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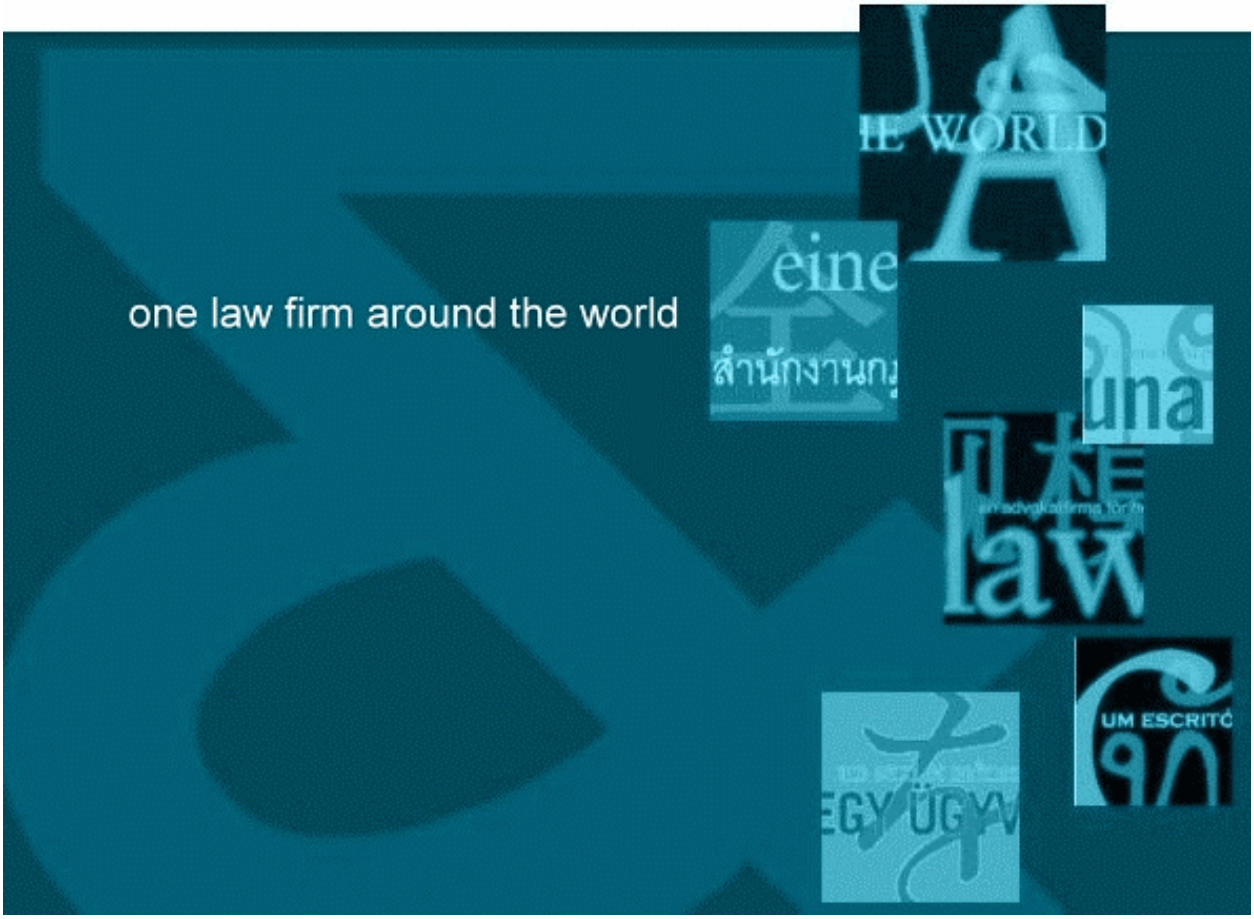
WORLD TRADE ORGANIZATION & REGIONAL TRADE AGREEMENTS

September 2002



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

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U.S. PERSPECTIVES

U.S. Industry Groups Comment on China's WTO Compliance at USTR Hearing

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Witnesses from major trade associations provided the following observations:

- Robert Kapp of the **US-China Business Council** –Believes China is making a sincere effort on implementation, for example on tariff reductions, but cited concerns on transparency, application of domestic regulations and standards, and administration of quotas.

- Willard Workman of the **U.S. Chamber of Commerce** – Cited five major areas of concern, including domestic political considerations in commercial decision-making.

- Erick Smith of the **International Intellectual Property Alliance ("IIPA")** and Joseph Damond of the **Pharmaceutical Research and Manufacturers of America (PhRMA)** – Cited China's lack of criminal remedies in enforcement of IP laws, and the spread of potentially dangerous counterfeit pharmaceuticals.

- Robert Vastine of the **Coalition of Service Industries** – Recognized China's progress in implementation of services commitments, but said that China has yet to satisfy expectations in areas including insurance, financial, telecommunications, professional and other services.

- Timothy Stratford of the **American Chamber of Commerce in China/General Motors** – Outlined varying approaches to compliance, and cited in particular China's delay in issuing regulations on auto financing.

- Jim Gradoville of the **U.S. Information Technology Office/Motorola China** – Spoke on China's compliance with IT commitments, including some problems with implementation of the Information Technology Agreement ("ITA").

- Sue Presti of the **Air Courier Conference of America, International (ACCA)** – Criticized China's licensing regime for international freight forwarding enterprises (IFFEs) and what ACCA perceives as a substantially "more restrictive" regime than before China's WTO accession.

- Ford B. West of **The Fertilizer Institute (TFI)** – Cited concerns about China's failure to meet important Tariff Rate Quota (TRQ) commitments for fertilizer.

- John Meakem of the **National Electrical Manufacturers Association (NEMA)** – Spoke on market access issues and efforts to engage China on trade standards and conformity assessment for U.S. electrical products.

U.S. Congressional-Executive Commission on China Releases First Annual Report

On October 2, 2002, the Congressional-Executive Commission on China (CECC) released its first annual report. The report presents a candid assessment of China's progress in the areas of human rights and the rule of law, and outlines over 40 recommendations for the Bush administration and Congress. Specific areas covered in the report include: religious freedom, labor rights, censorship and press controls, political dissent, and the rights of ethnic minorities, including Tibet. The CECC mandate is to monitor human rights and the development of the rule of law in China and to assess how these issues affect broader issues such as national security, environment, labor, and trade.

While China has taken some steps over the last twenty years to reform its legal framework, China has only begun to accelerate the reform process since it became a member of the World Trade Organization (WTO) in December 2001 in an effort to implement its WTO commitments. These WTO commitments, however, pertain primarily to improving the legal framework of commercial transactions, and do not apply directly to issues surrounding political liberalization or greater respect for human rights. Still, most CECC members and outside observers alike believe that these commercial reforms likely can contribute to a general strengthening of China's legal framework and could have an indirect affect upon the reform of the rule of law and the improvement of human rights.

U.S. Department of Commerce Conference on WTO GATS Services Negotiations

The U.S. Department of Commerce ("DOC") on September 12, 2002, held a conference on WTO (GATS) services negotiations, which presented U.S. industry negotiating objectives to foreign embassy representatives in Washington. USTR Assistant Secretary Joe Papovich and DOC Deputy Assistant Secretary Douglas Baker and representatives from over a dozen services sectors made presentations on U.S. industry priorities in the current round. In addition, Geza Feketekuty of the Monterrey Institute made a special presentation on trade capacity building and assistance to developing countries as part of the Doha Development Agenda.

U.S. Services Industry Meeting with Deputy Minister Medvedkov on Russia WTO Accession

The U.S. services industry held an informal meeting with Russia's Deputy Trade Minister Maxim Medvedkov (also lead WTO negotiator) on October 3, 2002, during his visit to Washington DC, in order to review progress on Russia's WTO accession. Industries represented include the insurance sector, computer-related services; express delivery, legal, telecommunications, financial services and securities. U.S. industry representatives emphasized the need for improved concessions, but were generally pleased with the progress in Russia's

services concessions. They also highlighted the need for greater transparency in Russia's regulatory process.

Legislative-Executive Working Group Established to Respond to WTO Dispute on FSC/ETI

Senate Finance Committee Chairman Max Baucus (D-Montana) and Ranking Member Charles Grassley (R-Iowa) announced that the first meeting of the Legislative-Executive Working Group on the Foreign Sales Corporation/Extraterritorial Income Exclusion Act will take place on September 24, 2002. The purpose of the Working Group is to develop potential solutions to the FSC/ETI WTO dispute with the European Union.

In related news, House Ways and Means Committee Ranking Member Charles Rangel (D-California) and Trade Subcommittee Chairman Philip Crane (R-Illinois) recently collaborated on an editorial piece for the Financial *Times* in which they call on Democrats and Republicans to work together to find a solution to the ETI issue. Rangel and Crane propose five principles that they believe should be the basis for a successful U.S. response to the WTO ruling.

Although the WTO has authorized the European Union to impose $4 billion worth of retaliatory tariffs on the United States, the EU is holding off for the time being, as the U.S. Congress and Administration take steps to revise U.S. tax code. Analysts believe that Baucus and Grassley have called the meeting of the Working Group in order to demonstrate to the EU concrete steps towards compliance with the WTO ruling.

Talks at the Electron Table: E-Commerce and the WTO

Panelists at the E-Commerce and the WTO seminar held in Washington, DC, provided an overview of the ongoing work program at the WTO with respect to electronic commerce ("e-commerce"). Overall, both U.S. government officials and private sector participants stressed the need to continue working towards an atmosphere that ensures e-commerce's continued growth. The participants agreed that the traditional principles of most-favored nation treatment, national treatment commitments, along with increasing market access would be beneficial for e-commerce regardless of whether it is treated as a good or as a service. Participants also agreed that industry members must continue to make their voices heard to their governments on e-commerce issues.

WTO WORKING BODIES

US, EC and Japan Submissions on China WTO Compliance; Meeting of the Market-Access Committee on China's TRM

The US, EC and Japan are among the first WTO Members to submit specific market-access issues of concern regarding China's compliance review. WTO Members and China considered these issues at the Committee on Market Access on September 23, 2002 – which launched formally the first annual review of China's compliance with its WTO obligations.

The three submissions often raised similar issues, including the following concerns:

- *Quotas and TRQs* – Delays in quota allocation and lack of transparency in administration of quotas on automobiles and machinery and electrical products, and TRQs fertilizers.

- *Export and specific duties* – Questionable export duties; application of specific vs. ad valorem duties, including on beer and film products.

- *Legislation on quota allocation for electrical and machinery products* – Requested further information on implementation of the new measure, including procedures for licenses and quota allocation.

We discuss below the submissions in further detail, the outcome of the September 23 meeting, and the outlook for China's compliance review.

Chinese Supreme Court Issues Rules on Administrative Litigation Involving International Trade to Expedite Compliance with WTO Commitments

The People's Republic of China (PRC) Supreme People's Court issued the Rules of the Supreme People's Court on Various Issues Regarding the Judgment of Administrative Litigation Involving International Trade on August 27, 2002. The rules will enter into force on October 1, 2002, and are enacted in China's efforts to comply with the judicial review provisions of the WTO Agreements. The rules, which are also characterized as a judicial interpretation made by the Supreme Court, are comprised of twelve articles defining: (i) the scope of litigation involving international trade; (ii) the court of jurisdiction; and (iii) applicable laws, etc.

In China, a judicial interpretation made by the Supreme Court has the same legal effect as official PRC laws and regulations and will be applied by courts nationwide. The interpretation specifically provides a judicial remedy to natural persons or legal persons including foreign companies if they want to challenge the administrative decisions or orders that affect their legal rights involving international trade matters. The administrative decisions or orders involved in international trade include those related to the dumping duty investigation handled by the PRC Ministry of Foreign Trade and Economic Relationship and the State Economic and Trade Commission.

WTO DISPUTES

European Community Impose Definitive Safeguards on Steel Products; EU Members Provisionally Drop Countermeasures on US Steel Products

On September 28, 2002, the European Commission imposed definitive safeguards on seven steel products in response to the US Section 201 safeguard measures. The Commission will conduct a supplementary investigation until February 2003 with regard to three other products. In relation to those products excluded from the definitive safeguard measures, the Commission has terminated the provisional safeguard measures, but has placed them under surveillance. The

definitive safeguard measures will take the form of tariff rate quotas and will be in force from September 29, 2002 to March 28, 2005.

A few days later, the Council of Ministers the European Union agreed to provisionally drop their retaliatory action on a first list of products, taking into consideration the positive impact of the product exclusions decided by the US in August 2002. However, the Council called upon the Commission to maintain adequate pressure on the US to further reduce the negative trade impact of its safeguard action, while pursuing vigorously dispute proceedings against U.S. steel safeguards in the WTO.

WTO Panel Rules Against U.S. Byrd Amendment

On September 16, 2002, the WTO Dispute Settlement Body ("DSB") officially released the panel report supporting claims made by eleven WTO Members against the U.S. Continued Dumping and Subsidy Offset Act ("Byrd Amendment" or "CDSOA").

Among the main findings against the Byrd Amendment are:

- Acts as a non-permissible "specific action" in direct violation of Antidumping (AD) Agreement Article 18.1, Subsidies and Countervailing Measures (SCM) Agreement Article 32.1 and GATT Article VI:2 and VI:3.

- Constitutes a violation and undermines AD Agreement Article 5.4 and SCM Agreement Article 11.4.

- The US should bring the Byrd Amendment into WTO-compliance, and suggested repealing it.

Nevertheless, the panel decided against the complainants on the following issues:

- Mexico's claim that the Byrd Amendment was a specific subsidy that causes adverse effects under SCM Agreement Article 5(b). The panel rejected the U.S. request that a separate final report be issued on the claims brought by Mexico.

- The Byrd Amendment does not, in fact, require investigating authorities to reject price undertakings and does not, thereby deprive developing countries of "constructive remedies" as provided for under AD Agreement Article 15.

Upon release of the report, the US immediately announced its intention to appeal the panel's findings. The US will require time and considerable political initiative to resolve the dispute – especially if the Appellate Body upholds the panel findings.

REGIONAL TRADE AGREEMENTS

Asia-Europe Summit Seeks to Renew Inter-Regional Partnership; EU-Bilateral Meeting with China Focuses on WTO Compliance

The Heads of State and Governments of the European Union Member States and ten Asian countries, including China, Japan, and some Southeast Asian countries, met last month in Copenhagen, Denmark with the aim to further strengthen their "bi-regional partnership." Many official events took place on the sidelines of the general summit, including a China-EU Summit and an Asia-Europe Trade Ministerial meeting. The EU meeting with China focused on China's efforts to comply with its WTO obligations.

We highlight in this report the trade-related results of the recent meetings, including the adoption of a Trade Facilitation Action Plan for 2002-2004. The next Asia-Europe Trade Ministerial meeting will take place in China in 2003, followed by a Summit in Vietnam in 2004.

US and Chile Keen to Conclude FTA; Conclusion of U.S.-Chile FTA Key to FTAA Success

Recently Regina Vargo, Assistant United States Trade Representative (AUSTR) for the Western Hemisphere, discussed the prospects for the U.S.-Chile Free Trade Agreement (FTA), and more broadly USTR's plans for more regional FTAs in the context of a meeting of the Chile-American Chamber of Commerce. While Vargo stated that she and her Chilean counterpart have agreed that timing of the FTA negotiations would be driven by substance rather than by artificial deadlines, it is clear that the United States has a keen interest in wrapping up the negotiations soon so that it can move forward on the rest of its agenda. Vargo also discussed prospects for the U.S.-Central America FTA and the Free Trade Area of the Americas.

Heraldo Muñoz, Minister Secretary General of the Government of Chile, addressed a meeting of the Inter-American Dialogue recently. Muñoz led Chile's mission to the World Trade Organization Ministerial Meeting in Doha, Qatar. Muñoz discussed how Chile intends to draw on the success of its recent agreement with the EU in its negotiations with the US. Muñoz was quick to point out that Chile would not accept "just any agreement with the United States for the sake of achieving a template agreement." Muñoz concluded his remarks with reservations and doubts about the future of U.S.-Latin America relations in general. He stated that if the US and Chile can conclude the FTA, then it may be possible to conclude the FTAA. If not, Muñoz believes the future of U.S.-Latin America relations looks "weak."

Zoellick Officially Notifies Congress of Administration's Intent to Pursue FTAs with Morocco and Central America and to Press Forward with Current FTA Negotiations

During his first major policy speech since the Trade Act of 2002 was signed into law, United States Trade Representative (USTR) Robert Zoellick announced on October 1 that the Administration had sent letters to Congress regarding the Administration's intention to initiate

negotiations for free trade agreements (FTAs) with Morocco and Central America. Zoellick also announced that the Administration had sent letters to Congress regarding the ongoing FTA negotiations with Singapore and Chile, which the US hopes to complete this year. On October 2, Zoellick formally notified Congress of the United States' specific objectives and goals for the ongoing negotiations toward a Free Trade Area of the Americas (FTAA). The Trade Act of 2002, which contains Trade Promotion Authority, requires the Administration (i) to give Congress 90-day notice that it intends to launch new free trade negotiations and (ii) to inform Congress of ongoing negotiations.

In related news on October 2, USTR announced that the United States and Tunisia had signed a new Trade and Investment Framework Agreement (TIFA), which provides a forum for the two countries to examine opportunities for expanding bilateral trade and investment. On the same day, Zoellick met with Egyptian Foreign Trade Minister Youssef Boutros Ghali under the U.S.-Egypt TIFA Council and discussed a possible FTA.

REPORTS IN DETAIL

U.S. PERSPECTIVES

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ANALYSIS

I. Background: USTR Annual Report on China

The USTR is required to submit by December 11 of each year – the date of China's accession (*i.e.* December 11, 2001), a report to Congress on China's compliance with its WTO commitments.[1] In preparation for the first annual report, USTR issued a request for public comments[2] and held a meeting of the Trade Policy Staff Committee (TPSC) to solicit public views. The TPSC is chaired by USTR, and includes representatives from the Departments of Agriculture, Commerce, Labor, State, Transportation, Treasury, the Patent and Trademark Office and the U.S. International Trade Commission.

We highlight below testimony presented to USTR by the following industry groups:

- US China Business Council
- U.S. Chamber of Commerce
- International Intellectual Property Alliance
- Pharmaceutical Research and Manufacturers of America
- Coalition of Service Industries
- American Chamber of Commerce China/General Motors
- U.S. Information Technology Office/Motorola
- Air Courier Conference of America, International
- The Fertilizer Institute
- National Electrical Manufacturers Association

[1] § 421 of the U.S.-China Relations Act of 2000 (P.L. 106-286).

[2] 67 Federal Register 45580-1, July 9, 2002.

II. US-China Business Council

Robert Kapp, President of the US-China Business Council ("USCBC") stated that China's implementation has for the most part been positive – "the glass is more than half full," – but emphasized that nine months is too short a period for evaluation.

