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WTO AND REGIONAL TRADE AGREEMENTS MONTHLY REPORT

January 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

NHTSA Requests Comments on Corporate Average Fuel Economy Standards

On December 29, the National Highway Traffic Safety Administration ("NHTSA") published in the Federal Register two notices seeking comments on Corporate Average Fuel Economy Standards ("CAFÉ").

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Comments are due by April 27.

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On January 6, 2004, the United States Trade Representative (USTR) requested public comments on the identification of countries under Section 182 of the Trade Act of 1974, commonly referred to as "Special 301".

Comments should be received by February 13, 2004.

Free Trade Agreements

US Concludes CAFTA with El Salvador, Guatemala, Honduras and Nicaragua; USTR Zoellick Visits Dominican Republic to Participate in First Round of FTA Negotiations

On December 17, 2003, the United States Trade Representative (USTR) announced that the US had concluded Free Trade Agreement (FTA) negotiations with the Central American countries El Salvador, Guatemala, Honduras and Nicaragua. Negotiations with a fifth Central American partner country, Costa Rica, will continue in January 2004.

The US Administration also seeks to include (or "dock") the US-Dominican Republic FTA into the CAFTA. On January 14, 2004, USTR Robert B. Zoellick visited the Dominican Republic to attend the first round of FTA negotiations, which took place in Santo Domingo from January 12-16, 2004.

The US and the Dominican Republic will hold three negotiating rounds, and hope to reach agreement by the end of March 2004. USTR hopes to submit the full CAFTA, with Costa Rica and the Dominican Republic included, to Congress by early July 2004.

Government Agencies Announce FTA Reviews; Chile and Singapore FTAs Enter Into Force; Defense Department Issues Interim Rule to Implement Both FTAs

The United States Trade Representative (USTR) and the United States International Trade Commission (ITC) in December 2003 announced the following reviews pursuant to the requirements in the Trade Act of 2002 regarding ongoing Free Trade Agreement (FTA) negotiations:

- An environmental review of the US-Dominican Republic FTA. Comments on this review are due by January 30, 2004.

- An interim environmental review of the US-Australia FTA. Comments on this review were due by January 16, 2004.

- Reviews of the probable economic effects of a US-Andean FTA (AFTA) and a US-Panama FTA. A hearing on these reviews will take place on February 10, 2004.

In addition, the Bush administration on December 31 published proclamations to implement the Chile and Singapore FTAs. To realize the implementation, the Department of Defense (DoD) on January 13 issued an interim rule that amends the Defense Federal Acquisition Regulation Supplement.

The interim rule became effective January 13, 2004. Comments on the interim rule should be submitted by March 15, 2004.

Customs

Panel Discusses Homeland Security and Trade in the Hemisphere

On December 17, 2003, the Inter-American Dialogue (IAD) held a panel discussion on how Department of Homeland Security (DHS) policies affect trade in the hemisphere.

DHS representatives and private sector participants agreed that securing the US border did not have to come at the expense of trade. DHS representative stated that facilitating trade while maintaining security would likely require greater budgetary resources

Customs and Border Protection (CBP) is considering certain Latin American ports for the Container Security Initiative (CSI), including Panama City, Santos (Brazil) and Buenos Aires (Argentina). Audience members expressed concern about potential trade diversion that could result from a select group of CSI ports in the region.

CBP Proposes to Amend Procedure for Publication of Administrative Forfeiture Notices

On January 14, 2003, the Bureau of Customs and Border Protection (CBP) proposed to amend the procedure that CBP must follow in administrative forfeiture proceedings. The proposal would raise the threshold value of seized property for which CBP must publish a notice in a newspaper from $2,500 to $5,000.

CBP also invites public comments on the proposed amendment. Comments must be received by March 15, 2004.

Petitions and Investigations

Domestic Industry Files Petitions Against Frozen and Canned Warmwater Shrimp and Outboard Engines

Antidumping petitions were recently filed against Frozen and Canned Warmwater Shrimp and Outboard Engines.

337 Complaint Regarding Water Squirt Toys Filed with ITC

A 337 Complaint regarding Water Squirt Toys was recently filed with the ITC.

421 Petition Regarding Innersprings Filed With ITC

A 421 petition was recently filed at the USITC.

China

State Council Approves Amendments to Foreign Trade Law to Comply with WTO

According to sources, the State Council of China approved amendments to the Foreign Trade Law on December 26, 2003. The amended Law seeks to implement China's WTO commitments, with a series of revisions relating to foreign trade operators, goods and technology trading rights, state trading, and automatic import/export licensing. In order to protect the domestic industry and market, the amended Law also specifies the scope of import/export designated trading, restrictions and prohibitions, emphasizes the protection of intellectual property rights and fair market competition, as well as provides for investigations into and remedies for unfair foreign trade practices.

In addition, the Law institutes new systemic administration for foreign trade operations. Despite State Council approval, our sources indicate that several government agencies are in conflict over certain provisions. Thus, it is uncertain when the amended Law will take effect.

WTO and Multilateral

USTR Zoellick Urges New Momentum to WTO Round

U.S. Trade Representative (USTR) Robert Zoellick on January 11, 2004 sent letters to trade ministers from all WTO Members urging them to reengage on key Doha Round issues so that 2004 does not become a "lost year." Zoellick's letter sends an important message in several respects:

(i) Agriculture – Stipulates that a successful Doha Round will require agreement to end all export subsidies by a date certain and recognizes that domestic supports will need to be importantly cut – but ties this to a substantial increase in market access. The position is a significant departure from the US-EU proposal prior to Cancun and marks the end of their common approach to agriculture.

(ii) Industrial negotiations – Supports ambitious tariff reductions, but with some flexibility on participation so that tariff elimination initiatives in specific sectors can be pursued on a critical mass basis, not all developing countries being required to participate.

(iii) Core market access agenda – The letter calls for attention to be focused on core market-access liberalization in goods, services and agriculture, implying less emphasis on rules-related issues. With regard to the Singapore issues, proposes negotiation on trade facilitation and prefers dropping investment and competition (the more controversial Singapore Issues),and perhaps transparency in government procurement.

(iv) Ministerial in 2004 – Proposes that the next Ministerial Conference, which is to be hosted by Hong Kong, should be held this year, in order to keep up momentum in the Round.

Initial reactions to Zoellick's letter have been mostly positive. WTO Members have welcomed it as a promise of re-engagement and US leadership in the Doha process, having been uncertain about the U.S. commitment to pursue major trade initiatives during a presidential election year. But there is also some doubt, more privately expressed, as to how much progress can really be expected this year in putting the Round back on track in 2004, given the essential need, recognized by Zoellick, for early progress on agriculture. The EU, however, has sent mixed messages, since it will have most difficulty in agreeing a date for termination of export subsidies.

WTO Appellate Body Upholds U.S. Sunset Review on Steel; Reverses Key Panel Findings

The WTO Appellate Body in a report released December 15, 2003,[1] has upheld U.S. measures challenged by Japan in a "sunset review" of an anti-dumping duty order on steel. (Under the Agreement, anti-dumping duties are supposed to "sunset" or expire, after five years.) However, the Appellate Body overturned the Panel on a number of key issues related to the sunset review disciplines of the *Anti-Dumping Agreement*. This decision is extremely important, in that it marks the first time the Appellate Body has determined the scope of Article 11.3, the so-called "sunset review" provision of the *Anti-Dumping Agreement*.

WTO Appellate Body Rules in Favor of United States in Softwood Lumber

The WTO Appellate Body in a report released on January 19, 2004, has ruled in favor of the United States on several key legal issues in the Canada-U.S. Softwood Lumber dispute.[2] It agreed with the U.S. position that Canada was providing a "financial contribution" to its lumber industry, and it opened the door to the possibility that the United States could use private prices in the northern states as the comparative benchmark for determining the extent of the "benefit" to the Canadian subsidy recipients. However, the tribunal upheld a complaint by Canada that the United States had failed to determine whether the subsidies had "passed through" to unrelated

[1] The decision of the Appellate Body in *United States - Sunset Review of Anti-dumping Duties on Corrosion-resistant Carbon Steel Flat Products from Japan* was released on December 15, 2003. The appeal was heard by Yasuhei Taniguchi (Japan), Georges Abi-Saab (Egypt) and A.V. Ganesan (India).

[2] The decision of the Appellate Body in *United States - Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* (DS 257) was released on January 19, 2004. The appeal was heard by Luiz Baptista (Brazil), John Lockhart (Australia) and Giorgio Sacerdoti (Italy).

producers. This is an important victory for the United States in this longstanding, multi-billion dollar bilateral trade dispute with Canada.

REPORTS IN DETAIL

SPECIAL REPORT

Key Trade Issues Remain Unresolved as 108th Congress Reconvenes

SUMMARY

On January 21, 2004, the second session of the 108th Congress convened. A closely divided Senate and disputes between House and Senate Republicans characterized the first session of the 108th Congress. Members of Congress failed to enact several pieces of important trade related legislation, including legislation necessary to stave off retaliation from US trading partners. Acrimony over the FY2004 appropriations bills, and the upcoming Congressional and Presidential elections likely will increase partisanship as Congress considers the President's FY2005 budget, which is due to Congress by February 2, 2004.

Congress is not expected to focus on many trade related pieces of legislation during the second session, but could consider legislation to prevent retaliation stemming from the WTO ruling on foreign sales corporations. The 2004 election cycle could hamper efforts to pass legislative trade initiatives. Neither party wants to allow the opposition to score a major legislative victory, especially during and election year. In addition, Members likely will increase efforts to protect their interests.

ANALYSIS

I. Security Issues Dominate First Session of 108th Congress

The first session of the 108th Congress officially adjourned on December 11th after the Senate failed to approve the Consolidated Appropriations Act of 2004. The Republican leadership failed to complete the seven pending appropriations bills when Senate Democrats balked at the number of earmarks and other pet projects contained in the omnibus appropriations bill. The bitter partisan fight over appropriations bills was reflective of the contentious character of the first session of the 108th Congress. Although the President scored victories with respect to funding the war in Iraq and on Medicare, other major initiatives, such as the energy bill, fell victim to partisan bickering.

The President secured some trade legislative objectives, including passage of the Chile and Singapore FTAs, but not before Congress chastised the Administration over issues such as temporary entry. (*Please see* W&C General Report, July 2003). Other trade related bills, such as legislation to bring the US into compliance with the World Trade Organization rulings on foreign sales corporations, remain unfinished.

Trade Bills Passed and Signed into Law During the First Session of 108th Congress

BILL	KEY PROVISIONS	KEY DATES
Burmese Freedom and Democracy Act of 2003 (H.R. 2330)	• Effectively bans the importation of any product into the US manufactured or sold by any Burmese government controlled or influenced company. • Freezes all Burmese assets in to the US. • Requires that Congress reauthorize the import ban on an annual basis	- Passed in the House on July 15, 2003. - Passed in the Senate on July 16, 2003. - Signed into law (PL 108-61) on July 28, 2003.
Syria Accountability and Lebanese Sovereignty Restoration Act of 2003 (HR. 1828)	• Requires the President to impose at least two of a list of potential sanctions against Syria. • Imposes stricter export controls on goods to Syria. • Allows President to waive sanctions against Syria if deemed in US national security interests.	- Passed in the House on November 20, 2003. - Passed in the Senate on November 11, 2003. - Signed into law (108-175) December 12, 2003. President has until June 12, 2004 to impose or waive sanctions.
US-Chile Free Trade Agreement Implementation Act (H.R. 2738)	• Implements US-Chile Free Trade Agreement signed on June 6, 2003. Agreement contains longer phase in periods for certain sensitive sectors including agricultural commodities (*e.g.*, dairy, sugar, wheat and wine subject to 12-year phase out periods). More restrictive provisions on safeguards, rules of	- Passed in the House on July 24, 2003. - Passed in the Senate July 31, 2003. - Sign into law (PL 108-77) on September 3, 2003. - Entered into force on January 1, 2004.

