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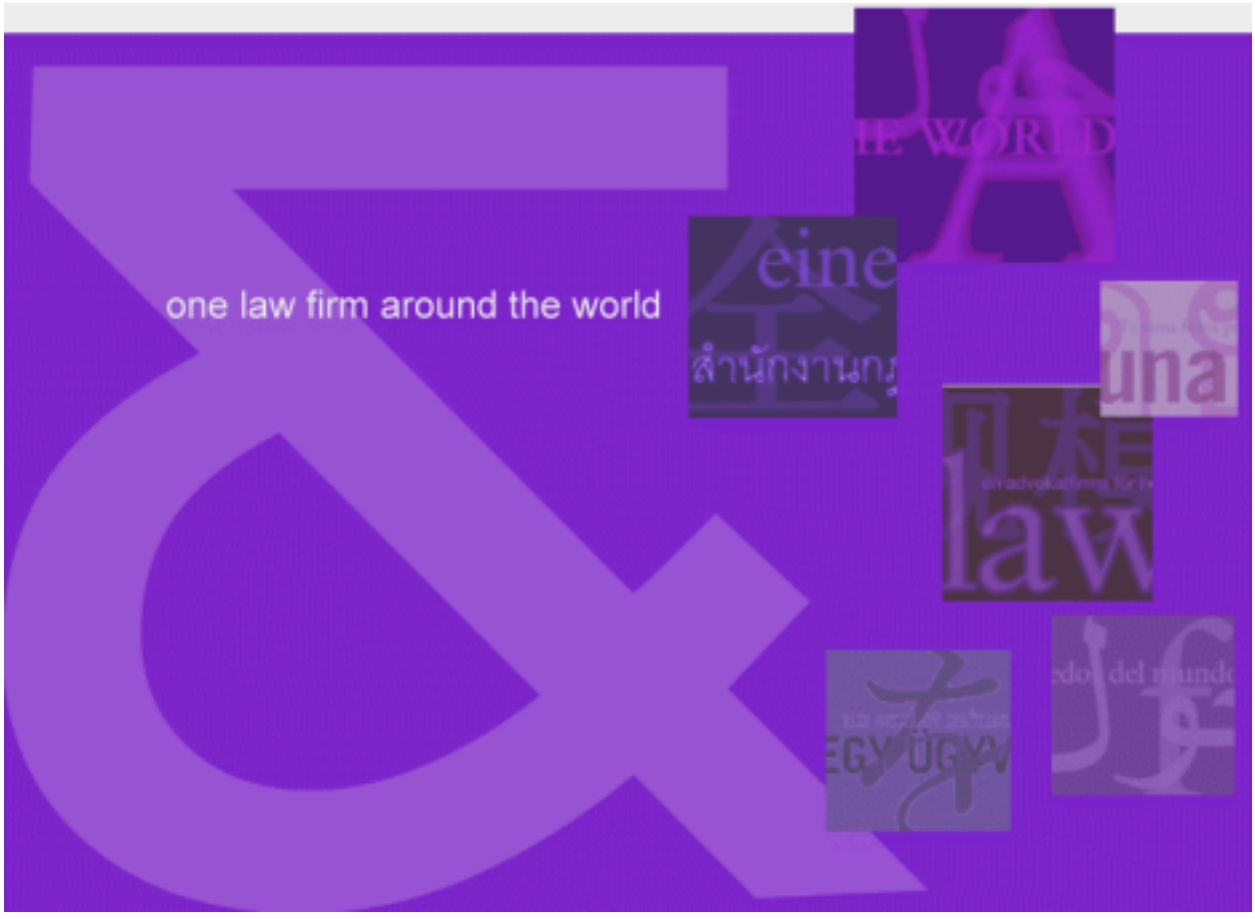

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

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Special Report: 108th Congress Convenes

The 108th Congress convened on January 7, 2003, with Republicans controlling both chambers for the first time since early 2000. Republicans will set the legislative agenda, which likely will help the Administration secure its legislative goals.

Congress will address a number of economic and security related issues, which will take priority over trade legislation. However, Congress still will consider a number of trade issues, including the Singapore and Chile FTAs. Congress, emboldened by the terms of Trade Promotion Authority, also will take on a strong oversight role in the bilateral, regional and multilateral trade negotiations.

In this report, we highlight the party and committee constitution for the 108th Congress as well as major trade-related legislative initiatives that the 108th Congress may consider.

EU-U.S. Container Security Agreement Proposed; Malaysia and Korea Join CSI

The European Commission on January 23, 2003, sent a formal proposal to the Council of Ministers seeking a mandate to negotiate an EU-U.S. container security agreement. Negotiations will begin in early February and should lead to an amendment to the 1997 EU-U.S. customs cooperation agreement, which would supersede the bilateral agreements concluded under the auspices of the U.S. Customs Service Container Security Initiative (CSI). The Commission is expected to insist on a reciprocity clause that would ensure screening of containers in U.S. ports destined for the EU to equalize levels and standards of control for EU and U.S. port operators.

In related developments, Malaysia and Korea have signed onto the CSI.

Customs Holds Public Meetings to Develop Advance Manifest Regulations for All Cargo; Customs Prepares for Full Enforcement of 24-Hour Rule

In response to the September 11, 2001, terrorist attacks, Customs recently issued regulations requiring electronic advance manifest information ("the 24-hour rule") for all U.S.-bound sea cargo. Customs is now developing advanced electronic manifest regulations for all inbound and outbound air, truck, rail, and sea cargo, pursuant to the Trade Act of 2002.

Customs recently held a series of public meetings to assist in the development of the proposed regulations, during which it presented "strawman" proposals for each type of cargo. In this report, we discuss Custom's mandate and the current state of development of the regulations.

With regard to the 24-hour rule for U.S.-bound sea cargo, Customs will begin full enforcement of the rule on February 2, 2003. At that time, Customs will begin to issue "no load" messages to carriers and NVOCCs that have not complied fully with the rule. Customs Headquarters in Washington, DC, will coordinate the effort.

Customs Issues Proposed Rulemaking Regarding Confidentiality of Vessel Cargo Manifest Information; Spain Joins Container Security Initiative (CSI)

Customs recently published a notice of proposed rulemaking regarding confidentiality protection for vessel cargo manifest information. The proposed rulemaking comes in response to concerns from the trade community that the advance manifest or "24-hour" rule could affect the confidentiality of importers, consignees, and shippers.

Specifically, the proposed rulemaking seeks to amend the Custom Regulations to allow, in addition to the importer or consignee, parties that electronically transmit vessel cargo manifest information directly to Customs, including non-vessel operating common carriers (NVOCCs), to request confidentiality with respect to the name and address of the importer, consignee, or shipper. The proposed rulemaking would require these parties to submit to Customs a letter of authorization signed by the importer or consignee with the request for confidentiality.

In other Customs news, Spain has joined the Container Security Initiative (CSI). The port of Algeciras joins the other eight CSI "megaports" in Europe. Over the past several months, the European Commission has expressed concern that the US has signed bilateral agreements with certain Member States (*i.e.*, Spain, Netherlands, Belgium, France, Germany, Italy, and the United Kingdom) and not others.

Thus, on December 17, the Commission announced that it had taken legal action against six EU Member states (Spain had yet to join the CSI at that time) for signing bilateral deals with the US within the framework of the CSI initiative. The Commission alleges that the bilateral agreements are a distortion of competition because they grant preferential treatment to traffic coming from the selected ports and could thus lead to diversion of trade to the detriment of ports not currently participating in the CSI system. Accordingly, the Commission argues, these bilateral deals break laws aimed at creating a single EU market.

U.S. Perspectives on the WTO

US Proposes to the WTO a "Tariff Free World" by 2015

The United States on December 5, 2002, made a submission to the WTO proposing the elimination of all tariffs on consumer and industrial goods by 2015.[1] The U.S. "tariff-free-world" initiative, if adopted in Doha Development Agenda negotiations, would eliminate annual tariffs on about US$6 trillion in global goods trade.

The U.S. proposal is in two phases. The first phase proposes elimination of all tariffs at or below 5 percent by 2010; reduce all other tariffs through a "tariff equalizer" formula to less than 8 percent by 2010; and eliminate tariffs in certain highly-traded industry sectors as soon as possible, but not later than 2010. In the second phase, for all remaining tariffs after 2010, these should be subject to equal annual cuts resulting in zero tariffs by 2015.

[1] Market Access for Non-Agricultural Products: Communication from the United States, TN/MA/W/18, 5 December 2002.

The U.S. proposal has been received with mixed reactions, both at home and abroad. From a domestic perspective, strong opposition is expected from Members of Congress representing states with import-sensitive textile and steel industries. Meanwhile, U.S. industries that import raw materials and those that export goods overseas support the proposal, and have assembled a "Zero Tariff Coalition." At the multilateral level, some WTO Members including Brazil, India, Malaysia and others have criticized the proposal as lacking flexibility for developing countries – which are required to make most of the tariff reductions. Some developed Members including Japan and the EC also expressed skepticism; however, some including Australia, Hong Kong, China; Singapore and Uruguay have expressed support.

USTR Optimistic on WTO Negotiations on Trade Facilitation and Transparency

At a panel hosted by the Carnegie Endowment for International Peace on December 20, 2002, Assistant USTR Dorothy Dwoskin and other panelists were hopeful that WTO negotiations on trade facilitation and transparency in government procurement would move forward at the Cancun Ministerial. Dwoskin stated that the U.S. strategy is to separate trade facilitation and transparency in government procurement negotiations from other "Singapore issues" (*i.e.* investment and competition policy) by Cancun. Dwoskin warned, however, that negotiations on these two issues are at risk of being undermined by parties that should be friendly, including the World Bank, World Customs Organization and the EU.

Another panelist, Michael Gadbaw, Senior Counsel of General Electric, expressed frustration on the pace of trade facilitation improvement, and suggested that USTR should pursue similar objectives independent of WTO negotiations through existing provisions of the Buy America Act or through bilateral trade agreements.

USTR Official Emphasizes Administration Will Pursue Liberalization Equally at Bilateral, Regional and WTO Levels

Chris Padilla, Assistant USTR for Intergovernmental Affairs & Public Liaison, stated during an **off-the-record** briefing on January 7 sponsored by the Washington International Trade Association ("WITA"), that there is no "checklist" USTR uses to determine with what countries it will negotiate an FTA.

Some analysts have criticized the Bush Administration for its "haphazard" FTA strategy, arguing that the Bush Administration lacks direction and focus. Analysts fear that the web of bilateral agreements will result in a "spaghetti bowl" of various agreements, each with its own provisions on rules of origin and other issues. Businesses, especially small businesses with less resources, would have to comply with a myriad of different requirements, depending on the market. Other analysts have criticized the U.S. FTA strategy for deflecting attention and resources away from the WTO process.

Administration officials such as Padilla argue that the US indeed has a clear strategy and insist that the U.S. bilateral, regional, and multilateral initiatives complement each other. Therefore, the bilateral and regional negotiations provide momentum for the WTO negotiations. If other WTO countries, Administration officials argue, were to accept the U.S. "tariff-free world" proposal at the WTO, then businesses would not have to contend with multiple sets of rules of origin provisions for goods.

WTO General Council Chair Addresses Challenges in Run-Up to Cancun in Visit to Washington DC

Sergio Marchi, Canada's Ambassador to the World Trade Organization (WTO) and Chairman of the WTO General Council, addressed the Washington International Trade Association (WITA) on January 14, 2003, regarding issues confronting WTO Members in the run-up to the WTO Ministerial meeting scheduled for September 2003 in Cancun, Mexico.

Marchi underscored the following issues as challenges that WTO Members are faced with in the run-up to Cancun and beyond:

- Ambitious objective of completing the round within the three-year timeframe;
- Implications of missed deadlines in TRIPs and special and differential ("S&D") treatment negotiations;
- Delays in progress in agriculture negotiations; and
- Effects of proliferation in free trade and regional trade agreements

At a separate event co-hosted by the Canadian American Business Council and the Coalition of Services Industries (CSI) on January 15, 2002, Marchi provided an overview of the current state of the Doha Development Agenda negotiations (or "Doha Round") and an outlook for the future. Marchi applauded the results that WTO Members had arrived upon in Doha, citing the launch of a broad negotiating mandate, China's accession to the WTO, and the promise of greater benefits for developing countries.

WTO Working Bodies

WTO Members Still at Impasse on Compulsory Licensing Provisions in the TRIPS and Public Health Declaration

On 20 December 2002, the Council for the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Council") of the WTO failed to reach an agreement on the implementation of paragraph 6 (concerning compulsory licensing) of the Declaration on the

TRIPS Agreement and Public Health ("Public Health Declaration")[2] reached at the Doha Ministerial. The Public Health Declaration aims to provide developing countries better access to generic versions of pharmaceuticals designed to combat endemic diseases, including through more flexible provisions on compulsory licensing (the ability to override a patent, under certain conditions, to allow production of the patented product in the domestic market).

About two dozen trade ministers came close to an agreement at the Sydney "mini-Ministerial" in November 14-16, 2002 – but Geneva delegations were unable to conclude a deal by the deadline of December 31, 2002. Many developing country WTO Members blame the US for the delay due to its insistence that an agreement include a short list of diseases. The US argues that without a list, some developing countries would seek financial gain through compulsory licensing by manufacturing generic drugs for non-infectious diseases. WTO Members have agreed to reconvene in early 2003 with a view to resolving the issue by the General Council meeting of 11 February 2003. This is not a formal deadline, however, and developing countries have suggested reopening the entire Public Health Declaration for renegotiation.

The developing country stance may be further hardened by the WTO's failure to reach agreement on strengthening special and differential ("S&D") treatment provisions under existing trade agreements, which also had a deadline of December 31, 2002. These issues and other priorities including agriculture negotiations may become the focus of attention at the next mini-Ministerial in Tokyo on February 15-16, 2003.

WTO Members Prepare for Cancun: Outlook for Negotiations in 2003

All work in the WTO in 2003 will be dominated by the preparations for, and the aftermath of, the Fifth Ministerial Conference at Cancun on 10-14 September. This report examines the state of negotiations in the Doha Round and related work in the light of the decisions required at Cancun and of the December 31, 2004 deadline for the conclusion of the Doha Development Agenda.

The year began under the heavy cloud cast by the breakdown of two negotiations in the final days of December: first, a way to improve access to essential drugs for the poorest countries; and secondly on "outstanding implementation issues" of interest to developing countries. In both cases deadlines laid down by the Doha Ministerial Conference were missed and there is no immediate prospect of agreement. On other matters, the lack of progress towards agreement on modalities (deadline of March 2003) for the agriculture negotiations has intensified the impression of a stalled process that augurs badly for Cancun. But we have been here before; short-term pessimism should not lead to the conclusion that the Round is in fundamental peril, though the official deadline certainly is in doubt.

WTO Dispute Settlement

[2] Paragraph 6 of the Public Health Declaration reads:

> "We recognize that WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002."

WTO Appellate Body Reverses Certain Panel Findings; Rules Against DOC Subsidy Calculation Methodology in US-EC CVD Dispute

On December 9, 2002, the WTO Appellate Body reversed certain findings by the Panel regarding U.S. subsidy calculation methodology in countervailing duty ("CVD") investigations, but upheld most of the Panel's findings that the Department of Commerce's ("DOC") methodology used in 12 cases against EC companies violates the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").[3]

The Appellate Body found that the DOC improperly used the "gamma" and "same person" methodologies in the original investigations, administrative reviews and sunset reviews, to determine the continuation of subsidies in the EC companies after their privatization. In doing so, the Appellate Body ruled against the "practice" of an administrative body such as the DOC, and not just the specific determinations as in previous disputes.

The Appellate Body overturned the Panel's rulings that Section 1677(5) regarding change in ownership determination (in post-privatization entities), as such does not violate the SCM Agreement. The Appellate Body also overturned the Panel's ruling that privatization always ends the subsidy; thus, a benefit can continue to exist after privatization.

WTO Appellate Body Finds Against U.S. Byrd Amendment; Overturns Certain Panel Findings

On January 16, 2003 the WTO Appellate Body ruled against the U.S. Continued Dumping and Subsidy Offset Act ("Byrd Amendment" or "CDSOA") in most substantive areas, but overturned the Panel's more controversial findings as follows.

- Upheld the Panel finding that the CDSOA is a non-permissible action against dumping or subsidization, and thus in violation with Antidumping (AD) Agreement Article 18.4 and Subsidies and Countervailing Measures (SCM) Agreement Article 32.5 and WTO Agreement Article XVI:4. However, it did not suggest repeal of the measure, unlike the Panel findings.

- Reversed the Panel finding that the US did not act in good faith in implementing the CDSOA in violation of AD Article 5.4 and SCM Agreement 11.4.

The AB report is considered as a loss for the US, and Members of Congress have been quick to criticize the finding as another example of the WTO overstepping its mandate on standard of review. The US is considering options for compliance, including a recent Administration proposal to repeal the measure in the 2004 Fiscal Year Budget.

[3] United States – Countervailing Measures Concerning Certain Products from the European Communities, WT/DS212/AB/R, dated 9 December 2002.

China in the WTO

China Submits Proposal to the WTO on Industrial Market Access

China submitted a proposal to the Negotiating Group on Market Access ("NGMA") on 24 December 2002[4] which emphasis harmonization of tariffs. The Chinese proposal has not yet been discussed in the NGMA, which is next scheduled to meet on 18-20 February 2003.

In the first half of 2003, WTO Members face a two-stage deadline in the NGMA:

(i) Reach a common understanding on possible negotiating modalities by the end of March 2003, and

(ii) Establish the modalities by 31 May 2003.

In this regard, fifteen Members, comprising the European Communities (the "EC"), Japan, Norway, Singapore, Canada, India, Hong Kong (China), Mexico, Oman, Switzerland, Mauritius, Taiwan, the US, Chile, and Korea have tabled proposals. Most of the proposals focus on the formula approach to tariff reduction or elimination, special and differential treatment, and non-tariff barriers.

US-China High-Level Exchange Discusses China's WTO Implementation Efforts

The US Department of Commerce on December 6, 2002, hosted a legal exchange seminar with a high-level delegation from China's Ministry of Foreign Trade and Economic Cooperation ("MOFTEC") and other government bodies led by Vice Minister Long Yongtu (formerly the lead negotiator on WTO accession). DOC and Chinese participants exchanged views on developments in China's legal environment post-WTO accession.

Participants spoke on the following issues:

(i) Mr. An Jian, Director General of the Economic Law Department of the Legislative Affairs Commission of the Standing Committee of the National People's Congress – Emphasized the uniform administration of China's trade regime.

(ii) Mr. Li Yuede, Director General of the General Affairs Division of the Legislative Affairs Office of the State Council – Discussed improvements in transparency of the legislative and rule-making process in China.

(iii) Ms. Yang Linping, Senior Judge of the Supreme People's Court – Cited the establishment of judicial review for administrative decisions related to international trade.

(iv) Mr. Dong Baolin, Director General of the National Trademark Administration; Mr. Xu Chao, Director General of the National Copyright Administration; and Mr. He Yuefeng, Division Director of the State Intellectual Property Office – Made joint presentations on improvements in China's intellectual property legal regime related to the TRIPs Agreement.

[4] TN/MA/W/20.

(v) Qiu Guangling, Division Director of the MOFTEC – Described China's growth in foreign investment, reforms in the legal investment regime and implementation of the TRIMs Agreement.

Supreme People's Court Releases Detailed Implementation Rules for Antidumping and Countervailing Judicial Review to Comply with WTO Commitments

On December 4, 2002, the Supreme Court of China announced two judicial interpretations governing the antidumping and countervailing judicial reviews respectively, in order to comply with its WTO commitments. The two regulations clarify the roles and responsibilities of the Chinese courts in judicial reviews of antidumping and countervailing investigations, as required by the WTO Antidumping and Subsidies agreements. The rules entered into effect on January 1, 2003.

Regional Trade Agreements

US and Singapore Agree on Capital Controls Issue in FTA

The US and Singapore announced on January 15, 2003, that negotiators have reached an agreement on the outstanding issue of capital controls in the FTA. The President could sign the FTA by the end of April.

USTR Official Says U.S.-Chile FTA Lends "Great Momentum" to FTAA Process

On January 13, 2003, Assistant USTR for the Americas Regina Vargo, addressed the CATO Institute regarding "Free Trade with Chile: Understanding What's at Stake." Vargo outlined four features which she believes distinguish the U.S.-Chile FTA from other trade agreements existent today: comprehensiveness, transparency, modernness, and approach to labor and the environment. The US believes the U.S.-Chile FTA lends "great momentum" to the FTAA process.

Currently, the US and the Chile are completing the "legal scrub" of the FTA text. USTR will not release the text at least until the legal scrub is complete. No decision has been made within the Administration on whether the text will be released before the President signs it.

US and Central America Launch Free Trade Negotiations

On January 8, 2003, the United States Trade Representative (USTR) announced the launch of negotiations toward a free trade agreement (FTA) with the Central American nations of Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua.

USTR Zoellick to Discuss Regional FTA on Visit to South Africa

On January 10, 2003, the United States Trade Representative (USTR) announced that the United States and the Southern African Customs Union (SACU) had agreed on a roadmap for negotiations toward a free trade agreement (FTA).

U.S. Agencies Seek Comments on FTAA and U.S.-Australia FTA

USTR and USITC have issued recent requests seeking public comments on the Free Trade Area of the Americas ("FTAA") and the US-Australia FTA.

U.S.-Morocco FTA Comments Focus on Intellectual Property Rights

Pursuant to the United States Trade Representatives' (USTR) request for public comments on October 10, 2002, on the Free Trade Agreement between the United States and Morocco (67 FR 63187), 21 companies and associations submitted comments.

Most submissions fully support negotiating a U.S.- Morocco FTA, although some oppose using the existing FTA with Jordan or certain provisions proposed for the FTAs with Singapore and Chile as a model. More than half of the submissions focus on intellectual property protection, and more specifically, on the need for Morocco to comply with the TRIPS regulations.

REPORTS IN DETAIL

U.S. TRADE POLICY DEVELOPMENTS

Special Report: 108th Congress Convenes

SUMMARY

The 108th Congress convened on January 7, 2003, with Republicans controlling both chambers for the first time since early 2000. Republicans will set the legislative agenda, which likely will help the Administration secure its legislative goals.

Congress will address a number of economic and security related issues, which will take priority over trade legislation. However, Congress still will consider a number of trade issues, including the Singapore and Chile FTAs. Congress, emboldened by the terms of Trade Promotion Authority, also will take on a strong oversight role in the bilateral, regional and multilateral trade negotiations.

In this report, we highlight the party and committee constitution for the 108th Congress as well as major trade-related legislative initiatives that the 108th Congress may consider.

ANALYSIS

I. House and Senate Return for 108th Congress

The House and Senate reconvened on January 7, 2003, for the start of the 108th Congress. Both chambers confirmed their choice of party leaders and began legislative work. Republicans control both chambers for the first time since early 2000.

- Senate Republicans have a 51 to 48 majority, with Independent Senator Jim Jeffords (Vermont) caucusing with the Democrats.
- House Republicans hold 229 seats and House Democrats hold 205 seats. Independent Bernie Sanders (Vermont) also caucuses with the Democrats.

II. Leadership for the 108th Congress

The Republican leadership will determine the schedule and priorities of the 108th Congress, probably in close consultation with the Bush Administration. Senate Majority Leader Bill Frist (R-Tennessee) is a close ally of the Administration. The biggest advantage resulting from the shift in Senate control is the ability of the Republicans to control the agenda. Democrats can no longer hinder the Administration's trade policy by refusing to consider certain issues. Still the Senate remains closely divided, and the Democrats likely will use the same tactics the Republicans used in the last Congress to exert pressure on the majority to address their concerns.

We highlight below the Leadership roster for the 108th Congress.

Senate Republican Leadership

- Majority Leader: Bill Frist (R-Tennessee)
- Majority Whip: Mitch McConnell (R-Kentucky)
- Republican Policy Committee Chairman: John Kyl (R-Arizona)
- Republican Conference Chairman: Rick Santorum (R-Pennsylvania)
- Republican Conference Vice Chair: Kay Bailey Hutchison (R-Texas)

Senate Democratic Leadership

- Minority Leader: Tom Daschle (D-South Dakota)
- Minority Whip: Harry Reid (D-Nevada)

House Republican Leadership

- Speaker of the House: Dennis Hastert (R-Illinois)
- Majority Leader: Tom Delay (R-Texas)
- Majority Whip: Roy Blunt (R-Missouri)
- Republican Conference Chairman: Deborah Pryce (R-Ohio)
- Republican Policy Committee Chairman: Chris Cox (R-California)

House Democratic Leadership

- Minority Leader: Nancy Pelosi (D-California)
- Minority Whip: Steny Hoyer (D-Maryland)

III. Daschle Will Not Run for President; Gephardt Will Not Seek Reelection

During the 108th Congress, the Senate will be a hotbed for Presidential election activity. Although Senate Minority Leader Tom Daschle (D-South Dakota) has announced that he will not seek the Democratic presidential nomination, other Democratic Senators preparing Presidential bids include John Kerry (D-Massachusetts), Joseph Lieberman (D-Connecticut), and John Edwards (D-North Carolina). Senator Bob Graham (D-Florida) is also considering a run but has not formally announced his decision.

Representative Richard Gephardt (D-Missouri), who stepped down as House Minority Leader last year, has filed papers to set up a Presidential exploratory committee. Gephardt reportedly will not seek reelection in 2004, regardless of the outcome of his Presidential bid.

