WHITE & CASE
LIMITED LIABILITY PARTNERSHIP

Japan External Trade Organization

WTO AND REGIONAL TRADE AGREEMENTS

Monthly Report

May 2004

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

TABLE OF CONTENTS

SUMMARY OF REPORTS

Special Report

USTR Issues 2004 Special 301 Report

On May 1, 2004, the United States Trade Representative (USTR) released the annual "Special 301" report, detailing the adequacy and efficacy of intellectual property (IP) protection in 85 countries. "Special 301," shorthand for Section 182 of the Trade Act of 1974, requires USTR to identify foreign countries that deny adequate and effective protection of IP or deny fair and equitable market access for US products relying on IP protection.

The USTR groups countries investigated under the Special 301 into three categories: "Priority Foreign Countries," "Priority Watch List Countries," and "Watch List Countries." Only the most flagrant offenders are categorized as Priority Foreign Countries. In the 2004 Special 301 Report, only Ukraine was so designated. Fifteen countries were designated Priority Watch List Countries, including four countries that were moved from up from the 2003 Watch List: Egypt, Korea, Kuwait and Pakistan. The USTR placed 34 countries, two less than 2004, on the less egregious 2004 Watch List, including Malaysia and Thailand.

USTR identified two "Section 306 Countries," which are countries with IPR status that will be closely monitored, and which could be subject to prompt trade sanctions if IPR enforcement fails to meet the criteria set forth in applicable bilateral agreements. China and Paraguay were placed into Section 306 in the 2004 report.

The "global scourge" of growing piracy and counterfeiting issues, especially in the realm of CDs, DVDs, and other optical media products was the primary focus of the 2004 Special 301 report. Secondary emphases included Internet piracy issues, foreign government use of illegal software, and health policy concerns, including the USTR's understanding of the August 30, 2003 agreement on the export of protected pharmaceutical products.

United States

Senate Adopts FSC/ETI Repeal; Legislation Faces Uncertain Future

On May 11, 2004, the Senate approved, by a vote of 92-5, the final version of a bill (S.1673) which should bring the U.S. into compliance in the WTO dispute over the FSC/ETI legislation. The bill also contains numerous amendments to the U.S. international tax code, and includes provisions granting alternative tax credits to companies and workers.

The House has not yet acted on its version of FSC/ETI repeal legislation (H.R. 2896), although pressure to do so should increase now after passage of the Senate bill.

Free Trade Agreements

ITC Hears Testimony on Potential Effects of CAFTA and Dominican Republic FTAs

On April 27, 2004 the U.S. International Trade Commission (ITC) heard testimony on the potential economic effects of the U.S.–Central America Free Trade Agreement (CAFTA) and the Dominican Republic Free Trade Agreement (DR FTA) on the U.S. economy. Groups that testified include representatives of the textile and apparel industries, sugar users and producers, as well as those concerned with intellectual property rights. The hearing will assist the ITC in preparing its overall assessment of the FTAs, which is due within 90 days from the date the President signs the FTAs.

Speakers Discuss Benefits of Andean FTA

On May 12 the Washington International Trade Association hosted an event to address issues surrounding the Andean Free Trade Agreement (FTA). Negotiations will begin between the United States and Colombia on May 18. Peru and Ecuador will soon thereafter participate in the negotiations, with Bolivia likely to follow at a later date.

Speakers from the United States and Colombian Governments are enthusiastic about the negotiations. They emphasized that the Andean FTA is an opportunity to build upon the strong existing trade relationship between the United States and the Andean region.

Labor issues will be difficult. Sandra Polaski, Senior Associate and Project Director for the Trade Equity and Development Project at the Carnegie Endowment for International Peace, noted that the Andean region presents greater challenges for USTR in the arena of labor standards than the Central America FTA. Many Members of Congress in the United States are critical of the Central America FTA due to what they consider weak labor provisions.

Free Trade Agreements Highlights

We want to alert you to the following US Free Trade Agreement developments:

- US and Australia Sign FTA.
- U.S. and Central American Countries to Sign CAFTA on May 28.
- Peru and Ecuador Participate in First Negotiating Round of US-Andean FTA.
- USTR Initiates Employment Impact Review on US-Andean FTA; Requests Comments.

US-EU

United States and European Union Sign Container Security Agreement

Following nearly six months of negotiations, the United States and the European Union (EU) signed an agreement to expand bilateral cooperation with respect the Container Security Initiative (CSI) on April 22, 2004. According to the agreement:

- The United States and the EU will work cooperatively in the area of risk assessment and pre-screening of sea cargo.
- United States customs officials will be deployed in EU ports and visa versa.
- The United States and the EU will develop and deploy enhanced screening technology and standardized containers.

United States Customs and Border Protection (CBP) expects to expand CSI to 11 additional ports, including countries joining the EU in May 2004.

At an event prior to the signing of the agreement, CBP Commissioner Bonner and EU Customs Director-General Verrue discussed the need to enhance cooperation in securing the supply chain. Bonner noted that harmonization of notification and filing requirements would lower costs to businesses and assist in more efficient risk targeting.

US-EU Highlights

We want to alert you to the following US-EU trade developments:

- USTR Terminates GSP Eligibility of New EU Member States

Multilateral

WTO Panel Rejects US Complaint Regarding Export Regime of the Canadian Wheat Board

A WTO Panel has rejected a U.S. complaint that the export regime of the Canadian Wheat Board violated WTO rules on "state trading enterprises" ("STEs"). However, the Panel found that a number of statutory provisions on the treatment of imported grain breached Canada's national treatment obligations under GATT Article III.

The Panel decision is important in that it marks the first major interpretation by a GATT or WTO Panel of the main disciplines related to so-called STEs. An STE is a body granted "exclusive or special privileges" by a WTO Member government for the export or import of goods. They are common in agriculture trade, and are used by developed and developing countries.

WTO Members Indicate Flexibility on Doha Round in Advance of Paris "Mini-Ministerial"; Recent Disputes Add Pressure to Negotiations

The attention of WTO negotiators in the Doha Development Agenda (or "Round") is currently focused on a series of meetings of trade Ministers that will take place over the next few weeks. The most high-profile event is the meeting this week in Paris among some thirty trade ministers on the sidelines of the OECD ministerial conference, May 13-14.

It is hoped that Ministers may be able to break the impasse on agriculture which has persisted in Geneva, and thus achieve an agreement in July on "frameworks" for the negotiations on agriculture and industrial tariffs which would unblock the Round as a whole. This focus of hope on events outside Geneva reflects the lack of real progress in the Geneva process itself since WTO Members resumed work in the Round's negotiating groups in February. Stimulus at the ministers' level is needed to invigorate the Geneva process.

Recently, key Members have offered greater flexibility in an effort to reach agreement in July. A meeting of several key Ministers in London on April 30, hosted by USTR Zoellick, showed signs that the EU, Brazil and other Members are moving closer to a compromise. Commissioners Lamy and Fischler of the EU sent an encouraging letter on May 9, which indicates that the EU would have additional leverage on agriculture export subsidies and the "Singapore Issues." Malaysia's trade minister Rafidah Aziz during meetings in Washington on May 10 indicated that Malaysia is willing to move the agenda forward, including on the issue of trade facilitation (it had previously rejected the Singapore issues). In a speech in Paris before the OECD meeting, USTR Zoellick again emphasized that the following weeks are critical to the success of the Round, and pointed out the need to resolve the two issues of agriculture and trade facilitation in particular.

Meanwhile, recent WTO dispute settlement developments could have implications for the Round. For example, Brazil appears to have prevailed in its dispute against U.S. cotton subsidies. This and other dispute findings underscore the growing importance of the WTO as the world trade court and suggest that if the Doha Round negotiations falter, they might be overtaken by the outcome of litigation. Most WTO Members would see this as very

undesirable; it is far better that international obligations should be negotiated rather than imposed through legal action.

Momentum Builds After Paris "Mini-Ministerial" to Conclude "July Package" of WTO Doha Round Negotiating Frameworks

The About thirty WTO trade Ministers meeting in Paris on the sidelines of the OECD ministerial conference, May 13-14 made progress in their discussions on agriculture and other issues in the Doha Round. In particular, the United States and EU reached agreement with the "G-20" and Cairns Group agricultural economies to develop new approaches on subsidies and market access in agriculture trade.

The following week in Geneva, the WTO General Council urged Members to consider new proposals on agricultural market access by late May, otherwise negotiations would be at risk between now and the end of July. Members aim to agree by then on the "July package" of negotiating frameworks for agriculture, industrial market access, trade facilitation, the cotton initiative and other issues including services and development.

REPORTS IN DETAIL

SPECIAL REPORT

USTR Issues 2004 Special 301 Report

SUMMARY

On May 1, 2004, the United States Trade Representative (USTR) released the annual "Special 301" report, detailing the adequacy and efficacy of intellectual property (IP) protection in 85 countries. "Special 301," shorthand for Section 182 of the Trade Act of 1974, requires USTR to identify foreign countries that deny adequate and effective protection of IP or deny fair and equitable market access for US products relying on IP protection.

The USTR groups countries investigated under the Special 301 into three categories: "Priority Foreign Countries," "Priority Watch List Countries," and "Watch List Countries." Only the most flagrant offenders are categorized as Priority Foreign Countries. In the 2004 Special 301 Report, only Ukraine was so designated. Fifteen countries were designated Priority Watch List Countries, including four countries that were moved from up from the 2003 Watch List: Egypt, Korea, Kuwait and Pakistan. The USTR placed 34 countries, two less than 2004, on the less egregious 2004 Watch List, including Malaysia and Thailand.

USTR identified two "Section 306 Countries," which are countries with IPR status that will be closely monitored, and which could be subject to prompt trade sanctions if IPR enforcement fails to meet the criteria set forth in applicable bilateral agreements. China and Paraguay were placed into Section 306 in the 2004 report.

The "global scourge" of growing piracy and counterfeiting issues, especially in the realm of CDs, DVDs, and other optical media products was the primary focus of the 2004 Special 301 report. Secondary emphases included Internet piracy issues, foreign government use of illegal software, and health policy concerns, including the USTR's understanding of the August 30, 2003 agreement on the export of protected pharmaceutical products.

ANALYSIS

I. Overview of the Special 301 Report

In the annual Special 301 report, the USTR identifies those countries that fail to provide effective and adequate protection for IP rights or deny fair market access to U.S. citizens who rely on IP protection, pursuant to Section 182 of the Trade Act of 1974.

The USTR groups countries investigated under the Special 301 into three categories: "Priority Foreign Countries," "Priority Watch List Countries," and "Watch List Countries."

Countries identified as Priority Foreign Countries are usually subject to an investigation under the provisions of Section 301; these nations are committing the most egregious IPR violations and are not making sufficient progress to address these problems via good faith negotiations. The USTR decides within 30 days whether to initiate an

investigation into the policies or practices that led to that nation's Priority Foreign Country status.

The Special 301 report recognizes a fourth category of IPR violation, consisting of those countries subject to close Section 306 monitoring. Section 306 nations are subject to prompt trade sanctions if IPR enforcement fails to meet the criteria set forth in applicable bilateral agreements. The USTR could enact sanctions or initiate out-of-cycle reviews into the IPR practices of such nations.

In the 2004 Special 301 report, USTR focused special attention on recurring IPR problems in the 85 countries under review. These concerns include the burgeoning issue of global piracy and counterfeiting, especially in the realm of CDs, DVDs, and other optical media products. Other concerns addressed by the report include Internet piracy issues, foreign government use of illegal software, and health policy concerns, including the USTR's understanding of the August 30, 2003 agreement on the export of protected pharmaceutical products.

II. The 2004 Special 301 Report

In the 2004 Special 301 Report, the USTR identified one Priority Foreign Country, 15 Priority Watch List countries, and 34 Watch List countries.

In a cautiously optimistic tone, the USTR noted the U.S. strategy of pursuing bilateral free trade agreements (FTAs) was helping advance the IP protection. USTR praised Central American nations, including the Dominican Republic for agreeing to enhance IPR protection in the context of FTA negotiations. Similar praise was offered to Australia and Morocco. The report pledges that USTR will continue to seek enforcement of IPR as set forth in the World Trade Organization (WTO) Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement in future FTAs with Southern Africa, Panama and Bahrain.

