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Japan External Trade Organization

WTO AND REGIONAL TRADE AGREEMENTS MONTHLY REPORT

December 2003

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

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Special Report: With WTO and FTAA Negotiations Stalled, Bush Administration Intensifies Pursuit of Bilateral FTAs

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- Announced its intention to launch negotiations toward FTAs with Thailand, the Andean countries (Colombia, Peru, Ecuador and Bolivia), and Panama;
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- Concluded negotiations with four Central American countries El Salvador, Guatemala, Honduras and Nicaragua on December 17, 2003. Negotiations with Costa Rica will continue in 2004.

In this report, we present the steps that the Administration has to take under TPA and status of the negotiations that the Administration is conducting or has announced.

United States Free Trade Agreements

US Announces New FTAs with Andean Countries and Panama

On November 18, 2003, the US Administration announced its intention to pursue new free trade agreements (FTAs) with Andean countries Colombia, Peru, Bolivia and Ecuador, and to launch negotiations with Panama.

The Administration will likely launch negotiations with Colombia and Peru in the second quarter of 2004, while Ecuador and Bolivia will follow “as soon as they are ready”.

The negotiations with Panama will begin in April 2004.

USTR Negotiator Stresses Importance of Reaching December Deadline to Send CAFTA to Congress Next Summer; CAFTA Faces Uphill Congressional Battle

Assistant United States Trade Representative (USTR) and Lead CAFTA negotiator Regina Vargo, Representative Brady (R-Texas), and representatives of the business and labor sectors discussed the progress and challenges of the US-Central America FTA (CAFTA) at a December meeting hosted by the US Chamber of Commerce. The final round of CAFTA negotiations concluded on December 16, 2003.

Vargo emphasized the need to conclude CAFTA negotiations by December 16, so that Congress could consider it next summer.

Brady predicted that CAFTA would be a difficult vote, as there is a growing resistance to free trade in Congress. The CAFTA labor provisions are very contentious. House Democrats and the AFL-CIO have announced that they would oppose CAFTA it fails to address their concerns regarding the protection of worker's rights.

Representative Levin Thinks Congressional Passage of CAFTA is "Unlikely"; Doubts That Congress Will Pass Pending China Bills

On November 17, 2003, Representative Sander Levin (D-Michigan) stated at an event by the Woodrow Wilson Center for International Trade that he thought it unlikely that Congress would pass a US-Central America Free Trade Agreement (CAFTA). Levin complained that discussions of trade issues were currently more difficult because of a number of trends such as, for example, an erosion of bipartisanship and an increased polarization between free traders and protectionists.

Commenting on US trade relationships with China, Levin opined that pending legislation (HR 3058 and S 1586) requiring increased tariffs or other barriers against China if China does not float its currency or revalue it relative to the dollar would serve as a good tool to exert pressure. He did not believe, however, that Congress would approve these bills.

USTR Official Optimistic About Concluding a "Good" FTA with Australia; Potential FTA Partners Discuss

On November 18, 2003, the Global Business Dialogue (GBD) sponsored a discussion on the U.S. policy of competitive liberalization. The discussion focused on the Free Trade Agreements (FTAs) that the U.S. is currently negotiating or will negotiate in the future. Participants included, among others, Assistant United States Trade Representative (USTR) Ralph Ives.

Commenting on the FTA negotiations with Australia, Ives was confident that the parties would conclude a "good" agreement. Ives admitted, however, that market access for agricultural goods, state-trading enterprises (STEs), pharmaceutical subsidies, and Australia's local content television rules remain challenging issues.

Ives announced that negotiations for an FTA with Thailand would start "sometime next year". Among other things, customs and IPR will be challenging issues for this FTA.

Commerce Under Secretary Aldonas Considers FTAs Good Way to Move Forward, but Stresses that WTO Remains at Core of U.S. Trade Policy

Speaking at an event hosted by the Global Business Dialogue (GBD) on December 2, 2003, Under Secretary for International Trade Administration Grant Aldonas stated that the WTO negotiations remain at the core of the U.S. trade policy. However, he considered the negotiation of Free Trade Agreements (FTAs) a good way to move forward with trade liberalization, especially to encourage movement in FTAA and WTO negotiations.

Congressional aides Everett Eissenstat and Tim Reif, who also spoke at the event, supported the view that pursuing FTAs is a useful strategy. Reif, however, was more skeptical and thought that the Administration's trade policy has its flaws.

Customs

CBP Annual Trade Symposium Focuses on Organization and Implementation of CBP Programs; DHS Announces Final Advance Manifest Rules

On November 20-21, 2003, the Bureau of Customs and Border Protection (CBP), Department of Homeland Security (DHS), held its Annual Trade Symposium. Senior managers from the Department of Homeland Security, CBP and other government agencies, along with representatives of the international trade and transportation community discussed, among other things, trade security, unification of inspection functions at the border, and the role of CBP in DHS.

DHS Secretary Tom Ridge announced the transmission to Congress of the final draft of the advance manifest rules required under the Trade Act of 2002. The rules require advanced information on all cargo entering and exiting the U.S. by any mode of transportation. The rules were published in the Federal Register on December 5, 2003 (68 FR 68139), and will become effective January 5, 2004.

This report summarizes information presented on the new rules and various other topics discussed at the symposium.

TSA Issues New Air Cargo Screening Directive; Announces Availability of Maritime Self-Assessment Risk Module

On November 17, 2003 the Transportation Security Administration (TSA) issued a new directive on the air cargo security. The directive requires domestic and foreign air carriers transporting cargo into and out of the US to implement enhanced security measures, including random inspections of cargo. In the directive the TSA pledges to devote additional resources to identify and improve technology that would facilitate greater screening of air cargo.

In a related event, TSA announced on December 5, 2003 the availability of the TSA Maritime Self-Assessment Risk Module (TMSARM). TMSARM is a vulnerability assessment tool developed to support a series of final rules that the U.S. Coast Guard (USCG) promulgated pursuant to the Maritime Transportation Security Act (MTSA) of 2002.

COAC Members Concerned About CBP Regional Structure and Bioterrorism Regulations

On November 18, 2003, the Treasury Advisory Committee on Commercial Operations (COAC) of the Bureau of Customs and Border Protection (CBP) held a meeting to discuss, among other things, the status of reorganization with the Bureau of the Customs and Border Protection agency (CBP) and the status of programs of interest to the trade community. The most controversial agenda items were the possible adoption of a regional structure for CBP

Field Operations and CBP's implementation of bioterrorism regulations promulgated by the FDA on October 10, 2003.

Department of Homeland Security (DHS) Undersecretary Asa Hutchinson and CBP Commissioner Robert Bonner expressed their commitment to continue consulting with COAC on current programs, and any potential changes to CDP and DHS that may affect the trade community.

FTAA Miami Ministerial

US and Brazilian Officials Discuss Results of, and Challenges Ahead for FTAA Negotiations After Miami Ministerial

At a colloquium at George Washington University, participants discussed the results of, and challenges ahead of FTAA negotiations after the Eight Ministerial Meeting held in Miami on November 20-21, 2003. Participants included Brazil's Ambassador to the US, Rubens Barbosa, Director General of the Caribbean Regional Negotiating Machinery, Richard Bernal and USTR Senior FTAA Negotiator, Ross Wilson.

Later the same day, Ambassador Barbosa and USTR's Ross Wilson presented their perspectives on the FTAA at an event hosted by the American Bar Association. Barbosa and Wilson disagreed on the interpretation of certain provisions of the Miami declaration, including the linkage between benefits and the level of commitments that countries would undertake.

ABF Makes Recommendations in All FTAA Areas

During November 17-19, 2003 the Americas' Business Forum (ABF) met in parallel with meetings of negotiators during the FTAA Ministerial Meeting in Miami. At the ABF, private sector representatives, academics and others from throughout the Western Hemisphere met to prepare their recommendations on the FTAA negotiations. For each FTAA topic, a specialized workshop was held. The ABF also convened a meeting with trade ministers from the region to present their recommendations.

We describe below the issues on where there was agreement (consensus) and disagreement (non-agreed issues) in the key workshops.

WTO/Multilateral

WTO Appellate Body Rules Against U.S. Safeguard; US Lifts Safeguard Measures

The WTO Appellate Body on November 10, 2003, affirmed that the U.S. safeguard measure on steel is WTO-inconsistent. The Appellate Body ruled that the measure breached a number of obligations of the United States under the *Agreement on Safeguards*, including the requirement to provide a "reasoned and adequate explanation" for its determinations regarding factors such as "unforeseen developments" and "increased imports." The Appellate Body also found that the safeguard measure breached the principle of

"parallelism," because the U.S. included all imports for the purpose of its injury analysis, but then exempted the free trade partners of the United States from the application of the measure.

The Bush Administration based on a number of factors, including its internal evaluation of the domestic industry's efforts to restructure in the past twenty months, lifted the safeguard on December 4, 2003. Although the Administration did not refer directly to the WTO ruling and threat of retaliation as a reason for lifting the safeguard, these factors no doubt influenced the decision.

Prospects for the WTO General Council Meeting of December 15: Acknowledgment of Progress, But No Major Breakthrough

The General Council of the WTO met on December 15, 2003 in Geneva, as required by the decision of WTO trade ministers at the conclusion of their conference in Cancun on September 14. It was then hoped that the agreement that could not be reached in Cancun would be achieved in intensive consultations at Ambassadorial level in Geneva and finalized by senior officials on December 15, thus relaunching the Doha Round after the Cancun setback.

Consultations since Cancun have yielded limited progress on the four priority areas of agriculture, non-agricultural market access ("NAMA"), the four "Singapore issues" and the cotton initiative. It became increasingly clear, however, that there would be no breakthrough on December 15. It was also expected that few, if any, senior officials from capitals would come to Geneva for the December meeting. Thus, consultations on how to relaunch the negotiations will continue into next year. Members will face greater challenges next year, including changes in the chairmanships of WTO bodies, and elections in the United States and the EU.

"WTO December General Council Meeting Ends Post-Cancun Process; Negotiating Groups to Resume Work in 2004"

The General Council of the World Trade Organization met on December 15-16, 2003, as instructed by Ministers at Cancun, but did not succeed in reaching agreement on the four priority issues which led to the Cancun breakdown, despite intensive consultations with that objective over the previous two months. It had been apparent for several weeks that there would be no breakthrough at the meeting (originally planned as a Senior Officials meeting) and therefore no "relaunching" of the Round in December. As a result, there was no sense of crisis among Members, many of whom had downplayed expectations of what could be achieved at this meeting. Moreover, few senior officials from capitals attended the meeting.

The "failure to relaunch" the Round can easily be misunderstood. There is no need to take any action to relaunch the Round. What has happened in the past five months is that the work has been concentrated in the WTO General Council, first to prepare for Cancun and subsequently in the hope of achieving in Geneva the mid-term agreement which escaped Ministers at Cancun; the Cancun process was in effect prolonged until December 15.

The reason for the lack of agreement both in September and December is that Governments are not yet ready to make the compromises and hard decisions which agreement requires – particularly on the issue of agriculture modalities. The Cancun process is now over and the

work will revert to the Doha negotiating groups, which had been suspended shortly after Cancun in order to focus attention on the Council Chairman's consultations among Heads of Delegations in Geneva. It is agreed that the negotiating groups will resume, probably in February, after the appointment of a new slate of Chairpersons. The Trade Negotiations Committee (TNC), the coordinating body which has also been in abeyance, will also be reactivated. No new deadlines or benchmarks were set for the work in 2004. The TNC and the General Council will consider these matters – no doubt including, at some stage, the question of the overall deadline of January 1 2005, which is still officially maintained.

REPORTS IN DETAIL

SPECIAL REPORT ON U.S. FTAS

Special Report: With WTO and FTAA Negotiations Facing Uncertainty, Bush Administration Intensifies Pursuit of Bilateral FTAs

SUMMARY

With the WTO and the FTAA negotiations marked by uncertainty, the Bush Administration is intensifying its efforts to negotiate bilateral Free Trade Agreements (FTAs). Since our last update, the Administration:

- Announced its intention to launch negotiations toward FTAs with Thailand, the Andean countries (Colombia, Peru, Ecuador and Bolivia), and Panama;
- Initiated reports on labor rights in Bahrain and the Dominican Republic, which is one of the steps they have to take under Trade Promotion Authority (TPA);
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ANALYSIS

I. Singapore and Chile FTAs First Agreements to be Completed Under TPA

On September 3, 2003, President George W. Bush signed the implementing legislation for the bilateral Free Trade Agreements (FTAs) with Chile and Singapore. The signing was the last step before the implementation of the FTAs, which will take effect starting January 1, 2004.

The U.S. agreed to negotiate the Chile and Singapore FTAs in November 2000, and the United States Trade Representative (USTR) launched negotiations in December 2000. At that time, the U.S. had concluded FTAs with Israel (April 22, 1985), Canada and Mexico (NAFTA) (December 17, 1992), and Jordan (October 24, 2000).

The Chile and Singapore FTAs were the first agreements to be completed under the renewed Trade Promotion Authority (TPA), which was passed with the Trade Act of 2002 on August 6, 2002.

According to TPA, the USTR must:

- Notify Congress of its intention to negotiate at least 90 days before initiating FTA negotiations. In the case of Chile and Singapore, USTR was required to notify Congress of the ongoing negotiations as soon as possible after the enactment of the Trade Act.

- Conduct environmental reviews of future FTAs.

- Conduct reviews of the impact of future FTAs on U.S. employment.

- Submit a report regarding labor rights of the countries with which the US is negotiating FTAs and describe the extent to which these countries have in effect laws governing exploitative child labor.

- Request that the International Trade Commission (ITC) prepare a report assessing the likely impact of the FTA on the U.S. economy as a whole and on specific industry sectors. The request should be made at least 90 days before entering into the FTA. The ITC must submit this report to the USTR and to Congress no later than 90 days after entering into the FTA.

- Notify Congress at least 90 days before entering into an FTA of its intention to enter into the FTA and promptly thereafter publish notice of such intention in the Federal Register.

- Submit to Congress, within 60 days after entering into the agreement, a description of the changes to existing laws that would be required in order for the US to be in compliance with the agreement.

- Submit to Congress, after entering into an agreement, (i) a copy of the final text, (ii) a draft of an implementing bill, (iii) a statement of any administrative action proposed to implement the agreement and (iv) the supporting information. Then Congress votes up-or-down on the implementing bill. If Congress approves the implementing bill, it is enacted into law.

Congress will have a maximum of 90 legislative days from formal introduction to consider the implementing bill.

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

II. U.S. Conducts Negotiations with Morocco, Central America, SACU, and Australia; Notifies Congress of Negotiations with Bahrain, Dominican Republic

Since the renewal of TPA, the Administration also launched FTA negotiations with Morocco, Central America, the Southern African Customs Union (SACU), Australia, Bahrain and the Dominican Republic.

We highlight below the status of these FTA negotiations.