A. USCBC Written Statement on China Compliance

Kapp referred to a detailed written statement by the USCBC outlining China's achievements to date on compliance, which draws upon USCBC's members experience and independent staff research. USCBC applauds China's "considerable progress" on tariffs, legislative and regulatory revision, and human resources training. The USCBC was critical, however, of problems of insufficient transparency of many government agencies; inadequate introduction and implementation of WTO-mandated reforms; discriminatory technical and procedural barriers; mismanagement of quotas and tariff rate quotas, and continued uncertainties of regulation, including on agricultural trade.

Kapp concluded by saying that the USCBC believes the highest authorities in the Chinese government are committed to full compliance with its WTO commitments. The task of compliance, however, is enormous and can have huge social costs – but on balance, the gains should outweigh the costs for not only the Chinese economy, but the US and world economy. He urged U.S. officials and industry to work together constructively with Chinese counterparts to manage their trading relationship.

B. Question from USTR

USTR asked about areas to address in the second year of Chinese WTO membership. Kapp responded that more specific problems would likely be raised by companies as patience runs out. He also commented that Congress is taking a very active role, almost "intrusive," and suggested a more practical and non-adversarial approach to compliance issues.

III. U.S. Chamber of Commerce

Willard Workman, Senior Vice President of the U.S. Chamber of Commerce ("Chamber") agreed with Kapp that it was too early to say whether China is fully committed to WTO compliance. Some areas have been encouraging, for example in the telecommunications and automotive sector, but other areas have been problematic – namely the insurance and agriculture sectors.

A. Workman Cites Five Major Areas of Concern

Workman laid out five major areas of concerns: (i) lack of transparency; (ii) insufficient consultation in the development of regulations; (iii) lack of an independent regulator; (iv) inadequate protection and enforcement of intellectual property rights; and (v) the dominance of domestic politics in commercial decision-making. He also cited particular problematic sectors,

including insurance – saying that capital requirements in China are far too high, compared with international standards.

B. Chamber Report on China Compliance and Recommendations

Workman referred to the Chamber's report – "First Steps: A U.S. Chamber Report on China's WTO Progress" – prepared by a Chamber working group chaired by Richard Holwill of Alticor/Amway and Sandra Kristoff of New York Life International. The working group was organized in the fall of 2001 to provide business input to USTR on WTO implementation, and has sub-groups on Agriculture, Distribution, Information Technology, Intellectual Property Rights, Services and Transportation. The first report of the group makes the following six recommendations:

(i) ***Continued improvements in transparency and consultation –*** Cited lack of transparency in issuance of biotech food safety and labeling regulations; insurance regulations.

(ii) ***Independent Regulators –*** Criticized lack of regulation on China Post actions; cited need for an independent telecommunications regulator.

(iii) ***De-politicization in commercial decision-making –*** Asserted that the granting of new insurance licenses is still based on political considerations and not "prudential" criteria.

(iv) ***Improved IPR protection –*** Criticized widespread piracy and counterfeiting as little sign of change in IPR enforcement.

(v) ***WTO consistent antidumping laws –*** Urged full compliance with Antidumping Agreement, or example, criteria for evaluation of material injury should be made public; protection of confidential data; effective judicial review, and greater transparency.

(vi) ***Effective institutional compliance structure –*** Cited lack of inter-agency coordination in China on WTO compliance and urged China to establish clear, effective institutional mechanisms for WTO enforcement.

C. Questions from Commerce and Agriculture

Commerce asked Workman about China's adherence to the Antidumping Agreement. Workman responded that there have been problems in the past, for example, on respect of confidential information and bureaucratic discretion in antidumping investigations. He cited that it was not a "huge problem" at the moment, and does not want China to step up investigations. He also responded to questions from the Department of Agriculture, saying that inefficient institutions have delayed issuance of quotas and TRQs. Also, there is concern over Chinese export subsidies and barriers on GMO products.

IV. IIPA and PhRMA Cites IPR Enforcement Concerns

A. Eric Smith of the IIPA Cites Lack of Enforcement

Eric Smith, President of the International Intellectual Property Alliance ("IIPA"), remarked that China still has "a long way to go" on IPR enforcement, and has the highest estimated rate of piracy in the world. Smith acknowledged that some improvements have been made to comply with the WTO TRIPs Agreement, but enforcement is very inadequate. He cited as a major obstacle the lack of criminal remedies in China and China's preference instead to use administrative fines – which are rarely imposed. As a result, there is a lack of effective deterrence to piracy.

B. Joseph Damond of PhRMA Cites Patent Concerns

Joseph Damond, Associate Vice President for Japan and Asia-Pacific, Pharmaceutical Research and Manufacturers of America (PhRMA) cited China's inadequately enforced IPR protection on pharmaceuticals –warning that it poses a public health threat as fake drugs are smuggled in China and abroad. He referred to a Chinese news article that estimates 192,000 Chinese died last year after using "bogus" and substandard drugs. He said one of PhRMA's priority concern is to curb the production and distribution of these dangerous counterfeit drugs.

In addition, Damond cited as particular areas to monitor: national treatment (prohibition on *de facto* or *de jure* discrimination); data exclusivity; import licensing; distribution; and compliance with TRIPs. However, he stressed that further reforms are needed before U.S. companies would be confident enough to enter the Chinese market. In particular, he urged USTR to emphasize to China the importance of amending its laws and regulations in a transparent and expeditious manner so as to strengthen the existing weak IP enforcement regime.

C. Questions from PTO and USTR

An official from the Patent and Trademark Office ("PTO") asked if IIPA was pleased with China's new Copyright Law. Smith responded that IIPA was disappointed with the Law's implementing regulations, saying that it was a mere "cute and paste" of the old 1992 regulations. The official also asked about the reasons for the lack of criminal penalties in China; Smith responded that local politics probably influences this scenario. For example, Smith said that enforcement varies regionally, for example, it is much better in Shanghai than other areas.

PTO and USTR officials also asked PhRMA about assisting China to enforce IPR on pharmaceuticals, and the possible role of the U.S. Customs Service in controlling patent infringement. Damond responded that he thinks Chinese officials would be receptive to technical assistance from the U.S. government. Regarding control of fake drugs by U.S. Customs, he said some products are difficult to identify – which adds to the concerns over illegal production in China.

V. Coalition of Service Industries

A. Vastine Cites Lack of Transparency

Robert Vastine, President of the Coalition of Service Industries ("CSI") focused his testimony on the lack of transparency in China, including the lack of notice and comment in the formulation of regulations, administrative and judicial reviews, licensing, and the establishment of independent regulators. He cited as examples the formulation of regulations in sectors including the telecommunications, insurance, legal, logistics and express delivery, among others. He cited inter-agency battles on WTO compliance, and that MOFTEC struggled to coordinate implementation efforts.

B. Questions from USTR, Treasury, Transport and Commerce

USTR asked whether CSI has established a network with service industries in other countries to address China compliance. Vastine responded that CSI is making a collective effort with European, Japanese and other services organizations. Treasury and USTR inquired about the equity requirements in insurance and cited U.S. states such as Colorado as an example of low equity requirements (*i.e.* $1.5 million). Vastine responded that he did not know the different capital requirements among states, but CSI objects to the excessive requirements imposed by China.

Transport asked about barriers in logistics services, and whether China had imposed more onerous barriers by creating new categories of services. Vastine responded that CSI members including UPS, Fedex, and EDS are monitoring these developments to ensure that China is not circumventing its commitments on distribution, express delivery and other services – and would provide further details later.

Commerce asked about China's treatment of foreign legal providers. Vastine responded that CSI was concerned with the apparent economic needs test on foreign legal providers, which would effectively undermine China's commitment to liberalize legal services. CSI member law firms are in the process of analyzing the new regulations on legal service providers and would follow up.

VI. Statement of AmCham China/General Motors

Timothy Stratford, Vice Chairman and General Counsel, General Motors China Operations, and representing the American Chamber of Commerce in China ("AmCham-China"), provided general observations on China's compliance efforts, and cited specific examples of implementation problems in the automotive sector.

Stratford categorized China's compliance problems in five degrees:

(1) China's legitimate (though unwelcome) exploitations of "loopholes";

(2) China's aggressive interpretations of ambiguous language;

(3) Imperfections and delays resulting from practical difficulties despite good-faith efforts;

(4) Imperfections and delays resulting from inadequate resources devoted to the problems by the Chinese government; and

(5) A blatant disregard for clear-cut obligations

Stratford said that for much of the past nine months of membership, U.S. companies active in China are facing degree (1) and (2), or (3) and (4) problems – arising from genuine efforts by the Chinese government to comply with its obligations. He believes there are few outright degree (5) violations at the moment, but the situation could deteriorate if China fails to implement effectively its WTO obligations, after another "six to nine months."

A. Stratford Cites Delays in Auto Financing Regulations

Stratford cited that China has yet to issue regulations that would allow foreign non-bank financial institutions to provide financing for automotive sales, despite its commitment to do so upon WTO accession. He added that foreign automakers have expressed their "disappointment and dissatisfaction" with the delay, but recognize that the establishment of a regulatory framework for auto financing is "not a trivial task" – and therefore remain patient with China.

Stratford pointed out that automakers were encouraged in June of this year when the People's Bank of China ("PBOC") provided draft regulations on auto financing. He emphasized that the opportunity to comment was in itself an achievement and "new level of transparency." The draft regulations, however, included troubling conditions on providers of auto finance, such as excessive capital requirements at levels higher than found anywhere else in the world.[3]

Stratford described the dilemma that if PBOC was rushed to issue regulations, it could issue them in their present, undesirable form and curtail interagency review of comments received. He described such a scenario as degree (1) or (2) problems – the unwelcome exploitation of "loopholes" or aggressive interpretation of ambiguous language in its WTO accession commitments.[4]

Stratford considers the PBOC's delay as a degree (3) problem arising from China's good faith efforts to implement a complex new regulatory system. He suggested as a strategy to work "cooperatively but urgently" with the PBOC to prepare the appropriate regulations. If the PBOC

[3] Other industry groups (e.g. U.S.-China Business Council, U.S. Chamber of Commerce, Coalition of Service Industries, *et. al.*) have cited similar concerns in the financial services and insurance sector, and have criticized China's excessive capital requirements.

[4] The WTO General Agreement on Trade and Services ("GATS"), *Annex on Financial Services*, grants Members wide flexibility to establish prudential guidelines for financial institutions – *i.e.* the "prudential carveout." China can cite reasons including "protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier" – to condition, and potentially undermine its liberalization commitment on the right of financial institutions to provide automotive financing.

delays continue after several more months, he believes it would be necessary to shift it to a degree (4) problem, *i.e.* delays resulting from a lack of resources. After a few more months, he would consider it a degree (5) blatant violation, and would seek stronger enforcement action.

In summary, Stratford believes that the auto finance implementation difficulty is illustrative of many of China's compliance problems. Generally, he believes it is (i) too early to make final conclusions on China's compliance; (ii) the implementation process remains dynamic and largely positive; and (iii) much serious work remains to be done.

B. USTR and ITC Questions on the Auto Sector

USTR asked Stratford about areas that are particularly worrisome, including in the automotive sector. He responded that it remains uncertain whether China will implement effectively the many concessions made in the sector, including on quotas, import licensing, and other measures. As a positive development, China lowered tariffs on vehicles on schedule. Stratford said that his sources in the Chinese government have indicated that pressure is lightening up from the Chinese domestic industry in resisting reforms, and the government believes it can proceed with liberalization. He added that the Chinese domestic auto industry is thriving, and will likely remain competitive after China implements its WTO commitments.

ITC asked Stratford about the types of technical assistance needed by Chinese officials. Stratford suggested more training in the standards process, especially as China is imposing more "EU-like" standards, and should ensure they do not act as trade barriers. He also suggested ITC provide advice on effective implementation of trade remedy laws, to discourage their growing use as protectionist measures.

VII. U.S. Information Technology Office/Motorola

A. Statement of USITO

Jim Gradoville, Vice President and Regional Director of Motorola China, and on behalf of the U.S. Information Technology Office ("USITO"), spoke on China's compliance with IT commitments. He noted that Motorola is China's largest foreign investor, with nearly $5 billion in annual sales and over 12,000 employees – but he would speak more generally on USITO's interests.

Gradoville cited positive developments including China's adherence to reduce tariffs in accordance with the WTO's Information Technology Agreement ("ITA"), resulting in about $500 million in reduced import duties on U.S. exports of IT products to China. He added, however, that China has required end-use certificates for IT products in fifteen HS categories, which run counter to "both the spirit and letter" of the ITA. In the telecommunications sector, he cited the lack of a regulator independent from the Ministry of Information and Industry ("MII"). He also cited "slow, overlapping and redundant" regulatory type approvals, certification and testing requirements on many IT products. In addition, he encouraged the U.S. government to pressure China to join the WTO Government Procurement Agreement, given China's procurement market of $12 billion this year.

B. Questions from USTR and Commerce

Commerce asked Gradoville about the lack of U.S. investment in China's telecommunications sector despite the liberalization undertaken by China. Gradoville responded that the industry has a strong interest in value-added services (vs. basic telecommunications), and is also facing difficulties allocating overseas investment due to overarching problems in the sector worldwide. USTR asked Gradoville about overall issues to monitor, including technical standards. Gradoville pointed out the need for an ongoing and non-adversarial dialogue between China and the US to address concerns about standards and other new measures affecting IT products.

VIII. ACCA Statement Cites Concerns over China's Licensing Regime

Sue Presti, Executive Director of the Air Courier Conference of America, International (ACCA), cited China's licensing regime for international freight forwarding enterprises (IFFEs) and expressed concern over recent legislation requiring IFFEs to apply for an entrustment license from China Post in order to continue operating in China. The State Postal Bureau (China Post), the Ministry of Foreign Trade and Economic Cooperation (MOFTEC), and the Ministry of Information Industries (MII) govern China's licensing regime. Presti explained that these three government bodies have issued three official Notices since China's accession to the WTO on December 11, 2001, which have created a "substantially 'more restrictive' [licensing] regime" for the transporting of "private letters."[5] She also explained that China Post had exempted national express letter businesses from these requirements.

The newest Notice, *Supplementary Notice on Postal and Delivery Services for the Import/Export of Letters and Goods Possessing Letter Characteristics* (Notice 472), was issued on September 5, 2002. This Notice provides companies 60 days to comply with entrustment application procedures; however, in the WTO agreement, China agreed not to impose any additional limits on courier services beyond those in place at the time of accession to the WTO.

Presti in particular asserted that China is violating its WTO obligations in the following areas:

- ***GATS "roll back" prohibition*** – China must not "roll back" market access by imposing more restrictive conditions on ownership and operation that were in place upon accession;

- ***Non-discriminatory licensing conditions*** – China failed to provide justification on why an additional licensing regime requiring "entrustment" is necessary; and

[5] Notice 629 of December 2001 broadly defines "private letters" to include business documents, computer and audiovisual media, and other materials.

- ***Market Access and National Treatment requirements*** – Alleged violations of GATS Market Access and National Treatment due to imposition of: (i) an apparent economic needs test; (ii) limitations on the number of suppliers, *de jure* or *de facto* basis; (iii) limited scope of services of the international operator or local partner; and (iv) more favorable treatment accorded to local post offices.

VIII. Fertilizer Industry Submission on Tariff Rate Quotas

Ford B. West, Senior Vice President of The Fertilizer Institute (TFI) cited concerns about China's failure to meet important Tariff Rate Quota (TRQ) commitments for fertilizer. Furthermore, TFI believes that China may be "manipulating its fertilizer TRQ process" in an attempt to protect China's own industry from potential foreign competitors. West asserted that China has misinterpreted procedures stated in the *Interim Measures on the Administration of Import Tariff Quota On Fertilizers* issued by the State Economic and Trade Commission (SETC), and has unfairly administered its value-added tax (VAT) to apply only to certain fertilizer products – in effect conferring preference to Chinese products. West encouraged the USTR to address these issues in its Annual Report due in December.

IX. NEMA Comments Cite Market Access and Trade Standards Issues

John Meakem, Manager of International Trade at the National Electrical Manufacturers Association (NEMA) testified that U.S. electrical producers (i) face numerous tariff and non-tariff barriers on their exports to China, (ii) face unfair competition from "extremely low-priced Chinese electrical good imports, and (iIi) share concerns over China's intellectual property protection regime. Meakem noted that another major concern for NEMA members focused on China's conformity assessment procedures and standards requirements. He emphasized recent action by China to only accept electrical goods built to conform to Chinese national standards or those published by the International Electrotechnical Commission (IEC) and the International Standards Organization (ISO) – both of which tend to reject North America-based international standards.

NEMA welcomed China's move, only four days prior to China's WTO accession, to merge the China Commission for Conformity Certification of Electrical Equipment (CCEE) with the State Administration for Entry-Exit Inspection and Quarantine (SAIQ) to form the Certification and Accreditation Administration of China (CNCA). The CNCA created a new conformity mark, the China Compulsory Certification (CCC), to streamline China's national conformity assessment procedures, which industry groups hope will lead to national treatment for U.S. electrical goods. Still, Meakem expressed concern over China's progress in other reform areas, including that fact that no single North America-based international standard is yet acknowledged by Chinese authorities.

OUTLOOK

The USTR hearing held few surprises as most participants indicated that after nine months of membership, China is struggling with implementation of its WTO commitments – but

it is too early to make a proper assessment of compliance. Beyond tariff reductions, China has yet to implement effectively many regulations affecting its trade and financial regimes (*e.g.* administration of quotas, insurance regulations, automotive financing, independent regulators, etc.). More troublesome, some industries like the express delivery/ACCA and IT/USITO feel that China has backtracked on its commitments and has imposed more onerous conditions to service providers and IT products. Nevertheless, most industry participants like the USCBC, AmCham, PhRMA and others believe China is making sincere efforts to comply with its many commitments. Still, participants hinted that their patience would wear thin, perhaps as early as next year, and might seek stronger enforcement action.

Meanwhile, WTO Members have begun their formal review of China's compliance with WTO commitments, including the discussion in the Market Access Committee on September 23, 2002. Other WTO bodies will also review China compliance efforts, including for agriculture and services trade, and intellectual property protection. The US, EC and Japan are among the first WTO Members to submit specific market-access issues of concern. *(Please refer to our report on China's Transitional Review Mechanism.)* Unlike in the past nine months, China will be less resistant to the review efforts in these WTO bodies since the TRM requires a comprehensive report to the WTO General Council by the end of 2002. It remains uncertain, however, if China will respond to the specific concerns of Members in a timely manner, or politely acknowledge these concerns and act according to its own interests and capabilities. For many of the issues raised such as transparency and regulatory reform, China will likely require much more time to comply with its WTO commitments.

Overall, it remains unclear as to how much patience and leeway other WTO Members such as the US will grant China on compliance. Already, some in the U.S. industry and others have threatened the use of the dispute settlement mechanism in order to ensure effective implementation. As evidenced by the diverse and high-level participation in the USTR hearing and public comments by U.S. industries, China's WTO compliance will remain a prominent trade issue long after China's accession.