BILL	KEY PROVISIONS	KEY DATES
	origin and other issues. • Contains controversial provisions, including on temporary entry of professionals.	
US-Singapore Free Trade Agreement Implementation Act (H.R. 2739)	• Implements US-Singapore Free Trade Agreement signed May 6, 2003. Agreement contains restrictive provisions for certain sensitive sectors including textiles and apparel (*e.g.*, rules of origin modeled after NAFTA, and to prevent trans-shipments). • Contains controversial provisions, including on temporary entry of professionals.	- Passed in the House on July 24, 2003. - Passed in the Senate July 31, 2003. - Sign into law (PL 108-78) on September 3, 2003. - Entered into force on January 1, 2004.

Trade Bills Pending Before the 108th Congress

BILL / ISSUE	KEY PROVISIONS	STATUS	OUTLOOK
Buy America (S. 1480)	• Would increase US content requirements and reduce executive waiver authority under the Buy America Act.	- The bill has made no progress in the Senate.	- "Buy America" issues, though sparking some debate during the last session of Congress, failed to materialize as a major trade issue during the FY2004 appropriations process, several attempts were made in the context of defense spending to increase the US-

BILL / ISSUE	KEY PROVISIONS	STATUS	OUTLOOK
			content of good procured with federal money. - Neither the Administration nor Republican leaders in Congress have raised the issue as a serious legislative priority.
Country of Origin Labeling – Agricultural Appropriations (HR 2373)	• Would delay implementation of the country of origin labeling program (COOL) by two year by preventing USDA from spending any money on implementation. Delay would not apply to fish. • Would require USTR to defend legality of the Byrd Amendment.	- The Agriculture Appropriations bill became part of the Consolidated Appropriations Act. - The House passed the Consolidated Appropriations Act on December 9, 2003, including the provisions delaying COOL. - The Senate passed the Consolidated Appropriations Act on January 22, 2004. including the provisions delaying COOL.	- The recent outbreak of mad cow in both Canada and the US has prompted some Senators to demand a reinstatement of the COOL program. Senator Daschle (D-SD) has been the key supporter of the program. - Though Congress has passed the Consolidated Appropriations Act delaying the full implementation of COOL, Senate Democrats have vowed to revive the debate over COOL.
China Currency (H.R. 3058, H.R. 3269, H.R. 3364, S. 1586, S. 1592, S. 1758)	• The various bills on China's currency are based on findings that China is manipulating its currency, which hurts US manufacturers. • With the exception of	- None of the bills dealing with China's currency have made progress in either the House or Senate. No hearings on the bills have been scheduled.	- On October 30, 2003 Treasury Secretary John Snow appeared before Congress and suggested that China is not distorting its currency as defined by US law. Other

BILL / ISSUE	KEY PROVISIONS	STATUS	OUTLOOK
	S. 1592, the bills would impose tariffs of up to 40% on Chinese goods unless China adopts more flexible currency valuation. • S. 1592 would require that the Administration initiate Section 301 cases against countries manipulating their currencies.		Administration officials oppose imposing tariffs as a way of addressing US manufacturing concerns.
Energy Policy Act (H.R. 6)	• Would direct the National Highway Traffic Safety Administration (NHTSA) to increase the corporate average fuel economy (CAFE) standards for non-passenger automobiles within 15 months after the enactment of the Act, and for passenger automobiles within 2 years. • Would appropriate the Department of Transportation $ 2 million to increase the CAFE standards. • Would direct NHTSA to issue an environmental assessment of the	-The House adopted the conference report on November 18 by a vote of 246-180. -Senate Majority Leader Bill Frist (R-Tennessee) delayed consideration of the conference report until 2004 after Senate leaders failed to obtain the votes they needed to invoke cloture and shut down a filibuster led by Senator Charles E. Schumer (D-New York).	-The Senate has scheduled another cloture vote for February 26. If the Senate manages to invoke cloture, an up-or-down vote is scheduled for February 27. -House and Senate leaders plan to revise portions of the bill. They may consider ways to move contentious items to other pieces of legislation and splitting up the bill into multiple smaller bills. -Although supporters prefer to pass the bill as a whole, the Administration has

BILL / ISSUE	KEY PROVISIONS	STATUS	OUTLOOK
	effects of the implementation of the increased standards on the environment.		indicated that it would not oppose carving up the bill.
Export Administration Act (HR 55)	• Would reauthorize the Export Administration Act, which expired in 2001. Would overhaul export license process and establish duel use export restrictions.	- Since being introduced, the bill has made no progress in the House.	- The Bush Administration has expressed support for the House legislation. However, concerns voiced by Rep. Henry Hyde (R-IL) and Senator Shelby (R-AL) has stalled progress on adopting any form of export control legislation. - In May 2003, the Administration suggested that if achieving a comprehensive export control bill was not possible, it would resort to alternative legislative and regulatory routes. Members of Congress are concerned about a perceived weakening of US export control laws.
Export Tax Regime (H.R. 2896 – American Jobs Creation Act of 2003, S. 1637 – Jumpstart Our Business Strength Act of 2003)	• Bill would repeal Extraterritorial Income Exclusion Act in order to bring the US into compliance with August 2003 order of the WTO Appellate Body.	- House version cleared the Ways and Means Committee on October 28, 2003. It awaits action by the full House. - Senate version cleared the Finance	- Several factors complicate passage of the bill, including serious disagreements among prominent Republicans over how generous certain tax breaks should be. Congressman

BILL / ISSUE	KEY PROVISIONS	STATUS	OUTLOOK
	Body. • The House version contains more generous tax breaks for domestic manufacturers, and other small businesses. The Senate version is revenue neutral, whereas the House version is expected to cost $60 billion over ten years. • Both versions contain multi-year phase in periods. The Senate version contains long phase-in periods specifically for companies with overseas operations	Committee on October 1, 2003. Senate has been awaiting House to pass its version.	Manzullo (R-Ill) opposes the House version of the bill, and has vowed to work with Democrats to block its passage. - The US faces retaliation by the EU stemming from the 2002 WTO ruling that determined ETI was illegal under the WTO. The EU has already concluded its retaliation list and has been authorized to impose up to $4 billion in retaliatory measures. The EU has set a deadline of March 1, 2004 for the US to act.
Laos Permanent Normal Trade Relations (H.R. 3195)	• Would grant Laos normal trade relations (NTR) status and allow the 2003 Bilateral Trade Agreement to enter into force.	- Since the bill was introduced, no action has been taken.	- Though supported by the Bush Administration, a bipartisan group of representatives opposes the bill. These opponents insist that Laos must first improve its human rights record.
Middle East Trade (H.R. 2267, S 1121)	• Would create a preference program for certain Middle East countries that undertake liberal	- Since being introduced in Congress, neither of the bills has made any progress. On January	- USTR has suggested the possibility of granting preferences to Middle East countries as a way of

BILL / ISSUE	KEY PROVISIONS	STATUS	OUTLOOK
	market reforms. Preferences would remain in effect until 2012.	16, 2004 Senator McCain (R-AZ) indicated that he would hold a hearing on the Senate version of the bill in mid-February.	engaging them economically. The Bush Administration has taken no formal position, though in an op/ed in a January 1, 2004, edition the New York Times, Secretary Powell stated that a Middle East Free Trade Agreement would be high on the Administration's priorities in 2004.
Miscellaneous Trade Bill (H.R. 1047, S. 671)	• Reduce tariffs on a wide range of products, including on a range of chemicals. • Authorize the establishment of integrated border inspection areas with Canada. • Extend normal trade relations with Serbia and Montenegro.	- House originally passed its version on March 5, 2003, but subsequently passed a modified version as part of a broader tax bill (H.R. 3251). - Senate Finance Committee approved its version on February 27, 2003.	- The bill languished in the Senate because of a hold placed by Sen. Selby (R-Ala) over provisions that would grant socks imported from Caribbean Basin countries duty-free treatment. That hold has been lifted however Senate Democrats have placed anonymous holds on the bill.
Repeal of the "Byrd Amendment" (S. 1299)	• Would repeal the so-called "Byrd Amendment" that was found to be WTO non-compliant in 2002.	- Bill has not made any progress since introduced in June 2003.	- The upcoming election cycle makes repeal of the Byrd Amendment unlikely. The Consolidated Appropriations Act of 2004 conference report contains language that would mandate USTR to continue defending

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			the Byrd amendment in all trade fora. - Several of the countries that challenged the Byrd Amendment in the WTO are now seeking retaliation against the US.
Russia PNTR (H.R. 1224, S. 580 S. 624)	• The bills would graduate Russia from the requirements of Title IV of the 1974 Trade Act (Jackson-Vanik). • H.R. 1224 would require a vote by Congress to ratify any agreement reached in connection with Russia's accession to the WTO. The other bills make no such demand.	- None of the bills have made any progress since their introduction. No hearings have taken place.	- Russia's opposition to the war in Iraq, combined with other trade issues and a tight legislative schedule have delayed congressional consideration.

II. Free Trade Agreements Mired in Election Year Politics

Beyond the current slate of trade related legislation, the Administration's drive to complete several bilateral free trade agreements (FTAs) raises the prospect of contentious debates within Congress on US trade policy. Agreements with Australia and Central America (CAFTA) are in the final stages of negotiations, and the Administration has indicated its desire to have Congress consider these agreements before the end of the year.

Inability of negotiators to conclude the pending FTAs and the upcoming Congressional and Presidential elections could complicate passage of FTAs during the second session of Congress. Special interest groups representing agriculture, apparel makers and manufacturers have mobilized opposition to FTAs with Australia and CAFTA. The upcoming elections will increase Member's sensitivity to the interests of their constituents, including special interest

groups opposing the FTAs. The slowdown of the US economy has also heightened awareness of these special interest groups.

Representative Sander Levin (D-MI), along with staff members for senior Republican Senators have suggested that Congress will not approve the CAFTA in 2004. .

III. Tight Congressional Schedule Could Hinder Trade Legislation

The election in November 2004 will reduce the number of legislative days in the second session of the 108th Congress. The House and Senate have targeted a summer recess date of July 22, 2004 to accommodate the Democratic National Convention, and an adjournment date of October 1, 2004. In addition, several weeklong breaks are scheduled between February and July.

Members will focus on the appropriations bills, potentially crowding out time on the calendar to consider other legislative issues.

OUTLOOK

The threat of sanctions by the EU and others for ETI and the Byrd Amendment could spur action on trade legislation. The EU has already prepared its retaliation list for the ETI dispute, and products from California, Michigan, New York and Florida will face higher tariffs if the US fails to repeal ETI. This targeting of politically sensitive states could provoke action by Congress, particularly if the Administration puts added pressure on senior Republican leaders. Members from states that would be targeted by the sanctions are the most likely to champion passage of ETI and Byrd Amendment legislation.

Trade related legislation typically fares poorly in election years. Democratic and Republican Members need to ensure support from their constituencies, and will likely reject trade legislation that could be perceived as reducing US jobs. The manufacturing sector, which has suffered substantial job losses during the Bush Administration, is likely to be hesitant of any major trade initiatives during the coming year.

UNITED STATES

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SUMMARY

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- ***Improvements to CAFE Program:*** NHTSA has requested comments on possible enhancements to the program that will assist in furthering fuel conservation while protecting motor vehicle safety and the economic vitality of the auto industry (FR74908). Comments should focus on the structure of the CAFE program, not the stringency level for a future CAFE standard.