TPA Provision:	90-Day Notification period of intention to initiate FTA negotiations	Environmental review	Employment Impact Review	Labor Rights Reports	ITC Reports on Economic Effects
Countries:					
Morocco	-USTR notified Congress on October 1, 2002 (67 FR 63187)	-Initiated on November 22, 2002 (67 FR 70476)	-Initiated on February 7, 2003 (68 FR 6529)	-Initiated on April 21, 2003 (68 FR 19579)	-Initiated on September 13, 2002 (67 FR 59312)
Central America	-USTR notified Congress on October 1, 2002 (67 FR 63954)	-Initiated on November 22, 2002 (67 FR 70475)	- Initiated on March 19, 2003 (68 FR 13358)	-Initiated on April 21, 2003 (68 FR 19580)	-Initiated on September 16, 2002 (67 FR 59312)
SACU	-USTR notified Congress on November 4, 2002 (67 FR 69295)	-Initiated on March 13, 2003 (68 FR 12150)	-Initiated on May 7, 2003 (68 FR 24532)	--	-Initiated on November 20, 2002 (67 FR 70757)
Australia	-USTR notified Congress on November 13, 2002 (67 FR 76431)	-Initiated on March 13, 2003 (68 FR 12149)	-Initiated on May 8, 2003 (68 FR 24785)	-Initiated on July 18, 2003 (68 FR 42783)	-Initiated on December 20, 2002 (67 FR 79149)
Bahrain	-USTR notified Congress on August 4, 2003 (68 FR 51062)	-Initiated on September 30, 2003 (68 FR 56373)	-Initiated on September 4, 2003 (68 FR 52622)	-Initiated on November 3, 2003 (68 FR 62328)	-Initiated on August 26, 2003 (68 FR 51301)
Dominican Republic	-USTR notified Congress on August 4, 2003 (68 FR 51823)	--	-Initiated on September 4, 2003 (68 FR 52623)	-Initiated on November 3, 2003 (68 FR 62330)	-Initiated on August 22, 2003 (68 FR 50808)

Countries	Status and Next steps	Negotiating structure	Expected challenges
Morocco	-A seventh round of negotiations took place from December 5-8, 2003, in Washington. -USTR presented texts on agriculture, services, and market access for industrial and agricultural goods, services, and customs, among others. -The original goal was to reach agreement by the end of 2003, but trade officials indicated that negotiations will continue in January 2004. No specific date has been set.	-Negotiations involve 11 negotiating groups: (i) textiles, (ii) market access, (iii) labor, (iv) environment, (v) IPR, (vi) government procurement, (vii) services, (viii) investment, (ix) e-commerce, (x) customs, and (xi) agriculture. -Negotiations progress on all fronts simultaneously. -The objective is to implement the FTA over 10 years, with "some areas of exception", such as agriculture, where a larger transition period is foreseen.	-Market access for agricultural goods; services; investment; IPR. -Market access for agricultural goods is the most difficult issue. - Some last-minute difficulties with Morcoco's request for exceptions in services sectors.
Central America	-A ninth negotiating round took place from December 8-16, 2003, in Washington. -USTR concluded the agreement with El Salvador, Guatemala, Honduras and Nicaragua on December 17, 2003. Negotiations with Costa Rica will continue in January 2004. -USTR will release the draft text of the agreement in January 2004. USTR will formally notify Congress of its intention to sign the agreement in early 2004. -USTR hopes to submit the full agreement, with the U.S.-Dominican Republic FTA included, to Congress by early July 2004. Sources indicate, however, that this may prove difficult. -The full agreement should enter into force on January 1, 2005.	-Negotiations involve 5 negotiating groups: (i) market access, (ii) investment and services, (iii) government procurement and IPR, (iv) labor and environment, (v) institutional issues such as dispute settlement -Central America is negotiating as a bloc. -The FTA builds on the FTA with Chile.	- Market access for agricultural goods, for textiles and apparel, and for some services such as telecommunications or financial services; IPR. -Market access for agricultural goods (e.g. sugar) is the most difficult issue. -Labor and environmental standards will likely be the most difficult issue in the U.S. Congress. However, agriculture and textiles and apparel might also prove challenging. - Ratifying the agreement could also prove difficult in the legislatures of Costa Rica and El Salvador. Opposition groups have threatened to block passage of the agreement in both countries. El Salvador, like the US, faces a presidential election in 2004, and the CAFTA is already considered a contentious issue.

Countries	Status and Next steps	Negotiating structure	Expected challenges
SACU	-A third negotiating round, which was scheduled for October, has been postponed until February 2004. -So far, negotiations have focused on agricultural and industrial trade, standards, customs, rules of origin, trade remedies, investment and services. -The goal is to reach agreement by the end of 2004. Trade officials indicated however that they will likely miss this deadline.	-A large plenary group leads the negotiations. Seven working groups discuss specific issues, including (i) market access for agricultural and non-agricultural products, (ii) technical barriers to trade (TBT), (iii) customs, (iv) labor rights, (v) environmental standards, (vi) SPS measures, (vii) investment, (viii) IPR, (ix) services, (x) e-commerce, (xi) and dispute settlement. -A first phase of the negotiations, in 2003, would deal with non-controversial issues, such as market access, rules of origin, and SPS measures. A second phase, in 2004, will deal with controversial issues, such as investment, services, government procurement, and IPR. -SACU is negotiating as a bloc.	- Special and differential treatment; IPR; government procurement; investment, services.
Australia	-A fifth negotiating round involving Australia's trade minister and USTR Zoellick took place from December 1-5, 2003, in Washington. - No chapters of the agreement have been finished. -The original goal was to reach agreement by the end of 2003, but trade officials from both sides indicated that a sixth negotiating round would take place in mid-January 2004. Both sides are confident that the FTA can be concluded by that time. -The overall goal is to submit the agreement to submit it to Congress before the U.S. elections in November 2004.	-Negotiations involve 17 negotiation groups, including: (i) agriculture, (ii) textiles, (iii) telecommunications, (iv) environment and labor, (v) industrial goods, (vi) investment, (vii) IPR, (viii) e-commerce. -The FTA will build on the model of the FTA with Singapore.	-Market access for agricultural goods, especially for beef, dairy, and sugar; state trading enterprises (STEs); Australia's local content television rules ("cultural content" requirements for so-called new media); Australia's Pharmaceutical Benefits Scheme (PBS). -Market access for agricultural goods will be the most difficult issue.

Countries	Status and Next steps	Negotiating structure	Expected challenges
Bahrain	-Negotiations will start in January 2004. -Negotiations are set to conclude by the end of 2004.	-- The FTA will build on the model of the FTA with Morocco or Jordan.	-U.S. and Bahrain government officials indicate that there are no real controversial issues, and that talks will proceed smoothly. -U.S. industry sources however indicated that IPR protection and a weak copyright law in Bahrain might prove to be a difficult issue.
Dominican Republic	-Informal discussions have already begun. A first formal round will be held from January 12-15, 2004. -A second round will be held from February 12-15, 2004. -A third round will be held from March 8-12, 2004. USTR hopes to reach agreement by that time. -USTR hopes to integrate the FTA into CAFTA by the end of May and submit the full agreement to Congress by early July 2004.	-The FTA will build on the FTA with Chile. -The negotiations will focus on market access issues.	-Labor and environmental standards; IPR.

III. U.S. Announces Intention to Launch Negotiations with Thailand, the Andean Countries, and Panama

Most recently, the Administration announced its intention to initiate negotiations with Thailand, the Andean countries (Colombia, Peru, Ecuador and Bolivia) and Panama.

Thailand

President Bush announced on October 19, 2003 that the U.S. and Thailand intend to launch FTA negotiations. The Administration intends to submit official notification to Congress by early 2004 and begin negotiations by March or April 2004. Both sides hope to conclude the negotiations in 2005. Sources indicate that agriculture, IPR, services, investment, customs and market access for industrial goods - especially automobiles- are likely to be challenging issues.

The decision to launch FTA negotiations with Thailand was reached despite resistance from some Members of Congress, including Senate Finance Committee Chairman Charles Grassley (R-Iowa). Grassley opposed launching an FTA at this time because of Thailand's role in the G-22 group of developing countries, which he blamed for contributing to the failure of the WTO ministerial in Cancun. Other Members however, such as Senate Finance Committee Ranking Member Max Baucus (D-Montana), supported the decision.

The Andean Countries (Colombia, Peru, Ecuador and Bolivia)

On November 18, 2003, the Administration announced its intention to pursue FTAs with Andean countries Colombia, Peru, Bolivia and Ecuador. U.S. negotiations with Colombia and Peru will likely begin in the second quarter of 2004; Ecuador and Bolivia will follow “as soon as they are ready” -- and will eventually be merged into a US-Andean FTA.

Challenging issues for this FTA could be, among others, IPR and investment.

Panama

On November 18, 2003, the Administration also announced its intention to launch negotiations with Panama. The negotiations would begin in April 2004 in Panama, and would mainly use the U.S.-Chile FTA as a model. However, the US-Singapore FTA would serve as a model for the service chapter. Challenging issues could be market access for agricultural products, especially rice, sugar, and corn.

Sources indicate that the Administration hopes to conclude the agreement by the end of 2004.

IV. U.S. Considers Other FTAs

Numerous countries have proposed FTAs with the U.S., especially after the collapse of the Cancun WTO talks. Below we highlight some of the countries and the prospects of a bilateral/regional FTA with the U.S.

Middle East

On May 9, 2003, President Bush announced a plan to establish a U.S.-Middle East Free Trade Area (MEFTA) by 2013 (*Please see W&C May 2003 report*). The initiative requires that prospective partners must first secure membership to the WTO before negotiating bilateral arrangements leasing to participation in the FTA. It is therefore that USTR has indicated its willingness to complete at the earliest possible bilateral negotiations with Saudi Arabia aimed at the latter's accession to the WTO[1].

On June 23, 2003, USTR Robert B. Zoellick held a speech at the World Economic Forum (WEF) in Jordan in which he outlined the following steps that the U.S. would follow to realize MEFTA:

- Support active membership in the WTO;
- Expand the Generalized System of Preferences (GSP);
- Offer to negotiate Trade and Investment Framework Agreements (TIFAs);
- Offer to negotiate Bilateral Investment Treaties (BITs);
- Negotiate comprehensive FTAs;
- Provide technical and financial assistance.

At the same event, Zoellick commented on the possibility of a U.S.-Egypt FTA, stating that Egypt still "has some work to do", especially in the area of customs, before an FTA could be possible. Zoellick earlier characterized Egypt as a "strong candidate" for an FTA. Sources indicate that the real reason is U.S. disappointment over Egypt's failure to back the U.S. challenge in the WTO against the E.U. moratorium on Genetically Modified Organisms (GMOs).

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

On October 26, 2002, President Bush announced the Enterprise for ASEAN Initiative (EAI), which aims to create a "network of FTAs" with the ASEAN countries, using the FTA with Singapore as a model. As precursors to such FTAs, the U.S. has pledged its support for ASEAN members acceding to the WTO. Other preliminary steps would include negotiating Trade and Investment Framework Agreements (TIFAs) or Bilateral Investment Treaties (BITs) with the U.S.

Members of Congress have named both the Philippines and Malaysia as possible candidates. Sources indicate that the Philippines is interested in an FTA with the U.S., but has not determined whether to pursue an FTA with the U.S. Analysts speculate that

[1] WTO rules require an acceding member to complete bilateral trade agreements with any WTO Member requesting negotiations.

Philippines President Gloria Arroya broached the subject with President Bush when they met in Washington on May 19, 2003.

Korea

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

New Zealand

On November 18, 2003, David Walker of the Embassy of New Zealand said at an event by the Global Business Dialogue (GBD) that New Zealand remained "keen" on an FTA with the U.S., and indicated that support within the U.S. Congress and business community for an agreement had grown. Walker was optimistic that negotiations with New Zealand could be announced shortly after concluding the negotiations with Australia.

USTR Zoellick, however, has stated repeatedly that the U.S. is not interested at this time, partly because of strong opposition from U.S. farmers and partly because New Zealand did not support the war in Iraq. Analysts suggest that New Zealand's refusal to allow nuclear-powered ships in its waters has also contributed to U.S. reticence. However, Walker claimed at the discussion that the U.S. Administration had guaranteed them that the nuclear issue does not play a role in the economic relationship.

Sri Lanka

Zoellick has named Sri Lanka as a developing country advanced enough to qualify for an FTA with the U.S., indicating that it would be "a footprint" for the U.S. in South Asia, where they currently do not have an FTA. USTR officials visited Sri Lanka in October 2003 to discuss an FTA.

However, sources indicate that the announcement of an FTA does not appear imminent.

Taiwan

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

Taiwan has indicated repeatedly that it would actively seek an FTA with the U.S., while several Congressmen, such as House Majority Leader Tom DeLay (R-Texas) or Senate Finance Committee Ranking Member Max Baucus (D-Montana) have also expressed their interest in an FTA.

However, a U.S.-Taiwan FTA does not seem a current priority for the Administration.

OUTLOOK

With WTO and FTAA negotiations facing uncertainty after the Cancun and Miami ministerial meetings, respectively, the Bush Administration is intensifying its efforts to negotiate bilateral FTAs as a way to move forward with trade liberalization.

It will be difficult, however, to pass some of the FTAs through Congress in 2004. Members of Congress have expressed concerns about labor and IPR violations of some of the proposed FTA partners, such as the Central American countries. Members of Congress and some people in the business community also question the commercial significance of some of the agreements, such as the proposed FTA with Bahrain. In an election year, these issues will likely become politicized and further complicate passage.

The timelines of the FTAs could also affect the future negotiations. USTR is a relatively small agency and the conclusion of one set of negotiations frees USTR resources to negotiate with other countries.

Nevertheless, with regional and multilateral negotiations moving slowly, the U.S. is clearly putting much of its attention on bilateral agreements. Whether or not this strategy of "competitive liberalization" will spur movement at the WTO or FTAA – remains to be seen.

UNITED STATES FREE TRADE AGREEMENTS

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SUMMARY

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The negotiations with Panama would begin in April 2004.

ANALYSIS

I. US Will First Launch Negotiations With Colombia and Peru; Ecuador and Bolivia will Follow Later

On November 18, 2003, the US Administration announced its intention to pursue FTAs with Andean countries Colombia, Peru, Bolivia and Ecuador.

Negotiations with Colombia and Peru will start first, and Ecuador and Peru will follow later. The FTAs will eventually be merged into a US-Andean FTA.

Challenging issues for this FTA could be, among others, IPR and investment.

II. Negotiations With Panama Would Mainly Use US-Chile FTA As a Model

On November 18, 2003, the US Administration also announced its intention to launch negotiations with Panama.

The negotiations would mainly use the US-Chile FTA as a model. However, the US-Singapore FTA would serve as a model for the services chapter. Sources indicate that Panama wants its own FTA with the US instead of being "docked into" the US-Central America FTA (CAFTA).

Challenging issues could be market access for agricultural products, especially rice, sugar, and corn.

OUTLOOK

The Administration will likely launch negotiations with Colombia and Peru in the second quarter of 2004, while Ecuador and Bolivia will follow "as soon as they are ready".

The negotiations with Panama would begin in April 2004. Sources indicate that the Administration hopes to reach agreement by the end of 2004.

USTR Negotiator Stresses Importance of Reaching December Deadline to Send CAFTA to Congress Next Summer; CAFTA Faces Uphill Congressional Battle

SUMMARY

Assistant USTR and Lead CAFTA negotiator Regina Vargo, Representative Brady (R-Texas), and representatives of the business and labor sectors discussed the progress and challenges of the US-Central America FTA (CAFTA) at a December meeting hosted by the US Chamber of Commerce. The final round of CAFTA negotiations concluded on December 16, 2003.

Vargo emphasized the need to conclude CAFTA negotiations by December 16, so that Congress could consider it next summer.

Brady predicted that CAFTA would be a difficult vote, as there is a growing resistance to free trade in Congress. The CAFTA labor provisions are very contentious. House Democrats and the AFL-CIO have announced that they would oppose CAFTA it fails to address their concerns regarding the protection of worker's rights.

ANALYSIS

Participants at a December 8 US Chamber of Commerce event discussed the progress and challenges of the US-Central America FTA (CAFTA), which is in its final round of negotiations this week. Participants included:

- Assistant USTR and Lead CAFTA negotiator, Regina Vargo
- Representative Kevin Brady and
- Business and labor sector representatives.

I. Regina Vargo: CAFTA Negotiations Must Conclude This Year

Vargo said that CAFTA is an important part of President Bush's agenda for Central America. The five CAFTA countries –i.e., Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua- are important markets for US products.

- In 2001, the US exported $9 billion to the five Central American countries.
- During 2003, trade between the US and CAFTA countries is expected to reach $ 25 billion. This figure increases if trade with the Dominican Republic is added.

Vargo noted that negotiators have been meeting "almost non-stop" since the last round of negotiations, but that there is still a lot of work to be done. The last round of negotiations was scheduled to run through December16.

The final round of negotiations addressed sensitive issues, which included market access for certain agricultural products, services, labor and environment.

- ***Agriculture:*** There is agreement that no product will be excluded from CAFTA. Additionally, the US has consented to a 15-year tariff phase-out for the most sensitive products – which include pork, beef, poultry, dairy, sugar, corn and rice.

- ***Services:*** The debate is over the telecommunications sector, as Costa Rica wants to maintain its state ownership and the US will not agree to the exclusion of a significant sector like telecommunications. Vargo stressed that the US is not seeking to force privatization of Costa Rica's telecom sector, but that there must be some opening, as Costa Rica will need more efficient telecom services to compete successfully.

Business representatives also expressed concern over other non-conforming measures requested by Costa Rica in the insurance and tourism industry.

- ***Labor:*** Central America's labor laws, as they are on the books, are "pretty good" and in line with ILO principles, said Vargo. However, there are some problems with CAFTA countries' enforcement, and Vargo said that the US intends to help CAFTA countries in this regard.

- ***Textiles:*** Central America is an important textiles producer. Parties have not decided on the definition of "short supply" or determined the short supply list. Short supply provisions would allow preferential treatment to textiles and apparel products made in the Central American countries using yarn and fabric originating in third countries. In these cases, the inputs (yarn and fabric) are deemed to be in short supply in the domestic industry. Vargo noted that US NAFTA partners, Mexico and Canada, are very interested in the so-called "cumulation" provisions, which would allow CAFTA parties to use inputs from countries that have FTAs with the US and still qualify for preferential treatment under CAFTA.

- ***Investment:*** The investment chapter is similar to the investment chapters of the Chile and the Singapore FTAs. CAFTA would additionally include an appellate dispute settlement body.