U.S. Congressional-Executive Commission on China Releases First Annual Report

SUMMARY

On October 2, 2002, the Congressional-Executive Commission on China (CECC) released its first annual report. The report presents a candid assessment of China's progress in the areas of human rights and the rule of law, and outlines over 40 recommendations for the Bush administration and Congress. Specific areas covered in the report include: religious freedom, labor rights, censorship and press controls, political dissent, and the rights of ethnic minorities, including Tibet. The CECC mandate is to monitor human rights and the development of the rule of law in China and to assess how these issues affect broader issues such as national security, environment, labor, and trade.

While China has taken some steps over the last twenty years to reform its legal framework, China has only begun to accelerate the reform process since it became a member of the World Trade Organization (WTO) in December 2001 in an effort to implement its WTO commitments. These WTO commitments, however, pertain primarily to improving the legal framework of commercial transactions, and do not apply directly to issues surrounding political liberalization or greater respect for human rights. Still, most CECC members and outside observers alike believe that these commercial reforms likely can contribute to a general strengthening of China's legal framework and could have an indirect affect upon the reform of the rule of law and the improvement of human rights.

ANALYSIS

The Congressional-Executive Commission on China (CECC) released its first annual report on October 2, 2002. CECC members[6] approved the report by an 18-5 vote. Two senators, Sam Brownback (R-Kansas) and Bob Smith (R-New Hampshire), and three representatives, Frank Wolf (R-Virginia), Sherrod Brown (R-Ohio), and Marcy Kaptur (D-Ohio) voted against the report. The report contains over 40 recommendations for the President and Congress and outlines specific steps the U.S. government should take to encourage China to pursue a dual policy of high-level advocacy on human rights issues and support for legal reform efforts. The CECC mandate is to monitor human rights and the development of the rule of law in China and to assess how these issues affect broader issues such as national security, environment, labor, and trade. (*Please see White & Case April 16 Report*) Please see www.cecc.gov for a full listing of these recommendations.

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

The Congressional members of the Commission highlighted 13 priority recommendations to the President and Congress. Some of these include the following:

- Facilitation of meetings of U.S., Chinese, and third-country companies doing business in a specific locality and industry in China to identify systemic worker rights abuses, develop recommendations for appropriate Chinese government entities, and discuss these recommendations with Chinese officials, with the goal of developing a long-term collaborative relationship between government and business to assist in improving China's implementation of internationally recognized labor standards;

- Organization by the Administration, in conjunction with the governments of other countries that import Chinese goods, of a series of conferences in key exporting regions in China to emphasize to Chinese manufacturers and exporters the importance of legal and fair working conditions to consumers in overseas markets;

- Development of a comprehensive plan for WTO-related technical assistance to China;

- Appropriation of Congressional funds for the Commercial Law Development Program (CLDP) to implement a commercial rule of law training program in China, as authorized by the U.S.-China Relations Act of 2000; and

- Expansion of U.S. government efforts to disseminate human rights, worker rights, and rule of law-related information in China through radio, television, and the Internet.

OUTLOOK

CECC co-chairs Senator Max Baucus (D-Montana) and Representative Doug Bereuter (R-Nebraska) praised the CECC's report and asserted that it provides a useful action plan for the Congress and the Administration in its dealings with China on the issues outlined in the report. They also hinted that Commission members would work with relevant Congressional committees to secure the necessary funding for both grass roots and government programs to improve the rule of law and the situation of human rights in China. In fact, the very membership of the CECC suggests that funding should not be too difficult to secure, as high-ranking CECC members from both parties are also members of major congressional committees of funding and jurisdiction.

U.S. Department of Commerce Conference on WTO GATS Services Negotiations

SUMMARY

The U.S. Department of Commerce ("DOC") on September 12, 2002, held a conference on WTO (GATS) services negotiations, which presented U.S. industry negotiating objectives to foreign embassy representatives in Washington. USTR Assistant Secretary Joe Papovich and DOC Deputy Assistant Secretary Douglas Baker and representatives from over a dozen services sectors made presentations on U.S. industry priorities in the current round. In addition, Geza Feketekuty of the Monterrey Institute made a special presentation on trade capacity building and assistance to developing countries as part of the Doha Development Agenda.

ANALYSIS

I. Introductory Remarks

A. Douglas Baker, Deputy Assistant Secretary for Services Industries, Tourism & Finance

Deputy Assistant Secretary Doug Baker provided opening remarks, explaining that for the past four years, the DOC has worked closely with the private sector to facilitate the industry's objectives in WTO GATS negotiations. The "Business Outreach" program includes roundtable discussions on individual sectors and larger gatherings like today's events – which is targeted at presenting U.S. industry interests to foreign embassies in Washington.

Baker pointed out that services are essential to the U.S. economy, with exports at about $270 billion annually and expected to increase to $350 billion in 2004. Although the EU, Canada and Japan account for half of U.S. exports, there is a growing trend of export to emerging markets, including Mexico, China, India, and South Africa – all above the $1billion mark.

Baker explained that DOC closely coordinates with the services industry through its Industry Sector Advisory Committees, including "ISAC 13" on services chaired by Bob Vastine of CSI, and "ISAC 17" on retailing and wholesaling, chaired by Frank Kelly. DOC is also active representing industry priorities in Geneva, and have participated in each of the 14 GATS negotiating rounds since February 2000. Together with USTR, State, Treasury, Transportation, Energy and the U.S. ITC, the inter-agency coordination has issued 15 negotiating proposals on behalf of U.S. industries (i.e. 12 sector; 3 cross-cutting) and initial market-access "requests" of 127 WTO Members on July 1, 2002.

In the recent July "services week" of negotiations, the US has received requests from about 20 countries to date, and expect more in the coming months. The US also held bilateral meetings with 35 countries to discuss these requests and will hold additional meetings during the October and December "services weeks." The next benchmark date is March 31, 2003 – the initial deadline for tabling offers.

B. Joseph Papovich, Assistant USTR for Services, Investment and Intellectual Property

Joe Papovich, Assistant USTR for the sector commented generally that the challenge of current negotiations is to improve "up and out" on services commitments, which during the Uruguay Round reflected existing practices. The agreements reached on basic telecommunications and financial services in 1997 resulted in further liberalization, but many other sectors such as distribution services would benefit from improved commitments.

Papovich dispelled the notion that GATS issues are monopolized by developed countries, but rather developing countries also are active in submitting proposals in many sectors and cross-cutting issues. He cited for example that Mercosur countries recognized the merits of improved distribution services for export of agricultural products, and submitted a proposal under GATS negotiations which supplements their efforts to liberalize agricultural trade. Papovich also commented that GATS negotiations do not intend to force privatization or deregulation, including in social services – as some critics have claimed.

Papovich described U.S. negotiating objectives generally as: (i) broad participation by WTO Members; (ii) roll-back existing restrictions; (iii) build on past successes; and (iv) open and predictable regulatory procedures, including regulatory transparency – which would provide citizens with a better understanding of policy objectives.

Papovich and Deputy AUSTR Peter Collins commented on the recent July "services week" negotiations, stating that about 20 countries have submitted market access "requests" by the initial June 30 deadline, and the number should increase to about 30 at the next round in October. Among these requests, about two-thirds are from developing countries. They were generally encouraged by the level of participation thus far.

II. Industry Priorities

Robert Vastine, President of the U.S. Coalition of Service Industries ("CSI") and also chair of ISAC-13 for services, moderated the panel discussion on cross-cutting and sectoral priorities of major industries.

A. Cross-Cutting Priorities

Industry representatives spoke on cross-cutting priorities including: (i) transparency; (ii) electronic commerce; and (iii) movement of natural persons – GATS "Mode 4" access.

1. Transparency

Emily Altman of Morgan Stanley spoke on the need for greater transparency in formulation of domestic regulations. She said that the US has tabled "two extremely good proposals" on transparency, including a horizontal proposal for all services and a specific proposal for financial services. These proposals are focused on (i) how rules are made and

applied; (ii) the process and not substance of rules; and (iii) encourages input into rules through public consultation.

Altman emphasized that domestic regulatory transparency is about basic domestic procedures for formulating regulations, and not about notifying the WTO about domestic rules. Improved regulatory transparency is beneficial by (i) resulting in better rules; (ii) attracting capital; and (iii) is essential for deep, liquid and efficient markets. Altman cited to two regional and international agreements on regulatory transparency: (1) EU's Consultation Practices of the Committee of European Securities Regulators ("CESR"); and (2) the International Organization of Securities Commissions ("IOSCO") "Objectives and Principles of Securities Regulations."

Altman concluded by asking participants to (i) encourage domestic regulatory authorities to consult with Geneva negotiators; (ii) indicate agreement on regulatory transparency in financial markets; (iii) recognize that increased transparency will attract capital and improve financial markets; and (iv) codify a good practice of regulatory transparency.

2. Electronic Commerce

Laura Lane of AOL Time Warner spoke on the role of electronic commerce in services transactions, and cited as priorities:

(i) ITA liberalization – Improve market access on IT products; the need for more affordable computers and other devices to access networks;

(ii) B-2-B/B-2-C services – More competitive and open market in value-added services; e-commerce transactions such as online advertising.

(iii) Expedite product delivery – Improve delivery of products through distribution networks, e.g. express-delivery services

(iv) Protect IPR – Protect IP rights online and offline, including adoption of WIPO treaties on protection of online content.

3. Movement of Natural Persons/Mode 4

Stuart Brahs of the Principal Financial Group, spoke on the need to facilitate the temporary movement of services professionals under GATS "Mode 4" – movement of natural persons. He provided a paper referring to a joint proposal from CSI and the European Services Network ("ESN") proposing a special "GATS visa" category (or "universal carte de sejour") which would facilitate the transfer of highly-skilled professionals to work abroad on a temporary basis. For example, entry should be granted regardless of whether the company or firm has an affiliate office in the host country. The visa would last for three years, could be renewed, and allow an unlimited number of entries.

Brahs underlined the need of multinational companies facing time-sensitive requirements to provide professional services to clients and their operations abroad. He acknowledged that the

proposal is somewhat controversial in light of heightened security concerns, but emphasized that the proposal seeks to eliminate costly procedures faced by companies operating abroad, and not intended to undermine national security.

B. Sectoral Priorities

Industry representatives from the banking and financial, insurance, energy, express delivery, professional, telecommunications and retail and distribution services presented their negotiating priorities.

1. Banking Services

Tom Farmer of the American Bankers Association described the merits of open and transparent financial markets characterized by improved technology and training; diversification of risk management; investment funding; best management practices; and corporate accountability including disclosure in financial reporting.

To achieve these objectives, he encouraged the following commitments:

(i) Market Access – Improve access and scope of control for banking firms, including branches, wholly-owned subsidiaries, joint ventures and representative office;

(ii) Efficient operations – Allow for temporary entry of financial services professionals and provision/transfer of financial information;

(iii) Consistency with prudential requirements – Schedule commitments for cross-border access consistent with prudential requirements.

Farmer emphasized that the banking sector is the linchpin for the economy and supports the business processes of individual clients and the chain of economic value throughout the economy. Therefore, positive GATS commitments as described above would improve operational efficiencies and cross border activity – which would reinforce sound banking practices and attract foreign investment.

2. Asset Management Services

Jennifer Choi of the Investment Company Institute described the rapid growth in mutual fund assets, from $2 trillion in 1990 to over $12 trillion in 2000. She underscored the need for more competition in asset management services to provide domestic investors greater access to global management expertise and in order to diversify investment portfolios. She highlighted pension fund management as a particular area of importance with the growing aging populations in many countries.

Choi said the industry encouraged the elimination of barriers that prevent foreign firms from establishing wholly-owned affiliates; including on cross-border activities; and the removal

of regulatory requirements that appear facially neutral, but result in denying effective market access.

Choi cited as particular barriers:

(i) Delegation of responsibilities – Restrictions on the delegation of certain functions to the parent company or affiliates abroad (e.g. consolidation of back-office operations). The industry is willing to cooperate to ensure adequate prudential supervision of these activities.

(ii) Staffing requirements – Requirements on local staffing, including the number of resident portfolio managers. The industry seeks to centralize management resources and research systems.

(iii) Capital requirements – Mandatory requirements to maintain large amounts of capital within the country. The industry emphasizes that asset management is not capital intensive (like the business of banks or broker-dealers), and client assets are typically not in the custody of asset managers.

(iv) Investment regulations – Imposition of strict asset allocation requirements and restrictions on investment in foreign securities. The industry can better maximize returns if permitted to invest in a wide range of options.

3. Legal and Accounting Services

Don Morgan of Cleary, Gottlieb, Steen & Hamilton emphasized that legal services is essential to facilitate transactions in goods, and other services abroad. Morgan explained that the U.S. legal industry does not seek to engage in host country law or domestic litigation, but seeks the right to practice U.S. or international law through establishment of affiliate offices abroad. He noted that foreign lawyers already enjoy such privileges in many U.S. states, including as foreign legal consultants. Thus, the U.S. legal industry request in GATS negotiations corresponds to the current level of openness available to foreign lawyers in the US.

In addition, Herb Finkston of the American Institute of Certified Public Accountants commented that the U.S. accounting industry also sought to improve market access abroad, and to improve further disciplines on domestic regulations.

4. Express Delivery Services

Dave Spence of Federal Express outlined the express delivery services industry's objectives as:

(i) Appropriate classification of "express delivery" services – Seeks definition as "express delivery" and not "courier" services – the latter inappropriately focuses on the service provider rather than the service, and does not capture what is encompassed by these companies' operations;

(ii) Reduce barriers to integrated services – Restrictions in other services, *e.g*. distribution, warehousing, logistics, etc., do not apply if supplied in connection with express delivery services.

(iii) Trade facilitation – Seek rules-based commitments on trade facilitation, including expedited customs procedures. The industry has provided (in Asia and Latin America) technical assistance on customs facilitation, and is willing to increase assistance.

5. Energy Services

Tim Richards of General Electric spoke on behalf of the Energy Services Coalition, advocating freer trade in energy services to ensure wider range of choice in energy services and in a more environmentally friendly manner. Richards in particular cited the need to enhance efficiency in energy services including exploration, production, transportation and distribution of energy. He added that several countries have submitted negotiating proposals on energy services, including the EU, Japan, Venezuela and the US.

Richards encouraged three specific types of commitments:

(i) Standstill commitments – Bind existing levels of market access;

(ii) Domestic regulatory commitments – Covert domestic energy liberalization legislation into WTO commitments, effective when the legislation takes effect; and

(iii) Rollback restrictions – Eliminate existing barriers in order to obtain concessions from trading partners, including regulatory transparency and movement of service professionals.

Richards believes that the first two commitments can be undertaken easily. The third commitment, although more difficult, would "introduce dynamism into the system" and increase the availability of competitive energy services.

Finally, Richards mentioned that the industry is considering a reference paper similar to the Reference Paper on Anti-competitive Practices adopted in the Basic Telecommunications Agreement in 1997. The paper for the energy sector would address network access issues, including with respect to electrical grids.

6. Telecommunications Services

Scott Shefferman of WorldCom said the industry's negotiating objectives are to expand the number and quality of market-access commitments, including by:

(i) Full Market Access and National Treatment – Removal of foreign ownership restrictions and exclusivities for incumbent carriers; and

(ii) Commitment to the Reference Paper – Ensure pro-competitive regulation by adherence to the Reference Paper.

Shefferman concluded by saying that competition in the telecommunications sector would result in lower cost and higher quality services, and would help domestic businesses become more efficient. A more competitive telecommunications infrastructure would also help attract foreign investment.

7. Computer and Related Services

Rebecca Reese of EDS explained that the U.S. IT industry sought to maintain the current, broad classification of "computer and related services" – and to not distinguish sub-categories of services, including Internet-related and web-hosting services. The industry also seeks expansion of liberalization commitments under the ITA and launch of negotiations on trade facilitation.

8. Audiovisual Services

Bonnie Richardson of the Motion Picture Association of America ("MPAA") pointed out that the US audiovisual industry's goal is significantly different than most industries – simply, it seeks "standstill commitments" to preserve the current state of market access. She explained that MPAA is sensitive to the concerns of local film and television industries in other countries, even if they impose technical barriers that have some trade-distorting effects. MPAA is thus more concerned about the introduction of new restrictions, and less so about the elimination of existing barriers. Nevertheless, Richardson stated that MPAA would seek to liberalize specific, particularly trade distortive barriers to the distribution of entertainment products overseas.

Richardson concluded by saying that the US is not alone in this sector, and that other countries with strong entertainment industries, including Hong Kong, Japan, India and Brazil, have made or are considering proposals to reduce barriers to audiovisual services.

9. Advertising Services

Adonis Hoffman of the American Association of Advertising Agencies explained that the industry thus far has been rather silent on GATS negotiations. He explained that advertising services encompasses many other services, including communication, production and design, marketing and other services. He added that the industry faces barriers regarding local content, post-production, payments and equity limits. Thus, the U.S. industry will take a more active role in seeking more commitments on market access and National Treatment, and the least-trade restrictive and technology neutral measures.

10. Travel and Tourism Services

John Gay of the American Hotel & Lodging Association described the travel industry as the world's fastest growing sector in which both developing and developed countries recognize the benefit of improving upon the large number of commitments made during the Uruguay Round. Nevertheless, the sector faces obstacles including government review of management and franchise agreements; restrictions on repatriation of profits; limits on equity share in joint ventures; discriminatory regulations; requirements on local personnel employment; and restrictions on movement of managerial staff abroad.

Gay cited in particular the need for improved commitments for travel and tour operators and the lodging industry, including access to global networks and the Internet; facilitate payments; and for loyalty programs to be free from government regulations. In addition, the industry is concerned about extreme regulation of operations made in the name of sustainable development or consumer protection reasons. The industry is keen to work with governments on these issues in a constructive manner as it has the mutual interest of preserving a country's natural beauty and attraction as a tourist destination.

11. Education Services

Marjorie Lenn of the National Committee on International Trade in Education explained the industry's desire to expand definition of education services to include higher education and testing services (in addition to adult education and training). She emphasized that the industry does not advocate the inclusion of primary and secondary education services. Rather, the industry seeks to expand access to quality education, training and testing services abroad – and does not seek to supplement education services abroad.

Lenn cited as specific problems that some countries do not recognize academic degrees which are not offered by their domestic institutions of higher education – which is all the more problematic for electronic degree programs. Other countries impose restrictive visa and customs regulations which deter movement of personnel and educational/training materials; conduct needs assessments; or impose curriculum on foreign degree granting programs.

12. Distribution and Retail Services

Erik Autor of the National Retail Federation remarked that distribution services – wholesaling, retailing, franching and direct selling services – are becoming increasingly global. However, major industry players including Walmart, IKEA, Royal Ahold, and McDonalds, among others, have faced mixed results in their retail operations abroad. These difficulties are sometimes cultural in nature, but commonly arise from discriminatory regulations. Autor cited specific barriers as non-transparent regulations and tax regimes, economics needs tests, equity restrictions, restrictions on repatriation of profits, size and location of stores, and lack of access to channels of distribution.

Autor urged that the removal of these barriers in distribution services are in the long-term interests of countries, as retailers often employ large numbers of local staff. A competitive retail sector also provides a wider selection of consumer goods at more competitive prices, which results in higher standards of living and economic growth.

