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WTO AND REGIONAL TRADE AGREEMENTS MONTHLY REPORT

December 2004

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

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United States

Senate Expected to Pass Miscellaneous Trade Act Before Adjourning

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Traditionally, Congress adopts the non-controversial miscellaneous trade bills by unanimous consent. However, Senate holds have prevented adoption of the 2004 Act by unanimous consent.

The Senate leadership has threatened to invoke cloture, and force an end to debate on the Act, if Senators refuse to remove holds on the bill. The Act commands a strong bipartisan majority and is expected to pass easily.

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Panelists included academics, practitioners, and private sector companies active in outsourcing in India and elsewhere. Panelists debated the merits of outsourcing, including the benefits to the IT sector and the economy overall. Panelists also discussed the pros and

cons of outsourcing, how Indian businesses benefit from offshoring, and concerns by labor groups.

United States Highlights

We also want to alert you to the following developments:

- US And Uruguay Sign BIT.
- USTR Initiates Review to Consider Azerbaijan as GSP Beneficiary.
- Byrd Complainants File Retaliation Requests.

Free Trade Agreements

CAFTA Expected to Trigger Contentious Debate in Upcoming 109th Congress

Panelists from business, labor and Congressional staff at an event hosted by the Global Business Dialogue (GBD) on November 9, 2004, confirmed that Congressional consideration of the US-Central America Free Trade Agreement ("CAFTA") would trigger a divisive and partisan debate. One Hill staffer, for example, suggested that the Bush Administration lacks the votes to pass CAFTA in Congress in its present form. Panel discussion focused on concerns over CAFTA's labor provisions as well as rules of origin. With President Bush having won re-election, panelists acknowledged that CAFTA is unlikely to be re-negotiated. Thus, panelists predict a contentious debate ahead as Congress considers enacting the most controversial FTA to date.

Free Trade Highlights

We also want to alert you to the following developments:

- Zoellick Notifies Congress Of Administration's Intention To Negotiate FTAs With United Arab Emirates And Oman.
- Zoellick Discusses Bilateral FTAs At APEC Ministerial.
- US And Australia Finalize Internal Arrangements To Implement US-Australia FTA.

US-European Union

US And EU Hold WTO Consultations in Aircraft Dispute; EU Requests WTO Compliance Arbitration Regarding US Legislation To Repeal FSC/ETI Act; Lifts Former Sanctions

On November 4-5, 2004, the United States and the European Union held a first round of World Trade Organization (WTO) consultations on the cases that they filed against each other on October 6, 2004 regarding their alleged subsidization of Boeing and Airbus, respectively. Both parties used the consultations to give each other the opportunity to ask

questions about their respective subsidies, and afterwards refused to comment on the substance of the discussions. A next round of discussion has not yet been scheduled.

In a related development, the EU on November 5 requested a WTO panel to judge if the recently signed "American Jobs Creation Act of 2004" (the "Jobs Act") is consistent with the WTO ruling that corporate tax cuts provided to US companies under the Foreign Sales Corporation/Extraterritorial Income (FSC-ETI) tax bill were an illegal export subsidy. US officials have claimed that the move by the EU was motivated by the EU's discontentment over the US's WTO case regarding the subsidization of Airbus.

US-Latin America

FTAA

FTAA Fate Still Uncertain; Latin American Countries Expect Little Change in US-Latin America Relations

With the 2004 election cycle now complete, President George W. Bush has begun the work on shaping his policy priorities for the next four years. Congressional leaders have also begun examining committee structures and legislative priorities for the 109th Congress, which will convene in January 2005. Regardless of whether US Trade Representative (USTR) Robert Zoellick remains in his position, the Bush Administration and USTR are expected to continue pursuing the "competitive liberalization" strategy as the central focus of U.S. trade policy, including as it applies to Latin America. This policy aims to achieve liberalization at all levels, including bilateral free trade agreements (FTAs) with Latin American and other trading partners, as well as regional and multilateral negotiations at the FTAA and WTO.

The fate of ongoing U.S. trade negotiations in Latin America remains unclear. Negotiations with the Andean countries and Panama have encountered some difficulties, and may not be completed within current deadlines. In addition, the outlook for the Free Trade Area of the Americas is equally unclear. The Bush Administration is expected to continue pushing for completion of the FTAA, but deadlock with Brazil could block meaningful negotiations.

NAFTA

Fox Administration Welcomes President Bush's Second Term; Will Seek Resolution of Trade and Immigration Issues

The Fox administration has outlined three main policy objectives to advance the bilateral agenda with the United States:

- Make progress on migration reform and explore an immigration agreement.
- Modernize and streamline procedures at the U.S.-Mexico border to increase security for the flow of goods and people.
- Deepen economic integration with the North American region and expand the North American Free Trade Agreement (NAFTA).

Trade policy analysts, however, are skeptical that the US and Mexico will make significant progress on these issues, especially immigration reform. Most analysts predict little change in U.S.-Mexico relations during Bush's second term.

Multilateral

WTO Appellate Body Issues Mixed Ruling in Argentine Challenge to U.S. "Sunset Review" Antidumping Laws

The WTO Appellate Body has delivered a mixed ruling in a challenge by Argentina to the "sunset review" provisions of U.S. anti-dumping law. (WTO rules provide that anti-dumping orders are supposed to expire, or "sunset", after five years, unless the investigating authority determines that expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.) Many exporters from Latin America and elsewhere are affected by the continuation of antidumping orders by U.S. authorities beyond the five year limit.

The Appellate Body affirmed the ruling of the Panel that the "waiver" provisions of U.S. anti-dumping law and regulations, under which respondent companies can waive or be deemed to have waived their rights to participate in the sunset review proceedings, are WTO-inconsistent. However, the Appellate Body reversed the Panel's finding that the U.S. *Sunset Policy Bulletin* was WTO-inconsistent as such, faulting the Panel for the absence of a "qualitative assessment" with respect to whether the Department of Commerce (DOC) regards the Bulletin as "conclusive." It thus left the issue of the WTO-consistency of the Bulletin to be decided in a future dispute. The Appellate Body also rejected Argentina's challenge to the injury determination of the U.S. International Trade Commission (USITC).

REPORTS IN DETAIL

SPECIAL REPORT

Administration and Congress Mull Post-Election Trade Priorities

SUMMARY

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The 109th Congress is expected to consider several trade related issues, including the Central America Free Trade Agreement (CAFTA), and whether to oppose extension of Trade Promotion Authority. The relevant congressional committees that oversee trade will not experience any major leadership or membership shifts, though Representative Phil Crane's (R-Illinois) defeat has left pending the chairmanship of the House Subcommittee on Trade.

ANALYSIS

I. Trade Priorities Unlikely to Shift; New Leadership at Commerce and USTR Possible

In his first post-election press conference, President Bush indicated that his victory has earned him "political capital" and that he would make use of it during his second term. Key trade sources have suggested that President Bush will continue to push his "competitive liberalization" trade policy, including a continued focus on bilateral free trade agreements (FTAs) and completion of the Doha round at the World Trade Organization (WTO). FTAs with the Andean region, Southern Africa and Thailand remain outstanding. In addition, the Administration will need to shepherd completed agreements with Central America through Congress.

Possible changes in the President's Cabinet remains the center of post-election speculation. The President has stated that he has begun the process of reflecting on the composition of his Cabinet, including his economic/trade team:

A. Department of Commerce:

Aides and insiders have suggested that Commerce Secretary Don Evans intendeds to leave his post and return to Texas; his wife and son have already relocated there. Secretary Evans had been rumored to be a potential replacement to White House Chief of Staff Andrew Card, though insiders see that move as unlikely given Card's desire to remain at his post. The leading name to replace Evans at Commerce is Mercer Reynolds III, the finance chairman of the Bush-Cheney '04 campaign.

B. Department of Treasury

Treasury Secretary John Snow joined the Administration midway through the President's first term, and is expected to remain in his position for at least the first year of Bush's second term. The President's desire to overhaul the tax code is a policy priority well suited to Snow.

C. USTR

Rumors about USTR Robert Zoellick's departure have been swirling for almost a year. Reported frustration with meddling by White House Senior Counselor Karl Rove, and the impasse at Doha round negotiations led some observers to suggest that Zoellick would depart prior to 2004, possible to head Freddy Mack. However, Zoellick has remained at USTR and his last year of service has been effective, particularly at the WTO. Despite resurgence in rumors about his departure, USTR staffers have suggested that Zoellick intends to stay.

Undersecretary of Commerce for international trade Grant Aldonas and former deputy assistant to the President for international economic affairs Gary Edson have been mentioned as potential replacements for Zoellick.

One of the Administration's immediate trade-related priorities will be to seek TPA renewal, which is set to expire on July 1, 2005. Under the Trade Act of 2002, President Bush has until March 1, 2005, to file his request for an extension of TPA until July 1, 2007. The President's request for an extension is automatically granted unless either chamber of Congress adopts a resolution of disapproval. Key congressional leaders have indicated that major opposition to an extension TPA is unlikely. The strengthened Republican majorities in both the House and Senate make adoption of a disapproval resolution even more unlikely.

II. Congressional Trade Leadership Remains Largely Unchanged

The November 2nd election results produced few major changes in Congress. The Republicans were able to solidify further their control of both chambers, 231-201 in the House and 55-44 in the Senate.

A. Senators Grassley and Baucus to Continue Leading Finance Committee

Senator Charles Grassley (R-Iowa) will retain his chairmanship over the Senate Finance Committee, with Senator Max Baucus (D-Montana) remaining the ranking member. Congressional leaders must determine the new committee structure for the 109th Congress as a result of the Republican congressional electoral gains. The changes likely will result in one less Democrat on the Senate Finance Committee, and potentially one more Republican. Currently the committee is split 11-10.

The defeat of Senator Tom Daschle (D-S. Dakota), and retirement of Senators John Breaux (D-Louisiana) and Bob Graham (D-Florida) will result in at least one, if not two, Democratic vacancies on the Finance committee. If the new Minority Leader, currently anticipated to by Senator Harry Reed (D-Nevada), seeks a seat on the committee to replace Daschle, Democrats may not have to worry about appointing further members. Should Reed forgo a seat on the committee, potential candidates include New York Senators Charles Schumer and Hillary Clinton.