Vargo acknowledged that CAFTA could be a very tight congressional vote and the outcome might be determined by a one-vote margin. According to Vargo, reasons for a tight vote include the 2004 presidential election and the fact that CAFTA involves sensitive issues for many members of Congress.

The US will begin negotiations with the Dominican Republic on January 12. The US-Dominican Republic agreement will be folded into CAFTA.

II. Representative Brady: CAFTA Faces Uphill Battle in Congress

Rep. Brady (R-Texas) – a member of the Ways and Means Committee- also predicted that CAFTA would be a difficult vote, the hardest of any FTA since NAFTA. He cited the difficult congressional environment for free trade that exists in Congress, due to a soft economy and growing concerns about Chinese products in the US market.

According to Brady, the support and involvement of the business community, trade groups and employers will be crucial for the approval of CAFTA.

III. Labor Groups Oppose Administration's Approach to CAFTA Labor Chapter

Labor is one of the key obstacles to congressional passage of CAFTA. The main concern is worker rights and the enforcement of labor laws in Central American countries. According to AFL-CIO Chief International Economist in Public Policy, Thea Lee, there are huge enforcement and impunity problems in Central America.

Congressional Democrats warn that Congress would reject CAFTA if the Bush Administration does not produce an agreement that addresses concerns about worker rights in Central America. AFL-CIO also announced that it would fight CAFTA next year.

Assistant USTR for Labor, William Clatanoff, said that the CAFTA labor chapter will follow the same pattern of the Chile and Singapore FTA's, i.e., countries must enforce their own labor laws. A country found not to be enforcing its labor laws will be subject to a monetary penalty by a dispute settlement panel. The fine will go into a special fund for certain labor initiatives, such as improvement or enhancement of labor law enforcement. If a country does not pay the fine, the prevailing party in the dispute has the right to collect the fine by other means –including suspension of trade benefits.

The AFL-CIO considers these provisions inadequate. The AFL-CIO contends that a country could amend its labor laws to decrease the protection of labor rights in the future, and still comply with CAFTA. In addition, the AFL-CIO says the sanctions for the infringement of the labor provisions of CAFTA are weaker than those established for the infringement of trade provisions.

OUTLOOK

Vargo warned that if negotiations did not conclude by the December 16 deadline and negotiations spilled over into next year, Congress would not be as receptive to CAFTA. Congress laid out a specific timetable for dealing with trade agreements in the Trade Promotion Authority, which mandates that the President notify Congress at least 90 days before signing an agreement. CAFTA had to be finished this year so the Administration could send it to Congress by the summer.

The final outcome in Congress will depend on how the sensitive issues are resolved, especially the labor issues. Congressional Democrats and labor groups oppose the model adopted by the Bush Administration for the labor chapter of the FTA, which means that the CAFTA faces an uphill battle in Congress.

Levin Thinks Congressional Passage of CAFTA is "Unlikely"; Doubts That Congress Will Pass Pending China Bills

SUMMARY

On November 17, 2003, Representative Sander Levin (D-Michigan) stated at an event by the Woodrow Wilson Center for International Trade that he thought it unlikely that Congress would pass a US-Central America Free Trade Agreement (CAFTA). Levin complained that discussions of trade issues were currently more difficult because of a number of trends such as, for example, an erosion of bipartisanship and an increased polarization between free traders and protectionists.

Commenting on US trade relationships with China, Levin opined that pending legislation (HR 3058 and S 1586) requiring increased tariffs or other barriers against China if China does not float its currency or revalue it relative to the dollar would serve as a good tool to exert pressure. He did not believe, however, that Congress would approve these bills.

ANALYSIS

I. Levin Thinks Number of Trends Make Discussions of Trade Issues More Difficult

On November 17, 2003, the Woodrow Wilson Center for International Scholars held a discussion with Representative Sander Levin (D-Michigan). The discussion focused on how the Administration interacts with Congress on U.S. trade policy matters and the influence of this interaction on pending and future trade negotiations.

Levin said that the following trends and developments make discussions of trade issues more difficult:

- The balance of power lies with the Administration and no longer with Congress, especially since the renewal of Trade Promotion Authority (TPA). Levin thereby complained about the inefficiency of the Congressional Oversight Group (COG).
- Bipartisanship has seriously eroded;
- Polarization has strongly increased, whereby the discussions take the form of free traders against protectionists;
- The Administration tends to give into the polarization, turning its back on the middle way between free trade and protectionism.

II. Levin Thinks China Bills Are Good Way to Pressure China

Commenting on the U.S. trade relationships with China and Japan, Levin opined that the U.S. has the right to object to currency manipulation by these countries, since the currency policies negatively affect the U.S. manufacturing sector. Levin thought that legislation, such as the pending China Bills (HR 3058 and S 1586), which would require increased tariffs or other barriers against China if China does not float its currency or revalue it relative to the dollar, serve as good tools to exert pressure.

OUTLOOK

Levin said that if these trends in trade continued, future bilateral and multilateral negotiations would "hit a dead end". He added that he thought it unlikely that Congress would pass a Central-America Free Trade Agreement (CAFTA). Levin criticized the Bush Administration for "backtracking" on labor and environmental issues.

Regarding the China legislation, Levin did not believe that Congress would approve the pending bills.

USTR Official Optimistic About Concluding a "Good" FTA with Australia; Potential FTA Partners Discuss

SUMMARY

On November 18, 2003, the Global Business Dialogue (GBD) sponsored a discussion on the U.S. policy of competitive liberalization. The discussion focused on the Free Trade Agreements (FTAs) that the U.S. is currently negotiating or will negotiate in the future. Participants included, among others, Assistant United States Trade Representative (USTR) Ralph Ives.

Commenting on the FTA negotiations with Australia, Ives was confident that the parties would conclude a "good" agreement. Ives admitted, however, that market access for agricultural goods, state-trading enterprises (STEs), pharmaceutical subsidies, and Australia's local content television rules remain challenging issues.

Ives announced that negotiations for an FTA with Thailand would start "sometime next year". Among other things, customs and IPR will be challenging issues for this FTA.

ANALYSIS

I. USTR Ives Says Agriculture, Pharmaceutical Subsidies, Local Content Television, and Investment Remain Challenges for U.S.-Australia FTA; Negotiations with Thailand will Start "Sometime Next year"

Ives downplayed criticism that U.S. trade policy undermines the multilateral negotiations in the WTO and has a "spaghetti bowl effect" of creating a net of trade and investment regulations that lack clarity and uniformity. He said that the U.S. has actively participated in the WTO negotiations, but refuses to wait for the "can't do countries" to move forward. Ives added that other countries, such as Chile, are also aggressively pursuing FTAs.

Ives said that the following remain challenging issues in the U.S.-Australia negotiations:

- ***Agriculture:*** The U.S. sugar, dairy, and beef industry fear that the FTA will flood the U.S. market with Australian imports, while Australia opposes agricultural subsidies by the U.S.

- ***Pharmaceutical subsidies***: The U.S. opposes Australia's Pharmaceutical Benefits Scheme, which grants subsidies to Australian Pharmaceutical companies.

- ***Local Content Television***: The U.S. oppose an Australian cultural broadcasting carve-out which requires that Australian TV stations broadcast a certain amount of locally produced programs.

- ***Investment:*** The US challenges Australia's State Trading Enterprises (STEs).

Regarding the announced FTA negotiations with Thailand, Ives said that under Trade Promotion Authority (TPA), the Administration first must notify Congress of its intention to launch negotiations. The actual negotiations would start "sometime next year". Ives thought that, among others, customs and IPR protection promised to be challenging issues for this FTA.

II. Representatives Discuss Announced and Possible Future FTAs

A number of representatives from the Dominican Republic, Thailand, Bahrain, New Zealand, and Taiwan also attended the discussion. Representatives from the Dominican Republic, Thailand, and Bahrain addressed their countries' announced FTA negotiations with the U.S. The representatives from New Zealand and Taiwan gave a variety of political, geopolitical, strategic and economic reasons why the US should have an FTA with their respective countries.

We highlight their comments below:

Hugo M. Guiliani Cury from the Embassy of the Dominican Republic said that the U.S and the Dominican Republic would hold three formal negotiating rounds between January and March 2004. He indicated that both parties hope to conclude the negotiations by early June 2004, and to send the agreement with the U.S.-Central America FTA (CAFTA) to the U.S. Congress by early July. Guiliani acknowledged, however, that obtaining Congressional passage would be difficult.

Nongnuth Phetcharatana of the Royal Thai Embassy downplayed U.S. fears that an FTA with Thailand would lead to a significant increase in U.S. imports of Japanese cars produced in Thailand. She said that Japanese auto makers also have plants in Mexico, with which the U.S. has an FTA, and added that an FTA would also increase U.S. car exports. Phetcharatana thought that agriculture and IPR would also be challenging issues.

Naser M. Y. Belooshi of the Government of Bahrain said that negotiations of a U.S.-Bahrain FTA would begin in January 2004. There is no date established yet for their conclusion. Belooshi stated that Bahrain exports to the U.S. mostly comprise aluminum products and oil.

David Walker of the Embassy of New Zealand said that New Zealand remained "keen" on an FTA with the U.S., and indicated that support within the U.S. Congress and business community for an agreement had grown. Walker was optimistic that negotiations with New Zealand could be announced shortly after concluding the negotiations with Australia.

James Wu of the Taipei Economic and Cultural Representative said that with the WTO negotiations at a halt, Taiwan would actively seek an FTA with the U.S. Wu acknowledged U.S. concerns about IPR protection in Taiwan, but stressed said that Taiwan is working hard to comply with its WTO requirements.

OUTLOOK

A fifth negotiating round for the US-Australia FTA took place from December 1-5, 2003, in Washington. The original goal was to reach agreement by the end of this round, but US and Australian trade officials indicated that a sixth negotiating round would take place in mid-January 2004. Both sides are confident that the FTA can be concluded by that time.

Despite New Zealand's interest in an FTA, USTR Zoellick has indicated repeatedly that the U.S. is not interested at this time, partly because of strong opposition from U.S. farmers and partly because New Zealand did not support the war in Iraq. Analysts suggest that New Zealand's refusal to allow nuclear-powered ships in its waters has also contributed to U.S. reticence. At the discussion, Walker claimed, however, that the U.S. Administration had guaranteed them that the nuclear issue does not play a role in the economic relationship.

A U.S.-Taiwan FTA also does not seem a current priority for the Administration. When a member questioned Ives at the discussion about a possible FTA, he declined to comment.

Commerce Under Secretary Aldonas Considers FTAs a Good Way to Move Forward, but Stresses that WTO Remains at Core of U.S. Trade Policy

SUMMARY

Speaking at an event hosted by the Global Business Dialogue (GBD) on December 2, 2003, Under Secretary for International Trade Administration Grant Aldonas stated that the WTO negotiations remain at the core of the U.S. trade policy. However, he considered the negotiation of Free Trade Agreements (FTAs) a good way to move forward with trade liberalization, especially to encourage movement in FTAA and WTO negotiations.

Congressional aides Everett Eissenstat and Tim Reif, who also spoke at the event, supported the view that pursuing FTAs is a useful strategy. Reif, however, was more skeptical and thought that the Administration's trade policy has its flaws.

ANALYSIS

On December 2, 2003, the Global Business Dialogue (GBD) held a discussion on Free Trade Agreements (FTAs) and their role in the global trading system. The discussion focused on the pursuit of FTAs by the U.S. Administration, as well as on the current status of the WTO negotiations and the negotiations of the Free Trade Area of the Americas (FTAA).

The speakers included:

- Grant Aldonas, Under Secretary for International Trade Administration, U.S. Department of Commerce ("Commerce");
- Everett Eissenstat, Senate Finance Committee, Republican Staff; and
- Tim Reif, House Ways and Means Committee, Democratic Staff.

I. Aldonas Says FTAs are Good Way to Keep Momentum on Free Trade; De-Emphasizes Importance of December 15 WTO Meeting

Aldonas stressed that the WTO is the place where "the juice is worth the squeeze" and that WTO negotiations are at the core of U.S. trade policy. He added however that it was important to keep up momentum on free trade through the negotiation of FTAs, especially to encourage movement in WTO and FTAA negotiations.

Aldonas thought that FTAs could function as a "laboratory" to explore going further on issues that are treated within the WTO, such as intellectual property. He emphasized, however, that some issues including agriculture subsidies must be dealt with at the WTO and not at the FTAA or in FTAs.

Aldonas defended the Administration's trade policy of "competitive liberalization" against criticism that the negotiation of FTAs did not result in progress in the WTO and the FTAA. He admitted that the multilateral negotiating process had slowed down since Cancun, but thought that since the WTO ministerial in Cancun and the FTAA ministerial in Miami there was an "overall positive energy" to move forward.

Regarding the FTAA, Aldonas stressed that with the new framework, he was "very positive" that it would be possible to reach a good, complete, comprehensive agreement whereby Brazil would join in the more ambitious commitments. He admitted, however, that negotiations would be challenging.

Aldonas also downplayed the importance of the December 15 WTO General Council meeting, and said that the objective was to obtain a basic conformation from all countries that they could move forward with the current text. Aldonas believes that the process to revive the Doha process will require some time, and that the December meeting should not be considered a "make or break date." He also stated that there is growing support among Members, including the EU, for reviving the Doha Round in the coming year.

II. Senate Aide Says Lack of Movement at the WTO and FTAA Should Ensure that FTAs be State-of-the-Art Agreements

Everett Eissenstat of the Senate Finance Committee thought that the disappointing results at the recent WTO and FTAA ministerial meetings mean that future FTAs should become state-of-the-art agreements. Achieving an ambitious level of liberalization in future FTAs would help demonstrate to Members of Congress the benefits of free trade and Trade Promotion Authority (TPA), which is up for renewal in 2005.

Eissenstat stressed that WTO negotiations should remain central to U.S. trade policy, but doubted that it would be possible to conclude the Doha Round by the 2005 deadline. He thought that the negotiations would remain stalled if the WTO applied the same special and differential treatment across the board, especially for agriculture.

Regarding the FTAA, Eissenstat opined that due to geopolitical changes, the initial enthusiasm for the FTAA had decreased. He said that Members of Congress were disappointed with the outcome of the FTAA ministerial in Miami and thought that the new approach to a framework agreement lacked ambition and was not very "stringent", leaving lots of room for interpretation.

Regarding the FTAs, Eissenstat thought that the negotiations on the U.S.-Morocco FTA could be concluded by the end of the year, but had doubts about finishing negotiations of the U.S.-Australia FTA this month. Regarding the U.S.-Central America FTA (CAFTA), Eissenstat thought that the important question was if negotiators could make enough progress in the coming weeks. He admitted that if they concluded CAFTA, the agreement awaited a "very tough vote", especially in the House.

III. House Aide Thinks FTAs Are Good Way to Increase Trade Liberalization, but Criticizes U.S. Approach to FTAs

Tim Reif of the House Ways and Means Committee thought that in order to get WTO negotiations back on track, it would be important to integrate developing countries more fully into the global trade system. Some options include increasing trade capacity building.

Reif believes that pursuing FTAs is a good way to increase trade liberalization, and could have a positive effect if constructed in the right way. He noted, however, that the trade policy of the Administration missed its intended effect due to the following flaws:

- U.S. policy on FTAs is based too much on political motives and not enough on economic reasons.

- The Administration should take measures to ensure that the benefits of the FTAs outweigh the costs, e.g. by creating one set of rules of origin.

- Regarding the selection of trade partners, there needs to be more bipartisan cooperation in the selection process in Congress, as well as between the Executive and Legislative branch.

- The U.S. should not just "pluck low hanging fruit" but be more ambitious and aim for FTAs with more significant partners.

Reiff opined that the FTA with Australia would be a good agreement, but that the FTAs with SACU, Central America, and Thailand would prove to be challenging.

OUTLOOK

Speakers at the event were generally supportive of the U.S. competitive liberalization strategy, and hoped that trade liberalization would proceed despite the difficulties. Some participants questioned, however, whether the strategy was working due to the difficulties that have arisen in recent negotiations at the FTAA and WTO. U.S. FTAs were intended to encourage support in Latin America and elsewhere for trade liberalization on a wider scale, but have instead become fallback options.

Speakers acknowledged that concluding some FTAs, the FTAA and WTO negotiations would be difficult next year, due to political and other reasons. Moreover, it will be difficult to secure Congressional approval of FTAs with Central America and Australia due to the sensitivities in the agreements themselves.

All speakers emphasized that WTO negotiations should be at the "core" of U.S. trade policy, and urged negotiations to proceed. It is increasingly evident, however, that WTO negotiations will not be relaunched this month at the December 15 General Council meeting. Rather, negotiators will attempt to revive the Doha Round sometime next year.