Nevertheless, according to the USTR, a global lack of international enforcement of IP rights continues to cost the U.S. economy hundreds of billions of dollars a year. One of the most egregious offenders, Ukraine, remains the only country on USTR's Priority Foreign Country list, and its products will remain subject to the $75 million in sanctions imposed in January 2002. While most Special 301-censured nations are WTO Members lacking wholehearted enforcement of TRIPs provisions, Ukraine still lacks the necessary laws under which optical media piracy and other IP violations can first be addressed as criminal. The USTR warned that this lack of IP regulation endangers Ukraine's bid to join the WTO.

The USTR insisted that counterfeiting and piracy represent a "global scourge," having grown in sophistication and scope over the last few years. In particular, the increasing piracy of digital media offers huge profit and only slight risk for international criminals. The USTR will press for action regarding U.S. trading partners where optical media are granted little or no IP protection.

The USTR continues to place a high priority on pressing for full TRIPs implementation for WTO members, especially developing and recently acceded countries. Non-compliant nations were warned that the USTR would withdraw trade preference programs for countries failing to improve IP protection. Still, the U.S. Government will continue to offer assistance to nations endeavoring to implement TRIPs standards of IPR

legislation and enforcement. Of particular concern to the USTR is the creation and enforcement of laws that support a "period of data exclusivity" for pharmaceutical innovators, as set forth in the TRIPs agreement. Countries not already implementing Article 39.3 of TRIPs were reminded that medical innovation relies on a government's protection of the profitability of pharmaceutical research.

Internet piracy issues received significant consideration in the 2004 Special 301 report. The USTR looked for trading partners to ratify and implement the 1996 copyright treaties of the World Intellectual Property Organization (WIPO), known collectively as the WIPO Internet Treaties, which safeguard IP protection in the electronic transmission of copyrighted works. The USTR will press for incorporation of the WIPO Internet Treaties in its bilateral FTAs.

The Special 301 report noted the USTR's success in striving to ensure the legitimate use of software by many foreign governments, while observing that such regulations are conspicuously absent in others. USTR reiterated its commitment to fighting disease in developing countries within the context of the TRIPS framework; including the special agreement on patented medicines reached in August 2003.

The USTR placed China and Paraguay under close Section 306 monitoring, observing the failure of both countries to uphold the IPR standards set by bilateral agreements. Both are subject to prompt trade sanctions if IPR enforcement fails to meet the criteria set forth in the applicable agreement.

A total of 49 countries were placed on one of the Special 301 Report Watch Lists. Their distribution is as follows:

The USTR placed 15 trading partners on the **2005 Priority Watch List**:

Argentina	Bahamas	Brazil
Egypt	European Union	India
Indonesia	Korea	Kuwait
Lebanon	Pakistan	Philippines
Russia	Taiwan	Turkey

The USTR placed 34 countries on the **2004 Watch List**:

Azerbaijan	Belarus	Belize
Bolivia	Bulgaria	Canada
Chile	Colombia	Costa Rica
Croatia	Dominican Republic	Ecuador
Guatemala	Hungary	Israel
Italy	Jamaica	Kazakhstan
Latvia	Lithuania	Malaysia
Mexico	Peru	Poland
Romania	Saudi Arabia	Slovak Republic
Tajikistan	Thailand	Turkmenistan
Uruguay	Uzbekistan	Venezuela
Vietnam		

OUTLOOK

The 2004 Special 301 report comes on the heels of the recent meeting of the US-China Joint Committee on Commerce and Trade (JCCT), where China pledged to crackdown on IP infringement through the use of enhanced criminal sanctions. USTR has indicated that it will use the out-of-cycle review mechanism in early 2005 to review China's implementation of its JCCT commitments on IP. Israel, Malaysia, Poland and Taiwan will also be subject to out-of-cycle reviews prior to 2005.

Democrats in Congress are using the 2004 Special 301 report to criticize the Bush Administration's record on trade policy. They claim that the Bush Administration has failed to vigorously defend U.S. trade interests, including IP protection. Top Democrats in the House have called on Bush to pursue more disputes before the World Trade Organization, including cases against countries that are engaging in IPR violations.

UNITED STATES

Senate Adopts FSC/ETI Repeal; Legislation Faces Uncertain Future

SUMMARY

On May 11, 2004, the Senate approved, by a vote of 92-5, the final version of a bill (S.1673) which should bring the U.S. into compliance in the WTO dispute over the FSC/ETI legislation. The bill also contains numerous amendments to the U.S. international tax code, and includes provisions granting alternative tax credits to companies and workers.

The House has not yet acted on its version of FSC/ETI repeal legislation (H.R. 2896), although pressure to do so should increase now after passage of the Senate bill.

ANALYSIS

I. Senate Adopts FSC/ETI Repeal

On May 11, 2004, the Senate approved, by a vote of 92-5, the final version of a bill (S.1673) which should bring the U.S. into compliance in the WTO dispute over the FSC/ETI legislation. Voting against final passage were Senators Bob Graham (D-Florida), Judd Gregg (R-New Hampshire), Ernest Hollings (D-South Carolina), Jon Kyl (R-Arizona), John Sununu (R-New Hampshire). Senators John Edwards (D-North Carolina), John Kerry (D-Massachussetts) and John McCain (R-Arizona) did not vote on final passage.

During consideration of the bill, the Senate rejected (i) an amendment to extend unemployment benefits, (ii) an amendment by Senator McCain to strip out the bill's energy tax provisions, and (iii) an amendment by Senator Hollings to delete the bill's international tax provisions.

Bill Includes Provisions Granting Alternative Tax Credits to Companies and Workers.

Some the bill's more important provisions would:

- Repeal the Extraterritorial Income Exclusion Act (ETI), replacing it with a phased-in 9 percent deduction on domestic manufacturing income that effectively lowers the corporate tax rate for these firms by 3 percentage points.
- Provide $18 billion in tax incentives for various energy production and conservation programs and initiatives.
- Allow companies to temporarily repatriate foreign income at a lower rate.
- Extend and expand the R&D tax credit through 2005.
- Impose new corporate tax shelter penalties and reporting requirements.
- Codify the economic substance doctrine.

- Restrict abusive leasing tax transactions.
- Impose new tax regimes for corporate inversions and individual tax expatriates.
- Provide a 20-year foreign tax credit carryforward.
- Provide a 5-year carryback for net operating losses.
- Increase section 179 expensing.
- Make numerous other international tax reforms.

Senate Adopts Numerous Amendments to U.S. International Tax Code

As the Senate neared a vote on final passage of the FSC/ETI bill last night, the Senate adopted several changes to the bill by unanimous consent. Among the key amendments:

- The Senate added language offered by Senator Kay Bailey Hutchison (R-Texas) that would broaden the bill's domestic production tax incentive to include the work of architects and engineers on domestic construction projects.
- Senator Mary Landrieu (D-Louisiana) won unanimous consent to add her amendment to expand the tax credit for companies paying reservists called up to active duty.
- Also by unanimous consent, the Senate adopted an amendment by Senator Carl Levin (D-Michigan) to increase the bill's tax shelter penalties, making the penalty 100 percent of the gross income from an abusive transaction and applying the penalty to those who aid or abet the transaction.
- The Senate also adopted two manager's amendments to the bill that made numerous technical corrections and other changes to the bill. In these amendments, Senate Finance Committee Chairman Charles Grassley (R-Iowa) agreed to delete a provision in the bill to raise $800 million over 10 years by codifying IRS rules on the tax treatment of contract manufacturing. The changes also included revenue offsets such as new tax treatment for certain deferred compensation arrangements of companies engaging in inversions and additional restrictions on abusive leasing transactions. The texts of these two manager's amendments are attached.

II. House Version of the Bill remains Stalled

The House bill (H.R. 2896) has been stalled due to the opposition of 20 or so House Republicans led by Representative Don Manzullo (R-Illinois), who chairs the House Small Business Committee. This group generally opposes the international tax reforms in H.R. 2896 on the grounds that the provisions could encourage companies to move jobs

offshore. However, Manzullo issued a statement on May 11 praising the Senate for passing its bill, adding that he looks forward to "working with Chairman Thomas and the House leadership to quickly pass compromise legislation that will replace FSC-ETI with domestic tax relief that will help create jobs in America."

OUTLOOK

The roll call votes on each amendment and final passage are posted at:

http://www.senate.gov/legislative/LIS/roll_call_lists/vote_menu_108_2.htm

The text of H.R. 2896 as approved by the Ways and Means Committee is posted at:

http://waysandmeans.house.gov/legis.asp?formmode=read&id=1028

Free Trade Agreements

ITC Hears Testimony on Potential Effects of CAFTA and Dominican Republic FTAs

SUMMARY

On April 27, 2004 the U.S. International Trade Commission (ITC) heard testimony on the potential economic effects of the U.S.–Central America Free Trade Agreement (CAFTA) and the Dominican Republic Free Trade Agreement (DR FTA) on the U.S. economy. Groups that testified include representatives of the textile and apparel industries, sugar users and producers, as well as those concerned with intellectual property rights. The hearing will assist the ITC in preparing its overall assessment of the FTAs, which is due within 90 days from the date the President signs the FTAs.

ANALYSIS

We highlight below the testimony of key participants at the April 27 ITC hearing on the potential effects of the Central America and Dominican Republic FTAs.

I. Textile and Apparel Industries

- National Council of Textile Organizations (NCTO). Robert DuPree, Vice President of NCTO, expressed the textile industry's concern with both FTAs, saying, "we view the proposed CAFTA with a sense of great fear." NCTO sees loopholes in these agreements that might allow Chinese and other Asian goods to displace U.S. production. The textile industry is particularly concerned with duty-free benefits granted to numerous categories of items made of textile inputs from outside either the U.S. or any of the CAFTA countries. NCTO estimates that these loopholes to the rules of origin could cost the U.S. textile industry USD 1 billion or more worth of export sales. DuPree also expressed concern with the enforcement of customs regulations.

- Footwear Distributors and Retailers of America (FDRA). Peter Mangione, president of FDRA, expressed his organization's satisfaction with the elimination of tariffs as from the first day of the entrance into force of the CAFTA and the Dominican Republic FTAs. However, he also expressed disappointment that 17 items are exempted from immediate zero duties.

- American Apparel and Footwear Association (AAFA). James Jacobsen, Vice Chairman of Kellwood Company, speaking on behalf of AAFA, expressed the organization's strong support for the swift passage and early enactment of both FTAs. Among the benefits of these agreements, Jacobsen cited the creation of additional markets for U.S. inputs and finished products, flexible rules of origin, simple customs procedures and the fostering of business certainty and investment predictability. At the same time Jacobsen predicted that these FTAs would pose minimal

risk of injury to the US, as import penetration is very high in the footwear and apparel industries.

Jacobsen stressed that early approval of the agreements--ideally immediately after the U.S. elections in November--is critical for the footwear and apparel industries, as that would give companies a head start to prepare for the phase out of global quotas on textiles in 2005. However, Jacobsen also noted that for the footwear and apparel industries, the effects of a vote against these FTAs in the U.S. Congress would be minimal, as there are other places where they can get their inputs. A negative vote would affect the Central American countries more.

- Camara Nacional de la Industria Textil, Mexico (Canaintex): Maureen Smith, representing Canaintex, Mexico's textile industry organization, presented a mixed evaluation of CAFTA. Canaintex supported the cumulation provisions that allow for the use of Mexican and Canadian inputs. However, she lamented the establishment of preconditions and quantity and product limitations, which will impede the establishment of a market based textile regime in the hemisphere.

II. Intellectual Property Rights Groups

- International Intellectual Property Alliance (IIPA): Maria Strong, Vice President and General Counsel of IIPA, a coalition of trade associations representing the copyright industries, said that CAFTA contained high standards on copyright protection and enforcement. These provisions will help to address what IIPA sees as the main problem in Central America and the Caribbean – the failure of many of these countries to enforce adequately their existing copyright laws. IIPA estimated that trade losses due to piracy of U.S. copyrighted materials reached at least USD 56 million annually.

- Pharmaceutical Research and Manufacturers of America (PhRMA): PhRMA supports these FTAs as they promote transparent, timely and science-based regulation in Central America; strengthen protection and enforcement of intellectual property rights; and ensure a level, non-discriminatory playing field for American firms that allows pharmaceutical products to be priced commensurately. Renard Aron, Assistant Vice President for Latin America and Canada at PhRMA, urged for rapid approval, implementation and enforcement of the FTAs, as delays in legislative approval will give room for opponents of strong IP protection to press local governments for weaker IP provisions and lax enforcement. In addition, the R&D pharmaceutical industry competes with illegal products in a number of markets, losing important market share that cannot be recovered later.