13. Insurance Services

Ray Sander of New York Life International spoke on the industry's efforts to encourage WTO Members to adhere to their best practices paper and model schedule for insurance services. The paper and schedule reflect a consensus among the industry, including the life, property, reinsurance and other insurance providers. In addition to more transparent regulatory regimes, the industry will seek improved market access for insurance services in WTO Members' markets.

III. Trade Capacity Building Efforts

Geza Feketekuty, President of the International Commercial Diplomacy Project at the Monterrey Institute, spoke on "Services Trade Capacity Building & Trade Liberalization – Fulfilling the Doha Agenda." Feketekuty began by describing recent U.S. government efforts to expand capacity building to complement WTO negotiations. For example, USTR has appointed an Assistant Secretary (Mary Ryckman) dedicated to trade and capacity building efforts, and US AID is allocating additional resources to capacity building. The U.S. government is preparing an inventory of trade capacity building assistance, including on WTO accession, compliance with trade agreements, and related activity.

In addition to U.S. government efforts, Feketekuty pointed out that CSI and the private sector are also active in supporting capacity building efforts in developing countries. CSI efforts are focused on promoting transparency in domestic regulation; encouraging effective participation by governments in services negotiations; expanding the role of the private sector in services negotiations; and effective implementation of the GATS.

Feketekuty stressed that capacity building efforts should focus not only on training in negotiations, but should assist domestic institutions to understand the merits of liberalization. For example, countries should receive assistance in analyzing the commercial interests at stake – and understand how WTO market access and regulatory requirements will affect domestic industries.

Feketekuty lamented that few institutions in the US, or abroad teach the skills and knowledge necessary to understand trade negotiation and regulation. He concluded by saying that many of the training materials he has developed can be found on the website: www.commercialdiplomacy.org

OUTLOOK

The DOC seminar indicated the strong interest of the U.S. services industry to move forward in WTO negotiations of the GATS. The U.S. industry is well prepared two years after the launch of comprehensive GATS negotiations, and many sectors have provided their detailed market-access requests to USTR. Most have as common objectives transparency in regulations, standstill as a minimum, or rollback of restrictions, and improved market access. Soon, these sectors will prepare to respond to requests made to the US by other countries. Nevertheless, some sectors, including advertising, education and health, are at an early stage of preparation or are facing internal opposition on liberalization.

The conference also demonstrated a strong commitment by the U.S. government and private sector to expand capacity building efforts and technical assistance. Without a better understanding of the negotiating or regulatory processes, developing countries will be all the more resistant to liberalization efforts in the current round.

U.S. Services Industry Meeting with Deputy Minister Medvedkov on Russia WTO Accession

SUMMARY

The U.S. service industries held an informal meeting with Russia's Deputy Trade Minister Maxim Medvedkov (also lead WTO negotiator) on October 3, 2002, during his visit to Washington DC, in order to review progress on Russia's WTO accession. Industries represented include the insurance sector, computer-related services; express delivery, legal, telecommunications, financial services and securities. U.S. industry representatives emphasized the need for improved concessions, but were generally pleased with the progress in Russia's services concessions. They also highlighted the need for greater transparency in Russia's regulatory process.

ANALYSIS

I. Medvedkov Believes Timing is Critical

Medvedkov believes that the "right time is coming" for completing accession and that accession is extremely important to domestic reform - but did not link the target date to the Cancun Ministerial (to take place in September 2003). He said, however, that unlike others (i.e. China), Russia is not willing to accede "at any price." Notably, he said that domestic interest groups - beyond insurance and banking sectors - are becoming more organized and "protectionist" and have started to resist more liberal commitments in the WTO, for fear of intense competition. Thus, an earlier accession date for Russia is all the more critical.

II. U.S. Service Industries Highlight Concerns

Representatives from leading U.S. service industries provided input on Russia's accession, and indicated varying degrees of support or criticism on the offers presented thus far in accession negotiations.

The insurance sector, for example, believes that Russia's commitments are inadequate, and particularly the excessive equity requirements. Medvedkov responded that just recently, Russia issued new guidelines in the sector that will introduce reform, but gradually. Nevertheless, Medvedkov said a "long-term strategic approach" will apply to compulsory and non-life insurance sectors – which are more difficult to liberalize.

Regarding computer services, Medvedkov stated that Russia is committed to liberalize most sectors upon accession, except for database services – which will be fully liberalized by 2008.

Regarding express delivery services, industry representatives were quite pleased with Russia's offer, which represents their desired approach to classify the sector separately from postal and courier services. Nevertheless, they will seek some clarification on the language of the commitment.

Regarding legal services, Medvedkov reiterated there should be "no problems" to foreign legal providers, but the GATS schedule will not reflect "none" – but will contain some reservations on foreign legal representation before Russian criminal courts, and maybe other practices.

Also, Medvedkov responded to the industry's questions on administrative procedural law and transparency – pointing out that the Russian Parliament is now moving forward on a draft law to implement GATT Article X, and will go even further. Medvedkov did not elaborate, but said that the government is moving towards "practicablity" in regulation. Russia's regulatory system, however, will not be modeled after U.S.-style "notice/comment" procedures.

OUTLOOK

Russia's WTO accession has reached a critical stage as President Putin and certain high-level officials including Medvedkov are keen to conclude negotiations by the Cancun Ministerial in September 2003. The date is critical due to scheduled Russian Parliamentary and Presidential elections in the following year. Medvedkov also emphasized that certain domestic industries were stepping up their resistance to liberalization commitments – beyond just insurance and agriculture – which would likely make accession even more difficult if further delays are encountered. Our sources indicate that Russia WTO accession negotiations have not accelerated as most WTO Members are awaiting for Russia to expedite domestic reform and improve its accession offers – including on services sectors. Russia is clearly not receiving the same expedited treatment as China, and recognizes that accession will not come easy, nor "at any price" – as emphasized by Medvedkov.

Legislative-Executive Working Group Established to Respond to WTO Dispute on FSC/ETI

SUMMARY

Senate Finance Committee Chairman Max Baucus (D-Montana) and Ranking Member Charles Grassley (R-Iowa) announced that the first meeting of the Legislative-Executive Working Group on the Foreign Sales Corporation/Extraterritorial Income Exclusion Act will take place on September 24, 2002. The purpose of the Working Group is to develop potential solutions to the FSC/ETI WTO dispute with the European Union.

In related news, House Ways and Means Committee Ranking Member Charles Rangel (D-California) and Trade Subcommittee Chairman Philip Crane (R-Illinois) recently collaborated on an editorial piece for the *Financial Times* in which they call on Democrats and Republicans to work together to find a solution to the ETI issue. Rangel and Crane propose five principles that they believe should be the basis for a successful U.S. response to the WTO ruling.

Although the WTO has authorized the European Union to impose $4 billion worth of retaliatory tariffs on the United States, the EU is holding off for the time being, as the U.S. Congress and Administration take steps to revise U.S. tax code. Analysts believe that Baucus and Grassley have called the meeting of the Working Group in order to demonstrate to the EU concrete steps towards compliance with the WTO ruling.

ANALYSIS

I. Baucus and Grassley Schedule First Meeting of Legislative-Executive Working Group

Senate Finance Committee Chairman Max Baucus (D-Montana) and Ranking Member Charles Grassley (R-Iowa) announced that the first meeting of the six-person, bipartisan Legislative-Executive Working Group on the Foreign Sales Corporation/Extraterritorial Income Exclusion Act will take place on September 24, 2002. The closed-door session will include Baucus, Grassley, House Ways and Means Committee Chairman Bill Thomas (R-California), Ranking Member Charles Rangel (D-New York), United States Trade Representative Robert Zoellick, and Deputy Secretary of the Treasury Kenneth Dam.

According to a Finance Committee press release, Baucus and Grassley have called the organizational meeting to direct their respective staffs to meet on a regular basis in an effort to develop "specific recommendations that can win support from the Congress and the Administration." Baucus and Grassley believe that bringing the United States into compliance with the WTO rulings regarding FSC/ETI will require "a long-term collaborative effort, involving tax and trade policy makers in Congress and the Administration."

The purpose of the Working Group is to develop a solution to the FSC/ETI dispute with the European Union. The Group's work may become even more important given the problems facing the American Competitiveness and Corporate Accountability Act of 2002 (HR 5095),

which would repeal the ETI tax credit, in the context of larger U.S. international tax reforms. House Ways and Means Committee Chairman Bill Thomas, who developed the bill (HR 5095), has had trouble moving it through Committee because of business opposition.

II. Rangel and Crane Call for Bipartisan Response to WTO Ruling

House Ways and Means Committee Ranking Member Charles Rangel and Trade Subcommittee Chairman Philip Crane recently collaborated on an editorial piece for the *Financial Times*. In the September 16 editorial, they call on Democrats and Republicans to work together to find a solution to the ETI issue. Citing previous bipartisan collaboration on trade issues, Rangel and Crane state that "the recent WTO ruling against the US requires a renewal of our bipartisan efforts…For the sake of the global economy, the EU and the US must work together—just as the political parties within the US must work together." Rangel has been one of Thomas' most vocal critics because Thomas apparently left Rangel and Democrats, in general, out of the drafting of both the Trade Promotion Authority (TPA) bill, recently signed into law, as well as the American Competitiveness and Corporate Accountability Act of 2002.

In their editorial, Rangel and Crane propose five principles that they believe should be the basis for a successful U.S. response to the WTO ruling:

1. The response must be bipartisan in nature. Every response to prior WTO challenges to the FSC/ETI provisions was bipartisan and involved both the Administration and Congress.

2. The US must comply with WTO rules through changes to U.S. tax law and/or changes to trade rules negotiated within the new round of WTO negotiations.

3. If the US must change its tax laws, the revenue created by the repeal of the FSC/ETI should be devoted to enhancing the competitiveness of companies operating within the US. Manufacturers should be the focus of any replacement tax provisions.

4. The US should "resist the temptation of responding to the WTO ruling by enacting tax penalties on the US operations of foreign companies."

5. The US must understand that enacting TPA was "a relatively easy preliminary step" towards the ultimate implementation of a new round of WTO negotiations. Rangel and Crane explain, "Congressional approval of the product of the new round of negotiations could be far more difficult. Linking the repeal of provisions for our job-producing exporters with tax liberalizations for companies operating overseas would make implementing a new round much harder. The argument that Congress will have provided tax and trade incentives to companies moving their operations overseas—and the jobs that go with them—could be fatal to any attempt to enact new

> trade legislation. This is a result neither of us can accept and is not in the US's best interests."

Rangel and Crane conclude that a solution based on the five aforementioned principles is "the only viable approach not only to the current threatened sanctions but also to continuing to expand trade worldwide."

OUTLOOK

Although the WTO has authorized the European Union to impose $4 billion worth of retaliatory tariffs on the United States, the EU is holding off for the time being, as the U.S. Congress and Administration take steps to revise U.S. tax code. Analysts believe that Baucus and Grassley have called the meeting of the Working Group in order to demonstrate to the EU concrete steps towards compliance. This is especially important in light of reports that Baucus has ruled out the possibility of a large-scale reorganization of the corporate tax system this session.

Since the WTO released its final ruling on January 14, 2002, the Administration and Congress have had difficulty deciding even how to approach the ETI issue. This situation, coupled with Baucus' hesitance to move a corporate tax bill and business opposition to the Thomas bill, has made for little concrete progress on the issue.

After the September 24 meeting, USTR Zoellick admitted that "the most we can do this year is lay the groundwork" – to modify the FSC/ETI regime, indicating the difficulty the Administration faces in modifying the U.S. tax code, especially with Congressional elections in November. Senator Baucus suggested that a solution would include a "combination of legislation and negotiated solutions." Clearly, the US will need to demonstrate definitive action and concrete results to the EU, in order to stave off potentially damaging retaliation.

Talks at the Electron Table: E-Commerce and the WTO

SUMMARY

Panelists at the E-Commerce and the WTO seminar held in Washington, DC, provided an overview of the ongoing work program at the WTO with respect to electronic commerce ("e-commerce"). Overall, both U.S. government officials and private sector participants stressed the need to continue working towards an atmosphere that ensures e-commerce's continued growth. The participants agreed that the traditional principles of most-favored nation treatment, national treatment commitments, along with increasing market access would be beneficial for e-commerce regardless of whether it is treated as a good or as a service. Participants also agreed that industry members must continue to make their voices heard to their governments on e-commerce issues.

ANALYSIS

On Wednesday, September 18, 2002, the Global Business Dialogue, the Washington International Trade Association, and the National Foreign Trade Council sponsored a seminar on E-Commerce and the WTO. The seminar is the seventh in a ten-part series of seminars on WTO negotiations. Speakers included:

- Mr. Kenneth Schagrin, Director, Telecommunications and E-Commerce Trade Policy, Office of the United States Trade Representative
- Dr. Andrea Camanzi, Senior Vice-President, Public and Economic Affairs, Telecom Italia Group
- Mr. Casey Anderson, Vice-President, International Public Policy, AOL Time Warner

I. Schagrin Presents Background of E-Commerce Work Agenda, Troubling Signs for Continued Progress, U.S. Objectives for the Future, and Things to Watch as the Negotiations Proceed

Mr. Schagrin, Director of Telecommunications and E-Commerce Trade Policy at the Office of the United States Trade Representative began the panel discussion by setting forth a background of the e-commerce work program. Schagrin then addressed signs that the negotiation of e-commerce issues may begin experiencing difficulties. Next, Schagrin discussed the status of the e-commerce work program on the classification of digital products, and provided the basic goals and objectives on which the United States would like to see agreement from all Members. Finally, Mr. Schagrin listed some things to watch as negotiations proceed.

A. Background on the WTO E-Commerce Work Program

Mr. Schagrin began his comments by discussing the background to the current WTO work program. Schagrin remarked that the WTO work program was established in 1998, and was accompanied by the customs duty moratorium on electronic transmissions. All main WTO

bodies were directed to look at e-commerce issues falling within their disciplines. The Doha Round extended the work program along with the moratorium, and the Doha Ministerial Declaration noted the importance of maintaining and creating an environment that was favorable to the development of e-commerce. The Doha Declaration also noted that it was necessary to continue studying the appropriate institutional arrangements for handling the work program. Schagrin noted that the background of Doha, which was to focus on increasing market access and national treatment commitments across a wide range of services, would bring benefits to high technology development. In this light, Schagrin believes that the disciplines applied to e-commerce need not recognize it as a new sector to be effective, but rather the traditional means of maintaining open trade can be applied with success.

B. Trouble on the Horizon

Despite the positive direction of the work on e-commerce, Mr. Schagrin noted that some difficulties may be on the horizon. The first troubling sign that has arisen is the fact that some Members are unwilling to agree to make the WTO customs duty moratorium on electronic transmissions permanent. Schagrin raised three points in response to those Members taking the position that the moratorium should not be permanent. First, all Members currently adhere to the moratorium, so why start imposing one now? Second, even if there was a way for customs officials to monitor and assess a duty, which Schagrin felt was doubtful, why use the WTO to do it? Third, Schagrin believes that the amount of revenue that would be brought in by a duty would be outweighed by the costs of implementing, monitoring and enforcement.

Mr. Schagrin singled out Japan as a country that is holding out on the issue of making the moratorium permanent. Schagrin expressed some disbelief at this, given that Japan has significant exports of digital products. Schagrin felt that Japan could be using its position on the moratorium as leverage for negotiations on other issues. Using Japan's position as an example, Schagrin noted that other Members might take positions on e-commerce that would otherwise conflict with their interests in order to obtain negotiating leverage on other issues. The overall effect of this approach would be to slow down the advancement of the e-commerce work program, an undesirable result.

C. Work Program on the Classification of Digital Products

Mr. Schagrin remarked that the work program on the classification of digital products as goods or services has slowed. The EC has taken the position that all digital products are services. This approach would lock in high tariff rates, a result Schagrin identified as stemming from protectionists in the EC. The United States has not yet decided whether, or if, digital products can be classified as goods or services.

D. Basic Goals and Objectives

Mr. Schagrin indicated that the United States would like to see agreement from all Members on some basic goals and objectives. First, Members should be able to agree that market access should be granted in a non-discriminatory manner. Second, irrespective of whether digital products are classified as goods or services, trade in those products should

continue on the basis of non-discrimination and national treatment principles.[7] Schagrin remarked that application of these two principles would lead to greater growth. Third, regulations should be transparent and non-discriminatory, to the extent that regulations are needed at all. Regulations should also take the least restrictive means possible.[8] Fourth, the customs duty moratorium on electronic transmissions should be made permanent.[9] Schagrin indicated that the above goals and objectives should be guiding principles of all future work on e-commerce.

E. Things to Watch

Mr. Schagrin noted that Members will want to watch the services negotiations at the request and offer stages to determine what countries are making meaningful offers in telecommunications and other e-commerce areas. Mr. Schagrin later noted in the question and answer session that a compilation of the requests and offers would be useful for negotiators heading into the Cancun Ministerial Meeting. Mr. Schagrin also stressed the need for the capital-based IT industry to monitor the negotiations and to work with its government to ensure that the business view is heard in Geneva.

Mr. Schagrin indicated that multilateral discussions should not proceed on issues that were not yet decided in Members' home countries. He cautioned that throwing undecided issues into multilateral negotiations will detract from the ability to obtain multilateral market access commitments.

F. Conclusion

Mr. Schagrin concluded by stating that the United States is committed to e-commerce discussions in a multilateral setting. In such a setting, Mr. Schagrin believes that broad goals and objectives can be the focus in the services area, and in market access negotiations. According to Schagrin, those opposing liberalizing e-commerce have the burden of showing that their view promotes and creates growth, rather than stifling it.

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[7] Mr. Schagrin's statement reflects CSI's position announced in its draft paper entitled "CSI Recommendations for: Five USG Goals for the WTO E-Commerce Work Program." In that paper, CSI's first stated goal is obtaining trade treatment consistent with principles of non-discrimination, MFN treatment, national treatment and full market access guarantees regardless of whether digital products are classified as goods or services.

[8] Mr. Schagrin's statement reflects CSI's second stated goal, which is that regulations, to the extent needed to achieve legitimate public policy objectives, must be transparent and non-discriminatory, and must represent the least trade-restrictive measures available.

[9] Mr. Schagrin's statement reflects CSI's third stated goal, which is to make the moratorium on customs duties on electronic transmissions permanent. Mr. Schagrin did not directly address CSI's final two objectives. CSI's fourth goal is to obtain market access and national treatment commitments across all sectors and modes of supply without limitations for services essential to e-commerce for B2B and B2C transactions. CSI's fifth goal is to maintain an open and unrestrained e-commerce infrastructure, which is not subjected to trade barriers. While Mr. Schagrin's remarks did not touch on the fourth and fifth goals directly, it was clear from Mr. Schagrin's overall remarks that the United States will seek to achieve those objectives as well.