Customs

CBP Annual Trade Symposium Focuses on Organization and Implementation of CBP Programs; DHS Announces Final Advance Manifest Rules

SUMMARY

On November 20-21, 2003, the Bureau of Customs and Border Protection (CBP), Department of Homeland Security (DHS), held its Annual Trade Symposium. Senior managers from the Department of Homeland Security, CBP and other government agencies, along with representatives of the international trade and transportation community discussed, among other things, trade security, unification of inspection functions at the border, and the role of CBP in DHS.

DHS Secretary Tom Ridge announced the transmission to Congress of the final draft of the advance manifest rules required under the Trade Act of 2002. The rules require advanced information on all cargo entering and exiting the U.S. by any mode of transportation. The rules were published in the Federal Register on December 5, 2003 (68 FR 68139), and will become effective January 5, 2004.

This report summarizes information presented on the new rules and various other topics discussed at the symposium.

ANALYSIS

I. DHS Secretary Ridge Announces Transmission to Congress of Final Draft of Advance Manifest Rules

DHS Secretary Tom Ridge announced the transmission to Congress of the final draft of the advance manifest rules required under the Trade Act of 2002. The rules, which were due to have been released in October 2003, require advanced information on all cargo coming into and leaving the U.S. by any mode of transportation: air, ship, rail or truck.

Ridge specified that the rules provide for the following notification requirements on the movement of cargo:

Inbound into the US:

Air & Courier - 4 hours prior to arrival in U.S., or "wheels up" from certain nearby areas

Rail - 2 hours prior to arrival at a U.S. port of entry

Vessel - 24 hours prior to lading at foreign port

Truck - Free And Secure Trade (FAST): 30 minutes prior to arrival in U.S.; non-FAST: 1 hour prior to arrival in the U.S.

Outbound from the US:

Air & Courier - 2 hours prior to scheduled departure from the U.S.

Rail - 2 hours prior to the arrival of the train at the border

Vessel - 24 hours prior to departure from U.S. port where cargo is laden

Truck - 1 hour prior to the arrival of the truck at the border

Ridge also addressed some of the concerns of trade members regarding the new regulations with regard to the requirement for advanced manifest information.

Responding to a question, Ridge indicated that the advanced information would be run against the commercial and law enforcement databases in order to render a judgment as to whether or not a shipment was high risk and needed to be physically inspected. Ridge stressed that the rules were designed with the active input of the trade community and take into account that there are differences between the different companies.

When asked if the risk management techniques for passenger aircraft would be applicable to air cargo, or if there was a possibility that the Transportation Security Administration (TSA) could implement rules that supersede Customs regulations on cargo, Ridge said that TSA would apply the same principles, maybe in slightly different ways, to all forms of transportation. He added that CBP had just begun reviewing the risk management techniques with the air cargo companies.

II. Customs Officials Indicate That Advance manifest Regulations Will Be Subject To Extended Phase-In Periods

In a separate panel discussion, Customs officials at the symposium noted that CBP received over 130 comments since the publication of the proposed regulations regarding the advanced manifest information in July, and that as a result the final regulations include an impact analysis and certain other changes. *(Please see W&C November 2003 report.*) The panelists indicated that the new regulations are expected to be subject to extended phase-in periods that will be published subsequent to the initial notice of the final regulations. The phase-in periods are dependent on the mode of transportation and method for transmitting information to Customs. The technology available varies according to the mode of transportation, and in instances where no existing system is in place for transmitting such data Customs will likely delay the implementation for that mode of transport until systems are ready. Customs officials stated that new systems such as Air AMS and the new truck system would be rolled out on a port-by-port basis.

Trade members raised questions over the new rules regarding the definition of "shipper", which would require carriers to identify the vendor as opposed to the prior carrier (in a multimodal shipment) for the shipment. Customs officials expressed a willingness to address concerns under the "special bill" provisions, but also noted that the agency will begin to "tighten" its procedures with regard to in-bond shipments.

III. "A Smart Border Includes A Smart Container"

CBP Commissioner Robert C. Bonner opined that the establishment of the DHS is the most important step taken to achieve the "twin goals" of enhancing border security and

facilitating trade. Providing an overview of the measures taken to reach the objective of "One Face at the Border", Bonner stated that the most significant development has been the creation of a CBP Officer, who is responsible for all inspections with the exception of specialized agriculture inspections. Specialized inspections will be performed in cooperation with a CBP Agriculture Specialist.

Bonner also discussed programs CBP has launched to prevent terrorism, focusing on the Customs and Trade Partnership Against Terrorism (C-TPAT). *(Please see W&C November 2003 report.)* Bonner hailed the current membership of 4600 companies participating in C-TPAT, which was launched in January 2002, as a sign of commitment from trade partners to the program.

Bonner indicated that the next steps for C-TPAT would include:

- Applying a C-TPAT Validation Program to ensure that the participants honor their commitments;
- Opening the program to foreign-based manufacturers; and
- Rolling out the use of a C-TPAT smart container.

Bonner emphasized that the last step would be invaluable in fostering the goals of C-TPAT. The Commissioner envisions a general use of the smart container with C-TPAT and FAST, and a green lane for participants. He stated that the C-TPAT smart container would be implemented "within a month or so", but added that in the beginning, not all members will be required to use it.

IV. Panel of DHS Senior Executives Describes Role of CBP Within DHS

Assistant Secretary for Border and Transportation Security Policy C. Stewart Verdery Jr. discussed Border and Transportation Security (BTS), indicating that the priority of BTS is to prevent terrorists and terrorist weapons from entering the U.S. while continuing the economic status and maintaining open borders.

Special Assistant to the Secretary for Private Sector Alfonso Martinez-Fonts said that his department is the "Eyes and Ears" of the DHS within the private sector and serves as DHS' liaison with U.S. businesses. Responsibilities include sharing information and ideas with the private sector and looking at the implementation of DHS import rules.

DHS General Counsel Joe Whitley said that the main task of his department was to protect the U.S. economy.

Members of the audience engaged the executives in an extensive question-and-answer session, covering a variety of subjects:

Regionalization of the DHS

When asked to comment on the regionalization of the DHS, executives responded that the policy is currently being discussed and that the details had not yet been worked out.

The Green Lane

In response to a question about the green lane, Martinez-Fonts said that the input of the trade community would be necessary. He said that the goal is to create a high level overview of the green lane while ensuring that it gets translated into practice. Martinez-Fonts indicated that CBP had frequent contact with small businesses to ensure that these were not the victims of the new regulations.

Air Cargo Security

When asked who would have the authority over air cargo security, Verdery responded that the Transportation Security Administration (TSA) would provide the strategic plan and would be responsible for its implementation. He added, however, that TSA would cooperate with the various other agencies. Verdery stressed that TSA would ensure that initiatives by other departments were consistent with the TSA strategic plan.

V. Panel of TMO Representatives Discusses CBP Merger

Assistant Commissioner of the Office of Strategic Trade and Transition Coordinator Deborah Spero described the transition toward one agency as "very challenging". The Transition Management Office (TMO), under Spero's direction, is set up to identify and tackle any problems involved with the transition.

Spero said that a key part of the transition is the creation of a CBP Officer. The CBP Officer would carry out the priority missions of securing the U.S. borders while facilitating trade and the traditional missions of customs, immigration, and agricultural inspections. However, because a job analysis by the TMO concluded that some of the agriculture inspection functions were too specialized, CBP created a second position for a CBP Agriculture Specialist. The Agriculture specialist will work with the CBP Officer in the examination and pre-arrival risk analysis.

Spero also described the training of the CBP Officer, which began in September, as consisting of (i) pre-academy orientation, (ii) basic training at the Federal Law Enforcement Training Center (FLETC), (iii) in-Port training, and (iv) Advanced Proficiency Training. Spero announced that CBP is planning to start the conversion of "legacy officers" and the cross training for new responsibilities in the spring of 2004.

Director of Border Unification of the Office of Field Operations Patricia Fitzpatrick discussed the creation of unified primary inspections. She said that to realize this will require the creation of (i) unified inspectors, (ii) unified practices to facilitate traveling for the passengers, and (iii) a unified anti-terrorism unit.

Fitzpatrick announced that CBP planned to have the top 50 airports in the U.S. fully integrated and unified by the end of 2003. The next step will be to create a unified primary inspection process and an anti-terrorism response unit by the beginning of February 2004. Finally, CBP will launch unified primary training by the spring of 2004.

Acting Director of the Cargo Verification Division of the Office of Field Operations Keith Fleming talked about unifying the cargo inspections. Fleming said that CBP wanted to (i) create a unified cargo processing system, (ii) integrate manifest entry and

examination processes, and (iii) eliminate multiple movements of cargo by providing one set of information, targeting system, hold, and release after the full CBP examination.

Fleming said that CBP wanted to achieve this in three steps. In the short term, they would focus on the communications with the local agencies, which should be completed by the end of 2003. In the medium term, they would start with the formal training, which they wanted to complete by the end of 2004. In the long term, they would integrate and completely unify the functions of CBP Officer and Agriculture Specialist Officer, whereby Fleming added that it was not yet clear when this would take place.

Fleming said that the trade would benefit because (i) there would be one location to conduct transactions, (ii) there would be consolidated exams, which would reduce the cost and the waiting times, and (iii) there would be an expanded workforce through the cross-training of employees, thus providing more eyes and ears and providing a better service.

VI. Panelists Discuss ACE Developments and CSI

The Deputy Commissioner for Customs, Douglas Browning hosted a panel of representatives from the Office of International Affairs and the Office of Information Technology to discuss the status of the Automated Commercial Environment (ACE), the new system that is intended to eventually replace CBP's overloaded and outdated Automated Customs System (ACS), and expansion plans for the Container Security Initiative (CSI).

ACE Architecture Moving Forward

The foundation of the ACE project has been rolled out in a pilot program. The Secure Data Portal is nearing the end of its pilot stage. The Portal provides a single on-line access point to CBP data and is the first major project of CBP Modernization. Currently, the ACE Secure Data Portal is accessible to 41 importer accounts and certain CBP officers as part of a pilot program. CBP intends to officially adopt the portal sometime before the end of the year, and will begin incrementally expanding portal access to more ACE participants, with the goal of providing access throughout CBP by the end of 2007. To date, approximately 50 trade user recommendations have been integrated into ACE requirements. Trade community proposals have included: 1) establishing account structures to improve information access and make communication and tracking easier; 2) creation of account-based periodic statements to allow for smoother payment processing; 3) development of the ability to transmit shipment data separate from trip data; and 4) development of the ability to support multiple forms of CBP border release processes. The portal permits ACS/AMS (automated manifest) tracking, and is eventually expected to be useful in physically tracking shipments.

Enhancing CSI

CBP officials predict that the use of the portal will facilitate trade and the CSI program, by permitting the tracking of shipments. CSI, which currently has the participation of sixteen foreign ports, is expected to grow to twenty ports by the end of January. At the symposium, Browning announced that the U.S. had reached an agreement with the EU with regard to CSI implementation. Previously, CSI came under fire from EU officials where the U.S. had engaged in bilateral agreements on CSI with individual members of the EU. The EU agreement is expected to be signed shortly. Some of the factors outlined for the expansion of CSI include the ability for CBP to implement inspections at the foreign port for

cargo destined for the U.S. and the use of non-intrusive inspection equipment at the foreign port. CBP also expects that the foreign port country be willing to establish an automated risk management system; share critical data and intelligence; conduct a port assessment in an effort to resolving infrastructure problems; and maintain integrity programs for port and customs personnel.

Panelists at the symposium stated that it is CBP's goal to have CSI at all ports where cargo is shipped to the United States and that it is working with the World Customs Organization, the World Bank and other international group to better define and implement this goal. In the meantime, CBP is working to use its resources for CSI more efficiently through increased manpower and technology.

When questioned on whether CSI inspections would preclude inspections once the same cargo reaches the United States panelists stated that CSI exams do not mean the shipment will not be inspected at the port of entry. However, Browning stated that the CSI exams are expected be done mostly by non-intrusive inspection and therefore less likely to cause delay. Browning stated that targeting would be for high-risk shipments or shipments that pose a threat of terrorism rather than just to facilitate normal U.S. import inspections.

When asked what the impact of the shift of agents away from the Attaché offices would have on CSI and other enforcement initiatives, Browning assured trade members that CBP and the Bureau of Immigration and Customs Enforcement (ICE) are working to keep the communications link open and develop processes to coordinate efforts for programs such as CSI.

VII. Solid Wood Packing and other Psytosanitary Certification

In August, the U.S. Department of Agriculture announced new requirements with regard to solid wood packing materials and psytosanitary certification. The new requirements were implemented to bring U.S. measures in line with the international standards (ISPM 15). Although USDA promulgated these requirements, the import and entry inspection of shipments subject to the new requirements are part of the functions transferred by USDA to the Department of Homeland Security and CBP. Customs officials at the symposium are working to integrate the inspection functions for USDA regulations into its new unified inspection process, and hope that the measure will permit central examination and review of shipments.

VIII. Bioterrorism Act

On the second day of the symposium, FDA and Customs officials engaged in a lively discussion with trade members regarding the recently published FDA regulations pursuant to the Bioterrorism Act. (*Please see W&C November 2003 report*.)

Customs officials claimed that their systems would be ready to accept prior notice information on December 12. However, for shipments that were exported before December 12 and on that date or after, shippers would not be able to make the prior notice until December 12. Both Customs and FDA have emphasized that enforcement of the prior notice regulations will be relaxed for at least the first month. Further, with regard to enforcement of the prior notice regulations, officials from FDA indicated that there will be no duel penalty for failures to provide prior notice, meaning that only one set, Customs, penalties will apply.

With regard to registration, FDA officials clarified that facilities that are subject to both USDA and FDA regulations will be required to register. This may impact some dairy and meat producers.

OUTLOOK

The symposium, which convenes annually, addresses the general focus of CBP as it moves into the coming year. The general themes of this year's symposium—unification of inspections for each of the separate agency regulations and the push to "move the border back" for enforcement against terrorism--indicate that CBP will continue to emphasize gathering greater shipment information sooner and consolidating cargo reviews and inspections.

The final advance manifest rules were published in the Federal Register (68 FR 68139) on December 5, 2003, and will become effective January 5, 2004. Bonner said at the symposium that in the "next couple of months", they would work with the transportation sector to ensure compliance. When asked what would be the final deadline for full compliance, Bonner said that he could not give an exact timeframe. He was confident, however, that companies could fully comply with the regulations "rapidly".

TSA Issues New Air Cargo Screening Directive; Announces Availability of Maritime Self-Assessment Risk Module

SUMMARY

On November 17, 2003 the Transportation Security Administration (TSA) issued a new directive on the air cargo security. The directive requires domestic and foreign air carriers transporting cargo into and out of the US to implement enhanced security measures, including random inspections of cargo. In the directive the TSA pledges to devote additional resources to identify and improve technology that would facilitate greater screening of air cargo.

In a related event, TSA announced on December 5, 2003 the availability of the TSA Maritime Self-Assessment Risk Module (TMSARM). TMSARM is a vulnerability assessment tool developed to support a series of final rules that the U.S. Coast Guard (USCG) promulgated pursuant to the Maritime Transportation Security Act (MTSA) of 2002.

ANALYSIS

I. TSA Issues New Air Cargo Screening Directive

On November 17, 2003 the Transportation Security Administration (TSA) issued a new directive on the air cargo security. The directive, issued in anticipation of further rulemaking by the TSA, required domestic and foreign air carriers transporting cargo into and out of the US to implement enhanced security measures, including random inspections of cargo. In the directive the TSA pledges to devote additional resources to identify and improve technology that would facilitate greater screening of air cargo.

The directive on air cargo security comes in the wake of reports that terrorist groups may be seeking to use cargo planes are weapons. Seeking to secure the US air cargo network, the TSA has identified four strategic priorities, which we review here:

Enhancing Supply Chain Security

TSA will require further background checks of indirect air carriers (IACs) applying to join the Known Shipper Program. This will include more extensive gathering if information on air carriers, and comparing that information to intelligence data on terrorist groups.

Identify Elevated Risk Cargo

Operating on the assumption that not all cargo can be screening, the TSA will deploy a Cargo Prescreening System, which, on the basis of information gathered from shippers, and terrorist watch lists, will identify elevated risk cargo. This system will work closely in conjunction with the risk management system used by Customs and Border Protection (CBP).

While the Cargo Prescreening System is being developed, the TSA will be requiring aircraft operators to conduct random cargo inspections. TSA officials will supervise these inspections, performed by industry personnel.

Identifying Technology for Cargo Inspections

The TSA is planning several pilot studies to employ emerging, non-intrusive inspection techniques to enhance cargo security.

Enhanced Facility Security Measures

The TSA plans to update security regulations for aircraft operators in order to strengthen security of the air cargo operating area. This will include greater screening of employees with access to cargo planes, and securing unattended cargo planes.

