on several occasions that any attempt to impose retaliatory measures on U.S. imports before the WTO ruling would itself violate WTO rules and lead to possible U.S. counter-retaliation.

China sent its communication to the WTO on 17 May. China said it would impose increased tariffs of 24 percent on imports of U.S. waste paper, soybean oil and compressors. In 2001 China said it imported from the United States waste paper worth USD 371 million. The value of imports of U.S. compressors was USD 17 million for the same year, while soybean oil imports totaled almost USD 4 million. The total amount of duty collected would be about $94 million annually. This is approximately the amount Chinese steel producers will have to pay every year on their U.S.-bound steel shipments because of the increased tariffs. However, China said it would only impose the retaliatory tariffs from the fifth day following the formal adoption of a WTO ruling that finds the U.S. safeguard tariffs on steel violate global trade rules.

Norway sent its communication to the WTO on 16 May, indicating that it would increase tariffs on apples, wine, tobacco, certain flat-rolled steel products, and pipe fittings by 30 percent in order to collect up to $5.6 million in annual duties. Norway also said the retaliation would take effect from the fifth day after a definitive WTO ruling against the U.S. steel tariffs and would stay in place until the U.S. withdraws its safeguard measure.

Switzerland sent its communication to the WTO on 17 May. Country officials declined to disclose details of their notification, it is likely that the amount of Switzerland's retaliation would only total several million dollars a year and would not be imposed until after a WTO ruling on the U.S. steel tariffs.

III. Retaliation by Japan

Japan sent its notification to the WTO on 17 May. The Japanese government prepared the document after Japan and the United States failed to settle the issue in bilateral consultations. According to the Japanese Ministry of Economy, Trade and Industry the Japanese list of targeted products covered USD 123.43 million worth of U.S. export products to Japan. Initially, Tokyo would impose 100 percent tariffs totaling $4.88 million on U.S.-produced steel and steel products, namely Japanese customs tariff number items from to 7202.29000 to 7325.99090. The measures would become effective on 18 June, one month after the date of the notice, if the two countries failed to settle the issue before this date.

Japan apparently selected the products in a manner allowing avoiding adverse impact on Japanese industries manufacturing products with U.S. steel products, among them being stainless steel bars; wire grills, net and fences; nuts, bolts, screws, and washers; ferroalloy; and flat rolled products.

It is still not clear what products will be subject to the remainder of the $123.43 million in tariffs. Japan would work out details if or when the WTO upholds the Japanese claim that the U.S. measures violate the WTO Safeguards Agreement.

IV. Safeguards by Hungary

Hungary will introduce provisional safeguard measures against 15 different product categories. The reason for this action is the constantly deteriorating state of the Hungarian steel industry as well as the introduction of U.S. safeguard duties. Hungary will introduce quantitative restrictions for imports of each of the 15 product categories. Imports exceeding the quantitative restrictions will be subject to import duties amounting to 20 or 25 per cent for different products. Each category has been divided into three sub-categories, representing imports from three groups of countries – the European Union, the Central and Eastern European Free Trade Area and others. The quantitative limits were set at an average of the annual imports for 1998, 1999 and 2000, plus 10 per cent thereof. The restrictions will be in effect for a period of six months; therefore only 50 per cent of the annual figures were used in the calculation. The provisional measures will come into effect on 3 June.

OUTLOOK

The bilateral deals that the United States concluded with Brazil, South Korea, Australia, and New Zealand diminish the threat of immediate retaliation from countries other than the EU and Japan. The extended deadline will also give the four WTO members adequate time to consult with businesses on future strategy and develop target lists of U.S. products provided the countries choose to exercise their rights to impose retaliatory measures. Obviously, none of the countries wants to impose sanctions right now, but they are willing to reserve their right to react after the 90-day deadline.

On the other hand, this step is a setback for the European Union. The EU has been the driving force in gathering countries to initiate trade action under the Safeguards Agreement and WTO dispute settlement rules. China's pursuit of a WTO dispute, its first as a WTO Member, was a boost to the EU's efforts. Now, after China decided to postpone the imposition of countermeasures and after South Korea said it would hold off on retaliation for at least several years, the efforts of the EU and Japan might lose their momentum.

The United States claims that imposition of immediate retaliatory measures would be a violation of Article 8.3 of the Safeguards Agreement, which states that the right to retaliation may not be exercised for the first three years a measure is in force, provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of the Safeguards Agreement. The EU and other countries argue that those conditions were not met since the amount of U.S. steel imports has been decreasing for the last four years. The position of the United States is that it is up to a WTO panel and not individual WTO members to determine whether the conditions were met or not.

The EU has requested a special Dispute Settlement Body meeting on June 3 to table a second request for the formation of the panel. A second request will automatically lead to the formation of a panel. Although other WTO Members including Brazil, China, Japan, New Zealand, Norway, South Korea and Switzerland intend to request panels at a later date, their claims will likely be heard together with the EU's claims in a single panel.

WTO Rules Against Chilean Price Band System and Safeguards

SUMMARY

On May 3, 2002, in a complaint brought by Argentina, a World Trade Organization ("WTO") panel ruled against (1) Chile's price band system and safeguard measures relating to certain agriculture products; and (2) Chile's safeguard measures on wheat, wheat flour and edible vegetable oils.

The ruling has significant implications, both legal and practical. From a legal standpoint, the Panel report sets forth its definitive interpretations, under both the Agreement on Agriculture and Article II:1(b) of GATT 1994, of the phrases "ordinary customs duties" and "other duties or charges," as well as holding that a Member's failure to list "other duties and charges" in a separate column on its tariff schedules may constitute a violation of the substantive obligations of Article II:1(b).

From a practical perspective, the ruling is likely to weaken Chile's negotiating position in current FTA negotiations with the United States and with the Mercosur bloc. The US and Mercosur countries have criticized price band systems utilized by Chile, the Andean countries and elsewhere. Moreover, the fact that this dispute was resolved before a WTO panel is in itself significant, inasmuch as Argentina could have raised the dispute under the Mercosur-Chile FTA dispute settlement mechanism. The fact that Argentina chose not to proceed in that forum could lead to further weakening of regional dispute mechanisms.