Foreign policy likely will be more important during the upcoming elections compared to previous elections, but international trade issues are unlikely to be major campaign issues. Members of the 108th Congress considering Presidential bids surely will think carefully about casting votes that could endanger their Presidential aspirations. Analysts do not expect the Presidential bids by various Members to influence significantly votes on upcoming trade legislation.

IV. Senate Committees Change Hands

After several weeks of battling over committee funding and constitution, the Senate passed organizing resolutions (S. Res. 18 and S. Res. 20) on January 15, 2003, allowing the new Republican majority to take control of Senate committees. Republicans will hold a one-seat margin on each of the Senate Committees. In a statement on the Senate Floor, Minority Leader Daschle emphasized that the agreement for the 108th Congress "reflects the same arrangement we had in the 107th Congress when Democrats were a 51-49 majority." Senate Republican leaders, however, have made it clear that the funding and constitution provisions in the resolutions do not set a precedent for future congressional sessions.

The Republicans will maintain control of the House Committees in the 108th Congress.

A. Senate Finance Committee

With the shift in Leadership, the Senate Finance Committee has gained four new members: Rick Santorum (R-Pennsylvania), Bill Frist (R-Tennessee), Jim Bunning (R-Kentucky), and Gordon Smith (R-Oregon). No new Democrats will be assigned to the panel.

Senator Charles Grassley (R-Iowa), a strong supporter of pro-trade initiatives, has returned to the post of Chairman of the Finance Committee, which has jurisdiction over trade issues. Grassley has worked for a strong trade liberalization agenda during his tenure on the Finance Committee. Although Grassley and Ranking Member Max Baucus (D-Montana) disagree on certain trade policy issues, they collaborated on the President's successful effort to renew Trade Promotion Authority and many other trade initiatives. Their cordial, collaborative relationship should continue, even as they again trade positions as Chairman and Ranking Member.

We provide the full Committee roster below:

Republican Membership

Chairman Charles Grassley (Iowa)

Orrin Hatch (Utah)

Don Nickles (Oklahoma)

Trent Lott (Mississippi)

Olympia Snowe (Maine)

Jon Kyl (Arizona)

Craig Thomas (Wyoming)

Rick Santorum (Pennsylvania)

Bill Frist (Tennessee)

Gordon Smith (Oregon)

Jim Bunning (Kentucky)

Democratic Membership

Ranking Member Max Baucus (Montana)

Jay Rockefeller (West Virginia)

Thomas Daschle (South Dakota)

John Breaux (Louisiana)

Kent Conrad (North Dakota)

Bob Graham (Florida)

James Jeffords (Vermont)

Jeff Bingaman (New Mexico)

John Kerry (Massachusetts)

Blanche Lincoln (Arkansas)

B. House Ways and Means Committee

The House Ways and Means Committee, where all trade legislation originates, will remain under the chairmanship of Representative Bill Thomas (R-California). Unlike the Senate Finance Committee, bipartisan collaboration is a rarity on the House Ways and Means Committee. Ranking Member Charles Rangel (D-New York) has complained of a lack of

consultation on a variety of matters. This partisan sniping on trade and other issues likely will continue.

Republican Membership

Chairman Bill Thomas (California)
Philip Crane (Illinois)
Clay Shaw, Jr. (Florida)
Nancy Johnson (Connecticut)
Amo Houghton (New York)
Wally Herger (California)
Jim McCrery (Louisiana)
Dave Camp (Michigan)
Jim Ramstad (Minnesota)
James Allen Nussle (Iowa)
Sam Johnson (Texas)
Jennifer Dunn (Washington)
Mac Collins (Georgia)
Rob Portman (Ohio)
Phil English (Pennsylvania)
J.D. Hayworth (Arizona)
Jerry Weller (Illinois)
Kenny Hulshop (Missouri)
Scott McInnis (Colorado)
Ron Lewis (Kentucky)
Mark Adam Foley (Florida)
Kevin Brady (Texas)
Eric Cantor (Virginia)
Paul Ryan (Wisconsin)

Democratic Membership

Ranking Member Charles Rangel (New York)
Fortney Pete Stark (California)
Robert Matsui (California)
Sander Levin (Michigan)
Benjamin Cardin (Maryland)
Jim McDermott (Washington)
Jerry Kleczka (Wisconsin)
John Lewis (Georgia)
Richard Neal (Massachusetts)
Michael McNulty (New York)
William Jefferson (Louisiana)
John Tanner (Tennessee)
Xavier Becerra (California)
Lloyd Doggett (Texas)
Earl Pomeroy (North Dakota)
Max Sandlin (Texas)
Stephanie Tubbs Jones (Ohio)

Phil Crane will continue to chair the Trade Subcommittee, with Sander Levin as Ranking Member.

V. Congressional Trade Action in the 108th Congress

Senate Finance Committee Chairman Charles Grassley has made the following comments regarding trade legislation in the 108th Congress:

- Congress will continue to provide a strong trade oversight role, pursuant to the terms of the Trade Promotion Authority.
- The US must comply with recent WTO rulings so that other U.S. trading partners will follow their commitments as well, even if they are politically difficult issues like FSC/ETI.
- Congress should pass legislation to implement the Kimberly Process, which regulates trade in so-called conflict diamonds.

Grassley also noted that the Finance Committee likely will move forward on the confirmation of several appointees to the International Trade Commission (ITC).

A. Chile and Singapore Free Trade Agreements

On January 30, 2003, President Bush officially notified Congress, pursuant to the terms of Trade Promotion Authority, of his intention to enter into free trade agreements (FTAs) with Chile and Singapore. Congress has 90 days to review the agreements before the President signs them, probably in late March or early April. The Administration will then work with Congress to develop implementing legislation for each agreement on which Members will cast an up-or-down vote.

USTR Robert Zoellick and Senate Finance Committee Chairman Charles Grassley (R-Iowa) have suggested that Congress will review the two agreements separately. Grassley has suggested that Congress could scrutinize the Chile FTA more due to the agriculture provisions. Nonetheless, analysts suspect the agreements will move through Congress in tandem.

Due to the heavy legislative load, Congress may not consider the agreements until Fall 2003, which would allow for implementation of the agreements on January 1, 2004.

B. Bilateral, Regional, and Multilateral Trade Negotiations

The Senate Finance Committee and the House Ways and Means Committee also will likely hold hearings and maintain an oversight role, pursuant to Trade Promotion Authority, with regard to the numerous other bilateral FTAs the Administration has announced: Australia, Morocco, Central America, and the Southern African Customs Union, as well as the Free Trade Areas of the Americas, and the Doha Round negotiations.

C. Russia WTO Accession and PNTR

The Senate Finance Committee and House Ways and Means Committee will continue to monitor progress on Russia's WTO accession. Press reports indicate that Senator Max Baucus, Ranking Member of the Senate Finance Committee, along with House Ways and Means Committee Ranking Member Charles Rangel (D-New York) and House Ways and Means Committee Trade Subcommittee Ranking Member Sander Levin (D-Michigan) may introduce legislation granting permanent normal trade relations (PNTR) to Russia. Because Congress usually grants PNTR to a country in conjunction with its WTO accession, the legislation would condition PNTR on a non-binding resolution approving or disapproving Russia's accession, after negotiations are completed.

During the 107th Congress, President Bush encouraged Congress to grant Russia PNTR in advance of several important summits, the most recent being the May 2002 Bush-Putin summit. At the time, Baucus stated that it would be inappropriate to grant PNTR to Russia until further progress had been made in its accession process. Baucus was concerned that granting Russia PNTR at the time would cause the United States to lose leverage in WTO accession negotiations with Russia.

D. China's WTO Compliance

The Senate Finance and House Ways and Means Committees will also continue to monitor China's compliance with its WTO commitments as well as the progress on the rule of law in China. The U.S. Congressional-Executive Commission on China will also remain active in its monitoring efforts.

E. Extension of Jackson-Vanik Waiver for Vietnam

Retaining normal trade relations (NTR) status is a necessary condition to continue full implementation of the U.S.-Vietnam Bilateral Trade Agreement (BTA), which took effect on December 10, 2001. Vietnam's trade status with the United States is subject to the Jackson-Vanik amendment to Title IV of the Trade Act of 1974. This law governs the extension of normal trade relations (NTR), formerly known as most-favored-nation (MFN), tariff treatment, as well as access to U.S. government credits or investment guarantees, to non-market economy (NME) countries that are otherwise ineligible for NTR treatment. Such countries may gain NTR treatment and coverage by U.S. trade financing programs only by complying with the freedom of emigration provisions under the Trade Act.

The Trade Act authorizes the President to waive the requirements for full compliance with respect to a particular country if he determines that such a waiver will substantially promote the freedom of emigration provisions, and if the President receives assurances that the emigration practices of the country will lead substantially to the achievement of those objectives. Analysts expect President Bush to issue a renewal of the waiver again this year. Congress likely will consider a resolution of disapproval, but it likely will be defeated as it was last year.

F. FSC/ETI

Analysts expect Congress to address the FSC/ETI issue during the 108th Congress, possibly introducing legislation to reform the U.S. international tax code to bring it into compliance with a series of WTO rulings against the FSC/ETI. Last year House Ways and Means Committee Chairman Bill Thomas (R-California) introduced a bill (HR 5095) to repeal the FSC/ETI and replace it with other tax incentives. Industry was critical of the bill, and the Committee never marked it up.

Thomas and Senate Finance Committee Chairman Charles Grassley (R-Iowa) seem eager to bring the U.S. tax code into compliance with the WTO rulings, but it remains unclear when and how they will do that, especially as they are increasingly agitated by the EU ban on genetically modified foods (GMOs) as well as other trade frictions with the EU. Analysts conclude that Thomas and other Congressional trade players want the EU to comply with WTO rules in the same way that the EU expects the US to comply.

President Bush has proposed a repeal of the ETI in his Fiscal Year 2004 Budget. The Administration seems to favor a legislative approach to the issue. Senate Finance Committee Ranking Member Max Baucus (D-Montana), however, wants the Administration to engage in negotiations with the EU in the context of the Doha Round, at the same time as Congress deals with the issue through legislation.

The US had asked the EU to hold off on retaliation until after the November 2002 elections, but the US still seems unable to act decisively on the matter, despite a flurry of proposals and discussions. Analysts speculate that the Administration and Congress have been unable to address the issue decisively thus far because many big businesses stand to lose a great deal of money if the ETI is repealed. Moreover, repeal of the ETI would likely necessitate complicated adjustments to U.S. tax code. Analysts speculate these may be some of the reasons why Baucus is advocating negotiations in the WTO context (Baucus believes the WTO favors an indirect as opposed to a direct tax regime; the United States maintains a direct tax regime).

Senate Finance Committee Chairman Charles Grassley (R-Iowa) has indicated that the Committee would not take up an ETI bill before May 2003.

G. Byrd Amendment

Congress is also expected to address the issue of the Continued Dumping and Subsidy Offset Act of 2000, better known as the "Byrd Amendment." President Bush has proposed a repeal of the Byrd Amendment in his 2004 Budget, but Senate Finance Committee Chairman Charles Grassley believes it will be difficult for Congress to pass a repeal of the Byrd Amendment. Senate Finance Committee Ranking Member Max Baucus (D-Montana) has criticized the Administration's proposed repeal of the Byrd Amendment.

H. Miscellaneous Trade Bill

Senate Finance Committee staffers are reviewing the miscellaneous trade bill (HR 5385) submitted during the 107th Congress. Senate Republicans likely will introduce a similar bill this

year. However, the bill probably will not contain contentious provisions on socks and health that held the bill up at the end of the 107th Congress.

The miscellaneous trade bill typically serves as a vehicle for non-contentious trade provisions to pass Congress. During every Congress, the Senate Finance Committee and the House Ways and Means Committee prepare miscellaneous trade bills to provide for temporary suspensions of duties on certain products and to make minor technical changes to the trade laws. The Committees collect and review the proposed bills in consultation with the public and with the Administration. The purpose of this review mechanism is to ensure that the legislation is not contentious and can be passed by unanimous consent. Generally, measures that create significant revenue losses, operate retroactively, suspend the duty on a domestically-produced product, or are otherwise contentious are not included in the final bill.

I. Antidumping Reform

On January 9, 2003, Senators Blanche Lincoln (D-Arkansas), Evan Bayh (D-Indiana); Richard Durbin (D-Illinois); Fritz Hollings (D-South Carolina) introduced the Expedited Remedy for Persistent Dumping Act of 2003 (S 136). The legislation would reform the U.S. antidumping law. The Senate Finance Committee now must consider the bill.

J. EAA

On January 7, 2003, Representative David Dreier (R-California) introduced the Export Administration Act (EAA) of 2003 (HR 55), legislation to renew and revamp the expired EAA. The bill has been referred to the House International Relations Committee.

Last year, the Senate approved a version of the EAA (S 149), which the Administration favored. Two House committees, however, approved different versions of the EAA (HR 2581), which both the Bush administration and industry opposed for being overly restrictive. Supporters of HR 2581 believe that S 149 would threaten national security by loosening export controls too much.

Senator Mike Enzi (R-Wyoming), the original sponsor of S 149, intends to reintroduce a revamped version of the bill during the 108th Congress. Enzi may have to change the bill due to the creation of the new Department of Homeland Security. According to his press secretary, S 149 remains one of Enzi's highest priorities.

Senate Banking Committee Chairman Richard Shelby (R-Alabama) also may introduce his own EAA renewal bill. The Banking Committee has jurisdiction over export controls in the Senate. In addition, House International Relations Committee Chairman Henry Hyde (R-Illinois) may introduce another version. During the last Congress, Hyde's Committee and the House Armed Services Committee attached amendments to the EAA that the Administration and industry opposed (HR 2581).

K. CAFE Standards

Senators Joseph Lieberman (D-Connecticut) and John McCain (R-Arizona) introduced a bill (S 139) that would establish a market-driven system of greenhouse gas tradable allowances that could be used interchangeably with passenger vehicle fuel economy standard (CAFE standards) credits. The bill has been referred to the Senate Committee on Environment and Public Works. Analysts speculate that the Senate Energy and Natural Resources Committee likely will work with the White House to develop an energy bill. It remains unclear whether it will include provisions regarding CAFE standards.

During the 107th Congress, the House approved a comprehensive energy bill (HR 4) that did not increase CAFE standards. The Senate approved an energy bill (S 517) that contained a provision giving the National Highway Traffic Safety Administration (NHTSA) 15 months to set new CAFE standards for light trucks. The House-Senate conference of the two bills was never completed.

VI. President Bush Highlights Priorities in State of the Union Address

In his State of the Union address on January 28, 2003, President Bush outlined his plans for the coming year, focusing on his efforts to boost economic growth, protect American security at home and abroad, as well as specific proposals on health care, energy independence, and combating AIDS. The President did not mention any specific trade initiatives in his State of the Union address.

OUTLOOK

The 108th Congress faces a number of pressing domestic and international issues, including economic stimulus, tax cuts, a possible war with Iraq, and the recent Shuttle Columbia disaster. Although Congress likely will deal with a variety of trade-related issues, analysts note that they are not among Congress' current priorities.

Moreover, in the lead-up to a Presidential election, trade issues normally become more contentious, so the Administration may be weary to deal decisively with the most difficult issues like compliance with the WTO rulings regarding the FSC/ETI and the Byrd Amendment. Instead Congress may take on more of an oversight role with regard to trade and the number of pending trade negotiations, particularly as the September 2003 WTO Ministerial Meeting in Cancun draws nearer.

In terms of trade issues, analysts believe that securing Congressional approval of the Singapore and Chile FTAs is one of the Administration's top priorities. With Republicans in control of the Congress, the Administration may find it easier to shepherd the agreements through Congress. Analysts speculate that the Administration and Congressional trade supporters will invoke the process set forth in Trade Promotion Authority to secure passage of the agreements.

EU-U.S. Container Security Agreement Proposed; Malaysia and Korea Join CSI

SUMMARY

The European Commission on January 23, 2003, sent a formal proposal to the Council of Ministers seeking a mandate to negotiate an EU-U.S. container security agreement. Negotiations will begin in early February and should lead to an amendment to the 1997 EU-U.S. customs cooperation agreement, which would supersede the bilateral agreements concluded under the auspices of the U.S. Customs Service Container Security Initiative (CSI). The Commission is expected to insist on a reciprocity clause that would ensure screening of containers in U.S. ports destined for the EU to equalize levels and standards of control for EU and U.S. port operators.

In related developments, Malaysia and Korea have signed onto the CSI.

ANALYSIS

I. EU-U.S. Container Security Agreement Proposed

On January 23, 2003, the European Commission sent a formal proposal to the Council of Ministers seeking a mandate to negotiate a container security agreement with the United States. The negotiations, set to begin in early February, should lead to an amendment of the 1997 EU-U.S. customs cooperation agreement, which would supersede the bilateral agreements concluded between the US and various Member States (Belgium, Netherlands, France, Germany, UK, Italy and Spain) under the auspices of the U.S. Container Security Initiative (CSI) *(Please see W&C January 15, 2003 Report).* The Commission would like to ensure a more coordinated approach to securing international trade, including in the following areas:

- The definition of key information for the identification of high-risk consignments and how to collect and exchange such information between competent authorities to ensure the effective application of risk management techniques;

- The establishment of common definitions for controls and agreement on how these definitions could be used to identify high-risk movement of goods;

- The coordination of positions to be taken on these issues in multilateral discussions; and

- The development of a common approach to carrying out these actions in conformity with international commitments.

The Commission believes that it is as concerned as the US about terrorist attacks, but argues that a pan-European measure is more effective than bilateral agreements with selected Member States. The Commission notes that the bilateral approach could cause trade diversion and competitive distortions, as the U.S. Customs Service has selected only a few EU ports thus far. On December 17, 2002, the Commission announced that it had taken legal action

against six EU Member states for signing bilateral deals with the US within the framework of the CSI.

The Commission is expected to insist on a reciprocity clause that would ensure screening of containers in U.S. ports destined for the EU to equalize levels and standards of control for EU and U.S. port operators.

II. Korea and Malaysia Join the CSI

Korea and Malaysia joined the U.S. Customs Service Container Security Initiative (CSI) on January 17, and 21, 2003, respectively. Soon U.S. Customs officers will be stationed at the ports of Busan, Korea, and Klang and Tangjung Pelepas, Malaysia, to target and pre-screen U.S.-bound cargo containers before they are shipped to the United States.

OUTLOOK

According to a Customs Service press release, Customs is in the process of implementing the CSI program in the ports that have joined and will continue to deploy teams to participating ports. Customs Commissioner Bonner stated that the Customs Service will expand the CSI beyond the top twenty megaports "as rapidly as we can."

Customs Holds Public Meetings to Develop Advance Manifest Regulations for All Cargo; Customs Prepares for Full Enforcement of 24-Hour Rule

SUMMARY

In response to the September 11, 2001, terrorist attacks, Customs recently issued regulations requiring electronic advance manifest information ("the 24-hour rule") for all U.S.-bound sea cargo. Customs is now developing advanced electronic manifest regulations for all inbound and outbound air, truck, rail, and sea cargo, pursuant to the Trade Act of 2002.

Customs recently held a series of public meetings to assist in the development of the proposed regulations, during which it presented "strawman" proposals for each type of cargo. In this report, we discuss Custom's mandate and the current state of development of the regulations.

With regard to the 24-hour rule for U.S.-bound sea cargo, Customs will begin full enforcement of the rule on February 2, 2003. At that time, Customs will begin to issue "no load" messages to carriers and NVOCCs that have not complied fully with the rule. Customs Headquarters in Washington, DC, will coordinate the effort.

ANALYSIS

I. Background

Since the September 11, 2001, terrorist attacks, "combating terrorism is the number-one priority of the U.S. Customs Service," as U.S. Customs Commissioner Robert Bonner stated recently. Although the United States and Customs must continue to tighten security, Bonner says that it should not be "at the expense of trade." Bonner argues that the development of more efficient screening systems will, in the long run, expedite rather than delay legitimate international trade. Many members of the trade community are not as optimistic.

In response to the September 11, 2001, terrorist attacks, Customs recently issued regulations requiring electronic advance manifest information ("the 24-hour rule") for all U.S.-bound sea cargo. Customs officials state that the 24-hour rule is critical to Customs' twin goals of securing trade and facilitating legitimate trade. Although it is clear that Customs is willing to work with the trade community to ease the transition to full implementation of these regulations, Customs is able to go only so far to accommodate the trade community. Customs fully expects the trade community to tailor its business practices and supply-chain management to the new regulations, and make appreciable investments in order to achieve maximum compliance.

The Administration's paramount focus is on security, which can be seen in the actions of almost every federal agency, not only the Customs Service. Customs may feel even more pressure from the Administration to secure the U.S. trading system when Customs moves to the newly authorized cabinet-level Department of Homeland Security. Many analysts fear that Customs' trade facilitation role could be all but lost in the new Department.

II. Trade Act of 2002 Requires Advanced Electronic Cargo Regulations for All Cargo

On November 26, 2002, Customs published a notice of public meetings (67 FR 70706) regarding the development of regulations regarding mandatory advanced electronic cargo information. The series of meetings is being held in accordance with section 343(a) of the Trade Act of 2002, which also contains Trade Promotion Authority (TPA), to assist in the development of proposed regulations to provide for the mandatory collection by Customs of electronic cargo information prior to importation into or exportation from the United States. The Secretary of the Treasury must promulgate regulations by October 1, 2003.

According to Customs Chief of Staff Andrew Maner, Customs first dealt with sea cargo (through the 24-hour rule) because it was the highest priority due to the "glaring deficiencies" in its security. Now Customs is dealing with other types of cargo as well as exportation from the United States. The Customs Trade Symposium in November 2002 was the official kick-off of the consultation period on the requirements contained in the Trade Act of 2002 *(Please see W&C December 17, 2002 Report).*

III. Customs Develops Regulations

In developing the regulations, the Secretary of the Treasury is directed to consult with a broad range of parties likely to be affected by the regulations, including importers, exporters, carriers, customs brokers, and freight forwarders.

Section 343(a) requires that the electronic cargo information required under the regulations be "reasonably necessary" to ensure aviation, maritime, and surface transportation safety and security. Generally, the requirements to provide particular information are to be imposed on the party (*e.g.*, exporter, importer, carrier, broker) most likely to have direct knowledge of the cargo information. When this is not practicable, the regulations should take into account how, under ordinary commercial practices, the party upon which the requirement is imposed acquires information, and whether and how the party is able to verify the information. Where information is not "reasonably verifiable," the regulations should permit the party to transmit information "on the basis of what it reasonably believes to be true."

Section 343(a) also requires the Secretary of the Treasury to take specific factors into consideration in the development and promulgation of the regulations, including:

- The existence of competitive relationships among parties;
- Differences among cargo carriers that arise from varying modes of transportation, different commercial practices and operational characteristics, and the technological capacity to collect and transmit information;
- The need for interim requirements to reflect the technology that is available at the time of promulgation of the regulations for purposes of transmitting/receiving/analyzing electronic information; and

- The need for transition periods and differences in transition times among modes of transportation.

The Trade Act of 2002 specifically states that the information collected pursuant to the regulations shall be used exclusively for ensuring aviation, maritime, and surface transportation safety and security, not for determining entry or for any other commercial enforcement purposes. Moreover, the regulations should avoid imposing requirements that are redundant with one another or that are redundant with requirements in other provisions of law.

In addition, the regulations should protect the confidentiality of business proprietary information, pursuant to current Customs regulations. Note that Customs, on January 9, 2003, issued a notice of proposed rulemaking regarding the confidentiality of vessel cargo manifest information (68 FR 1173) (*Please see W&C January 15, 2003 Report*).

IV. Customs Holds Public Meetings to Discuss Development of Regulations

Customs held a series of public meetings to assist in the development of the proposed regulations, with particular emphasis on the specific issues mentioned above. Separate meetings were held to discuss specific importation and exportation issues with regard to air cargo (January 14, 2003), truck cargo (January 16, 2003), rail cargo (January 21, 2003), and sea cargo (January 23, 2003).

A. Air Cargo

On January 14, 2003, Customs held a public meeting to discuss the development of proposed regulations requiring the mandatory collection by Customs of electronic manifest information for air cargo prior to importation into or exportation from the United States. Customs presented rough proposals for both inbound and outbound air cargo.

Representatives of all major carriers and couriers (FedEx, British Airlines, American Airlines) and related associations such as the Air Courier Conference of America (ACCA) took part in the public meeting. At the meeting, Customs officials explained that as the regulations are developed, Customs will consider proposals regarding the type of manifest data to be required, and the time needed for advance transfer of the data. Many of the participants, including ACCA, promised that within days they would present Customs with such proposals.

1. Customs Proposal Regarding Inbound Air Cargo

In an effort to ensure the safety and security of the aviation transportation system, Customs proposes that all carriers, freight forwarders, and some express consignment couriers be required to utilize the Air Automated Manifest System (AAMS) to provide Customs with advanced, electronic cargo declaration information. Customs needs this information as far in advance as necessary to analyze the data and respond in sufficient time to prevent the lading of suspect shipments. The amount of time necessary will depend on (i) the availability of automated targeting systems, (ii) the availability of Customs personnel to analyze the results, and (iii) the volume of information to be analyzed.

Discussion during the public meeting focused primarily on how much time should be considered sufficient. Customs officials stated that they are open to receiving proposals from affected parties regarding how much time is needed to: (i) to send the manifest information and (ii) to cancel the lading, if they receive messages from Customs via AAMS stating either that shipments must be held for security purposes, or that the data provided has been deemed insufficient to make a determination.