- ***Vehicle Manufacturer's Future Product Plans:*** NHTSA has requested comments regarding vehicle manufacturers' future product plans to assist the agency in analyzing possible reforms to the CAFE program (FR74931).

Comments are due by April 27.

ANALYSIS

I. NHTSA Requests Comments on Enhancement to CAFE Program

NHTSA is seeking comments on enhancements to the CAFE program, but not the stringency level for future CAFE standards (FR74908).

Since 1990, the CAFE standard for passenger automobiles has been 27.5 miles per gallon (mpg). By statute, NHTSA was prohibited from considering any change between MYs 1996 and 2004.

The FY01 Department of Transportation and Related Agencies Appropriations Act conference committee report relaxed restrictions on the CAFE program by, among other things, directing NHTSA to fund a study by the National Academy of Sciences (NAS) to evaluate the effectiveness and impacts of CAFE standards. The report concluded that technologies exist that could significantly increase passenger car and light truck fuel economy within 15 years, while maintaining vehicle size, weight, utility, and performance.

Responding to a request from Secretary of Transportation Mineta, Congress lifted the restriction prohibiting agency expenditures for the purposes of considering CAFE standards in the FY02 Department of Transportation and Related Agencies Appropriations Act. NHTSA began work towards the establishment of light truck CAFE standards, and has since set standards applicable to light trucks for MYs 2004 through 2007 (68 FR 16868).

The Department has also focused on improvements to the fuel economy program. For example, on February 7, 2002, the agency issued a Request for Comments seeking i) data on which to base an analysis of appropriate CAFE standards for light trucks for upcoming model years and ii) comments on possible reforms to the CAFE program.

NHTSA highlights the four prominent criticisms of the light truck CAFE program:

Energy security: The energy-saving potential of the CAFE program is hampered by the current regulatory structure, since the current standards encourage vehicle manufacturers to i) offer vehicles classified as light trucks for purposes of CAFE and ii) offer products with a gross vehicle weight rating ("GVWR") larger than the 8,500 lb CAFE threshold. In addition, reforms could encourage companies to pursue strategies to comply with standards instead of paying fines for non-compliance.

Traffic safety: The current light truck CAFE standards could create safety risks by encouraging vehicle manufacturers to achieve greater fuel economy by downweighting their light truck offerings.

Economic practicability: Future increases in the stringency of CAFE standards could have adverse economic impacts.

Modernization of the definition and classification of light trucks: The markets for, and designs of, cars and light trucks have changed substantially since the inception of the CAFE program in the late 1970's.

Please see the attached Federal Register notice for details on comments responding to the February 7, 2002, Request for Comments and specific issues on which NHTSA seeks comments.

II. NHTSA Requests Information on Product Plans

In a separate companion notice, NHTSA requests information, mainly from vehicle manufacturers, on their future product plans (FR74931).

NHTSA includes specific questions for manufacturers in an appendix to the notice. The appendix requests information from manufacturers regarding their product plans from MY 2003 through MY 2012, and the assumptions underlying those plans. NHTSA is requesting data from manufacturers for both their passenger car plans and their light truck plans.

OUTLOOK

Despite efforts by some Members of Congress to increase CAFE standards, the FY04 energy appropriations conference report awaiting congressional approval does not contain provisions to increase CAFE standards. However, the bill would expand tax breaks for consumers and makers of hybrid and alternative-fueled vehicles and alternative fuels.

Republicans will resume efforts to pass the energy bill conference report in January.

USTR Requests Public Comment on the Identification of Countries Under Special 301

SUMMARY

On January 6, 2004, the United States Trade Representative (USTR) requested public comments on the identification of countries under Section 182 of the Trade Act of 1974, commonly referred to as “Special 301”.

Comments should be received by February 13, 2004.

ANALYSIS

On January 6, 2004, the United States Trade Representative (USTR) published a notice in the Federal Register (69 FR 718), requesting written submissions from the public concerning foreign countries' acts, policies, and practices that are relevant to the decision whether particular trading partners should be identified under Section 182 of the Trade Act of 1974, commonly referred to as "Special 301".

Section 182 requires the USTR to identify countries that deny adequate and effective protection of intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual protection.

OUTLOOK

Submissions should be received by February 13, 2004.

Free Trade Agreements

US Concludes CAFTA with El Salvador, Guatemala, Honduras and Nicaragua; USTR Zoellick Visits Dominican Republic to Participate in First Round of FTA Negotiations

SUMMARY

On December 17, 2003, the United States Trade Representative (USTR) announced that the US had concluded Free Trade Agreement (FTA) negotiations with the Central American countries El Salvador, Guatemala, Honduras and Nicaragua. Negotiations with a fifth Central American partner country, Costa Rica, will continue in January 2004.

The US Administration also seeks to include (or "dock") the US-Dominican Republic FTA into the CAFTA. On January 14, 2004, USTR Robert B. Zoellick visited the Dominican Republic to attend the first round of FTA negotiations, which took place in Santo Domingo from January 12-16, 2004.

The US and the Dominican Republic will hold three negotiating rounds, and hope to reach agreement by the end of March 2004. USTR hopes to submit the full CAFTA, with Costa Rica and the Dominican Republic included, to Congress by early July 2004.

ANALYSIS

I. US Concludes CAFTA with El Salvador, Guatemala, Honduras and Nicaragua; Negotiations With Costa Rica Will Continue in January 2004

On December 17, 2003, the United States Trade Representative (USTR) announced that the US had concluded Free Trade Agreement (FTA) negotiations with the Central American countries El Salvador, Guatemala, Honduras and Nicaragua. Negotiations with a fifth Central American partner country, Costa Rica, will continue in January 2004. Costa Rica had indicated that it would need more time to address sensitive issues such as its monopoly in the telecommunications and the insurance sectors.

The draft text of the US-Central America Free Trade Agreement (CAFTA) will be released in January 2004. USTR expects to notify formally Congress of its intent to sign the agreement sometime "early in 2004", as required under the Trade Act of 2002, and will also continue to consult with Congress on steps to pass legislation which would implement the agreement.

II. USTR Zoellick Visits Dominican Republic to Participate in First Round of FTA Negotiations

On January 14, 2004, United States Trade Representative (USTR) Robert B. Zoellick visited the Dominican Republic to attend the first round of Free Trade Agreement

(FTA) negotiations between the US and the Dominican Republic. The negotiations took place in Santo Domingo from January 12-16, 2004.

Zoellick met with President Hipolito Mejia and his negotiating team to discuss an FTA that can be integrated into CAFTA. Zoellick also met with legislators, members of civil society and the business community in the Dominican Republic.

The US and the Dominican Republic will negotiate market access for government procurement, investment, services, financial services, textiles, industrial and agricultural goods. The US will also establish a Trade Capacity Building Working Group for the negotiations.

OUTLOOK

The US and the Dominican Republic will hold three negotiating rounds, and hope to reach agreement by the end of March 2004, after which they will integrate the FTA into CAFTA.

USTR hopes to submit the full CAFTA, with Costa Rica and the Dominican Republic included, to Congress by early July 2004.

Sources indicate that CAFTA awaits a difficult vote in Congress due to growing resistance to trade liberalization in Congress. Also, the CAFTA contains many contentious issues, including labor provisions, textiles quotas, agricultural market access, and other issues.

Government Agencies Announce FTA Reviews; Chile and Singapore FTAs Enter Into Force; Defense Department Issues Interim Rule to Implement Both FTAs

SUMMARY

The United States Trade Representative (USTR) and the United States International Trade Commission (ITC) in December 2003 announced the following reviews pursuant to the requirements in the Trade Act of 2002 regarding ongoing Free Trade Agreement (FTA) negotiations:

- An environmental review of the US-Dominican Republic FTA. Comments on this review are due by January 30, 2004.
- An interim environmental review of the US-Australia FTA. Comments on this review were due by January 16, 2004.
- Reviews of the probable economic effects of a US-Andean FTA (AFTA) and a US-Panama FTA. A hearing on these reviews will take place on February 10, 2004.

In addition, the Bush administration on December 31 published proclamations to implement the Chile and Singapore FTAs. To realize the implementation, the Department of Defense (DoD) on January 13 issued an interim rule that amends the Defense Federal Acquisition Regulation Supplement.

The interim rule became effective January 13, 2004. Comments on the interim rule should be submitted by March 15, 2004.

ANALYSIS

I. Government Agencies Announce FTA Reviews

The United States Trade Representative (USTR) and the United States International Trade Commission (ITC) in December 2003 announced the following reviews pursuant to the requirements in the Trade Act of 2002 regarding ongoing FTA negotiations:

- ***Environmental Review of Dominican Republic FTA:*** On December 24, the Trade Policy Staff Committee (TPSC), an interagency body chaired by USTR, announced the initiations of an environmental review of the proposed US-Dominican Republic FTA and requested comments on the scope of the review (68 FR 74693).
- ***Environmental Review of Australia FTA:*** On December 30, TPSC requested comments on the interim environmental review of the proposed US-Australia FTA (68 FR 75317). The interim review is available at http://www.ustr.gov/environment/environmental.shtml.

- ***Economic Impact of Andean and Panama FTAs:*** On December 31, the ITC announced that it instituted investigations into the probable economic effects of a US FTA with the four beneficiary countries of the Andean Trade Preferences Act (Bolivia, Colombia, Ecuador, and Peru) (68 FR 75629) and a US FTA with Panama (68 FR 75630). The ITC will also hold a joint public hearing on the investigations.

II. Chile and Singapore FTAs Enter Into Force; Defense Department Issues Interim Rule to Implement Both FTAs.

On December 31, the Bush administration published in the Federal Register proclamations to implement the Chile (68 FR 75787) and Singapore (68 FR 75793) FTAs.

On January 13, 2004, the Department of Defense (DoD) published a notice in the Federal Register (69 FR 1926), issuing an interim rule that amends the Defense Federal Acquisition Regulation Supplement to implement new Free Trade Agreements (FTAs) with Chile and Singapore. The DoD also invited public comments on the interim rule.

The new FTAs:

- Waive the applicability of the Buy American Act for some foreign supplies and construction materials from Chile and Singapore; and

- Specify procurement procedures designed to ensure fairness.

OUTLOOK

Comments on the environmental review of the US-Dominican Republic FTA are due by January 30, 2004.

Comments on the interim environmental review of the US-Australia FTA were due by January 16.

The hearing on the probable economic effect of AFTA and the US-Panama FTA will take place on February 10, 2004. The ITC will submit the confidential reports to USTR by April 8.

The interim rule to implement the Singapore and Chile FTAs became effective January 13, 2004. Comments should be submitted by March 15, 2004.

Customs

Panel Discusses Homeland Security and Trade in the Hemisphere

SUMMARY

On December 17, 2003, the Inter-American Dialogue (IAD) held a panel discussion on how Department of Homeland Security (DHS) policies affect trade in the hemisphere.

DHS representatives and private sector participants agreed that securing the US border did not have to come at the expense of trade. DHS representative stated that facilitating trade while maintaining security would likely require greater budgetary resources

Customs and Border Protection (CBP) is considering certain Latin American ports for the Container Security Initiative (CSI), including Panama City, Santos (Brazil) and Buenos Aires (Argentina). Audience members expressed concern about potential trade diversion that could result from a select group of CSI ports in the region.

ANALYSIS

We review here remarks made by IAD panelists on homeland security and their effects on hemispheric trade and the ensuing discussion based on audience questions.