ANALYSIS

I. Background

In a decision officially made public on May 3, 2002, a World Trade Organization ("WTO") panel ruled against 1) Chile's price band system and safeguard measures relating to certain agricultural products and 2) Chile's Safeguard Measures on wheat, wheat flour, and edible vegetable oils. The rulings were made in response to a complaint brought by Argentina.

A. The Chilean Price Band System

Chile's applied tariff rates for wheat, wheat flour, sugar, and edible vegetable oil are 8 percent ad valorem. Chile's bound rate in its WTO Schedule is 31.5 percent. Chile, however, subjects these products to a mechanism – the so-called Price Band System (PBS) -- that seeks to maintain a minimum import price if the international price is too low.

The PBS operates on the basis of different prices. First, upper and lower price thresholds are determined for each product on the basis of certain international prices. These "price bands" are set once every year through a Presidential decree. Second, Chile sets weekly "reference prices" based on prices in certain foreign markets.

When a product subject to the Chilean PBS arrives at the border for importation into Chile, Chilean customs authorities determine the total amount of applicable duties in several steps:

- They apply the standard ad valorem duty for that product;
- They identify the applicable "weekly reference price" for that given product;
- The total duty to be applied depends on a comparison of the "reference price" to the "price band".

Thus, three possible situations could arise:

- If the reference price falls below the lower threshold of the band, the customs authorities will levy the 8 percent duty, and will add an additional specific duty equal to the difference between the reference price and the lower threshold.
- If the reference price is between the lower and upper thresholds, the customs authorities will apply only the 8 percent duty;
- If the reference price is higher than the upper threshold, the customs authorities will grant a rebate on the 8 percent duty equal to the difference between the upper threshold and the reference price.

Argentina contended that through the PBS the applicable tariff rate for these products could be increased. In some cases, the combination of the applied rate and the PBS duty has "at times" surpassed the bound rate of 31.5 percent.

During the course of the WTO proceedings, Chile altered the operation of the PBS. The Chilean Congress passed a bill providing that the total ad valorem duty rate to be applied under the PBS may not exceed the bound rate.

Argentina challenged the PBS under Article 4.2 of the Agreement on Agriculture (AA) and Article II:1 (b) of GATT 1994.

B. The Safeguard Measures

In 1999, the President of Chile imposed a provisional safeguard measure on imports subject to the PBS. The measure consisted of an ad valorem tariff surcharge consisting of the difference between (1) the general applied tariff plus the ad valorem equivalent of the specific duty determined by the PBS and (2) the bound WTO tariff for these products. In other words, whenever the PBS duty, in conjunction with the 8-percent applied tariff, exceeded the 31.5-percent bound rate, the portion of the duty in excess of that bound rate represented the safeguard measure.

In January 2000, the Chilean government imposed a definitive safeguard measure for one year, extending the provisional measure. In November 2000, the Government extended the

safeguard measure for most products until July 2001. During the course of the proceedings, Chile notified the Panel that the safeguard measures on wheat and wheat flour would be withdrawn as of July 2001, and that the safeguard measure on vegetable oils would be terminated as of November 2001.

Argentina challenged the provisional safeguards, the definitive safeguard, and their extension, all under Article XIX of GATT 1994 and the Agreement on Safeguards (AS).

II. Specific Findings of the Panel

With regard to the PBS, the Panel concluded that Chile has acted inconsistently with:

- Article 4:2 of the AA, since it has maintained measures of the kind required to be converted into "ordinary customs duties";

- Article II:1(b), second sentence, of GATT 1994, by levying "other duties or charges" not recorded in its Schedule.

With regard to the Chilean safeguard measures, the Panel concluded that Chile failed to:

- Demonstrate that the safeguard measures were applied as the result of "unforeseen developments," in violation of Article XIX:1(a) of GATT 1994;

- Make adequate findings and reasoned conclusions on "like or directly competitive products," and consequently failed to identify the domestic industry, in violation of Article XIX:1(a) and Articles 2 and 4 of the AS;

- Demonstrate "increased imports" of the products subject to the safeguard measures, in violation of Article XIX:1(a) of the GATT 1994 and Articles 2.1 and 4.2 (a) of the AS.

- Demonstrate the existence of a threat of serious injury, in violation of Article XIX:1(a) and Articles 4.1(a), 4.1(b) and 4.2(a) of the AS.

- Demonstrate properly the existence of a causal link between increased imports and threat of serious injury, in violation of Articles 2.1 and 4.2(b) of the AS.

- Ensure that the safeguards measures were applied only to the extent necessary to prevent or remedy serious injury or facilitate adjustment, as required by Article XIX:1 (a) of GATT 1994 and Article 5.1 of the AS.

III. Discussion of the Panel's Findings

Some of the most significant aspects of the Panel report are the Panel's findings under Article 4.2 of the AA and Article II:1(b) of GATT 1994. By contrast, the Panel's findings regarding the safeguard measures apply past WTO case law and do not seem to provide new elements of interpretation of Article XIX of GATT 1994 and/or the Agreement on Safeguards.

The major findings of the Panel are discussed below.

A. The PBS and Article 4.2 of the Agreement on Agriculture

The Panel decided to start its analysis with the claims under Article 4.2 of the AA, rather than with Article II:1(b), since the Agreement on Agriculture "deals specifically and in detail with the matter at issue" (i.e., measures affecting market access of agriculture products). (Paras.7.9-7.16)

Argentina claimed that the PBS is the "kind" of measure that Chile was required to convert into ordinary customs duties when the WTO Agreement entered into force, according to Article 4.2 of the AA. This process is known as the "tariffication process," by which non-tariff measures had to be replaced by tariffs that provided for more or less equivalent levels of protection. Footnote 1 to Article 4.2 provides an illustrative list of measures that Members must have converted into ordinary customs duties. According to Argentina, the PBS is a "variable import levy," a "minimum import price," or a "border measure" similar to these two types of measures.