II. TSA Announces Availability of Maritime Self-Assessment Risk Module

On December 5, 2003 TSA published a notice in the Federal Register (68 FR 68096), announcing the availability of the TSA Maritime Self-Assessment Risk Module (TMSARM). TMSARM is a no-cost, web-based, flexible vulnerability assessment tool that TSA developed to support the regulations that the U.S. Coast Guard (USCG) promulgated pursuant to the Maritime Transportation Security Act (MTSA) of 2002.

USCG published a series of final rules implementing portions of MTSA regulations that mandate that any facility or vessel that might be involved in a transportation security incident conduct a vulnerability assessment and submit a security plan to the USCG by December 31, 2003. The USCG final rules provide a list of tools that may be used to conduct vulnerability self-assessments, including TMSARM.

OUTLOOK

The TSA air cargo directive will be followed up by formal rulemaking in the coming months. However, despite the promise of greater rulemaking, and enhanced security, some in Congress remain concerned about the lack of effective screening for air cargo. During consideration of the FY 2004 Department of Homeland Security Appropriations bill, Representative Ed Markey (D-Mass.) proposed that all cargo on passenger planes be screened for explosives. The TSA rejected the Markey proposal because they claimed it was not technologically feasible.

COAC Members Concerned About CBP Regional Structure and Bioterrorism Regulations

SUMMARY

On November 18, 2003, the Treasury Advisory Committee on Commercial Operations (COAC) of the Bureau of Customs and Border Protection (CBP) held a meeting to discuss, among other things, the status of reorganization with the Bureau of the Customs and Border Protection agency (CBP) and the status of programs of interest to the trade community. The most controversial agenda items were the possible adoption of a regional structure for CBP Field Operations and CBP's implementation of bioterrorism regulations promulgated by the FDA on October 10, 2003.

Department of Homeland Security (DHS) Undersecretary Asa Hutchinson and CBP Commissioner Robert Bonner expressed their commitment to continue consulting with COAC on current programs, and any potential changes to CDP and DHS that may affect the trade community.

ANALYSIS

On November 18, 2003, the Department Advisory Committee on Commercial Operations of the Bureau of Customs and Border Protection (COAC) held the fourth meeting of its eighth term.

The speakers included:

- Asa Hutchinson, Undersecretary for Border and Transportation Security, Department of Homeland Security;
- C. Stewart Verdery, Assistant Secretary for Border and Transportation Security Policy and Planning, Department of Homeland Security;
- Timothy E. Skud, Deputy Assistant Secretary of the Treasury;
- Robert C. Bonner, Commissioner, Bureau of Customs and Border Protection;
- Robert E. Perez, Director of the Customs-Trade Partnership Against Terrorism, Office of Field Operations, Bureau of Customs and Border Protection;

CBP Proposes Regional Structure for Field Operations

Secretary Hutchinson stated that, going forward, CBP would be based on centralized planning and decentralized execution. He noted that many of the departments and agencies, such as the Transportation Safety Administration (TSA), and the Bureau of Citizen and Immigration Services (BCIS) that were integrated under DHS already have regional management structures. Customs operated under a regional structure prior to the Clinton administration, but was reorganized to its current structure during the Clinton administration.

COAC members expressed concerns that CBP had yet to consult COAC on the creation of regional administration. COAC members fear that the creation of a regional structure could lead to disparate enforcement and application of customs rules and regulations.

"One Face at the Border" Makes Progress

Commissioner Bonner discussed announced the integration of inspectors from agencies that were combined into CBP earlier this year. Inspectors now incorporated into CBP will soon wear the same uniforms, and be cross-trained to perform customs as well as other functions, including immigration and certain FDA inspections. However, certain agricultural inspection functions will remain a specialized position within CBP.

Free and Secure Trade Expands to Mexico

Bonner informed COAC that on October 27, 2003, the Free and Secure Trade (FAST) program had been expanded with the opening of FAST lanes at the El Paso border crossing. FAST lanes at Laredo and Brownsville would open on December 5, 2003. Further crossings on the Mexico border will open in early 2004. FAST lanes have also been opened at Port Huron, Michigan.

COAC members noted that confusion remains over how the bioterrorism regulations will affect FAST. Port Director Michael Perez (Del Rio) stated that CBP and the FDA are working to reconcile differences between FAST and the bioterrorism regulations. (Perez also emphasized the need to expand C-TPAT membership.)

Additionally, COAC members raised concerns over the interaction between C-TPAT and FAST. COAC cited the example of a truck carrying mixed cargo (some cargo from C-TPAT members, and some from non-C-TPAT members), for which membership in C-TPAT may not result in fewer security checks at the border.

COAC Members Concerned About Lack of C-TPAT Information

Several COAC members raised concerns about benefits of C-TPAT membership, noting that little has been done to gather data on C-TPAT performance. Additionally, COAC members reiterated concerns about the lack of a published list of C-TPAT members. The lack of a published list, it was argued, makes it difficult for suppliers who might face added inspections at the border because, while they maybe C-TPAT members, the cargo they are carrying comes from a non-C-TPAT supplier.

Secretary Verdery stated that data gathering has begun and that CBP is working to develop analyses of C-TPAT performance. The publication of a C-TPAT list remains difficult for CBP because of privacy issues. However, CBP informed COAC that a secure online platform is under development to allow C-TPAT members to access a list of members. CBP will not publish a public list of C-TPAT members because of concerns over confidentiality and privacy laws.

Inter-Agency Task Force Working to Harmonize CBP and FDA Regulations

COAC members expressed the following concerns about the FDA bioterrorism regulations:

1. The lack of any exemptions under the bioterrorism rules for samples imported for research purposes.

2. The requirement that food shipments, under the bioterrorism regulations, must be inspected at the border crossing rather than the final destination.

3. The need to make two filings for food shipments (one with FDA and one with CBP), instead of one unified notification system.

CBP officials informed COAC that a high level task force comprised of officials from CBP, FDA and the White House were working to harmonize FDA requirements with existing and forthcoming CBP regulations. Secretary Verdery stated that the promulgation of advanced manifest rules as required by the Trade Act of 2002 had been delayed in order to ensure alignment with the bioterrorism regulations. Perez confirmed that enforcement of bioterrorism would be phased in over a 3 – 4 month period.

OUTLOOK

Commissioner Bonner stated that work continues on developing uniform global standards for customs procedures at the World Customs Organization (WCO). However, Bonner noted that progress would be slow, owing to the disparate views on customs standards among WCO members.

The next COAC meeting will take place in January 2004.

FTAA MIAMI MINISTERIAL

US and Brazilian Officials Discuss Results of, and Challenges Ahead for FTAA Negotiations After Miami Ministerial

SUMMARY

At a colloquium at George Washington University, participants discussed the results of, and challenges ahead of FTAA negotiations after the Eight Ministerial Meeting held in Miami on November 20-21, 2003. Participants included Brazil's Ambassador to the US, Rubens Barbosa, Director General of the Caribbean Regional Negotiating Machinery, Richard Bernal and USTR Senior FTAA Negotiator, Ross Wilson.

Later the same day, Ambassador Barbosa and USTR's Ross Wilson presented their perspectives on the FTAA at an event hosted by the American Bar Association. Barbosa and Wilson disagreed on the interpretation of certain provisions of the Miami declaration, including the linkage between benefits and the level of commitments that countries would undertake.

ANALYSIS

At a colloquium at George Washington University participants discussed the results of, and challenges ahead of FTAA negotiations after the Eight Ministerial Meeting held in Miami on November 20-21, 2003. Participants included the Director General of the Caribbean Regional Negotiating Machinery, Richard Bernal and USTR Senior FTAA Negotiator, Ross Wilson and Brazil's Ambassador to the US, Rubens Barbosa.

I. Richard Bernal: Original Deadline Difficult, a "Pragmatic Re- Dimensioning" of the FTAA is Likely

Ambassador Bernal referred to the context in which the FTAA Ministerial was held, emphasizing three factors that influenced its outcome:

The proliferation of bilateral FTA negotiations, which divert the focus and energy from the FTAA negotiations.

The stalemate of the Doha Round after Cancun; and

The recognition that FTAA negotiations include a wide variety of economies, with huge differences in their sizes and levels of development.

A. Scenarios for FTAA Negotiations

Bernal did not consider the Miami Declaration as a diminution of the original ambitions for the FTAA. On the contrary, he said that the FTAA is still too ambitious to be achieved by the original deadline of January 2005. In this regard, Bernal considered four possible scenarios for the FTAA negotiations:

Retain the scope and the schedule. This is the optimistic scenario supported by NAFTA and CAFTA countries, Chile and some Andean countries.

Reduce the scope and retain the schedule. Bernal considered this as the pragmatic option.

Reduce the scope and extend the schedule. This option has been supported by Brazil, which has suggested leaving certain matters for multilateral or bilateral negotiations.

Retain the scope and extend the schedule.

Bernal also referred to certain factors that would pressure countries to extend the FTAA negotiations beyond this year:

The complexity of the matters negotiated. Certain matters are too complex to be dealt with in one year.

Novelty of the issues negotiated.

Lack of consensus on certain areas.

Institutional capacity. Some small economies do not have the institutional capacity to participate in negotiations covering a wide range of areas.

B. Importance of Miami Ministerial: "Pragmatic Re-Dimensioning"

According to Bernal, the Miami Ministerial was relevant because:

It allowed the process to continue, and alleviated fears of a collapse similar to the WTO negotiations at Cancun.

It introduced a principle of flexibility that was not present in the negotiations before this meeting. Countries will be entitled to assume different levels of commitment.

It was an opportunity to discuss the scope of the negotiations.

Finally, Bernal referred to the date established for the conclusion of the negotiations, saying that it will be a very difficult task to finish the negotiations before January 2005. In his view, it is necessary to "get past the stage where people think it is possible to do everything." Bernal suggested that by the end of the first quarter of 2004 –after the next Trade Negotiations Committee meeting in February in Puebla, Mexico – negotiators will make a more realistic assessment of what they can achieve this year and will agree on leaving some areas aside. He referred to this as a "pragmatic re-dimensioning" of the FTAA, which will imply deciding which issues can be negotiated by January 2005 and which issues will be left for a separate agenda to be negotiated after 2005.

II. Ross Wilson: Miami Meeting a Success and Will Advance Liberalization.

Wilson discussed the context and the importance of the Miami Ministerial. He also commented on the goals and objectives that the US had towards the Ministerial.

A. Context

Miami was the first trade ministerial held in the US since the Seattle Meeting, whose failure had set international trade backwards.

Miami was held only two months after the collapse of the WTO Cancun meeting.

There are substantial political and economic uncertainties in the region.

A failure in Miami would have had very negative implications for the FTAA process.

Before the Ministerial there was a lot of talk about the conflicting positions of the US and Brazil.

B. Ministerial's Importance

It reaffirms the FTAA's comprehensive agenda.

It recognizes that countries can pursue different levels of commitment.

It recognizes and encourages countries to go beyond the basic commitments.

C. U.S. Objectives for the FTAA

There should be a commitment to a comprehensive agenda.

Countries who so agree should be able to go beyond the basic rights and obligations. This will allow certain countries to negotiate more ambitious plurilateral agreements in each of the nine areas under negotiation. Wilson suggested that this would permit the US to go further in areas like investment and intellectual property than some countries are willing to go. He also said that countries wanting to take commitments on the area of domestic agricultural support could do so.

It is important to introduce an element of flexibility.

Benefits should be commensurate to commitments.

Small economies should receive special treatment.

The January 2005 deadline should be maintained.

According to Wilson, the U.S.'s negotiating principles are reflected in the Ministerial Declaration. Wilson considered that the Miami Meeting was a success and will advance trade liberalization.

III. Rubens Barbosa: Emphasizes Need for Balance in FTAA

Ambassador Barbosa stressed the importance of what he considered to be a crucial element of Miami's Declaration: the commitment to a "balanced FTAA." He said that this balance between the obligations a country would have to undertake and the concessions it would receive was a central element that was missing before the Miami Meeting. Before Miami, he said, Brazil would have to undertake obligations in certain areas that are very sensitive to its economy like investment, government procurement or intellectual property but

it would receive no concessions on areas that Brazilian negotiators considered very relevant like antidumping or agricultural domestic support.

Another important element of the Miami Declaration highlighted by Barbosa was the right that countries would have of seeking compensation. This means that, for example, if a country requests to be exempted from the obligations relating to domestic support or antidumping measures it will have to make compensations in other areas (e.g. services or government procurement) to the countries that did make commitments with regard to domestic support or antidumping measures, and vice versa.

Finally, Barbosa also pointed out that those countries that decide to opt out of certain areas of negotiation can nonetheless participate in those negotiating groups as observers.

IV. Barbosa and Wilson Dispute Interpretation of Certain FTAA Provisions

Ambassador Barbosa and USTR's Wilson spoke the same day at an event sponsored by the American Bar Association (ABA). Barbosa and Wilson provided perspectives on the FTAA (similar to the George Washington University event earlier in the day), and engaged in more debate on the interpretation of certain FTAA provisions, including the application of benefits commensurate to commitments.

Wilson stated that the FTAA will remain comprehensive and all countries are expected to sign on to all nine major negotiating issues. The difference now is that countries are allowed more flexibility as to the commitments they undertake for each of the issues. Some countries might also opt for plurilateral agreements, but will be encouraged to undertake an ambitious level of commitments.

Barbosa stated that Brazil was pleased with the negotiations, and considered it an appropriate way to move forward. Barbosa said that since the US was unwilling to negotiate issues like domestic support and trade remedies, than Brazil could not negotiate sensitive issues like investment and intellectual property rights. Thus, the new framework should provide all countries more flexibility.

Wilson and Barbosa disputed how market access commitments would be realized in the FTAA, with Wilson insisting that benefits would be commensurate to the level of commitments. Barbosa commented that without full MFN, the FTAA would not be meaningful to Brazil. They commented that the Trade Negotiations Committee is now tasked to explore ways to structure the negotiations to account for the new political mandate.

OUTLOOK

Negotiators at the George Washington University and ABA events were mostly optimistic about the outcome of the FTAA Miami Ministerial meeting. Bernal, Barbosa and Wilson all supported the more flexible nature of the FTAA framework, and how it allowed for a political compromise that averted another high-profile collapse. While Wilson encouraged a more ambitious agenda covering all issues under negotiation, Bernal and Barbosa emphasized that countries had the option to undertake varying levels of commitments. Barbosa and Wilson disagreed, however, on the benefits that would accrue based on the level of commitments that countries undertake.

Although the FTAA framework provides countries more flexibility – and perhaps a more realistic approach to negotiations given the political sensitivities to trade liberalization – it leaves more room for mischief. Some countries like Brazil and Argentina will probably agree to only the minimum level of commitments. The US and other countries might achieve a more ambitious agreement, but without MERCOSUR countries. Moreover, the methodology for determining benefits based on the level of commitments is yet to be developed, and will be a complex task. Thus, the FTAA is at risk of becoming a less significant agreement in value, especially to the private sector.

Americans Business Forum Makes Recommendations in All FTAA Areas

SUMMARY

During November 17-19, 2003 the Americas' Business Forum (ABF) met in parallel with meetings of negotiators during the FTAA Ministerial Meeting in Miami. At the ABF, private sector representatives, academics and others from throughout the Western Hemisphere met to prepare their recommendations on the FTAA negotiations. For each FTAA topic, a specialized workshop was held. The ABF also convened a meeting with trade ministers from the region to present their recommendations.

We describe below the issues on where there was agreement (consensus) and disagreement (non-agreed issues) in the key workshops.