The key concerns of PhRMA regarding IP and market access are:

- Health authorities consistently fail to coordinate with patent officials and inappropriately issue sanitary registrations for products already under patent, whose patent application is pending, or whose period of data exclusivity has not expired.

- Lack of data exclusivity protection. Although a few countries have strong regimes on paper, these provisions are rarely enforced and are often subject to exemptions that violate previous international commitments made through TRIPS.

- Intrusive market access barriers that discriminate against U.S. pharmaceutical manufacturers.

- Consumer Project on Technology (CPTech): CPTech, an NGO focused on access to medicines and IP rules, expressed concern with certain provisions of CAFTA, which they see as designed to increase the monopoly power exercised in the sale of medicines, such as mandatory patent extensions, requirements that health registration bodies enforce poor quality or non-infringing patents, new *sui generis* rights in health registration data, and reduced national discretion on the scope and standards for patent protection. CPTech opposes these provisions, because they predict that they will lead to higher prices and harm the poor.

III. Sugar Users and Producers

- Grocery Manufacturers of America (GMA): GMA strongly supports the FTAs, as they will bring relevant export and import opportunities to its associates (food, beverage and consumer product companies). According to Sarah Thorn, GMA's Senior Director for International Trade, upon elimination of tariffs, GMA exports could increase from US$ 359 million to US$ 662 million – an 84% increase over current exports to the region. CAFTA will also provide new avenues for imports of key ingredients for food processors. However, GMA regretted that the over-quota tariff on sugar is not reduced or eliminated. She added that some confectionery companies have decided to relocate out of the U.S. based, among other factors, on the high prices for sugar in the U.S. market.

- American Sugar Alliance (ASA): ASA, a coalition of growers, processors, and refiners of sugarbeets and sugarcane, is adamantly opposed to CAFTA and the DR FTA, as it considers that these agreements can destroy the domestic industry. Jack Roney, Director of Economics and Policy Analysis for ASA, said that in the short run these agreements have the potential of sharply depressing prices in an already oversupplied domestic sugar market. Moreover, he argued that the provisions dealing with sugar in the FTAs set a bad precedent for future FTAs as this could lead to massive oversupply of the U.S. sugar market and the capitulation of the U.S. sugar industry to subsidized foreign producers.

ASA urged that sugar be reserved for comprehensive, multilateral negotiations in the WTO, and not included in CAFTA or in any other bilateral or regional FTA.

- Sweeteners Users Association (SUA): SUA, an association of manufacturers of confectionery, grocery products, dairy foods, soft drinks and other products with caloric sweeteners, supports CAFTA, as it will increase exports of U.S. food and beverage products to Central American countries. However, Thomas Earley, speaking for SUA, expressed the association's belief that CAFTA did not liberalize sugar trade sufficiently.

  Earley urged the ITC not to be drawn into debates over the U.S. sugar program, but to focus on the effects of CAFTA. In this respect he said that the quantities of sugar imports in CAFTA do not remotely threaten the sugar program or the U.S. sugar industry. In effect, he argued that the initial 109,000 metric tons of additional quota granted to CAFTA countries represents less that 1% of the total supply in the current 2003/2004 marketing year.

Finally, Earley commented on the expected benefits of CAFTA:

- Enhanced competition in the increasingly consolidated U.S. sugar market.
- Better opportunities for U.S. agriculture exports.
- Potentially positive employment effects in the confectionery, beverage and food industries.
- Benefits to consumers.

OUTLOOK

Despite the concern of some of the interest groups present at the hearing for a rapid approval of CAFTA and the DR FTA, the prospects for passage of these agreements this year remain uncertain. There is no signing date established yet for CAFTA and the DR FTA, nor is there any indication of when the U.S. Administration will send the agreements to Congress. Speaking at another event, Regina Vargo, Assistant US Trade Representative, said it is up to the White House – with input from Congressional leaders – to decide whether to submit formally the legislation to Congress for action this year.

At this stage, U.S. and Central American trade negotiators are conducting the final "legal scrub" of the text of the trade agreement. The Central American officials are using the interim period to meet with Member of Congress to press for action this year. They are also pressing for the White House to sign the agreements soon, which would set in motion the 90-day timeframe for Congressional consideration.

Speakers Discuss Benefits of Andean FTA

SUMMARY

On May 12, 2004, the Washington International Trade Association hosted an event to address issues surrounding the Andean Free Trade Agreement (FTA). Negotiations will begin between the United States and Colombia on May 18. Peru and Ecuador will soon thereafter participate in the negotiations, with Bolivia likely to follow at a later date.

Speakers from the United States and Colombian Governments are enthusiastic about the negotiations. They emphasized that the Andean FTA is an opportunity to build upon the strong existing trade relationship between the United States and the Andean region.

Labor issues will be difficult. Sandra Polaski, Senior Associate and Project Director for the Trade Equity and Development Project at the Carnegie Endowment for International Peace, noted that the Andean region presents greater challenges for USTR in the arena of labor standards than the Central America FTA. Many Members of Congress in the United States are critical of the Central America FTA due to what they consider weak labor provisions.

ANALYSIS

The US and Colombia are scheduled to begin negotiations for a free trade agreement next week, kicking off efforts to negotiate an Andean FTA to also include Peru, Ecuador, and Bolivia. Panelists at a May Washington International Trade Association event commented on the trade relations between the US and the Andean region, the potential political and economic benefits of an FTA for the two parties, and the issue of labor standards in the agreement.

Panelists in the roundtable discussion included:

- Ambassador Luis Alberto Moreno from the Embassy of Colombia;
- Regina Vargo, Assistant U.S. Trade Representative for the Americas;
- Sandra Polaski, Senior Associate and Project Director for the Trade Equity and Development Project at the Carnegie Endowment for International Peace; and
- John Murphy, Vice President of Western Hemisphere Affairs for the U.S. Chamber of Commerce.

I. Colombian Ambassador Underscores U.S.-Andean Trade Relations

Ambassador Luis Alberto Moreno identified international trade and investment as key to future prosperity and growth in his country and the region at large. Closer relations between the Andean region and the US will promote employment, security, and democratic stability in the Andes. U.S. workers and companies will also benefit from a sizable and strategic market for their exports.

Moreno commented on the strength of the Colombian-U.S. and Andean-U.S. relationships:

- ***Colombia is an important market for U.S. goods:*** Colombia's GDP of more than $90 billion makes it the third largest economy in the Western Hemisphere, outside of NAFTA.

- ***The Andean market is even larger:*** The Andean market comprises 93 million people, with a GDP of approximately $170 billion.

- ***Trade between the Andean region and the US is complementary:*** Trade is a win-win situation for both sides as they specialize in different products. Andean exports include oil, minerals, light manufacturing products, and tropical agricultural products, such as bananas and flowers. The US, on the other hand, exports high value-added goods, computers, services, and agricultural products, such as grain, corn, wheat, and soybeans.

- ***Areas where interests diverge are the minority:*** Though political considerations and labor and environmental issues are subject to debate during the negotiations, the converging interests of the two parties outweigh the differences.

II. Assistant U.S. Trade Representative Identifies Importance of the FTA to the U.S.

Regina Vargo, identified five reasons why the Andean FTA, to include all four countries, would benefit the U.S.

- ***The Andean FTA would strengthen democracy and promote prosperity:*** The Andean FTA would foster growth and stability in a region currently afflicted by drug trafficking and illegal trade. Indeed, the FTA will expand the positive results of the 1991 Andean Trade Preferences Act (ATPA).

- ***Trade between countries is already strong:*** Currently, $19 billion in two-way trade exists between the Andean and U.S. markets. In addition, the region claims $8 billion in U.S. FDI and is a $7 billion export market for the US.

- ***The Andean FTA is a "world class agreement":*** The Andean FTA will include rules for transparency, anti-corruption, intellectual property rights, and labor and environmental standards. In fact, the USTR has already resolved many of the complaints filed in this region, particularly concerning Ecuador's child labor laws and violence in the workplace.

- ***An important component of the agreement is trade capacity building:*** Trade capacity building introduced in the CAFTA agreement will extend to the Andean region. The USTR will work with all four countries to promote better understanding of the benefits of free trade.

- ***The Andean FTA is part of a broader regional effort:*** The Andean FTA represents an additional step toward securing the Free Trade Agreement of the Americas (FTAA)—"a key objective of the US."

III. Policy Analyst Emphasizes Importance of Labor Standards

Sandra Polaski, Senior Associate and Project Director for the Trade Equity and Development Project at the Carnegie Endowment for International Peace, discussed the need to negotiate robust labor provisions in the FTA. She said that the weak labor provisions negotiated in CAFTA have made it impossible for Congress to gather enough votes to pass the agreement. The Andean region presents even greater challenges for USTR in the arena of labor standards.

Polaski explained that an FTA will only pass if proponents can win critical pro-labor democratic votes on Capitol Hill. She described the iron triangle that currently exists in Congress—between the free traders, pro-labor democrats, and protectionists. To win the pro-labor votes, USTR must introduce a "robust" model for labor standards in its negotiations.

Two primary components make up this model:

- ***Create higher standards:*** The Andean region must introduce standards that meet the International Labor Organization (ILO) criteria in order to be considered for the FTA. The countries in this region do not currently meet the core standards.

- ***Include a robust enforcement mechanism:*** The enforcement provisions must be stronger than the current USTR model. A complaining country should be able to impose a fine or withdraw trading rights in the event of non-enforcement.

IV. Businesses Support U.S.-Andean FTA

John Murphy, Vice President of Western Hemisphere Affairs for the U.S. Chamber of Commerce, discussed the rationale for the Andean FTA from a business perspective, the desired components of the FTA, and the short- to medium-term prospects for the negotiations.

- ***Why is an FTA with the Andean region important?*** The Andean FTA will give important U.S. exporting sectors a new market for their goods. The potential benefits of the agreement will expand those realized in the 1991 Andean Trade Preferences Act, including an expansion of entrepreneurship and the introduction of new industries in the region.

- The benefits of the FTA are economic but also political. Colombia, for instance, is a large, centrally located market, and a "logical trading partner for the US." In addition, the Andean countries have demonstrated steadfast willingness to negotiate.

- ***What should be included in the FTA?*** The business community has been relatively satisfied with the scope of recent FTAs. With respect to the Andean negotiations, the business community would like to see

expedient phase-ins in market access, transparent rules of origin, protection of intellectual property rights, and comprehensive inclusion of all products and services.

- ***What are the prospects for the FTA?*** According to Murphy, the prospects for the FTA to be approved by Congress will be excellent, as many members are personally familiar with the region. In addition, the business community has already united to support a future agreement. A newfound coalition is comprised of associations such as the Chamber of Commerce, National Association of Manufacturers (NAM), and the Business Roundtable (BRT), and companies including Caterpillar, Citigroup, and Occidental.

OUTLOOK

Negotiations with Colombia scheduled to begin on May 18 will open up the latest round of FTA negotiations by USTR. The close trade relations between Colombian and U.S. officials will ensure an ambitious start to the negotiations, with Peru and Ecuador also joining the table in the very near future. A timeline for the proposed end of negotiations and release of an agreement between the Andean countries and the US has not been specified.

Free Trade Agreements Highlights

US and Australia Sign FTA

On May 18, 2004 United States Trade Representative (USTR) Robert Zoellick and Australian Trade Minister Mark Vaile signed the U.S.-Australia Free Trade Agreement (FTA) in Washington, DC, as they had announced on May 3, 2004. The President notified Congress of his intent to enter into the FTA on February 13, 2004, and thus under the Trade Act of 2002, May 14 the earliest date on which the agreement could be signed.

Concluded on February 8, 2004, the agreement is the first U.S. FTA with a developed country since the US-Canada FTA in 1988. The FTA will eliminate from the date of its enactment (expected on January 1, 2005 if implementing legislation is passed this year), more than 99 percent of manufactured goods tariffs between both countries, and introduce further liberalization in services and agricultural markets, among other areas.

USTR has indicated that it plans to submit implementing legislation to Congress as soon as possible, with the goal of securing passage of the agreement before the Congress' August recess. A spokesman for House Speaker Dennis Hastert (R-IL) has indicated he expects the agreement to be taken up during the summer. Despite some concerns raised by Senator Charles Grassley over the exclusion of sugar, prospects for final passage have improved in recent weeks due in part to bilateral resolution of phytosanitary issues related to U.S. pork.