The Republicans will replace retiring Senator Don Nickles (R-Oklahoma) and may have an additional seat to fill given their expanded majority. Senator Michael Crapo (R-Idaho) is currently in line to fill one of the vacancies, with Senators George Voinovich (R-Ohio) and John Ensign (R-Nevada) rumored as possible candidates.

B. House Subcommittee on Trade Seeks New Chairman

While the senior leadership of the House Ways and Means Committee remains stable, Chairman Bill Thomas (R-California) will need to find a replacement to chair the Trade Subcommittee after the defeat of Representative Phil Crane (R-Illinois). Representative Dave Camp (R-Michigan) is the most senior member of Ways and Means without a subcommittee chairmanship. However, Camp may opt to take over the Subcommittee on Oversight, leaving Representative Jim Ramstad (R-Minnesota) next in line.

III. Senator Grassley Quick to Layout Priorities for 109th Congress

Senator Grassley, wasting little time after the election, has outlined his policy priorities for the 109th Congress. With respect to trade, Grassley highlighted the passage of CAFTA as a top Finance Committee priority. Grassley's memorandum notes that opposition to CAFTA is expected from union groups and sugar producers. Beyond CAFTA, Grassley also noted President Bush's Trade Promotion Authority renewal request as a significant trade policy item for 2005.

OUTLOOK

The Bush administration will focus on shuffling the Cabinet as December approaches. Several sources indicate that, though several current members of the Cabinet are likely to depart, the process will be a gradual one stretching well into the first year of Bush's second term.

It is unclear if Senate Democrats will delay to confirmation of Bush's new Cabinet nominees. The loss of seats may force Democrats to take a more conciliatory tact in the 109th Congress. However, it is also possible that Senate Democrats could stall or block approval of Cabinet officials to gain negotiating leverage in other areas. Both parties usually give Presidents broad latitude in Cabinet appointments, though the controversy generated by some appointees, such as Attorney John Ashcroft, may leave Senators wanting to be more probing about the President's cabinet choices.

The Administration will likely have a full plate in terms of trade issues before the 109th Congress. Beyond CAFTA and TPA renewal, FTAs with the Andean region, Bahrain and Panama will require congressional action. USTR has indicated that it would like to submit the Panama FTA as part of the CAFTA package, which will also include the Dominican Republic. Despite the strengthened Republican majority, the Bush Administration will need to spend political capital to garner enough congressional votes to pass CAFTA. The increased majority may, according to some staffers on the Hill, lead President Bush to seek congressional approval of CAFTA sooner than originally anticipated.

UNITED STATES

Senate Expected to Pass Miscellaneous Trade Act Before Adjourning

SUMMARY

Important trade-related legislation awaits the Senate when it returns for its "lame duck" session on November 16, 2004, including the Miscellaneous Trade and Technical Corrections Act of 2004 (H.R. 1047) (the "Act"). The Act was expected to be a non-controversial piece of legislation to extend suspensions on tariffs for certain chemical products that expired at the start of 2004, among other things. Instead, Senators have placed numerous holds on the bill to advance unrelated trade and non-trade issues.

Traditionally, Congress adopts the non-controversial miscellaneous trade bills by unanimous consent. However, Senate holds have prevented adoption of the 2004 Act by unanimous consent.

The Senate leadership has threatened to invoke cloture, and force an end to debate on the Act, if Senators refuse to remove holds on the bill. The Act commands a strong bipartisan majority and is expected to pass easily.

ANALYSIS

Congress typically approves a miscellaneous trade bill every few years to provide for temporary duty suspensions and other technical corrections to U.S. customs procedures. The current version of the miscellaneous trade bill has languished since the 107th Congress. During 2004, a number of senators placed holds on the Act to advance their own trade and non-trade related agendas. Earlier this year Senator Shelby (R-Alabama) placed a hold on the bill to extract concessions on protections for sock producers in his state. Senator Kennedy (D-Massachusetts) also placed a hold on the bill to secure a Senate vote on increasing the minimum wage.

In September 2004, the Senate finally overcame holds on the bill and approved its version of H.R. 1047, thus allowing a House-Senate conference to resolve differences between the House and Senate versions.

Key non-tariff suspensions provisions contained in the final version of the Act include:

- **Armenia and the Trade Act of 1974** – The bill would repeal the application of title IV of the Trade Act of 1974 against Armenia. Title IV provides for the maintenance of discretionary trade treatment of former Soviet republics, including the Jackson Vanik Amendment. Repeal of title IV would make Armenia eligible for permanent normal trade relations with the US.

- **Repeal of the 1916 Anti-Dumping Act** – Ruled inconsistent with international trade obligations by the World Trade Organization in 2000, the 1916 Antidumping Act allows U.S. companies to seek civil

compensation (up to treble damages) against those importing "dumped" goods. The European Union and Japan, whose companies have been subject to proceedings under the 1916 Antidumping Act, have threatened to retaliate if the US does not repeal the law and end existing cases before US courts. The Miscellaneous Trade Act only includes an end to future cases.

- **Laos PNTR** – The subject of controversy for some years, the Miscellaneous Trade Act would grant PNTR to Laos. Some lobbying groups oppose PNTR for Laos because of Laos' alleged human rights abuses.

OUTLOOK

The conference report for HR 1047 is before the Senate, but has been blocked because of holds placed by Wisconsin senators Russ Feingold (D) and Herbert Kohl (D). Both Kohl and Feingold object to granting PNTR to Laos. The holds prevent the Senate from adopting the final bill by unanimous consent.

The Senate is expected to stay in session for only three days, and unless Senators Feingold and Kohl remove their holds, the Senate can only vote on the bill with the invocation of cloture (a parliamentary maneuver that limits further debate on a bill).

Senate Majority leader Bill Frist has threatened to file for cloture on November 15th unless the holds on the bill are lifted. Over 70 senators have signed a letter from Senators Grassley (R-Iowa) and Baucus (D-Montana) urging Frist to act on the bill during the lame duck. The cloture motion and bill are expected to pass with overwhelming majorities.

The House approved the Conference report prior to the election recess. Approval by the Senate would send the measure directly to President Bush for his signature.

Conference on Outsourcing in Asia: Moving Beyond the 'For and Against' Debate

SUMMARY

On October 28, 2004, the Asia Society hosted a conference in Washington DC on the economic effects of outsourcing (or offshoring) as well as the implications for the US, India and other Asian countries.

Panelists included academics, practitioners, and private sector companies active in outsourcing in India and elsewhere. Panelists debated the merits of outsourcing, including the benefits to the IT sector and the economy overall. Panelists also discussed the pros and cons of outsourcing, how Indian businesses benefit from offshoring, and concerns by labor groups.

ANALYSIS

On October 28, 2004, the Asia Society hosted a half-day conference on "Outsourcing to Asia: Moving Beyond the 'For and Against' Debate." Dr. Catherine Mann of the Institute of International Economics gave the keynote address and spoke on offshoring activities with a focus on the information technology (IT) sector. The conference also included panel discussions on the pros and cons of offshoring (or outsourcing), how Indian businesses benefit from offshoring, labor concerns about offshoring and related issues.

I. Keynote Speaker Dr. Catherine L. Mann Estimates Net Gains from Offshoring/Outsourcing

Dr. Catherine L. Mann, Senior Fellow at the Institute for International Economics (IIE) began by addressing the role of offshoring in the U.S. economy, and the example of the IT sector. Offshoring occurs as a fragmentation of the production process. Innovation in this process has resulted in 70 to 90 percent declines in IT prices over the last five years. Globalization has further reduced IT prices by 10 to 30 percent. The decline in prices contributes an estimated 0.3 percent to the U.S. Gross Domestic Product (GDP), or about $250 billion during this period.

The effects of globalization and declining prices have also produced macroeconomic gains. For example, the price elasticity of the U.S. IT industry demand is greater than one, meaning that a 10 percent drop in price has led to more than a 10 percent rise in investment. Dr. Mann noted that along with investment gains, half of all U.S. productivity growth is attributed to IT gains. Productivity growth has also raised the competitiveness level of U.S. affiliates abroad.

A. Uneven Diffusion of Globalization

Dr. Mann remarked, however, that the effect of globalization is unevenly diffused in the U.S. economy. The services sector and users of IT gain more from globalization as compared with small and medium-sized enterprises ("SMEs"). High growth areas of the U.S. economy have a large degree of complementing IT capital and labor. Dr. Mann noted, for example, that U.S. companies buy more IT hardware from overseas than they sell, which benefits these companies so long as it raises their competitiveness abroad. Moreover, for

every US$1 spent on IT hardware, a company needs to spend US$2.20 in services to operate the hardware. Thus, U.S. productivity growth benefits from the services sector, which accounts for a large trade surplus with other nations.

In contrast, SMEs over the past 5 years have not benefited as much as larger companies since they have purchased fewer IT goods and services. SMEs, for example, prefer to have their workers in close geographic proximity, contrary to basusiness models.

Dr. Mann observed that outsourced jobs have become commodities; remaining U.S. jobs require specific skills and local proximity, for example in-person expertise. IT jobs that remain in the US have changed from those with programming skills to system integration and network development. As a result, IT outsourcing can generate employment for high-wage workers but the challenge is to re-employ lower wage IT earners.

B. Lessons from Outsourcing

According to Dr. Mann, the main lesson learned from outsourcing is to buy IT products at a low cost and diffuse it to other economic sectors, particularly services, in order to expand GDP. Likewise, being too large of a net producer and not consuming enough IT lowers social savings. For example, in the case of some East Asian nations, their dependence on exports and limited import levels can result in structural problems. Dr. Mann also estimates that gains in consumption and investment add more to GDP than exports.

Dr. Mann noted that although the current WTO "Doha Round" is more focused on agriculture, countries must strive towards achieving services liberalization.