ANALYSIS

ISSUE	CONSENSUS	NON-AGREED ISSUES
AGRICULTURE	➢ Preferences under existing sub-regional and/or bilateral agreements should not be reduced by the FTAA. ➢ Tariffs may be increased or imposed as long as they do not exceed commitments under the TEP (tariff elimination program). ➢ Acceleration of tariff reductions under the TEP should apply to imports to all parties on an MFN basis. ➢ Export subsidies and other equivalent practices should be eliminated in equal reductions during a five-year period. ➢ FTAA must be consistent with WTO SPS Agreement. ➢ Parties should work	➢ All non-*ad-valorem* tariffs, duties, etc. should be translated into *ad-valorem* equivalents, serving as basis for reductions under the TEP. ➢ Parties should not raise tariffs during the negotiations, except to correct distortions in view of subsidies, etc. ➢ Exclusion of certain products from the agreement. ➢ Permission for price bands. ➢ Definition of "export subsidies". ➢ Domestic support to be treated in the FTAA.

	towards the harmonization of standards, nutrition labeling and fortification policies.	
COMPETITION POLICY	➢ Anti-competitive practices of both the public and private entities are condemned. ➢ Each party shall maintain competition laws or regulations. ➢ Exclusions prohibited. ➢ Cartels (including export cartels) should be prohibited. ➢ State aids that adversely affect competition are condemned. ➢ Transparency is a fundamental principle. ➢ Technical assistance should be provided.	➢ CARICOM conditions the adoption of competition policy rules to technical assistance and transitional measures. ➢ CARICOM should be given special consideration.
INVESTMENT	➢ All investment (national or foreign) should be undertaken in transparent conditions, respect for the rule of law and with provision for timely and impartial resolution of disputes. ➢ Same protections to both foreign and national investors. ➢ Dispute resolution mechanisms should include state-to-state and investor-to-state	➢ Parties did not reach agreement regarding the use of international arbitration as a means of dispute settlement. ➢ The Brazilian Coalition of Industries opposed the use of the investor-to-state dispute mechanism.

	provisions (for those countries that have adopted this principle). ➢ Once a dispute resolution mechanism is undertaken, it should be final. ➢ All FTAA countries shall adopt disciplines on performance requirements at a minimum in accordance with the WTO TRIMS upon the entry into force of the FTAA. ➢ Investors have the right to hire their top managerial or other key personnel irrespective of nationality and bring them into the country where the investment is located. ➢ Aim to create an "FTAA VISA" to allow free movement of skilled persons needed to support an investment. ➢ Labor topics should be addressed exclusively in the ILO and environmental topics should be dealt with in specialized forums.	
SERVICES	➢ More private sector involvement in the services negotiations. ➢ Non-trade issues should be dealt with in other, more appropriate	➢ No consensus reached on whether the specific services negotiations should go in different annexes or different chapters. The banking sector, telecoms and

	arenas and not within the FTAA. ➢ All services and sub-types of services should be included in the FTAA. ➢ Sector specific negotiations should take place for different sectors such as express delivery services, professional services, telecom and financial services. ➢ Governments may list exemptions on financial services for prudential reasons. ➢ Services chapter should include provisions regarding acquired rights. ➢ Seek national treatment for services. ➢ MFN treatment should be extended for services. Exception for existing regional trade agreements. ➢ Disciplines should apply to the national and sub-national levels, including local legislation. ***Professional Services Licenses and Movement of People*** ➢ Encourage mutual recognition agreements for professional services. Agreements	express delivery services representatives argued for the need for a separate chapter for their sectors. ➢ No agreement on whether to purse a positive or negative list approach. U.S. and some support while Brazil and CARICOM oppose more ambitious negative list. ➢ No agreement on which sectors would be an exception to the national treatment principle.

	should be extended among FTAA countries. ➢ Abolish visa requirements that restrain trade and allow for an "FTAA VISA" to facilitate movement of professionals in the region.	
DISPUTE SETTLEMENT	➢ Support for a binding FTAA Dispute Settlement mechanism. ➢ Creation of an FTAA Appellate Body (following the WTO model). ➢ Enforcement of panel and/or Appellate Body decisions includes compensation and suspension of concessions/benefits. ➢ Transparency: all decisions must be available to the public. Exception for business confidential information.	
GOVERNMENT PROCUREMENT	➢ FTAA procurement process should include domestic and non-domestic entities. ➢ Coverage: all products and services. ➢ Transparency is mandatory. ➢ Technical specifications should not be used as barriers. ➢ Government	➢ Non-inclusion of public services (position of CEB, the Brazilian industry association). ➢ Government procurement rules should not apply to technological development efforts (CEB). ➢ WTO Government Procurement Agreement should not be used as the model for the FTAA (CEB)

	procurement must take into account the value and performance. ➢ Technical assistance to smaller developing countries.	(CEB). ➢ Special rules for GP disputes. ➢ Developing countries should not be treated differently regarding GP (CANIFARMA – Mexico).
INSTITUTIONAL ISSUES	➢ Decisions should be made by consensus. ➢ Transparency is fundamental.	➢ Labor and environment provisions should not be addressed in the FTAA (CEB, CICYP, FEDECAMARAS-Venezuela, Fundación Pro-ALCA- Panama, US-Panama Business Council – Panama, UIA-Argentina). ➢ FTAA Secretariat should have Trade Policy Review functions.
INTELLECTUAL PROPERTY RIGHTS	➢ Technology transfer: Add to WTO TRIPS Agreement, Article 7, the expression "under a commercial basis." ➢ Support for the Doha Declaration on Public Health but no consensus on Art 1, § 4. ➢ Services' trademarks should receive the same treatment of goods' trademarks.	➢ "The workshop was almost dead", according to its chairman. The first and most fundamental question remained unresolved: the existence of an FTAA IP chapter. ➢ Exhaustion of rights.
SUBSIDIES, ANTIDUMPING AND COUNTERVAILING DUTIES	➢ "Basically adopted the provisions of the WTO AD agreement", according to its chairman. ➢ AD/CVD provisions should be WTO consistent, while	➢ Differential treatment for developing countries. ➢ Separate dispute settlement mechanism for AD/CVD proceedings. ➢ Inclusion of export credit

	allowing measures to clarify and add transparency.	provisions.
MARKET ACCESS	➢ Provide for National treatment. ➢ Four phase-out periods: immediate, 5 years, 10 years and longer. ➢ Parties should have sectoral agreements proposed by specific sectors to facilitate the process of integration and tariff reduction. ➢ Digital products should be covered in the Services Negotiating Group. ➢ Special regimes including refunds/drawback, duty deferral and temporary admission should not become subsidies prohibited by the WTO. ➢ Eliminate customs and consular transaction fees. ➢ Confer origin for goods. ➢ Determine regional value content. Specific industry table for the automotive sector. ➢ Certain processes do not confer origin (such as cutting or packaging). ➢ Business facilitation	➢ Inclusion of used goods, goods from FTZ's, and remanufactured goods (in order to receive beneficial treatment). ➢ Adoption of safeguard measures. ➢ Allowing for accumulation of materials from non-parties. ➢ Special and differential treatment for smaller economies and technical assistance. ➢ Definition of "international standards."

	procedures. ➢ Expedited clearance procedures for express shipments. ➢ Measures to protect citizens' health, safety and welfare are permitted; however, they cannot constitute barriers to trade.	

OUTLOOK

We summarize below the major themes from the workshops:

- **Agriculture** – Agreement on addressing market access, but not domestic support and subsidies in the FTAA.

- ***Competition Policy*** – According to its chairman, the most important provision concerns transparency. Any monopoly should follow a number of regulations. In addition, the workshop recommended the establishment of competition policy legislation in the FTAA countries.

- ***Dispute Settlement*** – The establishment of a binding FTAA dispute settlement system with an appellate body. All decisions should be public.

- ***Government Procurement*** – According to its chairman, the most important provision was that it should take into account both the value (price) and performance of a good or service. Disagreements persist on the question of inclusion of "public services" and how they are defined. Brazilian industry also questioned the application of rules in view of technological development policies, and mirrored the Brazilian government position on most issues.

- ***Institutional Issues*** – Lack of consensus on addressing labor and environment provisions in the FTAA.

- ***Intellectual Property*** – Lack of agreement on the most fundamental question: whether an IP chapter should exist in the FTAA.

- ***Investment*** – Recognized the need for national treatment for foreign investments. It recommended the creation of an "FTAA VISA" to facilitate movement of professionals. Brazilian industry opposed the inclusion of international arbitration as a means of dispute settlement, although Brazil has an arbitration law. Brazilian participants, like the government, also rejected the use of investor-to-State dispute mechanism

in the FTAA. The workshop resolved this question by adopting a provision that recognized the use of investor-to-State dispute resolution mechanism for the countries that want to adopt this principle.

- ***Market Access*** – Participants recognized the need for national treatment for products in the region. They did not agree on whether to develop safeguard provisions in the FTAA. The chairman requested more meetings in order to finish the workshop's work.

- ***Services*** – Unable to agree on modalities for negotiations, including the use of a positive or negative list approach. Recognized that some services sectors should be handled in discussions (possibly side agreements) in parallel with overall negotiations.

- ***Small Economies*** – Lack of consensus on the criteria for being classified as a small economy.

- ***Subsidies, AD and Countervailing Measures*** – Supported the WTO AD agreement, but could not agree on the need for further disciplines (especially the U.S. participants, which resisted further disciplines). Also did not agree on whether to discipline export credit provisions.

The results of the ABF's workshops represent the positions of various private sector representatives throughout the Hemisphere, and often (but not always) reflected their respective country negotiating positions. The U.S. and Brazilian business delegations were large and very active during the ABF. The Brazilian business delegation, however, often reflected the governmental position in a number of issues instead of presenting new positions or ideas for the successful completion of the FTAA. Brazilian participants often resisted ambitious liberalization commitments in areas like investment, intellectual property and services.

The U.S. delegation presented more diverse views than the U.S. government position, including in the area of agriculture. For example, the Grocery Manufacturers of America favored reduction of distorting domestic support measures since they increase the prices of groceries. The U.S. official position is to resist elimination of domestic support in the FTAA, but to negotiate this issue at the WTO.

The CARICOM delegation was very active in most workshops and insisted on special and differential treatment for small economies as well as requesting technical assistance.

WTO/MULTILATERAL

WTO Appellate Body Finds Against U.S. Safeguard Measures on Steel; U.S. Lifts Safeguard

SUMMARY

The WTO Appellate Body on November 10, 2003, affirmed that the U.S. safeguard measure on steel is WTO-inconsistent. The Appellate Body ruled that the measure breached a number of obligations of the United States under the *Agreement on Safeguards*, including the requirement to provide a "reasoned and adequate explanation" for its determinations regarding factors such as "unforeseen developments" and "increased imports." The Appellate Body also found that the safeguard measure breached the principle of "parallelism," because the U.S. included all imports for the purpose of its injury analysis, but then exempted the free trade partners of the United States from the application of the measure.

The Bush Administration based on a number of factors, including its internal evaluation of the domestic industry's efforts to restructure in the past twenty months, lifted the safeguard on December 4, 2003. Although the Administration did not refer directly to the WTO ruling and threat of retaliation as a reason for lifting the safeguard, these factors no doubt influenced the decision.

ANALYSIS

I. Factual Background

In March 2002, the United States imposed a three-year safeguard measure on ten steel product groups, in the form of additional tariffs ranging from 8% up to 30%. The measure was challenged by the EC, Japan, Korea, China, Switzerland, Norway, New Zealand and Brazil. In July of this year, a WTO Panel found that the U.S. measure was WTO-inconsistent (*Please see our report of July 16, 2003*).

II. Appellate Body Findings Against the U.S. Safeguard Measures

The Appellate Body began its analysis by recalling that GATT Article XIX and the WTO Agreement on Safeguards, read together, "confirm the right of WTO Members to apply safeguard measures when, as a result of unforeseen developments...a product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury" to the domestic industry producing like or directly competitive products. However, the Appellate Body stressed that the right to apply such measures arises "only" if these prerequisites have been met.

A. Unforeseen Developments: Panels should not have to "wonder why a safeguard measure has been applied"

The Appellate Body pointed out that the appeal did not raise the issue of whether the "unforeseen developments" identified by the United States - such as the Asian financial crisis or the appreciation of the U.S. dollar - actually amounted to "unforeseen developments" within the meaning of GATT Article XIX. Instead, its remit was to rule on a much more

narrow issue: whether the report of USITC had demonstrated, through a "reasoned and adequate explanation" that unforeseen developments had resulted in increased imports of each of the products on which the United States had imposed safeguard measures.

The United States argued that the authorities needed only to present a "logical basis" for their determinations, and that the Safeguards Agreement "does not explicitly require an 'explanation.'" The Appellate Body rejected this argument, saying that in the absence of a "reasoned and adequate explanation", a WTO panel would not be in a position to assess whether the prerequisites under the Safeguards Agreement have been met. The Appellate Body noted wryly that "a panel must not be left to wonder why a safeguard measure has been applied [original emphasis]." Moreover, the Appellate Body said that the demonstration of "unforeseen developments" must be performed for each product subject to a safeguard.

The United States noted that there was certain data in the USITC report that could have been used to support a finding of "unforeseen developments." Although the USITC itself had not cited this information, the U.S. argued that the WTO Panel was nevertheless required to consider such data in determining whether the "unforeseen developments" finding was consistent with the Agreement. The Appellate Body was dismissive of this argument, stating that a competent authority has an obligation to provide reasoned conclusions, and that "it is not for panels to find support for such conclusions by cobbling together disjointed references scattered throughout [the] report."

The Appellate Body therefore agreed with the Panel that the safeguard measures on steel were inconsistent with the WTO obligations of the United States because the USITC report failed to provide a "reasoned and adequate explanation" demonstrating that "unforeseen developments" had resulted in increased imports causing serious injury to domestic producers.

B. Increased Imports: "recent enough, sudden enough, sharp enough, and significant enough"

In examining whether the United States had made a WTO-consistent determination of "increased imports", the Appellate Body affirmed its rulings in earlier cases regarding the legal standard that should apply. It noted that "not just any increased quantities of imports will suffice [original emphasis]." Rather, the increase in imports must have been "recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury.'" Moreover, it stressed that a determination of whether there is an increase in imports cannot be made merely by examining the end points of the period of investigation, reasoning that "a simple end-point to end-point analysis could easily be manipulated to lead to different results, depending on the choice of end points." Instead, competent authorities were required to examine trends. The Appellate Body emphasized that "what is called for in every case is an explanation of how the trend in imports supports the...finding that the requirement of 'such increased quantities'...has been fulfilled [emphasis added]."

The Appellate Body upheld the findings of the panel that for most steel products, the United States had failed to "provide a reasoned and adequate explanation of how the facts support its determination with respect to 'increased imports'...."

However, the Appellate Body reversed the Panel's finding that the USITC had not provided a reasoned and adequate explanation for its determinations regarding the increase in imports of two product groups, tin mill and stainless steel wire.

This issue arose because the six Commissioners comprising the USITC did not all define the "like or directly competitive products" in the same way. In the case of tin mill, four Commissioners defined tin mill products as a separate and distinct product category. The other two Commissioners considered tin mill as part of a larger category of products. The USITC combined the results of three Commissioners (made on the basis of different product definitions) into a "single institutional determination" - an affirmative finding - on tin mill products. The President then chose this affirmative finding as the overall determination of the USITC, over the other "combined results" that had reached a negative finding. The Panel said that the findings of the three Commissioners were "irreconcilable", because they were not based on an identically-defined like product. The Panel concluded that such findings could not produce a "reasoned and adequate explanation" for the USITC's single determination.

However, the Appellate Body stated that the Agreement on Safeguards "did not interfere with the discretion of a WTO Member to choose whether to support the determination of its competent authority by a single explanation or, alternatively, by multiple explanations". It ruled that "a panel may not conclude there is no reasoned and adequate explanation for a competent authority's determination by relying merely on the fact that distinct multiple explanations given by the competent authority are not based on an identically-defined like product." The Appellate Body made the same findings for stainless steel wire.

Nonetheless, the Appellate Body declined to "complete the analysis" and determine whether the USITC had, in fact, provided a reasoned and adequate explanation with respect to increased imports of tin mill and stainless steel wire. It said that it saw no point in doing so, since the U.S. safeguard measures on all products groups, including these two, had been found to be WTO-inconsistent for other reasons (i.e. unforeseen circumstances, parallelism). Since all of the measures had been "deprived of a legal basis", there was no need for the Appellate Body to undertake any further analysis with respect to tin mill or stainless steel wire. In other words, the fact that the Appellate Body reversed the Panel on tin mill and stainless steel had no real impact on the overall results of the appeal, since the safeguard measures for all product groups were still WTO-inconsistent.

C. "Parallelism": no "gap" permitted

The USITC had included imports from all sources for the purpose of determining injury, but then exempted its free trade partners (Mexico, Canada, Israel and Jordan) from the application of the safeguards measure.

The Appellate Body found that this breached the principle of "parallelism" in the Safeguards Agreement. It reasoned that "where, for purposes of applying a safeguards measure, a Member has conducted an investigation considering imports from all sources (that is, including any members of a free-trade area), that Member may not, subsequently, without any further analysis, exclude imports from free-trade area partners from the application of the resulting safeguard measure [emphasis added]."

In the view of the Appellate Body, there could not be a "gap" between imports covered by the investigation and imports subject to the safeguard measure. It added that such a "gap" could be justified under the Agreement only if the Member established "explicitly" in its report that imports from sources covered by the measures - that is, imports from sources other than the excluded countries - "satisfy, alone and in and of themselves" the conditions for the application of a safeguard measure [emphasis added].

In the present case, the Appellate Body agreed with the Panel that the United failed to comply with the requirement of "parallelism" between the products for which the conditions for the safeguard measures had been established, and the products that were subject to the measure.