In addressing this claim, the Panel examined the legal nature of the PBS to determine whether it falls within the scope of measures identified in Footnote 1. In particular, the Panel had to examine whether the PBS was: i) a border measure; ii) a measure similar to a variable import levy or a minimum import price; iii) a measure other than an ordinary customs duty.

In that regard, the Panel found that the PBS was a border measure since it applied exclusively to imported goods and was enforced at the border. Further, the Panel examined the structure and operation of the PBS, as well as its objective, and concluded that the PBS was a "hybrid instrument," which had much in common with a "variable import levy" and/or "a minimum import price." Therefore, the Panel concluded that the PBS shared sufficient fundamental characteristics with those measures for it to be considered "similar" to them. The Panel noted that all the measures listed in footnote 1 were instruments that were characterized either by a "lack of transparency and predictability" or impeded transmission of world prices to the domestic market, or both.

Finally, in examining whether the PBS was a border measure "other than an ordinary customs duty", the Panel noted that Article II:1(b) of GATT 1994 -- which also uses the phrase "ordinary customs duties" -- provides context for the interpretation of this phrase under Article 4.2 of the AA. Neither Article II:1(b) of GATT 94 nor Article 4.2 of the AA, however, defines explicitly the phrase "ordinary customs duties." The Panel developed the following interpretation of the word "ordinary" by examining the English, French and Spanish versions of Article 4.2 of the AA. The Panel considered that the word "ordinary" had both "empirical" and "normative" components.[8] Based on its analysis of both components, the Panel stated that

[8] As an "empirical matter," the Panel noted that Members, "in regular practice, invariably express commitments in the ordinary customs duty column of their Schedule as *ad valorem* or specific duties, or combination thereof." Therefore, all "ordinary" customs duties may be said to take the form of *ad valorem* or specific duties (or combination thereof). In addition, as a

customs duties that take into account "exogenous" factors (such as world market prices), rather than relying exclusively on the value or volume of imported goods, are not "ordinary" customs duties.

The Panel further noticed that a key objective of the tariffication process for agriculture products was to make market access more "transparent and predictable." In this regard, customs duties of the "ordinary" kind scheduled by Members, which are exclusively based on either the value or volume of the goods or a combination thereof (i.e., not based on exogenous factors like price), were considered by the Uruguay Round negotiators to be the most desirable.

As a result of this interpretation of the phrase "ordinary customs duties," the Panel found that the Chilean PBS duties were neither in the nature of ad valorem duties, nor specific duties, nor a combination thereof, and observed that several features of the PBS were bound to "artificially inflate" the margin between the "lower threshold" of the PBS and the reference price, and consequently, the level of the applicable PBS duty.

Finally, on this basis, the Panel concluded that Chile was in breach of Article 4:2 of the AA, since it continued to maintain measures (i.e., the PBS) of the kind required to be converted into "ordinary customs duties."

B. The PBS and Article II:1(b) of GATT 1994

Argentina made also a claim under Article II:1(b) of GATT 1994, which provides:

"The products described in Part I of the Schedule relating to any Member, which are the products of territories of other Members, shall…be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement…" (emphasis added)

The Panel noted that the meaning of "ordinary customs duties" in Article II:1(b) was the same as in Article 4.2 of the AA. As a result, the Panel concluded that the first sentence of Article II:1(b), which only applies to "ordinary customs duties," did not apply to the PBS.

The Panel, however, found that the PBS constituted "other duties or charges of any kind" under the second sentence of Article II:1(b). The Panel noted that under the 1994 Article II:1(b) Understanding, such other duties or charges had to be recorded in a column called "other duties and charges" in Members' Schedules. The Panel also noted that if they were not recorded in the Schedules but were nevertheless levied, they would be inconsistent with the second sentence of Article II:1(b), in light of the Understanding. As Chile did not record its PBS in that column, the Panel found that the PBS duties were inconsistent with the second sentence of Article II:1(b).

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normative matter, the Panel said that scheduled duties are based on either the value or volume of imported goods, and do not appear to involve the consideration of "any other exogenous factors, such as, for instance, fluctuating world market prices."

C. State Practice

The Panel rejected Chile's argument regarding the existence of an alleged "state practice" that could constitute a "subsequent practice" under Article 31 of the Vienna Convention. First, referring to the Appellate Body's report in Japan – Alcohol, the Panel stated that the failure of Argentina and other Members to challenge the PBS until recently does not constitute a "sequence of acts or pronouncements" under Article 31. In addition, it noted that the fact that "a few" Members have adopted measures similar to the PBS is not a "sufficiently concordant, common and consistent sequence of acts" establishing the agreement of the WTO Members regarding the interpretation of Article 4.2 of the AA.

D. Legal Effect of a Regional Trade Agreement

Chile also raised a defense based on the argument that Chile and members of Mercosur, including Argentina, signed an FTA agreement (Economic Complementation Agreement (ECA) 35) in June 1996. Article 24 of that agreement reads as follows:

"When using the Price Band System provided for in its domestic legislation concerning the importation of goods, the Republic of Chile commits, within the framework of this Agreement, neither to include new products nor to modify the mechanisms or apply them in such a way which would result in a deterioration of the market access conditions for Mercosur." (emphasis added)

In response, the Panel noted that ECA 35 did not meet the conditions of the agreements referred to in Article 31 of the Vienna Convention. First, the Panel concluded that ECA 35 was clearly not an "agreement relating to the [WTO Agreement] which was made between all the parties in connection with the conclusion of the [WTO Agreement]," nor an "instrument which was made by one or more parties in connection with the conclusion of the [WTO Agreement] and accepted by the other parties as an instrument related to the [WTO Agreement]." Second, the Panel found that ECA 35 was not a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions," in part because ECA 35 specifically states that its provisions would "adjust" to those in the WTO Agreement. Furthermore, the Panel said that Article 24 of ECA 35 did not constitute a "relevant rule of international law applicable in the relation between the parties." In any event, the Panel did not see how the language of ECA 35 would be inconsistent with the position that the PBS was a measure covered by Article 4.2 of the AA.