II. Panel I: Discussion of Outsourcing in Practice

A. Mr. Vivek Kulkarni of B2K Corp Describes Growth of Outsourcing in India

Mr. Kulkarni, the CEO of B2K Corp, discussed the history of US IT outsourcing activities to India, beginning in 1984 with a Texas Instruments software development venture in Bangalore. At that time, it took the companies three years to develop a proper telecommunication connection to the US. Presently, a U.S. business can set up a venture in India in a matter of weeks. India is also moving towards sophisticated software programming and semiconductor development. The growth of Bangalore IT companies underscores the importance of intellectual property (IP) protection.

Mr. Kulkarni cited the example of McKinsey Company's knowledge center in Bangalore as helping to raise Indian professional quality standards. The center is involved with back office operations and employs hundreds. Overall demand is strong for such jobs, for example, one IT company recently received 87,000 applications for 700 advertised positions.

Mr. Kulkarni points out that the growth of IT professional jobs in Bangalore has created additional jobs and export opportunities. Indian IT professionals are often under 30 years old and have a higher than average consumption rate. They appreciate U.S. culture and tastes, including in clothes and other products and services.

In response to a question on whether he is concerned about jobs moving from India to countries that can compete at a lower cost, Mr. Kulkarni stated that it is important that every country gains from trade. He remarked that America has a progressive financial industry and perhaps U.S. universities can support India in development of other economic sectors.

Regarding a question on the average cost of doing business in India versus the US, Mr. Kulkarni replied that the typical salary for a recent Indian college graduate is US$6,000. Indian call center workers earn $1.10 per hour; seasoned employees earn roughly $1 to $2 per hour more. US outsourcing to Indian IT companies creates an average cost savings of 50 cents on the dollar.

B. Ms. Anupam Ahuja Describes Rapid Growth of Office Tiger

Ms. Anupam, Director of Marketing and Communications at OfficeTiger commented on the history of the company that handles outsourcing to India, and how it has grown from two people in 1999 to 2,500 employees in 2004. OfficeTiger has an onsite-offshore business model that supports white-collar jobs, including call centers and other back-office services.

C. Mr. Mark Riedy of Andrews Kurth, LLP Discusses Outsourcing Restrictions

Mr. Riedy, partner of the firm Andrews Kurth LLP gave a presentation on "US and Indian Government Impediments to Offshore Outsourcing/Call Centers, Proposed Visa Restrictions and Indian Investment Considerations." He estimates that U.S. companies have outsourced 35 projects valued at $1billion or more each. He also commented that U.S. companies that are not outsourcing are questioning why they are not participating.

Mr. Riedy discussed various legislative restrictions on outsourcing being considered at the state and national levels in the US. At the state level, Reidy explained that 196 bills are being considered in state houses that would restrict offshoring and outsourcing activity including call centers. At this stage, 4 of these bills have been enacted while 2 are pending. For example, if a company resides in a particular state with anti-offshoring laws and conducts offshoring regardless, the company could be at a disadvantage when bidding for a state government contract.

At the federal level, Reidy indicates that Congress has considered 82 bills that would restrict offshoring and outsourcing activity including call centers. The Thomas-Voinovich Amendment enacted in January 2004, for example, imposes a one-year narrow ban on the offshore outsourcing of new government contracts involving the Departments of Treasury and Transportation under OMB Circular 76. The proposed Dodd Amendment aims to make the Thomas-Voinovich Amendment permanent and would extend the ban to all federal and state contracts that receive federal funding.

D. Panelists Respond to Questions

In response to a question if the U.S. backlash against outsourcing has hurt Indian business, Mr. Kulkarni asserted that legislation is not a real solution and will only hurt the US in the long run. He stated that multinational corporations (MNCs) do not have a problem with outsourcing, but acknowledged that outsourcing may make more vulnerable SMEs takeover targets.

Mr. Riedy noted that the US has the Foreign Corrupt Practices Act and tax incentives to make U.S. companies more competitive abroad. Ms. Ahuja added that protectionist measures like U.S. steel safeguards are ineffective, and the real issue is to create the demand for more jobs. Ms. Ahuja opined suggested that this demand can be created through innovation, education and leadership.

III. Panel II: Future Directions in Outsourcing

A. Mr. Ron Blackwell of the AFL-CIO Comments on Labor Implications

Mr. Blackwell, Director for Corporate Affairs of the AFL-CIO, remarked that outsourcing and trade are intrinsically important, but believes that international production rules disadvantage labor interests. Mr. Blackwell views outsourcing as a wage arbitrage operation which does not provide long-term economic benefits. To make outsourcing a more equitable business practice, Mr. Blackwell proposed the following actions:

- Modify company incentives to account for human rights concerns;
- Remove U.S. corporate tax subsidies for offshore activities;
- Initiate a U.S. national competitiveness strategy; and
- Reduce the current account deficit.

B. Mr. Bruce Josten of the U.S. Chamber of Commerce Urges Focus on U.S. Economic Health

Mr. Josten, Executive Vice President of the U.S. Chamber of Commerce, asserts that the US should focus on advancing its own economy. He commented, for example, that the US should lower its dependence on foreign oil and open ANWAR (Alaskan wilderness region) for drilling. Moreover, the lack of IP protection abroad costs U.S. companies more than $250billion in annual revenues.

Mr. Josten also commented that U.S. competitiveness is hampered by structural concerns including weaknesses in health and education. He insisted that health insurance costs are detracting from U.S. jobs. Regarding education, the number of U.S. college graduates in math, science and engineering was down to 60,000 in 2003. In contrast, for the same fields in 2003, China graduated 195,000 and the EU 100,000.

C. Mr. Josh Bivens of the Economic Policy Institute Comments on Income Disparity

Mr. Josh Bivens, Trade Economist at the Economic Policy Institute observed that outsourcing makes nations wealthier as a whole, but clearly some groups gain while others lose. Over the last 20 years, U.S. capital has risen while blue-collar wages have fallen. Moreover, income disparity has grown, particularly at the lower end of the scale.

D. Mr. Jeff Baker of BearingPoint Comments on Outsourcing Gains and Costs

Mr. Jeff Baker, Director of IT Outsourcing at BearingPoint remarked that outsourcing operations are moving upscale to the $90,000 to $110,000 salary level, making it more difficult to find these resources. Higher skilled jobs have been created in China, India and other nations due to their strong education systems. Outsourcing, however, has hidden costs including attrition, higher job-hopping rates and training costs. Moreover, application resource development costs are growing with increased client contact.

IV. Additional Questions from Participants

Participants at the conference asked questions of panelists, including the benefits and drawbacks of outsourcing.

In response to a question on the benefits of outsourcing, Dr. Mann remarked that trade with a poorer country creates a win-win outcome. Moreover, trade can benefit a country if that country raises its innovation rate. In addition, domestic policy dictates how much a country benefits from trade and how well the economic benefits are distributed.

In response to a question on the U.S. training costs for outsourcing, Mr. Baker noted that a large part of these costs involve the "churn rate" or movement in the employment market. For example, India has a large number of IT workers that change jobs every 6 to 8 months.

Mr. Blackwell then asserted that U.S. companies are not committing enough resources to train workers as they are to finding cheaper labor abroad. Mr. Josten noted that the US spends $60 to $70 billion on training annually, but agreed that more should be done to enhance trade adjustment assistance. Mr. Josten suggested that the U.S. social support system should go beyond Social Security. Nevertheless, other nations have experienced economic problems with social systems that are too generous. Mr. Blackwell also commented on the importance of labor and environmental protections in pending free trade agreements (FTAs). Mr. Josten disagreed and cautioned using FTAs to impose U.S. labor and environmental standards on developing countries.

In response to a question on whether the Senator Kerry plan to fix outsourcing problems would have been effective (since Bush has since been re-elected), Mr. Bivens remarked that the plan would have made a minor impact but it was nevertheless important to draw attention to the issue.

In response to a question on whether other countries are feeling the negative effects of outsourcing, Dr. Mann noted the EU is affected by offshoring to new EU Member States. The atmosphere in the EU is different, however, since it has greater social protection programs – which have resulted in 10 percent or more unemployment rates. The US in contrast has a larger wage disparity.

Mr. Josten also remarked that nations view outsourcing differently. The US, EU, Canada and Japan are dealing with aging populations and must figure out how to pay for the social support programs. For example, the US employment market used to be characterized by lifetime employment; now, the average job tenure is about five years.

OUTLOOK

The expansion of India, China and other East Asian economies ensures that outsourcing will remain a prominent and controversial issue. Business trends indicate that offshoring activities to India and abroad are on the rise, especially among large American companies and other multinationals. Many pursue offshoring to take advantage of lowers costs of manufacturing and services abroad, spurred on by technological advances. Moreover, companies are doing so to survive as many of their competitors seek to reduce costs by outsourcing after-sales, human resources, IT and other services abroad.

On the other hand, U.S. state and federal measures have been proposed to discourage these business practices. Weak job markets in certain parts of the country coupled with the election cycle has turned outsourcing into a political debate, and given rise to protectionist sentiments. Senator Kerry had proposed more strict requirements on companies that outsource jobs. President Bush's recent re-election is unlikely to prompt stringent initiatives from the White House against outsourcing. Moreover, few federal or state measures that would restrict outsourcing have been enacted.

Regardless of the merits or setbacks from outsourcing, it is apparent that such activities will result in greater U.S. job displacements over time. Thus, lawmakers expect to devote more attention in the near term to enhancing social assistance programs, training and retention, encouraging U.S. capital growth and innovation, and addressing structural issues like health and education. If the U.S. economy is unable to maintain its competitiveness, then outsourcing will become one of many symptoms of lagging economic health.

United States Highlights

US And Uruguay Sign BIT

On October 25, 2004, Deputy United States Trade Representative (USTR) Peter Allgeier and Uruguayan Minister of Economy and Finance Isaac Alfie signed the United States-Uruguay Bilateral Trade and Investment Treaty (BIT). The US and Uruguay first announced their intention to negotiate a BIT on November 18, 2003, during the Free Trade Area of the Americas (FTAA) Ministerial meeting in Miami, Florida, and concluded negotiations on September 7, 2004.