Considering the time-sensitive nature of the airfreight business, Customs proposed that the data be supplied 8 hours prior to lading for courier shipments, and 12 hours prior to lading for other shipments.

Express couriers that already have Customs approved electronic manifest systems may continue to utilize them. All other express couriers will be required to use the AAMS. In addition to transmitting all of the data required in the *Customs Automated Manifest Interface Requirement-Air* document, additional data elements, including dangerous goods indicator, airport of departure, and scheduled date and time of departure will be required. Air carriers will be required to participate in the AAMS at all U.S. ports at which they have direct arrivals. Carriers will be required to utilize the AAMS to request electronically all permits to transfer and in bond movement authorizations.

Customs may notify parties via the AAMS with messages stating that (i) certain shipments must be held for security purposes or (ii) the data provided is insufficient to make a determination and that the party must provide better data for Customs to analyze.

Non-AAMS participants will be required to purchase or develop the hardware and software necessary to participate. In addition, all parties will need to enact measures to comply with data quality requirements and supply the data in the specified time frame. Moreover, carriers will need to develop procedures to ensure that selected cargo is not loaded onto their aircraft.

Customs envisions a phased-in transition periods for the carriers. Current AAMS participants will be required to come into compliance with the data quality and cut-off time requirements within three months of the publication of the final rule. Non-AAMS participants will be required to begin transmitting electronic manifest information within two months of the publication of the final rule, and to meet the data quality standards within the three-month time frame.

2. Customs Proposal Regarding Outbound Air Cargo

For outbound air cargo, Customs intends to utilize the already existent Automated Export System (AES), which the U.S. Customs Service and the Department of Commerce, Bureau of Census jointly administer, to receive all export cargo information prior to export from the United States. In this way, Customs officials explained, they would be able to track the freight wherever it is.

Customs intends to require both commodity information and manifest information. Commodity information consists of Schedule B classifications, quantity, weight, consignee,

value, etc. With regard to manifest information, Customs will require carrier IATA number, conveyance number, flight number, transfer reference number, etc.

The AES will need to be enhanced in order to implement the proposed regulations. In the interim, Customs will require the information to be transmitted and accepted by AES no later than 24 hours prior to lading for air carriers and air couriers.

The trade community will be required to report both the External Transaction Number (XTN) and the Internal Transaction Number (ITN) for every shipment until the foreseen enhancements of the AES are complete.

Customs recognizes that the reprogramming of the AES will impact trade practices in the following ways:

- More information will be required for shipments currently reported via AES.
- Information will be required for shipments not currently reported via AES.
- All information will be required in fixed period prior to export.

B. Truck Cargo

On January 16, 2003, Customs held a public meeting to discuss the development of proposed regulations requiring the mandatory collection by Customs of electronic manifest information for truck cargo. Members of the truck cargo community took part in the discussion, during which they criticized the initial Customs "strawman" proposal. The proposal calls for transmission to Customs of advanced electronic cargo manifest information four hours prior to lading for inbound truck cargo and twenty-four hours prior to lading for outbound truck cargo.

Generally, the trade community criticized the proposal as harmful to the truck cargo business. If implemented, they believe it would disrupt the "just-in-time" delivery. Customs argues that the proposed requirements are necessary to ensure surface transportation safety and security.

1. Customs Proposal Regarding Inbound Truck Cargo

The U.S. Customs is currently restructuring the cargo release process for all modes of commercial imports into the United States. Customs explains the changes as the first step in the transition to the Automated Commercial Environment (ACE), which will include both expedited and standard release mechanisms. ACE is designated to replace gradually the existing Border Release Advanced Screening and Selectivity (BRASS) release system. The Free and Secure Trade (FAST) system and its Southern border equivalent will ultimately replace BRASS. The FAST system will make the way for the truck manifest system, which will be incorporated into ACE *(Please see W&C September 12, 2002 Report).* All truck carriers will be required to comply with the ACE system within 90 days of its official availability at each port of entry.

The Customs "strawman" proposal regarding inbound truck cargo proposes that advanced electronic cargo manifest information be provided 4 hour prior to lading. Participants in the meeting were most vocal in the criticisms of the proposed time period and the term "prior to lading."

The Southern Border Cargo Release Strategy will mirror the FAST system, taking into account the cargo processing needs of the Southern border. Currently, a working group of Customs officials from United States and Mexico are developing similar release systems.

Expedited processing will be afforded to those certified carriers who process cargo through the Pre-Arrival Processing System (PAPS) and employ pre-approved drivers that are only transporting shipments from Customs–Trade Partnership Against Terrorism (C-TPAT) importers. Customs believes that both systems provide a high level of security and safety for the truck cargo industry.

2. Customs Proposal Regarding Outbound Truck Cargo

Like its proposal regarding air cargo, Customs proposes that the Automated Export System (AES) be utilized to receive all export cargo information for outbound truck cargo prior to export from the United States. In this way, Customs would be able to track the freight wherever it is. Customs proposes requiring the transmission of electronic information no later than 24 hours prior to lading for truck carriers and express consignment couriers.

Truck carriers and express consignment couriers will be required to report both the External Transaction Number (XTN) and the Internal Transaction Number (ITN) for every shipment until the enhancements of the AES mentioned above are complete. All exporters would be required to comply with the proposed reporting procedures 90 days after AES has been modified.

C. Sea Cargo

On January 23, 2003, Customs held a public meeting to discuss the development of proposed regulations requiring the mandatory collection by Customs of electronic manifest information for sea cargo. Customs presented proposals for inbound and outbound sea cargo.

Customs will accept comments regarding the current proposals for a ten-day period following the January 23 meeting, in addition to the full comment period when Customs publishes the proposed rules in the Federal Register.

1. Customs Proposal Regarding Inbound Sea Cargo

The strawman proposal regarding inbound sea cargo is very similar to the current 24-hour rule. The proposal would require electronic paperless transmission of manifest information via the vessel automated manifest system (AMS) by all ocean carriers and non-vessel operating common carriers (NVOCCs), or other knowledgeable parties registered or licensed by the Federal Maritime Commission, 24 hour priors to lading at the foreign port.

Customs proposes the following programming changes to the AMS. Customs could make additions and/or amendments to this list:

Programming for a load date/time indicator, which will require the date of lading and time of lading as a mandatory field in the manifest transmission. Customs needs this information to determine the amount of time needed to send a "no load" message to the vessel operator.

Members of the sea vessel community are concerned with this provision because the technology to capture this type of data does not exist, particularly in foreign ports. Customs will work with the sea vessel community to refine this provision so that Customs does not require information that is not possible to capture.

Developing an "end of manifest" function to indicate that all bills of lading have been transmitted. Amendments and corrections can be transmitted afterward without affecting the "24-hour clock." However, changes to the description, consignee, or shipper and additional bills of lading will not be treated as amendments/corrections. Rather, such changes/additions would restart the 24-hour clock.

Allowing the B04 record (reference identifier) to be utilized in the AMS. This would allow an NVOCC to report a master bill of a carrier. The trade community has requested use of this field.

Customs proposal envisages a transition period in which all ocean carriers and NVOCCs, or other knowledgeable parties, must develop strategies to become automated at all of their direct ports of arrival in the United States. Non-automated entities will be given a three-month phase-in period to become automated. Entities that are already automated will have 30 days to automate at all U.S. direct ports of arrival.

2. Customs Proposal Regarding Outbound Sea Cargo

Like its proposal regarding air and truck cargo, Customs proposes that the Automated Export System (AES) Vessel Transportation Module be utilized to receive all export cargo information for outbound sea cargo prior to export from the United States. Customs proposes changing the timing of manifest transmission from within 10 days post-departure to 24 hours prior to departure. Customs does not anticipate major changes to the manifest information already required, although changes in the sequence of the transmission may be necessary to allow pre-departure reporting.

OUTLOOK

Customs must submit a report to Congress, specifically the Senate Finance and Science, Commerce, and Transportation Committees and the House Ways and Means and Transportation and Infrastructure Committees, setting forth (i) the proposed regulations; (ii) an explanation of how Customs is addressing security concerns through the proposed regulations; and (iii) an explanation of how the proposed regulations address particular comments received from interested parties. The report is due not later than 15 days prior to the promulgation of the regulations (September 15, 2003).

During the January 23 meeting regarding sea cargo, Customs officials discussed the "penalty phase" of the 24-hour rule, which begins on February 2, 2003, when Customs will begin full enforcement of the rule. Customs officials stated that they would "move slowly and target only the most egregious violations." Preliminarily, Customs will concentrate on compliance with the description requirements.

To assist the trade community, Customs is posting detailed information on its website (www.customs.gov), including a memorandum with guidelines for manifest descriptions, with "totally unacceptable" descriptions like "FAK" (freight of all kinds) and "consolidated cargo." Customs has given the memo to all ports, in order to ensure uniformity in its application.

Beginning February 2, Customs will begin to send "no load" messages for violations of the 24-hour rule. Customs officials explained that the "no load" message is distinct from a "hold" message, which means that when the cargo arrives in the US, it will be held before being released. A "no load" message means that cargo cannot be loaded at the foreign port.

Customs plans to implement the technology for a "no load" message in the AMS system. In the interim, Customs will contact the carrier or NVOCC directly with the "no load" message. Customs has asked carriers and NVOCCs to provide them with a contact person and phone number to whom the "no load" message should be directed. Customs officials emphasized that the "no load" messages will be uniform and will come officially from Customs Headquarters in Washington, DC, which will monitor the program closely.

Customs Issues Proposed Rulemaking Regarding Confidentiality of Vessel Cargo Manifest Information; Spain Joins Container Security Initiative (CSI)

SUMMARY

Customs recently published a notice of proposed rulemaking regarding confidentiality protection for vessel cargo manifest information. The proposed rulemaking comes in response to concerns from the trade community that the advance manifest or "24-hour" rule could affect the confidentiality of importers, consignees, and shippers.

Specifically, the proposed rulemaking seeks to amend the Custom Regulations to allow, in addition to the importer or consignee, parties that electronically transmit vessel cargo manifest information directly to Customs, including non-vessel operating common carriers (NVOCCs), to request confidentiality with respect to the name and address of the importer, consignee, or shipper. The proposed rulemaking would require these parties to submit to Customs a letter of authorization signed by the importer or consignee with the request for confidentiality.

In other Customs news, Spain has joined the Container Security Initiative (CSI). The port of Algeciras joins the other eight CSI "megaports" in Europe. Over the past several months, the European Commission has expressed concern that the US has signed bilateral agreements with certain Member States (*i.e.*, Spain, Netherlands, Belgium, France, Germany, Italy, and the United Kingdom) and not others.

Thus, on December 17, the Commission announced that it had taken legal action against six EU Member states (Spain had yet to join the CSI at that time) for signing bilateral deals with the US within the framework of the CSI initiative. The Commission alleges that the bilateral agreements are a distortion of competition because they grant preferential treatment to traffic coming from the selected ports and could thus lead to diversion of trade to the detriment of ports not currently participating in the CSI system. Accordingly, the Commission argues, these bilateral deals break laws aimed at creating a single EU market.

ANALYSIS

I. Customs Issues Proposed Rulemaking Regarding Confidentiality of Vessel Cargo Manifest Information

On January 14, 2003, Customs published a notice of proposed rulemaking regarding confidentiality protection for vessel cargo manifest information (68 FR 1173). The proposed rulemaking comes in response to concerns from the trade community, particularly the non-vessel operating common carrier (NVOCC) community, that the advance manifest or "24-hour" rule could affect the confidentiality of importers, consignees, and shippers. In comments submitted to Customs when the 24-hour rule was in its proposed rulemaking stage, the NVOCC group recommended that Customs amend the regulations to permit NVOCCs to request confidentiality on behalf of importers and consignees.

Brian Goebel, Counselor and Senior Policy Advisor, Office of the Commissioner, mentioned at the Customs Trade Symposium, that Customs would issue such a proposed

rulemaking. He explained that Customs would look at the comments to see if they should explore the issue further. However, he emphasized that there are inherent limits to what Customs can do to keep the information confidential.

Specifically, the proposed rulemaking seeks to amend the Custom Regulations to allow, in addition to the importer or consignee, parties that electronically transmit vessel cargo manifest information directly to Customs, including NVOCCs, to request confidentiality with respect to the name and address of the importer or consignee, related marks and identification numbers that reveal their names and addresses, and the names and addresses of their shippers. The proposed rulemaking would require these parties to submit to Customs a letter of authorization signed by the importer or consignee with the request for confidentiality.

Under the current Customs Regulations, only the importer or consignee, or an authorized employee, attorney, or official of the importer or consignee, can make such requests for confidentiality. Moreover, Customs may disclose certain information contained in vessel manifests unless the importer or consignee request confidentiality.

Comments are due on or before February 10, 2003.

II. Spain Joins Container Security Initiative (CSI)

U.S. Customs Commissioner Robert Bonner and Spanish Director General of Customs Nicolas Bonilla Penvela announced on January 8, 2003, that Spain has joined the U.S. Customs Service's Container Security Initiative (CSI). The port of Algeciras, Spain, joins the other CSI "megaports" in Europe, including the ports of Rotterdam, Netherlands; Antwerp, Belgium; Le Havre, France; Bremerhaven and Hamburg, Germany; Genoa and La Spezia, Italy; and Felixstowe, United Kingdom.

A. EC Concerned about Bilateral CSI Agreements

Over the past several months, the European Commission has expressed concern that the US has signed bilateral agreements with certain Member States (*i.e.*, Spain, Netherlands, Belgium, France, Germany, Italy, and the United Kingdom) and not others.

The Commission shares the U.S. concern about the possibility of terrorists using maritime transport and realizes that if this threat materializes, maritime transport could come to a halt. Aware of this possible scenario and its disastrous effects on the economy, the Commission understands that the US (and the main EU ports) want to have a network of "safe ports" in place which could continue to function even in the case of an emergency situation. However, the Commission does not agree with the selective approach the US has adopted thus far.

The Commission would like safety measures applied to all Member States, regardless of whether they have maritime transport. Moreover, the Commission would like to be fully involved in the development and application of the security measures and would like to be able to keep control over data gathering and information sent to U.S. Customs and the manner in which it is sent. Presently, the CSI program and the so-called 24-hour rule largely involve exchanges of information between the exporting companies and the U.S. Customs Service. Even

the Member States' customs authorities are kept outside of this data gathering system. The Commission would like to see a central data gathering system, even though it recognizes that this would take long to introduce.

A Commission official stated that the EU is concerned about the effects of the 24-hour rule on exporters and port operations. However, analysts note that the US seems unwilling and unlikely to make any compromises at present.

B. European Commission Seeks EU-US Agreement for CSI

The Commission has been trying unsuccessfully to launch negotiations on an EU-US agreement for CSI that would replace the bilateral deals. Instead, the EU and the US have exchanged draft texts on a political statement on the launch of negotiations. The compromise text would not contain an actual agreement, but would serve as the basis for both sides to seek formal negotiating mandates from their authorities. The Commission, in negotiating an EU-US agreement, would envisage building on the experience gained under the existing bilateral agreements and working methods between U.S. Customs and the relevant port authorities.

According to official sources, all Member States would support an EU agreement with the US. There was a feeling among various delegates at a recent meeting of the Member States' Directors General for Customs that the Member States which have bilateral agreements in place with the US have felt more or less obliged to enter into these arrangements because of the enormous economic interests which are at stake.

The Commission official has not seen any signs of ports wanting to pull out of the bilateral agreements, and does not expect that they would do so, given the economic interests at stake. In his view, the existing arrangements under the bilateral agreements will remain in place, even though they are not ideal, pending clarity on the likelihood of an EU-US agreement.

C. EC Takes Legal Action Against Member States that Have Joined CSI

On December 17, the Commission announced that it had taken legal action against six EU Member states (Spain had yet to join the CSI at that time) for signing bilateral deals with the US within the framework of the CSI initiative. The Commission alleges that the bilateral agreements are a distortion of competition because they grant preferential treatment to traffic coming from the selected ports and could thus lead to diversion of trade to the detriment of ports not currently participating in the CSI system. Accordingly, the Commission argues, these bilateral deals break laws aimed at creating a single EU market.

The Commission stated that it had launched the first step in a process that could result in a legal battle between the Commission and France, Belgium, the Netherlands and Germany by sending what it calls a letter of formal notice. The Commission has asked Britain, Italy, and Spain about the details of their CSI agreements. If the Commission is unsatisfied with the answers, it may launch infringement cases against these countries as well.

OUTLOOK

Bonner has stated that Customs is in the process of implementing CSI in the ports that have already signed onto the program, deploying teams to the participating ports as quickly as possible. Bonner has also stated that Customs intends to expand the CSI program "as rapidly as we can" beyond the top-20 megaports to "all ports that ship substantial amounts of cargo to the United States, and that have the infrastructure and technology in place to participate in the program."

Bonner criticized the European Commission for having taken action against the EU Member states for participating in the CSI "at a time of heightened concern for potential terrorist activity." However, the recent legal actions launched by the Commission do not seem to have obstructed the extension of the CSI initiative to other European ports, namely Spain.

In related news, Representative David R. Obey (D-Wisconsin), Ranking Member of the House Appropriations Committee, has accused the Bush administration of risking the success of the CSI by failing to provide sufficient funding.

U.S. PERSPECTIVES ON WTO

US Proposes to the WTO a "Tariff Free World" by 2015

SUMMARY

The United States on December 5, 2002, made a submission to the WTO proposing the elimination of all tariffs on consumer and industrial goods by 2015.[5] The U.S. "tariff-free-world" initiative, if adopted in Doha Development Agenda negotiations, would eliminate annual tariffs on about US$6 trillion in global goods trade.

The U.S. proposal is in two phases. The first phase proposes elimination of all tariffs at or below 5 percent by 2010; reduce all other tariffs through a "tariff equalizer" formula to less than 8 percent by 2010; and eliminate tariffs in certain highly-traded industry sectors as soon as possible, but not later than 2010. In the second phase, for all remaining tariffs after 2010, these should be subject to equal annual cuts resulting in zero tariffs by 2015.

The U.S. proposal has been received with mixed reactions, both at home and abroad. From a domestic perspective, strong opposition is expected from Members of Congress representing states with import-sensitive textile and steel industries. Meanwhile, U.S. industries that import raw materials and those that export goods overseas support the proposal, and have assembled a "Zero Tariff Coalition." At the multilateral level, some WTO Members including Brazil, India, Malaysia and others have criticized the proposal as lacking flexibility for developing countries – which are required to make most of the tariff reductions. Some developed Members including Japan and the EC also expressed skepticism; however, some including Australia, Hong Kong, China; Singapore and Uruguay have expressed support.

ANALYSIS

I. U.S. Sets Ambitious Zero Tariff Goal for Manufactured Goods

According to USTR, the U.S. proposal would seek the following tariff reductions from all WTO Members:

Phase One: From 2005-2010, reduce and harmonize tariffs to less than 8 percent.

(i) Eliminate all tariffs between zero to five percent by 2010. More than three-quarters of imports to the United States, Europe, and Japan would become duty-free.

(ii) Eliminate tariffs in "highly-traded goods" by 2010. These goods account for 60 percent of U.S. exported goods, and would be eliminated by 2010. Zero tariffs in key sectors would be sought as soon as possible, but no later than 2010.

[5] Market Access for Non-Agricultural Products: Communication from the United States, TN/MA/W/18, 5 December 2002.

(iii) Use "tariff equalizer" formula reduces remaining duties to 8 percent or less by 2010. Tariffs not eliminated by this stage would be subject to the "equalizer" formula, whereby the highest tariffs would be cut at the fastest rate. For example, a 40 percent tariff would be cut to 6.7 percent by 2010. A 7 percent tariff would drop to 3.7 percent.

Phase Two: From 2010-2015, eliminate all remaining tariffs down to zero. Annual cuts of tariffs equalized at rates of less than 8 percent would fall to zero by 2015.

The US seeks a comprehensive approach with no exceptions including for sensitive sectors like textiles. All WTO Members would be subject to obliged to reduce tariffs based on the same formula, although the US suggests that special and differential provisions for developing countries could be considered after the establishment of negotiating modalities. The US also proposals a parallel process that would identify and eliminate non-tariff trade barriers.

USTR estimates that a "tariff free world" would save American families up to US$1,600 a year and remove duties on more than US$670 billion in American products shipped overseas. USTR also points out that developing countries would gain significant benefits from South-South trade liberalization, including income gains of US$500 billion.

II. Support and Criticism from U.S. Industry and Congress

The U.S. proposal has drawn both praise and criticism from domestic industries and Congress. Not surprisingly, industrial sectors that have come to rely on protectionist policies and their supporters in Congress have criticized the proposal. On the other hand, industries that benefit from cheaper imports and lower barriers to their exports have rallied to support the proposal.

Among Members of Congress, the critics have had the strongest initial reactions. A spokesman for Rep. John Spratt (D-South Carolina) said, "This is not the time to broaden free access to the American textile market." Rep. Spratt will become the top assistant to newly elected Minority Leader Nancy Pelosi (D-California) in the next Congress. He is also a member of the Congressional Textile Caucus, a group of lawmakers interested in protecting domestic apparel manufacturing. Echoing Spratt's thoughts, the American Textile Manufacturer's Institute (ATMI) predicted the plan would wipe out US$13 billion worth of American textile exports and jeopardize one million jobs.[6] "China will be the main beneficiary of this giveaway," said ATMI Chairman Van May.

The office of Rep. Peter Visclosky (D-Indiana)) also criticized the initiative, claiming it runs counter to the Administration's recent efforts to protect the steel industry with new tariffs. "We just finished imposing punitive tariffs on foreign steel companies," noted Rep. Visclosky's chief of staff. "It's not a consistent trade policy." Congress will likely hold hearings on the issue in the near future.

[6] American Textile Manufacturers Institute – "ATMI Blasts Doha Tariff Proposal, Would Devastate U.S. Textile Industry, Export Markets", 26 November 2002

Supporters include groups like the National Foreign Trade Council (NFTC) and the National Association of Manufacturers (NAM) who have pledged to work to build support for the proposal in Congress and abroad. The NAM, which spearheading an industry alliance called the "Zero Tariff Coalition" lauded the USTR's efforts as "visionary and realistic."[7] Noting that manufactured goods compose over 80 percent of U.S. exports, NAM President Jerry Jasinowski said the Doha round of talks hinge on "slashing the trade barriers that American manufacturers face abroad." The NAM also praised the two-step process for eliminating the tariffs, saying it "maximizes the remaining U.S. leverage."

III. Mixed Reactions from WTO Members to U.S. Proposal

Various WTO Members had mixed reactions to the U.S. proposal: some consider it bold and others unrealistic. Many developing countries, to a greater extent than developed ones, depend on import tariffs as a source of government revenue and to protect domestic industries, and have reacted unfavorably.

A. Opposition to U.S. Proposal

Many developing countries expressed skepticism and cited the lack of derogations allowing them greater flexibility in reducing tariffs. Although the U.S. proposal cites special and differential treatment provisions, these are general in nature. For example, the US suggests that detailed special and differential provisions should be developed only after "agreement on the modalities and a common vision for the result of our negotiation."[8]

India criticized the U.S. proposal as "radical" and "clearly unfair." South Korea, Malaysia, Brazil, Kenya, Pakistan and the Philippines also criticized the proposal. Some Members stated that the proposal is counter to the Doha Development Agenda, which should take into account the special needs of developing nations. Furthermore, the Doha Declaration states that developing Members should be accorded "less than full reciprocity in reduction commitments." Japan and the EC expressed sympathy for their concerns, saying that it might not be realistic or practical to expect developing Members to abandon tariffs completely.

B. Support for U.S. Proposal

Countries that welcomed the U.S. proposal include Australia, Hong Kong, China; New Zealand, Uruguay, Singapore and Taiwan. These countries are strong proponents of liberal trade policies and favor significant reductions in barriers abroad. Singapore and Hong Kong, China praised the fact that the U.S. proposal contains no product exclusions. Uruguay supported the proposal and hoped that such a deal could be extended to agricultural products.

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[7] National Foreign Trade Council Press Release – "The NFTC Strongly Endorses U.S. Market Access Proposal as Essential to the Ultimate Success of the Doha Development Agenda", 26 November 2002.

[8] Market Access for Non-Agricultural Products: Communication from the United States, TN/MA/W/18, 5 December 2002, at para. 15.

In a rather unusual development, Director-General Supachai criticized the U.S. proposal in his capacity as head of the WTO. Supachai's biased remarks prompted a rebuke from the office of the USTR. Generally, the WTO Secretariat is not permitted to have positions on negotiations, but rather to provide neutral support to the process.

C. Comparison of WTO Members' Market Access Proposals

The U.S. proposal is by far the most ambitious to date in advocating a complete reduction of tariffs by 2015. The U.S. proposal, however, places less attention to developing country treatment and non-tariff barriers. Other recent proposals including from the EC address these issues in greater detail.

The following is a comparison of some of the key components of the EC and U.S. market access proposals.