IV. Implications of Panel Findings

The fact that many countries participated as third parties in the case (Brazil, Colombia, Ecuador, Paraguay, Venezuela, Australia, Costa Rica, the EC, El Salvador, Guatemala, Honduras, Japan, Nicaragua, the United States) indicates the importance of the case, not only for the Latin American region, but also for agriculture negotiations in general.

We highlight below some of the major implications of this ruling:

A. Implications for FTA Negotiations Involving South American Countries

U.S. trade negotiators and American agricultural groups have criticized the Chilean PBS and have highlighted it as one of the sensitive issues in the Chile-U.S. FTA negotiations. A definitive ruling against Chile will likely weaken Chile's negotiating position. Other countries, with which Chile has already concluded FTA agreements, may also press Chile for a revision of the system.

Andean countries, such as Ecuador and Peru, have pricing mechanisms that are similar to the Chilean PBS. Other trading partners have also criticized the Andean countries' systems. The existence of these systems has been a roadblock to successful negotiations of an FTA between Mercosur and the Andean countries. Thus, a definitive WTO decision against Chile's PBS may persuade the Andean countries to review their systems, which in turn may have a positive impact on the Mercosur-Andean Community FTA negotiations.

Finally, the FTAA negotiations will benefit from the removal of PBS-type systems in Chile and other Andean countries, as otherwise they could become obstacles to those negotiations, just as they have in the U.S.-Chile and Andean countries-Mercosur FTA negotiations.

B. Systemic Implications for the Latin America Regional Integration System

This is the first time that a WTO Panel has ruled in a controversy between two ALADI members. In this particular case, both parties belong to the same FTA Agreement (Mercosur-Chile), which has its own dispute settlement mechanism. This decision, therefore, shows countries' lack of reliance on RTA dispute settlement mechanisms, preferring to settle their disputes in the WTO. In that regard, Argentina's decision to bring a case before the WTO against another ALADI member could be seen as a negative precedent, since it could further weaken the institutional provisions in the different FTA agreements concluded in the region (i.e., Mercosur).

C. Implications for WTO Legal Precedent

With regard to Article II:1(b) of GATT 1994, the Panel report can be read as holding that a Member's failure to record an "other duty or charge" in its Schedules constitutes a violation of the substantive obligations of Article II, so long as the "other duty or charge" is actually levied. In this case, the Panel found Chile's PBS to be the type of "other duty or charge" that should have been recorded in Chile's schedules, but was not. According to the Panel, therefore, once the PBS was actually employed, that created a violation of Chile's obligations under Article II.

In addition, the Panel report contains useful language distinguishing the meanings of the phrases "ordinary customs duties" and "other duties or charges." According to the Panel, if exogenous factors, such as world market prices, are taken into account in calculating a duty, then that duty cannot be classified as an "ordinary custom duty." Rather, it would be classified as an

"other duty or charge." The Panel's interpretation of these phrases was identical for purposes of both Article 4.2 of the AA and Article II:1(b) of GATT 1994.

OUTLOOK

Chile has immediately appealed the Panel's report. The Appellate Body is expected to render its final decision by September 2002. The Chilean authorities have already said that in the event the appeal is unsuccessful, which is highly probable, a scenario may ensue whereby the applied rate tariff for the products currently covered by the PBS will be as much as 31.5 percent, which is Chile's WTO bound tariff.

The Argentine decision to bring this case before the WTO may be seen as part of a larger strategy by Argentina to eliminate similar schemes in Europe and the Andean countries.

Certain Developing Country Comments and Proposals Regarding Reform of the WTO Dispute Settlement Understanding (DSU)

SUMMARY

WTO Members agreed with the launch of the Doha Round to negotiate improvements to the Understanding on Rules and Procedures Governing the Settlement of Disputes ("Dispute Settlement Understanding" or "DSU").

We agree to negotiations on improvements and clarifications on the Dispute Settlement Understanding. The negotiations should be based on the work done thus far as well as any additional proposals by Members and aim to agree on improvements and clarifications not later than May 2003, at which time we will take steps to ensure that the results enter into force as soon as possible thereafter.

To date, three DSU reform proposals have been circulated by WTO Members. The submissions consist of (1) the EU proposal for DSU reform (TN/DS/W/1) circulated on March 5; (2) Thailand's proposal that the number of Appellate Body Members be increased by at least two to four persons, circulated on March 20 (TN/DS/W/2); and (3) the request on March 21 for re-circulation of a joint proposal from Thailand and the Philippines regarding amendments to Article 22.7 of the DSU (TN/DS/W/3). On May 7, 2002, the WTO circulated a submission by India providing comments and posing questions regarding the EU DSU reform proposal (TN/DS/W/5).

We summarize below the recent proposals from Thailand and the Philippines, and India's follow-up submission to the EU proposal.

ANALYSIS

I. India's Questions Regarding the EU Proposal on DSU Reform

The EU was the first WTO Member to submit a DSU reform proposal. The proposal covered (1) the selection of panelists; (2) issues related to the implementation of Dispute Settlement Body ("DSB") recommendations; (3) transparency in the dispute settlement process; (4) the regulation of *amicus curiae* submissions; and (5) specific recommendations for amendment of selected provisions of the DSU. (*See* "WTO Monthly Report, April 2002" for an overview of the EU proposal.)

India characterized its questions as designed to seek "certain clarification and information" from the EU on the DSU reform proposal. India's questions reflect a parsing of the EU proposal and a challenge to the rationale and many of the assumptions that underlie several of the EU suggested reform initiatives. Indeed, India has commented on nearly every aspect of the EU submission, with (i) questions aimed at discerning why the EU makes certain assumptions; (ii) comments challenging the effectiveness of the EU proposals; and (iii) requests for elaboration or clarification in other areas.