II. Camanzi Discusses the EC's and BIAC's Positions on E-Commerce

Dr. Andrea Camanzi, Senior Vice-President of Public and Economic Affairs for the Telecom Italia Group, began by stressing that the most important issue in his view is the classification of digital products. He believes that this issue will be critical to the success of the Doha Round. He noted that problems have arisen because some Members argue that digital products are services, and he believes the reason for this is to allow higher tariffs. Dr. Camanzi is opposed to defining digital products as services in order to place higher tariffs on the products. Dr. Camanzi then discussed the EC's position on e-commerce, and finally, the Business and Industry Advisory Committee's ("BIAC") position.

A. EC's Position on E-Commerce Issues

According to Dr. Camanzi, the EC's position in a nutshell, is that e-commerce is commerce. While the form is new, the substance is the same. Accordingly, the EC argues that WTO rules are directly applicable to e-commerce. Dr. Camanzi noted that two issues are left open by the EC's view. First, whether there should be a permanent moratorium on the levying of tariffs on electronic transmissions, and second, whether the GATS Annex on Telecommunications applies to the internet. Dr. Camanzi noted that the issue hinges on whether the internet is defined as a "public telecommunications transport network" under the Telecommunications Annex to the GATS. Some Members believe that the internet should not be viewed as public, because it consists of private networks, as well as public ones. The EC, however, believes that the GATS Annex applies to the internet because it views the internet as a public network.

B. BIAC's E-commerce Objectives

Dr. Camanzi also laid out the negotiating objectives in BIAC's recent paper relating to telecommunications and electronic commerce.[10] Dr. Camanzi explained that the paper notes four core proposals for trade negotiations: 1) promoting the development of the domestic and global infrastructure necessary to conduct e-commerce while avoiding barriers that would hinder development; 2) promoting full implementation of existing commitments and seeking increased liberalization for all basic telecommunications, value-added and computer and related services; 3) promoting the development of trade in goods and services by e-commerce; and 4) promoting effective protection for intellectual property made available over digital networks. Dr. Camanzi indicated his belief in, and commitment to obtaining such objectives.

C. Conclusion

Dr. Camanzi concluded by remarking that e-commerce is an important issue on both sides of the Atlantic. He noted the industry needs to work towards convincing Members to eliminate duties on all IT products, to help and support government on the question of

[10] If you would like a copy of the paper, please contact us and we will forward it to you.

classification of digital products, and to support regulatory reform that further liberalizes e-commerce.

III. Anderson Notes E-Commerce is Here to Stay and Discusses Trade Agenda Items

Mr. Casey Anderson, Vice-President of International Public Policy for AOL concluded the panel discussion with remarks on the permanence of e-commerce, and the trade agenda items of importance to AOL.

A. E-Commerce is Here to Stay

Mr. Casey began his remarks by asking the rhetorical question of whether e-commerce was really that important. With the decline of the high-tech sector's stock values, some began to question whether the internet and e-commerce were important. Anderson cited to a statistic showing that e-commerce, in fact, remains quite important. In the most recent 12 months, e-commerce has grown by 40 percent, which is the highest growth rate to date. Moreover, Anderson cited an OECD Report finding that productivity and economic growth from the internet has had a meaningful impact.

Anderson went on to note that e-commerce provides benefits in all directions, to both merchants and consumers. It allows parties in both the developed and developing world to engage in transactions that increase both parties' welfare. Anderson also noted that the internet and e-commerce are still at the beginning stages, and that global welfare will increase as more people access the internet.

B. Trade Agenda Items

Mr. Anderson briefly discussed trade agenda items, noting that he agreed with Mr. Schagrin's remarks. He added that a negotiating objective should be the avoidance of e-commerce as a justification for renegotiation of any disciplines that would lead to increased tariff burdens on e-commerce. Anderson also noted that intellectual property protection was an important aspect of promoting e-commerce growth, but that liberalization of financial services and the ability to deliver products, and to do so quickly, were equally important. Even though the latter issues are not often thought of as basic e-commerce issues, they are critical if e-commerce is to realize its full potential.

IV. Question and Answer Session

A. Differences Between the United States and EC Positions on E-Commerce

Mr. Schagrin responded to a question concerning what differences exist between the United States and the EC's position on e-commerce by stating overall, the two have similar objectives in the services negotiations. Schagrin noted that in telecommunications, both share the objectives of greater market access and national treatment commitments. The differences are mainly in the approaches. The United States believes that basic telecommunications is different

than value-added services, and wants to avoid an overly prescriptive implementation. Schagrin stated that he is not sure that the EC agrees with the United States' approach.

Mr. Schagrin identified as a key difference between the two, the issue of how digital products should be classified. The EC believes that all digital products are services, while the United States has not concluded that digital products fit neatly into either goods or services. Schagrin believes that the EC's approach is based on cultural sensitivities and on the EC-wide VAT directive.

B. Effect of Trade Act of 2002 Language on E-Commerce for Negotiations

Mr. Schagrin responded to a question on what effect the language in the recently enacted Trade Act of 2002 governing e-commerce negotiating objectives would have by stating not much. USTR has been seeking the objectives spelled out in the Trade Act of 2002 for some time, and believes they are worthy objectives. Schagrin indicated that USTR will work closely with Congress, states, regulatory agencies, and will consult with the private sector in an effort to attain greater market access and lower burdens on e-commerce.

C. Approach to the Digital Divide

Mr. Schagrin responded to a question concerning how the United States intends to deal with the digital divide by citing to the need to work with countries to make meaningful commitments on investment. Schagrin believes that most companies will hesitate to make an investment in a country that does not have strong investment protection. Thus, Schagrin feels that the most effective approach to closing the digital divide is to encourage countries without strong investment protection to make commitments in that area.

D. Potential for Ministerial Declaration on E-Commerce at the Cancun Ministerial

Mr. Schagrin responded to a question about whether there would be a ministerial declaration on e-commerce stemming from the Cancun Ministerial by stating that he did not believe the issue of classification of digital products as goods or services would be resolved. He noted that the United States wants to move in the direction of establishing bedrock principles on issues such as market access, MFN, and national treatment. Schagrin also remarked that a stocktaking of how e-commerce issues were being addressed would be a useful tool for negotiators. In particular, Schagrin noted the need for an examination of the requests and offers that were made in services negotiations on e-commerce related issues.

E. Potential Parallels Between Bilateral FTAs United States Is Negotiating and Multilateral Negotiating Objectives

Mr. Schagrin responded to a question on whether the United States was seeking precedent for multilateral treatment of e-commerce in its bilateral FTA negotiations with Chile and Singapore. According to Schagrin, the United States is not intentionally proceeding on such a basis. Schagrin remarked that both Singapore's and Chile's positions on e-commerce issues

were similar to the United States', and therefore, the United States was proceeding on that basis. Mr. Schagrin felt that some issues negotiated in the bilateral deals could be steps toward a multilateral framework, but to say that the bilateral and multilateral negotiation were moving in the same direction would not be accurate.

F. Industry Representatives Position on E-Commerce Provisions in Bilateral Versus Multilateral Agreements

Mr. Anderson and Dr. Camanzi responded slightly differently to a question on whether the industry prefers e-commerce provisions in bilateral or multilateral agreements. Mr. Anderson felt that bilateral agreements serve as useful precedents for negotiating multilateral agreements, and to the extent a bad precedent exists in a bilateral agreement, the negotiator's job is to distinguish it. Dr. Camanzi felt that the integrated nature of e-commerce requires an integrated solution, hinting at the fact that multilateral negotiations are more appropriate and effective for addressing the issue.

G. Potential for a Permanent Moratorium by the Cancun Ministerial Meeting

Mr. Schagrin responded to a question concerning whether there would be a permanent customs duty moratorium on electronic transmissions by the Cancun Ministerial Meeting by stating that in an ideal world there would be one, but he did not feel that there would such a declaration.

H. EC Value Added Tax Provision

Mr. Schagrin responded to a question on whether the United States was considering a challenge to the EC's Value Added Tax regime (due for implementation in 2003) at the WTO. Mr. Schagrin stated that consideration of a challenge is premature at this time. He also noted that all non-EU suppliers of digital products should be concerned about the EU's VAT regime, hinting at the fact that a challenge is not just in the United States' interests. Schagrin also indicated that he was unsure of what Agreements would be the basis for the challenge, saying that would depend on how the regime was implemented.

I. Importance of China and E-Commerce

Mr. Anderson responded to a question concerning the status of e-commerce in China. Anderson was optimistic about the Chinese market, noting that the number of internet users was growing and that the long term prospects are good. He added that while the Chinese market is not at the same level of development as either the United States or EU, AOL Time Warner was quite excited about it.

OUTLOOK

Panelists seemed to agree that there is a lot of work to be done to promote the growth of e-commerce. Addressing e-commerce is complex because the issue spans so many different disciplines. However, most of the panelists agreed that application of core trade liberalization

principles such as MFN treatment, national treatment commitments and increased market access would be equally applicable and equally effective in promoting the growth of e-commerce. Panelists also agreed on the continued need for the IT industry to make its voice heard to ensure that its views were known and represented in Geneva, especially as negotiations on GATS and other sectors proceed. Finally, all of the panelists were highly optimistic about the benefits of liberalized e-commerce for global productivity and global prosperity.

WTO WORKING BODIES

US, EC and Japan Submissions on China WTO Compliance; Meeting of the Market-Access Committee on China's Transitional Review Mechanism

SUMMARY

The US, EC and Japan are among the first WTO Members to submit specific market-access issues of concern regarding China's compliance review. WTO Members and China considered these issues at the Committee on Market Access on September 23, 2002 – which launched formally the first annual review of China's compliance with its WTO obligations.

The three submissions often raised similar issues, including the following concerns:

- ***Quotas and TRQ allocation*** – Delays in quota allocation and lack of transparency in administration of quotas on automobiles and machinery and electrical products, and TRQs fertilizers.

- ***Export and specific duties; taxation*** – Questionable export duties; application of specific vs. ad valorem duties, including on beer and film products; and discriminatory consumption tax on imported goods.

- ***IT end-use certificates*** – Requirements of end-use certificates for certain IT products in violation of the ITA.

We discuss below the submissions in further detail, the outcome of the September 23 meeting, and the outlook for China's compliance review.

ANALYSIS

I. Launch of China Compliance Review

China's accession to the WTO established a unique mechanism – known as the Transitional Review Mechanism ("TRM"), which scrutinizes China's compliance with its WTO commitments for the next eight to ten years. The TRM requires an annual report to the General Council on China's compliance with its WTO commitments – the first one due at the end of 2002.

Since China joined the WTO in December 2001, China has resisted WTO Members' efforts to raise specific concerns at various working bodies at the WTO – stating that the TRM only requires a formal report at the end of the year. At the Market Access Committee meeting on September 23, China agreed to begin the formal review of specific concerns on China's compliance, and will report their findings at the end of 2002.

II. September 23 Market Access Committee

The September 23 meeting of the Market Access Committee which convened to consider, among other things, China's WTO compliance efforts was a long and difficult meeting and lasted until nearly 9:00 pm (far longer than typical meetings). The majority of the time was spent on China's TRM, on which the discussion was tense and, on China's side, somewhat aggressive. The major issue discussed in terms of time taken was China's delay in administration of quotas and the issue of tariff rate quotas.

Several countries including Canada, the EU and Japan raised concerns on China's use of specific duties in violation of its WTO commitments. Canada for example was able to convince China to move towards applying ad valorem duties on newsprint by January 1, 2003. The EU and Japan raised the issue of specific duties on beer and photographic film, to which China responded it would not adjust to ad valorem duties on film. China believes it is within its legal right to maintain specific duties and would do so. Taipei expressed support on both beer and photographic products.

Taipei also submitted other questions and requested that answers might be provided later in writing. China rejected Taiwan's request aggressively, saying that it would provide no further answers because the TRM, as far as this Committee was concerned, ended with this meeting. (The discussion became heated at this point, with China referring to "troublemakers" and claiming that they were not obliged to provide information in English and had only done so as a courtesy.)

Generally, other WTO Members were concerned by China's failure to provide substantive answers to their questions. The formal meeting was then suspended and reconvened in informal mode. China also offered an informal meeting with delegations while national experts were in town at which they would make further information available. But, when the US pointed out that this would not serve the purpose of having China's responses on the record, China withdrew its offer.

Finally, since there will be no further meeting on China's TRM in the Market Acccess committee, the Chairman will draft a report on the review to the Goods Council and the General Council. Some delegations, including Japan, argued for a substantial report in which it would be made clear that some questions have not been answered. The Chairman, however, seems more likely to opt for a less controversial, short summary report referring to the relevant notes of the Committee meeting. Otherwise, Members will face a difficult negotiation on the content of the report. The discussion will thus move to the Goods Council and from there to the meeting of the General Council on December 10-11, where the overall report on China's TRM will be discussed. However, discussion at the overseeing bodies will cover the entire range of outstanding problems, and particular issues will be given less attention.

III. US Submission Highlights Quotas and Other Concerns

The United States presented a submission on August 28 on China's TRM on its market access concerns.[11] The U.S. submissions highlights concerns on TRQs on fertilizers; quotas on automobiles and machinery and electrical products; end-use certificates for IT products, and 2002 tariff rates.

A. Tariff-Rate Quotas on Fertilizers and Wool Tops

The US raised the issue of tariff-rate quotas (TRQs) allocation for fertilizer through entities other than state trading enterprises, and pointed out that China delayed allocation of 2002 TRQs for fertilizer four months late – and asked about 2003 TRQs for fertilizer and wool tops.

The US also pointed out that China agreed that TRQ allocation would be based on end-user demand and consumer preferences. However, the *Interim Measures on the Administration of Import Tariff Quota On Fertilizers* (issued on January 15, 2002) provide that TRQ allocation will be "based on the production needs and market demand of different regions" (Article 12) and "based on the needs to maintain comprehensive balance of national economy and rational allocation of resources" (Article 6(1)). The US asked China to explain this apparent discrepancy in practice in light of its WTO obligations.

B. Industrial Quotas on Automobiles, Machinery and Electrical Products

The US criticized China for its inadequate information and significant delay in the allocation of 2002 quotas for automobiles, machinery, electrical and other products. The US asked China to provide the following information for 2002 quotas:

(i) Total quantity of quota applied for;

(ii) The number of requests for quota denied;

(iii) Total quantity of quota allocated to end-users;

(vi) Fill rates for the quota; and

(v) Total quantity of quota allocated to entities that had not previously been allocated quota.

The US requested that China ensure 2003 quotas are allocated fully to end-users no later than November 1, 2002, in accordance with paragraph 129 of its Working Party Report.

The US cited the regulation *Implementing Measures for Quota Management of Machinery and Electrical Product Imports* (MOFTEC Order 23, issued December 20, 2001),

[11] China's Transitional Review Mechanism, Questions from the United States to China Concerning Market Access, G/MA/W/35, 28 August 2002.

and noted that China failed to provide a reasonable period for comment, as required by its WTO transparency obligations. The US asserted that the regulation contains criteria on allocation that goes beyond the criteria China agreed to in the Working Party Report. For example, Article 10 requires quota applicants to submit an application to local administrative authorities and departmental machinery and electrical product offices for verification before they can submit the application to MOFTEC. However, China specifically committed not to impose such multiple application requirements. (*See* China's Working Party Report, para. 129.)

In addition, Article 13 prevents a quota holder from making changes to trade means, use of product, names of product, price, equipment conditions, etc. after an import license has been issued, and it also appears to give administrative authorities power to disapprove such changes after the quota has been allocated (but prior to issuance of an import license). The US asked China to explain these restrictions in light of paragraph 131 of the Working Party Report, which provides that "all commercial terms of trade, including product specifications, product mix, pricing, and packaging, would be at the sole discretion of the quota holder, so long as the products are within the relevant quota category."

C. Value-Added Tax Applied to Certain Fertilizer Products

The US alleged that China provides discriminatory treatment on VAT rates, in violation of Article III of GATT, regarding different types of fertilizer. In particular, *Circular about VAT Exemption Policy for Certain Farming Materials* (No. 113/2001), jointly issued by Ministry of Finance and the State Administration of Taxation on July 20, 2001, exempts all phosphate fertilizers except diammonium phosphate (DAP) from China' s value-added tax (VAT). DAP, a product produced in the United States, competes with similar phosphate fertilizers produced in China, such as monoammonium phosphate (MAP). The *Circular* also exempts from the VAT all nitrogen fertilizers except urea, while allowing a partial VAT rebate for domestic producers of urea. Thus, these tax policies discourage use of foreign DAP and urea, for which China committed to permit access under TRQs.

D. Consumption Tax Applied to Imported Goods

The US alleged that China's methodology for consumption tax on imported goods is a possible violation of National Treatment requirements under Article III of GATT. Specifically, under the *Provisional Regulations on Consumption Tax*, in effect since 1993 and yet to be revised, China uses a different tax base to compute consumption tax for imported products and domestic products. For domestic products, the tax base for domestic products is the sales amount (apparently the ex-factory price). (*Provisional Regulations*, Article 5.) This amount is multiplied by the consumption tax rate to derive the consumption tax due. In contrast, for imported products, Article 9 sets the tax base as the "composite assessable value," which is defined as (dutiable value + customs duty), divided by (1 – consumption tax rate). The resulting amount is then multiplied by the consumption tax rate to derive the consumption tax due. Thus, the US asked if China plans to modify the discriminatory tax measure.

E. ITA End-Use Certificates

The US pointed out that in regard to the ITA, China has not yet become a participant in the Committee on the Expansion of Trade in Information Technology Products, nor has it implemented its commitments in accordance with the ITA, because it is requiring importers to obtain "end-use" certificates from the Ministry of Information Industries ("MII") on 15 ITA products to receive ITA reduced or duty-free treatment. The US stated that all ITA participants determine on the basis of classification ITA product descriptions, and not through the use of "end-use" certificates. In fact, during the ITA negotiations, the use of "end-use" certificates was considered and rejected since they are generally unnecessary and very burdensome. The US asked China when it will eliminate "end-use" certification requirements.

F. 2002 Tariff Rates

The US pointed out that all WTO Members are required to provide annually to the WTO Integrated Data Base (IDB) applied tariffs (by March 31) and import statistics (by September 30). The US reminded China to provide these applied rates to the IDB.

III. EC Submission Highlights Quota Allocation and Duties

The EC on August 5, 2002, submitted its questions and concerns to China[12] in advance of the September 23, 2002 meeting of the Committee on Market Access. The EC asked Chinese authorities to respond to its specific questions, and in particular, to submit outstanding information as required by Section 8 and paragraph IV.2(d) of Annex 1A of its Protocol of Accession[13] regarding quota allocation.

The EC's commented on three major issues: (i) transparency of quota allocation; (ii) application of export and specific duties, and (iii) recent domestic legislation affecting quotas for machinery and electronic products.

A. Transparency of Quota Allocation

The EC criticized the lack of transparency in China's administration of (i) quotas; and (ii) tariff rate quota ("TRQ") allocation. The EC asserted that "Chinese authorities have failed to indicate the actual allocation, the criteria followed, the beneficiaries, as well as other aspects that concern both allocation and re-allocation of quotas." The EC asked for more clarification and information on legislation concerning these and other issues.