Provision	U.S. Proposal	EC Proposal
Tariff Elimination	**Comprehensive** – Includes all industrial and consumer goods, including agricultural equipment, bicycle parts, construction equipment, IT and electronics products, and medical and scientific equipment	**Incremental** – Aims to reduce all tariff duties by "compression approach" including deeper cuts for products of greater interest to developing countries.
Developing Countries	**Little discussion of special treatment** – Postpones the discussion of S&D provisions until after the determination of modalities.	**Emphasis** – Calls for staggered phase-in periods and unilateral tariff elimination for all products from least developed countries.
Non-tariff Barriers	**Vague** – Calls for "parallel" measures and promises a more specific work plan.	**More discussion** – Attention to export duties and eventually horizontal rules in order to minimize the effects of non-tariff barriers.
Environmental Goods	**General** – Refers to Trade Promotion Authority as establishing the objective of elimination of tariffs and non-tariff barriers to environmental technologies and goods.	**Emphasis** – Reiterates a desire to negotiate deeper cuts for environmental goods and to improve eco-efficiency.

India's criticism of the U.S. proposal is no surprise based on the approach of its own market access submission in October 2002.[9] The Indian paper aims at ensuring that market access modalities and ensuing negotiations would result in substantial gains for developing countries. For example, India asserted that: "The average tariff of developed countries in most of the sectors being proposed for 'zero for zero' approaches is around 3-5 percent. Bringing them down to zero will not involve any significant reduction. This is not the case with developing countries, which would face sharp drops in their revenue collection."[10] Clearly, India points out the difficulties developing countries face in shoring up their national budgets if they pursue significant tariff reduction.

[9] Market Access for Non-Agricultural Products – Submission by India, TN/MA/W/10, 22 October 2002.

[10] Ibid. para. 7(i).

The Indian proposal advocated the following steps:

- ***Starting point*** – Begin reduction commitments from the last negotiated level of bound commitments (and not necessarily applied tariffs).

- ***Less than full reciprocity*** – Incorporate the Doha Declaration's "less than full reciprocity" concept in all aspects, and not merely in longer implementation periods, as the EC had proposed.

- ***Tariff peaks, escalation and non-tariff measures*** – Deal effectively with tariff peaks, escalation and non-tariff measures in products of particular export interest to developing countries. Developing countries should be allowed to keep tariffs for certain domestically sensitive products unbound or without a maximum tariff threshold

WTO members are working towards establishing a framework for negotiating modalities (approaches) by March 31, 2003, with a deadline of May 31, 2002. This two-stage deadline is a result of EC urging, which sought to link the schedule for industrial goods with important deadlines for agriculture and services negotiations in March 2003. Despite the staggered deadlines, most Members are still far from reaching agreement on negotiating modalities for industrial goods.

The Chair of the Negotiating Group for Market Access, Ambassador Pierre Girard of Switzerland will draft a consolidated overview of the proposals to date in preparation for the Group's first meeting in 2003, scheduled for February 19-21, 2003.

OUTLOOK

The U.S. proposal is clearly ambitious and controversial, at home and abroad. The U.S. approach is somewhat surprising, considering the limited protection it would extend to sensitive domestic industries like steel and textiles – and its limited emphasis on developing country treatment. Nevertheless, the U.S. proposal is a starting point and should seek ambitious tariff reductions from all WTO Members and industries. Although initial reactions have been mixed, the U.S. government and industry supporters will attempt to sell the vision of a "tariff free world" to skeptics.

Among other proposals, the EC and Japan have emphasized developing country interests by offering longer transition periods and reductions of tariffs in textiles and manufactured goods. Despite these gestures, many WTO Members are more concerned about achieving progress in agriculture – which for many developing countries is their top priority in the current round. The lack of progress in establishing negotiating modalities in agriculture by the deadline of March 2003 will risk delaying progress in industrial goods negotiations, as well as the round as a whole.

USTR Optimistic on WTO Negotiations on Trade Facilitation and Transparency

SUMMARY

At a panel hosted by the Carnegie Endowment for International Peace on December 20, 2002, Assistant USTR Dorothy Dwoskin and other panelists were hopeful that WTO negotiations on trade facilitation and transparency in government procurement would move forward at the Cancun Ministerial. Dwoskin stated that the U.S. strategy is to separate trade facilitation and transparency in government procurement negotiations from other "Singapore issues" (*i.e.* investment and competition policy) by Cancun. Dwoskin warned, however, that negotiations on these two issues are at risk of being undermined by parties that should be friendly, including the World Bank, World Customs Organization and the EU.

Another panelist, Michael Gadbaw, Senior Counsel of General Electric, expressed frustration on the pace of trade facilitation improvement, and suggested that USTR should pursue similar objectives independent of WTO negotiations through existing provisions of the Buy America Act or through bilateral trade agreements.

I. Assistant USTR Dwoskin Has Favorable Outlook for Trade Facilitation and Transparency Negotiations; Warns of Negotiations Being Undermined

AUSTR Dwoskin commented favorably on the progress of trade facilitation and transparency in government procurement negotiations -- insisting that most WTO Members except India believe that negotiations are already underway for both issues. Regarding trade facilitation in particular, Dwoskin reported a "very good start" to negotiations since Doha. She added that the so-called "Colorado Group" -- including Australia, Canada, Hungary, Morocco, Singapore and the US -- have banded together to support trade facilitation negotiations. The EC, however, has not been as helpful in the course of negotiations. She noted that GE and other industry players have assisted these efforts, and welcomed support from other companies facing similar global problems with inefficient customs procedures.

Dwoskin warned that other international organizations that should be friendly to negotiations, namely the WCO and World Bank, have not been helpful and are threatening to undermine trade facilitation negotiations. She blamed their "bureaucratic jealousy" and asserted that the WCO should not feel threatened as there is "plenty of work to go around." She cited one senior World Bank economist (presumably Joseph Steiglitz, the Bank's former Chief Economist), who has preached to developing countries that trade facilitation and customs reform are not always good objectives for all countries (i.e. "one agreement does not fit all"). USTR is encouraging a more cooperative approach from both the WCO and World Bank.

II. GE's Gadbaw Suggests Approaches to Improve Transparency

Michael Gadbaw commented that although the EC is partly to blame for delaying negotiations on trade facilitation and transparency in government procurement, USTR is "not off the hook." He pointed out, for example, that the Buy America Act has had for the past ten years a provision that authorizes USTR to grant more favorable preferences based on trading partners' efforts to improve transparency in government procurement. He acknowledged the need for a

WTO agreement on transparency, but asserted that USTR should consider bilateral approaches as well.

Gadbaw made several suggestions regarding WTO efforts on trade facilitation and transparency:

(1) ***Rule of law/APEC model*** – the APEC agreement on transparency as a good model; WTO Members should consider adopting legally-binding principles;

(2) ***Bribery as an inconsistent action*** – insisted that bribery should be considered as nullification and impairment of a WTO obligation, e.g. illegal subsidy, and suggested the use of fines;

(3) ***OECD agreement on anti-bribery/corruption*** – encouraged incorporation of the OECD agreement on anti-bribery and corruption into WTO rules;

(4) ***Publish "corruption gap"*** – a WTO notification requirement to publish a "corruption gap", *e.g.*, amount of tariff revenues reported collected vs. paid by exporters; and

(5) ***Border actions*** – the need to address corruption at the border, including stronger disciplines on customs practices.

OUTLOOK

Assistant USTR Dwoskin was insistent that negotiations on trade facilitation and transparency in government procurement have started and are making good progress, despite the lack of negotiating modalities (to be decided in Cancun). Many multinational companies place high priority on these negotiations as they often experience a significant loss of revenue as a result of inefficient customs procedures. Understandably, many including the US government and industry are frustrated at delays in the WTO on concluding agreements on trade facilitation and transparency in government procurement. GE, for example, is advocating that USTR pursue bilateral approaches to achieving the same objectives in a shorter time, *e.g.*, through the Buy America Act or free trade agreements.

USTR Official Emphasizes Administration Will Pursue Liberalization Equally at Bilateral, Regional and WTO Levels

SUMMARY

Chris Padilla, Assistant USTR for Intergovernmental Affairs & Public Liaison, stated during an **off-the-record** briefing on January 7 sponsored by the Washington International Trade Association ("WITA"), that there is no "checklist" USTR uses to determine with what countries it will negotiate an FTA.

Some analysts have criticized the Bush Administration for its "haphazard" FTA strategy, arguing that the Bush Administration lacks direction and focus. Analysts fear that the web of bilateral agreements will result in a "spaghetti bowl" of various agreements, each with its own provisions on rules of origin and other issues. Businesses, especially small businesses with less resources, would have to comply with a myriad of different requirements, depending on the market. Other analysts have criticized the U.S. FTA strategy for deflecting attention and resources away from the WTO process.

Administration officials such as Padilla argue that the US indeed has a clear strategy and insist that the U.S. bilateral, regional, and multilateral initiatives complement each other. Therefore, the bilateral and regional negotiations provide momentum for the WTO negotiations. If other WTO countries, Administration officials argue, were to accept the U.S. "tariff-free world" proposal at the WTO, then businesses would not have to contend with multiple sets of rules of origin provisions for goods.

ANALYSIS

Chris Padilla, Assistant USTR for Intergovernmental Affairs & Public Liaison, stated that there is no "checklist" USTR uses to determine with what countries it will negotiate an FTA. Padilla made his remarks during an **off-the-record** briefing with the D.C. trade community on January 7. The Washington International Trade Association ("WITA") sponsored the briefing.

I. US Will Pursue Multilateral, Regional and Bilateral Liberalization

Padilla reiterated the Administration's well-known three-pronged approach to trade liberalization: pursue trade liberalization at the multilateral, regional and bilateral levels. He noted that the US does not want to "put all of its eggs in one basket." Padilla reminded the audience that there are over 140 countries in the WTO, and any single one of them could block trade liberalization efforts due to the WTO's consensus-based decision-making process. The US does not want to be constrained by countries that are not willing or able to liberalize. The US has employed a strategy of competitive liberalization to promote a "healthy dynamic of competition." Passage of Trade Promotion Authority (TPA) and the launch of the Doha negotiations have provided momentum for trade liberalization on the domestic and international fronts.

Other countries have expressed interest in FTAs with the US. In fact, Padilla remarked, Zoellick rarely attends a meeting with a foreign trade minister where he is not approached about

another FTA. Padilla noted that the interest in FTAs is a sign that the U.S. strategy of competitive liberalization is working.

Responding to a question on whether the greater focus on bilateral FTAs is an admission that the WTO process is not working, Padilla said, "no." He stated that they are complementary processes, and the bilateral process helps to energize the WTO process. In addition, the bilaterals help build allies at the WTO to help the US advance the multilateral trade agenda.

When asked whether USTR will launch more FTAs in the next few years, Padilla answered that "in the next two years, yes--in the next two months, no." USTR has a staff of only about 200, and negotiators already are committed to tough negotiating schedules on the FTAs that the Administration has announced.

Another participant asked if USTR would request more money from Congress, given its limited resources. Padilla did not answer the question directly, but said that people within the Administration and in Congress understand the large amount of work USTR has and its limited resources.

One participant asked whether USTR has a standard for the rules of origin in all the FTAs so that they would all "melt" together. Padilla said the best solution is for WTO members to adopt the U.S. "tariff-free world" proposal, which says that countries will "go to zero," thereby eliminating the problems associated with different rules of origin for goods. The US is pursuing a complementary strategy in the various FTA negotiations. Therefore, adoption of the U.S. proposal at the WTO would allow the various FTAs to fit together and eliminate the "spaghetti bowl" argument.

II. Padilla Stresses "Human Face" of Trade Issues

USTR has strived in years past to garner public support for free trade. Generally, international trade issues are what Washington analysts refer to as "inside the Beltway issues," meaning that few people outside the Washington, D.C., area are interested in international trade policy. However, in recent years, environmental and labor groups, among others, have taken a more active role in developing international trade policy. There is a sense among free trade supporters that USTR needs to educate the public on how free trade benefits ordinary citizens. This education, supporters contend, could translate into greater congressional support for trade initiatives by breaking the linkage many U.S. citizens see between international trade and low wage labor in foreign countries "stealing" U.S. jobs. Possibly in response, Padilla emphasized the "human face" of trade throughout his remarks today, focusing on the positive effects on ordinary citizens in the US and abroad of the U.S. WTO proposals.

The US has proposed bold liberalization initiatives at the WTO. Padilla recognized that the U.S. proposals are ambitious, but refuted the argument that the proposals are unrealistic. Instead, he said that the proposals are "well within reach."

One participant asked Padilla to address the developing countries' argument that the U.S. WTO proposals are unfair. Padilla emphasized the importance of technical assistance programs to offset some of the tariff revenue lost as a result of liberalization. He said that tariff revenue is

not the most efficient way of collecting government revenue, as noted in recent IMF studies. Tariffs are regressive in nature and not a useful development tool. The developing countries, he added, argue that they cannot liberalize because developed country tariffs make it impossible. However, if tomorrow, Padilla said, developed countries abolished all tariffs, it would not solve the problem for developing countries because almost 70 percent of tariffs paid by developing countries are paid to other developing countries. Many problems stem from barriers in South-South trade.

III. Critics Argue U.S. Trade Policy Lacks Direction

Padilla recognized two criticisms of the U.S. strategy: i) The US is focusing too much on bilateral negotiations and ii) the U.S. strategy lacks clear direction.

- ***Bilateral Negotiations:*** Padilla stressed that bilateral negotiations allow the US to pursue trade liberalization with countries that are ready instead of waiting for all WTO members to agree. Padilla stressed that the US is not abandoning the WTO system; in fact, the US has proposed ambitious initiatives, which have restored vigor at the WTO by challenging the WTO to live up to its mandate. The US proposal includes "going to zero," even in sensitive U.S. sectors.

- ***Direction of U.S. Trade Policy:*** Padilla said there is no "secret magic checklist" of things countries need to complete before they are eligible to negotiate an FTA with the US. The decision to negotiate an FTA is a complex decision, and the US considers economic, domestic, and security issues, although not one of these issues is a dominant factor. The US, Padilla stated, is open to FTAs with countries of all sizes and stages of development, but highlighted the following five common considerations:

    - ***Economic relationship:*** The Administration looks at the economic and commercial relationship of possible FTA partners, including the trade flows. For example, Singapore is a free port for goods, but maintains barriers to its services sector.

    - ***Model FTA:*** The US seeks to negotiate "state-of-the-art" FTAs. In an apparent reference to EU trade negotiations where the EU refuses to liberalize its agricultural sector, Padilla emphasized that the US seeks ambitious FTAs, which include the agricultural sector. The US wants to set models for FTAs by including meaningful provisions on IPR protection, such as those in the Singapore and Chile FTAs.

    - ***Overall U.S. strategy:*** Bilateral FTAs contribute to the overall FTA strategy. For example, The Chile FTA will contribute to the FTAA negotiations, and the Singapore and Australia FTAs have spurred interest in other parts of the region.

- ***Economic and political development:*** The Administration will consider the importance of an FTA in supporting economic reform and political development. For example, the U.S.-Central America FTA aims to cement economic and political reforms in the region. Therefore, the Administration considers strategic objectives other than commercial effects of an FTA.

- ***Domestic considerations:*** The Administration considers the views of the U.S. domestic audiences, including Congress.

Padilla commented that a Trade and Investment Framework Agreement ("TIFA") is not a prerequisite for an FTA, but it is a helpful step.

Padilla hedged somewhat on a question on whether assistance with the war on terror is a formal or informal consideration for determining FTA partners. Padilla emphasized that there is no formal checklist.

IV. Padilla Addresses Current and Future FTA, FTAA and WTO Negotiations

- ***Southern Africa***: Padilla was asked about how the US would deal with TRIPS in the upcoming negotiations with the Southern African Customs Union (SACU) and what the main concerns of the US will be during the negotiations. Padilla said that, regarding TRIPS, the US is looking for a "rational middle ground," which he thinks the US has found in its recent unilateral statement on TRIPS and the Doha language. Capacity building will be a major issue in the negotiations with the SACU. The US will provide assistance on basic things, such as providing computers and travel money, teaching environmental inspectors, and implementing commitments.

- ***Central America:*** One participant questioned how the US intends to negotiate the U.S.-Central America FTA if the US only is willing to liberalize its agricultural sector at the WTO level, especially given the large U.S. agricultural subsidies. Padilla said that in the Chile FTA the parties agreed not to use agricultural subsidies on products traded between the US and Chile. The US does not have export subsidies on agricultural exports to Chile, but would reserve the right to subsidize certain products if a third country were to import subsidized agricultural products into Chile. Padilla noted that this does not necessarily mean that the same model will be adopted in the U.S.-Central America negotiations, but there are solutions.

- ***Chile and Singapore:*** Padilla was asked when USTR plans to send the Chile and Singapore FTAs to Congress. Singapore, he answered is not complete, so it is unclear. The Chile text is "ready to go." The President will send notification to Congress that he will sign it in the "very near future." USTR would like to send the Singapore and Chile FTAs at the same time.

- ***FTAA and WTO:*** Responding to a question regarding whether USTR has a contingency plan for the FTAA and WTO negotiations if they take longer than expected, Padilla said, "no." USTR expects to meet the 2005 deadline. He also mentioned that despite the "hyperventilation" in the press, Padilla believes that the new Lula Administration in Brazil will be an active participant in the FTAA negotiations. Brazilian negotiators will be tough, he admitted, but so are the U.S. negotiators.

V. USTR Will Consult with State Governments on Certain Services Issues

Answering a question on USTR's outreach initiatives for state and local U.S. government agencies, Padilla said that USTR will compile a list of requests from other countries regarding state issues in the next few weeks and send them to the state governments. He noted that USTR has received many requests from foreign governments requesting the US to liberalize certain services sectors that fall under state competencies, such as the electricity and insurance sectors. Padilla added that he thinks some governments went through the Uruguay commitments and took out anything dealing with states and included it in their request. The first step will be for the US to consult with the state governments to see if the relevant regulations still are in effect.

VI. India Takes Lead Among Developing Countries at WTO

One participant asked what role India is playing in Geneva. Padilla said that if India blocks progress at the WTO, then the rest of the world will continue negotiating without it. Nancy Adams, a U.S. WTO negotiator present at the briefing, commented that India seems to want to play a leadership role among developing countries to defend developing country interests. She expects India to be a hard bargainer and maintain some tough rhetoric.

OUTLOOK

Padilla stressed that the US is open to other FTA partners, but in the near future, USTR negotiators will focus on negotiating the FTAs already announced by the Bush Administration. Negotiators undoubtedly will strive to build upon the Chile and Singapore FTAs to establish models for the FTAA and WTO negotiations. This building block approach, supporters of trade liberalization hope, will result in support for trade liberalization initiatives at the regional and WTO levels.

USTR considers possible FTA partners on a case-by-case basis. Although Padilla did not elaborate on the importance the Administration places on a country's support for the U.S.-led war on terror, most analysts agree that it is a consideration. Padilla somewhat jokingly remarked that the US will not negotiate an FTA with Iraq anytime soon. Clearly there are some steps that potential FTA partners could take to make themselves more attractive as FTA partners, such as signing a TIFA with the US. However, there is no formal "checklist" of steps a country can take to ensure that it will be a future U.S. FTA partner.

WTO General Council Chair Addresses Challenges in Run-Up to Cancun in Visit to Washington DC

SUMMARY

Sergio Marchi, Canada's Ambassador to the World Trade Organization (WTO) and Chairman of the WTO General Council, addressed the Washington International Trade Association (WITA) on January 14, 2003, regarding issues confronting WTO Members in the run-up to the WTO Ministerial meeting scheduled for September 2003 in Cancun, Mexico.

Marchi underscored the following issues as challenges that WTO Members are faced with in the run-up to Cancun and beyond:

- Ambitious objective of completing the round within the three-year timeframe;
- Implications of missed deadlines in TRIPs and special and differential ("S&D") treatment negotiations;
- Delays in progress in agriculture negotiations; and
- Effects of proliferation in free trade and regional trade agreements

At a separate event co-hosted by the Canadian American Business Council and the Coalition of Services Industries (CSI) on January 15, 2002, Marchi provided an overview of the current state of the Doha Development Agenda negotiations (or "Doha Round") and an outlook for the future. Marchi applauded the results that WTO Members had arrived upon in Doha, citing the launch of a broad negotiating mandate, China's accession to the WTO, and the promise of greater benefits for developing countries.

ANALYSIS

I. Background: Accomplishments of Doha

Marchi began his remarks with some reflections on the November 2001 Doha Ministerial Meeting. He called Doha a turning point from the experience in Seattle, in which the international community demonstrated that it could act successfully in a unified manner. Marchi believes United States Trade Representative (USTR) Robert Zoellick was "crucial" to the successful launch of the Doha Development Agenda because he "took back the leadership that had been tarnished in Seattle."

Marchi outlined what he views as the three major accomplishments that came out of Doha:

(i) Launch of a Broad Negotiating Mandate

The Doha Development Agenda covers a significant scope of issues so that all members can gain economically. Marchi believes the undertaking was historic, especially with regard to agriculture, where countries must level the playing field.

(ii) Accession of China to WTO

Now that China has joined the WTO, 97 percent of trade globally is under the auspices of the WTO. Marchi believes that the strengthened rule of law in China, resulting from China's WTO accession, will provide "huge potential" for investors worldwide to enter the Chinese market.

(iii) Bridging the Development Divide

Although Marchi believes the Doha Round will be particularly fruitful for developing countries, he stated, "I do not buy into the idea that the other Rounds were bad for developing countries." He believes the Doha Round will help bridge the development gap by opening the North to textiles and agricultural goods from the South. Marchi also noted that the Doha Round would provide for more and better technical assistance than previous Rounds. Technical assistance is aimed at helping developing countries build capacity to meet their WTO obligations and to improve their participation in the ongoing trade negotiations.

II. Doha Round Making Progress, But Challenges Ahead

Marchi emphasized that launching the Doha Round, "was probably the easiest part. Now the real work has started in earnest." Marchi stated that a lean work plan had been established and all of the negotiating groups were making progress, although the speed of their work could be debated.

With regard to the November 2002 Sydney Mini-ministerial, Marchi noted that it was the first time in WTO history that members held an ambassadorial retreat to discuss system issues. In this way, it was the first time that the WTO membership had stepped back "to see the bigger issues and to candidly ask how we will be managing the institution ten years forward." He characterized the Sydney meetings as "very open and candid, refreshingly so, actually." In fact, Ambassadors have remained engaged in the negotiations since the Sydney meetings.

However, Marchi noted that there is a risk involved in holding Mini-ministerials, as only 20-25 countries are invited, which could create a transparency issue. On the whole, Marchi believes that this is a risk worth taking because the alternative would be to let all of the issues "backload" to future Ministerials. (The next Ministerial will be in Tokyo and held the weekend of February 15, 2003.)

Despite his general optimism with the state of the Round, Marchi conceded that members need to pick up the pace of the negotiations, which have created a real management problem, especially for the smaller delegations which have only one or two officers assigned to the WTO. Without sufficient human resources, these delegations "can just start saying no to proposals." Therefore, the membership needs to keep in mind the issues created by smaller delegations because he fears the situation could get worse as the pace of negotiations increases.

III. Turning Challenges to Opportunities in the Run-Up to Cancun

Marchi outlined a number of challenges facing the WTO that must be made into opportunities in the run-up to the Cancun Ministerial:

A. Timeframe

With the "very ambitious" three-year timeframe envisioned for the Doha Round, the Cancun Ministerial and its success will be critical in setting the path for the conclusion of the Round. Marchi emphasized that Cancun must provide the momentum to drive the Round in its last year. Therefore, Cancun must be "a successful pitstop or the rest of the journey will be complicated."

B. Retaining the Trust of Developing Country Members

Although 2002 ended on a rather sour note due to the missed deadlines for TRIPs and special and differential treatment ("S&D"), Marchi hopes that the missed deadlines do not "poison" other issues. He said that it would be interesting to see the mood in Geneva, as delegations begin to filter back in during January.

C. Temptation to "Backload" Issues into Cancun

Marchi made it clear that the WTO membership could not afford to "backload" issues into Cancun. Instead, deadlines must be honored. Leaving too many issues to be dealt with at Cancun, would add to the complexity of the numerous issues Ministers would already be dealing with, which is what happened at the failed Seattle Ministerial. Doha was built on a very different approach—dealing with issues along the way and dealing with as many issues as possible beforehand.

D. U.S.-EU Partnership

Marchi stated that the United States and European Union have "tried to fence in their differences" to work together to launch the Doha Round. Their partnership would be critical to the successful close of the Round. He posited that the US would have to use Trade Promotion Authority (TPA) and the Republican Congress to deal with difficult issues like antidumping. The EU, for its part, would have to reform its Common Agricultural Policy or risk "killing" the Round.

E. Proliferation of Regional and Bilateral Agreements

Members must ensure that the numerous regional and bilateral agreements are complementary to the WTO process. Marchi said he supported these agreements because they went beyond trade to cement the relationships among countries. In addition, they fomented public understanding of the rationale behind the WTO. However, countries must be cautious not to spend too much energy on regional and bilateral deals at the expense of pursuing WTO negotiations. Developing countries, in particular, must be cautious because they are often not invited to negotiate regional and bilateral agreements. Thus, the WTO is their greatest ally.

F. Building Support for the WTO Institution

Members must take care to help build support for the institution of the WTO. Although Marchi conceded that the WTO should not be criticism-free, he considered that support for the WTO should be better articulated so that the public understands what the world would be like without an institution like the WTO.

IV. Marchi Responds to Questions on Prospects for Specific Negotiations

A. Impact of Missed Deadlines in TRIPs and S&D on Negotiations

In response to a question regarding whether there could be progress in other areas without progress in TRIPs and S&D, Marchi stated that everything in the Doha Agenda was linked and that "nothing is agreed until everything is." Nonetheless, all work should not end because of the recent missed deadlines.