US and Central American Countries to Sign CAFTA on May 28

On May 13, 2004 USTR Robert Zoellick announced that the United States and Central American countries Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua will sign the U.S.-Central America Free Trade Agreement (CAFTA) on May 28, 2004, in Washington, DC. The President notified Congress of his intent to enter into the CAFTA on February 20, 2004. Under the Trade Act of 2002, the earliest date the agreement could be signed is May 21, 2004.

The Dominican Republic, which will be "docked" into CAFTA, will be present as an observer at the signing ceremony. Under the Trade Act of 2002, the U.S. must delay signing with the Dominican Republic until the completion of consultations with Congress.

The Administration now has to submit implementing legislation to Congress for approval. USTR has pledged to submit implementing language for CAFTA, including the Dominican Republic, as a single legislative package. However, prospects for the passage of CAFTA prior to the end of 2004 are dim. Sensitive constituencies, such as textile workers, sugar producers, and labor unions oppose the agreement. This coupled with election year politics has resulted in officials in the Administration and in Congress acknowledging that passage of CAFTA prior to 2005 is unlikely.

Peru and Ecuador Participate in First Negotiating Round of US-Andean FTA

On May 3, 2004 USTR announced that Peru and Ecuador would join the U.S. and Colombia on May 18-19 in the first round of negotiations on a U.S.-Andean FTA. As

announced on March 23, 2004, the negotiations were originally scheduled to begin with Colombia alone, while Peru and Ecuador first had to address certain issues regarding the protection of worker rights and a number of outstanding disputes with U.S. investors.

USTR further announced that to spur economic growth in Peru and Ecuador, the board of the Overseas Private Investment Corporation (OPIC) has approved a $ 54 million loan for a micro-financing initiative in the Andean countries and several others.

USTR Robert Zoellick notified Congress of the Administration's intention to negotiate an FTA with the Andean countries on November 18, 2003. The agreement will also include Bolivia. However, USTR has indicated that Bolivia is not yet ready to negotiate.

USTR Initiates Employment Impact Review on US-Andean FTA; Requests Comments

On May 14, 2004 the Trade Policy Staff Committee (TPSC), an interagency body chaired by USTR, announced in the Federal Register (69 FR 26917) that USTR and the Department of Labor ("Labor") are initiating a review of the impact of the proposed U.S.-Andean FTA on U.S. employment, including labor markets.

USTR and Labor are seeking public comments on potentially significant sectoral or regional employment impacts in the United States, as well as other likely market impacts of the FTA. Comments are due by June 7, 2004.

US-EU

United States and European Union Sign Container Security Agreement

SUMMARY

Following nearly six months of negotiations, the United States and the European Union (EU) signed an agreement to expand bilateral cooperation with respect the Container Security Initiative (CSI) on April 22, 2004. According to the agreement:

- The United States and the EU will work cooperatively in the area of risk assessment and pre-screening of sea cargo.
- United States customs officials will be deployed in EU ports and visa versa.
- The United States and the EU will develop and deploy enhanced screening technology and standardized containers.

United States Customs and Border Protection (CBP) expects to expand CSI to 11 additional ports, including countries joining the EU in May 2004.

At an event prior to the signing of the agreement, CBP Commissioner Bonner and EU Customs Director-General Verrue discussed the need to enhance cooperation in securing the supply chain. Bonner noted that harmonization of notification and filing requirements would lower costs to businesses and assist in more efficient risk targeting.

ANALYSIS

The April 22nd agreement between the EU and the U.S. Department of Homeland Security will extend the Container Security Initiative (CSI) to ports throughout the European Union. In 2003, CBP introduced CSI on a bilateral basis with several EU member states, raising controversy between EU members and in the European Commission. Negotiations to broaden the existing US-EU Customs Agreement, the Agreement on Customs Cooperation and Mutual Assistance in Customs Matters (CMAA), commenced in November 2003.

I. Background

In 2003, CBP introduced CSI in eight European Member States with prominent ports, including the Netherlands, Belgium, Germany, France, Italy, Spain, the United Kingdom, and Sweden, which together account for 85% of the container traffic between the EU and the US. These "special relationships" resulted in the Commission suing the Member State governments for pursuing bilateral trade deals with the US. The Commission, in its submissions to the European Court of Justice, claimed that the agreements distorted trade patterns in the EU. It also argued that trade and customs are competencies held by the European institutions, not the Member State governments.

In November 2003, the EU's Council of Ministers authorized the Commission to negotiate with the US on CSI and related customs security initiatives. Under the

"Transatlantic Agreement," initiated by U.S. Ambassador to the EU Rockwell Schnabel and Commission Director General Robert Verrue, the US and EU formed a joint working group to coordinate the expansion of CSI throughout the EU, as to prevent differential treatment among Member States and to secure transatlantic trade.

II. US and EU Extend CSI

The April 22nd agreement broadens the existing CMAA, which was signed by the US and the EU in May 1997. The primary objective of the new agreement is to expand CSI on a reciprocal basis throughout the EU. It also aims to establish best practices and common standards for risk-management techniques, and to improve public-private partnerships to secure the logistics of international trade.

The key feature of CSI is the reciprocal arrangement by which the US will send customs officials to European ports, and vice versa. U.S. customs officers at European ports will work in cooperation with host government customs administrations to screen cargo destined for the US. The same will apply at European ports. Four core elements characterize CSI, as identified by CBP:

- ***Identifying high-risk containers:*** CBP established automated targeting tools and systems of advanced intelligence to identify high-risk cargo.
- ***Pre-screening containers before shipping:*** Security screening takes place at the port of departure, not the port of arrival.
- ***Employing new technology:*** Advanced technology, including large-scale X-ray and gamma ray machines and radiation detection devices, is intended to make screening a rapid process that facilitates trade.
- ***Introducing standardized containers:*** New standardized containers allow customs officials at ports of arrival to easily identify signs of tampering on pre-screened cargo.

To implement the agreement, customs experts from the US, EU Member States and the Commission are scheduled to meet in May 2004.

III. Commissioner Bonner and Director-General Verrue Agree on Need to Secure Supply Chain

On April 21, 2004, the European Institute hosted a roundtable discussion with CBP Commissioner Bonner and EU Customs Director-General Verrue. Officials spoke of the need to cooperate on securing the trans-Atlantic supply chain. Verrue noted that the new agreement will facilitate cooperation in targeting high risk containers for inspection. In addition, Verrue noted that the European Union has been working to strengthen the Common External Border (CEB), and revise the EU Customs Code in order alleviate U.S. concerns.

In response to questions, both Commissioner Bonner and Director-General Verrue agreed that common procedures in terms of advanced notification and documentation requirements would reduce transactions costs and improve trans-Atlantic trade. Under the

new agreement, an expert group will meet regularly to facilitate greater cooperation on customs procedures.

OUTLOOK

The new agreement on the CSI comes just before the expansion of the EU and will allow newly acceding states to participate in the Initiative. Poland's ports have been of particular concern to the US.

Expansion of the CSI in Europe reflects CBP's continuing goal of pushing security beyond U.S. borders. CBP has also expressed interest in expanding CSI to ports in South America.

US-EU Highlights

USTR Terminates GSP Eligibility of New EU Member States

On May 18, 2004 the United States Trade Representative (USTR) published a notice in the Federal Register (69 FR 28185), announcing that as of May 1, 2004 the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, and Slovakia were no longer eligible as beneficiaries of the Generalized System of Preferences (GSP) program as a result of their accession to the European Union.

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

MULTILATERAL

WTO Panel Rejects US Complaint Regarding Export Regime of the Canadian Wheat Board

SUMMARY

A WTO Panel has rejected a U.S. complaint that the export regime of the Canadian Wheat Board violated WTO rules on "state trading enterprises" ("STEs").[1] However, the Panel found that a number of statutory provisions on the treatment of imported grain breached Canada's national treatment obligations under GATT Article III.

The Panel decision is important in that it marks the first major interpretation by a GATT or WTO Panel of the main disciplines related to so-called STEs. An STE is a body granted "exclusive or special privileges" by a WTO Member government for the export or import of goods. They are common in agriculture trade, and are used by developed and developing countries.

ANALYSIS

I. State Trading Enterprises and Wheat Exports

Applicable WTO provision: disciplines on State Trading Enterprises

Article XVII sets out the principal rules applicable to State Trading Enterprises. Article XVII:1(a) provides that:

"Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in [the GATT] for governmental measures affecting imports or exports by private traders."

Article XVII:1(b) provides more specific content to this obligation by specifying that paragraph (a):

"… shall be understood to require that such enterprises shall, having due regard to the other provisions of [the GATT], make any such purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales."

[1] The decision of the Panel in *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain* (DS276) was released on April 6, 2004.

Obligations imposed on WTO Members for STEs: drafters did not intend to "leave the door open to circumvention"

The Panel found that under Article XVII:1(a), WTO Members "formally guarantee, pledge or promise that their STEs shall act in the prescribed manner." The Panel reasoned that if this provision did not impose a legal obligation on Members, they could "create and use STEs to evade disciplines imposed by the GATT 1994 on governmental measures affecting imports or exports by private traders, since Members could not be brought to task in the event that their STEs did not abide by the disciplines imposed by Article XVII:1." The Panel considered that it was "highly unlikely" that the drafters of this provision "intended to leave the door open for Members to circumvent their obligations under the GATT 1994 in this way."

"General Principles of Non-Discriminatory Treatment" includes MFN

As noted above, STEs are required to act in "a manner consistent with the general principles of non-discriminatory treatment prescribed in [the GATT] for governmental measures affecting imports or exports by private traders." Although the Panel did not attempt a comprehensive definition of this term, it did note that such "general principles of non-discriminatory treatment" prescribed in the GATT included "the general principles of most-favoured-nation treatment as enshrined in Article I:1 of the GATT 1994." The Panel also pointed to an explanatory note, attached to Article XVII:1, which supported the Panel's view that an export STE would not act in a manner inconsistent with the MFN principle if "it were to charge different prices for its sales of a product in different export markets, provided that such different prices are charged for commercial reasons."

"Enterprises of other contracting parties" do not include competitors

The Panel recalled that under Article XVII:1(b), STEs are required to "afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in [its] purchases or sales."

The United States argued that "enterprises of the other [Members]" were not limited simply to enterprises interested in buying a product from the export STE. In the U.S. view, this phrase also encompassed enterprises of other Members which sell the same product as the export STE in the same market.

The Panel agreed that "enterprises of the other [Members]" were those enterprises interested in buying the product offered for sale by the export STE. However, it rejected the U.S. argument that the phrase also encompassed "enterprises selling the same product as that offered for sale by the export STE in question (i.e the competitors of the export STE)." The Panel reasoned that such enterprises, in their capacity as sellers, did not "compete for participation" in the sales of the export STE. Therefore, the Panel concluded that this provision did not mean that export STEs were required to "afford their competitors…an adequate opportunity to compete in the marketplace." If that had been the intent of the drafters of Article XVII, then "different wording would have been used."

Defining "commercial considerations" as "mere matters of business"

The Panel noted that under Article XVII:1(b), STEs are required to make "purchases or sales solely in accordance with commercial considerations." The Panel stated its view that "commercial considerations" should be understood to mean "considerations pertaining to commerce and trade, or considerations which involve regarding purchases or sales 'as mere matters of business'." The Panel added that such commercial considerations included, as the text of the provision indicated, "price, quality, availability, marketability, transportation and other conditions of purchase or sale."

Therefore, according to the Panel, "if an STE makes purchases or sales based solely on such elements of consideration as price, quality, availability, etc., it makes purchases or sales based on considerations which relate to, and are characteristic of, commerce and trade, and which involve regarding purchases or sales as mere matters of business." The requirement that STEs must make purchases or sales solely in accordance with commercial considerations implied that "they should seek to purchase or sell on terms which are economically advantageous for themselves and/or their owners, members, beneficiaries, etc."

These considerations led the Panel to the conclusion that "if an STE is directed to make, or does make, purchases or sales on the basis of such considerations as the nationality of potential buyers or sellers, the policies pursued by their governments, or the national (economic or political) interest of the Member maintaining the STE, it would not be acting solely in accordance with commercial considerations." Such considerations "do not relate to, and are not characteristic of, commerce and trade, and they are not consistent with regarding purchases or sales as mere matters of business."