I. Panelists Focus on Facilitating Trade and Meeting US Security Needs

Cresencio Arcos, Director of International Affairs for the Department of Homeland Security focused his remarks on port security throughout the hemisphere. Arcos cited corruption in Latin American ports as the biggest obstacle in implementing CSI throughout the region. Some ports in Latin America are being considered for CSI according to Arcos, including Panama City, Santos (Brazil) and Buenos Aires (Argentina). However, a final decision on these ports has not been made.

Shanker Singham, Chairman, International Trade & Competition Group, Steel, Hector & Davis spoke on the need to ensure that DHS policies do the least harm to the "just in time" supply chain that drives the North American economy. Singham argued that proper risk management and targeting through the use of advance manifest rules could make programs like CSI effective at securing US borders, while permitting the flow of goods.

Singham suggested that the flow of persons is the area in which DHS has performed the worst since the department was established. He noted that applications for new visas had declined by almost 40%, while the number of illegal migrants entering the US has not declined. Cumbersome visa rules cost the US tourism and business dollars, according to Singham.

George J. Weise, Former Commissioner of Customs (1992-1997), addressed the importance of private sector cooperation in combating terrorism and securing US borders. Weise

suggested that Customs and Border Protection (CBP) was undergoing an important change in operating culture, which includes a greater sensitivity to the needs of the trade community.

II. Questions Center on Immigration, Bioterrorism and Potential Trade Distortion

Audience members targeted Director Arcos exclusively during the question and answer period. Questions focused on concerns over immigration, bioterrorism and the trade distorting effects of opening a limited number of CSI ports in Latin American.

On immigration, Arcos stated that the business community's concerns over obtaining visas for foreign workers and students was valid, and that DHS has presented a memorandum of understanding to the State Department to ease some of the delays in processing applications.

When asked about the possible alignment of advance notification requirements under the Trade Act and Bioterrorism Act, Arcos emphasized that the Food and Drug Administration (FDA) and CBP must work together. FDA is an independent agency and, therefore, DHS cannot force FDA to alter its implementation of the bioterrorism regulations. Arcos and Weise both stated that DHS would continue to work with FDA with a goal of ensuring that notification requirements set by DHS are aligned with FDA's requirements.

Several audience members raised concerns over the possible trade distorting effects of opening a limited number of CSI port in Latin America. Audience members argued that opening only three CSI ports would ruin the economies of small island economies that rely on shipping. Singham noted that, within the context of the Free Trade Area of the Americas, there exist programs to provide technical assistance in the area of trade facilitation.

OUTLOOK

With the entry into force of the regulations under the Bioterrorism Act on December 12, 2003, and the promulgation of interim final rules on advance manifest requirements in late November 2003, all products imported into the US will face heightened scrutiny at the US border.

The bioterrorism regulations will not, according to CBP, be fully enforced until late-Spring 2004. This interim period may provide a window to allow DHS to work with FDA to facilitate greater alignment of the two agencies' notification policies.

CBP Proposes to Amend Procedure for Publication of Administrative Forfeiture Notices

SUMMARY

On January 14, 2003, the Bureau of Customs and Border Protection (CBP) proposed to amend the procedure that CBP must follow in administrative forfeiture proceedings. The proposal would raise the threshold value of seized property for which CBP must publish a notice in a newspaper from $2,500 to $5,000.

CBP also invites public comments on the proposed amendment. Comments must be received by March 15, 2004.

ANALYSIS

On January 14, 2003, the Bureau of Customs and Border Protection (CBP), Department of Homeland Security (DHS), proposed in the Federal Register (69 FR 2093) to amend the procedure that CBP must follow in administrative forfeiture proceedings. The proposal would raise the threshold value of seized property for which CBP must publish a notice in a newspaper from $2,500 to $5,000.

The current regulations require CBP to publish notice of seizure and intent to forfeit in a newspaper circulated at the Customs port and in the judicial district where the seizure occurred if the value of the seized property exceeds $2,500. By changing the requirements for publication, the proposed amendment would significantly reduce the publication costs incurred by CBP.

OUTLOOK

CBP also invites public comments on the proposed amendment. Comments must be received by March 15, 2004.

Petitions and Investigations

Domestic Industry Files Petitions Against Frozen and Canned Warmwater Shrimp and Outboard Engines

SUMMARY

Antidumping petitions were recently filed against Frozen and Canned Warmwater Shrimp and Outboard Engines:

ANALYSIS

I. Frozen and Canned Warmwater Shrimp from Brazil, China, Ecuador, India, Thailand, and Vietnam

Docket No: 2344

Document Type: 731 Petition

Filed By: Benjamin L. Ward

Firm/Org: Dewey Ballantine

Behalf Of: Ad Hoc Shrimp Trade Action Committee

Date Received: December 31, 2003

Confidential: Yes

Commodity: Frozen and Canned Warmwater Shrimp

Country: Brazil, China, Ecuador, India, Thailand, and Vietnam.

Description: Letter to Marilyn R. Abbott, Secretary, USITC; requesting that the Commission initiate an antidumping duty investigation in Certain Frozen and Canned Warmwater Shrimp from Brazil, China, Ecuador, India, Thailand, and Vietnam.

Status: Pending Institution

II. Outboard Engines from Japan

Docket No: 2347

Document Type: 731 Petition

Filed By: Alan Wm. Wolff

Firm/Org: Dewey Ballantine

Behalf Of: Mercury Marine

Date Received: January 8, 2004

Confidential: Yes

Commodity: Outboard Engines

Country: Japan

Description: Letter to Marilyn R. Abbott, Secretary, USITC; requesting that the Commission conduct an investigation under section 731 of the Tariff Act of 1930, as amended regarding the imposition of antidumping duties on outboard engines.

Status: Pending Institution

337 Complaint Regarding Water Squirt Toys Filed with ITC

SUMMARY

A 337 Complaint regarding Water Squirt Toys was recently filed with the ITC.

ANALYSIS

Docket No: 2346

Document Type: 337 Complaint

Filed By: Clement Cheng

Firm/Org: Law Offices of Clement Cheng

Behalf Of: Water Sports, LLC

Date Received: January 7, 2004

Confidential: Yes

Commodity: Water Squirt Toys

Country: None

Description: Letter to Marilyn R. Abbott, Secretary, USITC; requesting that the Commission institute an investigation pursuant to section 337 of the Tariff Act of 1930 regarding Water Squirt Toys and the Importation Thereof. The proposed respondent is Polyfect Toys Co., Ltd., Hong Kong.

Status: Pending Institution

OUTLOOK

Under Section 337 of the Tariff Act of 1930 (19 U.S.C. §1337), the Commission conducts investigations into allegations of certain unfair practices in import trade. Most Section 337 investigations involve allegations of patent, copyright, or trademark infringement. In the event that the Commission determines that Section 337 has been violated, the Commission may issue orders excluding the products at issue from entry into the United States, directing the violating parties to cease and desist from certain actions, or both.

421 Petition Regarding Innersprings Filed With ITC

SUMMARY

A 421 petition was recently filed at the USITC.

ANALYSIS

Docket No: 2345

Document Type: 421 Petition

Filed By: William A. Gillon

Firm/Org: Butler, Snow, O'Mara, Stevens & Cannada, Pllc

Behalf Of: American Innerspring Manufacturers

Date Received: January 6, 2004

Confidential: Yes

Commodity: Innersprings

Country: China

Description: Letter to Marilyn R. Abbott, Secretary, USITC; requesting that the Commission conduct an investigation pursuant to section 421 (b) of the Trade Act of 1974 (19 U.S.C. 2451 (b)) to determine whether imports of uncovered innerspring units are being imported into the U.S. from China as to cause or threaten to cause market disruption.

Status: Pending Institution

ASIA

China's State Council Approves Amendments to Foreign Trade Law to Comply with WTO

SUMMARY

According to sources, the State Council of China approved amendments to the Foreign Trade Law on December 26, 2003. The amended Law seeks to implement China's WTO commitments, with a series of revisions relating to foreign trade operators, goods and technology trading rights, state trading, and automatic import/export licensing. In order to protect the domestic industry and market, the amended Law also specifies the scope of import/export designated trading, restrictions and prohibitions, emphasizes the protection of intellectual property rights and fair market competition, as well as provides for investigations into and remedies for unfair foreign trade practices.

In addition, the Law institutes new systemic administration for foreign trade operations. Despite State Council approval, our sources indicate that several government agencies are in conflict over certain provisions. Thus, it is uncertain when the amended Law will take effect.

ANALYSIS

On December 26, 2003 the State Council of China approved amendments to the Foreign Trade Law. The amended Law seeks to implement China's commitments to the World Trade Organization (WTO) with a series of revisions relating to foreign trade operators, goods and technology trading rights, state trading, and automatic import/export licensing. The amendments to the Foreign Trade Law address three areas of concern: (i) implementation of WTO commitments; (ii) protecting industry and market; and (iii) China's administrative regime and sanctions.

I. Implementation of WTO Commitments

The amended Law fulfills China's WTO obligations in the following areas:

A. Foreign trade operators

Previously, the Law stipulated that only legal entities and other organizations could engage in foreign trade. The amended Law now allows individuals to partake in such activities.

China has committed to accord all foreign individuals and enterprises treatment no less favorable than that given to enterprises in China with respect to the right to trade within three years of joining the WTO, i.e. by November 10, 2004. As a first step towards this commitment, the Chinese government has revised the Law to allow Chinese individuals to engage in foreign trade, including trade in technology, trade in international services and cross-border trade. Our sources indicate that, by November 10, 2004, China will likely issue a set of procedures formalizing the 'universal' right to trade.

Currently, China imposes a set of stringent requirements for application of trading rights.[3] As committed under the WTO, China must remove the examination and approval system and allow all parties to freely engage in foreign trade. We understand that the amended Law has removed the stringent requirements and only requires the trader to register with the relevant authorities. However, analysts contend that the Chinese government will continue to impose conditions for registration, such as capital requirements.

B. State trading

China can continue to maintain its state trading system after accession to the WTO. With the revised Law, China modifies the state trading system, allowing authorities, such as the Ministry of Commerce (MOC) and the National Development and Reform Commission (NDRC), and certain agencies of the State Council to jointly grant an exclusive operating right or special state trading right to a foreign trade operator. In other words, a private operator may possibly obtain the right to trade in specific controlled items.

C. Import and export licensing

China must remove import and export licensing requirements in compliance with the WTO rules. However, it is retaining an automatic licensing regime as a way to track (but not restrict) the demand of certain industrial products, machinery and electronic goods.

II. Protecting Industry and Market

Besides fulfilling WTO commitments, amendments to the Law institute rights provided under the WTO rules in the protection of domestic industry and maintenance of fair market competition.

D. Designated trading

Currently, China can designate and permit certain entities to trade in specific products. Traders not designated by the authorities may not deal in such products. China must remove this limitation within three years after its WTO accession - by December 2004. However, the Chinese government has opined that the unrestricted right to trade in these products may only be given to WTO members and that China retains the right to impose designated trading on non-WTO members. As such, the Law contains a new provision laying down the policy of designated trading to that effect.

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[3] An entity intending to engage in the import and export of goods and technologies must fulfill the following requirements, as well as acquire a permit from the Chinese authorities:

(i) It must have its own name and corporate structure;
(ii) It must have a definite scope of business in foreign trade;
(iii) It must have a place of business, and the financial resources and professional personnel essential to the proper conduct of the foreign trade dealings;
(iv) It must have a track record in import and export activities which have been effected on its behalf or have the necessary supply sources of goods for import or export; and
(v) It must satisfy all other requirements provided in relevant laws and administrative regulations.