The US-Uruguay BIT seeks to strengthen trade and investment ties between both countries and establishes a framework that will:

- protect US investments;
- promote market-oriented policies;
- support the development of international law standards consistent with these objectives;
- indirectly promote the export of US goods and services; and
- The BIT entered into force when it was signed.

USTR Initiates Review to Consider Azerbaijan as GSP Beneficiary

On November 5, 2004, USTR published a notice in the Federal Register (69 FR 64621), announcing the initiation of a review to consider Azerbaijan as a beneficiary developing country under the Generalized System of Preferences (GSP) program. USTR also requests comments relating to the designation criteria, due on December 10, 2004.

The GSP program grants duty-free treatment to specific products that are imported from more than 140 designated developing countries and territories. The GSP was authorized by the Trade Act of 1974, and was renewed by the Trade Act of 2002.

Byrd Complainants File Retaliation Requests

On November 11, 2004, the European Union submitted a request to the WTO for authorization to retaliate due to U.S. non-compliance with a 2002 World Trade Organization (WTO) ruling that found the Continued Dumping and Subsidy Offset Act of 2000 (the "Byrd Amendment") inconsistent with WTO rules. The EU has requested to retaliate up to US$50 million against U.S. imports. Other complainants in the dispute including Brazil, Canada, Japan, Mexico, and South Korea are also expected to proceed with retaliation against the US, totaling another US$50 million. Unless the US repeals the Byrd Amendment, the EU has indicated it will commence retaliation in early 2005.

Despite the threat of retaliation, the U.S. Congress appears to remain supportive of the Byrd Amendment. Earlier this year, seventy senators sent a letter to President warning that

the Senate supported the measure. Thus, retaliation by the EU and other trading partners is expected to commence in early 2005.

Free Trade Agreements

CAFTA Expected to Trigger Contentious Debate in Upcoming 109th Congress

SUMMARY

Panelists from business, labor and Congressional staff at an event hosted by the Global Business Dialogue (GBD) on November 9, 2004, confirmed that Congressional consideration of the US-Central America Free Trade Agreement ("CAFTA") would trigger a divisive and partisan debate. One Hill staffer, for example, suggested that the Bush Administration lacks the votes to pass CAFTA in Congress in its present form. Panel discussion focused on concerns over CAFTA's labor provisions as well as rules of origin. With President Bush having won re-election, panelists acknowledged that CAFTA is unlikely to be re-negotiated. Thus, panelists predict a contentious debate ahead as Congress considers enacting the most controversial FTA to date.

ANALYSIS

Legislation on CAFTA is expected to be among the most significant trade issues that will be raised before the 109th Congress. We review here the GBD panel discussion on CAFTA and the prospects for the agreement:

I. Proponents Defend Potential Commercial Benefits of CAFTA and Argue for Rapid Implementation

Speaking in favor of CAFTA at the GBD event were **Angela Hofmann**, Wal-Mart, **Maria Bennaton Regaldo**, Embassy of Honduras and **David Malech**, Office of Rep. Kevin Brady (R-Texas). All three noted that, combined, the CAFTA countries constitute the US' second largest export market, and that the US enjoys balanced trade with the region. Malech noted that under existing preference programs, the CAFTA countries already have significant access to the U.S. market, and that the agreement would give U.S. companies an opportunity to compete in sectors such as insurance and telecommunications.

Responding to criticisms over the labor provisions of the agreement, Regaldo noted that the CAFTA countries have been working with the Inter-American Development Bank (IADB) and the International Labor Organization to improve capacity building. Regaldo defended CAFTA countries' labor practices, asserting that all six countries have strong laws and constitutional provisions to protect labor groups. Malech added that unilateral preference programs have done little to improve the cause of workers rights in Central America, but that the current CAFTA text includes effective labor protections.

A third argument in support of CAFTA advanced at the panel was the need to support Central America's apparel and textile interests following the expiration of the global textile quotas in January 2005. Both Regaldo and Mealech expressed concern that both Central American and U.S. textile producers would suffer against Chinese competition without strategic partnerships to make the hemisphere more competitive in this sector.

II. Ways and Means Chief Counsel Predicts Defeat of CAFTA

Tim Reif, Chief Trade Counsel to the Minority on the House Ways and Means Committee predicted that, without changes, the current version of CAFTA would not garner sufficient votes to pass in the House. Reif also disputed whether CAFTA, as negotiated, would offer Central America any relief from Chinese competition. He pointed to the rules of origin and cumulation provisions, and argued that the CAFTA countries' inflexibility on these issues would be of little benefit to the region.

On labor issues, Reif expressed his discomfort with what he viewed as Members of Congress being forced to judge the integrity of labor laws in the CAFTA countries. Rather, Reif suggested that CAFTA should contain binding commitments on labor, a suitable transition period, and a method of adjudicating disputes on the enforcement of labor standards. He also reiterated concerns raised by the State Department and ILO regarding the CAFTA countries existing labor legislation.

III. AFL-CIO Opposes CAFTA; Predicts Major Confrontation Ahead

Thea Lee, Assistant Director for International Economics with the American Federation of Labor and Congress of Industrial Organizations (AFaL-CIO), expressed her organization's opposition to CAFTA, arguing that its labor provisions were "grossly inadequate" and that U.S. workers are skeptical whether the agreement will create jobs. Lee insisted that labor and environmental concerns were just as important as the commercial terms of CAFTA, and that the lack of binding dispute settlement with respect to labor provided no assurance that the Central American countries would not encroach on workers' rights.

IV. Renegotiating of CAFTA Viewed as Unlikely; Dominican Republic Could be Dropped

In the discussion following the panelists' prepared remarks, most speakers agreed that the Bush Administration was unlikely to consider renegotiating any part of CAFTA. Regaldo noted that the legislatures of CAFTA countries were already reviewing the text in order to prepare for implementation of the agreement. Malech argued that renegotiating the agreement would simply be an attempt to kill CAFTA, and that what the agreement needs is quick Congressional approval.

Panelists also raised the fate of the Dominican Republic within CAFTA during the discussion. The Dominican Republic's decision to impose a tax on high fructose corn syrup ("HFCS") has led to an outcry among U.S. corn producers, and has led to calls to drop the Dominican Republic from CAFTA. Malech suggested that Republicans are prepared to drop the Dominican Republic if keeping the country would result in the Congressional defeat of CAFTA. Reif countered that the matter should be dealt with before the World Trade Organization and should play no role in Congressional consideration of CAFTA.

OUTLOOK

The President has not yet stated when he intends to submit CAFTA to Congress for its consideration under the Trade Promotion Act of 2002. When he does, Congress will have 90 days to vote on CAFTA. No formal whip count has been conducted as of yet, and both

proponents and opponents predict a bitter fight ahead. The four trade agreements passed by Congress during the 108th Congress won the support of senior Democrats on the House Ways and Means Committee. However, CAFTA's labor provisions could jeopardize bipartisan support and provoke a highly contentious debate.

Another controversial issue involving CAFTA that was not mentioned during the GBD panel is the influence of the U.S. sugar industry. While Republicans will command an even greater majority in the 109th Congress, they will need to be sensitive to the sugar lobby. The sugar industry has strong support among both political parties. As was demonstrated in the US-Australia FTA, the power of the US sugar industry is not to be underestimated. The sugar industry's opposition to CAFTA will also likely costs some Republican votes in the House, and require the House leadership to seek greater support from Democrats.

Free Trade Agreements Highlights

Zoellick Notifies Congress Of Administration's Intention To Negotiate FTAs With United Arab Emirates And Oman

On November 15, 2004, United States Trade Representative (USTR) Robert Zoellick notified the U.S. Congress of the Administration's intention to negotiate Free Trade Agreements (FTAs) with the United Arab Emirates (UAE) and Oman. U.S. trade with both countries is worth $5.6 billion. Major exports include machinery, aircraft, vehicles, and electrical machinery, while major imports include mineral fuel and woven apparel.

The agreements would build on the Trade and Investment Framework Agreements (TIFAs) that the United States recently concluded with both countries, and are viewed by the Administration as part of a broader free trade strategy aimed at establishing the Middle East Free Trade Area (MEFTA) by 2013. As announced on May 9, 2003, this strategy contemplates a "building blocks" approach of using the FTA with Morocco, the FTAs the U.S. already has in place with Israel and Jordan, and the recently concluded FTA with Bahrain as anchors to negotiate FTAs with other Middle Eastern countries. At some point before 2013, the U.S. intends to consolidate these FTAs to form the MEFTA.

As required by the Trade Act of 2002, USTR now has 90 days to work with Congress to prepare for the negotiations, which are expected to begin in early 2005.

Zoellick Discusses Bilateral FTAs At APEC Ministerial

On November 17-18, 2004, Zoellick attended the sixteenth Ministerial Meeting of the Asia-Pacific Economic Corporation (APEC) in Santiago, Chile, where he met with a number of his APEC counterparts to discuss numerous bilateral and multilateral issues and initiatives.

In particular, discussions at the meeting focused on the following issues:

- seeking ways to ensure high-standard FTAs within the Asia-Pacific region;
- cooperation on the negotiations for the World Trade Organizations' Doha Development Agenda (DDA);
- cutting red tape and reducing transaction costs for businesses operating in the Asia-Pacific region; and
- strengthening IPR regimes in the APEC economies.

US And Australia Finalize Internal Arrangements To Implement US-Australia FTA

On November 17, 2004, USTR announced that Zoellick and Australian Trade Minister Mark Vaile had exchanged diplomatic notes certifying that the United States and Australia have completed the internal requirements to allow the US-Australia Free Trade Agreement (FTA) to enter into force on the foreseen date of January 1, 2005. The US had

threatened to delay the implementation of the FTA because of concerns regarding Australia's implementing legislation, which did not fully implement a number of commitments regarding intellectual property. However, Australia has now committed to take the necessary steps to address these issues.