STEs not obligated to prevent disadvantage to "commercial actors"

The United States argued that Article XVII:1(b) had to be interpreted to require that export STEs not use their special or exclusive privileges "to the disadvantage of 'commercial actors,' including those selling the same product as an export STE in the same markets." The Panel rejected this argument, reasoning that the provision referred to "commercial considerations", and not to "commercial actors." The Panel reasoned that:

> In our view, the circumstance that STEs are not inherently "commercial actors" does not necessarily lead to the conclusion that the "commercial considerations" requirement is intended to make STEs behave like "commercial" actors. Indeed, we think it should lead to a different conclusion, namely, that the requirement in question is simply intended to prevent STEs from behaving like "political" actors. To elaborate, "commercial actors" must make purchases or sales solely in accordance with commercial (*i.e.*, not political, etc.) considerations in order to stay in business. STEs, on the other hand, because they are not inherently "commercial actors", may be able to make purchases or sales in accordance with *non*-commercial (*i.e.*, political, etc.) considerations and still stay in business. As we see it, this is precisely why it is necessary to require them to make purchases or sales solely in accordance with commercial (*i.e.*, not political, etc.) considerations. Otherwise, Members could seek to use STEs to escape relevant GATT 1994 obligations. [original emphasis]

Moreover, according to the Panel, STEs "are not necessarily used only for commercial purposes." STEs may also be used to "carry out governmental policies or programmes (*e.g.*, policies related to food security, policies aimed at reducing alcohol consumption, policies to achieve price stabilization, etc.). Such STEs must and, hence, do purchase or sell on the basis of commercial considerations, but they do not normally purchase or sell for the purpose of maximizing profit."

Therefore, the Panel concluded that the term "commercial" did "not imply that export STEs may not use their special or exclusive privileges to the disadvantage of 'commercial actors'." The Panel added that the term "commercial" was unqualified, and did not require export STEs to make sales solely in accordance with "fair" commercial considerations. Accordingly, the Panel did not think that particular sales by an export STE could be regarded as not in accordance with 'commercial" considerations' merely because "the specific terms of these sales could not have been offered in the absence of the exclusive or special privileges granted to the export STE." However, if an export STE were to use its exclusive or special privileges to "sell into one export market at the economically best price possible and into other export markets at a price that is lower than would be necessary to meet local conditions of supply and demand, this would tend to indicate that the STE in question is not charging the lower price for commercial reasons." Therefore, the "only constraint" imposed on export STEs by the relevant clause of Article XVII:1(b) was the "exclusive or special privileges… must not be used to make sales which are not driven exclusively by 'commercial considerations'…."

The Panel also stated that the U.S. view (that STEs should not be permitted to use their privileges to the disadvantage of 'commercial actors') took "no account of relevant disciplines set out elsewhere" in the WTO Agreement, such as the Agreement on Agriculture and the SCM Agreement.

Canadian Wheat Board export regime consistent with Article XVII: no obligation to "maximize profit"

Applying these principles to the present case, the Panel found that the CWB export regime was consistent with the state trading enterprise disciplines of Article XVII.

The Panel rejected the U.S. argument that the CWB's legal structure and mandate, together with the privileges granted to it, created an "incentive for the CWB to discriminate between markets by making some of its sales in a 'non-commercial' manner." The Panel said that because of its governance structure, the CWB had an incentive to maximize returns to the producers whose products it markets. Moreover, the Panel reiterated its view that the fact that an export STE like the CWB might sell wheat at lower prices than "commercial actors" could offer would not, in itself, justify the conclusion that such sales would not be in accordance with commercial considerations.

The Panel said it saw "nothing in Article XVII to suggest that export STEs like the CWB can only meet the 'commercial considerations' requirement if their sales operations are structured so as to maximize profit." Nor was there "anything in the text of Article XVII which would indicate that the CWB must conduct itself in the marketplace exactly like privately-held profit-maximizing share-capital corporations would."

The Panel therefore dismissed the U.S. claim that Canada breached its obligations under Article XVII.

II. Treatment of Imported Grain: National Treatment Violations

Applicable WTO provision: national treatment disciplines

Article III of GATT 1994 sets out the primary national treatment obligation for trade in goods. Article III:4 provides in part that "[t]he products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."

Prior authorization for foreign grain: "additional requirements" for imports means less favourable treatment

A section of the *Canada Grain Act* provides that foreign grain cannot enter Canadian grain elevators without prior authorization of the Canada Grains Commission. This authorization is subject to the discretion of the Commission.

The Panel found that this provision breached Canada's obligations under GATT Article III:4. The Panel stated that GATT/WTO jurisprudence supported the view that "the imposition of additional, or extra requirements on imported products as compared to like domestic products constitutes less favourable treatment" within the meaning of Article III:4. By imposing a requirement on foreign grain that was not applicable to domestic grain – prior authorization to enter the grain elevators – this statutory provision treated imported grain less favourably than like domestic grain. The Panel added that the law denied imported grain competitive opportunities that were available to like domestic grain. The Panel concluded that the Canadian law was inconsistent, as such, with GATT Article III:4.

Canada's "necessity" defence rejected

The Panel rejected Canada's argument that this statutory provision could be justified under GATT Article XX(d), as a measure "necessary to secure compliance with laws or regulations which are not inconsistent" with GATT 1994.

The Panel found that this argument failed the "necessity" test under Article XX(d). It quoted prior Appellate Body jurisprudence as support for the proposition that a measure cannot be considered as "necessary" under Article XX(d) if "an alternative measure which [a Member] could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it." The Panel recalled that the Appellate Body articulated a "weighing and balancing" test as the basis for making a determination as to whether a measure is "necessary" within the meaning of Article XX(d).

In Canada's view, the statutory provision was necessary to ensure the quality of Canadian grain, maintain the integrity of the Canadian grading system, protect consumers against misrepresentation, and preserve and enforce the CWB's monopoly. The Panel rejected all of these arguments. In the Panel's view, an alternative, WTO-consistent measure that would achieve all of Canada's objectives would be to allow foreign grain to be received

into Canadian elevators without prior authorization, subject to the general requirement that foreign grain be kept separate from domestic grain, with the possibility that an exemption from the segregation requirement could be granted upon request.

Therefore, the Panel concluded that the Canadian law on receipt of foreign grain, which was not "necessary" within the meaning of GATT Article XX(d), violated Canada's obligations under Article III.

Other national treatment violations: "mixing requirement" and "revenue cap"

The Panel also found that a Canadian law that restricted the mixing of foreign grain with grain from Eastern Canada was also inconsistent with GATT Article III:4. Eastern Canadian grain could be mixed in transfer elevators without any prior authorization, while the mixing of foreign grain required prior authorization. The Panel said that this accorded less favourable treatment to imported like products, in violation of Article III:4.

Canada's "necessity" defence under Article XX(d) was rejected for this measure as well. In the Panel's view, a WTO-consistent alternative measure available to Canada would be to grant standing authorization for the mixing in transfer elevators of Eastern Canadian grain with foreign grain, subject to the condition that the result be designated as mixed grain and not Canadian grain.

Therefore, the Panel concluded that the Canadian law on mixing grain, which once again was not "necessary" under Article XX(d), violated Canada's obligations under Article III.

A provision of the *Canada Transportation Act* capped the maximum revenue that railroads could receive for transporting Western Canadian grain. No such "cap" existed for the transportation of foreign grain. The Panel found this revenue cap adversely affected the competitive opportunities for imported grain in that, in some circumstances, it would make the transportation of imported grain by rail more costly. In the Panel's view, this constituted less favourable treatment for imported grain than to like Western Canadian grain, in violation of GATT Article III:4.

III. Procedural Issue/Panel's Terms of Reference: U.S. Claim Struck

Canada was partially successful in a preliminary challenge it made to the U.S. Panel request. The Panel agreed with Canada that the original U.S. Panel request failed to comply with the requirement in Article 6.2 of the Dispute Settlement Understanding to "identify the specific measures at issue" for its Article XVII claim. The original U.S. request referred to "the laws, regulations and actions of the Government of Canada and the CWB related to exports of wheat." The Panel found that the U.S. request created "considerable uncertainty as to the identity, number and content of the laws and regulations which it is challenging", and therefore "does not provide adequate information on its face to identify the specific measures at issue." The Panel said that "due process requires that the complaining party fully assume the burden of identifying the specific measures under challenge." However, the Panel said that the U.S. request shifted part of the burden onto Canada, requiring it to "undertake legal research and exercise judgement in order to establish the precise identity of the laws and regulations implicated by the panel request." Therefore, this portion of the U.S. panel request was found, on a preliminary basis, to be inconsistent with DSU Article 6.2. (Other Canadian

challenges under Article 6.2 were rejected.) Following the Panel's preliminary ruling, the United States put in a second Panel request. Technically, a second Panel was then established, with the same Panel members, and the two Panels ran concurrently to consider the substantive U.S. complaints.

OUTLOOK

This is an important decision, in that it marks the first major interpretation by a GATT or WTO Panel of the main disciplines related to so-called "state trading enterprises." A state trading enterprises (STE) is a body granted "exclusive or special privileges" by a WTO Member government for the export or import of goods. While STEs appear in a variety of forms, the most prevalent type of STE is a marketing board, typically for agricultural products. STEs are used in both developed and developing countries.

The rules on STEs are set out principally in Article XVII of the GATT. This provision, which was part of the original GATT 1947, sought to ensure that countries could not circumvent their GATT obligations through the use of marketing boards or other organizations. For example, Article XVII stated that STEs had to make their purchases or sales solely in accordance with "commercial considerations" and "in a manner consistent with the general principles of non-discriminatory treatment" set out in the GATT for governmental measures affecting imports or exports by private traders. However, until now, such key terms had not been defined by a GATT or WTO Panel. It was unclear what STEs could do, or could not do, consistently with Article XVII.

Significantly, the Panel rejected the U.S. position that the "commercial considerations" requirement meant that STEs had to behave like "commercial actors." The United States argued that Article XVII needed to be read strictly, to prevent STEs from using their special or exclusive privileges to the disadvantage of commercial actors, particularly those selling the same product into the same market as the STE. The Panel reasoned that the provision referred to "commercial considerations", and not "commercial actors", and that STEs "are not necessarily used only for commercial purposes." Indeed, in the context of the Canadian Wheat Board (CWB), the Panel said that it did not see "anything in the text of Article XVII which would indicate that the CWB must conduct itself in the marketplace exactly like privately-held profit-maximizing share-capital corporations would."

At the same time, the Panel stressed that Article XVII is intended to prevent STEs from behaving like "political actors." It stated, somewhat vaguely, that "commercial considerations" should be understood to mean "considerations pertaining to commerce and trade", or considerations involving regarding purchases or sales "as mere matters of business."

The refusal of the Panel to read a "commercial actor" requirement into GATT Article XVII has drawn sharp criticism from the U.S. Government. The U.S. Trade Representative, Robert Zoellick, issued a statement that the Panel's ruling "demonstrates the need to strengthen rules on state trading enterprises in the WTO." He added that the United States would continue in the negotiations "to aggressively pursue reform of the WTO rules in an effort to create an effective regime to address the unfair monopolistic practices of state trading enterprises like the Canadian Wheat Board."

The Panel's ruling on the national treatment issues will be less controversial. The Canadian measures created a series of statutory advantages for domestic grain over imported like products, and these Panel applied well-established jurisprudence in finding that the measures violated GATT Article III.

WTO Members Indicate Flexibility on Doha Round in Advance of Paris "Mini-Ministerial"; Recent Disputes Add Pressure to Negotiations

SUMMARY

The attention of WTO negotiators in the Doha Development Agenda (or "Round") is currently focused on a series of meetings of trade Ministers that will take place over the next few weeks. The most high-profile event is the meeting this week in Paris among some thirty trade ministers on the sidelines of the OECD ministerial conference, May 13-14.

It is hoped that Ministers may be able to break the impasse on agriculture which has persisted in Geneva, and thus achieve an agreement in July on "frameworks" for the negotiations on agriculture and industrial tariffs which would unblock the Round as a whole. This focus of hope on events outside Geneva reflects the lack of real progress in the Geneva process itself since WTO Members resumed work in the Round's negotiating groups in February. Stimulus at the ministers' level is needed to invigorate the Geneva process.