Marchi conceded that it would not be easy to pick up the momentum that existed in December and that the missed deadlines will certainly have an impact on negotiations, but it was difficult at this point to determine the degree of impact. Marchi said that he hoped it was "just a missed deadline."

Marchi explained that the deadlines for S&D and TRIPs were missed for very different issues. With regard to S&D, there were 85 different proposals on the table, and they each need to be given time. Marchi was disappointed that the Committee on Trade and Development was unable to reach an agreement on how to move forward in this area. A group of African countries rejected as insufficient a compromise proposal from the Quad Group (US, EU, Japan and Canada) which accepted 27 of the 85 developing country proposals. Marchi said, "Regrettably, we took nothing instead of partial progress." He hopes that Members will make progress on the issues already agreed to and move forward on them in the coming weeks. The TRIPs issue was much different in that "incredible progress" was made, but an agreement was stalled due to "one outstanding issue" (presumably how to prevent the re-export of generic drugs manufactured in times of public health crises).

B. Role of Agriculture Negotiations

In response to a question regarding the role of agriculture in the Doha Round, Marchi stated that it was important to place agriculture within a much broader economy. He noted, "The numbers don't lie, and the issue of subsidies is real." Marchi does not believe that the current level of agricultural subsidies is sustainable because developing countries cannot compete. He emphasized, "The issue cries out for reform." Marchi stated that although a gulf existed between the two sides in the agriculture debate, he believed that a convergence exists in the current Round, and that Members must capitalize on it.

C. Industrial Market Access

In response to a question regarding the U.S. proposal on industrial market access, Marchi welcomed the U.S. proposal because he believed it injected ambition into the debate by

communicating what was at stake for the private sector. He stated that the core agenda of the Round and its greatest core benefit must be market access. He warned countries not to dismiss proposals "before they land" because ambitious proposals are needed to drive the negotiations. Members should use the U.S. proposal to "lift our sights."

D. Negotiating Modalities Versus Actual Negotiations

In response to a question regarding whether Members were putting too much pressure on the early stage of developing negotiating modalities (approaches) instead of saving energy for actual negotiations, Marchi stated that issues could become too difficult at the end if Members do not agree upon modalities that are specific enough. He considered that Members needed to "pay now and see the benefits later."

E. Singapore Issues

With regard to the so-called Singapore issues (competition, transparency in government procurement, trade facilitation, and trade and investment), Marchi was disappointed that all of the Singapore issues were put in the same basket in the Doha Round, as some were more "mature" than others (presumably trade facilitation and transparency in government procurement).

F. China Transitional Review Mechanism

Regarding the transitional review mechanism (TRM) for China, Marchi stated that he thought the exercise of the TRM had gone relatively well in 2002. He explained that it was difficult at first as "we are making it up as we go along" in an effort to get China and the other Members to agree on a mode of approach (*e.g.*, should China provide written as opposed to oral answers to questions raised by the Membership?). He considered that the General Council needed to step back and look at the TRM from a broader perspective and ask itself what had been learned in the process and how China could make positive changes as a result.

G. Services

In response to a question regarding the status of the negotiations on the emergency safeguard mechanism applicable to services, Marchi replied that the deadline for the negotiations had been extended again, until March 2004. Although safeguard provisions do not exist for the services sector, Article X of the WTO's Agreement on Trade in Services mandates Members to initiate "multilateral negotiations on the question of emergency safeguard measures." Some Members, particularly the Association of Southeast Asian Nations (ASEAN), led by Thailand, have been the main proponent of services safeguards, supported by Pakistan and Cuba. The March 15 2004 deadline for agreement on whether a safeguard should be allowed under services rules, strikes a compromise position between safeguard proponents, who pushed for an extension just until the next WTO ministerial likely in mid- 2003 and developed countries who want to postpone a decision until the scheduled conclusion of the round at the end of 2004. In general, Marchi considered the services talks to have retained their momentum.

OUTLOOK

Marchi emphasized that the progress made before the Cancun Ministerial would be critical to a successful outcome in Cancun. In particular, Marchi warned that current deadlines should not slip further and into Cancun; otherwise, a "Seattle-like" failure could arise due to an overburdened agenda. Among issues like S&D and public health, Marchi suggested that some progress would be more desirable than no agreement at all.

Marchi also cautioned that the Doha Round should not take eight years like the Uruguay Round because the WTO will lose legitimacy with the private sector. He cited the proliferation of FTAs and regional negotiations as an indicator of trade diversion, and how much of this activity leaves behind poorer developing countries. Thus, the WTO should be the preferred approach of all Members and especially developing countries. Marchi concluded his remarks by stating that no Round had failed to date, and he did not want the Doha Round to be the exception.

WTO WORKING BODIES

WTO Members Still at Impasse on Compulsory Licensing Provisions in the TRIPS and Public Health Declaration

SUMMARY

On 20 December 2002, the Council for the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Council") of the WTO failed to reach an agreement on the implementation of paragraph 6 (concerning compulsory licensing) of the Declaration on the TRIPS Agreement and Public Health ("Public Health Declaration")[11] reached at the Doha Ministerial. The Public Health Declaration aims to provide developing countries better access to generic versions of pharmaceuticals designed to combat endemic diseases, including through more flexible provisions on compulsory licensing (the ability to override a patent, under certain conditions, to allow production of the patented product in the domestic market).

About two dozen trade ministers came close to an agreement at the Sydney "mini-Ministerial" in November 14-16, 2002 – but Geneva delegations were unable to conclude a deal by the deadline of December 31, 2002. Many developing country WTO Members blame the US for the delay due to its insistence that an agreement include a short list of diseases. The US argues that without a list, some developing countries would seek financial gain through compulsory licensing by manufacturing generic drugs for non-infectious diseases. WTO Members have agreed to reconvene in early 2003 with a view to resolving the issue by the General Council meeting of 11 February 2003. This is not a formal deadline, however, and developing countries have suggested reopening the entire Public Health Declaration for renegotiation.

The developing country stance may be further hardened by the WTO's failure to reach agreement on strengthening special and differential ("S&D") treatment provisions under existing trade agreements, which also had a deadline of December 31, 2002. These issues and other priorities including agriculture negotiations may become the focus of attention at the next mini-Ministerial in Tokyo on February 15-16, 2003.

ANALYSIS

I. Chairman's December 2002 Negotiating Text at an Impasse

Currently, WTO Members are grappling with how to amend TRIPs Article 31(f) on compulsory licensing ("predominantly for the domestic market") to allow developing countries

[11] Paragraph 6 of the Public Health Declaration reads:

> "We recognize that WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002."

to import generic drugs under patent. The US, Canada and Switzerland have been typically resistant to a broad interpretation of TRIPs provisions as their domestic pharmaceutical industries fear erosion of intellectual property rights through abuse of TRIPs, or through unauthorized trans-shipments of generic drugs. These developed countries have suggested an agreement on a waiver provision, with the intent to amend Article 31(f) at a later date.

Major developing countries that have capacity to produce generic drugs, including India, Brazil and China are pushing for a more liberal interpretation of compulsory licensing provisions for a wider range of pharmaceuticals. Even highly-developing countries like South Korea, Hong Kong, China; and Singapore would like to reserve the right to produce generic drugs in the event of unexpected outbreaks of disease or attacks of bio-terrorism. About two dozen trade ministers came close to reaching an agreement at the Sydney mini-Ministerial held on November 14-16, and had anticipated a final agreement would conclude by the December 31, 2002 deadline.

On 16 December 2002, Eduardo Perez Motta, Mexico's WTO Ambassador and Chairman of the TRIPS Council put forward a draft text that provides a general outline on the scope of the deal. With limited brackets, most of the WTO membership agreed that Chairman Motta's proposal was a promising text from which to conclude a final agreement. Despite this near unanimous approval of this text as a working document, the US could not accept the text and the negotiations ended on 20 December without resolution. Since that deadline has passed, the text may prove difficult to build upon.

II. US Demonstrates Some Flexibility, But Isolated at the WTO

At the close of the 20 December 2002 negotiating session, the US was the only WTO Member still officially in opposition to the negotiating text proposed by the Chairman Eduardo Perez Motta. At that same negotiating session, U.S. negotiators requested a delay into the late evening to consult Washington D.C. regarding possible flexibility on the deal. U.S. negotiators returned from their consultations with a modified footnote that expands a list of diseases, based on a more limited list that developing countries had turned down in previous negotiations.

Several versions of the U.S. footnote exist. The following is a recent version, which has expanded the scope to include diseases beyond the initially proposed list of HIV/AIDs, malaria, TB and other infectious epidemics of similar gravity and scale:

> "This decision applies to public health problems arising from yellow fever, plague, cholera, meningococcal disease, African trypansimiasis, dengue, influenza, HIV/AIDs, leishmaniasis, TB, malaria, hepatitis, leptospirosis, pertussis, poliomyelitis, schistosomiasis, typhoid fever, typhus, measles, shigellosis, hemorrhagic fevers, and arboviruses and other epidemics of comparable gravity and scale including those that might arise in the future due to natural occurrence, accidental release or deliberate use."

Developing countries, however, rejected the expanded list of diseases. They argue that there is no mandate to limit the scope of the Public Health Declaration to specific diseases and circumstances. Many developing countries and humanitarian NGOs seek the broadest possible

interpretation of the Public Health Declaration – and inclusive of non-infectious diseases such as asthma, heart disease and cancer. They warn that further delays would provoke the need to renegotiate the Public Health Declaration. Such a scenario would result in strong pressure to widen the Declaration and make it even less restrictive.

U.S. pharmaceutical producers have lobbied the White House intensely on this issue arising from the fear that patents for many diseases and ailments (beyond pandemics and infectious diseases) will be disregarded. They argue that the lack of IP protection for a wide range of health problems would discourage future research and development spending on important medicines. They also argue that developing countries also seek to override patents for commercial gain on less relevant drugs, including Viagra.

The US government has been responsive to industry concerns, and U.S. strategy reportedly requires authorization at the highest levels, including from U.S. Vice President Dick Cheney. Nevertheless, U.S. opinions are divided. In a public letter to USTR Zoellick, several prominent American doctors specializing in AIDS/HIV treatmnet urged the US not to exempt certain diseases, vaccines and diagnostic tests, and stipulate geographic limitations. Similarly, in a letter dated 20 December 2002, major Democrats including Charles Rangel and Sander Levin also backed such an approach in calling for an agreement that is not restricted to epidemics and other similar infectious diseases.

In an effort to placate some WTO Members who have portrayed the US as having caused the delay in a deal, the US announced unilateral provisions on compulsory licensing favorable to developing countries in greatest need of generic drugs.[12] The most prominent is a dispute settlement moratorium on WTO Members who export drugs produced under compulsory license to poorer countries facing health crises. The US also urged other developed countries with pharmaceutical exporting concerns to join that moratorium (the EU, Canada and Switzerland recently joined the moratorium). The US emphasized that these drugs should not be diverted to wealthier countries, including developed countries and those developing economy Members classified by the World Bank as high-income countries.[13]

OUTLOOK

Despite its efforts to reach an acceptable deal, the US is becoming increasingly isolated in its position on the Public Health Declaration. Other large pharmaceutical-exporting Members like the EC, Canada and Switzerland supported the 16 December text. In an effort to break the

[12] USTR Press Release, "U.S. Announces Interim Plan to Help Poor Countries fight HIV/AIDS and other Health Crises in Absence of WTO Consensus", 20 December 2002

[13] These countries include Barbados, Brunei, Cyprus, Hong Kong, Israel, Kuwait, Liechtenstein, Macao, Malta, Qatar, Singapore, Slovenia, Taiwan, and the United Arab Emirates. The US states that these countries "have sufficient production capacity in the pharmaceutical sector or sufficient financial resources to address such public health problems and thus do not need to import under compulsory licenses."

deadlock, the EU submitted on 10 January a compromise proposal listing 23 infectious diseases for which compulsory licensing might in principle be justified (a list which is acceptable to the US) and proposing that the list might be expanded on the basis of advice requested by a Member from the WHO.

Many WTO Member received the EU text favorably at an informal meeting on 28 January in Geneva. The US and Japan were non-committal. However, India, Brazil and some other developing countries attacked the text and remain opposed to any list of diseases. Nor does the approach satisfy the pharmaceutical industry, who mistrust the WHO and fear their involvement would lead to open-ended use of compulsory licensing to meet "public health problems." (And, reportedly the WHO staff dealing with this issue are from the more "radical" and least trade-sympathetic side of the Organization). Continued deadlock is also unfortunate for the public image of pharmaceutical companies, as some of their CEOs recognized at the annual Davos conference recently.

Nevertheless, recent announcements by the US, Switzerland, Canada and the EU that they will not initiate disputes against countries exporting drugs produced under compulsory license to countries in need have helped to improve the atmosphere. Much now depends on the positions of African countries, with which the US is working intensively. Brazil and India have taken hard line positions since they have major generic drug manufacturing capacity, and potential export possibilities at stake. But, the moral imperative derives from the health crisis in Africa and not from commercial interests of developed or developing countries.

Looking ahead, it is not very likely that further consultations will produce an agreement by the meeting of the General Council on 10-11 February. The issue will probably be raised at the Tokyo mini-Ministerial meeting on 14-15 February. The continuing deadlock will harm prospects for the Round overall because developing countries see the Declaration as part of a single deal that launched the Round. Developing countries also were disappointed at the failure to reach agreement on special and differential ("S&D") treatment by December 2003. Although these issues are important, even more developing countries consider progress in agriculture negotiations as their highest priority – which is all the more critical that WTO Members reach some agreement on agricultural modalities by the deadline of March 2003.

WTO Members Prepare for Cancun: Outlook for Negotiations in 2003

SUMMARY

All work in the WTO in 2003 will be dominated by the preparations for, and the aftermath of, the Fifth Ministerial Conference at Cancun on 10-14 September. This report examines the state of negotiations in the Doha Round and related work in the light of the decisions required at Cancun and of the December 31, 2004 deadline for the conclusion of the Doha Development Agenda.

The year began under the heavy cloud cast by the breakdown of two negotiations in the final days of December: first, a way to improve access to essential drugs for the poorest countries; and secondly on "outstanding implementation issues" of interest to developing countries. In both cases deadlines laid down by the Doha Ministerial Conference were missed and there is no immediate prospect of agreement. On other matters, the lack of progress towards agreement on modalities (deadline of March 2003) for the agriculture negotiations has intensified the impression of a stalled process that augurs badly for Cancun. But we have been here before; short-term pessimism should not lead to the conclusion that the Round is in fundamental peril, though the official deadline certainly is in doubt.

ANALYSIS

I. TRIPS and Health Still Deadlocked

The Doha Declaration on the TRIPS Agreement and public health calls for a solution to the problem that countries with little or no pharmaceutical manufacturing capability cannot make use of the compulsory licensing provisions of the TRIPS Agreement: Article 31 says that compulsory licensing should be predominantly for supply of the market of the country authorizing compulsory use of the patent. This means that a generic drugs manufacturer in, say, India should not be authorized to use another firm's patent in order to produce HIV/AIDS drugs for export to Africa. The US, however, rejected the text proposed by the Chair in December defining the conditions in which Article 31 would be waived for such compulsory licensing for export, to meet public health problems. The US claimed the text would provide too broad a scope for possible use of compulsory licensing.

The EU submitted on 10 January a compromise proposal listing 23 infectious diseases for which compulsory licensing might in principle be justified (a list which is acceptable to the US) and proposing that the list might be expanded on the basis of advice requested by a Member from the WHO. Many countries favorably received the text at an informal meeting on 28 January. The US and Japan were non-committal. But, India, Brazil and some other developing countries attacked the text and see any list of diseases as circumscribing the application of the Doha declaration's reference to public health problems afflicting developing and least-developed countries, and therefore as renegotiating the Declaration. Nor does it satisfy the pharmaceutical industry, who mistrust the WHO and fear their involvement would lead to open-ended use of compulsory licensing to meet "public health problems." (And, reportedly the WHO staff dealing with this issue are from the more "radical" and least trade-sympathetic side of the Organization).

It is not very likely that further consultations will produce agreement by the meeting of the General Council on 10-11 February. The issue could well go to the "Mini-Ministerial" meeting of about two dozen invited WTO Members in Tokyo on 14-15 February. Though this is not part of the Doha Round agenda, the deadlock will harm prospects for the Round, because developing countries see the Declaration on TRIPS and health as part of a single deal which included the launching of the Round. Continued deadlock is also unfortunate for the public image of pharmaceutical companies, as some of their CEOs recognized in Davos recently.

Nevertheless, recent announcements by the US, Switzerland, Canada and the EU that they will not initiate disputes against countries exporting drugs produced under compulsory license to countries in need have helped to improve the atmosphere. Much now depends on the positions of African countries, with which the US is working intensively. Brazil and India have taken hard line positions since they have major generic drug manufacturing capacity, and potential export possibilities at stake. But, the moral imperative derives from the health crisis in Africa and not from commercial interests of developed or developing countries.

II. Special and Differential Treatment of Developing Countries Still Undecided

The inability of the Committee on Trade and Development (CTD) to agree how to handle 85 "outstanding implementation issues" also unfortunately sets developed and developing countries in opposition. The issue of special and differential ("S&D") treatment has been a major problem for the WTO since 1998. Time spent unproductively on these issues in 1999 accounts in part for the failure to prepare adequately for the disastrous Ministerial Meeting in Seattle.

Improving S&D treatment covers a huge range of developing country concerns, some implying renegotiation of Uruguay Round agreements or deferment of certain obligations under them. Others focus on technical and financial assistance and capacity building, while some appear almost frivolous. At Doha Ministers took decisions on a large number of specific points and directed that the remainder should be dealt with in the Doha Round negotiations where appropriate and otherwise, "as a matter of priority" by the end of 2002 for appropriate action.

The CTD was unable in December to decide how to deal, procedurally or in terms of deadlines, with 22 proposals relating to special and differential (preferential) treatment for developing countries under specific WTO agreements. Moreover, an informal meeting on 24 January broke up in disorder. The CTD meets again on 3 February and should report to the General Council on 10-11 February. But, few expect early agreement even on the agreement-specific issues, let alone the larger group of more general S&D issues. This too is souring the atmosphere, with some countries claiming that it demonstrates the emptiness of the commitment to development as the theme of the Doha Round.

The economic stakes of S&D treatment are very small; this is a matter of politics more than substance. Some of the requests are reasonable, others are not - *e.g.* for permanent exemptions from certain rules or from product standards. The potential for harm has been increased by the ineptitude of the industrialized countries, who should long ago have made clear which issues they were prepared to negotiate or settle and which were out of the question.

However, the December-January failure is much more the responsibility of the African countries leading the group of least-developed countries, which rejected an offer to settle 27 of the 85 issues outstanding. Deadlock on this is likely to be used tactically, for example by India, to hold up agreement on the "Singapore issues" of investment, competition, trade facilitation and transparency in government procurement negotiations, on which decisions are needed at Cancun.

III. Negotiating Modalities for Agriculture: Difficult Challenges Ahead

By far the most important current issue in the WTO is whether agreement can be reached on negotiating modalities on agriculture which should be finalized by 31 March. The EU, which had been heavily criticized for delay in submitting negotiating proposals, did so on 16 December; they were approved by EU member states only on 27 January, after opposition from France and Ireland.

The EU proposals have been attacked, as expected, by the US and Cairns group agricultural exporters: but as concerns the reduction of tariffs, export subsidies and domestic support they are seen by some experienced Cairns negotiators as a not unreasonable starting bid, given the EU's difficulty in staying within the parameters of the unreformed CAP. The greater difficulty is the range of "non-trade" concerns, including food safety, the precautionary principle, mandatory labeling requirements and animal welfare, as well as geographical indications which the EU has included in its proposal and on which agreement by 31 May would be extremely difficult. There are profound divergences within the negotiating group on the tariff-cutting formula, on export subsidies and domestic support and on special and differential treatment for developing countries, as well as on the admissibility of non-trade concerns.

A meeting of the negotiating group on 22-24 January produced no movement towards consensus, leading the chairman, Stuart Harbinson, to report that while delegations remain entrenched on their positions prospects for the negotiations are not encouraging. He will produce a draft text of modalities before the Tokyo "Mini-Ministerial" in mid-February, but is already being warned, e.g. by Japan, not to risk compromise proposals on the contentious issues. The prospects for agreement on negotiating modalities by 31 March are not good. The EU Agriculture Commissioner Mr. Fischler has said that this is not essential, but the US and Cairns insist that the agreed deadlines must be respected.

It is universally accepted that without progress in agriculture the rest of the Doha Round will not move. Liberalization in agriculture is the greatest single objective of developing countries as a whole, as well as of the Cairns group. There are other important deadlines at the end of March: for the submission of initial offers in the services negotiations, and for initial agreement on negotiating modalities for industrial products (final by 31 May). These other negotiations are obvious points of leverage, especially for developing countries, and it would be very surprising if they were not affected by continuing paralysis in agriculture. Work on investment, competition and geographical indications, on all of which the EU is a major *demandeur*, would also certainly be made more difficult. These considerations lead many in Geneva delegations and the WTO Secretariat to expect great difficulty in the preparations for Cancun and at the Conference itself.

OUTLOOK

How important is the Cancun Ministerial? The Cancun Ministerial certainly matters a great deal. Its essential function is to complete the work of the Doha Conference, and the agenda of the Round, by initiating real negotiations on the four "Singapore issues." It should also position the rest of the agenda for a furiously intensive final year of negotiation leading to conclusion in December 2004. Disagreement in Cancun would make that impossible.

But it is virtually impossible to find any informed observer who believes that conclusion at the end of 2004 is a serious possibility in any case. The deadline was always seen as extremely ambitious from the timing viewpoint. It implies completing negotiations on investment and competition one year after agreement to start them – since their results, like all others, would have to be clear by the time of the US Presidential election in November 2004. Although much preparatory work has been done, that is hardly feasible. Nor is it believed that significant results in agriculture could be achieved in 2004.

From the political viewpoint, completing a major Round in the final stages of a US election campaign, in any circumstances, would be extraordinarily difficult (for the US) and dangerous (for the rest of the world, given the number of campaign promises the President would be pressed to make). Although the prospect of a long round is unattractive, the expiry of fast track authority (the traditional deadline for GATT negotiations in the past) only in 2007 and the need for movement towards CAP reform point to prolongation after December 2004. Most participants assume this will happen.

If this is true, the likelihood of a difficult meeting at Cancun is less disturbing. It is already being spoken of by negotiators as "Montreal II", in reference to the Montreal mid-term meeting of the Uruguay Round in 1988, which broke down over agriculture, textiles, safeguards and intellectual property rights. This could be a likely scenario for Cancun – agriculture again being the catalyst. But the Montreal "crisis" led to agreements on these four subjects a year later in April 1989, which cleared the way for uninterrupted and successful negotiations on textiles, safeguards and TRIPS and eventually even on agriculture.

It is very likely that some of the Cairns countries are already looking to Cancun as the crisis that will produce agreement on agricultural modalities; it may well take the involvement of Ministers to achieve that. But Cancun is probably too early to be the real turning point of the Doha Round. The Montreal meeting was followed by the collapse, again precipitated by agriculture, of the 1990 Brussels Conference which should have concluded the Uruguay Round: it too had an unrealistic four-year deadline. Instead it ended only in December 1993, after the Blair House agreement on agriculture. The analogy with the likely development of the Doha Round is close: but if prolongation after 2004 is inevitable it should be properly managed, not the product of a premature and insincere attempt to conclude, as at Brussels.

2003 will therefore be a difficult and stressful year in the WTO, but the negative aspects should not be overemphasized. A great deal of necessary and valuable work was accomplished in the first year of the negotiations. A crisis in 2003, comfortably distant from any likely terminal date, could well be salutary. It is unfortunate that the three major difficulties of the month of

January all involve deferment of the hopes of developing countries. But even that may induce a greater realism: the entire S&D agenda is worth far less to them than meaningful liberalization in agriculture.

WTO DISPUTE SETTLEMENT

WTO Appellate Body Reverses Certain Panel Findings; Rules Against DOC Subsidy Calculation Methodology in US-EC CVD Dispute

SUMMARY

On December 9, 2002, the WTO Appellate Body reversed certain findings by the Panel regarding U.S. subsidy calculation methodology in countervailing duty ("CVD") investigations, but upheld most of the Panel's findings that the Department of Commerce's ("DOC") methodology used in 12 cases against EC companies violates the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").[14]

The Appellate Body found that the DOC improperly used the "gamma" and "same person" methodologies in the original investigations, administrative reviews and sunset reviews, to determine the continuation of subsidies in the EC companies after their privatization. In doing so, the Appellate Body ruled against the "practice" of an administrative body such as the DOC, and not just the specific determinations as in previous disputes.

The Appellate Body overturned the Panel's rulings that Section 1677(5) regarding change in ownership determination (in post-privatization entities), as such does not violate the SCM Agreement. The Appellate Body also overturned the Panel's ruling that privatization always ends the subsidy; thus, a benefit can continue to exist after privatization.

ANALYSIS

I. Background: DOC Methodology

The dispute on *United States – Countervailing Measures Concerning Certain Products from the European Communities*[15] (hereinafter "*US – CVD on EC Products*") concerns an EC complaint against U.S. law that considers subsidies granted to state-owned companies that are later fully privatized as subject to countervailing duties. The EC claimed that the U.S. Department of Commerce ("DOC") in 12 countervailing duty determinations[16] against EC companies had applied its "change in ownership" subsidy calculation methodology inconsistently with the SCM Agreement. The DOC used this methodology to account for subsidies to the former state-owned companies prior to privatization.