1. Delays in Quota Allocation

[12] China's Transitional Review Mechanism, Communication From The European Communities, G/MA/W/33, 13 August 2002.

[13] WT/L/432.

The EC welcomed China's reduction of tariff quotas for fertilisers as one positive step, but stated that overall, China's management of quotas for industrial goods is not transparent. The EC warned that the lack of transparency "fosters uncertainty and creates additional costs to Chinese consumers."

The EC acknowledged that China's State Economic and Trade Commission ("SETC") intends to publish the circulars concerning quota allocation for 2003 by mid-October 2002, and hopes that the government will overcome delays experienced in 2002. Still, the EC questioned whether Chinese authorities would handle other problems regarding quotas and TRQs.

2. Requests for Specific Information

The EC asked China to notify the following specific information:

Quota requirements remaining in effect after China's accession (see section 8.1(b) of the Protocol of Accession);

- Applied tariffs;
- Trade data;
- Quantitative restrictions;
- Information on administration of TRQs in 2002 (see paragraphs IV.1(a) and IV.2(c) of Annex 1A);
- Information about conditions imposed on distribution licences, quotas, TRQs or other means of approval for importation (see paragraph IV.2(d) of Annex 1A);
- Information on introduction or application of NTMs other than those listed in Annex 3 (see paragraph IV.2(a) of Annex 1A); and
- Information on phased elimination of Annex 3 NTMs (see paragraph IV.2(b) of Annex 1A).

B. Application of Duties

The EC appreciated China's progress in adhering to tariff reductions contained in China's Schedule, and said efforts were "generally satisfactory." The EC cited some minor problems including border trade and the imposition of preferential duties to some trade partners. The EC also asked for an electronic version of the Chinese applied tariff rates.

The EC, however, raised numerous specific concerns regarding China's administration of its trade regime, including application of specific and export duties.

1. Specific Duties

Regarding specific duties, the EC questioned why Chinese authorities sometimes opt for the application of specific duties, even if their Schedule contains bound *ad valorem* rates. The EC warned that although such action could be compatible with WTO rules, they "should be undertaken only if and when due care is taken not to exceed the bound duty rates. This has not been the case in some specific instances." Also, the EC asked China to provide a listing of the specific duties currently applied – including mixed, compound and on a sliding scale?

2. Export Duties

Regarding export duties, the EC cited the Protocol's requirement in Section 11, paragraph 3 on the elimination of all taxes and charges applied to exports, unless they are either in conformity with GATT Article VIII (*Fees and Formalities Connected with Importation and Exportation*) or listed in Annex 6 of the Protocol (84 products). The EC noted that on December 20, 2001, the Ministry of Foreign Trade and Economic Co-operation ("MOFTEC") and Customs General Administration published the announcement No. 2001/17, which contains a list of commodities under administration of export licenses for 2002 – which contain some products not listed in Annex 6. The EC questioned China's reasons for the levying of export duties in the case of products not listed in Annex 6, and warn that these duties might be inconsistent with China's WTO commitments. The EC requested further clarification on this matter.

C. Quotas on Import of Machinery and Electrical Products

The EC requested further details on China's recent "Implementation Rules on the Quota Administration of Import of Machinery and Electrical Products" – including the legal instruments implementing the framework legislation.

The EC asked for specific details on the timeframe for issuing a license following the filing of an application, and whether the new measure contains a deadline. The EC also asked for details on the procedures and rights relating to license extensions. The EC questioned why the measure refers to allocation procedures at the local level, ahead of MOFTEC. The EC reminded China that allocation requests should be submitted to one agency at one administrative level only, so as to simply the allocation and issuance of import licenses.

The EC cited Paragraph 130 of the Report of the Working Party[14], which specifies the procedure to be followed for the allocation of quotas to newcomers. The measure, however, refers to a "proportion" of the yearly quota as allocated to newly-added applicants, at the same time stating "priority to applicants with strong productions, sales and service abilities." The EC was concerned about this apparent bias against newcomers and asked China for further detail on the procedures authorities intend to follow for the treatment of newcomers in quota allocation.

[14] WT/ACC/CHN/49.

In addition, the measure contains the word "deduction" – the EC asked whether this is equivalent to a "proportionate reduction" in the year following the lack of quotas filled by an applicant. The EC also asked for further details on quota re-allocation.

The EC also cited Article 5 of the measure on MOFTEC's commitment to publish the quota for the subsequent year. The EC asked that China publish the quota allocation of the previous year with clear data on the number of applications requested, as well as the number of those rejected and reasons for rejection.

On a related matter, the EC asked China to clarify the procedures enacted to implement the Information Technology Agreement. The EC also questioned the use of end-use certificates for ITA products.

IV. Japan Submission Highlights Tariff and Quota Concerns

Japan on August 23, 2002, presented a submission on its market-access concerns.[15] Japan cited concern with China's delay in providing relevant information to each subsidiary body in advance of the review – and thus requested China to reply and to submit necessary information ten days before the meeting. Japan raised specific concerns on application of specific vs. ad valorem tariffs on film products and beer; allocation of import quotas for automobiles; and import prohibition on used goods.

A. Tariffs on Film, Beer and Motor Vehicles

Japan referred to China's tariff rates on 35 items of photographic products in HS Chapter 37, on an *ad valorem* (levied on yuan/yuan) basis, those items are currently levied by specific import duties (levied on yuan/square metre basis) in a manner of far more excessive tariff rates than bindings.[16] Japan believes that those excessive duties should be lowered at the level of the bound rates, and asked China to provide a concrete time schedule for the revision from specific duties to ad valorem duties, in line with China's commitments.

Japan also referred to China's tariff rate on beer in HS chapter 22, which reflects an ad valorem basis, but is currently levied specific import duties. Japan asked China to respect the bound rate in line with China's commitments.

In addition, Japan asked whether China intends to create new tariff lines for CKD or SKD for motor vehicles, and to provide further information, including definitions of CKD and SKD as new tariff lines and the tariff rates,

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[15] China's Transitional Review Mechanism, Communication from Japan, G/MA/W/34, 23 August 2002.

[16] The Report of the Appellate Body for the case of Argentine minimum specific import duties concludes that it is inconsistent with Article II:1(b) of the GATT 1994(1) if the application of a type of duty different from the type provided in the bound tariff schedule results in the levying of excessive duties, in any transaction, compared to the concession tariff rates. (WT/DS56/AB/R).

B. Quantitative Restrictions and Import Quotas for Automobiles

Japan raised many specific questions on procedures for quantitative restrictions, and particularly as import quotas are applied to automobiles. For example, Japan asked China whether it notified its procedures on import licensing, including for submitting applications shall be published in the sources notified to the Committee 21 days prior to the effective date of the requirement. Japan also asked for general information on trading rights, including (i) eligibility of the applicant and relationship to trading rights and (ii) whether there are any entity without trading rights that have been qualified as applicants.

In regards to the automotive sector, Japan asked for information (both on the basis of application and actual allocation) on the value of import quotas for complete vehicles, CKD, and parts, broken down, respectively, by country of origin, engine displacement, and company. Japan also asked about the current status of import quota allocation distributed by the various provinces, autonomous regions, municipalities, and special economic zones. Japan asked China to confirm the schedule for quota allocation, and whether it will do so by October 30 for the year 2003.

1. Reallocation of Unused Quotas

Japan requested that unused quotas for this year be returned and reallocated as specified in the Report of the Working Party – by September 1, 2002.[17] Japan noted that China started the actual allocation of quota for current year in April, and asked whether China intends to postpone the deadline for return of unused quotas.

2. Priority Consideration for New Entrants in Quota Allocation

Japan urged China to give priority consideration to new entrants in allocating quotas.[18] Japan asked China to explain how it implements this obligation and to specify what amount of quota has been allocated to new entrants.

3. Quota System for Motor Vehicles

Japan urged China to specify the criteria in the "Implementation Rules on the Quota Administration on Imports of Machinery and Electrical Products", for motor vehicles and in accordance with the Working Party Report requirements:[19]

(i) Priority consideration to be given to new entrants, enterprises with foreign ownership equal to or less than 50 percent, and enterprises with foreign ownership greater than 50 percent in allocating quota.

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[17] Paragraphs 130 and 131

[18] Paragraphs 128 and 130 of report of Working Party

[19] Paragraphs 127, 129, and 130 of report of Working Party

(ii) An import license to be issued in most cases within 3 working days, and in exceptional cases, within the maximum of 10 working days, after a request for the license.

(iii) An import license to be extended once, upon request, for up to 3 months, if the request is made before 15 December of the current quota year.

(iv) The procedures for requests for extension mentioned in 3) above.

(v) Methodology of quota reduction for holders failing to return unused quota, and the date of reduction.

4. Extension of Period for Quota Allocation

Japan cited Paragraph 129 of the report of Working Party, which provides that import licenses would be extended once, upon request, up to 3 months, if the request is made before December 15. Japan wanted China to ensure that for this year, the effective period for all quotas and related import licenses be extended by three months, since the allocation of quota was delayed for three months.

C. Import Prohibition on Used Goods

Japan asked China about its prohibition on imports of certain used goods, including industrial electric products. Japan cites GATT Article XI:1 as generally banning import restrictions, and China's Protocol of Accession does not permit such import prohibition. Japan asked China to confirm the above-mentioned information, and to explain the consistency of import prohibitions for used goods with WTO requirements.

OUTLOOK

Starting this September, WTO Members will begin an active process of reviewing China's compliance with WTO commitments – including application of its trade regime, as discussed with considerable attention in the Market Access Committee on September 23, 2002. Other WTO bodies will also review China compliance efforts, including for services trade, agriculture, and intellectual property protection. Discussions in those committees are expected to raise equally difficult issues regarding China's compliance.

Unlike in the past year, China has been less resistant towards review of its compliance efforts in these WTO bodies since the TRM requires a comprehensive report by the end of 2002. Nevertheless, China has not responded to many specific concerns raised in the submissions of the US, EC or Japan, or by other Members. Rather, China has responded to a select number of issues (e.g. Canadian newsprint duties), but for most other issues it has not responded in much detail or to the satisfaction of other Members. For many of the issues raised such as quota allocation or application of duties, China will likely face further delays – whether intentional, or due to a lack of coordination and resources among responsible agencies.

Although no WTO Member has yet to raise a formal dispute against China, it appears that many are losing patience over delays, or disagreements on interpretation of China's commitments. After China's first year of membership and formal TRM report, it will be a matter of time before formal complaints are raised on China's implementation efforts, or lack thereof.

Chinese Supreme Court Issues Rules on Administrative Litigation Involving International Trade to Expedite Compliance with WTO Commitments

SUMMARY

The People's Republic of China (PRC) Supreme People's Court issued the Rules of the Supreme People's Court on Various Issues Regarding the Judgment of Administrative Litigation Involving International Trade on August 27, 2002. The rules will enter into force on October 1, 2002, and are enacted in China's efforts to comply with the judicial review provisions of the WTO Agreements. The rules, which are also characterized as a judicial interpretation made by the Supreme Court, are comprised of twelve articles defining: (i) the scope of litigation involving international trade; (ii) the court of jurisdiction; and (iii) applicable laws, etc.

In China, a judicial interpretation made by the Supreme Court has the same legal effect as official PRC laws and regulations and will be applied by courts nationwide. The interpretation specifically provides a judicial remedy to natural persons or legal persons including foreign companies if they want to challenge the administrative decisions or orders that affect their legal rights involving international trade matters. The administrative decisions or orders involved in international trade include those related to the dumping duty investigation handled by the PRC Ministry of Foreign Trade and Economic Relationship and the State Economic and Trade Commission.

ANALYSIS

I. Background

Providing a judicial review mechanism on the administrative decisions/orders related to international trade is a new development in China's legal system arising from its entry in the World Trade Organization (WTO). According to the provisions of the Accession Protocol, China is required to provide a judicial review mechanism for administrative decisions in order to provide individuals or corporations, including foreign entities, a scheme of judicial remedy in the event that their interests have been affected by the administrative decisions regarding the international trade of goods, service, and/or intellectual property rights. Although the legal jurisdiction of administrative acts is not expressly excluded from the Administrative Procedure Law of the PRC, a lack of detailed rules on the applicable laws and clear procedures actually prevents parties, especially foreign parties, from bringing disputes involving international trade before the appropriate court. As a result, in the past few foreign parties raised disputes regarding administrative decisions on international trade in Chinese courts.

In addition, in order to ensure WTO compliance, the Chinese legislature issued and amended many domestic laws and regulations to widen the jurisdiction of judicial review of administrative acts and decisions. For example, the latest amendment to the PRC Patent Law repeals the final award right exclusively handled by the patent re-examination board and gives applicants a right of judicial review before the Supreme Court.

By issuing a Supreme Court judicial interpretation, the PRC Government intends to expedite its compliance with WTO commitments without going through a lengthy legislative process. Normally, it would take much longer to pass a law under the typical legislation process because the legislative body must go through a process of at least three readings to pass a law.

II. Key Legal Modifications

A. Clarification on Conflicts Between International Law and Domestic Laws

Before the issuance of the Supreme Court interpretation, the courts were unsure of how to apply laws and regulations if they conflicted with each other under the provisions of international agreements to which China is a party. Under this interpretation, the Chinese courts could judge an administrative case involving international trade by following: (i) laws and regulations of the PRC or (ii) local regulations promulgated by local legislative bodies. Article 9 of the Supreme Court interpretation further provides that, if the applicable domestic laws or regulations conflict with one another, then the court shall apply the laws or regulations that are consistent with the relevant provisions of international treaties to which China is a party.

B. Judicial Review Applicable to Preliminary Actions, Not Only Final Rulings

Before the issuance of the Supreme Court interpretation, foreign parties could only raise disputes on final determinations, antidumping duty orders, and final decisions of the administrative review according to Article 53 of the PRC Antidumping Regulations. In other words, the parties involved could not pursue litigation against administrative activities, such as the implementation of illegal or incorrect procedures. With this interpretation, all types of administrative actions will be subject to judicial review, such as decisions on the refusal to initiate an antidumping investigation or the violation of other regulated procedures. Once the case is brought to the judicial system, the burden of proof shall be borne by defendants, i.e., administrative institutions, in accordance with the Administrative Procedure Law of the PRC.

OUTLOOK

The Supreme Court interpretation is a noteworthy example of how China can expedite reform in its legal system to bring its laws and regulations into compliance with WTO rules. Since the Supreme Court interpretation has the same legal effects as national laws, the rule will provide courts nationwide with detailed instructions on how to apply laws and handle legal actions against administrative decisions involving international trade. Analysts speculate that this development will likely provoke an increase in administrative litigation involving international trade. The inevitable increase in domestic trade litigation will no doubt test China's actual enforcement of these new judicial review mechanisms, and whether they are indeed consistent with China's WTO obligations.

WTO DISPUTES

European Community Impose Definitive Safeguards on Steel Products; EU Members Provisionally Drop Countermeasures on US Steel Products

SUMMARY

On September 28, 2002, the European Commission imposed definitive safeguards on seven steel products in response to the US Section 201 safeguard measures. The Commission will conduct a supplementary investigation until February 2003 with regard to three other products. In relation to those products excluded from the definitive safeguard measures, the Commission has terminated the provisional safeguard measures, but has placed them under surveillance. The definitive safeguard measures will take the form of tariff rate quotas and will be in force from September 29, 2002 to March 28, 2005.

A few days later, the Council of Ministers the European Union agreed to provisionally drop their retaliatory action on a first list of products, taking into consideration the positive impact of the product exclusions decided by the US in August 2002. However, the Council called upon the Commission to maintain adequate pressure on the US to further reduce the negative trade impact of its safeguard action, while pursuing vigorously dispute proceedings against U.S. steel safeguards in the WTO.

ANALYSIS

I. EU Definitive safeguards and monitoring system

On September 28, 2002, the European Commission (the Commission) published Regulations 1694/2002 imposing definitive safeguards on certain steel products and 1695/2002 establishing monitoring system.[20] The measures are in response to the US Section 201 safeguards and aim to prevent a flood of steel import products into the European Union market.

Background

On March 28, 2002, the European Community initiated an investigation to determine the existence of injury or threat of injury to the Community producers of products like or directly competitive with 21 imported steel products. The steel products covered by the investigation were (1) non alloy hot rolled coils, (2) non alloy hot rolled sheets and plates, (3) non alloy hot rolled narrow strip, (4) alloy hot rolled flat products, (5) cold rolled sheets, (6) electrical sheets (other than GOES), (7) metallic coated sheets, (8) organic coated sheets, (9) tin mill products, (10) quarto plates, (11) wide flats, (12) non alloy merchant bars and light sections, (13) alloy merchant bars and light sections, (14) rebars, (15) stain- less bars and light shapes, (16) stainless wire rod, (17) stainless steel wire, (18) fittings (<609, 6 mm) , (19) flanges (other than of

[20] O.J. L 261/1, September 28, 2002.

stainless steel) , (20) gas pipes and (21) hollow sections. On the same day the EC imposed provisional measures on 15 of the products under investigation [products 1-6; 9-14; 17-19].

The Definitive Safeguard Measures

The definitive safeguard measures will be under the form of tariff rate quotas and will cover seven products [products 1-5; 18 and 19]. The first year of the quotas will amount to 6.21 million tons of total EU steel imports, which is about a quarter of the EU steel imports in 2001.

The definitive safeguard measures entered into effect on September 29, 2002 and will be in force until March 28, 2005. When announcing the definitive safeguard measures, EU Trade Commissioner Pascal Lamy said that they will be "immediately withdrawn" if the U.S. eliminates its own steel safeguards within five days following the adoption of a negative ruling in the WTO.

The volumes of the tariff quotas are based on the average volume of imports during the last three years plus 10 %. Each year of the three-year period, the tariff quotas will be increased by 5 %.

Imports in excess either of the volume of the relevant tariff quota set out or of the volume of the part specified in relation to the country from which that product originates, must be subject to an additional duty at the rate specified in Annex 1 of the Regulation for that product and that period.

The tariff rate quotas apply to all countries irrespective of the origin of the product. However, the Commission considered that quotas for products 2 through 5, 8 and 9 must be allocated among those countries having substantial interest in supplying these products to EU market. Twenty countries (Argentina, Bulgaria, China, the Czech Republic, Egypt, Hungary, Iran, Japan, Libya, Norway, Poland, Romania, Russia, Slovakia, South Africa, South Korea, Switzerland, Turkey, Ukraine, and Yugoslavia) are considered to be with a substantial interest. Their quotas are published in Annex I to Regulation 1694/2002.

The circumstances in relation to product number 1 (hot rolled coils) are different. Hot-rolled coils are the most important product for steel producers, representing 38 % of the Community production and 30 % of imports. A large number of supplying countries have a substantial interest in supplying hot rolled coils so that, were the tariff quota to be allocated amongst those countries having a substantial interest in its supply, there would be a large number of relatively small quota allocations and only a small percentage (less than 7,5 %) of the global quota tariff quota would remain available for exporters in other countries. The Commission considers that a higher percentage should be made available to exporters in other countries in order to preserve their traditional level of trade and maintain accessibility to the Community market for other potential suppliers. Therefore, the Commission considers that the tariff quota in relation to hot rolled coils should take the form of a single global quota.