E. Import and export restrictions and prohibitions

The amended Law clarifies and enhances the circumstances surrounding import and export restrictions and prohibitions. China may restrict or prohibit trade in certain goods, services and technology in order to protect human or animal health and safety, to safeguard the environment to preserve public morals and national security, as well as to prevent fraud. In addition, it may regulate trade in gold and silver and continue to impose state trading on certain types of products. It will also prohibit or restrict trade in the protection of intellectual property rights.

F. Protection of intellectual property rights

The Chinese government recognizes that protection of intellectual property rights is an important aspect of cross-border trade and an issue of increasing concern to businesses. The amended Law reflects this realization, with provisions relating to the import of infringing products and abuse of intellectual property rights:

- The State Intellectual Property Office (SIPO), the courts, the Customs General Administration and the State Administration of Industry and Commerce (SAIC) are authorized to investigate imports suspected of infringing on intellectual property rights. Where an infringement exists, the Chinese government can take remedy actions, such as prohibiting the infringing import, impose administrative or criminal penalties, suspend the offending business operations and designate the infringing party to compensate the right holder.

- Currently, China depends largely on the transfer of technology from foreign sources to advance its industrial development. As such, the Chinese government is particularly concerned about intellectual property right owners using their exclusive rights to negatively influence or block technology flows or transfers into China. In such instances, the Law permits the Chinese authorities to investigate and adopt remedy measures.

- China insists on reciprocal treatment for its citizens and their intellectual property rights. Where a country or area fails to provide fair treatment or effective protection for Chinese intellectual property, the Law broadly allows the Chinese government to retaliate against that country or area by suspending certain agreements and obligations. As the amended Law is not yet implemented, we are uncertain as to how the Chinese government intends to operationalize this provision.

G. Anti-trust practices

The Law is expanded to cover monopolistic practices, unfair competition and other activities that prejudice the proper functioning of the market. Specifically, the Law provides that businesses cannot exploit their market dominant position or engage in collusive arrangements by:

- Imposing unfair or discriminatory trading conditions;
- Unreasonably restricting production and sales, as well as development and transfer of technology; or
- Unreasonably refusing to provide goods, services or implement technology.

H. Trade remedy regime

China is becoming increasingly concerned with unfair competition brought about by foreign trade practices that could damage the domestic industry. In addition, it is also wary about foreign countries using trade remedy measures to target Chinese trade. The amended Law contains a new chapter establishing a formal trade remedy regime in China.

The Law establishes procedures for initiation of investigation of unfair practices. Investigations may delve into the following issues:

- The effect of import and export of goods and technology, as well as international trade in services, on the domestic industry and its competitive capacity;
- The international trading environment and barriers to trade with key trading countries and areas;
- Antidumping, countervailing and safeguards measures;
- The circumvention of trade remedy measures, such as changing country of origin;
- Threat to the domestic industry caused by influx of imports; and
- Foreign trade activities and the relation to state security issues and interests.

The amended Law also augments China's trade remedy regime in the following areas:

- China recognizes that, in accordance with WTO rules, a WTO member has the right to request consultations with China in cases where Chinese products are imported into the territory of the WTO member in such increased qualities or under such conditions that causes or threatens to cause market disruption to the domestic producers of that WTO member. The amended Law reflects this understanding.
- The Law now provides an avenue for domestic industry to address unfair competition in third country trade. In cases where foreign products are exported to a third country at a less than reasonable price:

- causing substantial injury or threatening to cause substantial injury to the Chinese domestic industry, or

- constituting a substantial obstacle to the establishment of Chinese domestic industry,

the Chinese government may, upon request of the domestic industry, initiate consultations and negotiations with the third country to resolve the issue.

- The Chinese industry may suffer from an influx of imports resulting from import restrictions (trade remedy) taken by a third country. In such cases, the Chinese government may take the necessary trade remedy measures and restrict imports.

- The Law specifies the type of measures the Chinese government can take to resolve serious injury or threat of serious injury to domestic industry, including preferential export policies, subsidies, dumping/subsidy investigations and anti-dumping/countervailing duties.

- While the trade remedy provisions largely relate to trade in goods, the revised Law does provide for remedy measures to resolve injury or threat of injury to domestic services industry.

III. Oversight

A. Administrative regime

In order to enhance the supervision of and services provided to foreign trade business, the amended Law stipulates the establishment of:

- A system monitoring and alerting the authorities and businesses on international trade in goods, services and technology;

- A public information system relating to foreign trade;

- A statistical system on foreign trade statistic; and

- A system publicizing foreign trade violations.

B. Sanctions

The revised Law strengthens actions and penalties taken against illegal foreign trade practices. In general, illegal trade practices face administrative penalties, including monetary fines and confiscation of illegal goods. Under the amended Law, the authorities can further penalize the trader by rejecting its qualification applications or prohibiting its engagement in trade in goods, services and technology for three years.

The amended Law also emphasizes the linkage between foreign trade violations and the criminal code. While trading offences have been criminalized in the past, we believe that the Chinese government will enhance such actions in the future.

OUTLOOK

Our sources report that the Chinese State Council has already approved the amended Law. However, we understand that the release of the revised Law, which has been planned for 2003, is now postponed to 2004. Apparently, the delay is due to the conflicting views held by a number of Chinese agencies on certain key provisions and further modifications to the Law may be introduced. It is uncertain as to when the State Council will announce the revised Law.

WTO AND MULTILATERAL

USTR Zoellick Urges New Momentum to WTO Round

SUMMARY

U.S. Trade Representative (USTR) Robert Zoellick on January 11, 2004 sent letters to trade ministers from all WTO Members urging them to reengage on key Doha Round issues so that 2004 does not become a "lost year." Zoellick's letter sends an important message in several respects:

(i) ***Agriculture*** – Stipulates that a successful Doha Round will require agreement to end all export subsidies by a date certain and recognizes that domestic supports will need to be importantly cut – but ties this to a substantial increase in market access. The position is a significant departure from the US-EU proposal prior to Cancun and marks the end of their common approach to agriculture.

(ii) ***Industrial negotiations*** – Supports ambitious tariff reductions, but with some flexibility on participation so that tariff elimination initiatives in specific sectors can be pursued on a critical mass basis, not all developing countries being required to participate.

(iii) ***Core market access agenda*** – The letter calls for attention to be focused on core market-access liberalization in goods, services and agriculture, implying less emphasis on rules-related issues. With regard to the Singapore issues, proposes negotiation on trade facilitation and prefers dropping investment and competition (the more controversial Singapore Issues),and perhaps transparency in government procurement.

(iv) ***Ministerial in 2004*** – Proposes that the next Ministerial Conference, which is to be hosted by Hong Kong, should be held this year, in order to keep up momentum in the Round.

Initial reactions to Zoellick's letter have been mostly positive. WTO Members have welcomed it as a promise of re-engagement and US leadership in the Doha process, having been uncertain about the U.S. commitment to pursue major trade initiatives during a presidential election year. But there is also some doubt, more privately expressed, as to how much progress can really be expected this year in putting the Round back on track in 2004, given the essential need, recognized by Zoellick, for early progress on agriculture. The EU, however, has sent mixed messages, since it will have most difficulty in agreeing a date for termination of export subsidies.

ANALYSIS

I. Highlights of Zoellick's Letter

USTR Robert Zoellick on January 11, 2004, sent a letter to all trade ministers of WTO Members urging a "common sense" approach to the Round, and to seek their support to prevent making 2004 a "lost year." He will embark on a tour of major capitals early this year to test these ideas.

Zoellick's letter contains an important change of position on agriculture, and new flexibility on tariff reductions for industrial goods. The letter also reflects a return to the historic U.S. position that this round should focus on agricultural reform and market access.

A. Agriculture: An End to an Alliance with the EU

Zoellick urged Members to set an (early, if possible) definitive end date for the elimination of export subsidies reflecting an apparent break with the joint proposal put forward with the EC in August. He called for a substantial decrease in domestic support, especially in the area of greatest distortion, the "amber box" subsidies but tied action in this area to a substantial increase in market access for agriculture by both developed and developing countries. He also called for caps where none exist now on less distorting "blue box" subsidies.

Zoellick urged Members, both developed and developing countries, to agree on a common, "blended" methodology for tariff reduction formulas. He also supported elimination of cotton export subsidies and subsrtantial reduction of trade-distorting domestic support together with comprehensive economic reform and introduction of new technologies.

Overall, Zoellick's positions represent a return to the more ambitious U.S. agriculture proposal of 2002. The break with the EU/US common position can also be understood as a movement towards agricultural exporting countries such as Brazil and its G-20 partners.

B. Industrial Negotiations: A "Blended Formula" of More Flexibility and Ambition

Zoellick proposed an ambitious approach to tariff reductions, but suggested some flexibility in participation by the less advance developing countries. He canvassed a blend of tariff harmonization and across-the-board cuts, as proposed in agriculture, and as a way of facilitating progress on sectoral tariff elimination initiatives, he was open to reduction agreements involving a "critical mass" of countries as opposed to universal participation. He also mentioned that there exists widespread support for reducing non-tariff barriers in the course of negotiations.

C. Focus on Core Market Access Agenda; Less Attention to Rules and Singapore Issues (Except Trade Facilitation)

Zoellick urged that Members focus on the core market-access agenda of liberalizing trade in goods, services and agriculture. His letter makes no mention of rules issues such as trade

remedies, including anti-dumping, and regional trade agreements, and this has drawn adverse comment from Members such as Switzerland for whom rules negotiations are central.

Regarding services, Zoellick called for additional and improved market access offers in services negotiations. Currently, there are 40 offers from Members. He also suggested more technical assistance to support these negotiations.

Regarding the Singapore Issues, Zoellick urged Members to start negotiations on trade facilitation, and would support negotiations on transparency in government procurement. He suggested that Members drop investment and competition (as he would prefer), or develop a plan for further study. This too is a more explicit distancing of the US from the EC position than we have seen hitherto.

D. General Council Chairperson: A More Engaged Developing Country Candidate

Zoellick suggested that the next General Council chairperson be from a developing country, given the importance of development to the Round. He cited as good candidates the ambassadors from Brazil, Chile, Pakistan, Singapore, and South Africa. The tradition is to rotate the chair, with the next being from a developed country. Ambassador Oshima of Japan is currently seen as the most likely candidate. Zoellick's letter may call this into question although support for his suggestion is not overwhelming.

E. A Ministerial in 2004: Right Timing, or Too Soon?

Zoellick proposed that the next Ministerial Conference, which will be hosted by Hong Kong, should be held before the end of this year, in order to keep up momentum in the Round. The suggested date is earlier than expected, and reportedly is not favored by Hong Kong, , which will face logistical challenges in holding the meeting this year, but might be able to do so in late December.

That timing, however, would not suit Pascal Lamy who leaves his post in the European Commission at the end of October. Hong Kong may also be conscious that a meeting this year, which would obviously not mark the conclusion of the Round, may achieve little progress: a meeting in mid-2005, which was the more general expectation, might be more productive.

II. Initial Reactions on Letter

Public comments by the partners of the United States, in capitals and in Geneva, have been generally positive. The re-engagement of the United States in the Doha process is very welcome, particularly following its preoccupation throughout the autumn with regional and bilateral initiatives, and that of the EC with its internal policy review. The virtual silence of the two great powers through the autumn and the disappointing outcome of the December process in the WTO General Council had created the impression that 2004 would be a lost year, which Zoellick is now trying to dispel.

Zoellick's letter has certainly succeeded in injecting life into the debate about the Doha Round. At the first major WTO meeting since the publication of the letter, the Trade Policy Review of the United States on 14 January 2004, almost all speakers welcomed Mr. Zoellick's initiative in these general terms. In private, however, there is a great deal of speculation and some confusion about the motivation and the policy implications of the letter.