D. Causation: Need to establish 'causal link' between 'increased imports' and 'serious injury'

The Panel found that the USITC had failed to provide a reasoned and adequate explanation on "causation", i.e. it had failed to demonstrate that a "causal link" existed between increased imports and serious injury, as required by the Agreement. The United States appealed on this issue.

The Appellate Body declined to rule on the issue of causation ("we neither reverse nor uphold those findings"), since the U.S. safeguards measure had already been found to be WTO-inconsistent on other grounds. Unusually, however, it indicated that it would provide "guidance" on causation issues, as had been requested by a number of participants in the appeal.

The Appellate Body reviewed a number of its earlier decisions, and then summarized the jurisprudence as follows: "the Agreement on Safeguards...requires that competent authorities demonstrate the existence of a 'causal link' between 'increased imports' and 'serious injury' (or the threat thereof) on the basis of 'objective evidence.' In addition, the competent authorities must provide a reasoned and adequate explanation of how facts...support their determination. If these requirements are not met, the right to apply a safeguard measure does not arise."

The decision of the Appellate Body in United States - Definitive Safeguard Measures on Imports of Certain Steel Products was released on November 10, 2003. The appeal was

heard by James Bacchus (United States), Georges Abi-Saab (Egypt) and John Lockhart (Australia).

III. President Bush Lifts Safeguard Measures on Steel

The Bush Administration on December 4, 2003, announced its long-anticipated decision to terminate the Section 201 steel safeguard tariffs that the President imposed in March 2002. The President justified the lifting of the tariffs on the basis that the U.S. steel industry had used the "breathing room" afforded by 20 months of tariff relief to restructure, consolidate, and reduce excess capacity.

A. Administration Will Continue Import Monitoring Efforts

During the press conference at the White House, Press Secretary Scott McClellan The stated that the Administration will continue to monitor steel imports, including through an import licensing system to ensure that steel imports are not entering the U.S. in quantities that might harm the domestic industry. In addition, he also reiterated the commitment to continuing steel subsidy negotiations at the OECD.

McClellan also stated that the industry "wisely used the breathing space provided by the tariffs, achieving increased productivity, low production costs, increasing their competitiveness against foreign steel producers, as well as negotiating new 'groundbreaking' labor agreements. In addition, McClellan noted that the Pension Benefit Guarantee Corporation had succeeded in relieving high pension costs that had plagued some domestic steel companies.

B. USTR Zoellick Highlights Industry Restructuring Efforts

USTR Zoellick, at the same press conference, commented that the safeguard program was imposed as a result of a difficult period for the U.S. steel industry, including unprecedented bankruptcies and job losses. Zoellick then cited the International Trade Commission's (ITC) Section 201 mid-term review findings to demonstrate that the Section 201 steel tariffs had achieved their purpose by giving the U.S. steel industry the time and opportunity to consolidate, restructure, and thwart further bankruptcies. In addition, Zoellick noted that industry restructuring and consolidation had (i) increased overall productivity (12.5% increase in the flat-rolled sector); (ii) stabilized steel prices (15-30% increase over February 2002 prices); (iii) improved profitability, including a $400 million profit reported in the first 12 months of relief by the flat-rolled steel sector; (iv) renewed stock market confidence in the U.S. steel sector, including increased stock prices for some steel firms; and (v) led to a surge in US steel exports to the world.

Zoellick also noted that changing economic circumstances around the world, including imports that are at their lowest level in a decade, had reduced steel price suppression in the U.S. market. Zoellick also pointed to increased world demand for U.S. steel including Russia, China, and other Asian markets. Finally, Zoellick noted that the costs imposed on consumers as a result of the safeguard tariffs should not be allowed to outweigh the benefits of the safeguard program. "Fortunately", he said, "the cost to the US economy was limited" and that the benefits of the safeguard program far outweighed the costs to consumers. "Going forward, however", he continued, "it is not the case." That calculation, according to Zoellick, motivated the President to terminate the safeguard.

During the question and answer period, Zoellick noted that the safeguard tariffs were intended as a temporary measure and that the ITC mid-term review was part of the 201 process from the start. Under repeated questioning, he also maintained that the WTO's recent ruling, concluding that the section 201 steel tariffs imposed by the Adminsitration violated the WTO safeguard agreement, and the threat of EU retaliation, had not been a decisive factor in the administration's decision. He concluded that the ITC's mid-term review report served as the primary basis for the administration's decision to repeal the tariffs.

OUTLOOK

Given the extremely high political profile of this dispute, and the dollar value of the measures, this is one of the most important Appellate Body decisions in recent memory. Although the Bush Administration did not cite the ruling as one of the reasons for lifting the steel safeguard, the ruling and the threat of retaliation by the EU and other trading partners no doubt influenced the Administration's decision.

Yet from a legal perspective, the Appellate Body's decision is unremarkable. The WTO has a well-established body of jurisprudence on safeguards, and the Appellate Body applied this jurisprudence in its review of the U.S. measures in a fairly conventional way. There were few surprises in the decision, and the outcome had been widely expected.

At the same time, it is worth noting that the Appellate Body's findings rest largely on fairly narrow procedural grounds. For example, with respect to "unforeseen developments", the Appellate Body was careful to emphasize at the outset that the "precise scope" of the issue before it was simply whether the United States International Trade Commission (USITC) had provided a "reasoned and adequate explanation" for its determination. It was not called upon to consider the broader issue of whether the factors cited by the United States (such as the Asian or Russian financial crises, or the appreciation of the U.S. dollar) could be considered as "unforeseen circumstances" for GATT/WTO purposes. Similarly, for "increased imports", the USITC was again faulted for failing to provide a "reasoned and adequate explanation" of how the facts supported its conclusions. With respect to "parallelism", the Appellate Body provided guidance, as it had in earlier cases, as to how the determination could be made in a WTO-consistent manner.

The EC and other trading partners were poised to retaliate against U.S. imports, and no doubt influenced the Bush Administration's decision to lift the safeguard. Under the *Agreement on Safeguards*, affected exporting countries may retaliate against the country that has imposed the safeguard measure by suspending "substantially equivalent concessions." The Agreement generally does not permit such retaliation ("rebalancing") for the first three years that a safeguard measure is in effect, "provided that" (i) the safeguard has been taken as a result of an absolute increase in imports; and (ii) the measure is in conformity with the Agreement. The EC argues that both of these provisos have now been removed by the Appellate Body decision, thereby granting it the right to retaliate. The EC has passed a regulation providing for the automatic application of sanctions five days after the adoption of the Appellate Body report (which took place on December 10).

It is worth noting, however, that the retaliation provisions of the *Agreement on Safeguards* are ambiguous, and have never been interpreted by a Panel. The application of

these provisions by the EC - and possibly other countries, including Japan - would thus move this dispute into largely uncharted legal waters.

Fortunately for trans-Atlantic and Pacific trade relations (as well as the multilateral trading system), the Bush Administration decided to lift the safeguard rather than face the threat (WTO-authorized or otherwise) of significant retaliation. The WTO ruling's influence in the Administration's decision is significant, and a testament to the effectiveness of a rules-based trading system.

Prospects for the WTO General Council Meeting of December 15: Acknowledgment of Progress, But No Major Breakthrough

SUMMARY

The General Council of the WTO met on December 15 2003 in Geneva, as required by the decision of WTO trade ministers at the conclusion of their conference in Cancun on September 14. It was then hoped that the agreement that could not be reached in Cancun would be achieved in intensive consultations at Ambassadorial level in Geneva and finalized by senior officials on December 15, thus relaunching the Doha Round after the Cancun setback.

Consultations since Cancun have yielded limited progress on the four priority areas of agriculture, non-agricultural market access ("NAMA"), the four "Singapore issues" and the cotton initiative. It became increasingly clear, however, that there would be no breakthrough on December 15. It was also expected that few, if any, senior officials from capitals would come to Geneva for the December meeting. Thus, consultations on how to relaunch the negotiations will continue into next year. Members will face greater challenges next year, including changes in the chairmanships of WTO bodies, and elections in the United States and the EU.

ANALYSIS

I. Overview of Efforts to Restart the Cancun Process

A. Centralization of Negotiations Under Chairman Castillo

All work in the Doha Round since Cancun has been centralized in a process of informal consultations under the leadership of the Chairman of the General Council, Ambassador Carlos Perez del Castillo of Uruguay. In agreement with the Director-General, Dr. Supachai, Castillo decided to suspend meetings of the Negotiating Groups set up at Doha in order to focus efforts on the resolution of the four major issues outstanding from Cancun – the frameworks for negotiations on agriculture and non-agricultural market access ("NAMA"), the Singapore issues and the initiative on cotton subsidies by four African countries. Throughout October and November, Castillo has held intensive consultations on these issues with Heads of Geneva delegations, having stated at the outset the objective of reaching by December 15 the position that should have been attained by the end of the Cancun conference. This would have implied agreement on a new draft – Revision 3 – of the Ministerial declaration as a basis for moving forward negotiations of the Doha Round.

B. Some Progress Made, But No Breakthrough in December

It appeared that Ambassador Castillo accepted that the restart to the Doha process based on a revised draft text would not be possible in December. Neither among delegations nor in the Secretariat was there any expectation that agreement would be reached on any substantive point by the end of this year. The consultations held the past two months had not revealed significant changes of position, or "flexibility" on the four issues under discussion. Ambassador Castillo reported after a "green room" meeting of among 30 delegations on 18 November that Members were committed to restarting the process, but wide differences

remained on the outstanding issues. Nevertheless, he indicated that most Members accepted building on the Derbez texts circulated in Cancun.

Many developing countries, in particular, stressed their wish to re-engage in negotiations as quickly as possible, in order to undo the damage of Cancun. Dr. Supachai has stated that strong support exists to restart the process, including after meeting of APEC members in Bangkok in October and of African ministers in Cairo in November. Castillo continued intensive consultations and held another stock-taking meeting on December 9.

II. Re-Engagement by the EU and US in the Doha Process

It has been said that there has been a lack of engagement, and certainly of leadership, on the part of the EU and to a lesser extent the United States, to the Doha process after Cancun. The EU announced in September a thorough internal review of its trade policy stance in the light of Cancun, and during this period – it has been unable to take clear positions in Geneva. The EU has also wished to make it clear that it is not a demandeur willing to make further concessions, or "payments" in order to secure early resumption of negotiations. The United States has been preoccupied with the Free Trade Area of the Americas (FTAA) Ministerial meeting in November, and the launch of new bilateral trade negotiations.

A. EU Completes Internal Review: Willingness to Reengage at the WTO

The EU Commission has now completed its internal policy review and has submitted to Member States a Communication on Reviving the Doha Round Negotiations, which includes recommendations on moving the process forward. EU trade ministers and the EU Parliament's Committee on External Trade approved the Commission's recommendations at their respective meetings on December 2. Foreign ministers at the General Affairs Council on December 8-9 also approved the recommendations. The EU's renewed mandate on the WTO should help provide a stronger basis for its interventions in Geneva, but it was too late to affect the outcome in December.

In its Communication, the Commission adopted a more lenient approach to the Singapore issues that would encourage WTO members to pursue plurilateral agreements if they could not reach a multilateral framework for investment or competition policy. The Commission would also take a more flexible approach than before on environment and geographical indications. The Commission, however, was critical of what it perceives as a modest approach to industrial market access and would seek more ambitious tariff reduction formulas, especially as applied to developing countries. The Commission also called for greater ambition in market access negotiations on services.

In regards to agriculture, the EU indicated its willingness to take a more progressive approach if other countries did the same. The Commission urged developing countries, including the "G-21" group to take a more reasonable negotiating approach and for developing countries to lower their own barriers.

B. US De-Emphasizes Importance of December 15 Meeting; Sees Momentum in Early 2004

USTR Robert Zoellick on December 2 reaffirmed the U.S. commitment to the WTO and expects that WTO Members will revive the Doha process by early next year. Zoellick remarked that the Derbez texts provide a "reasonable basis for moving forward" even though the United States does not agree to certain elements.

Earlier on the same day, Undersecretary of Commerce Grant Aldonas stated that the importance of the December 15 meeting should be de-emphasized. Aldonas believes that the process to revive the Doha process will require some time, and that the December meeting should not be considered a make or break date. He also stated that there is growing support among Members, including the EU, for reviving the Doha Round in the coming year.

III. Status of Chairman Castillo's Consultations on the Four Priority Issues

Chairman Castillo's consultations during the autumn have been informal and private; no reports have been produced. Chairman Castillo was currently completing a second round of informal consultations on four key issues. We understand, however, that in general delegations have restated known positions rather than offering flexibility, and that little real progress can be claimed. In part this has been due to the EU's difficulty in engaging fully until its policy review was completed. Nevertheless, there has been a much more positive and cooperative atmosphere among delegations in comparison with the period following the collapse of the Seattle Ministerial, when it took a full year for bitterness to subside and work to resume. Post-Cancun there has been a strong and general desire to move forward, and very little recrimination.

A. Agriculture: Little Movement in Positions

On agriculture, there has been no discernible progress. Castillo held an informal "green room" consultation on agriculture with a group of 30 key WTO Members from 20-21 November. Castillo expressed frustration after the meeting over the lack of movement on major issues. He stated that the lack of convergence would not allow him to produce a revised text.

During the latest discussions, Members had put forth previous positions from the Cancun negotiations. For example, the G-21 presented a text submitted at Cancun that proposed stronger disciplines on domestic support programs than contained in the Derbez texts, and setting a date for the elimination of export subsidies by a defined date. On market access, the G-21 called for an expansion of tariff rate quotas, and a reintroduction of a three-pronged tariff reduction formula (similar to the Uruguay Round approach). The EU renewed its call for an extension of the "peace clause" on agricultural subsidies, which was opposed by various G-21 and Cairns Group countries. The United States insisted on adopting a uniform and ambitious tariff reduction formula for all Members, including developing countries (with some exceptions).

B. Non-Agricultural Market Access: North-South Rift More Apparent

Chairman Castillo indicated that for industrial tariff negotiations, most Members could accept the text from Cancun as a basis for moving forward, although there was no agreement on the text as it stood. It also seems that agreement on modalities for the tariff negotiations will now be more difficult than it might have been at Cancun as North-South divisions have become more apparent. At the most recent meeting on November 27 among

30 key WTO Members, developed and developing countries took firm and opposing positions on the tariff reduction formulas and the sectoral tariff elimination initiatives.

In addition, in its policy review the EU has strongly criticized the Cancun text and the draft of the former Chairman, Ambassador Girard, as lacking ambition and making far too many concessions to developing countries (in line with its position that the more advanced among them should be contributing more to market access). The United States also seeks more ambitious tariff reduction targets for developing countries (based on a non-linear formula), as set out in its "tariff free world" proposal.

C. Singapore Issues: "2+2" or "1+3" Should Equal a Way Forward

On the four Singapore issues of trade facilitation, transparency in government procurement, investment and competition policy, Members have attempted to consider each issue based on its own merits. Members have been discussing ways to "unbundle" the issues, and will probably remove investment and competition from the Doha agenda. There remains uncertainty over the treatment of the other two less controversial issues.

The change in the EU position on the Singapore issues since Cancun has led to progress in these discussions. In the EU's policy review, it is implicitly accepted that multilateral agreements on all four are unattainable and that it makes no sense to insist on parallel treatment of them within the single undertaking of the Round. In consultations held by Deputy-Director General Rufus Yerxa (on behalf of Chairman Castillo) on December 3, the EU in effect offered to drop investment and competition from the agenda (the 2+2 formula, meaning two of the issues would be within the single undertaking – trade facilitation and transparency in government procurement – and the others would not). At the recent meeting most developing countries indicated a willingness to discuss trade facilitation. However, they still differed on whether to clarify modalities for negotiations in a working group (approach of the African Caribbean and Pacific countries), or whether to launch negotiations formally (approach of the US and other demandeurs). In recent meetings, Members have also raised concerns over their lack of resources to implement these agreements.

There was also some consideration of a 1+3 solution, implying the dropping of government procurement also, and this is clearly a possibility; trade facilitation from the beginning has been the least controversial of the four. The result of these discussions will be the conclusions drawn by the Chairman in his statement; if he concludes that the 2+2 formula is the most likely to be acceptable he will say so, and although his view will not bind the Members, it will have some force. The EU's surrender of investment and competition does not of course bind other Members that have supported them, such as Japan and Korea, but it is almost universally assumed that these two subjects will now be dropped from the Doha agenda. There are attempts may be made by the EU and its supporters to negotiate plurilateral agreements among willing participants, but that is by no means a simple solution. Moreover, developing countries have resisted a plurilateral approach to these issues.

D. Cotton: A More Realistic Approach

On the initiative to eliminate cotton subsidies, put forth by four West African countries some months before Cancun, Chairman Castillo has indicated that a majority of

Members felt that the issue should be integrated into agricultural talks, but given special attention. Consultations on the cotton initiative appear to have clarified the situation to the extent that elements of the problem which are not trade-related, such as the West African producers' demand for monetary compensation, would not be addressed in the WTO. The problem is seen as essentially part of the agriculture negotiations, but many delegations would be ready to accept that a solution should not have to await the overall conclusion of the Round.