The origin of any product to which the Regulation applies must be determined in accordance with the provisions in force in the Community.

The quotas will be administered on a "first come first served" approach on the basis of customs declarations requiring exporters to prove they have steel ready to export under the quota system.

Country exclusions

The specific regimes, foreseen in bi-lateral and unilateral agreements between the EC and Russia, Kazakhstan, and Ukraine, will continue to operate.

However, the Commission decided to make one exception for the Russian Federation, which is allocated as a significant supplier in product 18 [fittings <609.6 mm] a 10 percent country-specific quota share. Imports from Russia of that product are not covered under its bilateral agreement with the EU, according to a trade lawyer who represents Russian and Ukrainian steel exporters.

In compliance with WTO disciplines, the definitive safeguard measures will not be applied to imports from developing countries where such imports of a particular product do not exceed 3 percent of total EU imports of that product. Annex 2 to the Regulation specifies the developing countries to which the definitive measures apply because they exceeded such 3 percent criterion.

Products Subject to Supplementary Investigation

With regard to three products (i.e. tin mill products, quarto plates, and rebars), the Commission reserved its right, after completion of supplementary investigation, to add them to the definitive safeguard measure. The investigation with regard to these additional products must be completed and a decision made no later than February 2003.

Products under surveillance

The Commission terminated the provisional safeguard measures on eleven products that were excluded from the definitive measures. However, the Commission placed them under surveillance. The list of products under surveillance can be found in Annex 3 to Regulation 1694/2002. Any additional duties paid in relation to those products under the provisional measures will be refunded. The surveillance will be in place for the same duration as the measures imposed on the other seven steel products.

II. EU Members Provisionally Drop Countermeasures on US Steel Products

On September 30, 2002, the Council of Ministers of the EU ("the Council") adopted its conclusions on the EU-US steel dispute.

Although it is not explicitly mentioned in the conclusions, the EU Member States agreed with the European Commission's proposal not to impose countermeasures in the short term on the products listed in Annex I to Council Regulation 1031/2002.

We recall that on May 13, 2002, the EC notified the WTO its intention to suspend concessions to the US as a response to the introduction of the US Section 201 safeguard measures on certain steel products. The notification contained two lists of US goods subject that could be subject to retaliation - a short one (Annex I) and a long one (Annex II). The first annex contains a "short list" US products that would be subject to 100 percent *ad valorem* duty as of June 18, 2002. The second annex lists a long list of US products that would be subject to 30 percent, 15 percent, 13 percent or percent duties from March 20, 2005, or, if the WTO Dispute Settlement Body declares the Section 201 safeguard measures incompatible with the WTO disciplines, from the fifth day following that decision. (*Please, see W&C EU May 2002 Trade Report*)

Council Shows Mixed Feelings Regarding the US Product Exclusions

The Council noted the positive impact of the product exclusions decided by the US in August 2002. However, the Council considered disappointing the fact that:

- The US product exclusions represented less than 30 percent of the total impact of the US safeguards on EU exports and
- More than 40 percent of EU total steel exports to the US were still subject to those US protectionist measures

Council Confirms WTO Challenge of US Measures

The Council confirmed that the EU would vigorously pursue its WTO challenge to the US measures, which is expected to result in the condemnation of the US illegal safeguard action by the Panel in March 2003. The Council also stressed that the EU would impose automatic re-balancing measures against the US if its measures were not terminated immediately after the WTO final ruling.

Council Reserves its Rights to Impose Countermeasures

EU Member States recalled that the EU had reserved its rights, in the May 14 notification to the WTO, to increase tariffs on a short list of US products as of June 18, 2002.

By doing so, the Council wants to ensure that the US will continue granting exemptions to the Section 201 steel measures to EU companies. On the basis of a new report from the Commission, the Council can still decide to impose countermeasures for Annex I products.

OUTLOOK

The continuity of the EU definitive safeguard measures is subject to the continuity of the US definitive safeguard measures themselves. The U.S. has indicated that it will not announce more product exclusions from the Section 201 safeguard measure before March 2003. A WTO panel is expected to condemn the US measure by that time. It is likely; therefore, that the EU will focus on the next few months on the WTO panel procedure, in order to get a report that

declares the US measures illegal; rather than on the imposition of countermeasures on Annex I products.

WTO Panel Rules Against U.S. "Byrd Amendment"

SUMMARY

On September 16, 2002, the WTO Dispute Settlement Body ("DSB") officially released the panel report supporting claims made by eleven WTO Members against the U.S. Continued Dumping and Subsidy Offset Act ("Byrd Amendment" or "CDSOA").

Among the main findings against the Byrd Amendment are:

- Acts as a non-permissible "specific action" in direct violation of Antidumping (AD) Agreement Article 18.1, Subsidies and Countervailing Measures (SCM) Agreement Article 32.1 and GATT Article VI:2 and VI:3.

- Constitutes a violation and undermines AD Agreement Article 5.4 and SCM Agreement Article 11.4.

- The US should bring the Byrd Amendment into WTO-compliance, and suggested repealing it.

Nevertheless, the panel decided against the complainants on the following issues:

- Mexico's claim that the Byrd Amendment was a specific subsidy that causes adverse effects under SCM Agreement Article 5(b). The panel rejected the U.S. request that a separate final report be issued on the claims brought by Mexico.

- The Byrd Amendment does not, in fact, require investigating authorities to reject price undertakings and does not, thereby deprive developing countries of "constructive remedies" as provided for under AD Agreement Article 15.

Upon release of the report, the US immediately announced its intention to appeal the panel's findings. The US will require time and considerable political initiative to resolve the dispute – especially if the Appellate Body upholds the panel findings.

ANALYSIS

I. AD Agreement Article 18.1, SCM Agreement Article 32.1, GATT Article VI:2 and VI:3: Finding of Specific Action Against Dumping or Subsidies

AD Article 18.1 and SCM Article 32.1 serve to limit remedies to "dumping of exports" and "against a subsidy of another Member" to those explicitly mandated by the AD and SCM Agreements. Complainants thus argued that Byrd Amendment fell outside these sanctioned remedies – e.g. antidumping duties or CVD duties. They also argued that the Byrd Amendment was, in fact, a specific action against dumping. The US argued that the Byrd Amendment was

not a specific action against dumping or subsidization because it does not apply directly to the imported good or importer and does not place a burden on the importer.

The panel sided with the complainants in finding the measure constitutes a specific action against dumping, and one that falls outside the remedies mandated by the AD and SCM Agreements. The panel found that although the Byrd Amendment makes no explicit reference to the constituent elements of dumping, it does so implicitly: "CDSOA offset payments follow automatically from the collection of anti-dumping duties, which in turn may only be collected following the imposition of anti-dumping orders, which may only be imposed following a determination of dumping (injury and causation). Thus there is a clear, direct and unavoidable connection between the determination of dumping and CDSOA offset payments."[21]

In violating AD Agreement Article 18.1 and SCM Agreement Article 32.1, it follows that the Byrd Amendment violated GATT Articles VI:2 and VI:3.

II. AD Agreement Article 5.4 and SCM Agreement Article 11.4: Provision of Artificial Incentives to Domestic Producers

AD Agreement Article 5.4 and SCM Agreement Article 11.4 state that antidumping and subsidy investigations may not be initiated unless the authorities have considered the level of support of an application from domestic producers. The complainant argued that, in offering the promise of offset financial inducements to domestic producers, the Byrd Amendment undermined the intent of AD Article 5.4 and SCM Article 11.4.

The panel supported the complainants, ruling that the Byrd Amendment constitutes an illegal "financial incentive" because only those domestic producers who filed or supported antidumping/countervailing duty petitions would qualify for offset payments. In particular, the panel determined that: "…given the low cost of supporting a petition, and the strong likelihood that all producers will feel obliged to keep open their eligibility for offset payments for reasons of competitive parity, we would conclude that the majority of petitions will achieve the levels of support required under AD Article 5.4/ SCM Article 11.4."[22]

By creating this artificial incentive for domestic producers to both initiate and support petitions, the panel ruled that the Byrd Amendment "may be regarded as having *undermined the value of AD Article 5.4/ SCM Article 11.4 to the countries with whom the United States trades,* and the United States may be regarded as not having acted in good faith in promoting this outcome."[23] (Emphasis added)

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[21] United States – Continued Dumping and Subsidy Act of 2000, WT/DS217,234/R, 16 September 2002, ("US – *CDSOA).* Para. 7.21

[22] *Ibid*. Para 7.62

[23] *Ibid.* Para. 7.23

The Byrd Amendment could thus lead to a greater number of investigations which, in turn, could disrupt the global trading environment. According to evidence, not challenged by the US, submitted by some complainants, offset payments to affected domestic producers as of December 2001 totaled over US$206,000,000.

In finding the Byrd Amendment to be in violation with AD Agreement Articles 5.4 and 18.1 and SCM Agreement Articles 11.4 and 32.1, the panel also found that the Byrd Amendment violated AD Agreement Article 18.4, SCM Agreement Article 32.5, and therefore WTO Agreement Article XVI:4.

III. AD Agreement Article 18.4 and SCM Agreement Article 18.3: Does Not Undermine Price Undertakings

The panel ruled did not support the claims by complainants that the Byrd Amendment gave U.S. producers a *de facto* veto right over any price undertakings or "constructive remedies." The panel reasoned that, because the Byrd Amendment neither "explicitly amends the statutory provisions relating to price undertakings in a manner inconsistent with these provisions" nor does it have an effect "such that the authority cannot possibly comply with its obligations in respect of price undertakings under the AD and SCM Agreement."[24]

In fact, the panel found that U.S. statutory provisions explicitly require that the investigating authority consult with domestic producers and potentially affected domestic consuming industries before deciding whether to accept a price undertaking. Thus, the panel concluded that the Byrd Amendment did not violate AD Agreement Article 8.3 and SCM Agreement Article 18.3.

IV. AD Agreement Article 15: No Violation of Developing Country Treatment

Of the complainants, India and Indonesia argued that the Byrd Amendment undermined the value of AD Agreement Article 15, which calls for "special regard [must be given] by developed country Members to the special situation of developing country Members…"[25]

Although the panel acknowledged that price undertakings were considered by certain developing country Members as being "constructive remedies" mandated by AD Agreement Article 15, the panel stressed that U.S. authorities are not forced by the Byrd Amendment to reject price undertakings out of hand. The panel thus did not find a violation of Article 15.

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[24] *Ibid.* Para. 7.72

[25] Implementation of Article VI of GATT 1994 ("AD Agreement"), Article 15, Developing Country Members.

V. SCM Agreement Article 5(b): No Finding of Nullification and Impairment

Article 5 (b) of the SCM Agreement states that no Member should, through the use of any mentioned subsidies cause the "nullification or impairment of benefits accruing directly or indirectly to other Members…"

The panel rejected Mexico's claim that, in granting specific subsidies, the Byrd Amendment nullifies and impairs benefit accruing to Mexico under Articles II and VI of GATT 1994. Due to the fact that Mexico had based it arguments on the offsetting payments, and not the Byrd Amendment itself, the panel reasoned that there was no basis upon which to find that the Byrd Amendment is specific within the context of the SCM Agreement.

The panel deemed that because the Byrd Amendment is not product-specific, and because the amount of such subsidies is not directly linked to the level of tariff concession, "there is no certainty that the grant of offset payments under the CDSOA will systematically offset or counteract benefits accruing to Mexico under Articles II and VI of the GATT 1994."[26]

VI. Panel Recommendations: Suggested Repeal of CDSOA

The panel concluded that the Byrd Amendment is inconsistent with AD Articles 5.4, 18.1 and 18.4, SCM Articles 11.4, 32.1 and 32.5, Articles VI:2 and VI:3 of the GATT 1994, and Article XVI:4 of the WTO Agreement. Nevertheless, the panel rejected complainants' claims that the Byrd Amendment violated AD Articles 8.3 and 15, SCM Articles 4.10, 7.9 and 18.3, and Article X:3(a) of the GATT 1994, and Mexico's claim that the Byrd Amendment violates SCM Article 5(b). The panel also suggested that if Members regard subsidies a permitted remedy to unfair trade practices, then Members should clarify this matter through negotiation.

Regarding recommendations on compliance, the panel went as far as to suggest repeal of the CDSOA – a very unusual step. Citing the mandate of Article 19.1 of the Dispute Settlement Understanding (DSU)[27], the panel reasons that: "[a]lthough there could potentially be a number of ways in which the United States could bring the CDSOA into conformity, we find it difficult to conceive of any method which would be more appropriate and/or effective than the repeal of the CDSOA measure. For this reason, we suggest that the United States bring the CDSOA into conformity by repealing the CDSOA."

The panel's recommendation is particularly controversial as most panel reports typically refrain from calling for the repeal of an offending measure, and instead recommend that the losing party bring its measure into conformity with WTO rules.

OUTLOOK

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[26] *Ibid.* Para. 7.128

[27] Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU Agreement"), Article 19.1, Panel and Appellate Body Recommendations, "…In addition to its recommendations, the panel and Appellate Body may suggest ways in which the Member concerned could implement the recommendations."

Both the US and complainants have reacted strongly to the panel findings, which mostly went against the Byrd Amendment. The US immediately appealed the decisions while the EC and others requested that the US repeal the Byrd Amendment. U.S. trading partners have alleged that the Byrd Amendment serves as an incentive to American steel and other ailing domestic industries to file unnecessary antidumping complaints since they can benefit from the fees collected by the CDSOA.

Not surprisingly, the US has immediately appealed the decision – which will result in an Appellate Body finding by November 16, or later if more time is required. If the Appellate Body upholds most of the panel's findings, the US will come under increasing pressure to repeal the Byrd Amendment – starting early next year. Already, there are signs that Congress has no intentions to repeal the Amendment. U.S. Senate Finance Committee Chairman Max Baucus (D-MT) issued public warnings after the findings that there is little support in Congress to follow WTO rulings in general, and the ruling against the Byrd Amendment in particular. Baucus believes WTO dispute panels have exceeded their authority, especially in findings against U.S. trade remedy laws.

Perhaps even more troubling than non-compliance by the US, some of the complainants have threatened to adopt laws similar to the Byrd Amendment to counterbalance the effects of CDSOA payments to U.S. industries. Such a proliferation of trade-distortive and protectionist measures would undermine not only the WTO's dispute settlement mechanism, but the global trading system in general.

REGIONAL TRADE AGREEMENTS

Asia-Europe Summit Seeks to Renew Inter-Regional Partnership; EU-Bilateral Meeting with China Focuses on WTO Compliance

SUMMARY

The Heads of State and Governments of the European Union Member States and ten Asian countries, including China, Japan, and some Southeast Asian countries, met last month in Copenhagen, Denmark with the aim to further strengthen their "bi-regional partnership." Many official events took place on the sidelines of the general summit, including a China-EU Summit and an Asia-Europe Trade Ministerial meeting. The EU meeting with China focused on China's efforts to comply with its WTO obligations.

We highlight in this report the trade-related results of the recent meetings, including the adoption of a Trade Facilitation Action Plan for 2002-2004. The next Asia-Europe Trade Ministerial meeting will take place in China in 2003, followed by a Summit in Vietnam in 2004.

ANALYSIS

The Fourth Asia-Europe (ASEM) Summit meeting, the Fourth ASEM Meeting of Ministers of Economy, Industry and Trade and the Fifth Annual EU-China Summit, all took place in September 2002 in Copenhagen, Denmark. We highlight below the results of these meetings on the trade agenda.

I. Background

ASEM is an informal process of dialogue and cooperation between the fifteen Member States of the EU and the European Commission and ten Asian countries (Brunei, China, Indonesia, Japan, South Korea, Malaysia, the Philippines, Singapore, Thailand and Vietnam). Its objective is to strengthen the relationship between the EU and Asia in a spirit of mutual respect and equal partnership.

The first ASEM Summit was held in Bangkok in March 1996. This Summit gave rise to an ongoing process of Summit-level meetings, Ministerial-level meetings and a range of technical meetings and activities. ASEM activities can be grouped into three main "pillars": (i) political dialogue, (ii) economic cooperation, and (iii) cultural and educational issues. The summits give equal priority to all three pillars.

II. The Fourth ASEM Meeting of Ministers of Economy, Industry and Trade

The Fourth ASEM Meeting of Ministers of Economy, Industry and Trade took place in Copenhagen on 19 September, 18-20, 2002.

During the meeting, the Ministers:

- Agreed on a new set of goals to reduce trade barriers between the EU and Asia;

- Pledged greater consultation on multilateral trade issues under the WTO;

- Referred to the high tariffs imposed by Washington on steel imports in March 2002 and urged the US to immediately remove those safeguard measures;

- Agreed to launch a reinforced dialogue on multilateral issues through a program of high-level meetings and conferences;

- Undertook to work constructively to conclude the on-going WTO Doha Development Agenda of Multilateral Negotiations by the end of 2004;

- Agreed to accelerate the current accession negotiations to the WTO of Asian countries such as Vietnam; and

- Endorsed a list of concrete goals to be achieved under the **Trade Facilitation Plan for 2002-2004**, which include actions to modernize customs and facilitate the movement of goods. Businesses from Asia and Europe adopted the plan during the Eighth Asia-Europe Business Forum (AEBF 8) that preceded the Summit and proposed it to the leaders of both regions.

III. The Fourth ASEM Summit

The Fourth ASEM Summit was held in Copenhagen on September 23-24. The ASEM Heads of State and Government based their discussions on those which took place during the Fourth ASEM Meeting of Ministers of Economy, Industry and Trade. They pledged to promote trade and investment between ASEM countries by continuing the work of two existing ASEM initiatives in this field: the Trade Facilitation Action Plan for 2002-2004 and the Investment Promotion Action Plan.

The ASEM leaders decided to set up a Task Force, based on an initiative by the President of the European Commission Romano Prodi and the Prime Minister of Singapore Goh Chok Tong to boost the role of the euro in Asia. The Task Force, which will be composed of five European and five Asian experts, will be action-oriented, explore the possibilities of establishing a closer economic partnership in trade, investment and finance. And increase the knowledge base regarding economic developments in the two continents. The leaders asked the Task Force to prepare an interim report in 2003 to the ASEM Foreign Ministers via the Economic and Finance Ministers, and to provide a final report to the Fifth ASEM Summit, which will take place in Hanoi in 2004.

IV. Fifth Annual EU-China Summit

The Fifth EU-China Summit took place in Copenhagen on September 24, 2002. The leaders exchanged views on EU-China relations and on international and regional issues of common interest, including China's WTO compliance efforts. The two sides briefed each other on developments in the EU and China, placing particular emphasis on the EU integration and enlargement process, the implementation of China's ongoing economic and social reform, and the forthcoming Eleventh Congress of the Chinese Communist Party.