Signed into law by President George Bush on August 3, 2004, the FTA will eliminate upon the date of its enactment duties on 99 percent of all U.S. manufactured goods to Australia, and introduce further liberalization in services and agricultural markets. Under the FTA, the US will gain a major new market for its manufactured goods, including aircraft, autos, and medical equipment, which already account for 93 percent of U.S. exports to Australia. U.S. industrial goods exports to Australia are estimated to grow by $2 billion a year under the agreement.

US-EUROPEAN UNION

US And EU Hold WTO Consultations in Aircraft Dispute; EU Requests WTO Compliance Arbitration Regarding US Legislation To Repeal FSC/ETI Act; Lifts Former Sanctions

SUMMARY

On November 4-5, 2004, the United States and the European Union held a first round of World Trade Organization (WTO) consultations on the cases that they filed against each other on October 6, 2004 regarding their alleged subsidization of Boeing and Airbus, respectively. Both parties used the consultations to give each other the opportunity to ask questions about their respective subsidies, and afterwards refused to comment on the substance of the discussions. A next round of discussion has not yet been scheduled.

In a related development, the EU on November 5 requested a WTO panel to judge if the recently signed "American Jobs Creation Act of 2004" (the "Jobs Act") is consistent with the WTO ruling that corporate tax cuts provided to US companies under the Foreign Sales Corporation/Extraterritorial Income (FSC-ETI) tax bill were an illegal export subsidy. US officials have claimed that the move by the EU was motivated by the EU's discontentment over the US's WTO case regarding the subsidization of Airbus.

ANALYSIS

I. US And EU Hold First Round Of WTO Consultations Regarding Respective Subsidization Boeing And Airbus

On November 4-5, 2004, the US and the EU held a first round of WTO consultations on the cases that they filed against each other on October 6, 2004 regarding their alleged subsidization of Boeing and Airbus, respectively. Both parties did not yet aim to solve the dispute, but mainly used the consultations to give each other the opportunity to ask questions about their respective subsidies.

Afterwards, officials refused to comment on the substance of the discussions. EU officials did say that they planned to urge the WTO to take into consideration that the US had breached international obligations by unilaterally withdrawing from the 1992 agreement EU-US Agreement on Large Civil Aircraft.[1] The EU claims that this agreement, which currently regulates aircraft subsidization, remains in effect, while the US has countered that under the agreement, either party had the right to withdraw when the other party was not in compliance.

If the consultations fail to resolve the matter within 60 days, by December 5, 2004, then either complaining party may request the Dispute Settlement Body (DSB) to establish a panel that will examine the matter. Both sides have indicated however that they hope to avoid this, and sources indicate that a panel would likely find the subsidies of both sides illegal under the WTO. A next round of discussion has not been scheduled.

[1] This agreement is currently not incorporated into the WTO.

II. EU Requests a WTO Compliance Arbitration Regarding US Legislation To Repeal FSC/ETI Act; Lifts Former Sanctions

On November 5, 2004, the EU requested a WTO panel to judge if the recently signed "American Jobs Creation Act of 2004" (the "Jobs Act") is consistent with the January 2002 WTO ruling that corporate tax cuts provided to US companies under the Foreign Sales Corporation/Extraterritorial Income (FSC-ETI) tax bill were an illegal export subsidy.[2] The Jobs Act, which was signed by President George Bush on October 22, 2004, repeals the FSC-ETI regime, but the EU now challenges the legality of:

- the provision of a two-year transition period to repeal the Act, during which US firms would continue to receive the FSC tax cuts; and
- the "grandfathering" provision that allows companies with permanent contracts in effect after September 17, 2003 to continue to receive the FSC benefits beyond 2006.

The compliance panel now has 90 days to pass a judgment. If the panel agrees with the EU's charges, the EU would be allowed to seek compensation by making a new list of US imports on which it will impose sanctions.

The EU did announce on October 25, 2004 that in response to the repeal, it would lift, as of January 1, 2005, the former list of retaliatory sanctions on more than 1.600 US imports. The sanctions have been in place since march 2004 and have been increasing by one percentage point at the start of each new month.

OUTLOOK

US officials have criticized the EU's decision, claiming that it was motivated by the EU's discontentment over the WTO case that the US recently filed against the EU regarding the alleged subsidization of Airbus. It is hereby worth noting that Boeing is one of the companies that would benefit from the grandfathering arrangement. EU officials have not openly denied the US charges, although outgoing EU Trade Commissioner Pascal Lamy had assured United States Trade Representative (USTR) during their last meeting on October 19 that the EU would not link both cases.

[2] WT/DS108/27

US-LATIN AMERICA

FTAA

FTAA Fate Still Uncertain; Latin American Countries Expect Little Change in US-Latin America Relations

SUMMARY

With the 2004 election cycle now complete, President George W. Bush has begun the work on shaping his policy priorities for the next four years. Congressional leaders have also begun examining committee structures and legislative priorities for the 109th Congress, which will convene in January 2005. Regardless of whether US Trade Representative (USTR) Robert Zoellick remains in his position, the Bush Administration and USTR are expected to continue pursuing the "competitive liberalization" strategy as the central focus of U.S. trade policy, including as it applies to Latin America. This policy aims to achieve liberalization at all levels, including bilateral free trade agreements (FTAs) with Latin American and other trading partners, as well as regional and multilateral negotiations at the FTAA and WTO.

The fate of ongoing U.S. trade negotiations in Latin America remains unclear. Negotiations with the Andean countries and Panama have encountered some difficulties, and may not be completed within current deadlines. In addition, the outlook for the Free Trade Area of the Americas is equally unclear. The Bush Administration is expected to continue pushing for completion of the FTAA, but deadlock with Brazil could block meaningful negotiations.

ANALYSIS

I. US Trade Priorities Unlikely to Shift

In his first post-election press conference, President Bush indicated that his victory has earned him "political capital" and that he would make use of it during his second term. Key trade sources have suggested that President Bush will continue to push his "competitive liberalization" trade policy, including a continued focus on bilateral free trade agreements (FTAs), regional trade negotiations and the completion of the Doha Round at the WTO.

One of the Administration's immediate trade-related priorities will be to seek TPA renewal, which is set to expire on July 1, 2005. Under the Trade Act of 2002, President Bush has until March 1, 2005, to file his request for an extension of TPA until July 1, 2007. The President's request for an extension is automatically granted unless either chamber of Congress adopts a resolution of disapproval. Key congressional leaders have indicated that major opposition to an extension TPA is unlikely. Moreover, a resolution to disapprove TPA renewal must pass the two committees with jurisdiction on trade, the House Ways and Means and Senate Finance committees. The strengthened Republican majorities in both the House and Senate make adoption of a disapproval resolution even more unlikely.

II. No Major Changes Expected in Trade Policy Towards Latin America

A. FTAA Negotiations Face Uncertain Future

FTAA countries were reluctant to engage in serious negotiations before the election. Now that it is clear President Bush will remain in the White House, countries are more likely to engage in discussions regarding the future of the FTAA.

The FTAA still faces serious challenges. Plans for holding the next ministerial by December 2004 in Brazil have been shelved. However, USTR Zoellick is expected to discuss how to move negotiations forward with Brazilian foreign minister Celso Amorim in early December. It is possible that they could agree to hold an FTAA Ministerial in Brazil during the first half of 2005.

Despite last year's ministerial conference in Miami, FTAA negotiators continue to disagree on the baseline commitments that should be included in the common text of the agreement. Amorim has stated that negotiations at the WTO represent Brazil's current top priority, particularly given Brazil's interest in lowering global agricultural subsidies.

B. U.S.-MERCOSUR Relations Unlikely to Change; MERCOSUR Waits to See U.S. FTAA Positions

The FTAA's future could become more tied to external developments, including progress in negotiations at the WTO and involving the region's key trading nations. Already, WTO negotiations are moving forward including on the sensitive issue of agriculture. Furthermore, if FTA negotiations between the US and Andean countries progress, or EU-Mercosur negotiations move forward, these developments could lend momentum towards the FTAA. MERCOSUR countries, like other Latin American countries, expect little change in U.S.-Latin America relations. They expect the Bush administration to continue focusing on security issues, and understand that Latin America is not one of the key foreign policy priorities.

MERCOSUR countries were hesitant to engage in serious FTAA negotiations before the U.S. presidential elections concluded. MERCOSUR countries are now watching the Bush administration to see if it adopts more flexible positions in the FTAA. Although negotiations are more likely to proceed now that the elections are over, countries still must overcome significant obstacles before negotiators can make real progress.

C. Chilean Administration Pleased with Bush's Reelection

Chilean President Ricardo Lagos sent a congratulatory note to President Bush on his reelection. The note stated that "Chile and the United States share principles and values, and upon this basis we shall continue to work together in the future". President Lagos highlighted the strong relations between both governments during the first term of President Bush.

Analysts and politicians in Chile do not expect any major change in U.S.- Chile relations, which are considered to be excellent, despite the fact that President Lagos is a socialist and President Bush a conservative and that Chile, as a member of the UN Security Council, did not support the U.S. invasion of Iraq.

The U.S.-Chile FTA now is a key element in the relations between both countries, and President Bush is perceived as more committed to free trade than Senator Kerry.

Some analysts and private sector representatives expressed concern about Senator Kerry's proposal to review U.S. trade agreements during the first 120 days of his Administration, and the fact that Senator Edwards voted against the U.S-Chile FTA. They feared that a Kerry administration generally would increase trade barriers.

Chilean exports are a key factor in the country's economic growth, so any sign of protectionism in one of its main trade partners generates concern among the Government and the private sector.

However, there are certain aspects of Bush's policies that also raise concern among analysts in Chile. In particular, the management of the U.S. deficit is perceived as a possible deterrent for future world economic growth.

Many analysts in Chile share the opinion of other analysts in Latin America, who argue that Latin America is not a priority for the Bush administration. However, some analysts suggest that the lack of U.S. attention is not necessarily negative, since it could force Latin American countries to solve their own problems.

D. NAFTA Integration Still a Priority

President Bush's reelection represents little change for North American relations in the short-medium term. President Bush will continue to focus his foreign policy initiatives on the war in Iraq and security related issues. As a result, the level of U.S. engagement with Mexico and Canada is unlikely to change much.