A. Moving From Ad Hoc to More Permanent Panelists

The EU reform proposals center on the way panelists are selected and suggest procedures for establishing a system of permanent panelists. According to the proposal, the EU reforms are aimed at expediting the panel selection process and increasing the quality of panel reports. The EU offered four reasons for why reform is needed.

First, the EU noted the growing demand for panelists because of increasing use of WTO dispute settlement, including dispute settlement panels, panel proceedings to determine compliance with DSB recommendations, and arbitrations regarding the scope and propriety of suspension of concessions. Second, reform is needed in light of an increase in both the procedural and substantive complexity of the panel process and the corresponding strain that this has placed on the ad hoc system of panelists. Third, the EU noted that moving to a more permanent system of panelists would enhance the legitimacy and credibility of the panel process itself. Finally, the EU reform is intended to increase the involvement of developing countries in the panel process.

With respect to the first point, India pressed the EU to elaborate on what the EU deemed to be the "growing quantitative discrepancy between the need for panelists and the availability of ad hoc panelists." In this regard, India's questions focused on the particular requirement that panelists not be nationals of Members involved in the dispute and whether this requirement presented constraints on the panel system. Moreover, India questioned the EU's position that increasing recourse to the WTO Director-General for appointment of panelists was necessarily a negative development.

Regarding the EU observation that the increasing sophistication of WTO disputes (both procedurally and substantively) warranted a system of permanent panelists, India asked why the EU believed that permanent panelists would be more efficient and or better qualified to hear and decide disputes. India also raised questions that seemed to challenge the EU assumption that permanent panelists would enhance legitimacy and credibility of the panel process in the eyes of the public.

India also posed questions based on the EU assumption that a system of permanent panelists would increase the participation of developing countries in the dispute settlement panel process. At the outset, India asked what constitutes "broad developing country participation" and requested that the EU explain more concretely how developing country participation would increase in the wake of the EU reform measures.

Finally, India's submission reflected questions regarding why the move to permanent panelists "would lead to faster proceedings and better and more consistent rulings."

B. Implementation Issues

The EU proposal focused on the two circumstances in which implementation issues arise: (1) in the context of a multilateral determination of consistency with the WTO agreements of measures taken by a WTO Member to comply with recommendations and rulings of the DSB;

and (2) in the multilateral procedure for the suspension of concession or other WTO obligations in the event of non-compliance with a recommendation of the DSB.

The EU proposal centered on the "sequencing" aspect of these two circumstances. The WTO practice that has developed has been for a Member to seek recourse under DSU Article 21.5 before requesting compensation or seeking to suspend concessions under Article 22. The practice has developed that the disputing WTO Members will resort to an Article 21.5 arbitration "where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB.

DSU Article 3.7 is clear that the first objective of WTO dispute settlement is to secure withdrawal of WTO-inconsistent measures. In the event that that immediate compliance is not possible, the EU proposes to make trade compensation a more "realistic" alternative to suspension of concessions or other obligations.

India observed that the EU proposal did not "address the crucial issue of how to make the defendant comply" with a decision of the DSB in the wake of an adverse panel ruling. India continued:

> In fact if the EC's proposal on making trade compensation more realistic is accepted it could serve as an inducement for the losing party not to com ply promptly with the DSB decision. If the EC agrees that the key objective of the dispute settlement mechanism is to secure withdrawal of WTO inconsistent measures, how does the proposal for making trade compensation more realistic encourage this objective?

India then posed the question of whether the EU would "agree that by agreeing on trade compensation the defaulting Member may have no incentive at all to bring its inconsistent measures with WTO obligations."

C. Transparency

The EU proposal purported to bring WTO dispute settlement proceedings in line with practice under international law with respect to public access to dispute settlement proceedings. The EU proposed a partial opening of trade proceedings, but recognized that that "[t]he precise modalities for opening panel and Appellate Body proceedings to the public would have to be developed but in any event, the panel or the Appellate Body should be able to impose limited and justified restrictions on the opening of the proceedings, especially when dealing with business confidential information."

India sought clarification with respect to the EU proposal that suggested that certain segments of the panel and Appellate Body process be made open to the public. India also sought to clarify whether the EU "was of the view that Member countries which are not a party to the dispute would have the right of attendance during panel/Appellate Body proceedings."

D. Regulation of Amicus Curiae Submissions

The EU noted that the Appellate Body has interpreted the DSU to allow the submission of *amicus curiae* briefs (or "friends of the court" – unsolicited submissions by non-parties) on a case-by-case basis. The EU proposal addressed (i) the process and conditions precedent for submitting amicus curiae submissions must be established; (ii) the notion that acceptance of *amicus curiae* briefs should not delay a proceeding, nor create additional burdens for the developing Members; and (iii) *amicus curiae* submissions should be directly relevant to the legal and factual issues before the panel; or the legal issues appealed to the Appellate Body.

The EU proposed that the two-stage approach articulated by Appellate Body should be retained, whereby an entity seeking to file an *amicus curiae* submission first requests leave (i.e., permission) to file a submission; and then offers the written submission.

India asked a host of questions that it believed emerged from the proposals relating to the submission of amicus *curiae* briefs. The questions related to the following issues:

- Additional time constraints imposed from *amicus* submissions;
- The ability to respond to arguments flowing from *amicus* submissions; and additional burdens on defending Members to respond to arguments such briefs;
- The nature of rights of non-governmental organizations by virtue of their ability to submit *amicus* briefs;
- The affect that *amicus* submissions might have on implementation issues;
- Processes and procedures for how the panel or Appellate Body would address new arguments made in an *amicus* submissions;
- Whether those entities that offered *amicus* submissions would also be required to submit further information or clarification if requested;
- The procedures for determining who has "a direct interest in the factual or legal issues raised in the dispute (i.e., standing to submit an *amicus* brief);
- How reliance /non-reliance on amicus submissions would be handled by the panel or Appellate Body.