With regard to China's accession to the WTO, China stated that it would fully implement its WTO commitments. The EU side re-affirmed its will to continue and intensify its efforts to support China in this, both through cooperation programs and through dialogue in key areas. The two sides also affirmed their interest in strengthening the multilateral trading system, and their commitment to a successful conclusion of the multilateral trade negotiations of the Doha Development Agenda. They pledged to intensify their dialogue in this sphere and to work together for an ambitious result that would fulfill the expectations of all WTO members. In addition, they plan to consult with each other and with other WTO members to ensure respect of the deadlines foreseen in the Doha Ministerial Declarations and Decisions, and to prepare a successful Fifth WTO Ministerial Conference in Cancun, Mexico, in September 2003.

Leaders welcomed the continued growth in EU-China trade and agreed to encourage further efforts to expand trade in both regions. They stressed the importance of foreign direct investment and the need for an increase in bilateral investment flows. Finally, the leaders expressed the desire to resolve recent food and consumer safety problems as quickly as possible, to open the way for more fruitful cooperation on sanitary and phytosanitary issues.

OUTLOOK

The more unilateral posture of the U.S. Administration on economic, political, and security issues has driven both Europe and Asia to forge a closer 'multidimensional' partnership on a range of issues. This growing economic interdependence between Europe and Asia as well as the rise in trade, investment and social agreements between the regions validate ASEM's relevance both as a productive organization and as an increasingly important institutionalized dialogue between Asian and European countries. The EU-China dialogue, for example, allowed both parties to raise bilateral concerns arising from China's WTO compliance efforts – an approach clearly preferred by China.

The ASEM meetings serve an important role in facilitating the regular exchange of ideas as well as the identification of common challenges for the countries in each region. As with the Asian-Pacific Economic Cooperation (APEC), the success of ASEM lies in its broad inclusion of issues – the focus being not only on economic issues, but rather the desire to address a wide variety of social and environmental aspects relating to trade and the broader economy. While the Copenhagen Summit did not conclude with any formal social agenda, the very inclusion of various non-governmental organizations (NGOs) and trade unions perhaps signals a new trend for future ASEM meetings.

The upcoming ASEM meeting schedule includes the following key dates: the Third India-EU Summit is scheduled for October 10, 2002 in Denmark; the Fifth ASEM Trade Ministerial meeting will take place in China in 2003; and the Fifth ASEM Summit will take place in Vietnam in 2004.

US and Chile Keen to Conclude FTA; Conclusion of U.S.-Chile FTA Key to FTAA Success

SUMMARY

Recently Regina Vargo, Assistant United States Trade Representative (AUSTR) for the Western Hemisphere, discussed the prospects for the U.S.-Chile Free Trade Agreement (FTA), and more broadly USTR's plans for more regional FTAs in the context of a meeting of the Chile-American Chamber of Commerce. While Vargo stated that she and her Chilean counterpart have agreed that timing of the FTA negotiations would be driven by substance rather than by artificial deadlines, it is clear that the United States has a keen interest in wrapping up the negotiations soon so that it can move forward on the rest of its agenda. Vargo also discussed prospects for the U.S.-Central America FTA and the Free Trade Area of the Americas.

Heraldo Muñoz, Minister Secretary General of the Government of Chile, addressed a meeting of the Inter-American Dialogue recently. Muñoz led Chile's mission to the World Trade Organization Ministerial Meeting in Doha, Qatar. Muñoz discussed how Chile intends to draw on the success of its recent agreement with the EU in its negotiations with the US. Muñoz was quick to point out that Chile would not accept "just any agreement with the United States for the sake of achieving a template agreement." Muñoz concluded his remarks with reservations and doubts about the future of U.S.-Latin America relations in general. He stated that if the US and Chile can conclude the FTA, then it may be possible to conclude the FTAA. If not, Muñoz believes the future of U.S.-Latin America relations looks "weak."

ANALYSIS

I. AUSTR Vargo Discusses U.S. Trade Priorities for Latin America

Yesterday Regina Vargo, Assistant United States Trade Representative (AUSTR) for the Western Hemisphere, discussed the prospects for the U.S.-Chile Free Trade Agreement (FTA), and more broadly USTR's plans for more regional FTAs in the context of a meeting of the Chile-American Chamber of Commerce.

A. U.S. Trade Priorities in Latin America

Vargo outlined the four priorities of the Administration's policy toward Latin America for the next year:

1. Implementation of the Andean Trade Preferences Act (ATPA);

2. Conclusion of the U.S.-Chile FTA;

3. Launch of FTA negotiations with Central America, with a target conclusion of the end of December 2003; and

4. Reaffirmation of the key dates for the Free Trade Area of the Americas (FTAA) negotiations as well as the beginning of the FTAA market access negotiations.

B. Outlook for Conclusion of U.S.-Chile FTA

With respect to the U.S.-Chile FTA, Vargo explained that there are three additional negotiating rounds scheduled before the end of the year, with the next round occurring at the end of September in Atlanta, Georgia. As has been widely reported, the major outstanding issues are labor and environmental provisions and investment protection provisions. In addition, USTR is awaiting the International Trade Commission's (ITC) report on the effect the FTA could have on the U.S. agricultural sector. While Vargo stated that she and her Chilean counterpart have agreed that timing would be driven by substance rather than by artificial deadlines, it is clear that the United States has a keen interest in wrapping up the negotiations soon so that it can move forward on the rest of its agenda.

C. Possible Effects of EU-Chile FTA on U.S.-Chile FTA

Responding to a question about what effect the European Union-Chile trade agreement would have on the final text of any U.S.-Chile FTA, Vargo indicated that in USTR's view, the EU agreements have tended to be narrower in scope and less ambitious than the U.S. agreements will be. She highlighted the agricultural sector as one in which the US may attempt to achieve more with the Chilean agreement than the Europeans did. While she offered no explanation of this statement, analysts speculate that USTR sees the agricultural sector as Europe's weakness in any bilateral negotiation.

D. Prospects for U.S.-Central America FTA

With respect to the negotiations with Central America, Vargo referenced an August 22, 2002 letter that USTR Robert Zoellick sent to Congressional leadership, outlining the Bush administration's intent to move forward on FTAs with Chile and Singapore and to launch FTA negotiations with Central America and Morocco. She stressed USTR's commitment to begin and finish these negotiations quickly. She was optimistic that this could be achieved given the amount of work already done by the Central American countries in their FTA agreements with Mexico, and broadly with Latin America.

E. Upcoming FTAA Ministerial Meeting

With respect to the FTAA, Vargo stressed the upcoming Ministerial Meeting beginning on November 1 in Quito, Ecuador. She highlighted two main features of this meeting:

- The launch of the market access negotiations, and
- The release of a draft, bracketed text as a framework for the final stage of negotiations.

With respect to the market access negotiations, Vargo laid out the steps for the negotiations, with each country announcing its base tariff rates between August 15 and October 15, followed by specific tariff offers, improvements, and finally work on the revised offers beginning July 15, 2003. Vargo also mentioned an important event that would occur at the end of the Quito Ministerial – the US and Brazil will assume the joint chairmanship of the last stage of the FTAA negotiations. She indicated that this would not be a rotating or sequential chairmanship, but rather a joint chairmanship.

II. Chilean Government Official Says Conclusion of U.S.-Chile FTA Key to FTAA Success

Minister Secretary General of the Government of Chile Heraldo Muñoz addressed a meeting of the Inter-American Dialogue on September 17. Muñoz led Chile's mission to the World Trade Organization Ministerial Meeting in Doha, Qatar.

A. Lessons Learned from Success of EU-Chile FTA

Muñoz stated that EU-Chile FTA is opening major growth opportunities for Chile. In terms of the U.S.-Chile FTA, Muñoz is hopeful that negotiations will be completed by the end of the year, stating that it would be a major accomplishment for Chile to complete two major trade agreements within the same year.

According to Muñoz, the U.S.-Chile FTA is well received by the majority of Chileans because they believe it will bring greater opportunities for growth. Nonetheless, some sectors have organized against the FTA for ideological reasons, but Muñoz emphasized that this is not the prevailing view because the impact of the EU-Chile FTA has been "phenomenal." Muñoz explained that as a result of the EU agreement, Chileans are trying to target new export opportunities, thus producing a national debate on the topic, which the Chilean government views as positive. Muñoz speculates that the U.S.-Chile FTA will provoke an even greater level of dynamism in the country.

In response to a question regarding how Chile intends to draw on its success with the EU agreement in its negotiations with the US, Muñoz stated that strong political will and high-level involvement are key to the ultimate success of negotiations, especially regarding the most sensitive issues, like fisheries, wine, and services in the EU negotiations. Muñoz was quick to point out, however, that Chile would not accept "just any agreement with the United States for the sake of achieving a template agreement." In the end, the agreement must be beneficial for Chile.

Muñoz stated that Chile had also presented the Canada-Chile FTA as a model of success in the course of negotiations with the United States. He noted that trade and investment have increased tremendously as a result of the agreement and that the side agreements on labor and environment are also quite good.

B. Chile's Trade Priorities

In response to a question regarding Asia's role in the future of Chile, Muñoz stated that Asia, and Japan in particular, continue to be important trading partners for Chile. Nonetheless Muñoz noted that Chile's priorities lie in completing negotiations with the US and with the European Free Trade Association (EFTA). When those agreements are complete, Chile will begin to consider agreements with New Zealand, Singapore, China, and India. In addition, Chile will work on the negotiations already underway with Korea *(Please see W&C September 2002 Report).* Muñoz concluded that the saliency of Asia in Latin America, and Chile in particular, would only increase in the future.

C. Future of U.S.-Latin America Relations

Muñoz concluded his remarks with reservations and doubts about the future of U.S.-Latin America relations in general. He conceded that the final approval of Trade Promotion Authority is the "best signal we have that the trade agenda is still on" despite the events of September 11, 2001, and the U.S.-led war on terrorism. He went on to say that if the US and Chile can conclude the FTA, then it may be possible to conclude the FTAA. If not, Muñoz believes the future of U.S.-Latin America relations looks "weak." Muñoz stated that he is skeptical about the future of U.S.-Latin America relations because "we're not a priority. We've never been a priority."

OUTLOOK

House Ways and Means Committee Chairman Bill Thomas (R-California) and Senate Finance Committee Chairman Max Baucus (D-Montana) released lists of the House members and Senators who will comprise the Congressional Oversight Group ("COG") on September 13 and 16, respectively. The Trade Act of 2002, which contains Trade Promotion (TPA) and was signed into law on August 6, established the COG. The COG is meant to serve as the primary consultative mechanism between Congress and the Administration in trade negotiations. The Congressional Oversight Group is scheduled to hold its first closed-door meeting today. USTR Robert Zoellick is expected to attend and brief the COG on future U.S. trade negotiations and provide an update on ongoing FTA negotiations with Chile and Singapore.

Because the Administration cannot complete the Chile and Singapore negotiations without meeting its consultation obligations to the COG, analysts view the formation of the COG as a definitive step toward completion of these pending free trade agreements. Congress likely will "test" the Administration's commitment to Congressional consultations based on the success of the COG consultations with the USTR during the final stages of the Chile and Singapore negotiations. The extent to which USTR includes the COG in negotiations and the extent to which the COG, and Congress as a whole, are satisfied with their involvement will almost certainly dictate the level of support the Administration receives in its future trade initiatives, including the Doha Round and the FTAA negotiations.

Zoellick Officially Notifies Congress of Administration's Intent to Pursue FTAs with Morocco and Central America and to Press Forward with Current FTA Negotiations

SUMMARY

During his first major policy speech since the Trade Act of 2002 was signed into law, United States Trade Representative (USTR) Robert Zoellick announced on October 1 that the Administration had sent letters to Congress regarding the Administration's intention to initiate negotiations for free trade agreements (FTAs) with Morocco and Central America. Zoellick also announced that the Administration had sent letters to Congress regarding the ongoing FTA negotiations with Singapore and Chile, which the US hopes to complete this year. On October 2, Zoellick formally notified Congress of the United States' specific objectives and goals for the ongoing negotiations toward a Free Trade Area of the Americas (FTAA). The Trade Act of 2002, which contains Trade Promotion Authority, requires the Administration (i) to give Congress 90-day notice that it intends to launch new free trade negotiations and (ii) to inform Congress of ongoing negotiations.

In related news on October 2, USTR announced that the United States and Tunisia had signed a new Trade and Investment Framework Agreement (TIFA), which provides a forum for the two countries to examine opportunities for expanding bilateral trade and investment. On the same day, Zoellick met with Egyptian Foreign Trade Minister Youssef Boutros Ghali under the U.S.-Egypt TIFA Council and discussed a possible FTA.

ANALYSIS

I. Zoellick Formally Notifies Congress about FTAs with Morocco and Central America

In his first major policy speech since the Trade Act of 2002 was signed into law in August, United States Trade Representative (USTR) Robert Zoellick addressed the National Press Club on October 1, 2002, regarding the intersection of globalization, trade, and economic security. Zoellick announced that the Administration had sent letters the very same day to Congress, giving the required 90-day notice of the Administration's intention to initiate negotiations for free trade agreements (FTAs) with Morocco and Central America.[28] The Trade Act of 2002, which contains Trade Promotion Authority (TPA), requires the Administration to give Congress 90-day notice that it intends to launch trade negotiations *(Please see W&C September 11, 2002 Report).* Zoellick also announced that the Administration had sent letters to Congress, as required by TPA, regarding the ongoing FTA negotiations with Singapore and Chile.

[28] The United States intends to negotiate an FTA with the five member countries of the Central American Economic Integration System (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua.

The letters[29] spell out the United States' specific negotiating objectives for the new trade agreements. The letters regarding Singapore and Chile contain the Administration's goals and objectives for completing the final stages of the ongoing FTA negotiations by the end of this year. Each of the letters includes a pledge to make no changes to U.S. trade remedy laws. In his speech, Zoellick further emphasized that, in its negotiations, the United States will insist on maintaining the strength and integrity of its trade remedy laws, while seeking to protect U.S. exporters from the unfair use of similar laws by other countries. Analysts note that the Administration is taking care to maintain Congressional support for its trade initiatives, especially since many Members felt betrayed by the Administration when the US agreed to put trade remedy laws on the table in the new Doha Round of World Trade Organization (WTO) negotiations *(Please see W&C December 12, 2001 Report).*

In his speech, Zoellick stressed that the U.S. Congress plays a key role in guiding trade negotiations, especially in light of the establishment of the Congressional Oversight Group, whose formation was mandated by the Trade Act of 2002 *(Please see W&C September 18, 2002 Report).* Zoellick stated that USTR has consulted with Congress over 300 times this year regarding trade matters. In terms of the U.S.-Chile FTA, Zoellick stated that Chile and the US are approaching their "final phase of work," noting that USTR has held thirty-two meetings with Congress this year about the FTA, twelve of which occurred in September 2002.

II. Zoellick Links Trade and National Security

The major theme of Zoellick's speech was the intersection of trade and national security. He discussed the common Bush administration theme that TPA will allow the United States to achieve economic growth and national security at home and political stability abroad. Zoellick's speech was peppered with references to the fight against terrorism and tyranny in the Persian Gulf, which analysts note is not surprising, given the current Bush administration push for preemptive military strikes against Iraq.

In this vein, Zoellick explained that part of the Administration's trade strategy is to build economic alliances with countries that are critical to global security and to support democracies promoting tolerance (*i.e.* the Administration's pursuit of an FTA with Morocco and the incorporation of the Indonesian islands of Batam and Bintam into the benefits of the U.S.-Singapore FTA). Zoellick also mentioned that he would be meeting with Australian Trade Minister Mark Vaile because the US is "eager" to negotiate an FTA with Australia for both economic and security reasons.

III. Zoellick Outlines Administration's Ten-Point Agenda for Trade

Zoellick concluded his speech by highlighting the Bush administration's trade successes to date, including the recent accession of China and Taiwan to the WTO, the launch of the Doha Round, the signing of the U.S.-Vietnam Bilateral Trade Agreement, the completion of the U.S.-Jordan FTA, the negotiations toward a Free Trade Area of the Americas (FTAA), and most

[29] The full text of Zoellick's letters to Congress are available at www.ustr.gov.

recently, the approval of Trade Promotion Authority in the Trade Act of 2002. He then outlined the Administration's "Ten-Point Agenda for Trade":

1. Open new markets and commercial opportunities by completing trade agreements with Singapore and Chile;

2. Promote security and new business networks by pursuing free trade agreements with important partners, such as Morocco and possibly Australia;

3. Encourage development and democracy through economic-business partnerships by pursuing free trade agreements with the Southern African Customs Union, the Central American countries, etc.;

4. Bolster hemispheric prosperity and economic security by creating a Free Trade Area of the Americas by 2005. At the same time, the US will grant statutory trade preferences and negotiate agreements with sub-regions and individual countries, to move step-by-step toward free trade throughout the hemisphere;

5. Open world markets for U.S. farmers and ranchers by advancing new, fairer rules that lower agricultural market barriers, eliminate export subsidies, and drastically reduce subsidies that distort production and prices;

6. Build better jobs for American workers, including a push for the reduction or elimination of trade barriers on manufactured goods, of which the United States is the world's leading producer;

7. Revolutionize a freer global trade in services, opening minds to the great possibilities of this newer area of negotiations and creating opportunities for the 80 percent of Americans holding service jobs;

8. Stimulate American and global innovation and creativity by upgrading intellectual property rules to match technological innovation, insisting on enforcement, and assisting developing countries with special needs;

9. Aggressively enforce U.S., global, and special trade rules so as to keep the United States' commitment to America's workers and businesses for fair treatment;

10. Reform and expand the membership of the WTO by increasing transparency and outside involvement; building capacity for full participation by developing countries; and by adding new nations—especially Russia.

IV. Zoellick Formally Notifies Congress about Ongoing FTAA Negotiations

In related news on October 2, Zoellick formally notified Congress of the United States' specific objectives and goals for the ongoing negotiations toward a Free Trade Area of the Americas (FTAA). Like the notifications regarding FTA negotiations with Singapore and Chile, the Administration is required under TPA to formally notify Congress of the FTAA negotiations.

OUTLOOK

Since President Bush signed the Trade Act of 2002 into law, the Administration has been pursuing ongoing negotiations as well as exploring free trade arrangements with a number of other countries *(Please see W&C September 11, 2002 Report)*. On October 2, USTR announced that the United States and Tunisia had signed a new Trade and Investment Framework Agreement (TIFA), which provides a forum for the two countries to examine opportunities for expanding bilateral trade and investment. On the same day, Zoellick met with Egyptian Foreign Trade Minister Youssef Boutros Ghali under the U.S.-Egypt TIFA Council. The two officials discussed ways to increase bilateral trade ties, including the possibility of a U.S.-Egypt FTA. They agreed to form working groups to facilitate rapid progress on priority trade and investment issues, including customs administration, government procurement, and sanitary and phytosanitary issues. The two sides agreed to try to meet again in spring 2003.

In press releases, USTR Zoellick noted that Tunisia has been supportive in the U.S.-led war against terrorism and that Egypt has been an important partner in promoting peace and stability in the Middle East. Analysts note that the Administration tends to "reward" countries that cooperate with the war on terrorism and that promote peace efforts in the Middle East by increasing trade and economic ties with the United States.