The prospects for resolution of trade disputes between Mexico and the United States (sugar and trucking, for example) are encouraging, but still difficult due to congressional concerns in both countries. The US is unlikely to modify any of the trucking safety compliance requirements soon and the Mexican Congress is refusing to repeal the 20 percent tax on High Corn Fructose Syrup (HCFS).

However, countries have good chances of obtaining concrete gains in the area of North American integration. Mexico, Canada, and the United States have acknowledged the need to strengthen NAFTA trade and institutions in many areas, including infrastructure and tariff harmonization. The deepening of NAFTA is probably one of the few areas where countries do not need congressional approval to implement reforms and can achieve mutual benefits.

OUTLOOK

The Administration will likely have a full agenda of trade policy issues to bring before the 109th Congress. For the moment, it seems that no major changes are expected in the Administration's trade policies toward Latin America.

Among the priorities are CAFTA and TPA renewal, and FTAs with the Andean region, Bahrain and Panama all would require congressional action. USTR has indicated that it would like to submit the Panama FTA as part of the CAFTA package, which will also

include the Dominican Republic. Despite the strengthened Republican majority, the Bush Administration will need to spend political capital to garner enough votes to pass the controversial CAFTA deal. The increased majority may, according to some staffers on the Hill, lead President Bush to seek congressional approval of CAFTA sooner than originally anticipated. Beyond FTAs, finding a way to break the impasse on the stalled FTAA negotiations will require serious attention by the Bush Administration.

NAFTA

Fox Administration Welcomes President Bush's Second Term; Will Seek Resolution of Trade and Immigration Issues

SUMMARY

The Fox administration has outlined three main policy objectives to advance the bilateral agenda with the United States:

- Make progress on migration reform and explore an immigration agreement.
- Modernize and streamline procedures at the U.S.-Mexico border to increase security for the flow of goods and people.
- Deepen economic integration with the North American region and expand the North American Free Trade Agreement (NAFTA).

Trade policy analysts, however, are skeptical that the US and Mexico will make significant progress on these issues, especially immigration reform. Most analysts predict little change in U.S.-Mexico relations during Bush's second term.

ANALYSIS

I. Fox Administration Seeks Migration Reform and Solutions to Trade Disputes

President Vicente Fox welcomed President George W. Bush's reelection and intends to pursue migration reform and resolution of trade disputes in the remaining two years of his administration.

Mexican leaders understand that President Bush will continue to focus his foreign policy initiatives on the war in Iraq and security related issues. However, Fox and his cabinet members agree that the Bush team offers continuity and a new opportunity to develop solutions to common problems.

Deputy Secretary of North America Geronimo Gutierrez at the Ministry of Foreign Relations outlined three main policy objectives to advance the bilateral agenda with the United States. We discuss these objectives and their prospects for implementation in the near future below.

- **Migration Reform.** Government sources indicate that the Fox administration will concentrate its efforts to make immigration a key priority in the bilateral agenda. Moreover, the Administration appears be poised to redouble its efforts to secure an immigration agreement with the United States. Minister of the Interior Santiago Creel stated that "there is still hope" to conclude an immigration agreement with the US. Also, Deputy Secretary of North America Geronimo Gutierrez confirmed that Mexico would push for a "legal and secure" immigration agreement.

- **Border Safety.** The Fox administration will seek to strengthen bilateral law enforcement cooperation to fight human smuggling and guarantee the safe treatment of Mexican nationals. In addition, Mexico will push for fair implementation of the U.S. Bioterrorism Law on U.S.-Mexico cross-border trade.

- **Trade Integration.** Mexico will continue to seek solutions to ongoing trade disputes (i.e. sugar, trucking, tuna) with the Bush administration. Minister of Economy Fernando Canales stated that since the US is Mexico's most important trading partner, the resolution of trade disputes is imperative if parties are to focus on other long-term initiatives. The Fox administration will also push to deepen integration in other areas, including rules of origin, tariff harmonization, phitosanitary regulations, and electronic commerce.

II. Private Sector Demands Progress in U.S.-Mexico Bilateral Agenda

Representatives from the private sector also welcomed President George W. Bush's reelection, and demanded the Fox administration make concrete progress in the U.S.-Mexico bilateral agenda. Chairman of the Business Coordinating Council (CEE) Jose Luis Barraza stated that the Bush reelection offers opportunities to resolve pending trade disputes and other bilateral issues.

In general, the private sector supports the deepening of NAFTA and seeks to: (i) decrease transaction costs; (ii) develop business opportunities for Mexican entrepreneurs; (iii) avoid excessive customs inspections by U.S. authorities; and (iv) reduce timing and shipping costs.

Due to the strong linkage between the U.S. and the Mexican economy, the private sector welcomed continuity in President Bush economic policy, which indirectly affects the Mexican economy.

OUTLOOK

President Bush's reelection represents little change for U.S.-Mexico relations in the short-medium term. President Bush will continue to focus his foreign policy initiatives on the war in Iraq and security related issues. As a result, the level of U.S. engagement with Mexico is unlikely to change much.

Despite optimism about Bush's reelection expressed by government officials and private sector representatives, various analysts and media sources are more pessimistic. They argue that Mexico must adopt new methods of tackling priorities on the bilateral agenda. Otherwise, the Bush administration is unlikely to focus on U.S.-Mexico issues, given its other foreign policy priorities.

MULTILATERAL

WTO Appellate Body Issues Mixed Ruling in Argentine Challenge to U.S. "Sunset Review" Antidumping Laws

SUMMARY

The WTO Appellate Body has delivered a mixed ruling in a challenge by Argentina to the "sunset review" provisions of U.S. anti-dumping law. (WTO rules provide that anti-dumping orders are supposed to expire, or "sunset", after five years, unless the investigating authority determines that expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.) Many exporters from Latin America and elsewhere are affected by the continuation of antidumping orders by U.S. authorities beyond the five year limit.

The Appellate Body affirmed the ruling of the Panel that the "waiver" provisions of U.S. anti-dumping law and regulations, under which respondent companies can waive or be deemed to have waived their rights to participate in the sunset review proceedings, are WTO-inconsistent. However, the Appellate Body reversed the Panel's finding that the U.S. *Sunset Policy Bulletin* was WTO-inconsistent as such, faulting the Panel for the absence of a "qualitative assessment" with respect to whether the Department of Commerce (DOC) regards the Bulletin as "conclusive." It thus left the issue of the WTO-consistency of the Bulletin to be decided in a future dispute. The Appellate Body also rejected Argentina's challenge to the injury determination of the U.S. International Trade Commission (USITC).

ANALYSIS

I. Factual Background: Antidumping Order Remains in Place Despite Sunset Review

This dispute arose from a five-year "sunset" review of a U.S. anti-dumping order on imports from Argentina of oil country tubular goods (OCTG), i.e. steel tubular products used in the oil and gas sector. The original order was imposed in 1995, with a dumping margin of 1.36%. Following imposition of the order, the Argentine company Siderca, the only Argentine exporter that participated in the original investigation, stopped exporting to the United States.

The sunset review of the original order took place in 2000-2001. The DOC determined that revocation of the order would be likely to lead to continuation or recurrence of dumping. The USITC similarly determined that revocation would be likely to lead to continuation or recurrence of injury to the U.S. industry. Therefore, the anti-dumping order was not permitted to "sunset", and it remains in place.

II. Legal Framework: "Sunset" Reviews under the Anti-dumping Agreement

One of the key provisions invoked by Argentina to support its claims was Article 11.3 of the *Anti-Dumping Agreement, the "sunset review" provision*. Article 11.3 states in part that an anti-dumping duty must be terminated no later than five years after its imposition, unless the domestic authority determines that the expiry of the duty "would be likely to lead

to continuation or recurrence of dumping and injury." Argentina also argued that the United States had breached a number of provisions in Article 3, which enumerates disciplines applicable to the establishment of injury under the Agreement.

III. U.S. Sunset Policy Bulletin: Panel Should Have Made a "Qualitative Assessment"

The DOC *Sunset Policy Bulletin* provides that if certain factual scenarios exist, then Commerce will normally find that dumping would be likely to continue or recur if the anti-dumping order were revoked. Argentina claimed that U.S. law, as such, was inconsistent with Article 11.3 because it substituted a presumption that dumping was likely for a determination based on evidence.

A. Panel found the Sunset Policy Bulletin WTO-inconsistent as such

The Panel said that it was not clear whether the Bulletin's scenarios were determinative or simply indicative for the purposes of Commerce's determinations. Therefore, it examined the evidence submitted by Argentina regarding U.S. practice in sunset reviews, and found that Commerce had consistently applied the Bulletin's presumptions in all cases. Indeed, Commerce had found likely dumping in *all* U.S. sunset reviews in which the U.S. industry had participated since entry into force of the WTO Agreement (217 affirmative likelihood determinations in 217 cases, including in 43 cases in which such a determination had been contested). The Panel found that this evidence demonstrated that Commerce regarded the provisions of the *Sunset Policy Bulletin* as "conclusive." In the view of the Panel, this ran "counter to the requirement of Article 11.3 [for an investigating authority] to carry out a rigorous examination and to base its determinations on a sufficient factual basis." Therefore, the Panel found that the relevant provisions of the Bulletin violated Article 11.3.

B. Appellate Body: Bulletin is a "measure" for purposes of WTO dispute settlement

The Appellate Body reviewed its previous rulings on the scope of Article 11.3, and affirmed that the terms "review" and "determine" in Article 11.3 "compel an investigating authority in a sunset review to undertake an examination, on the basis of positive evidence, of the likelihood of continuation or recurrence of dumping and injury." It added that the authority "must arrive at a reasoned determination", resting on a sufficient factual basis, and that it cannot "rely on assumptions or conjecture."

The Appellate Body upheld the finding of the Panel that the *Sunset Policy Bulletin* was a "measure" for the purposes of WTO dispute settlement, affirming an earlier ruling that "acts setting forth rules or norms that are intended to have general and prospective application" were measures subject to dispute settlement. However, it reversed the Panel's ruling that the relevant provisions of the Bulletin were inconsistent, as such, with Article 11.3.