[14] United States – Countervailing Measures Concerning Certain Products from the European Communities, WT/DS212/AB/R, dated 9 December 2002.

[15] WT/DS212/AB/R, dated December 9, 2002.

[16] OF the 12 CVD determinations, 6 were original investigations, 2 were administrative reviews and 4 were sunset reviews.

A. DOC's "Gamma" and "Same Person" Methodologies

The DOC used two separate methodologies in its CVD determinations:

(i) "Gamma" methodology – Determination to what extent the privatization transaction price has led to the repayment of any unamortized subsidies; a CVD action is then taken against any subsidies (all, some or none) that were not repaid.

(ii) "Same person" methodology – Provides a two-step test: (a) examines non-exhaustive criteria on continuity of business operations, production facilities, assets and liabilities, and retention of personnel; and (b) if DOC concludes the post-privatization entity is distinct, a subsidy would not exist. The reverse is true, i.e., if the entity is not distinct, the subsidy exists and is subject to CVD.

B. EC Arguments Against DOC Methodology; Section 1677(5)(F)

The EC complained that of the 12 determinations, 11 were based on the gamma methodology that was later overturned by the U.S. Court of Appeals for the Federal Circuit ("CAFC") in the *Delverde III* case. The CAFC found the methodology inconsistent with the relevant U.S. statute Section 1677(5)(F).[17] The CAFC determined that the DOC adopted a *per se* rule that pre-privatization subsidies would always pass through despite an arm's length, fair market value transaction in contravention of Section 1677(5)(F). As a result of the CAFC ruling against the gamma methodology, the DOC developed the "same person" methodology – which was used in one of the 12 determinations, and also applied in remand re-determinations for four of the 11 determinations based on the gamma methodology.

The EC claimed that both the gamma and same person methodologies are inconsistent with various provisions of the the SCM Agreement. The EC argued that based on these methodologies, the DOC improperly determined the existence of subsidies in all 12 determinations post-privatization. The EC also claimed that Section 1677(5)(F) is a *prima facie* violation of the SCM Agreement.

C. Panel Finds Against DOC Methodologies and Section 1677(5)(F)

The panel agreed with most of the EC's arguments and found that the DOC acted inconsistently in applying the gamma and same person methodologies to the determinations in the 12 cases, including investigations, administrative reviews and sunset reviews. The panel also found Section 1677(5)(F) to be in violation of the SCM Agreement. The panel circulated its

[17] 19 U.S.C. § 1677(5)(F) – hereinafter "Section 1677(5)(F)" states:

> [a] change in ownership of all or part of a foreign enterprise or the productive assets of a foreign enterprise does not by itself require a determination by the administering authority that a past countervailable subsidy received by the enterprise no longer continues to be countervailable, even if the change in ownership is accomplished through an arm's-length transaction.

findings on July 31, 2002. The US appealed the decision on September 9, 2002. On December 9, 2002, the WTO Appellate Body circulated its decision, which the Dispute Settlement Body adopted on January 8, 2003.

II. Appellate Body Findings: Overturns Panel's Findings, But Rules Against DOC Methodology

A. Interpretation of "Benefit" and "Recipient"

The Appellate Body began by citing the similarities between this dispute and a Panel ruling against the DOC's treatment of privatized companies in three administrative reviews of CVD cases in the *US – Lead Bars* dispute.[18] The Panel in that dispute said that privatization at arm's length and for fair market value "will *always* necessarily extinguish the remaining part of a benefit previously existing with the state-owned enterprise."[19] In that case, the panel and Appellate Body found these determinations to be inconsistent with the SCM Agreement.

The Appellate Body then examined two specific issues: (i) the interpretation of "benefit" and (ii) interpretation of "recipient" of a financial contribution.

With regard to "benefit", which is referred to in the definition of "subsidy" in Article 1.1 of the SCM Agreement, the Panel had found that where a privatization occurs at fair market value, "the benefit is extinguished" and thus no longer "accrue[s] to the privatized producer." The US argued on appeal that a change in ownership through privatization "does not remove the new equipment, extract knowledge from the workers, or increase the previously lowered debt load."[20]

The Appellate Body agreed with the US that privatization does not remove the "benefit" entirely, including the equipment that a state-owned enterprise acquired through subsidies.[21] The Appellate Body stated that the "*utility value* of equipment acquired as a result of a financial contribution is not extinguished, because it is transferred to the newly-privatized firm."

Although agreeing with the US in regard to the "utility value", the Appellate Body stated that the *utility value* is legally irrelevant for the purpose of determining the continued existence of a "benefit" as defined by the SCM Agreement. Rather, "benefit" is assessed using the *marketplace* and *market value* – and not the *utility value* - as a basis for comparison. Thus, "it is the *market value* of the equipment that is the focal point of

[18] United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom ("*US – Lead Bars*"} WT/DS138/R, dated 23 December 1999.

[19] *Ibid.*, at para. 93 to 95.

[20] *US – CVD on EC Products*, at paras. 96-99.

[21] *Ibid*., at paras. 103-105.

analysis, and not the equipment's *utility value* to the privatized firm."[22] Based on this reasoning and examination of other U.S. arguments, the Appellate Body rejected the US's interpretation of "benefit."

As to the meaning of "recipient" (referred to in Article 14 of the SCM Agreement), the Panel found that no distinction should be made between a company and its shareholders, as together they constitute a producer – a natural or legal person that may be the "recipient" of the benefit. The US challenged this finding since the Appellate Body had historically drawn a clear distinction between the legal person (a firm) and the shareholders. The Appellate Body, in response, said that the US had misinterpreted its past findings, since it had never excluded the possibility that a "recipient" could include both a firm and its owner. Nevertheless, the Appellate Body stated that the Panel's interpretation "went too far" in stating that no distinction should be made between a firm and its owners.

The Appellate Body then overturned the Panel's finding that privatizations at arm's length and for fair market value "*must* lead to the conclusion that the privatized producer paid for what he got and thus did not get any benefit or advantage from the prior financial contribution bestowed upon the state-owned producer." Instead, the Appellate Body ruled that the privatization "*may* result in extinguishing the benefit" and that there is a "rebuttable presumption that a benefit ceases to exist after such a privatization" but "depends on the facts of each case."[23]

B. Rejection of "Same Person" Methodology

As mentioned previously, after the CAFC in the *Delverde III* case rejected the DOC's "gamma" methodology, the DOC developed the "same person" methodology to calculate subsidies in CVD investigations.

The same person methodology requires a two-step test: first, an analysis of whether the post-privatization entity is the same legal person that received the subsidies before privatization. The DOC determined this based on criteria including the continuity of general business operations, production facilities, assets and liabilities and retention of personnel. In the second step, if the DOC concludes that the post-privatization entity is a new entity, it would conclude that the benefit no longer exists. The DOC would then examine whether the privatized producer benefits from any new subsidy. However, if the DOC concludes that the same person continues to exist, the subsidy would be found to continue in the post-privatization producer regardless of arm's-length and for fair market value considerations.

The Panel had concluded that the same person methodology both "as such" and "as applied" is itself inconsistent with the SCM Agreement because it prohibits examination of the conditions of privatization when the producer is not a distinct legal person. The Appellate Body

[22] *Ibid.*

[23] *Ibid*. at paras. 126-127.

considered the DOC's application of the same person methodology to administrative reviews, original investigations and sunset reviews in the cases concerned.

The Appellate Body found that when the DOC determined that no new legal person is created as a result of privatization, it would determine the existence of a subsidy "without further analysis," including the price paid by the new owners for the privatized enterprise, privatization at arm's length, for fair market value, or other factors. Based on this reasoning, the Appellate Body found that the DOC's use of the same person methodology in the administrative reviews violate Article 21.2 of the SCM Agreement; the original investigations violate Article 19.1; and the sunset reviews violate Article 21.3. Furthermore, the Appellate Body upheld the Panel's finding that the same person methodology "as such" violates the SCM Agreement.

C. Rejection of "Gamma" Methodology

The Appellate Body also considered the U.S. appeal of the Panel's findings against the DOC's "gamma" methodology. The Appellate Body recalled its previous finding in the US – Lead Bars dispute in which it ruled against the gamma methodology in administrative reviews. **The Appellate Body applied the same reasoning to this dispute and ruled the gamma methodology used in four sunset reviews and other determinations was also inconsistent with the SCM Agreement.**

D. Section 1677(5)(F) As Such Does Not Violate the SCM Agreement

The US appealed the Panel's finding that Section 1677(5)(F) as such is inconsistent with the SCM Agreement regardless of administrative discretion to implement this statute. The Panel had ruled that Section 1677(5)(F) prevents the DOC from considering factors such as privatization at arm's length and for fair market value in its subsidy calculation.

The Appellate Body overturned the Panel's finding on Section 1677(5)(F), stating that privatization will not "necessarily" or "always" lead to the removal of a subsidy. It added that the statute does not mandate a particular method of determining the existence of a subsidy. Thus, the Appellate Body found that Section 1677(5)(F) does not prevent the DOC from exercising WTO-compatible discretion in determining the existence of a subsidy in a post-privatized entity.

OUTLOOK

The Appellate Body's ruling may have significant implications for future disputes against agency practices in trade remedy disputes. Generally, trade remedy laws and statutes are written broadly in order to provide for agency discretion. As such, WTO Members normally challenged specific determinations since it was difficult to challenge a government agency's behavior or practice in general, and outside the context of a specific investigation. Previous WTO findings, for example, have concluded that the administrative practices by the DOC are not measures that

can give rise "independently" to WTO violations.[24] Since the DOC could depart from its "practice" so long as it provides a reason for doing so, the "practice" was not "mandatory."

In this case, the Appellate Body ruled against the DOC's administrative practice of the "same person" methodology. The Appellate Body with this case appears to set a precedent that specific actions taken consistently and repeatedly could be challenged, and found in violation.[25] This approach could make it easier to challenge the general practice of the DOC and other government agencies, and not only in the context of specific determinations.

[24] United States - Measures Treating Export Restraints as Subsidies, WT/164/R, dated 29 June 2001; and United States - Anti-Dumping and Countervailing Measures on Steel Plate from India, WT/DS206/R, dated 28 June 2002.

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[25] In paragraph 162 of the decision, the Appellate Body has even recommended to "(…) the Dispute Settlement Body request the United States to bring its measures and *administrative practice* (the "same person" method), (…) into conformity" (emphasis added).

WTO Appellate Body Rules Against U.S. Byrd Amendment; Overturns Certain Panel Findings

SUMMARY

On January 16, 2003 the WTO Appellate Body ruled against the U.S. Continued Dumping and Subsidy Offset Act ("Byrd Amendment" or "CDSOA") in most substantive areas, but overturned the Panel's more controversial findings as follows.

- Upheld the Panel finding that the CDSOA is a non-permissible action against dumping or subsidization, and thus in violation with Antidumping (AD) Agreement Article 18.4 and Subsidies and Countervailing Measures (SCM) Agreement Article 32.5 and WTO Agreement Article XVI:4. However, it did not suggest repeal of the measure, unlike the Panel findings.

- Reversed the Panel finding that the US did not act in good faith in implementing the CDSOA in violation of AD Article 5.4 and SCM Agreement 11.4.

The AB report is considered as a loss for the US, and Members of Congress have been quick to criticize the finding as another example of the WTO overstepping its mandate on standard of review. The US is considering options for compliance, including a recent Administration proposal to repeal the measure in the 2004 Fiscal Year Budget.

ANALYSIS

I. Background: Panel Findings Against Byrd Amendment

The following is a summary of the issues raised during the Panel proceedings, and the actions taken by the Panel on those issues. (Please also refer to our previous reports on the Byrd Amendment proceedings.)

Complainants' claims on violation of WTO Agreements	***Panel findings on complainants' claims***
AD Agreement Article 18.1 (Final Provisions) – "No specific action … can be taken except in accordance with the provisions of GATT 1994"	Deemed CDSOA inconsistent
GATT Article VI:2 (Anti-dumping and Countervailing Duties) – "… may levy … an AD duty not greater in amount than the margin of dumping in respect of such product"	Deemed CDSOA inconsistent
AD Article 1 (Principles) – "An AD measure shall be applied only under the circumstances provided for in Article VI of GATT 1994…"	Deemed CDSOA inconsistent
SCM Agreement Article 32.1 (Other Final	Deemed CDSOA inconsistent

Provisions) – "No specific action against a subsidy … can be taken except in accordance with … GATT 1994"	
GATT Article VI:3[26] (Anti-dumping and Countervailing Duties) – "No Countervailing Duty shall be levied … in excess of an amount equal to the estimated bounty or subsidy determined to have been granted…"	Deemed CDSOA inconsistent
GATT Article X:3(a) (Publication and Administration of Trade Regulation) – "Each Contracting Party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings…"	Rejected complainants' claims
AD Agreement Article 5.4 (Initiation and Subsequent Investigation) – No auto initiation, WTO requirement that an investigation only be initiated when an application has been made by or on behalf of domestic industry (Good faith)	Deemed CDSOA inconsistent
SCM Agreement Article 11.4 (Initiation and Subsequent Investigation) – No auto initiation, WTO requirement that an investigation only be initiated when an application has been made by or on behalf of domestic industry (Good faith)	Deemed CDSOA inconsistent
AD Agreement Article 8 (Price Undertakings)	Rejected complainants' claims
SCM Agreement Article 18 (Undertakings)	Rejected complainants' claims
WTO Agreement Article XVI:4 (Miscellaneous Provisions) – "Each member shall ensure the conformity of its laws, regulations and administrative procedures…"	Deemed CDSOA inconsistent
AD Agreement Article 18.4 (Final Provisions) – "Each Members shall take all necessary steps … to ensure… the conformity of its laws, regulations, and administrative procedures…"	Deemed CDSOA inconsistent
SCM Agreement Article 32.5 (Other Final Provisions) - "Each Members shall take all necessary steps … to ensure… the conformity of its laws, regulations, and administrative procedures…"	Deemed CDSOA inconsistent

[26] In conjunction with SCM Agreement Article 4.10 (Remedies), SCM Agreement Article 7.9 (Remedies) and SCM Agreement Article 10 (Application of Article VI of GATT 1994). The claims under SCM Agreement Articles 4.10 and 7.9 were later withdrawn.

In addition to these claims, Mexico, in its complaint stated that the CDSOA caused adverse effects that violated SCM Agreement Article 5. The Panel rejected this Mexican claim. India and Indonesia argued that the CDSOA violated AD Agreement Article 15, which requires special and differential treatment for developing countries. The Panel also rejected this Indian and Indonesian claim relating to "constructive remedies" for developing countries.

In its appeal to the Appellate Body, the US challenged all the Panel's findings of inconsistencies. The US also challenged the Panel finding that the US was too late in its requests for separate Panel reports.

II. Appellate Body Findings Uphold Panel Substantive Findings; Overturn More Controversial Findings

A. Scope of Appeal

Canada, supported by other participants, claimed that the US expanded the scope of the issues under appeal in a stage later than the original U.S. Notice of Appeal by:

(i) Contending that the Panel ought not to have considered the CDSOA in combination with other U.S. laws; and

(ii) Contending that the Panel exceeded its terms of reference by opining on a measure that was not within its purview in the dispute at hand. In particular, the US takes issue with the "advisory opinion" in the Panel report which stated:

> "Even if CDSOA offset payments were funded directly from the US Treasury, and in an amount unrelated to collected anti-dumping duties, we would still be required to reach the conclusion … that offset payments may be made only in situations presenting the constituent elements of dumping."[27]

Since the US did not include these in its Notice of Appeal, Canada complained that these issues were "very serious allegations that must not be made without proper notification to the appellees in the Notice of Appeal."[28]

The Appellate Body agreed with the U.S. argument that these jurisdictional issues could be examined at the appellate stage. The Appellate Body cited an excerpt of a prior Panel report:

> "…Panels cannot simply ignore issues which go to the root of their jurisdiction – that is, to their authority to deal with and dispose of matters. Rather, panels must deal with such issues – if necessary, on their own

[27] Panel Report, para. 7.22.

[28] Canada's letter dated 5 November 2002, as cited in AB CDSOA Report para. 188

> motion – in order to satisfy themselves that they have the authority to proceed." (footnote omitted)[29]

Nonetheless, the Appellate Body rejected the U.S. claim that the Panel had exceeded its terms of reference by considering the "…adverse impact results from the combination of anti-dumping duties and offset payment subsidies in the particular circumstances of the CDSOA."[30] (emphasis by the Appellate Body)

Similarly, the Appellate Body also dismissed the U.S. claim that the Panel report's 'advisory opinion' was outside the Panel's mandate. The Appellate Body noted that the Panel was simply clarifying that its finding of inconsistency was in no way based on the fact that the offset payments were funded from collected anti-dumping duties.[31]

B. Upheld Finding Against U.S. Requests for Separate Panels

The Appellate Body upheld the Panel's finding against the U.S. request for two separate panels separating the Canadian and Mexican claims from the claims of the other nine parties (Australia, Brazil, Chile, EC, India, Indonesia, Japan, Korea and Thailand). The US had appealed the Panel finding that the U.S. request was untimely – arriving seven months after the composition of the Panel; and incomplete – in that it did not specify any prejudice the US would suffer if the Panel issued a single report. The Appellate Body upheld the Panel findings on the basis of these same two issues.

C. Upheld Finding CDSOA is a Specific and Non-permissible Action Against Dumping and Subsidization

The US appealed the Panel findings that the CDSOA was a specific prohibited action against dumping and subsidization. The Appellate Body upheld most of the Panel's substantive findings in this regard.

The Appellate Body found that the CDSOA did not correspond to any of the sanctioned responses to dumping or subsidization permitted by the AD and SCM agreements. The Appellate Body reaffirms the Panel's reasoning that, in qualifying as "specific", a provision is removed from the realm of footnotes 24 and 56 of the AD and SCM Agreements, respectively. The Appellate Body found that the measure itself operates as a subsidy and concluded that the subsidy is not one of the permitted "specific actions against" dumping or subsidization allowed by the AD or SCM Agreements.

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[29] Appellate Body Report, Mexico – Corn Syrup (Article 21.5 – US), para. 36, as cited in the AB Report, para. 207.

[30] Panel Report, para. 7.119 and footnote 334 thereto, as cited in the AB Report

[31] AB Report, para. 214

The Appellate Body did, however, agree with the US on certain matters described below:

- The Panel had erred in including a "conditions of competition" analysis in its report; and
- The Panel had placed inappropriate emphasis on whether the CDSOA provides a financial incentive to file or support anti-dumping or countervailing duty petitions.

The Appellate Body suggested that the US bring the Byrd Amendment into WTO conformity, but did not suggest any approach. This position is more moderate than the Panel's controversial statement that called for the repeal of the Byrd Amendment.

The Appellate Body ruling is not retrospective, and will thus not affect duties that have already been disbursed. Approximately US$330 million in payments were distributed to trade remedy petitioners in January 2003.

D. Rejected Finding that US Did Not Act in Good Faith under AD Article 5.4 and SCM Article 11.4

The Panel had found that the CDSOA, in providing a financial incentive for U.S. producers to file or support applications for the initiation of AD or CVD investigations, made it much easier to meet the levels of support required under AD Agreement Article 5.4 and SCM Agreement Article 11.4. Based on this reasoning, the Panel determined that the CDSOA "may be regarded as having undermined the value of AD Article 5.4/SCM Article 11.4 to the countries with whom the United States trades, and the United States may be regarded as not having acted in good faith…"[32]

The US appealed the controversial finding and asserted that there is "no basis or justification in the WTO Agreement for a dispute settlement panel to conclude that a Member has not acted in good faith, or to enforce a principle of good faith as a substantive obligation agreed to by WTO Members."[33] (The US also asserted later at the DSB's January 27 meeting that the very judgment by a WTO dispute body of whether or nor a WTO Member had or had not acted in good faith was outside the mandate of the dispute settlement system.)

The Appellate Body agreed with the US and found that AD Article 5.4 and SCM Article 11.4 "contain no requirement that an investigating authority examine the motives of domestic producers that elect to support an investigation… In other words, it is the 'quantity' rather than the 'quality' of support that is the issue."[34] Thus, the Appellate Body rejected the Panel's finding that the US did not act in good faith. It added that AD Article 5.4 and SCM Article 11.4 "require no more than a formal examination of whether a sufficient number of domestic producers have

[32] Panel Report, para. 7.63

[33] US Submission of Appeal, para. 105

[34] AB report, para. 283

expressed support for an application."[35] The Appellate Body also cited previous rulings that had addressed the principle of good faith.[36]

III. US Responds with Criticism and a Possible Solution

A. Congressional Opposition to WTO Decision

On February 4, 2003, 70 U.S. Senators issued a formal complaint against the WTO findings on the Byrd Amendment asserting that "the WTO has acted beyond the scope of its mandate by finding violations where none exists and where no obligations were negotiated." The letter, which originated in the offices of Senator Byrd (D-WV) and DeWine (R-OH) – the original sponsors of the legislation, urged the Administration to enter into negotiations prior to any attempt to change the law.

In particular, the Senators ask that the Bush Administration:

(i) "Seek express recognition" of the right to distribute monies collected from AD and CVD duties;

(ii) Reinforce this approach in the Administration's strategy concerning the WTO dispute settlement process; and

(iii) Consult closely with Congress on negotiations concerning this issue.

The strong showing by the Senators will no doubt make it more difficult for the Administration to seek a repeal of the Amendment, and especially without some effort in negotiating a solution with the complainants.

B. Administration Seeks Repeal in the Budget Bill

The Bush Administration has indicated that it would seek to repeal the Byrd Amendment in its budget proposal for Fiscal Year 2004, citing that the measure is a "corporate subsidy" that provides companies an additional "double dip" benefit when there are existing antidumping and countervailing duties in place. The Administration did not cite the WTO decisions as a reason for seeking a repeal, although it is implicit in the budget proposal that the Administration does not strongly support the measure.

Separately, Senator Grassley (R-IA), Chairman of the Senate Finance Committee, reaffirmed his commitment to complying with WTO rulings and reminded his colleagues that the Byrd Amendment was passed without full consideration by the Senate Finance Committee (it

[35] AB Report, para. 286

[36] The AB reports cited included AB report in *US-Shrimp*, para. 158, AB Report in *US-FSC*, para. 166, and *US-Hot Rolled Steel*, para. 101.

was inserted in the Agriculture Appropriations Bill in a questionable maneuver by Senator Byrd). Ranking Democrat Max Baucus (D-MT) criticized the Administration's budget proposal concerning the Byrd Amendment, and called it "bad policy."

OUTLOOK

The repeal of the Byrd Amendment must take place in the context of legislative action, and perhaps within a much larger bill such as the 2004 Fiscal Budget as initially suggested by the Bush Administration. Even so, the Byrd Amendment is supported by enough Congressmen to perhaps derail Administration efforts to bury its repeal in a budget bill. In any event, the US will probably buy as much time as possible at the WTO in order to comply with WTO findings.

The Dispute Settlement Body (DSB) adopted the Appellate Body report at its meeting on January 27, 2003. The US has 30 days from the adoption of the report (*i.e.* until February 27) to indicate to the DSB how it intends to comply with the ruling. The US might also seek arbitration on a "reasonable period of time" to comply with the findings, which could extend compliance actions well into 2004.

CHINA IN THE WTO

China Submits Proposal to the WTO on Industrial Market Access

SUMMARY

China submitted a proposal to the Negotiating Group on Market Access ("NGMA") on 24 December 2002[37] which emphasis harmonization of tariffs. The Chinese proposal has not yet been discussed in the NGMA, which is next scheduled to meet on 18-20 February 2003.

In the first half of 2003, WTO Members face a two-stage deadline in the NGMA:

(i) Reach a common understanding on possible negotiating modalities by the end of March 2003, and

(ii) Establish the modalities by 31 May 2003.

In this regard, fifteen Members, comprising the European Communities (the "EC"), Japan, Norway, Singapore, Canada, India, Hong Kong (China), Mexico, Oman, Switzerland, Mauritius, Taiwan, the US, Chile, and Korea have tabled proposals. Most of the proposals focus on the formula approach to tariff reduction or elimination, special and differential treatment, and non-tariff barriers.

ANALYSIS

I. Background

The Doha Ministerial Declaration mandates the comprehensive negotiation of market access issues:

> "We agree to negotiations which shall aim, by modalities to be agreed, to reduce or as appropriate eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs, and tariff escalation, as well as non-tariff barriers, in particular on products of export interest to developing countries. Product coverage shall be comprehensive and without a priori exclusions. The negotiations shall take fully into account the special needs and interests of developing and least developed country participants, including through less than full reciprocity in reduction commitments, in accordance with the relevant provisions of Article XXVIII bis of GATT 1994 and the provisions cited in paragraph 50 below. To this end, the modalities to be agreed will include

[37] TN/MA/W/20.

appropriate studies and capacity-building measures to ddassist least-developed countries to participate effectively in the negotiations." [38]

In its proposal, China addresses several components of this mandate.

A. Base rates

The Chinese proposal on base rates is more aggressive than the Quad's mainly because the former's special and differential treatment component creates a major difference between the treatment accorded to developed and developing countries. China proposes that developed countries should take their applied rates as the base for the negotiations, while developing countries should take the simple average between their applied and bound rates[39].

The US, advocating a uniform approach towards base rates, has proposed that the lower of the applied and the bound rates be the one taken into consideration. Japan, in a more conservative position, proposed that the bound rates in 2002 should be the base rates, while bearing in mind major discrepancies between applied and bound rates. Neither the EC nor Canada has tabled substantive proposals in this regard.