Recently, key Members have offered greater flexibility in an effort to reach agreement in July. A meeting of several key Ministers in London on April 30, hosted by USTR Zoellick, showed signs that the EU, Brazil and other Members are moving closer to a compromise. Commissioners Lamy and Fischler of the EU sent an encouraging letter on May 9, which indicates that the EU would have additional leverage on agriculture export subsidies and the "Singapore Issues." Malaysia's trade minister Rafidah Aziz during meetings in Washington on May 10 indicated that Malaysia is willing to move the agenda forward, including on the issue of trade facilitation (it had previously rejected the Singapore issues). In a speech in Paris before the OECD meeting, USTR Zoellick again emphasized that the following weeks are critical to the success of the Round, and pointed out the need to resolve the two issues of agriculture and trade facilitation in particular.

Meanwhile, recent WTO dispute settlement developments could have implications for the Round. For example, Brazil appears to have prevailed in its dispute against U.S. cotton subsidies. This and other dispute findings underscore the growing importance of the WTO as the world trade court and suggest that if the Doha Round negotiations falter, they might be overtaken by the outcome of litigation. Most WTO Members would see this as very undesirable; it is far better that international obligations should be negotiated rather than imposed through legal action.

ANALYSIS

I. Work on Doha Negotiations Active Beyond the Geneva Process

WTO Members agreed in February 2004 to re-activate the Doha Round negotiating groups that have been suspended since the Cancun failure, and the groups have indeed been active. Since it had not been possible for the General Council to resolve any of the issues which caused the breakdown at Cancun, it has been apparent that the groups would struggle to make progress beyond the technical level. At the most recent stock-taking session of the Trade Negotiations Committee (TNC) on April 21, WTO Members acknowledged that there has been a genuine and widely-shared will to make progress in the Round. It remains true,

however, that there will be no substantive movement until progress in agriculture (which is still lacking) unblocks the other issues.

A. Meetings of Key Members Attempt to Lend Momentum to Doha Process

Key Members have tried to build on this shared will to move negotiations forward by the end of July. On April 30, USTR Robert Zoellick hosted a private meeting of key trade ministers in London, including the EU, Brazil, Kenya and South Africa (India also invited, but did not attend due to schedule conflicts). The meeting focused mainly on agriculture; Brazil and South Africa are among the leaders of the Group of 20 developing countries that emerged at Cancun as the major adversary of the great powers on the agriculture dossier. Although the London meeting was essentially exploratory, some progress was reported. The Ministers agreed on the importance and feasibility of the July package, and Mr. Lamy was reported to indicate that the EU would have additional flexibility on the elimination of agricultural export subsidies (as was announced later in his May 9 letter). It is believed by most negotiators that an essential ingredient of any acceptable agriculture framework would be acceptance of a commitment to eliminate export subsidies by a "date certain" – even if the date itself were left open at this stage.

The same group is expected to meet again in the margins of the OECD Ministerial meeting on May 13-14, in Paris. Mexico's Foreign Minister, Luis Ernesto Derbez will host a "min-Ministerial" meeting involving some thirty Ministers of developed and developing countries at this time. In other events, Ministers of least-developed countries (LDCs) met in Dakar, Senegal, on May 4-5, and those of the African Union will meet in Rwanda later in the month. Reportedly, Ministers of the LDCs and African countries are willing to engage more actively in the Round.

B. EU Signals New Flexibility on Agriculture and Singapore Issues

EU Commissioners Pascal Lamy and Franz Fischler sent a letter on May 9 to their counterparts that was positive in tone, and outlined key areas where the EU would be willing to do more in the Doha Round – that is, if other developed and advanced developing countries also undertake ambitious liberalization commitments.

In particular, Lamy and Fischler emphasized the following issues:

- ***(i) "Parallelism" in agriculture –***Asserted that the EU is ready to put on the table (and presumably eliminate) all export subsidies, provided that there must be "parallelism" and a balanced overall package on agriculture. They also stated that the EU is prepared to commit to large reductions in distorting (amber) support and the reduction and capping of "blue box" payments. They also said that "early action" on the cotton issue remains a priority, and encouraged countries to eliminate most trade distorting domestic subsidies for this commodity.

- ***(ii) Need to regain momentum in NAMA –*** Warned of the lost momentum in NAMA negotiations, and suggested the need to develop a "simple, general and ambitious" formula for tariff reductions.

- ***(iii) Services talks lagging –*** Warned that services negotiations are "lagging very seriously behind" and the need to move from "second into third gear." Suggested that developed countries show greater flexibility on developing country priorities, including on "Mode 4" temporary movement of professionals.

- ***(iv) New clarity on Singapore issues –*** Acknowledged that there is no consensus to launch negotiations on investment and competition. Stated that "to be very clear, that would leave only trade facilitation and perhaps transparency in government procurement."

- ***(v) Recognition of developing country constraints –*** Proposed that the poorest and weakest WTO members (essentially "G-90") should not have to liberalize beyond existing commitments, but should receive improved access to other markets and therefore have the "Round for Free." These countries would also be encouraged to increase their tariff bindings and participate in negotiations like trade facilitation, to the extent possible. Also urged developed and advanced developing countries to offer duty-free and quota-free access to least-developed countries' products.

Lamy and Fischler also emphasized that the framework modalities for the four key issues of agriculture, NAMA, Singapore issues and development should be established no later than July. They urged Members to develop an outline text on these issues no later than the end of May.

II. Geneva Process Sets July Deadline; Achieves Limited Progress

A. New "Deadline" Established: Frameworks and Resolution of Four Key Issues By July

WTO Members have again set themselves a new deadline: to agree at the meeting of the General Council on July 29-30, on a package of results, including the frameworks for negotiations on agriculture and non-agricultural market access, decisions on how to treat the Singapore issues and some agreed position on the "cotton issue." These are the four subjects which Members hoped to settle at the December 2003 Council, but have not achieved concrete progress on since the restart of negotiations in February 2004.

At this stage, it is not clear how many other issues will be covered in the July package, but it is generally accepted that the bar will be set below the level of the Cancun objectives: as stated by the Chairman of the General Council, Ambassador Oshima, at an informal meeting of Heads of Delegations on April 29. The practical question is "what is the minimum tangible outcome that will enable the WTO to keep up the momentum of the Round and provide guidance for further work?" A modest outcome is to be expected in July. Also, few if any Ministers are likely to attend the July General Council.

Nevertheless, the insistence of key Members including the EU and United States on the need for agreement in July is driven by the knowledge that no political or strategic decisions on the Doha Round can be expected in the following five or six months. The

elections in the United States and India this year, and the October changeover in the European Commission – particularly the expected departure of Pascal Lamy – mean that if an effective decision to relaunch the Round is not taken in July, it will not be taken until the spring of 2005 (or later).

Cynics may ask how much difference it would make on whether or not the WTO agrees on a package in July since the political constraints will arise regardless of an agreement. Notwithstanding, an agreement in July would have the real value of locking in the frameworks and other decisions that can be taken this year, and would permit technical work to proceed on that basis. There is also every reason to take advantage of the cooperative relationship between USTR Zoellick and Commissioner Lamy, which has provided much of the momentum in this Round, while they are both still in office. The departure of South Africa's trade Minister, Alec Erwin, who is to become Minister for public enterprise, is another important loss to the Doha process.

B. Agriculture: Time Running Out Despite New Flexibility

Informal discussions on agriculture under the new Chairman, Ambassador Groser of New Zealand, started very positively in late March this year, but at the most recent meeting in late April, Members made no progress at all on the market access "pillar" of the negotiations. It appears that of the three pillars of trade – export subsidies, domestic support and market access – the most intractable is the last.

There are hints of movement on the other two pillars involving subsidies and domestic support by the US and the EU (as seen in the May 9 letter). Nevertheless, both the EU and US insist that in exchange for their agreement to reduce subsidies, other Members including developing countries like Brazil and India, must offer significant market access commitments. In particular, the US and EU advocate using the "blended formula" for tariff cuts, which is still strongly resisted by developing countries with high tariffs.

Ambassador Groser has warned that unless the outlines of a framework for agriculture are clear by the end of May, there will be insufficient time to draft and agree a text by the July Council. He does not intend to float a "Chairman's text" (like the approach of the former Chairman) which, however good, would inevitably be attacked on all sides since negotiators would not have reached the difficult compromises themselves.

C. NAMA: Little Movement Over Tariff-Cutting Approaches

WTO Members have made little progress on non-agricultural market access, or "NAMA" negotiations, including on the selection of formulas and other approaches (e.g. "critical mass" and sectoral zero-tariff initiatives) to tariff reduction. Developing countries, for example, have been resistant to formulas that would require higher tariff cuts. The United States and EU insist that developing countries reduce their high tariffs and barriers in line with their importance in world trade. They support the principle of "less than full reciprocity" as it applies to developing countries, but insist that the concept must not allow for major exceptions, or limited reductions in tariff bindings.

Members have recently shifted their attention to addressing non-tariff barriers, but will revisit tariff cutting formulas at the next NAMA negotiating group meeting on May 10-12. Many observers believe that developing countries are holding back on NAMA for

tactical reasons (since they have to undertake the more ambitious tariff cuts) until there is progress in agriculture talks.

D. Singapore Issues: Trade Facilitation Set to Move Forward

A decision in July is also needed on the handling of the Singapore issues, although this matter appears much closer to settlement. Consultations led by WTO Deputy Director General Rufus Yerxa indicate a strong likelihood that there will be agreement in July to launch negotiations on trade facilitation, the least controversial of the four issues. It seems equally clear that there will be no such agreement on investment, competition policy and transparency in government procurement, which at best are likely to be remitted to the working groups which have already been studying them for several years.

The EU letter on May 9 also clarifies that the EU is willing to remove the three more controversial issues off the Doha agenda, and would support trade facilitation negotiations (but still encourage negotiations on transparency in government procurement).

On trade facilitation, the most important open question is whether the disciplines to be negotiated should be binding – that is, enforceable through dispute settlement. Existing rules on the subject in the GATT, though they are inadequate, are binding. Some developing countries maintain that any stronger disciplines should not be. It may well be impossible to decide on this in advance, so that it would be left for the negotiations to decide. Another major issue will be the cost for developing countries, in financial and human resources, of implementing new disciplines, and the consequent need for technical and financial assistance.

At an event in Washington DC on May 10, Malaysia's trade minister Rafidah Aziz commented on the Singapore issues and indicated that strong support has emerged to launch negotiations only on trade facilitation, but there is yet to be consensus. She explained that some Members including Malaysia are concerned with the additional administrative burdens that might arise from a trade facilitation agreement. Nevertheless, she indicated that Malaysia and others are now more willing (than at Cancun) to take this approach on the Singapore issues.

E. The Cotton Subsidies Issue: More Attention, But Less Concrete Progress

The initiative by the West African countries Benin, Burkina Faso, Chad and Mali to reduce or eliminate subsidies to cotton growers in industrialized countries was left unsettled at Cancun and in the December Council, and will be an important issue in July. There has been little recent discussion on this in Geneva, but attention to the matter has been given elsewhere, including in meetings with African Ministers. In these discussions, the development aspects of the problem have been vigorously and effectively tackled through bilateral assistance, notably from the EU, and in useful studies by the World Bank and others on diversification, development of new export markets and related initiatives.

The likely outcome of discussions in the General Council is agreement that the issue of cotton subsidies should be taken up in the overall agriculture negotiations. Nevertheless, developing countries will seek to insist, as a condition for agreement to this, that it should be given a high degree of priority within the negotiations and should not be submerged in the general discussions.

In other developments, the reported WTO dispute findings against the U.S. subsidy programs on cotton (in a dispute raised by Brazil and supported by the African countries) is expected to keep attention focused on cotton, and other subsidy programs.

F. Services: Lagging Behind and in Danger of Poor Quality Offers

The services negotiations, although free of crises, are not in a healthy state. Parallelism with agriculture has already caused damage and could pose a real threat to meaningful liberalization in the services round. Although the target for submission of initial offers was March 31, 2003, only 42 offers have so far been submitted and in general their quality, as pointed out by the Chairman of the services negotiations, Ambassador Jara of Chile, is disappointing.

The lack of quality offers in itself, at this stage is not surprising: it is known that some offers are being withheld because of the lack of progress in agriculture, and these are merely initial offers, which should be improved as the negotiations proceed. Nevertheless, there is a great danger in the complacent assumption that, when the agriculture and NAMA modalities are agreed and that negotiation starts to move, the services negotiations will fall into place. Based on previous experience, the process of drafting, negotiating and redrafting services schedules is far more complex and time consuming than the translation of agriculture or NAMA modalities into reductions in tariffs, subsidies and domestic support. For agriculture and NAMA negotiations, the work can and will probably will be done in the last six or nine months of the Round, after the modalities are finally settled.