C. "Qualitative Assessment" required

The Appellate Body agreed with the Panel that the text of the Bulletin did not resolve the issue as to whether the factual scenarios were regarded by Commerce as "determinative/conclusive, or merely indicative." The Appellate Body expressed concern about "the possible mechanistic application" of the three scenarios set out in the Bulletin,

"such that other factors of equal importance are disregarded." In the view of the Appellate Body, this necessitated a "qualitative assessment of the likelihood determination in individual cases."

However, the Appellate Body faulted the Panel for relying "solely on the overall statistics or aggregate results" without undertaking "a qualitative assessment" of at least some of the individual cases cited by Argentina to discern "whether the USDOC regarded the existence of one of the factual scenarios of the [Bulletin] as determinative/conclusive for its determinations." The Appellate Body noted that the fact that affirmative determinations were made in reliance on one of the three scenarios in all the sunset reviews where the domestic industry participated "strongly suggests that these scenarios are mechanistically applied." However, without a qualitative examination of the reasons leading to such determinations, the Appellate Body stated that it was not possible to definitively conclude that these determinations were "based exclusively on these scenarios in disregard of other factors."

The Appellate Body concluded that the Panel did not make "an objective assessment of the matter" pursuant to Article 11 of the Dispute Settlement Understanding (DSU). Accordingly, it reversed the Panel's findings that the relevant provisions of the *Sunset Policy Bulletin* were inconsistent, as such, with Article 11.3. However, the Appellate Body emphasized that it was not concluding that these sections of the Bulletin were WTO-consistent:

> "...our reasoning here does not exclude the possibility that, in another case, it could be properly concluded that the three scenarios in...the [Bulletin] are regarded as determinative/conclusive of continuation or recurrence of dumping. However, such a conclusion would need to be supported by a rigorous analysis of the evidence regarding the manner in which...the [Bulletin] is applied by the USDOC."

Given this lack of "qualitative assessment" of the individual cases, the Appellate Body also concluded that it did not have a sufficient factual basis to "complete the analysis" and rule on the conditional appeals regarding Argentina's claim that Commerce had not administered the Bulletin in a uniform, impartial and reasonable manner, contrary to GATT Article X:3(a), or Argentina's challenge to U.S. practice.

IV. U.S. "Waiver" Provisions Violate the Anti-Dumping Agreement

Under U.S. law, a party that does not provide a "complete substantive response", i.e. all of the information required by the regulations, is deemed to have waived its right to participate in Commerce's sunset review proceedings. Similarly, a party may expressly waive its right to participate in the Commerce sunset review. Whether there is a "deemed" or an "affirmative" waiver, the results are the same: U.S. law requires Commerce to make a finding that dumping is likely to continue or recur with respect to that exporter.

A. Waiver provisions under U.S. law: use of "assumptions" rather than "evidence"

The Appellate Body upheld the Panel's findings that the "waiver" provisions of U.S. law violate Article 11.3. It reasoned that "[b]ecause the waiver provisions require the USDOC to arrive at affirmative company-specific determinations without regard to any

evidence on record, these determinations are merely *assumptions* by the agency, rather than findings supported by evidence [original emphasis]." The Appellate Body said that as a result of the waiver provisions, certain order-wide likelihood determinations made by Commerce will be based, at least in part, on "statutorily-mandated *assumptions* about a company's likelihood of dumping [original emphasis]." The Appellate Body ruled that this was inconsistent with the obligation of an investigating authority under Article 11.3 to arrive at a "reasoned conclusion" on the basis of "positive evidence."

B. Due process rights under the Anti-Dumping Agreement: "liberal" but not "indefinite"

Articles 6.1 and 6.2 of the Agreement set out what the Appellate Body described as "fundamental due process rights." Under Article 6.1, all interested parties in an anti-dumping investigation must be given "ample opportunity" to present evidence that they consider relevant to the investigation. Article 6.2 provides that throughout the anti-dumping investigation, all interested parties shall be given "a full opportunity for the defence of their interests."

The Appellate Body stated that the wording of these two provisions suggested that there should be "liberal opportunities" for interested parties to defend their interests. At the same time, the tribunal reasoned that Articles 6.1 and 6.2 did not provide "indefinite rights", which would "prevent the authorities of a Member from proceeding expeditiously." Therefore, the Appellate Body reasoned that the "ample" and "full" opportunities guaranteed by Articles 6.1 and 6.2 "cannot extend indefinitely and must, at some point, legitimately cease to exist." Specifically, where the continued granting of opportunities to present evidence and attend hearings would impinge on an investigating authority's ability to control the conduct of its inquiry, and to carry out the multiple steps necessary to reach a timely completion of the sunset review, a respondent must be considered to have "reached the limit of the 'ample' and 'full' opportunities" set out in these provisions.

C. Deemed waiver resulting from incomplete submissions breaches due process rights

The Appellate Body affirmed the ruling of the Panel that U.S. regulations with respect to deemed waiver resulting from the filing of an incomplete submission violated Articles 6.1 and 6.2. It said that an incomplete submission might contain relevant evidence in support of the respondent's position, yet fall short of the information required by Commerce's regulations to be considered "complete." In the view of the Appellate Body, disregarding a respondent's evidence in this manner was incompatible with the respondent's right under Article 6.1 to present evidence that it considers relevant. Moreover, it said that a respondent in this situation would also be denied the opportunity to participate in the hearing, contrary to its rights under Article 6.2 to be provided a "full opportunity for the defence of [its] interests."

D. Deemed waiver resulting from a failure to respond upheld: "the fault lies with the respondent"

The Appellate Body found no inconsistency with Articles 6.1 and 6.2 with respect to Commerce's regulations regarding respondents that do not respond to the notice of initiation.

It stated that "[w]e do not see it as an unreasonable burden on respondents to require them to file a timely submission in order to preserve their rights for the remainder of the sunset review. Indeed, even an incomplete submission will serve to preserve those rights." Therefore, it concluded that "if a respondent decides not to undertake the necessary initial steps to avail itself of the 'ample' and 'full' opportunities available for the defense of its interests, the fault lies with the respondent, and not with the deemed waiver provision."

V. Injury: Article 3 Does Not Apply to Sunset Reviews

The Appellate Body ruled that the obligations set out in Article 3 of the Anti-Dumping Agreement with respect to the determination of injury did not apply to sunset reviews.

Argentina had pointed to a footnote to Article 3, which defined injury "under this Agreement", and that provided that "injury" was to be "interpreted in accordance with the provisions of...Article [3]." Based on this text, Argentina argued that any reference in the Agreement to "injury", including to the likelihood of continuation or recurrence of injury in Article 11.3, required that such a determination be made in accordance with the provisions of Article 3.

The Appellate Body disagreed. It accepted that the footnote defined "injury" for the whole of the Agreement, including during sunset reviews. However, it said that "[i]t does not follow...from this single definition of 'injury', that all of the provisions of Article 3 are applicable in their entirety to sunset review determinations under Article 11.3." In the view of the Appellate Body, it was not correct to equate the "definition" of injury with the "determination" of injury. It said that the focus of Article 3 was on the determination of injury rather than on its definition.

The Appellate Body also distinguished between the determination of injury, addressed in Article 3, and the determination of likelihood of continuation or recurrence of injury, addressed in Article 11.3. It referred to the absence of textual cross-references between these two provisions, as well as to what it called the "different nature and purposes" of the two determinations. Therefore, investigating authorities were not mandated to follow the provisions of Article 3 when making a likelihood of injury determination in a sunset review.

VI. Scope of Obligation to Conduct a "Review" and Make a "Determination"

Argentina's primary argument, that Article 11.3 itself imposed substantive obligations on investigating authorities independently of the application of Article 3 in sunset reviews, arose from the obligation to conduct a "review" and make a "determination", and flowed logically from the "rigorous, diligent examination" that the Appellate Body had previously ruled was required under Article 11.3.

The Appellate Body said that the additional requirements that Argentina claimed were required as Article 11.3 obligations were "identical to the requirements contained in...Article 3." The Appellate Body appeared to agree with Argentina that these obligations would apply as Article 11.3 obligations, regardless of the application of Article 3 to sunset reviews.

The Appellate Body agreed that terms "determine" and "review" were "critical to understanding the obligations of an investigating authority in sunset reviews" and

necessitated a "reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination." However, it added that the requirement for an investigating authority to arrive at a "reasoned conclusion" did "not have to be satisfied through a specific methodology or the consideration of particular factors in every case." The Appellate Body said that it was "not persuaded by the argument of Argentina that a likelihood-of-injury determination can rest on a 'sufficient factual basis' and can be regarded as a 'reasoned conclusion' *only* after undertaking all the analyses detailed in the paragraphs of Article 3 [emphasis added]."

At the same time, the Appellate Body made clear that in a sunset review determination, certain of the analyses mandated by Article 3 "may prove to be probative, or possibly even required, in order for an investigating authority in a sunset review to arrive at a 'reasoned conclusion'." For example, the tribunal expressed the view that "the fundamental requirement of Article 3.1 that an injury determination be based on 'positive evidence' and an 'objective examination' would be equally relevant to likelihood determinations under Article 11.3." Moreover, factors such as the volume, price effects, and the impact on the domestic industry "may be relevant to varying degrees in a given likelihood-of-injury determination." In addition, an investigating authority could also, in its own judgment, consider other factors contained in Article 3 during a sunset review. However, in the view of the Appellate Body, "the necessity of conducting such an analysis in a given case results from the requirement imposed by *Article 11.3* - not Article 3 - that a likelihood-of-injury determination rest on a 'sufficient factual basis' that allows the agency to draw 'reasoned and adequate conclusions' [original emphasis]."

The Appellate Body therefore upheld the determination of the Panel on this issue, finding that the Panel did not err in its interpretation of the term "injury" in Article 11.3, or its analysis of the factors that an investigating authority is required to examine in a likelihood of injury determination.