II. Thailand's Proposal to Increase the Number of Members on the Appellate Body

Thailand proposed amending Article 17.1 of the DSU. Article 17.1 provides that the Appellate Body "shall be comprised of seven persons, three of whom shall serve on any one case." Thailand cites the increasing number of disputes that have reached the appellate stage, the attendant burden on the Appellate Body, and delays in appellate proceedings as reasons that support its reform measure. Thailand proposes to increase the number of the Appellate Body

members by an additional two to four persons (To bring the total number to 9 or 11, respectively.) Thailand also proposed that a specific time frame be established in order to enact this reform.

Thailand noted that since the issuance of the first Appellate Body Report in 1996, there have been 44 disputes to reach the Appellate Body, with the annual breakdown of appeals as follows:

Year	AB Cases
1996	4
1997	5
1998	8
1999	9
2000	12
2001(to date)	6

With respect to delays in WTO appellate proceedings, Thailand observed "recent practice shows that there can be a delay in appeal proceedings resulting in the report being circulated more than 90 days after the date of the notice of appeal. This has so far happened in five cases. In two of these cases, the Appellate Body report was circulated as late as 140 days after notice of appeal."

The Appellate Body workload has significantly increased in the past six years since the WTO DSU took effect. Many panel decisions are appealed. Thailand's proposal has merit and deserves attention. Alternatively, in lieu of an increase in Appellate Body members, the transfer of Appellate Body positions to full-time positions, as opposed to Appellate Body members having part-time status might also be a way of addressing some of the problems.

III. Thailand And Philippines Joint Proposal Regarding the Application of Article 22.7 of the DSU

Thailand and the Philippines requested that their previously submitted DSU reform proposal be re-circulated to WTO Members. The joint proposal concerns so-called "sequencing" issues raised by the application of Article 22.7 of the DSU. The proposal concerns the DSB's ability to permit a WTO Member to suspend concessions or other obligations in response to a non-remedied violation by another WTO Member. DSU Article 22.4 requires that the level of any suspension of WTO benefits be equivalent to the level of the purported nullification or impairment. The Philippines and Thailand proposal seeks to address the inability of DSU Article 22, in its current form, to ensure such equivalence in a given case. The proposal is confined to the arbitration phase as described in DSU Article 22.7. Specifically, the proposal revises and expands Article 22.7 from one paragraph (in its current version) to eight paragraphs, adding 7 new subparagraphs, designated (b)-(h). Proposed paragraph 22.7(a) is essentially the current version of Article 22.7.

A. Proposed Paragraph 22.7(b)

The proposal expressly directs the arbitrator to determine the level of the nullification or impairment of benefits affecting the complaining party and asks this party to provide the arbitrator with all trade data necessary for this purpose. The obligation upon WTO Members to provide necessary trade data arguably is implicit in the current version of Article 22.7, but practice has shown cooperation in this respect to be arbitrary. At the same time, however, trade data is essential for the arbitrator to determine whether the level of suspension sought is equivalent to that of the nullification or impairment. The proposal does not specify what actions the arbitrator should take in the event that the complaining party fails to provide data. In order to prevent interpretation problems, the proposal suggest that rules should indicate whether the arbitrator is authorized to dismiss the request for suspension of concessions, or whether he would the arbitrator would undertake to collect the information.

B. Proposed Paragraph 22.7(c)

The proposal directs the complaining party to submit a detailed proposal that contains a list that identifies the concessions or other obligations for which the complaining party seeks permission to suspend. If the arbitrator considers that the level of suspension is not equivalent to the level of nullification or impairment, the complaining party is obliged to modify the list accordingly until the arbitrator considers that equivalence has been obtained.

C. Proposed Paragraph 22.7(f)

The proposal specifies that the complaining party cannot suspend concessions or other obligations that have not been designated on the list submitted to the arbitrator. The proposal thus seeks to prevent so-called "carousel retaliation" – as employed by the United States, for example, in rotating the target list of products subject to retaliatory tariffs. Carousel retaliation maximizes the number of industries and sectors subject to retaliation, with the intention to create more pressure on the violating party to comply.

Given that under the current version of Article 22.7 (as well as in new proposed text), the authorization to suspend concessions or other obligations is made by the DSB, and not by the arbitrator, the proposal should refer to the DSB's decision.

D. Proposed Paragraph 22.7(g)

The proposal suggests that the complaining party may submit a request to the arbitrator for an adjustment "for technical purposes" of the list of concessions or other obligations. This proposed adjustment procedure could take place any time after the authorization to suspend concessions is granted by the DSB. The proposal does not specify whether the adjustment procedure is also available where the DSB authorized suspension of concessions without the parties resorting to arbitration. The proposal fails to define the "technical purposes" that would warrant the adjustment procedure in a particular case. It is important that the proposal delineate the potential scope of the adjustment procedure.

E. Proposed Paragraph 22.7(h)

The proposal contemplates that the arbitrator shall take into consideration for the assessment of the level of the suspension the time necessary for the relevant sector of trade to prepare for such suspension and to recover thereafter. The proposal makes this requirement only for the arbitrator and not for the DSB.

OUTLOOK

Negotiations on DSU reform are proceeding towards a scheduled conclusion by May 2003. The EU proposal was the first to initiate broader discussion, including on implementation and transparency issues. Recent proposals from developing countries indicate a commitment to improve the DSU. India's response to the EU proposal indicates its reluctance to make the DSU process more transparent, including by allowing amicus briefs. Certain aspects of the proposal submitted by Thailand and the Philippines on Article 22 retaliation are likely to provoke some controversy given the sensitivity arising from recent US and EU approaches to retaliation. The proposal by Thailand on increasing the number of Appellate Body members merits attention, especially considering the increasing number of appeals. Generally, there is agreement that the DSU must be strengthened as inevitably, it will become a more active framework for facilitating global trade disputes.

WTO Establishes Panel on Mexican Telecommunication Services

SUMMARY

On April 17, 2002 the WTO Dispute Settlement Body (DSB) established the first panel to date dealing exclusively with the General Agreement on Trade in Services ("GATS") on the long-running dispute between Mexico and the United States regarding telecommunication services.