B. Formula approach

China proposed a formula that is similar to the Swiss Formula agreed during the Tokyo Round[40]. However, the Chinese proposal includes a "peak factor" in addition to the existing coefficient in the Swiss formula, which could help to minimize the tariff peaks that still exist in some sectors.

Japan also proposed a formula based upon the "trade-weighted average target tariff rate". The EC, while supporting the formula approach, has not yet submitted its formula for discussion. The US, which in the Uruguay Round preferred a "request-and-offer" method, proposed a mixed approach, including the use of the Swiss Formula.

C. Sectoral approach

[38] WT/MIN(01)/DEC/1, 20 November 2001, para. 16.
[39] Applied rates as of 2000
[40] The Swiss Formula is expressed as follows: Z= AX/A + X, where X was the starting tariff, Z was the resulting tariff and A was a coefficient which varied for some Contracting-Parties. For the US, it was set at 14; for the EC, 16. Taking these two coefficients, the resulting tariff would be, as follows:

Coefficient A=	Start tariff X=	Calculation AX/A + X =	Resulting Tariff Z=
EC = 16	10%	(16*10)/(16+10) = 160/26	6.15
	20%	(16*20)/(16+20) = 320/36	8.89
US = 14	10%	(14*10)/(14+10) = 140/24	5.83
	20%	(14*20)/(14+20) = 280/34	8.24

JACKSON, John H. – *The World Trading System – Law and Policy of International Economic Relations.* 2nd Edition. Cambridge (Massachusetts): The MIT Press, 1997, p.146.

China proposed a sectoral approach to negotiations in a complementary manner to the formula approach. This approach, where appropriate, is generally favourable to the Quad countries. The EC and Japan intend to use it for, *inter alia*, environmental goods, and the US has also listed the goods for which it proposes to apply a sectoral approach (this list includes photographic films).

D. Tariff peaks, tariff escalation and the "lowest" tariffs

China proposed to define a "tariff peak" as a tariff rate three or more times greater than the simple average tariff level in a WTO Member. In contrast, China did not make a substantive proposal regarding tariff escalation, merely calling on Members to take concrete measures to eliminate it.

Japan is the only Quad country that has also addressed the discussions of tariff peaks and escalation. It proposed that tariff peaks and escalation should be rectified by "zero-for-zero" or harmonization approaches, depending on the sector. The concept of rectifying a tariff peak by a "zero-for-zero" approach is much more aggressive than the harmonization one. Therefore, the latter is more likely to receive support from other WTO Members.

China considered that the developed countries should eliminate all the "lowest" tariffs[41] maintained in the schedules, while developing countries would be allowed to maintain them only when this represents an important source of tax revenue for the government. The US proposed the complete elimination of the lower tariffs without providing for differential levels of development, and hence implementation. No other Quad member has submitted a proposal in this regard.

E. Non *ad valorem* duties

In its submission, China touched a topic which has been, to some extent, neglected by the Quad countries at this stage of the negotiations – the conversion of non *ad valorem* duties into *ad valorem* through a uniform method. Japan's submission on this issue is currently the only one from the Quad, and is less detailed than the Chinese proposal. (*Please see the following chart for a detailed comparison*). According to the Chinese proposal, tariff reduction should be based upon the tariff rate resulting from the conversion of non *ad valorem* rates to *ad v alorem* rates according to the following uniform method:

a. All the converted tariffs should be consolidated in the schedules of commitments (this is, to some extent, also supported by the US).

b. Developed countries should eliminate all non *ad valorem* tariffs from their schedules.

[41] Although China has not formally defined the concept of "lowest tariff", it is understood to mean very low tariffs, sometimes referred to as "nuisance tariffs". Proposals for their administration have been made in earlier rounds of negotiations.

c. Developing countries should limit their number of non *ad valorem* tariffs to no more than 3% of the total tariff lines.

F. Binding of tariffs

Although China called for the entire WTO Membership to bind their tariffs, it proposed a flexible period of implementation according to the level of economic development. The U.S. proposal goes one step beyond, since it proposes that Members should prefer to bind only through *ad valorem* rates. The Japanese proposal goes in another direction, calling on the WTO Members to increase the number of sectors covered by bindings. Neither the EC nor Canada has made specific proposals on this issue.

OUTLOOK

In general, the Chinese submission to the NGMA has advanced the stage of the discussions by putting forth more concrete proposals for areas in which the Quad has not yet been equally detailed. China's emphasis on S&D treatment focuses mainly on longer implementation periods. Such S&D considerations may conflict with the U.S. position on market access, which seeks a more uniform treatment for the entire WTO membership.

Comparison of Market Access Proposals by China and Quad Countries

The following chart describes the nine salient features of the Chinese proposal, as relative to the Quad's positions on those topics.

Subject	Special & Differential Treatment component	Proposal	Commentaries (In relation to the Quad's proposals)
1. **Base Rates**	Yes	• Developed countries – the applied rates in 2000 should be the base rates; • Developing and new acceding countries – simple average rate between their applied rate in 2000 and their final bound rates committed in the Uruguay Round (or in their accession). - The HS1996 should serve as basis for the tariff reduction; final results should be scheduled in the "HS 2002".	- The US proposes that reductions should be based on applied rates as of January 1, 2000 or the Uruguay Round final bound levels, whichever are lower[42]. - The EC seeks a reduction in the gap between bound and applied rates, but it has not tabled any substantive proposal in this regard[43]. The EC suggests 2001 as the year of reference, since this is the closest date to the start of the negotiations[44]. - Japan proposes to use the bound rates on the HS 2002 version, rectifying major disparities between bound and applied tariff rates[45]. - Canada will not agree to bind valuable real cuts in its applied rates in return for purely pro forma liberalization[46].
2. **Reduction Formula**	The B coefficient is still subject to negotiation and may vary accordingly to the level of development.	$T_1 = \frac{(A + B \times P) \times T_0}{(A + P^2) + T_0}$ T_0 : Base rate T_1 : Final rate A : Simple average of base	- The US proposes a mixed approach, comprising two phases: from 2005 to 2010, elimination of lower tariffs, elimination in the sectors applying the zero-for-zero and the application of a harmonizing Swiss Formula; finally, from 2010 to 2015, the complete elimination of remaining tariffs through a linear cut[47]

[42] TN/MA/W/18, dated 5 December 2002, para. 9.
[43] TN/MA/W/1, dated 24 June 2002, para. 13.
[44] *Ibid.*, para. 14.
[45] TN/MA/W/15 and TN/TE/W/17, dated 20 November 2002, p. 4.
[46] TN/MA/W/9, dated 15 October 2002, para. 7.

Subject	Special & Differential Treatment component	Proposal	Commentaries (In relation to the Quad's proposals)
		rates P : Peak factor, $P=T_0/A$ (ratio between the base and the average rates) B : Adjusting coefficient, e.g. for the year 2010, B=3; for the year 2015, B=1 (to be negotiated)	a linear cut[47]. - The EC argues that a formula approach is the best way of achieving the ambitious mandate of tariff reduction with the current size of the WTO membership, with no concrete proposal[48]. - Japan proposes a specific formula based on the trade-weighted average target tariff reduction[49]. - Canada argues that the use of a single formula can create unfair outcomes since countries have clear differences in their levels of development[50].
3. **Sector Approach**	No	- Voluntary adoption; and - Complementary function to the formula approach.	- The US requests a sectoral approach to wood products, non-ferrous metals, bicycle parts, certain chemicals and allied products including soda ash and **photographic film**, electronics, fish and fishery products, scientific equipment, and environmental goods. - The EC proposes that, where possible, negotiations can aim at complete tariff elimination for groups of products or sectors[51], especially environmental goods[52]. - Japan suggests the use of "zero-for-zero" or harmonization approach for the sectors where plurilateral agreements already exist, consumer electrical products, biclycles, rubber and articles

[47] TN/MA/W/18, dated 5 December 2002, para. 8.
[48] TN/MA/W/1, dated 24 June 2002, para. 11.
[49] TN/MA/W/15 and TN/TE/W/17, dated 20 November 2002, p. 2.
[50] TN/MA/W/9, dated 15 October 2002, para. 9.
[51] TN/MA/W/1 dated 24 June 2002, para. 9.
[52] *Ibid.*, para. 11.

Subject	Special & Differential Treatment component	Proposal	Commentaries (In relation to the Quad's proposals)
			thereof, glass and articles thereof, ceramic products, cameras, watches, toys, electrical machinery parts, titanium, motor vehicles, textiles and clothing, mahine tools, construction equipment, bearing, certain articles of iron or steel and paper[53]. - Canada supports a combination of approaches (sectoral agreements, formula-based and request/offer process)[54].
4. **Tariff peaks**	No	- China proposes a definition to be adopted by all countries independently of the level of development: "a tariff rate three times more than the simple average tariff level of that Member"[55]. - This definition should also be maintained in future reductions of tariff peaks.	- Japan proposes that tariff peaks should be rectified though "zero-for-zero" or "harmonization" approaches, depending on the sectors[56].
5. **Tariff escalation**	No	- No substantive proposal made; - Members should take concrete measures to reduce the tariff escalation in their regimes.	- Japan proposes that tariff escalation should be rectified though "zero-for-zero" or "harmonization" approaches, depending on the sectors[57].
6. **Non *ad valorem* tariff**	Only in the elimination of the non *ad*	- Method of conversion: existing non *ad valorem* tariffs should be converted into *ad valorem*	- Japan proposes that non *ad valorem* duties will be converted to *ad valorem* equivalents based on the year 2000

[53] TN/MA/W/15 and TN/TE/W/17, dated 20 November 2002, p. 4.

[54] TN/MA/W/9, dated 15 October 2002, para. 8.
[55] TN/MA/W/20, dated 24 December 2002, para. 7.
[56] TN/MA/W/15 and TN/TE/W/17, dated 20 November 2002, p. 2.
[57] *Ibidem.*

Subject	Special & Differential Treatment component	Proposal	Commentaries (In relation to the Quad's proposals)
	the non *ad valorem* tariffs.	converted into *ad valorem* through a ***uniform method*** for developed and developing countries. - Tariff reduction: the reduction should be based upon the tariff rate resulting from that conversion from non *ad valorem* to *ad valorem* rates; it should be included in the schedules. - Future elimination: • Developed countries: they should eliminate all non *ad valorem* tariffs of their schedules; and • Developing countries: they should limit their number of non *ad valorem* tariffs to no more than 3% of the total	equivalents based on the year 2000 import statistics[58].

[58] *Ibidem.*

Subject	Special & Differential Treatment component	Proposal	Commentaries (In relation to the Quad's proposals)
		tariff lines.	
7. **"Lowest tariffs"**	Yes	• Developed countries: they should eliminate all their "lowest" tariffs; and • Developing countries: they should be free to maintain the "lowest" tariffs only if these tariffs constitute an important source of revenue for the country.	- The US proposes the elimination of the lower tariffs by all Members[59].
8. **Binding of tariffs**	Only in the implementation.	All Members should bind their tariff rates; however, the implementation may differ according to the level of development, as follows: • Developing countries: they may enjoy longer transitional periods; and • Least developed countries: they may enjoy more flexible arrangements.	- The US supports the view that Members should bind all tariff lines and should maximize the use of *ad valorem* duties[60]. - Japan considers that all WTO Members should improve binding ratios by binding the tariffs of as many tariff lines as possible[61].

[59] TN/MA/W/18, dated 5 December 2002, para.8.
[60] *Ibid.*, para.9.
[61] TN/MA/W/15 and TN/TE/W/17, dated 20 November 2002, p. 2.

US-China High-Level Exchange Discusses China's WTO Implementation Efforts

SUMMARY

The US Department of Commerce on December 6, 2002, hosted a legal exchange seminar with a high-level delegation from China's Ministry of Foreign Trade and Economic Cooperation ("MOFTEC") and other government bodies led by Vice Minister Long Yongtu (formerly the lead negotiator on WTO accession). DOC and Chinese participants exchanged views on developments in China's legal environment post-WTO accession.

Participants spoke on the following issues:

(i) Mr. An Jian, Director General of the Economic Law Department of the Legislative Affairs Commission of the Standing Committee of the National People's Congress – Emphasized the uniform administration of China's trade regime.

(ii) Mr. Li Yuede, Director General of the General Affairs Division of the Legislative Affairs Office of the State Council – Discussed improvements in transparency of the legislative and rule-making process in China.

(iii) Ms. Yang Linping, Senior Judge of the Supreme People's Court – Cited the establishment of judicial review for administrative decisions related to international trade.

(iv) Mr. Dong Baolin, Director General of the National Trademark Administration; Mr. Xu Chao, Director General of the National Copyright Administration; and Mr. He Yuefeng, Division Director of the State Intellectual Property Office – Made joint presentations on improvements in China's intellectual property legal regime related to the TRIPs Agreement.

(v) Qiu Guangling, Division Director of the MOFTEC – Described China's growth in foreign investment, reforms in the legal investment regime and implementation of the TRIMs Agreement.

ANALYSIS

I. China Ensures Uniform Implementation of the Trade System

Mr. An Jian, Director General of the Economic Law Department of the Legislative Affairs Commission of the Standing Committee of the National People's Congress began by emphasizing that China's legal system guarantees the uniform implementation of the WTO Rules within its entire customs territory. The Constitution of China stipulates that the central government must uphold the uniformity and dignity of the socialist legal system. The Legislation Law establishes uniform legislation system with different levels. An Jian further explain how the Legislation Law allocates the legislation power to ensure uniform implementation.

So far China has taken measures to ensure that its legal regime conforms with the WTO Agreements. The NPC and its Standing Committee have enacted or revised 14 laws including the Sino-foreign Equity Joint Venture Law, Sino-foreign Contractual Joint Venture Law, Wholly Foreign-owned Enterprises Law, Patent Law, Trademark Law and Copyright Law, Customs Law, Import and Export Commodity Inspection Law, Insurance Law, etc. The State Council has enacted, revised 37 administrative regulations, repealed 12 administrative regulations and 34 other documents. In addition, relevant departments of the State Council has formulated, revised or repealed about 1000 rules and measures. In September 2001, the State Council required the local governments at all levels to amend or enact local rules and regulations so as to comply with the WTO requirements. Achievement in this area is profound, more than 1900 local regulations and government rules were revised, or repealed. The Supreme People's Court has repealed 20 relevant judicial interpretations and formulated relevant interpretations for the judicial review of administrative cases required by the WTO.

Regarding the rule-making process, An Jian explained that the National People's Congress (NPC) and its Standing Committee exercise the legislative power of the State and enact laws. The State Council has the power to establish administrative regulations. Local people's congress and their standing committees may formulate local regulations in light of the specific conditions and actual needs of their respective administrative areas. The government at provincial levels may formulate local rules.

The Chinese central government will enact uniform laws and administrative regulations to implement the WTO Agreement. In economic areas, the issuance of laws on finance, taxation, Customs, foreign trade and intellectual property shall be exclusively regulated by the NPC and its Standing Committee. If no laws have been released in those areas, the State Council can formulate administrative regulations upon authorization of the NPC and its Standing Committee. The authorization shall be clear in objective and scope, and the State Council shall not further authorize the legislation power to other bodies. The implementation of the WTO Agreements has connections with the internal basic system of finance, taxation, Customs, foreign trade, intellectual property of the Members. Thus, no local authorities will have legislation power in these areas.

The laws enacted by the NPC and its Standing Committee and the administrative regulations formulated by the State Council have a national-wide effect; the administrative regulations shall not conflict with the laws. Local regulations and rules are only effective within the local areas of the legislation authorities and shall not contradict with laws and administrative regulations. This principle also applies to special economic zones, opening-up cities in the costal areas, economic and technology development zones, hi-tech and new-tech industry development zones and bonded areas. International Treaties ratified by the Standing Committee of the NPC are at the same level as laws in terms of hierarchy. Although Treaties cannot be directly applied in China, China will implement the Treaties by amending the existing laws, enacting new laws and administrative regulations, which will be enforced throughout the tariff territory of China.

The recording and examination mechanism is created to provide remedies after a conflicting rule or regulation is enacted. Under this mechanism, administrative regulations shall be reported to the State Council for the record. Administrative rules, local rules and regulations

shall be reported to the State Council for the record. Conflicting regulations and rules will be subject to amendment or annulment. Moreover, An Jian said that community association, enterprises and citizens who consider that administrative regulations, local regulations contradict with the Constitution or laws may submit written suggestions to the Standing Committee of the NPC for examination.

II. China Committed to Improving Transparency of its Legal System

The Director General of the Legislative Affairs Office of the State Council, Mr. Li Yuede started by reaffirming China's commitment to the WTO principle of transparency. He told the audience that China has made considerable progress in this regard.

Li described the new WTO Notification and Inquiry Center established in the MOFTEC as a coordination point for inquiries about WTO matters. The Center handles questions from WTO Members, enterprises and individuals. Moreover, inquiry points concerning TBT and SPS issues were set up in the State General Administration of Quality Supervision, Inspection and Quarantine as required by those Agreements. According to Li, these inquiry points have been working efficiently since their establishment. Since the end of June 2002, these inquiry points have provided replies to about 350 questions raised by WTO Members, enterprises and individuals.

Regarding legal reform, Li explained that China promulgated the Legislation Law, the Regulations on Procedures of Formulating Administrative Regulations, the Regulations on Procedures of Formulating Rules as well as other related laws and regulations to ensure transparency in legislation. For example, each of these laws required that once a law is promulgated, it must be published in a designated official publication and nationwide-distributed newspapers. Central government has reiterated that laws not published shall not be cited as the legal basis in regulating foreign trade.

In practice, these transparency-related laws and regulations are strictly enforced. He mentioned that the main channels for information include the Gazette of the Standing Committee of the NPC, the Gazette of the State Council; in addition, all departments of the State Council and local government also have their gazettes. Chinese government also decided in June 2002 to convert the Bulletin of the MOFTEC to the Gazette of the PRC on Foreign Trade and Economic Cooperation, which now acts as the official journal notified to the WTO. The trial publication of the gazette was issued on 27 October 2002 and the formal one will be released by 1 January 2003.

Li stated that China's mechanism of public participation in the legislation and rule-making process is among the basic principles outlined by the Legislation Law. He added that there are many examples where China has released publicly the whole text of draft laws for comments. In general, he stated that US-style legislative procedures can be found in China's Procedures of Formulating Administrative Regulations, and the Regulations on Procedures of Formulating Rules. These regulations state that the relevant authorities may hold public hearings if proposed legislation involves the immediate interests of natural persons, legal persons and other organizations. In the case of formulating rules, the draft of the rule shall be made public for comments if the draft is controversial.

As for English version of relevant laws, regulations and rules, Li stated that China has been providing this service since it adopted market-oriented policies. The Legislative Affairs Commission of the Standing Committee of the NPC is responsible for the verification and finalization of the official foreign language version of laws. The Legislative Affairs Office of the State Council is responsible for the verification and finalization of the official foreign language version of administrative regulations. Both agencies publish laws, regulations in English annually, and all effective laws, regulations and important department rules have their English version. Regarding English translation of local regulations and local rules, Li explained that Beijing and Shanghai have been made good progress but other localities are still addressing these concerns.

III. Judicial Review of International Trade Administrative Cases

A senior Judge of the Supreme People's Court, Ms. Yang Linping, gave a presentation on China's recent establishment of judicial review of administrative decisions related to international trade. Yang stated that extending subject matter jurisdiction to international trade-related administrative cases will greatly improved the system of judicial review in China.

Yang explained that the Supreme People's Court of China has issued Regulations on judicial interpretations on adjudicating administrative cases involving the WTO rules. The Supreme Court also intends to draft a set of judicial interpretations on the trial of intellectual property-related administrative cases.

The Regulations on international trade matters are general rules on judicial review, as opposed to other judicial interpretations that focus on specific aspect of international trade (antidumping, for example). Yang briefed the audience on specific matters including the governing scope of courts, parties' right to take actions, jurisdiction, standard of review and applicable law:

(i) Governing scope – Includes not only those administrative cases involving WTO rules, but cases involving bilateral and multilateral treaties China signed or ratified in the areas of trade, investment and intellectual property rights.

(ii) Parties' right to take actions – Yang mentioned two points. First, Article 3 provides that any natural person, legal person or other organization may commence an action if they believe an international trade-related administrative act infringes their legitimate rights and interests. Second, Article 4 states that the Regulations retroactively apply to acts of parties that occurred before the Regulations were enacted as long as the administrative decision is rendered after.

(iii) Jurisdiction – Article 5 of the Regulations provides that the Intermediate People's Courts and those at a higher levels are courts of first instance for trade-related administrative cases.

(iv) Standard of review – Unlike its counterpart in the US, Article 6 of the Regulations gives the People's Court the authority to review both the facts and application of law of the administrative cases in question. Situations that would render a administrative case

problematic include: inadequacy of essential evidences, exceeding authority, abuse of power, violation of legal procedures, erroneous application of the laws and regulations, obviously unfair administrative sanction, failure to perform or delaying the performance of statutory duty, among others.

(v) Applicable law – WTO rules do not have direct effect in China. The court will apply the laws, administrative regulations and rules consistent with local regulations and rules. Yang stressed, however, in the trial of international trade-related administrative cases, the People's Court will most likely apply laws and administrative regulations and merely refer to the administrative rules. Moreover, local regulations and rules constitute a legal ground when the international trade-related cases occur under the local territorial jurisdiction. In case of ambiguity, the court has the authority to provide an interpretation that is consistent with the relevant international treaty.

In conclusion, Yang pointed out the Regulations only addresses primary issues of the trial. More detailed rules will be developed as the court gains experience in handling these types of cases.

IV. Developments in Chinese Intellectual Property Laws

Dong Baolin, Director General of the National Trademark Administration; Xu Chao, Director General of the National Copyright Administration; and He Yuefeng, Division Director of the State Intellectual Property Office gave a joint presentation on developments in China's intellectual property legal regime. They highlighted areas of reform in China's IP laws to comply with the TRIPs Agreement.

A. Second Revision of the Chinese Patent Law to Comply with TRIPs

The Patent Law was formally implemented in April 1985 and amended in 1992 to expand the scope and duration of protection for patents. The second and the latest amendment of the Patent Law occurred on August 25, 2000 and came into effect on July 1, 2001. About 35 articles were revised in an effort to fully comply with the TRIPs Agreement.

The major changes in the second amendment of the Patent Law include:

- ***Offering for sale***: Outlaws the conduct of offering for sale.

- ***Prohibits "legitimate use" of illegal products:*** Prior to the amendment, the use or sale of products in good will were exceptions to infringement. Now this conduct is considered infringement unless the wrongdoer can prove that products are obtained from legitimate channels of distribution.

- ***Provisional measures on infringement, property and evidence preservation***: Article 61 provides that if a patentee or any interested party can provide reasonable evidence that the rights are being infringed or infringement is imminent and that any delay of action is likely to cause irreparable harm, the people's court will order provisional measures – including an injunction, property and evidence preservation.

- ***Provision relating to compensation***: According to Article 60, the amount of damages shall be based on losses suffered by the patentee or the profits gained by the offenders, or the appropriate multiple of the amount of the royalties.

- ***Judicial review of administrative decisions***. If the applicant for a patent is not satisfied with the decision of the Patent Reexamination Board, he may institute a review of the decision through legal proceedings in the judicial system.

- ***Increases the standard for granting a compulsory license***: In order to obtain a compulsory license overriding a patent, the entity or individual must prove that the invention or utility model involves more important technical advance of considerable economic significance than the invention or utility model for which a patent right has been granted earlier. The entity or individual must also prove that he has not been able to conclude with the patentee a license contract on reasonable terms and conditions. Moreover, the decision in granting a compulsory license shall specify reasonable scope and duration. In addition, if the patent holder is not satisfied with the decision granting a compulsory license or the royalties paid to the patent holder for the license, the patent holder can institute legal proceedings in the judicial system.

B. Revised Copyright Laws

Laws and regulations currently in force to protect copyright include the Copyright Law, the Implementing Rules to the Copyright Law, the Regulation on Computer Software Protection, Criminal Law, the Regulation on the Copyright Collective Societies, the Regulation on the Protection of Folklore, the Regulation on the Protection of Internet Communication Right and the Statutory License Fee for Broadcasting Organizations.

China's revised Copyright Law extends the scope of protection, better defines the right of performers and producers, adds the provisional measures of property and evidence preservation, stipulates the amount of statutory damages and enhances the administrative sanctions on infringements that harm public interests. These provisions are discussed in more detail below.

- ***Provides for National Treatment***: Incorporated the Berne Convention protections into Article 2 of the Copyright Law. In addition, neighboring rights are also protected in the Implementing Rules of Copyright Law and the Rules to Protect Computer Software.

- ***Expands subject matter***: Expands the scope of protection to include cinematographic work, architecture work, artistic acrobatics work and sketches and 3-dimensional work. In Article 14, the work of edition was changed to work of compilation which includes database work.

- ***Defines copyright owner***: The owner can be the author, inheritor and transferee, legal person and foreigner.

- ***Expands content of rights***: Adds new content in this regard. Mechanical Performing Rights is added to the Public Performing Rights. Broadcasting Rights also include direct broadcasting and communication of the broadcasting. Exhibition Right is limited to fine art and photographic work and Projecting Right only applies to cinematographic work. Rental Right is a new provision, but only to cinematographic work and computer software. Distribution Right is limited to the physical transportation of the copies of the work. In addition, the right of communication through information networks is defined as a right to make a work available to the public in such a way that members of the public may access the work from a place and at a time individually chosen by them.