VII. "Cumulation" of Imports Not Prohibited

Article 3.3 of the Agreement provides that where imports of several countries are simultaneously subject to anti-dumping investigations, the authorities may "cumulatively assess the effects of such imports" provided certain conditions are met. Argentina argued that investigating authorities were not permitted to cumulate in sunset reviews, as Article 3.3 referred only to original "investigations." In the alternative, Argentina argued that if cumulation was permitted during sunset reviews, the authorities had to comply with the conditions set out in Article 3.3.

The Appellate Body rejected both of these arguments. After dismissing certain textual arguments advanced by Argentina, it stated that the rationale for cumulation applied equally during an original investigation and a sunset review. It said that "cumulation remains a useful tool for investigating authorities in both inquiries to ensure that all sources of injury and their cumulative impact on the domestic industry are taken into account in an investigating authority's determination as to whether to impose - or continue to impose - anti-dumping duties on products from those sources." Given this rationale, the Appellate Body said that it would have been "anomalous" for WTO Members to have limited authorization for cumulation to original investigations.

VIII. "Likely" Standard: "Likely" Means "Probable"

As noted above, Article 11.3 provides in part that anti-dumping orders must be terminated after five years unless the investigating authorities determine that the expiry of the duty would be "likely" to lead to continuation or recurrence of dumping and injury. In the December 2003 *U.S. - Steel Sunset* case, the Appellate Body ruled that "likely" meant "probable." Argentina argued that the United States did not apply a "probable" standard in sunset reviews. Argentina noted that the USITC followed the guidance of the U.S. *Statement of Administrative Action* that "likely" meant something less than "probable." Indeed, Argentina pointed to a statement made by the United States to a NAFTA Panel - which was adjudicating the same measure at issue in the WTO proceedings - that "Congress did not intend 'likely' to mean "probable."

The Appellate Body agreed with Argentina that "likely" in Article 11.3 meant "probable." However, it said that "the wording of the final determination, on its face, suggests that the USITC applied the 'likely' standard." It added that the question as to whether the USITC "actually" applied the likely standard in this case related to the basis on which the agency made its determination concerning injury, an issue the Appellate Body examined subsequently (see next section). The Appellate Body agreed with the United States that because the USITC explicitly stated in its final determination that it applied the 'likely' standard, the only way for the Panel to assess whether that standard was in fact applied was to evaluate whether the facts supported that finding.

Although the Panel had dismissed the relevance of U.S. statement to the NAFTA Panel, as well as similar statements to U.S. courts, the Appellate Body said that this was part of the Panel's function to weigh the evidence before it. This reasoning seems to suggest that the Appellate Body viewed the Panel as having considered the USITC's statements that 'likely' did not mean 'probable', but that the Panel assigned little weight to these statements.

IX. Consistency of the USITC's Determination with the 'Likely' Standard of Article 11.3

The Appellate Body said that if the Panel was satisfied that an investigating authority's determination on continuation or recurrence of dumping or injury rested upon a "sufficient factual basis to allow it to draw reasoned and adequate conclusions", then it should "conclude that the determination at issue is not inconsistent with Article 11.3."

The Appellate Body stated that the USITC's overall conclusion that the continuation or recurrence of injury was "likely" was the result of three separate conclusions, related to the likely volume of cumulated dumped imports, the likely price effects of dumped imports, and the likely impact of dumped imports on the domestic industry. It also said that the likelihood standard applied to a likelihood of injury determination as a whole, and not to every factor considered by the investigating authority in the course of its analysis. After examining the evidence before the Panel, the Appellate Body stated that the Panel did not err in finding that the USITC had a sufficient factual basis for its determination. The Appellate Body indicated that it would not disturb the Panel's evaluation of these arguments, suggesting that it considered these findings to be within the Panel's discretion as the "trier of facts."

X. The "Temporal Issue": the Timeframe For a Likely Injury Determination

U.S. law provides that during a sunset review, the USITC must determine whether revocation of the order would be likely to lead to continuation or recurrence of injury "within a reasonably foreseeable time." U.S. law also states that the Commission "shall consider that the effects of revocation...may not be imminent, but may manifest themselves only over a longer period of time."

Argentina argued, among other things, that the statute was inconsistent with the requirements implicit in the term "injury", for which Article 3.7 establishes a maximum time period of "imminent." The Appellate Body dismissed Argentina's positions on this issue, in large part because it had already concluded that sunset reviews were "not subject to the detailed disciplines of Article 3." It also said that a determination of injury can be "properly reasoned and rest on a sufficient factual basis even though the timeframe for the injury determination is not explicitly mentioned."

XI. U.S. Challenge to Panel's Terms of Reference Rejected

The United States challenged a number of claims in Argentina's Panel Request, arguing that they did not "present the problem clearly", as required by Article 6.2 of the DSU. This U.S. challenge was rejected by both the Panel and the Appellate Body, and Argentina's Panel Request was found to be consistent with DSU Article 6.2.

XII. No Appeal on WTO-Consistency of U.S. Measure "as applied"

The Panel ruled that Commerce's reliance on the dumping margin from the original investigation breached Article 11.3. The Panel stated that "the original determination of dumping by itself cannot represent a sufficient factual basis for concluding that dumping continued during the life of the measure, let alone representing an adequate factual basis to conclude that dumping is likely to continue or recur after the expiry of the order." Moreover, the application of the deemed waiver provisions in the OCTG sunset review was also inconsistent with Article 11.3. The Panel found that Commerce also violated certain procedural rights under Article 6.2 of the Agreement, including the right to a hearing. The United States did not appeal these findings. Therefore, this finding by the Panel will be adopted by the DSB, along with the other findings affirmed or modified by the Appellate Body.

The decision of the Appellate Body in *United States - Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* was released on November 29, 2004

OUTLOOK

The decision is the latest in a series of Panel and Appellate Body reports defining the scope of the "sunset review" disciplines of the Anti-Dumping Agreement. Although the Appellate Body affirmed the core principles applicable to sunset reviews, the decision also left a number of key issues unresolved.

The Appellate Body reiterated that an investigating authority conducting a sunset review must arrive at a "reasoned determination" that rests on a "sufficient factual basis"

rather than "assumptions or conjecture." It also warned against the "mechanistic application" of presumptions or inferences that may preordain the results of the review.

The DOC *Sunset Policy Bulletin* provides that Commerce will normally find "likely dumping" where certain factual scenarios are present. In the current dispute, Argentina placed before the Panel evidence that since the entry into force of the WTO Agreement, the DOC has found "likely dumping" in every sunset review in which the U.S. industry has participated. Commerce made 217 "likely dumping" determinations in 217 cases, including 43 cases in which such a determination had been contested actively by all parties. The Panel found that this demonstrated that Commerce regarded the *Sunset Policy Bulletin* as conclusive. In the view of the Panel, the relevant provisions of the Bulletin were inconsistent with Article 11.3, as this ran counter to the requirement for an investigating authority to conduct a "rigorous examination" and to base its determination on a "sufficient factual basis."

However, the Appellate Body faulted the Panel for relying "solely on the overall statistics or aggregate results" rather than conducting a "qualitative assessment" of at least some of the individual cases to determine if the DOC regarded the Bulletin as conclusive. Therefore, it overturned the Panel's ruling that the Bulletin was WTO-inconsistent. It hastened to add that it was not making a finding that the Bulletin was WTO-consistent. It said that in another case, it could be demonstrated that the DOC does indeed regard the Bulletin as conclusive. It stated that the fact that affirmative determinations were made in reliance on one of the three scenarios in all sunset reviews where the domestic industry took part "strongly suggests that these scenarios are mechanistically applied."

It is by no means clear why the Panel in this case should have conducted such a "qualitative" analysis. Indeed, the fact that Commerce found likely dumping 217 times in 217 cases itself speaks volumes as to extent to which the agency views the *Sunset Policy Bulletin* as determinative in sunset reviews. A record of 100% likely dumping, with no exceptions, itself constitutes a kind of "qualitative assessment" that could have amply justified a finding of WTO-inconsistency. Moreover, the Appellate Body could have "completed the analysis" and examined some of the cases put forward by Argentina to conduct such a "qualitative assessment", as it had a sufficient factual basis to do so. This hands-off approach by the Appellate Body will mean that a definitive assessment of the WTO-consistency of the *Sunset Policy Bulletin* will have to await a future case.

The Appellate Body found that the waiver provisions of the U.S. law require Commerce to make determinations based on assumptions rather than evidence, inconsistently with the obligation under Article 11.3 to arrive at "reasoned conclusions" on the basis of "positive evidence." This ruling is important, in that the waiver provisions of U.S. law have been applied in numerous sunset reviews. With respect to the procedural rights guaranteed under Article 6, the Appellate Body ruled that deemed waiver resulting from incomplete submissions was WTO-inconsistent, although deemed waiver resulting from the failure of a company to respond did not violate the Agreement. Clearly, the Appellate Body wants to avoid imposing obligations on investigating authorities when an affected company elects not to participate at all.

On injury issues, the Appellate Body agreed with the United States that the Article 3 disciplines on the determination of injury do not apply to sunset reviews. Argentina argued that Article 11.3 itself imposed a series of obligations on investigating authorities when they

conduct a "review" and make a "determination" in a sunset review. In dealing with this issue, the Appellate Body provided little guidance as to what requirements do, or do not, apply during sunset reviews. It stated that "the necessity of conducting...an analysis in a given case results from the requirement imposed by *Article 11.3* - not Article 3 - that a likelihood-of-injury determination rest on a 'sufficient factual basis' that allows the agency to draw 'reasoned and adequate conclusions' [original emphasis]." Yet this is precisely what Argentina argued, as the Appellate Body stated in the summary of the Parties' arguments. Nonetheless, the Appellate Body provided little response as to what requirements *were* imposed by Article 11.3. This issue, also, will presumably need to await additional litigation.

Thus, while the Appellate Body affirmed that sunset reviews impose meaningful and substantive disciplines on investigating authorities, it missed the opportunity to clarify the parameters of those obligations.

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