Since August 2000, the United States has asserted that Mexico has failed to satisfy its commitments under the Agreement on Basic Telecommunications (ABT), and particularly the Reference Paper on Anti-competitive Practices ("Reference Paper"). The US suspended the panel proceedings for almost two years based on progress made by Mexico. Mexico's telecommunications monopoly Telmex; however, has refused to abide by proposed reforms intended to facilitate competition, including interconnection rates and the independence of the regulator Cofetel.

A panel soon will be composed and will proceed towards a decision by October 2002. The US and Mexico can suspend the panel deliberations at any time, and might do so if a settlement is reached.

ANALYSIS

I. Background

In August 17, 2000, the United States requested consultations with Mexico regarding a wide range of measures affecting telecommunications services. The US and Mexico held consultations in October 2000, but failed to resolve the dispute. In November 2000, the United States requested the establishment of a panel, which Mexico blocked.

Mexico since then has taken considerable steps to address several of the U.S. concerns, which led the United States to delay the second panel request (anticipated in December 2000). Since that time, the United States claims, however, that Mexico's monopoly Telmex has obstructed certain reforms, including interconnection rates and introduction of competition by the regulator Cofetel. Some U.S. companies have being pushing the US to request the establishment of a panel in the forum of the WTO.

On February 13, 2002 the United States made another request for the establishment of a Dispute Settlement Body (DSB) panel concerning Mexico's telecommunication services. As expected, Mexico blocked the first request.

II. Establishment of the Panel

In the meeting of the DSB held on April 17, 2002, a panel was established to resolve the dispute between the United States and Mexico regarding telecommunications services. This is the first panel exclusively dealing exclusively with the General Agreement on Trade in Services

(GATS). Other WTO Members have requested to join as third parties, including the European Union, Japan, Brazil, Canada, Guatemala, Nicaragua, and Honduras.

The WTO's Dispute Settlement Understanding ("DSU") provides that a panel should be composed within 20 days if agreement is reached between parties on the panelists; otherwise, the WTO's Director General will appoint the remaining panelists. The panel will meet twice in the next six months and must render its decision by October 17, 2002. The decision can be appealed to the Appellate Body (increasingly, the case). However, the scope of appeals is limited to issues of law covered in the panel report and legal interpretations that the panel, and not factual findings.

Despite the start of the panel process, the US and Mexico may suspend deliberations at any time if a settlement is reached. In fact, some observers believe the US is proceeding with the process in order to exert pressure on Mexico to reform its Telecommunications Law – and not to give in to pressure from Telmex to relax disciplines ensuring competition.

III. Parties' Claims and Arguments

The US argues that Mexico, by incorporating the "Reference Paper" to its GATS commitments, is obliged to impose certain disciplines on its monopoly supplier Telmex. In particular, the US claims that Sections 2.1 and 2.2 of the Reference Paper require Mexico to ensure that Telmex provides interconnection at any technically feasible point in the network, under non-discriminatory terms, conditions and rates when Telmex is dealing with other suppliers of basic telecom services.

Also, the establishment of these terms, conditions and cost-oriented rates shall be transparent, reasonable, and sufficiently "unbundled" so that suppliers need not pay for network components or facilities they do not require. The US refers to the 13.5 (U.S.) cent charge that Telmex levies on basic communication suppliers in the US for interconnecting their calls to Mexico and argues that the charge is almost twice as high as the maximum rate Telmex charges Mexican suppliers.

The US also claims that Mexico has not complied with its commitment to permit foreign basic telecom service suppliers to provide cross-border "facilities-based" voice telephony, circuit-switched data transmission and facsimile services and cross-border "commercial agency" services.

On the other hand, Mexico claims that Telmex has already reached agreements with two of the main U.S. telecommunications suppliers on key issues raised by the US. According to our sources, the US is using the WTO to support its own companies to negotiate better agreements in specific business.

Nevertheless, Mexican officials intend to demonstrate their commitment to opening the Mexican telecommunications market via sectoral reform legislation to be introduced in the Congress this year. The Congress had scheduled to conclude a new Telecommunications Law on April 16, but failed to reach an agreement to finalize such legislation. (The ordinary session of the Congress concluded on April 30.) The president of the Communications Commission at

the House of Representatives, Jesús Orozco announced that the Congress will attempt to finalize the new Telecommunications Law at the ordinary session of Congress in September.

OUTLOOK

The formal establishment of the panel on Mexico's telecommunications sector is no guarantee that proceedings will lead to findings; in fact, U.S. interests might be undermined if the panel findings interpret the Reference Paper disciplines lightly. Over the past two years, the US and Mexico have preferred settlement and likely will continue to negotiate on the sidelines of the dispute. Certain actions on the part of Mexico, particularly its Congress on passing an effective Telecommunications Law will influence the WTO process.

In the event the panel issues findings in the Mexican dispute, these findings will likely establish important precedents in the interpretation of WTO Members' telecommunications services commitments in particular, and GATS rules in general. The outcome could also affect current GATS negotiations, which includes improving commitments in the telecommunications sector and stronger regulatory disciplines like those contained in the Reference Paper.

REGIONAL TRADE AGREEMENTS

U.S. and Brazil Officials Cite Cooperation on FTAA and WTO Negotiations Despite U.S. Agriculture and Steel Policies

SUMMARY

The U.S. and Brazilian deputy trade ministers on May 21, 2002 at a US-Brazil Chamber of Commerce seminar in Washington indicated that the two countries were working together constructively on FTAA and WTO negotiations. They also presented a positive view of the bilateral trade relationship as cooperative, despite disagreements over steel and agriculture.

The US and Brazil will co-chair the FTAA negotiations beginning in November. The US and Brazil will intensify discussions on how exactly the chairmanship will proceed, especially given the political transition in Brazil. The Brazilian representative noted that the co-chairmanship likely will be "challenging," but he expects positive results. The officials also cited success in recent cooperative efforts on the WTO Doha Development Agenda.