A. EU Initial Reactions Mixed

EU reactions to Zoellick's letter have been mixed, as seen from recent statements by Agriculture Commissioner Franz Fischler and Trade Commissioner Pascal Lamy to the EU Parliament on January 13, 2004.

Fischler took the harder line, insisting that the EC would only move on export competition if all forms of export subsidization were "fully addressed in a parallel fashion" and noting the silence of the US on "food aid dumping." He also said that the EU should not be required to end its export subsidies by a defined date if the United States takes no action on its export credits, and called for stronger disciplines on "amber box" than on "blue box" support programs, as being more trade-distorting.

Lamy expressed support for Zoellick's initiative in general terms, and stated that WTO Members should move towards agreement on negotiating frameworks for agriculture and industrial market access by March or April, 2004.

Since the approval by the European Council in December of the Commission's report on the revivifying of the Doha Round, which amounts to a new negotiating mandate for the Commission, the EU has also indicated its re-engagement in the Round in a communication to the WTO General Council in December 2003.

B. Reactions from Other Countries: Guarded Optimism

Brazil and other delegations have reacted positively to Zoellick's letter, again in general terms. Brazil's Ambassador to the WTO Luiz Felipe de Seixas Correa, on January 13 stated the letter was positive, and welcomed the "U.S. commitment to the global trade agenda." Nevertheless, he wanted further details on U.S. positions based on Zoellick's letter before passing judgment on the prospects of the Round this year. This guarded optimism is the typical reaction, though some representatives have commented adversely on Zoellick's apparent down-grading of the rule-making elements of the Round, which include trade remedies as well as investment and competition. West African cotton-producing countries have commented that his allusions to cotton subsidies appear to commit the United States to nothing new.

OUTLOOK

Zoellick's initiative comes somewhat as a surprise as many observers believed that the United States would not initiate major trade initiatives during an election year. In addition, it was uncertain not long ago whether Zoellick would still remain as USTR (he was reportedly a leading candidate to become the chairman of Freddie Mac). With this new initiative, it is

apparent that Zoellick intends to remain in his role and will expend considerable effort to revive WTO negotiations. With this new statement of position, the United States has joined the EU (after its renewed mandate in December 2003), in ending their period of reflection after collapse of the talks in Cancun – and has signaled its readiness to re-engage at the WTO.

Three elements in Zoellick's letter have aroused special interest and debate among WTO delegates – his apparent change of position on agriculture, his call for a Ministerial meeting in 2004 and his proposal that a developing country Ambassador should chair the General Council in 2004. All three have a bearing on the great underlying question – how much difference will his démarche make to the course of events this year?

On agriculture, Zoellick's letter is a strong signal that the United States is moving away from the common position it developed with the EC before Cancun. Not surprisingly, the EU's initial reactions have been cautious, if not hostile (at least on agriculture), but for many other Members this is a positive development. Other Members see the resumption of traditional U.S. positions as a move towards developing exporters of agricultural products and an effort to repair post-Cancun relations. Some have suggested that it was timed with an eye in particular to Latin American partners in this week's Monterey Conference. Key members of the G-20, including Brazil and India, have sounded a positive note in commenting on the letter. It is seen as positive that Mr. Zoellick has so firmly stated the crucial importance of early movement on agriculture in this Round, but in doing so he has identified the main reason why many are skeptical about the possibility of real progress in 2004. The EU is again the focus of pressure to move on agricultural reform.

The proposal that WTO Ministers should meet in Hong Kong later this year has caused some surprise, not least in Hong Kong, which would have difficulty in organizing a Conference before the final days of the year and was expecting that it would more likely take place in mid-2005. The desire to create momentum is clear, but some delegations fear that the proposal could have the opposite effect of diverting energy in the second half of the year into preparations for the Conference and of causing decisions which might have been taken earlier to be reserved for the Ministerial.

If the Ministerial could be held in mid-year 2004 it could precipitate the necessary decisions on negotiating frameworks, etc., and that would no doubt be the preference of Pascal Lamy. But it seems that this would not be a practical possiblity, in Hong Kong at least. Some delegations are also doubtful of the desirability of meeting again so soon at Ministerial level, in what risks being seen as another attempt at Cancun rather than a forward move. The case for an early Ministerial meeting as a catalyst for progress can certainly be made, and the United States and others will no doubt do so when the WTO General Council meets on 12 February 2004. But it will not be easy to persuade the membership to agree a date before it is clear what the purpose of the meeting will be, and it is therefore unlikely that a positive decision could be taken at that meeting.

Mr Zoellick's suggestion that a developing country Ambassador should chair the General Council in 2004, despite the convention that developed and developing countries alternate in the chair, has caused most surprise. It had been generally believed, after much consultation, that

Ambassador Oshima of Japan would assume the post, and this proposal appears something of a slight to Japan. It has elicited very mixed reactions, but little strong support. There is speculation that it may be motivated by the expectation that 2005 will be a more active year than 2004, both in the Doha Round and because of the appointment of a new Director-General. But that is hardly consistent with the proposal of a Ministerial Conference in 2004. By convention the chairmanship in 2005 would be held by an African Ambassador and the African caucus has stated that while it has no objection to a developing country chairman in 2004, it wishes to maintain Africa's "regular" turn in 2005.

Controversy on this point could complicate the already difficult process of agreeing on a slate of chairs for the standing WTO bodies, as well as the Doha Round negotiating groups. Once the new negotiating chairs are in place, hopefully on 12 February, Members will aim to reach agreement as soon as possible on the frameworks to move forward negotiations on agriculture, industrial goods and other issues.

In summary, Mr. Zoellick's letter has certainly stimulated interest and debate, and many of his points on the substance of the negotiations have been well received. But there is some regret that debate on the substance has been overlaid by the procedural issues of chairmanships and Ministerial meetings. The test of his substantive ideas will come when the negotiating groups resume their work in February, especially in the attempt to agree negotiating frameworks for agriculture and industrial products.

WTO Appellate Body Upholds U.S. Sunset Review on Steel; Reverses Key Panel Findings

SUMMARY

The WTO Appellate Body in a report released December 15, 2003,[4] has upheld U.S. measures challenged by Japan in a "sunset review" of an anti-dumping duty order on steel. (Under the Agreement, anti-dumping duties are supposed to "sunset" or expire, after five years.) However, the Appellate Body overturned the Panel on a number of key issues related to the sunset review disciplines of the *Anti-Dumping Agreement*. This decision is extremely important, in that it marks the first time the Appellate Body has determined the scope of Article 11.3, the so-called "sunset review" provision of the *Anti-Dumping Agreement*.

ANALYSIS

I. Factual Background

This dispute arose from a determination of the U.S. Department of Commerce (DOC) in 2000 that revocation of a 1993 anti-dumping duty order on certain steel products from Japan "would be likely to lead to continuation or recurrence of dumping." The DOC transmitted this determination to the U.S. International Trade Commission (ITC). The ITC, in turn, determined that revocation of the order would be likely to lead to continuation or recurrence of material injury to a U.S. industry within a reasonably foreseeable time. Therefore, the anti-dumping order remained in place.

On August 14, 2003, a WTO Panel dismissed Japan's challenge to the U.S. measures (please see our report of August 15, 2003). A number of the Panel's findings were appealed by Japan to the WTO Appellate Body, as described below.

A. Sunset Reviews under the Anti-dumping Agreement

One of the key provisions invoked by Japan to support its claims was Article 11.3 of the *Anti-dumping Agreement*. Article 11.3 provides in part that an anti-dumping duty must be terminated no later than five years after its imposition, unless the authorities determine in a review that the expiry of the duty "would be likely to lead to continuation or recurrence of dumping and injury."

[4] The decision of the Appellate Body in *United States - Sunset Review of Anti-dumping Duties on Corrosion-resistant Carbon Steel Flat Products from Japan* was released on December 15, 2003. The appeal was heard by Yasuhei Taniguchi (Japan), Georges Abi-Saab (Egypt) and A.V. Ganesan (India).

B. U.S. Sunset Policy Bulletin "challengeable as such" in WTO dispute settlement

The "Sunset Policy Bulletin" sets out the policies of the DOC regarding the conduct of sunset reviews. It includes what the United States claims is "guidance" regarding when revocation of an anti-dumping order would be considered as "likely" to lead to continuation or recurrence of dumping. It was published in 1998, before the United States had conducted any sunset reviews of anti-dumping or countervailing duties.

Japan had argued before the WTO Panel that the Sunset Policy Bulletin was inconsistent "as such" (i.e. on its face, regardless of its actual application). The Panel rejected this argument on the basis that the Sunset Policy Bulletin was "not a mandatory legal instrument obligating a certain course of conduct", and therefore it could not, "in and of itself, give rise to a WTO violation." In other words, in the view of the Panel, the Sunset Policy Bulletin was "not a measure that is challengeable, as such, under the WTO Agreement." **The Appellate Body reversed the Panel on this issue.**

The Appellate Body stressed that "there is no basis, either in the practice of the GATT and the WTO generally or in the provisions of the *Anti-Dumping Agreement*, for finding that only certain types of measure can, as such, be challenged in dispute settlement proceedings under the *Anti-Dumping Agreement*." The Appellate Body saw "no reason for concluding that, in principle, non-mandatory measures cannot be challenged 'as such'." To the extent that the Panel suggested otherwise, it was "in error."

The Appellate Body reasoned that "in principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings." It recalled that GATT and WTO panels "have frequently examined measures consisting not only of particular acts applied only to a specific situation, but also of acts setting forth rules or norms that are intended to have general and prospective application." It said that "disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability needed to conduct future trade." Allowing claims against such measures, as such, "serves the purpose of preventing future disputes by allowing the root of WTO-inconsistent behaviour to be eliminated."

Therefore, the Appellate Body said that Panels were not obliged, as a preliminary jurisdictional matter, to examine whether the challenged measure was mandatory. It said that the mandatory/discretionary distinction was relevant, if at all, only as part of the panel's assessment as to whether the measure was WTO-inconsistent. However, it cautioned against "the application of this distinction in a mechanistic fashion."

The Appellate Body found that the Panel's characterization of the Sunset Policy Bulletin was based on "a number of deficiencies", including its failure to "consider the extent to which the specific provisions of the Sunset Policy Bulletin are normative in nature", and "the extent to which USDOC itself treats these provisions as binding." **Therefore, the Appellate Body reversed the Panel's conclusions that the Bulletin was "not challengeable, as such", under the WTO Agreement.**

C. Sunset Reviews: Need for "reasoned conclusion" that dumping is "probable"

Before examining the specific claims advanced by Japan, the Appellate Body first considered the scope of the "sunset review" obligations under Article 11.3.

The appeal concerned the so-called "likelihood determination", i.e. the disciplines that apply to investigating authorities when they determine whether the expiry of the duty would be "likely" to lead to continuation or recurrence of dumping. The Appellate Body emphasized that the "likelihood determination is a prospective determination" which requires authorities to "undertake a forward-looking analysis."

The Appellate Body stated that original dumping investigations and sunset reviews are "distinct processes with different purposes." In an original investigation, investigating authorities must determine whether "dumping exists." By contrast, in a sunset review, they must determine whether expiry of the duty is likely to lead to "continuation or recurrence" of dumping.

Significantly, the Appellate Body agreed with Japan that the definition of "dumping", set out in Article 2.1 of the Agreement ("introduced into the commerce of another country at less than its normal value") applied for purposes of the entire *Anti-Dumping Agreement* - not just at the investigation stage, but during sunset reviews as well. This determination was of critical importance for the Appellate Body's subsequent determination on "zeroing", as discussed below.