IV. The December 15 Meeting: Lowering Expectations, But Not Another Major Setback

Most WTO Members no longer considered the 15 December meeting as a key date in which to relaunch negotiations of the Doha Round (as hoped at the end of the Cancun meeting). Rather, the EU and other key players urged Members to revive the Round in early 2004, and perhaps by the February meeting of the General Council.

Perhaps because of its inability to participate effectively in the consultations hitherto, the EU has urged Chairman Castillo to press forward with his consultations very early in the new year, with a view to reaching an agreement during February if possible. No doubt, the EU has in mind the fact that Castillo will leave as Chair at the end of the first meeting in 2004 of the General Council, which is currently scheduled for February 11-12. It is obviously sensible to make maximum use of his availability, but we understand that he does not expect to be consulting intensively on the Doha Round issues in January, a time when he will be heavily preoccupied with the construction of the new slate of Chairs of WTO Councils and Committees, and of the Doha Negotiating Groups. (It is rumored that Castillo will soon return to Uruguay to become Foreign Minister. His successor as Chair of the General Council is widely expected to be Ambassador Ishima of Japan.)

The implication of this is that what cannot be achieved in December is most unlikely to be achieved at the February meeting of the General Council. Castillo therefore sought to make best possible use of the December meeting, though the level of ambition for it was greatly reduced. Since there was no agreement on the issues on which he had been consulting he did not submit a new (third) draft of the Ministerial declaration. This was his original intention, and has been referred to as "Plan A".

Instead, Castillo would make a Chairman's statement reporting on progress since Cancun and setting out the current position on the issues on which he has consulted ("Plan B"). The statement would be personal, not negotiated, and would therefore not bind Members, but would have real value nevertheless. He was likely to be very cautious about proposing new deadlines or target dates, given the damage to credibility caused by repeated failure to meet past deadlines. Nevertheless, he was expected to suggest as a general objective agreement in mid-2004 on the negotiating modalities for agriculture and non-agricultural market access. He would probably propose that the suspended negotiating groups should resume their work in February (after the appointment of the new chairs), even though there may be some uncertainty about the basis on which they would do so, since the draft produced at Cancun is not generally accepted.

Ideally the Chairman's statement would be accepted without dissent or much discussion at the 15 December meeting. Some Members may choose to put positions on

record. It is possible that the EU's policy review and the changes of position it implies will be introduced and debated. The key points in this are: (1) acknowledgment of the important changes of position in relation to the Singapore issues; (2) maintenance of a tough line on agriculture and industrial tariff negotiations; (3) readiness to contribute to a solution of the cotton issue within the context of agriculture; (4) and in relation to development and market access issues – a markedly more demanding approach to the more advanced, as opposed to the poorer developing countries.

OUTLOOK

Prior to the December 15 meeting, Castillo held an informal gathering on December 9 to provide Members another opportunity to express their positions on the status of Doha Round negotiations. He expected to report these findings and the outcome of his intensive consultations by producing a Chairman's statement at the December 15 General Council. Moreover, the General Council was intended to be a low-key meeting, and Members were likely to adopt the Chairman's statement without much debate. It was already apparent that few governments planned to send senior officials, as was envisioned at the close of the Cancun meeting. Thus, there would be no major relaunch of Doha Round negotiations – but the meeting would not result in another breakdown, either.

Among the first priorities next year, Members must decide on the new Chairs for the Negotiating Groups (as well as most other WTO bodies), since it seems generally agreed that there should be a new slate. Not all Chairs will necessarily change, but most of them – certainly including agriculture and non-agricultural market access - are expected to do so. There may well be difficulty in finding generally acceptable candidates, particularly for agriculture. In any event, Chairman Castillo will spend much of the first two months of 2004 on the selection process, which could become a politically sensitive exercise. Furthermore, Castillo will probably not spend his last weeks as Chair on efforts to relaunch the Doha process, despite the desire of the EU and other Members that he do so by the February General Council meeting. The formal relaunch of negotiations will proceed sometime after the new Chairs take their positions, and under the direction of a new Chair of the General Council.

The implication of a low-key meeting of the General Council on December 15, particularly if there was no immediate resumption of intensive consultations in January, would be that WTO Members have accepted the inevitability of prolongation of the Round beyond the official deadline of January 1 2005. This was also implied by the nature of the EU Commission's Communication to its Ministers this month, which made no mention of the December meeting. The U.S. Presidential election in 2004, as well as the EU's enlargement and elections next year, almost certainly made prolongation of the Round inevitable in any case.

Overall, most WTO Members are keen to restart the process sooner than later despite their major differences on the four outstanding issues, among other Doha Round issues. The mood after Cancun has been mostly cooperative, unlike the long period of acrimony that followed the collapse in Seattle. The EU and United States have affirmed their commitment to the WTO, but resumption in their leadership of the process will require some time. Developing countries have also expressed remorse at the collapse in Cancun, and many have recognized that they have much to lose from an impasse in the Round. Moreover, the longer

the Round is stalled, the more difficult it might become to restart the process. Challenges include the possible proliferation of disputes in agriculture (with the expiration of the peace clause this year), and declining political support for the WTO among key players.

There is also an increasing awareness that progress in the most difficult issues such as agriculture reform cannot be achieved outside the WTO. The decision by FTAA ministers in Miami last month is a clear example – agriculture and some rules-related negotiations have been relegated back to the WTO as countries in the hemisphere find that they cannot deal effectively with these issues on a regional level. Bilateral and regional agreements can help to advance trade liberalization; however, comprehensive and ambitious liberalization cannot be pursued anywhere else but the WTO.

"WTO December General Council Meeting Ends Post-Cancun Process ; Negotiating Groups to Resume Work in 2004"

SUMMARY

The General Council of the World Trade Organization met on December 15-16, 2003, as instructed by Ministers at Cancun, but did not succeed in reaching agreement on the four priority issues which led to the Cancun breakdown, despite intensive consultations with that objective over the previous two months. It had been apparent for several weeks that there would be no breakthrough at the meeting (originally planned as a Senior Officials meeting) and therefore no "relaunching" of the Round in December. As a result, there was no sense of crisis among Members, many of whom had downplayed expectations of what could be achieved at this meeting. Moreover, few senior officials from capitals attended the meeting.

The "failure to relaunch" the Round can easily be misunderstood. There is no need to take any action to relaunch the Round. What has happened in the past five months is that the work has been concentrated in the WTO General Council, first to prepare for Cancun and subsequently in the hope of achieving in Geneva the mid-term agreement which escaped Ministers at Cancun; the Cancun process was in effect prolonged until December 15.

The reason for the lack of agreement both in September and December is that Governments are not yet ready to make the compromises and hard decisions which agreement requires – particularly on the issue of agriculture modalities. The Cancun process is now over and the work will revert to the Doha negotiating groups, which had been suspended shortly after Cancun in order to focus attention on the Council Chairman's consultations among Heads of Delegations in Geneva. It is agreed that the negotiating groups will resume, probably in February, after the appointment of a new slate of Chairpersons. The Trade Negotiations Committee (TNC), the coordinating body which has also been in abeyance, will also be reactivated. No new deadlines or benchmarks were set for the work in 2004. The TNC and the General Council will consider these matters – no doubt including, at some stage, the question of the overall deadline of January 1 2005, which is still officially maintained.

ANALYSIS

I. Chairman Castillo Attempts to Keep the Cancun Process Alive

Since the collapse of talks in Cancun, Chairman of the General Council, Ambassador Carlos Perez del Castillo of Uruguay has centralized all work on the Doha Development Agenda (or "Round") in a process of informal consultations under his leadership, in coordination with Director-General, Dr Supachai. They have suspended meetings of the Negotiating Groups set up at Doha in order to focus efforts on the resolution of the four major issues outstanding from Cancun – (i) the frameworks for negotiations on agriculture; (ii) non-agricultural market access; (iii) the Singapore issues; and (iv) the initiative on cotton subsidies by four African countries. Throughout October and until the December 9 stock-taking meeting in Geneva, Castillo has held intensive consultations on these issues with Heads of Geneva delegations, having stated at the outset the objective of reaching by December 15 the position which should have been attained by the end of the Cancun

conference. This would have implied agreement on a new draft – Revision 3 – of the Ministerial declaration as a basis for the further negotiations.

The atmosphere in which these consultations took place was generally cooperative and positive, in marked contrast to the acrimony which persisted for a full year after the failed Ministerial at Seattle. Delegations expressed strong commitment to multilateralism and the Doha process, and the same commitment has been repeatedly expressed at Ministerial level - in meetings of APEC, African and Central American Ministers for example. Nevertheless, the Geneva consultations have not produced significant flexibility or changes of position as compared to those taken at Cancun. The Chairman was forced to conclude that it would not be possible to submit a new draft of the declaration with any hope of agreement and settled for what became known as Plan B – a report by himself to the December 15 meeting on the status of consultations to date, with the aim to resume negotiations in 2004.

Ambassador Castillo has noted in his report to the General Council that "there does not seem to be a sense of urgency" in Geneva, although in the debate which followed many delegations committed themselves to try to meet the 2004 deadline. Explicit lifting of the time pressure of course risks relaxation of effort, but there is in fact a great deal of essential technical work to do in most areas of the negotiations which could not be done within the official time-frame. There will now be time to do it. Furthermore, the underlying reality is still that agriculture is the crucial issue and until it begins to make progress other issues will mark time.

II. The Chairman's Report to the General Council: Status of Discussion on Four Priority Issues and Suggestions on How to Move Forward

Ambassador Castillo's report to the General Council, made also on behalf of the Director-General, puts the best possible face on the situation, stressing the strong commitment of Members to multilateralism and to the completion of the Doha Agenda. But, it does not seek to hide the fact that there has been little real negotiation on the four priority issues since Cancun.

A. Castillo's Report on the Four Priority Issues

- **Agriculture.** The Chairman reported that consultations took as their effective starting point the "Derbez" text of September 13 and stated firm personal views on the way forward on the three "pillars" of the negotiations. On domestic support, he suggested negotiators should aim for "very substantial reduction of the total Aggregate Measure of Support or even contemplate its total phasing out over a timeframe to be negotiated." On market access he noted that the idea of a common approach for developed and developing countries seemed to be gaining ground – *i.e.* the notion of a tariff reduction formula which would "ensure that all Members will have to share the burden of tariff reductions, but that developing countries will not be called upon to assume a disproportionate part." On export competition the key outstanding issue is the end date for the phasing out of export subsidies for all agricultural products; the Chairman repeated his view that "this commitment to the elimination of all forms of export subsidies is a must for these negotiations to be successful."

On special and differential treatment he noted that "the concepts of Special Products and the Special Safeguard Mechanism for developing countries.have now become part of the approach in this area of the negotiations."

It should be recalled that what is under discussion is the "framework" for the agriculture negotiations, not the detailed modalities which should have been agreed in March 2003. Castillo did not suggest a new target date for agreement on the modalities.

- **Non-Agricultural Market Access**. Consultations were also directed towards agreement on a framework, using the Derbez text as a starting point. Castillo suggested that for the three major issues – the key element of the tariff formula, the definition of a sectoral component (e.g. zero-for-zero negotiations in specific sectors) and the degree of special treatment for developing countries – are "unlikely to be settled at the framework stage" and best left for negotiation at the subsequent modalities stage.

- **The Singapore Issues.** Castillo reported general acceptance that they should be "unbundled", meaning that each of the four should be treated on its own merits, and no longer as part of an umbilically-linked quartet. He suggested that it would be appropriate to continue exploring possible modalities for negotiations on two issues: Trade Facilitation and Transparency in Government Procurement. On the two more controversial issues of Investment and Competition he said that "What treatment, if any, the other two issues might receive in the future is a matter for further reflection at some appropriate time," thus coming as close as possible to suggesting that they be dropped from the single undertaking, if not from the entire Agenda. This is the "2+2" formula, meaning two inside the single undertaking and two outside, which has been the general expectation since Mr. Lamy's concession at Cancun.

- **The Cotton Issue Initiative.** Consultations focused on three "tracks": (i) procedure, meaning the question whether the cotton problem should be treated on a stand-alone basis or as part of the wider agriculture negotiations; (ii) trade-related substance, meaning essentially domestic support for cotton growers; and (iii) development-related aspects, meaning essentially technical and financial assistance to developing countries heavily dependent on cotton production. Members did not reach agreement on these issues, and discussions will continue. Castillo also suggested that specific development support measures might be implemented in the short term, since "multilateral negotiations require time."

B. Reactivation of the Doha Negotiating Groups; Turnover of Chairs in 2004

Finally, the Chairman proposed that the Trade Negotiations Committee (TNC) and all the negotiating bodies set up at Doha should be reactivated. The TNC, chaired by Dr. Supachai, in principle oversees the specifically "negotiating" elements of the Doha Agenda,

while the General Council is supposed to deal with ongoing work for which there is yet no negotiating mandate, such as trade facilitation. This has not been a helpful distinction, and since the mistaken decision that the TNC should report to the General Council – the Council has become the overall management body for the Round.

It is agreed that the slate of Chairmanships of the negotiating bodies will be renewed in January, along with those of the standing committees and Councils of the WTO. Not all Chairs will necessarily change, but most will certainly do so. Consultations on this will occupy most of Ambassador Castillo's time in January and he is not expected to resume consultations on the relaunching of the Doha process. He will leave the Chair of the General Council after its next meeting, in mid-February; many expect that his successor will be the Ambassador of Japan, Mr. Oshima. The negotiating groups will therefore resume their work, under new Chairs, in February and March.

Regarding the ongoing consultations on Trade Facilitation and Transparency in Government Procurement, WTO Deputy Director-General Rufus Yerxa will continue to chair the consultations. It is still possible that opposition to negotiations on government procurement among developing countries will result in what has been referred to as a "1+3" approach to the Singapore Issues, meaning that Trade Facilitation alone will be the subject of multilateral negotiations. This has been the least controversial of the four and probably offers the greatest potential benefits. No proposals have yet been made as to further work on Investment and Competition.

C. Members' Reactions to the Chairman's Report

The Chairman's report was followed by a long series of statements in which WTO Member delegations set out their own appreciations. Members were generally supportive, but not always in full accord with the Chairman. It cannot therefore be said that his conclusions and suggestions have been agreed.

The group of least developed countries for example maintained that all four Singapore Issues should be dropped from the WTO framework altogether and claimed that developmental concerns had not been properly addressed. Switzerland, on the other hand, said that all four Singapore Issues should remain part of the Doha mandate, while accepting the Chairman's 2+2 formula for deferred consideration of Investment and Competition. India insisted on extensive special and differential treatment of developing countries in the agriculture context and proposed the creation of a negotiating body on implementation issues and special and differential treatment. The EC warned that without stronger commitment, 2004 could be a lost year for the Doha Round. All statements were noted, and have the same status. The Chairman was nevertheless able to conclude that his proposal to restart the negotiations had been generally accepted. It is not however clear to what extent the Derbez text is acceptable as the basis for further work.

OUTLOOK

The conclusion we are forced to draw is that despite WTO Members' professed attachment to the 2004 deadline, they are in fact working to a different timescale. There is none of the urgency that would be demonstrated if delegations believed they had only twelve months in which to wrap up the negotiations. Nor, is it easy to believe that difficult decisions

in the Doha Round would be welcomed in Washington in a Presidential election year – and at a time when trade issues are politically sensitive.

If so, the current impasse should not be seen as a crisis or a failure in the multilateral trading system. It is unfortunately the case that WTO negotiations move more slowly than industry – or Governments – would wish, but when there are major systemic questions at issue, such as the reform of agricultural policies which is at the heart of this Round, quick solutions are not to be found. In the end, WTO negotiations move when Governments are ready, and real deadlines, such as the EU's CAP reform or expiry of U.S. trade negotiating authority, impose themselves.

Meanwhile, the importance of the WTO system does not rest only on the development of new rules or even further liberalization. Rather, an important function of the WTO is the means by which potentially explosive trade issues are mediated and resolved. In the past few weeks, more important than slow progress in the Doha Round – has been the lifting of U.S. safeguard measure on steel. There is little doubt that the handling of this issue through the WTO legal system, and the pressure that led to the lifting of the safeguard measure, were infinitely preferable to the bilateral arm-wrestling between the EU and the United States. Both trading powers might also soon face more difficult, but perhaps necessary challenges to their agricultural subsidy programs with the expiration of the "peace clause" in January 2004. Moreover, with the accession of China, and soon of Russia, the WTO's mediating role has become even more important, and this should not be obscured by understandable impatience with the inevitably slow progress of the Doha Round.