The same approach and timeframe is untenable for services negotiations. The rush to conclude services talks would result in the acceptance of many inadequate schedules without real negotiation, as happened in 1993, and disappointment of the high hopes for effective liberalization of services trade in this Round. To date, there has been very little discussion of services in the General Council, but it should not be overlooked in July. Agreement on a date for submission of revised offers would be a minimal achievement in the light of the response to the deadline for initial offers. Moreover, it is necessary to show that services cannot work in parallel with the agriculture and NAMA timeframes.

G. Dispute Settlement Understanding: Another Extension Expected

The current deadline on negotiations on reform of WTO dispute settlement procedures is May 31, and in advance of the Round generally. There is little expectation that this will happen this year, despite great efforts by the negotiating group's new Chairman, Ambassador Spencer of Australia.

Recently, a group of seven delegations – Argentina, Brazil, Canada, India, Mexico, Norway and New Zealand - has also attempted to galvanize the talks by floating a "mini-package" of reforms on three major issues, though this has not yet been tabled or generally distributed. However, the initial reactions by the EU and the US are said to be unenthusiastic, and the general view is that it is too late to negotiate such a proposal by the end of the month. A further extension of the deadline is expected.

H. Special and Differential Treatment: More Flexibility for "G-90" Countries

The EU has committed to an undertaking, in a speech by Pascal Lamy to trade Ministers of the "G-90" group of developing countries in Dakar, that it will not seek tariff reductions from these countries in the negotiations. (Lamy clarified this position in the May 9 letter, as discussed above.) Lamy accepted that they are not in a position to make a significant contribution to liberalization. They would, however, be encouraged to bind their current tariffs and to participate in an agreement on trade facilitation. One of the underlying problems in the Doha Round is that a number of developing countries are more concerned about erosion of their preferential access to developed markets, which would flow from a general reduction in tariffs, than about the potential benefits of liberalization.

I. Doha Deadline: Extension Needed

It is not clear whether the July Council will take a decision to extend the Doha Round, though all agree that the official deadline of 1 January 2005 is unattainable. A short extension would carry no conviction, but agreement on a realistic one would be difficult. The issue may be left to the Sixth Ministerial Conference in Hong Kong, which is expected to take place in the second half of 2005.

III. Dispute Settlement Findings Add Pressure to Current Negotiations

Several recent dispute settlement cases have established important principles or precedents that could have implications for the Doha Round.

A. Mexican Telecoms Monopoly: First Major GATS Case

In the first dispute settlement case to deal exclusively with services issues the United States has prevailed in a complaint that Mexico is in breach of its GATS commitments on the supply of telecommunications services. The Panel decision of April 2, 2004 (which might be appealed) is also the first interpretation of the "Reference Paper" on regulatory principles which was a major element of the 1997 Agreement on Basic Telecommunications. The essential purpose of the Reference Paper was to prevent anti-competitive practices by dominant suppliers in their domestic markets. One of the Panel's findings was that the Mexican government had not taken appropriate measures to prevent the dominant supplier Telmex from engaging in anti-competitive practices. It also found that practices required under domestic law could nevertheless be considered to be anti-competitive under the Reference Paper. The broad interpretation of the Reference Paper is important: over 70 countries have made commitments on it and telecoms is a vital sector.

It remains to be seen whether this broad finding against anti-competitive practices might discourage, or encourage Members from establishing stronger regulatory disciplines in the course of GATS negotiations. Other sectors including energy and professional services have floated proposals for other reference papers as applied to their sectors.

B. EU GSP System: Discriminatory Preferences Questioned

The Appellate Body released an important decision on April 7, 2004 in the case brought by India against the EU Generalized System of Preferences. India had challenged

preferential tariffs given to Pakistan and other countries in recognition of their participation in the "Drug Arrangement" program to combat drug production and trafficking. India argued that the Enabling Clause which legitimizes preferences for developing countries must be applied to all developing countries – i.e. that special preferences within the GSP scheme were illegitimate.

The original Panel agreed with India, ruling that preferences extended under the Enabling Clause must be provided to all developing countries equally. The Appellate Body reversed this finding, asserting that developed countries may discriminate within their GSP programmes to address the specific needs of similarly situated developing countries. India still won its case, because the Appellate Body found against the EU Drug Arrangement on the ground that not all similarly-situated developing countries had access to it. But its decision has caused concern among developing countries which fear the apparent legitimization of discrimination between developing countries, on various policy grounds, within GSP schemes. Thus, this decision might also have implications for other developed country GSP schemes, including the United States.

C. Canadian Wheat Board: Mixed Findings

A Panel on April 6, 2004, rejected a U.S. complaint that the export regime of the Canadian Wheat Board violated WTO rules on "state-treading enterprises". However, it found that some provisions on the treatment of imported grain were in breach of Canada's national treatment obligations. The main interest of the report was the Panel's interpretation of GATT Article XVII, on State Trading Enterprises, in relation to marketing boards. It did not accept the US contention that STEs must behave like "commercial actors", but stressed that Article XVII is intended to prevent them from behaving as "political actors" or agents of the government.

D. U.S. Cotton Subsidies: Apparent Victory Against U.S. Program Has Wider Implications

It has been widely reported that Brazil has won its case against the domestic subsidies provided to cotton farmers by the United States. The Panel's report released in April to parties is still confidential, but both Brazil and the United States have commented, on the basis of the Panel's preliminary ruling, in terms that confirm Brazil's victory. (The West African countries advocating the cotton initiative also supported Brazil in the proceedings.)

The essence of Brazil's complaint was that the U.S. subsidies forced down world prices, damaging competitive producers including Brazil and West African countries, and secured an unfair share of world cotton trade for U.S. cotton (although they were not directly linked to exports). The United States has said it will certainly appeal. This is a critical case, since, depending on the reasoning the panel has used it could provide a basis for challenges to other subsidy programs, if adverse effects can be demonstrated.

Furthermore, negotiators are asking whether the finding will add urgency to Doha Round agriculture negotiations by raising the pressure to move on domestic support, or whether exporting countries will be inclined to take the route of litigation in preference to protracted negotiations. Brazil has also challenged EU sugar subsidies.

E. US Online Gambling Dispute: Apparent Victory Against U.S. Internet Policy

It is also reported, on the basis of a Panel report which is still confidential but which has been widely commented on, that Antigua and Barbuda has won its case against U.S. restrictions on Internet gambling, which it claimed were contrary to U.S. commitments under the GATS. Whatever the legal findings of the Panel, the case has political significance, both in that it marks a successful challenge to the United States by a developing country of 60,000 people, but also in that, like the cotton case, it has aroused strong negative reactions in America, where the debate on trade policy is increasingly charged with electoral politics.

OUTLOOK

WTO Members including the United States and EU are undertaking major efforts to ensure that 2004 is not a lost year for the Doha Round. USTR Zoellick in a speech in Paris today commented that Cancun could be compared to the battle at Dunkirk – a low point during the Second World War – but in hindsight, not a disaster and ultimately a turning point towards victory.

WTO Members have set themselves another deadline in July to reach agreement on the negotiating frameworks for the four issues outstanding since Cancun. Otherwise, not much political movement will happen until at least the spring of 2005 due to elections and political turnover in the United States and EU, and other countries.

There are strong signs that the will among Members to revive the Round is strong, and the mood is far more positive since talks collapsed in Cancun. In the latest poll of over 100 trade officials and experts released on May 7 by the Institute for International Business, Economics and Law (IIBEL) at the University of Adelaide, Andy Stoler, the Executive Director of IIBEL reported a dramatic turn around in attitudes toward progress in WTO agriculture negotiations. In the last poll in February, only 16 percent of those surveyed believed that a framework agreement could be agreed for agriculture by mid-2004. The current poll in May indicates that 40 percent of those surveyed believe an agreement will be reached by July; another 28 percent give agreement a fifty-fifty chance, and only 30 percent doubt that an agreement will be possible. The respondents also expressed optimism in other areas: 81 percent feel negotiators are near agreement on a framework for NAMA negotiations, and 83 percent believe negotiations can be launched soon in the long-stalled talks on trade facilitation.

Notwithstanding the growing optimism, negotiators face a daunting task with little time to spare. The mini-Ministerial taking place his week in Paris will attempt to bridge gaps in the critical area of agriculture. No doubt, Ministers in Paris will press the EU to clarify its letter of May 9, which offers greater flexibility on agriculture. Without an EU commitment to end export subsidies on agriculture (at some date to be determined), there is little hope for any agreement on negotiating frameworks or modalities. If political leadership emerges from the Paris meeting, the General Council should have further guidance at its next session on May 17 in Geneva. In fact, many Members believe that the Geneva process must produce outlines for the framework agreements by the end of May; otherwise, agreement in July would be unlikely.

It is also increasingly clear that the United States and EU will demand more of the advanced developing countries, and less of the lesser developed in the Round. The advanced economies including the G-20, for example, must come to terms with their resistance to lowering tariffs and other barriers if they are to gain reductions in subsidies by developed countries. The same applies for NAMA negotiations. Otherwise, the lack of "balance" in negotiations wound undermine the Round overall. Only the least-developed and weaker economies could benefit from a "free ride" and would not be pressured (but encouraged) to open their markets beyond existing commitments and participate in other negotiations.

In other critical areas like services, the current lack of attention and poor quality of offers could seriously undermine any meaningful liberalization. Since Members are focused on resolving agriculture and NAMA frameworks and modalities, attention to services might have to wait until then. Thus, there is the real fear that inadequate time will be spent on improving services offers. Among other issues, at least, the controversy over the Singapore issues – which put an end to talks at Cancun, appears to have abated. Most Members are prepared to support the launch of trade facilitation negotiations in July, and will allow the other three issues to fall off the Round's agenda.

If WTO Members are unable to meet the latest deadline they have set for themselves in July, then litigation might be the more prevalent trend. For most Members and target countries, it is a far less desirable approach to addressing trade barriers. The dispute over U.S. cotton subsidies (and the EU sugar regime) is just the beginning; other subsidy programs might be challenged soon if Doha Round negotiations falter. The increase in litigation, especially on sensitive sectors like agriculture commodity programs – pose great risks for the multilateral system, and would undermine political support for the WTO among domestic constituents.

Thus, the next several months will be critical in determining whether Cancun was indeed an event that marked the end of comprehensive, multilateral trade negotiations. If so, the Doha Round might be an ambitious battle that could not be won due to widespread sensitivities over trade liberalization. Still, Cancun could actually be viewed as the turning point that galvanized the world's economies to turn the tide against factionalism, and win the war against protectionism.

Momentum Builds After Paris "Mini-Ministerial" to Conclude "July Package" of WTO Doha Round Negotiating Frameworks

SUMMARY

The About thirty WTO trade Ministers meeting in Paris on the sidelines of the OECD ministerial conference, May 13-14 made progress in their discussions on agriculture and other issues in the Doha Round. In particular, the United States and EU reached agreement with the "G-20" and Cairns Group agricultural economies to develop new approaches on subsidies and market access in agriculture trade.

The following week in Geneva, the WTO General Council urged Members to consider new proposals on agricultural market access by late May, otherwise negotiations would be at risk between now and the end of July. Members aim to agree by then on the "July package" of negotiating frameworks for agriculture, industrial market access, trade facilitation, the cotton initiative and other issues including services and development.

ANALYSIS

I. Ministers at Paris "Mini-Ministerial" Add New Momentum to Doha Round

The meeting among thirty trade Ministers on the sidelines of the OECD Ministerial in Paris, May 13-14, signaled encouraging signs that WTO Members would reach framework agreements on the four key issues expected in the July "package": (i) agriculture; (ii) non-agricultural market access ("NAMA"); (iii) resolution of the Singapore Issues, presumably to launch negotiations on trade facilitation; and (iv) the cotton initiative. Other issues that might be included in the July package include a call for improved offers on services and additional flexibility for lesser-developed countries.

Mexico's foreign minister, Luis Ernesto Derbez hosted the gathering of Ministers in Paris (he also presided over the ill-fated Cancun Ministerial last September) which included key Ministers and senior officials from the United States, European Union and 27 other countries. Derbez, in a statement on May 13 indicated that an agreement in July should include the elimination of all forms of export subsidies in agriculture and recommended negotiations to proceed only on trade facilitation.

Officials agreed that the Paris meeting was productive, with a view to agreement on frameworks by the end of July, but that expectations would have to be modest.