ANALYSIS

I. US-Brazil Maintain "Cooperative" Trade Relationship

Clodoaldo Hugueney, Under Secretary General for Integration, Economic & Foreign Trade Issues, Brazilian Ministry of Foreign Relations, and Peter Allgeier, Deputy US Trade Representative, USTR, on May 21, 2002 at US-Brazil Chamber of Commerce seminar in Washington, discussed the "Outlook for the FTAA & WTO Negotiations" at an event hosted by the Brazil-US Business Council.

Allgeier noted that the US and Brazil will meet tomorrow for the second meeting of the US-Brazil bilateral consultative mechanism, which was established in March of last year. The first meeting took place last July in Rio. The meeting will focus on: (i) how to ensure that countries meet the established deadlines in the WTO round; (ii) issues related to the FTAA – including market access and how to conduct the co-chairmanship of the FTAA negotiations in light of the political transition in Brazil; and (iii) US-Brazil bilateral issues, such as agriculture and intellectual property protection. The US and Brazil will begin co-chairing the FTAA negotiations in November.

Allgeier characterized the consultative mechanism as "cooperative and constructive" and cited the WTO Doha Ministerial Declaration on TRIPs and access to medicines as one successful result of this cooperation.

Hugueney recognized that co-chairmanship of the FTAA will be challenging, but he expects "good results". Hugueney added that the US and Brazil, as the two heavyweights in the Hemisphere, must share responsibility in the FTAA process.

II. FTAA Countries Begin Market Access Negotiations

Despite the economic and political difficulties that currently exist in Latin America, Allgeier emphasized that every week FTAA countries manage to send negotiators to Panama to continue work on the FTAA. These negotiations only will intensify as negotiations become more complex.

Allgeier reminded the audience of the following FTAA deadlines:

- Market access negotiations began on May 15. The market access negotiations cover merchandise trade, agricultural trade, services, investment and government procurement.
- Market access offers will be made between December 15 and February 15.
- Countries can request changes to the offers from February 16-June 15.
- Countries will then submit revised offers, which entails negotiating "back and forth".

Allgeier highlighted the following US-Brazil issues in the FTAA:

- ***Tariffs:*** There are few contentious tariff-related issues.
- ***Investment:*** The US and Brazil agree on a negative list approach for investment.
  - One debate is whether the investment provisions should apply to obligations made only after the conclusion of the FTAA negotiations or whether the provisions should apply to "pre-established" obligations made before the FTAA negotiations. The U.S. position is that the provisions should apply to pre-established obligations.
- ***Services:*** The US and Brazil are trying to determine whether FTAA countries should use a negative or positive list approach for services.
- ***Government Procurement:*** Should the government procurement provisions apply to sub-federal entities? Thirty-seven US states voluntarily agreed to abide by the government procurement provisions in the Uruguay Round. Therefore, the US believes a similar model could be established for the FTAA.

III. U.S. Agriculture and Steel Policies Threaten WTO Negotiations

Allgeier emphasized that the US is committed to negotiating an ambitious agriculture deal at the WTO, including provisions on market access, subsidies and trade distorting domestic support. Although the recent U.S. Farm Bill increases domestic support, Allgeier insisted that it is WTO consistent.

The message from the US Congress, Allgeier said, is that the US is "not going to prematurely deny ourselves recourse to what we are entitled to under the WTO." However, if

the Administration returns with a good agreement on agriculture from the WTO, then it will win congressional support.

As expected, Hugueney criticized the recent US Section 201 steel safeguards and the Farm Bill that Bush recently signed into law. The farm law, he said, provides a new argument for the EU not to pursue liberalization in agriculture. Hugueney added that, even though the farm law is consistent with U.S. WTO commitments, the law will make agriculture negotiations more difficult.

Hugueney also emphasized that the agriculture issue is so important because it is a primary objective of many countries. As for Brazil, agriculture is not the only concern in international trade negotiations, but agriculture certainly is a top priority.

IV. Mercosur Trade Agreements With Andean Community, Chile, South Africa and EU

Hugueney cited the following trade negotiations in which Mercosur is involved:

- ***Mercosur-Andean Community***: Mercosur and the Andean Community are approaching the final stages of their FTA negotiations. Brazil believes the FTA will promote solidarity in the Hemisphere. The blocs still must resolve some contentious issues, but Hugueney predicts that negotiations will conclude, or be very close to conclusion, by December.

- ***Mercosur-Chile:*** Mercosur and Chile recently concluded an agreement on agriculture and autos. Mercosur aims to conclude a similar agreement with Mexico.

- ***Mercosur-South Africa:*** Mercosur and South Africa will hold trade talks during the first week of June on a possible future FTA. Hugueney acknowledged that the negotiating process could be long, but said that the auto sector is one area in which there might be some concrete progress early in the negotiations.

- ***Mercosur-EU:*** Agriculture issues, among others, are difficult issues in the Mercosur-EU negotiations. After July, both sides hope to have a clearer idea of the scope of negotiations, which will determine whether the blocs will pursue an ambitious broad agenda for the FTA or pursue an agreement with a more limited the scope.

OUTLOOK

Despite irritants to the US-Brazil bilateral relationship caused by U.S. actions on steel and agriculture, the senior U.S. and Brazilian officials made it clear that they will continue to work together constructively at the bilateral, regional and multilateral levels. Observers in Latin America have noted that Brazil increasingly considers its commercial interests as more vital beyond MERCOSUR, especially after the recent Argentine financial crisis. Thus, a stronger relationship with the US is key to Brazil's external strategy.

FTAA countries have just begun market access negotiations and likely will negotiate the least contentious items first. However, as negotiations become more advanced and complex, disagreements involving sensitive areas, such as agriculture and trade remedies, could delay negotiations. The US has taken the position that agricultural issues should be negotiated at the WTO level, instead of at the FTAA level, because the US has more negotiating leverage at the WTO.

Nevertheless, the recent US Farm Bill could undermine U.S. credibility in agriculture negotiations at the WTO. Such an outcome will likely hinder completion of an FTAA agriculture agreement. The FTAA, like WTO negotiations, will be handled as a single undertaking, and all issues must be concluded before the agreement enters into force – coincidentally, both have a deadline of 2005.