The tribunal also said that the language of Article 11.3 "makes clear that it envisages a process combining *both* investigatory and adjudicatory aspects [original emphasis]." It reasoned that:

> ...Article 11.3 assigns an active rather than a passive decision-making role to the authorities. The words "review" and "determine" in Article 11.3 suggest that authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination. In view of the use of the word "likely" in Article 11.3, an affirmative likelihood determination may be made only if the evidence demonstrates that dumping would be probable if the duty were terminated - and not simply if the evidence suggests that such a result might be possible or plausible.

The Appellate Body also said that certain rules regarding evidence and procedure, as well as public notice, also applied to sunset reviews.

The Appellate Body stressed that "authorities must conduct a rigorous examination in a sunset review before the exception (namely, the continuation of the duty) can apply." It referred to the "exacting nature" of the obligations under Article 11.3, suggesting that the drafters of the Agreement foresaw "a rigorous process that can take up to one year, involving a number of procedural steps, and requiring an appropriate degree of diligence on the part of the national authorities."

Importantly, the Appellate Body agreed with the Panel that:

> The text of Article 11.3 contains an obligation "to determine" likelihood of continuation or recurrence of dumping and injury....The requirement to make a "determination" concerning likelihood therefore precludes an investigating authority from simply assuming that likelihood exists. In order to continue the imposition of the measure after the expiry of the five-year application period, it is clear that the investigating authority has to determine, on the basis of positive evidence, that termination of the duty is likely to lead to continuation or recurrence of dumping and injury. An investigating authority must have a sufficient factual basis to allow it to draw reasoned and adequate conclusions concerning the likelihood of such continuation or recurrence.

Having made these general interpretive remarks, the Appellate Body then turned to the specific claims advanced by Japan.

II. Appellate Body Findings on Japan's Specific Claims

A. Zeroing Defect "taints the likelihood determination"

Japan challenged the DOC's reliance, in the sunset review in question, on dumping margins calculated in two previous administrative reviews. Japan argued that the DOC could not rely on these margins, because they had been calculated using a WTO-inconsistent "zeroing" methodology. The Panel had rejected this argument, reasoning that the substantive disciplines set out in Article 2, on the "determination of dumping", did not apply in making a determination of "likelihood of continuation or recurrence of dumping" under Article 11.3. **The Appellate Body reversed the Panel on this issue.**

The Appellate Body acknowledged that Article 11.3 did not prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review. It reasoned that Article 11.3 "neither explicitly requires authorities in a sunset review to calculate fresh dumping margins, nor explicitly prohibits them from relying on dumping margins calculated in the past." This "silence in the text of Article 11.3" suggested to the Appellate Body that "no obligation is imposed on investigating authorities to calculate or rely on dumping margins in a sunset review."

However, it said that if investigating authorities chose to rely on dumping margins in making their likelihood determination, the calculation of these margins must comply with the disciplines set out in Article 2.4, which prescribes certain rules for determining a "fair comparison" between the export price and the normal value.

The Appellate Body recalled its findings in the earlier case of *EC - Bed Linen* that "zeroing" was WTO-inconsistent, since in that case it did not provide a "fair comparison" between the export price and normal value. It re-iterated that the "inherent bias" in a zeroing methodology "may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping."

The Appellate Body said that "if a likelihood determination is based on a dumping margin calculated using a methodology inconsistent with Article 2.4, then this defect taints the likelihood determination too." **It therefore reversed the Panel's legal conclusion that the United States did not act inconsistently with Article 11.3 in the sunset review by relying on dumping margins calculated in previously reviews using a "zeroing" methodology.**

However, in the present case, there were insufficient factual findings in the Panel report about the particular methodology used by the DOC in the administrative reviews, or any clear indication as to whether the Panel considered that the U.S. methodology entailed "zeroing." Therefore, in keeping with the limited mandate of the Appellate Body only to review errors of law, not to make findings of fact, the Appellate Body said that it was not possible for it to assess whether the DOC methodology used in calculating the dumping margins in the administrative reviews was equivalent to the "zeroing" methodology found to be WTO-inconsistent in *EC - Bed Linen*.

Therefore, the Appellate Body said that it lacked the "sufficient factual basis" to "complete the analysis" of Japan's claims on this issue. For this reason, the Appellate Body was unable to rule on whether the United States acted inconsistently with Article 2.4 or 11.3.

B. "Company-specific" Likelihood Determinations Not Required in Sunset Reviews

The Appellate Body upheld the finding of the Panel that the *Anti-Dumping Agreement* does not require investigating authorities to make "company-specific" likelihood determinations in sunset reviews.

The Sunset Policy Bulletin provides that the DOC will make its likelihood determination on an "order-wide" basis, i.e. it will make a single determination as to whether revocation of the order would be likely to lead to continuation or recurrence of dumping. Japan had argued that the authorities must make a separate determination, for each individual exporter or producer, as to whether revocation would be likely to lead to continuation or recurrence of dumping by that exporter or producer.

The Panel did not examine the substance of Japan's "as such" claim, because it was based on the Sunset Policy Bulletin, which, as noted above, the Panel had concluded was "not challengeable." **The Appellate Body reversed the Panel on that point.**

However, the Appellate Body re-iterated its view that Article 11.3 did not prescribe any particular methodology to be used by investigating authorities in making a likelihood determination in a sunset review. Therefore, "company-specific" determinations, although allowed, were not required. After examining related provisions, the Appellate Body concluded that "when the drafters of the *Anti-Dumping Agreement* intended to impose obligations on authorities regarding individual exporters or producers, they did so explicitly."

C. Avoiding the "mechanistic application of presumptions"

The Sunset Policy Bulletin provides that the DOC "normally will" make an affirmative likelihood determination in the following circumstances: (i) dumping continued at any level above 0.5% after the issuance of the order; (ii) imports ceased after the issuance of the order; or (iii) dumping was eliminated after the issuance of the order and import volumes declined significantly.

Japan argued that these "predetermined standards for finding likelihood" made the Sunset Policy Bulletin inconsistent, "as such", with Article 11.3.

Once again, the Appellate Body reversed the Panel's ruling that it could not examine the substance of Japan's "as such" claim, because, according to the Panel, it was based on the "non challengeable" Sunset Policy Bulletin. Going on to examine the substance of Japan's arguments, the Appellate Body said that it saw no problem, in principle, with the United States instructing its investigating authorities to examine dumping margins and import volumes. The issue was whether the Sunset Policy Bulletin went further, and instructed the DOC to attach "decisive or preponderant weight" to these factors in every case.

The Appellate Body cautioned that it "would have difficulty accepting that dumping margins and import volumes are always 'highly probative' in a sunset review by USDOC if this means that either or both of these factors are presumed, by themselves, to constitute sufficient evidence that the expiry of the duty would be likely to lead to continuation or recurrence of dumping." It acknowledged that such a presumption might have some validity when dumping had continued with significant margins since the duty was imposed. However, the second and third scenarios in the Sunset Policy Bulletin related to situations where there was no dumping, which might have been "caused or reinforced by changes in the competitive conditions of the market-place or strategies of exporters, rather than by the imposition of the duty alone." According to the Appellate Body, a "case-specific analysis" of the relevant factors would be necessary to determine that dumping would recur if the duty were terminated.

The tribunal admonished that "a firm evidentiary foundation is required in each case for a proper determination under Article 11.3 of the likelihood of continuation or recurrence of dumping." Such a determination could not be based "solely on the mechanistic application of presumptions." Therefore, the Appellate Body considered that the WTO-consistency of these provisions of the Sunset Policy Bulletin hinged on whether they instructed the DOC to "treat dumping margins and/or import volumes as determinative or conclusive, on the one hand, or merely indicative or probative, on the other hand, of the likelihood of future dumping."

Having asked this question, the Appellate Body was unable to answer it. It said that the lack of relevant factual findings on the record prevented it from being able to rule on Japan's claim.

The Appellate Body acknowledged that instructions to an executive agency, such as the Sunset Policy Bulletin, may "well serve as a useful tool to the agency as well as for all participants in administrative proceedings", including by promoting "transparency and consistency in decision-making." At the same time, the Appellate Body warned that:

> ...these considerations cannot override the obligation of investigating authorities, in a sunset review, to determine, on the basis of all relevant evidence, whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping. As we have found in other situations, the use of presumptions may be inconsistent with an obligation to make a particular determination in each case using positive evidence. Provisions that create 'irrebuttable' presumptions, or 'predetermine' a particular result, run the risk of being found inconsistent with this type of obligation.

Although the Appellate Body was unable to rule on Japan's "as such" claim related to these provisions of the Sunset Policy Bulletin, it agreed with the Panel's dismissal of the "as applied" claim. It said that it saw no reason to overturn the Panel's findings that the DOC had a sufficient factual basis for its conclusions concerning the likelihood of continuation or recurrence of dumping in this specific case.

OUTLOOK

This decision is extremely important, in that it marks the first time the Appellate Body has determined the scope of Article 11.3, the so-called "sunset review" provision of the *Anti-Dumping Agreement*.

The Agreement sets out the overarching principle that anti-dumping duties may remain in force "only as long as and to the extent necessary to counteract dumping which is causing injury." Article 11.3 provides specific content to this general principle by stating that an anti-dumping duty must be terminated within five years of its imposition, unless the importing country determines that "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury."

However, the United States generally does not allow anti-dumping duties to "sunset." In 1998, as the date of the first set of sunset reviews was approaching, the Department of Commerce (DOC) published a "Sunset Policy Bulletin." The Bulletin provides what the United States claimed was "guidance" as to when the DOC should conclude that dumping would be "likely" to continue or recur if the order were revoked. The DOC has applied the Bulletin with alarming consistency. It has found "likely dumping" in every single sunset review in which the U.S. industry has participated - with no exceptions. The United States claimed that the Sunset Policy Bulletin was not a "measure" subject to challenge in WTO dispute settlement proceedings, because it was not mandatory. The Panel in this case agreed with that view.

Significantly, however, the Appellate Body reversed the findings of the Panel on this issue, ruling that there was "no reason for concluding that, in principle, non-mandatory measures cannot be challenged 'as such.'" It stressed that "the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings" may be subject to dispute settlement under the *Anti-Dumping Agreement*. The Appellate Body upbraided the Panel for failing to "consider the extent to which the specific provisions of the Sunset Policy Bulletin are normative in nature", and "the extent to which USDOC itself treats these provisions as binding."

The Appellate Body also ruled that where authorities in a sunset review rely on a dumping margin (calculated either in the sunset review or in previous proceedings) in making their "likelihood" determination, the calculation of that margin must have been made in a WTO-consistent manner. More specifically, the Appellate Body said that where the dumping margin was calculated with the use of the WTO-inconsistent "zeroing" methodology (i.e. considering negative dumping margins as zero), then "this defect taints the likelihood determination too."

More generally, the Appellate Body indicated that the sunset review process imposes serious disciplines on WTO Members wishing to maintain anti-dumping orders beyond their scheduled expiration date. It rejected the notion that importing authorities may "simply assume that likelihood exists." Instead, the "exacting nature" of the sunset review provision requires authorities to conduct a "rigorous examination" before the exception can apply. There must be a "firm evidentiary foundation" in each case for a proper determination under Article 11.3, and such a determination cannot be based "solely on the mechanistic application of presumptions." The Appellate Body also said that "likely" dumping means "probable" dumping.

None of the U.S. measures challenged by Japan in this case were found to be WTO-inconsistent. In a number of instances, the Panel had not made sufficient factual findings to allow the Appellate Body to rule on Japan's claims.