A. EU Position Encourages Optimism at Gathering in Paris; Some Member States Question Commission Authority on Agriculture

EU Commissioners Pascal Lamy and Franz Fischler sent an important letter on May 9 in advance of the Paris meeting signaling what they described as a "clear signal" of their willingness to do more on agriculture export subsidies if "parallelism" is achieved in agriculture negotiations. The EU also clarified its position on Singapore Issues, and offered essentially a "Round for Free" to the lesser-developed countries, or "G-90" (though Lamy has subsequently repented of this phrase, and now speaks of a "modest price"). Many WTO Members have reacted favorably to the letter, and view it as a significant shift in the EC position towards a "date certain" to eliminate export subsidies (albeit with conditions).

EU Commissioner Lamy in a speech in Paris on May 13 compared the WTO talks to volcanoes and said that they occur in three phases: "sleeping, smoking or erupting." He believed that "after a period of relative calm… the WTO volcano is 'smoking' again, and the smoke is pretty dense." He described the mood in Paris to be "positive and constructive" and believes that Members are willing to move forward with a July package, which could "complete 50% of the Doha Agenda."

Lamy highlighted priority issues to address before July:

- ***Attention to agriculture market access*** – Recognized progress was being made to develop a "visible architecture" for export subsidies and domestic support but for market access, talks were only at the "design stage." He suggested looking at other options to develop a "composite formula" addressing offensive interests but also covering sensitivities (presumably including those of developed and developing countries).

- ***Ambition on industrial market access and services negotiations*** – Emphasized that industrial tariffs are a key priority for the EU, and any agreement in July "must not create loopholes which mean its effectiveness is reduced." He also highlighted services as an area which must "remain in the July picture" and noted that the issue is also important for developing countries including on Mode 4 (temporary movement of professional workers).

- ***Negotiations only on trade facilitation*** – Clarified that on the Singapore Issues, "the picture is becoming clearer; emerging consensus on Trade Facilitation." He added that "this is obviously now the only one of the Singapore Issues on the front burner. We regret this but have to be lucid at this stage in order to move forward."

- ***Immediate flexibility for developing countries*** – Indicated the need to offer flexibility to the weakest economies and reaffirm that "the price they need to pay in this Round is extremely modest." In effect, these countries would be asked only to bind current tariff levels and participate in negotiations on trade facilitation. He stressed that this message should be given now, in order to "make things clearer and easier."

Nevertheless, reports indicate that several EU Member States are concerned that the Commission's strategy on export subsidies is misguided, and goes beyond its mandate. At the May 14 meeting in Brussels of the 133 Committee (the body which reviews EU trade policy), ten of the 25 states questioned the May 9 letter from Lamy and Fischler, and argued that it could undermine EU leverage in agriculture negotiations. The ten states are France, Greece, Ireland, Italy and Spain and several new Members - the Czech Republic, Hungary, Lithuania, Poland and Slovakia. At the same meeting, pro-reform Member States Denmark, Estonia, Finland, Germany, Latvia, Sweden and the United Kingdom praised the May 9 letter as appropriate. They noted that EU flexibility is conditional on achieving "parallelism" in other areas of agriculture negotiations, including developing country tariffs; U.S. export credit programs and the state trading enterprises of Canada and other countries.

Lamy dismissed these criticisms at meetings in Paris, and asserted that "There's no question of [Fischler] and myself going beyond our mandate." It would clearly be very difficult, as other delegations have noted, for the EC to resile from this position now, particularly if it forms the basis for an agreement on the agricultural framework in July.

B. US and EU Call for Balance in Agriculture Negotiations: Blended Formulas and Blue Box Payments

USTR Robert Zoellick in a speech on May 13 responded to calls for a reduction of export subsidy programs, and indicated that the United States would re-examine programs including export credits. U.S. officials claim that the subsidy element of U.S. credit programs can be removed by limiting repayment to a maximum of six months. (EU officials urge that the US should also reduce interest rates and fees on the credits to the level charged by financial institutions.)

U.S. and EU officials again suggested using a "blended formula" to tackle high tariffs, which are prevalent among many developing countries. The "G-20" and Cairns Group countries have rejected this approach, but agreed to U.S. and EU insistence that these countries table a proposal on an alternative formula before the end of May. U.S. officials have stated that WTO members would need time to consider the proposal before the next negotiating session on agriculture, June 2-4. Zoellick warned that a proposal delivered after the June negotiating session could jeopardize the July package.

Reportedly, the United States is proposing that the July package on agriculture should include the "Swiss" formula, which is meant to harmonize tariffs by cutting high tariffs more substantially than lower tariffs. The "blended" formula would incorporate the Swiss formula as well as the Uruguay Round formula of minimum and average tariff cuts (favored by the EU). The Swiss formula is opposed by many developing countries because it would require them to make deeper tariff cuts. At the same time, G-20 and Cairns Group countries argue that the EU should cut its high tariffs on products including beef, dairy and sugar. (The EU favors a formula that would protect these sensitive products.)

Ministers at the Paris meeting also reported that the G-20 and Cairns Group might be more amenable to a definition of "blue box" subsidy programs as suggested by the United States and EU prior to Cancun. The United States and the EU in a joint proposal before Cancun had suggested limiting blue box spending to 5 percent of the total value of agricultural production.

The Agriculture Agreement defines blue box subsidies as domestic support linked to limits on production that are exempted from spending limits. The United States and EU propose to amend this definition to include direct payments that do not limit production, but which meet other blue box criteria (payments based on fixed areas and yields and in reference to past production, or on 85 percent or less of the base period of production). The United States, for example, argues that the amendment is necessary to allow countercyclical payments to qualify as blue box subsidies. These payments compensate farmers for the difference between a commodity's market and target prices fixed by the government. The United States and EU intend to shift significant levels of subsidies from the amber to the blue box.

G-20 and Cairns Group officials insist they will continue to seek substantial cuts in domestic support, both for trade-distorting support falling within the amber box as well as the blue box. They also insist that any redefinition of the blue box must be accompanied by additional disciplines, including spending caps on commodity programs.

C. G-20 and Cairns Group Under Pressure to Present New Formula by Late May

Ministers announced on May 14 in Paris that they would develop an alternative formula for agricultural market access, as agreed by the so-called Five Important Partners (FIPs) including the United States, EU, India, Brazil and Australia. The G-20 and Cairns Group indicated in Paris that they would present a proposal after rejecting the "blended" formula advocated by the United States and EU. Negotiators from India and Brazil, however, have questioned whether the G-20 could do so within a short timeframe. In India, the elections in mid-May produced a new government which might delay its ability to agree on a position. Other hurdles include strategic differences between Brazil and Australia on how to proceed.

Australia has emphasized that the negotiations must expand tariff-rate quotas as part of a market access deal. Australian Minister Mark Vaile on May 18 in Washington DC explained that he urged ministers in Paris to expand TRQs as part of the negotiations. On the other hand, Brazil, unlike Australia, does not place the same priority on TRQ expansion. Instead, Brazil sees TRQ expansion as an exception that WTO members would take on if they wanted to exclude a commodity from a tariff cutting formula.

Regarding tariff cutting formulas, the G-20 and Cairns Group suggest tariffs can be harmonized through different approaches including a tiered approach to tariff reductions by different percentages, with the highest tariffs facing the most significant cuts. The G-20 has complained (in a letter on May 7) that the blended approach would require developing countries to make deeper overall tariff cuts. To address this concern, the revised blended approach is likely to include a mechanism which would allow developing countries to make tariff cuts on a percentage basis, and allow for some exceptions. The G-20 and Cairns Group proposal is expected to contain three to four options for a formula including a tiered as well as blended approach. The two groups intend to develop the basic elements of their proposal prior to a meeting of senior officials from the Five Important Partners on June 2, which is also the start of the next agriculture negotiating session in Geneva.

II. WTO General Council Calls for New Proposals

A. General Council Recognizes Progress in Paris; Indicates Need for New Proposals Before the End of May

WTO Director General Supachai stated at the General Council meeting on May 17 that discussions among Ministers at the Paris Mini-Ministerial have "produced a new sense of focus and determination." General Council Chairman, Ambassador Shotaro Oshima of Japan also reinforced this message, and indicated that "there are now unmistakable signs of momentum from the highest political levels, and it is incumbent upon us in Geneva to do everything possible by July to seize and build on these developments." There is no doubt that the Lamy-Fischler letter in particular has improved the negotiating atmosphere in Geneva, where negotiators see it as a positive initiative offering a real opportunity to make substantive progress on the intractable issue of export subsidies.

The proposal to offer the weakest Members – essentially the G90 – a "Round for Free" has not, however, been universally welcomed. For instance, some of the more advanced developing countries in Asia and Latin America see it as implying heavier demands on them or as a wedge driven between different strata of the developing world and thus as an attack on the principle of self-designation which has defined development status in the WTO until now. Some countries such as Egypt, Argentina, and New Zealand worried that such flexibility could further divide the WTO membership. USTR Zoellick stated he was "willing to work with the concept" outlined by Commissioner Lamy, but warned against creating a two-tiered multilateral trading system.

On agriculture the United States and EU reiterated the need for a proposal by the G-20 and Cairns Group on a market access formula. The United States has pressured the G-20 and Cairns Group to produce the proposal within 10 days of the May 17 General Council in order to have adequate time to prepare for the June session of the agriculture negotiating group. Some Members of the G-20 question whether 10 days is adequate time given the political circumstances. Brazilian Ambassador to the WTO Felipe de Seixas Corrêa indicated that the G20 is making every effort to present a proposal by the June 2 meetings. India's ambassador to the WTO told the General Council that his country's new government would need additional time in order to develop its positions. Other reports indicate that India has been constructive in internal discussions and would not block progress in the Round. Other Members like Canada has expressed discomfort with the various approaches, including implications for its sensitive dairy sector and the Canadian Wheat Board. At any event, there will clearly be a difficult negotiation on agricultural market access before the framework can be agreed, and time is short.

Among other issues discussed at the Council, it was acknowledged that all Singapore Issues except trade facilitation would be dropped from the single undertaking of the Doha Round. Japan and Korea indicated that they would join the consensus to launch negotiations on trade facilitation alone. Nevertheless, there is hesitancy among some developing countries about proceeding with trade facilitation. For example, some Members have expressed concerns about the legally-binding nature of a trade facilitation agreement and over the resources constraints to implement an agreement. Still, no Member has spoken against launching negotiations on the subject. It is still possible that work on the three remaining issues will continue outside the Round, but not much can be expected to flow from this.

OUTLOOK

The Paris Mini-Ministerial meetings generated more momentum to move negotiations forward on the Doha Round, and possible to achieve frameworks by the end of July. The meeting also reinforced the message that time is running out, and especially to overcome the obstacles on agriculture. Ministers appreciated the letter by Commissioners Lamy and Fischer on May 9, and believe it presents a historic opportunity to deal with the long problematic issue of export subsidies. Many would also agree that agriculture market access is now the most critical issue to resolve by July, and will attempt to do so based on a proposal by the G-20 and Cairns Group expected before the next agriculture negotiating session in early June. Ministers also acknowledged that the controversy over the Singapore Issues was mostly resolved, and that most would support launching trade facilitation negotiations.

Among other proposals being floated, the EU proposal to provide greater flexibility to the lesser-developed (mostly G-90) countries has raised some concerns, as noted above. Later, Lamy retracted his statement but still urged the greatest degree of flexibility for the lesser-developed countries.

The stage is now set to decide on which key issues will end up in the July package, and how to present the "package." Although some Members prefer a modest package consisting of a simple declaration including only the four key issues outstanding since Cancun, there is a need to offer further guidance on other matters including services and probably development issues. Some Members have proposed that the negotiating bodies submit reports, which can then be compiled into a July package. A compilation of reports by negotiating bodies would be more comprehensive, but could be seen as diminishing the political value of a simple declaration and hence, the "single undertaking" nature of the Round. In any event, many ministers and their colleagues in Geneva would support building upon the current momentum to conclude the "July package" in whatever form.

After July, political guidance is not expected at the same level of intensity as in previous months, due to election and political cycles in the United States and EU – the two key Members that have provided much needed political leadership in recent months. Thus, another missed opportunity in July would probably paralyze further movement on the Doha Round at least, until the Spring of 2005 or later. Moreover, a failure in July could undermine the WTO in a more damaging manner as disputes proliferate (*i.e.*, the resort to litigation over negotiation) and commitment to multilateralism diminishes.