The United States has taken the position that Article 11.3 of the Anti-Dumping Agreement imposes very few substantive obligations. However, the Appellate Body decision has shown that the provision does, in fact, impose meaningful disciplines on Members when they determine whether dumping is "likely" to continue or recur. Indeed, the Appellate Body has issued a clear warning that "provisions that create 'irrebuttable' presumptions, or 'predetermine' a particular result, run the risk of being found inconsistent." The decision has thus provided new life to a critically important provision of the *Anti-Dumping Agreement.*

WTO Appellate Body Rules in Favor of United States in Softwood Lumber Dispute; Some Findings on Subsidies in Favor of Canada

SUMMARY

The WTO Appellate Body in a report released on January 19, 2004, has ruled in favor of the United States on several key legal issues in the Canada-U.S. Softwood Lumber dispute.[5] It agreed with the U.S. position that Canada was providing a "financial contribution" to its lumber industry, and it opened the door to the possibility that the United States could use private prices in the northern states as the comparative benchmark for determining the extent of the "benefit" to the Canadian subsidy recipients. However, the tribunal upheld a complaint by Canada that the United States had failed to determine whether the subsidies had "passed through" to unrelated producers. This is an important victory for the United States in this longstanding, multi-billion dollar bilateral trade dispute with Canada.

ANALYSIS

I. Factual Background

In 2002, the U.S. Department of Commerce (DOC) imposed countervailing duties on softwood lumber imports from Canada. The DOC determined the subsidy rate to be 19.34%, of which virtually all (19.25%) was attributed to Provincial stumpage programs.

This was challenged by Canada in the WTO, and the Panel handed down a split decision on August 29, 2003 (please see our report of August 31, 2003). The Panel agreed with the United States that Canadian stumpage programs provided a "financial contribution", and could be subject to countervailing duties. However, it also found that the United States violated the SCM Agreement when it resorted to U.S. prices, rather than internal Canadian prices, as the benchmark for determining whether Canadian producers had received a "benefit" from the subsidies. The Panel also found that the United States violated its obligation to determine whether the benefit of the subsidy had "passed through" to unrelated producers or manufacturers. The United States appealed, and Canada cross-appealed, to the Appellate Body.

II. Right to Harvest Standing Timber Constitutes a "financial contribution" of a "good"

The Appellate Body began by noting that the concept of a "subsidy" under the SCM Agreement "captures situations in which something of economic value is transferred by a

[5] The decision of the Appellate Body in *United States - Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* (DS 257) was released on January 19, 2004. The appeal was heard by Luiz Baptista (Brazil), John Lockhart (Australia) and Giorgio Sacerdoti (Italy).

government to the advantage of a recipient." It added that a subsidy would be deemed to exist where two distinct elements were present: (i) there was a financial contribution by a government; and (ii) the financial contribution conferred a benefit.

Canada had argued that the term "good" was limited to "tradeable items with an actual or potential tariff classification", which would exclude standing timber. In Canada's view, the conferral of the right to harvest standing timber was not the same as the provision of a "good", and accordingly there was no "financial contribution" of a good through the stumpage programs.

The Appellate Body disagreed, stating that Canada's definition of "goods" would "undermine the object and purpose of the SCM Agreement, which is to strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while, recognizing...the right of Members to impose such measures." It added that "to interpret the term 'goods'....narrowly, as Canada would have us do, would permit the circumvention of subsidy disciplines in cases of financial contributions granted in a form other than money, such as through the provision of standing timber for the sole purpose of severing it from land and processing it." The Appellate Body therefore agreed with the Panel that standing timber - i.e., trees - were "goods" within the meaning of the SCM Agreement.

The Appellate Body then ruled that by granting a right to harvest standing timber, Canadian Provincial governments "provide that standing timber to timber harvesters." Accordingly, the Provincial governments "provided goods" within the meaning of the SCM Agreement. Therefore, the DOC acted consistently with the Agreement when it determined that the Provinces were providing a "financial contribution" by providing "goods" - standing timber - through the stumpage programs.

III. Determining "benefit" when "private prices are distorted by the government's participation in the market"

The SCM Agreement states that the provision of a "good" by a government shall not be considered to confer a "benefit" to a recipient unless the provision is made for less than "adequate remuneration." The adequacy of such remuneration, in turn, must be determined "in relation to prevailing market conditions for the good" in the "country of provision."

Canada complained that the DOC used stumpage prices in the United States, rather than non-government prices in Canada (the "country of provision") to determine the benefit to Canadian lumber producers. The Panel agreed, finding that the recourse to U.S. prices as the benchmark for determining "benefit" was inconsistent with the SCM Agreement. The Panel said that the benchmark for determining benefit to the recipient was the market in the country of provision, in this case Canada.

The Appellate Body reversed the Panel on this issue. The Appellate Body was unwilling to accept the U.S. position that the term "market conditions" meant "a market undistorted by the government's financial contribution." However, it also rejected the Panel's view that the phrase "in relation to" the country of provision meant "in comparison with." The Appellate Body

emphasized that "the drafters did not intend to exclude any possibility of using as a benchmark something other than private prices in the market of provision."

The Appellate Body cautioned that although the SCM Agreement did not "dictate that private prices are to be used as the *exclusive* benchmark in all situations", it provided that the "prices of similar goods sold by private suppliers in the country of provision are the primary benchmark that investigating authorities must use when determining whether goods have been provided by a government for less than adequate remuneration." However, the Appellate Body said that investigating authorities may use a benchmark other than private prices in the country of provision if it is first established that "private prices in that country are distorted because of the government's predominant role in providing those goods."

The Appellate Body said that the Panel's interpretation to the contrary was "overly restrictive" and "based on an isolated reading of the text." It added that the Panel's approach would "frustrate the object and purpose of the SCM Agreement" because "if the calculation of benefit yields a result that is artificially low, or even zero....then a WTO Member could not fully offset, by applying countervailing duties, the effect of the subsidy as permitted by the Agreement."

The Appellate Body reasoned that "[w]hen private prices are distorted because the government's participation in the market as a provider of the same or similar goods is so predominant that private suppliers will align their prices with those of the government-provided goods, it will not be possible to calculate benefit having regard exclusively to such prices."

At the same time, the tribunal emphasized that an allegation that a government is a significant supplier "would not, on its own, prove distortion and allow an investigating authority to choose a benchmark other than private prices in the country of provision." The determination of "whether private prices are distorted because of the government's predominant role in the market" must be made on a case-by-case basis. The Appellate Body added that when an investigating authority resorts to a benchmark other than private prices in the country of provision, the benchmark chosen must nevertheless, in accordance with the Agreement, "relate or refer to, or be connected with, the prevailing market conditions in that country, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale."

The Appellate Body declined to "suggest alternative methods" that would be available to investigating authorities if they determined that private prices in the country of provision were distorted due to the government's predominant role in the market as a provider of the same or similar goods. It said that it would "make no findings on the WTO-consistency of any of these methods in the abstract."

One benchmark that was by no means "abstract" was that chosen by the United States in the present case, that of private stumpage prices in the border states of the northern United States. The Panel had found that this use of "cross-border pricing" by the DOC was WTO-inconsistent. However, the Appellate Body said that it did not have a sufficient factual basis to rule on whether this DOC benchmark was appropriate. It therefore reversed the Panel's finding of

WTO-inconsistency, but declined to "complete the analysis." In other words, the Appellate Body overturned the Panel's finding that the use of cross-border pricing violated the SCM Agreement, but did not rule on whether this U.S. methodology was WTO-consistent or not. This, presumably, will need to be decided in a future case.

IV. "Pass through analysis" Required for Upstream Transactions

Canada argued that even if Provincial stumpage programs did provide subsidies, the DOC violated the Agreement by failing to conduct a "pass through" analysis to determine subsidization of lumber in the case of upstream transactions for inputs. In Canada's view, the DOC could not simply assume that the benefits of the subsidy were passed through from timber harvesters, when they sold logs, to unrelated producers or manufacturers. The Appellate Body largely agreed, noting that "the investigating authority must establish that the benefit conferred by a financial contribution directly on input producers is passed through, at least in part, to producers of the processed product...."

The Appellate Body also agreed that the DOC had failed to conduct a pass-through analysis with respect to arms-length sales of logs by harvester/sawmills to unrelated sawmills, in breach of U.S. obligations under the Agreement. However, a pass-through analysis was not required with respect to arm's length sales of lumber to unrelated remanufacturers. The Appellate Body reasoned that "once it has been established that benefits from subsidies received by producers of *non-subject* products (that is, inputs) have passed through to producers of *subject* products (primary and remanufactured softwood lumber), we do not see why a further pass-through analysis *between* producers of subject products should be required...[original emphasis]."

V. Amicus Briefs Not Considered

During this appeal, the Appellate Body received two *amicus curiae* ("friends of the court") briefs, one from a Canadian aboriginal group and the other from U.S. environmental NGOs. Consistent with the cautious approach the Appellate Body has taken to unsolicited *amicus* briefs in recent cases, the tribunal stated simply that it "did not find it necessary to take the two *amicus curiae* briefs into account" in rendering its decision.

OUTLOOK

This is an important victory for the United States in this longstanding, multi-billion dollar bilateral trade dispute with Canada.

The Appellate Body made two determinations of critical importance to the U.S. position.

First, it found that Canada's "stumpage" programs - under which private companies are granted licenses to harvest standing timber from government-owned land - provide a "financial contribution" within the meaning of the *Agreement on Subsidies and Countervailing Duties* (SCM Agreement). The Appellate Body has thus definitively supported the U.S. position on what has likely been the single most divisive issue in this decades-old dispute. It also means that

whatever methodological problems may exist in the determinations of subsidy by the Department of Commerce (DOC), the core legal basis for the U.S. measure remains intact.

Second, it overturned the Panel on the appropriate benchmark to be used by investigating authorities in determining the "benefit" to the recipient. The Panel had found that the recourse to U.S. prices as the benchmark for determining "benefit" was inconsistent with the SCM Agreement. In the Panel's view, the benchmark for determining benefit could only be the market in the country that provided the subsidy - in this case, Canada. The Appellate Body disagreed, saying that the investigating authorities may use a benchmark other than private prices in the subsidizing country if it is first established that private prices in that country are "distorted" because of the government's "predominant role in providing those goods."

Despite the rulings in favor of the United States on these two critical points, the Appellate Body decision nevertheless leaves many issues unresolved.

First, the Appellate Body declined to suggest any "alternative methods" that would be available to investigating authorities if they determined that private prices in the subsidizing country were distorted due to the government's role in the market. It said that it could not make any findings on the WTO-consistency of any such methods "in the abstract." Nevertheless, the door has now been opened for WTO Members to select a benchmark other than the market of the subsidizing country, with no clear guidance as to which alternative benchmarks might be WTO-consistent. This means that the guidelines on the appropriate benchmark may well need to be decided case by case, panel by panel in the future.

Second, in a related point, many of the key terms used by the Appellate Body were also left undefined. For example, it may be very difficult to determine, in future cases, when the government's role in the market should be considered as "predominant," or whether private prices should be considered as "distorted." Once again, the Appellate Body has freed Members to choose alternative benchmarks, and yet has provided little guidance as to when this option may be invoked in a WTO-consistent manner.

Third, even in the present case, the Appellate Body did not rule on whether the benchmark chosen by the United States - private stumpage prices in the border states of the northern United States - was WTO-consistent, saying that it lacked the factual basis to decide this issue either way. This virtually guarantees new litigation on the U.S. cross-border pricing methodology.

Recent intensive efforts by Canada and the United States to negotiate an end to this dispute have not been successful. Therefore, with failed negotiations and inconclusive WTO decisions, there appears to be no end in sight to the intractable Softwood Lumber dispute.