- ***Additional neighboring rights***: Changes made to Neighboring Rights of performers, audio-visual products producers, publishers, and broadcasts organizations. For performers, they have additional rights to authorize others to communicate to the public of his live performance, authorize others to reproduce and distribute the sound recordings and video recordings of his performance, and authorize others to make available to the public of his performance through information network. Rental right is given to audio-visual products producers and publishers that have the right of typographical designs of the books or the periodicals which they have published. Broadcasts organizations' right to authorize rebroadcast its broadcasts is added.

- ***Provides for collective administration***: The new Copyright Law sets forth the principle of collective administration and authorizes the State Council to issue detailed regulations.

- ***Provides for provisional measures***: The new Copyright Law provides for provisional measures of property and evidence preservation, stipulates the amount of statutory damages, and enhances the administrative sanction on the infringements that harm the public interest.

The new Copyright Law also makes changes to the ownership of copyright, term of protection, limitation and copyright contract.

C. The Second Revision of the Trademark Law

The first Trademark law of China was enacted in 1982 and was revised in 1993. The second revision was made in October 2001 in preparation for WTO accession, and reflects the most current revision of the Trademark Law. The revised Trademark Law specifically provides for protection of well-known trademarks and geographical indications, expands the scope of eligible subject-matter of a trademark, stipulates the right of priority, adds judicial review to administrative decisions relating to trademark registration and strengthens the cracking down on trademark infringement. These provisions are discussed in further detail below.

- ***"Registration first" principle subject to exceptions***: Trademark registration in China generally follow the principle of "registration first", which means a trademark

belongs to the individual or entity who registers first. However, Article 31 sets an exception to this rule, and states that no trademark application shall infringe upon another party's exiting prior rights, nor shall an applicant register an unfair means a mark which is already in use by another party and enjoys substantial influence. Trademarks that are registered in violation of this provision will be subject to cancellation upon the request of the owner of the mark or any interested party.

- ***Stronger provisions against infringement***: In determining infringement, Article 52 no longer requires the seller to know he is selling goods that infringe the exclusive right of a registered trademark. Rather, just the act of selling will suffice. In enforcement, the law gives the administrative authority of industry and commerce the rights to confiscate and destroy the infringing goods and any instruments specifically used to manufacture the infringing goods and counterfeit representations of registered trademark (Article 53). Compensation is increased (Article 56), and more effective provisional measures are added (Article 58).

- ***Protects well-known trademarks and geographical indications:*** Regulates the system of well-know marks by refusing the registration and prohibiting the use of a trademark that is a reproduction, an imitation, or a translation liable to create confusion, or that is not registered in China. Three-dimensional and colored marks are now allowed to be registered as trademarks. In addition, provisions on collective marks, certification marks and geographical indications are added. Article 10 adds two provisions providing that words or devices that are identical with or similar to the name of a particular venue where a central state government organization is located or the name or graph of the symbolic building of a central state government organization, signs identical with or similar to the official signs and hallmarks indicating control and warrant are also prohibited to be used as trademark without authorization.

- ***Grants right of priority***: An applicant may enjoy the right of priority if an application for registration of a mark was previously filed and registered in a foreign country, provided that the application in China is filed within six months from the date on which the application was first filed in the foreign country. In addition, a right of priority can also be claimed when a trademark is used for the first time on goods displayed at an international exhibition sponsored or recognized by the Chinese government as long as applicant files an application to register the mark within six months form the date of exhibition.

- ***Provides for judicial review:*** Finally, an interested party now has recourse to judicial review and can bring a case to the Supreme People's Court if he is not satisfied with the administrative decisions of relevant authorities.

In 1997, the number of foreign countries and regions applying for trademark registration was 16. This number increased to 114 in 2001. In 1979, the registered trademarks amounted to 32,589, among which 5,130 were foreign trademarks. By the end of 2001, the number was

1,452,277, among which 273,825 were foreign trademarks. In addition, 1396 people have acquired qualification as trademark agents, and 151 trademark agencies have been approved.

V. China's Foreign Investment Legal System & the Implementation of TRIMs

Mr. Qiu Guangling, Division Director of MOFTEC spoke on growing foreign investment in China since WTO accession. He also discussed China's efforts to implement the TRIMs Agreement.

From January to October, 2002, China has approved 27,630 projects, up 34.46 percent over the same period last year. Contractual investment reach US$75 billion, up 35.85 percent with US$45 billion of actual paid-in investment. China has been the largest recipient of foreign investment in the past nine years among developing countries. Foreign investment is prevalent in basic industry sectors, infrastructure facilities, high-tech industries, commercial retailing, foreign trade, finance, telecommunication and insurance, among others. The sources of foreign investment are from more than 180 countries and regions, including more than 400 companies out of Fortune 500 companies. For example, foreign companies set up 400 research and development centers. Foreign-invested enterprises (FIEs) currently in operation totaled more than 200,000 with total employees of about 23 million. In addition, FIEs exports account for more 50 percent of China's total export volume, and 20 percent of the nation's tax revenue. Regarding U.S. investment, from January to September 2002, China approved 2403 projects by U.S. investors, a growth of 28.3 percent over the same period last year. Contractual U.S. investment amounts to US$7.33 billion with actually paid-in investment reaching US$3.95 billion, up 14.76 percent. U.S. investment is focused in coastal areas, although current trend shows increasing investment in mid-western regions.

Qiu explained that in order to implement the TRIMs Agreement, China has abolished 830 legal documents and revised 325 laws and regulations. In addition, local governments are doing the same and expect to complete their modifications by the end of 2002. Among these changes, China eliminated requirements on foreign exchange balancing, local content and export performance.

To further improve the legal framework for foreign investment, China will streamline its laws on foreign-invested venture capital investment enterprises, foreign investment in "A share" and "B share," foreign acquisition of non-circulating shares of listed domestic companies, foreign investment participation in restructuring and development of financial assets management companies, merger and acquisition of domestic companies by foreign investment, and trading rights.

To encourage investment generally, China has liberalized its service trade sector, relaxed foreign shareholding requirement, expanded encouraged and allowed investment areas and created more incentives to encourage foreign investment in its western regions. In service trade, China has promulgated and revised a wide range of laws and regulations in sectors including banking and finance, telecommunications, transportation, distribution, logistics, aviation and intermediary organizations. China is currently revising laws and regulations on commercial retailing, foreign trade, construction, accounting, medical services and education. The

government will further improve the investment environment by streamlining approval processes, further opening up the services sector, encouraging foreign investment in high-tech industries, fundamental industries, supplying industries and mid-western areas. In addition, multinational companies are encouraged to establish regional headquarters, R&D centers and procurement centers for export.

OUTLOOK

On the whole the seminar provided a useful exchange of views between high-level Chinese officials and U.S. officials. The seminar also provided a good overview of China's extensive legal reform achievements and areas still lacking in the post-WTO accession. In general, Chinese officials were very optimistic that China was moving quickly and in the right direction in its implementation of WTO commitments. These officials provided some new information on the reform of legal system, including prospects for further reform of the investment and intellectual property regimes in the near future. Nevertheless, beyond China's progress in legal reform, China still has significant steps to take to ensure the respect of rule of law, transparency and less discriminatory actions toward foreign investors.

Supreme People's Court Releases Detailed Implementation Rules for Antidumping and Countervailing Judicial Review to Comply with WTO Commitments

SUMMARY

On December 4, 2002, the Supreme Court of China announced two judicial interpretations governing the antidumping and countervailing judicial reviews respectively, in order to comply with its WTO commitments. The two regulations clarify the roles and responsibilities of the Chinese courts in judicial reviews of antidumping and countervailing investigations, as required by the WTO Antidumping and Subsidies agreements. The rules entered into effect on January 1, 2003.

ANALYSIS

The two interpretative regulations are *The Supreme People's Court Regulation on Certain Issues of Law Application for Antidumping Administrative Litigation,* and *The Supreme People's Court Regulation on Certain Issues of Law Application for Countervailing Administrative Litigation.*

As China has not initiated any countervailing investigation to date, our analysis focuses on the antidumping judicial review regulation.

I. Interpretation of the Law and Regulation

A. Scope of antidumping judicial review

The regulation provides that the courts must fully review the facts and legal issues involved in the administrative conduct of an antidumping investigation. The judicial review covers the following:

(i) The final determinations of dumping, the dumping margin, injury and the degree of injury;

(ii) The administrative decisions concerning the antidumping duty imposed, retroactive duty, duty drawback and duty imposed on new exporters;

(iii) The review decisions on the retention, revision and cancellation of antidumping duty and price undertaking; and

(iv) Other specific decisions in the antidumping investigation, which could be challenged pursuant to relevant laws and regulations.

B. Governing law

The courts must conduct the judicial reviews on basis of the Administrative Procedure Law, the Antidumping Regulation, the administrative regulations and statutes promulgated by

the State Council. The courts may also refer to the rules issued by MOFTEC, SETC and the Customs General Administration (CGA). For example, MOFTEC has promulgated several provisional rules relating to initiation of dumping investigations, response, disclosure and verification of information. However, the courts do not need to treat these rules as binding since the State Council did not set them.

C. Participants in proceedings

The following persons may participate in the judicial review proceedings:

(v) Plaintiff: Any individual or organization with legal interests in the conduct of antidumping administration can petition the courts. They include interested parties in the original antidumping investigation, foreign exporters, domestic importers and others.

(vi) Defendant: The defendants in the judicial review are the corresponding departments of the State Council. According to the *Antidumping Regulations of the PRC*, the "corresponding departments" include MOFTEC, SETC, and the Tariff Commission of the State Council (TCSC).

(vii) Third Parties: Other departments of the State Council with legal interests in the antidumping determination may join the judicial review as third parties.

D. Venue

According to the Regulation, the high people's court in the region where the defendant resides, i.e. the High People's Court of Beijing Municipality, and the intermediate people's court designated by such high court, i.e. the Second Intermediate Court of Beijing Municipality, will hear the judicial review cases.

E. Burden of Proof

Generally, the burden of proof falls on the defendant who has to submit evidence and legal documents supporting the challenged antidumping determinations. The courts will review the complaint based on the file records submitted by the defendant. They will not accept any factual evidence not recorded in the original antidumping investigation.

The plaintiff is obliged to provide evidence supporting his complaint. However, the courts will not accept any new evidence if it is information that the defendant had requested for but the interested parties had refused to provide in the original antidumping investigation. In cases where the interested parties had refused to submit evidence without justified reasons, or hindered the investigation "seriously" in other ways in the original antidumping proceedings, the courts can decide that the government authorities had sufficient evidence to make their determination based on the "best information available."

F. Remedies

The Regulation provides for the courts to arrive at the following decisions:

(viii) Re-affirm the original antidumping determination;

(ix) Reverse the original antidumping determination and instruct the defendant to revise the antidumping determination; and

(x) Arrive at other judgments according to law or relevant judicial interpretations.

II. Estimated Timeline of an Antidumping Judicial Review Case

Assuming that a final antidumping determination is announced on December 30, 2002, the timeline for judicial review on this determination is as follows:

By March 30, 2003	Interested parties file their petition to the courts.
By April 6, 2003	The courts determine whether to accept the case. If the court rejects the case, the plaintiff can appeal within 7 days.
By April 11, 2003	The court informs the defendants of the judicial review.
By April 21, 2003	The defendants present their comments and arguments.
By July 6, 2003	The courts make their first instance determination.
On July 23, 2003	The courts' determination comes into effect or both the plaintiff and the defendant can appeal against the courts' decision to the higher courts.

OUTLOOK

Based on its WTO commitments, China must provide for judicial review of all its administrative decisions. The Regulations establish a legal framework for interested parties who disagree with an antidumping investigation decision to file a judicial review request to the Courts. However, we are uncertain about the judicial review system in the following ways:

(i) The knowledge of the judges – China is very new to the WTO rules and antidumping practices. As such, the judges may lack the necessary expertise and experience to deal with antidumping cases;

(ii) The relationship between government and the courts – The independence of Chinese courts is questionable. As such, we are uncertain whether the courts can make decisions contrary to the government's actions;

(iii) Who the actual defendant is – According to the *PRC Administrative Procedure Law*, only the final decision made by a government body can be subjected to judicial review. In China's antidumping system, MOFTEC and SETC present the injury decision and propose the antidumping duty to the Tariff Commission under the State Council (TCSC) for approval. Hence, it is the TCSC that makes the final decision. However, the TCSC is not a government body, but merely an inter-governmental conference system. Thus, the plaintiff will face the dilemma of determining the defendant of the case.

REGIONAL TRADE AGREEMENTS

US and Singapore Agree on Capital Controls Issue in FTA

SUMMARY

The US and Singapore announced on January 15, 2003, that negotiators have reached an agreement on the outstanding issue of capital controls in the FTA. The President could sign the FTA by the end of April.

ANALYSIS

The US and Singapore announced on January 15, 2003, that negotiators have reached an agreement on the outstanding issue of capital controls in the FTA. According to a US Treasury fact sheet, negotiators agreed that all issues would be handled in the dispute resolution chapter, instead of creating exceptions to the investment provisions allowing free transfers. This agreement avoids the need to discuss if and when countries agree that capital flow restrictions would be necessary. The agreement on capital controls paves the way for final conclusion of the FTA.

A U.S. negotiator noted that there are a few minor details outstanding, but the USTR expects to send the text of the FTA to Congress soon, possibly next week. Congress will then have 90 days to review the provisions in the FTA. USTR will use this 90-day period to consult with Members of Congress on the implementing legislation, which is ultimately what Congress will vote on. The FTA text likely will not be released to the public until after this 90-day period.

U.S. companies have started to organize lobbying efforts to garner congressional support for passage of the FTA. Although the FTA is not expected to encounter much opposition, some analysts fear that partisan disagreements concerning investment, labor and environment could hinder passage. Nevertheless, most analysts expect Congress to approve the FTA.

OUTLOOK

The President could sign the FTA by the end of April.

USTR Official Says U.S.-Chile FTA Lends "Great Momentum" to FTAA Process

SUMMARY

On January 13, 2003, Assistant USTR for the Americas Regina Vargo, addressed the CATO Institute regarding "Free Trade with Chile: Understanding What's at Stake." Vargo outlined four features which she believes distinguish the U.S.-Chile FTA from other trade agreements existent today: comprehensiveness, transparency, modernness, and approach to labor and the environment. The US believes the U.S.-Chile FTA lends "great momentum" to the FTAA process.

Currently, the US and the Chile are completing the "legal scrub" of the FTA text. USTR will not release the text at least until the legal scrub is complete. No decision has been made within the Administration on whether the text will be released before the President signs it.

ANALYSIS

On January 13, 2003, Regina Vargo, Assistant United States Trade Representative for the Americas, addressed the CATO Institute regarding "Free Trade with Chile: Understanding What's at Stake." She characterized the recently concluded free trade agreement (FTA) with Chile as a concrete sign of U.S. interest in Latin America, which the region has been awaiting for years. She called the agreement "a win-win, state-of-the-art, trade agreement for modern economies."

Vargo believes four features distinguish the U.S.-Chile FTA from the other trade agreements existent today:

Comprehensiveness

The United States and Chile challenged themselves to be "as open as possible" in negotiating the FTA. Vargo believes they were "extremely successful" in this regard because under the U.S.-Chile FTA, "free trade means free trade" with very generous immediate duty-free access, particularly in industrial goods.

In terms of agriculture, the elimination of Chile's price band was very important to the United States, and its elimination was key to the successful outcome, Vargo stated. In comparison to the agreements Chile has with Canada and the EU, Vargo believes that market access for agriculture is "equal if not better" under the U.S.-Chile FTA. Therein, the U.S.-Chile FTA levels the playing field for US farmers.

Vargo also noted the "very broad" liberalization of trade in services contained in the U.S.-Chile FTA, where a negative-list approach was used. In addition, Vargo highlighted the government procurement provisions contained in the agreement, stating that they represent "the most liberalizing approach we've taken with anyone."

Transparency

Vargo believes the FTA shows Chile's commitment to a rules-based system with its specific and concrete obligations to enhance customs transparency and procedures. The FTA sets forth a broad customs regime in which all customs laws, regulations, guidelines, and rulings must be posted on the internet. Moreover, it calls for notice and public comment procedures and the rapid release of goods.

In terms of dispute settlement, the FTA calls for open public hearings, possible *amicus* briefs, public release of non-confidential documents in government-to-government disputes. Similar transparency provisions exist for investor-state disputes.

Modernness

The FTA recognizes the modern state of international trade. For example, the FTA recognizes the unique aspects of the express shipment sector. In addition, the FTA contains strong commitments for e-commerce, including non-taxation of e-commerce transactions and national treatment. Vargo pointed out that Chile's already modern telecom infrastructure made it possible for the two countries to negotiate a modern agreement that includes strong transparency provisions.

Approach to Labor and the Environment

Vargo noted the importance of including the provisions on labor and environment in the text of the FTA itself because it recognizes that minimum standards and enforcement have a relationship to trade. She explained that the enforcement structure for labor and environmental violations is similar to that for commercial violations. Vargo highlighted the "very innovative use of fines" in the enforcement of both labor and environmental and commercial disputes under the U.S.-Chile FTA. The approach is one where "it makes sense to move from a monetary assessment approach to the ability to use traditional trade sanctions."

OUTLOOK

Vargo concluded that the U.S.-Chile FTA is a trade partnership with Chile that extends beyond the FTA itself, to the Free Trade Area of the Americas (FTAA) and the Doha Round. The US believes that the conclusion of the FTA with Chile lends "great momentum" to the FTAA process for two primary reasons. First, the FTA demonstrates the ability of the US to conclude a broad, liberal FTA in the region. In addition, it allows the US to proceed with negotiations for an FTA with Central America because the Central American countries share some of the same approaches and proclivities as Chile, and the US hopes to use the two FTAs to broaden the base of like-minded countries for the FTAA.

Currently, the US and the Chile are completing the "legal scrub" of the FTA text. Vargo countered the idea that the FTA with Chile is a "secret document," as USTR has released summaries of the agreement. However, Vargo stated, "It is entirely realistic to say that we are not going to have multiple texts out." In other words, until the legal scrub is complete, USTR will not release the text in case technical, language, or other changes have to be made. She

emphasized that USTR has released the text to "all relevant members of civil society." Vargo concluded that no decision has been made on whether the text will be released before the President signs it.

US and Central America Launch Free Trade Negotiations

SUMMARY

On January 8, 2003, the United States Trade Representative (USTR) announced the launch of negotiations toward a free trade agreement (FTA) with the Central American nations of Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua.

ANALYSIS

On January 8, 2003, the United States Trade Representative (USTR) announced the launch of negotiations toward a free trade agreement (FTA) with the Central American nations of Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua. Negotiations on the U.S.-Central American FTA or CAFTA will begin in San Jose, Costa Rica, on January 27, 2003. According to a USTR press release, the parties intend to conclude negotiations by December 2003.

The parties reached agreement on the structure for negotiations, with nine negotiating rounds planned for 2003. The parties decided upon five negotiating groups: market access; investment and services; government procurement and intellectual property; labor and environment; and institutional issues like dispute settlement. An additional group on trade capacity-building will also meet in tandem with the five negotiating groups.

The parties also agreed on a special framework to begin immediately to address sanitary and phytosanitary issues related to agricultural trade, in an effort to resolve issues like import bans on certain U.S. agricultural products.

According to USTR, the Bush Administration hopes to accomplish the following objectives in the CAFTA:

- broad liberalization in market access for goods and services, including e-commerce;
- the elimination of non-tariff barriers;
- science-based food inspection systems;
- strong protections for intellectual property and for investors;
- increased transparency in government regulation and procurement;
- strengthened capacity to protect workers and the environment;
- meaningful dispute settlement mechanisms.

President Bush announced his intention to explore an FTA with Central America in January 2002 during an address to the Organization of American States *(Please see W&C March 2002 Report).* On October 1, 2002, Bush formally notified Congress of his intention to launch

negotiations, pursuant to Trade Promotion Authority (TPA) *(Please see W&C October 2002 Report).* As part of the announcement, USTR Robert Zoellick sent letters to the Senate and House Leadership, as prescribed in TPA.

USTR Zoellick to Discuss Regional FTA on Visit to South Africa

SUMMARY

On January 10, 2003, the United States Trade Representative (USTR) announced that the United States and the Southern African Customs Union (SACU) had agreed on a roadmap for negotiations toward a free trade agreement (FTA).

ANALYSIS

On January 10, 2003, the United States Trade Representative (USTR) announced that the United States and the Southern African Customs Union (SACU) had agreed on a roadmap for negotiations toward a free trade agreement (FTA). The FTA with SACU, which consists of the countries Botswana, Lesotho, Namibia, South Africa, and Swaziland, was notified to Congress in November 2002, and is part of the Bush Administration's broader trade liberalization efforts. USTR Robert B. Zoellick began a visit to South Africa on January 13, 2003, during which he and SACU leaders would discuss the roadmap and timetable for forthcoming negotiations.

Following his visit to South Africa, Zoellick will lead the U.S. delegation to the Second U.S./Sub-Saharan Africa Trade and Economic Cooperation Forum from January 15-17. This annual forum provides an opportunity for U.S. and sub- Saharan African trade officials to discuss ways of expanding trade and investment relations under the provisions of the African Growth and Opportunity Act (AGOA).

U.S. Agencies Seek Comments on FTAA and U.S.-Australia FTA

SUMMARY

USTR and USITC have issued recent requests seeking public comments on the Free Trade Area of the Americas ("FTAA") and the US-Australia FTA.

ANALYSIS

I. USTR and FTAA Civil Society Committee Request Comments on FTAA

On December 27, 2002 the USTR requested comments on the second draft text of the FTAA (FR79232). The second draft text is available at www.ustr.gov. Comments are due by January 31, 2003.

In addition, the USTR on December 27 announced that the Committee of Government Representatives on the Participation of Civil Society (Civil Society Committee), has issued an open and ongoing invitation for public comment on all aspects of the FTAA (FR79231), including: i) the second draft consolidated texts of the FTAA Agreement, ii) the ongoing FTAA negotiations and iii) the FTAA process in general. The Civil Society Committee will accept comments on an ongoing basis, but for submissions to be reflected in the Committee's Report to the FTAA Ministers in Miami in 2003, submissions must be received by May 1, 2003.

II. USITC Requests Comment on U.S.-Australia FTA

On December 27, 2002 the US International Trade Commission announced that it instituted investigation Nos. TA-131-24 and TA-2104-04 (FR79149) on *The US-Australia FTA: Advice Concerning the Probable Economic Effect*. The investigation will focus on the probable economic effect of providing duty-free treatment for imports of Australia i) on industries in the US producing like or directly competitive products, and ii) on consumers. In addition, the final report will analyze the probable economic effect of eliminating tariffs on Australian imports of certain agricultural products.

The ITC plans to hold a public hearing related to the investigation on February 6. Written submissions concerning the ITC investigation are due by February 13, 2003.

U.S.-Morocco FTA Comments Focus on Intellectual Property Rights

SUMMARY

Pursuant to the United States Trade Representatives' (USTR) request for public comments on October 10, 2002, on the Free Trade Agreement between the United States and Morocco (67 FR 63187), 21 companies and associations submitted comments.

Most submissions fully support negotiating a U.S.- Morocco FTA, although some oppose using the existing FTA with Jordan or certain provisions proposed for the FTAs with Singapore and Chile as a model. More than half of the submissions focus on intellectual property protection, and more specifically, on the need for Morocco to comply with the TRIPS regulations.

ANALYSIS

I. Background

Last April, President Bush and King Mohammed VI agreed to launch negotiations on a Free Trade Agreement (FTA) between the United States and Morocco, and on October 1, 2002, USTR Robert Zoellick formally notified Congress of the administration's intention to begin these negotiations.

On October 10, 2002, the USTR published a notice in the Federal Register (67 FR 63187), announcing that the interagency Trade Policy Staff Committee (TPSC) requested public comments and would hold a public hearing on the proposed U.S.- Morocco Free Trade Agreement. Written comments were due by November 25, 2002, and 21 companies and associations submitted comments.

We have highlighted the comments submitted by the following institutions:

- The National Electrical Manufacturers Association (NEMA), the largest trade association representing the interests of U.S. electrical industry manufacturers.

- The American Chamber (AmCham) of Commerce in Morocco, a non-profit, independent association consisting of the leaders of the U.S. corporations in Morocco and Moroccan organizations and individuals doing business with the U.S.

- Wal-Mart Stores Inc. ("Wal-Mart"), which operates Discount stores, Supercenters and Neighborhood Markets.

- The American Free Trade Association (AFTA), an incorporated, not-for profit trade association representing the legitimate needs and interests of the domestic parallel market industry.

- The Business Software Alliance (BSA), representing the leading software and computer companies in the United States.

- The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO).

- The National Retail Federation (NRF), the largest trade association representing the retail industry.

- The Pharmaceutical Research and Manufacturers of America (PhRMA), an association that represents America's research-based pharmaceutical and biotechnology companies.

II. General Comments

Nema strongly supports the expansion of free trade in electrical products through FTA's, especially the negotiating of inter-governmental Mutual Recognition Agreements for federally-regulated products such as medical devices. However, Nema opposes the negotiation of MRAs for unregulated electrical products.

Amcham fully supports the US-Morocco FTA, because it has the potential to greatly expand bilateral trade and investment to the benefit of both Moroccan and American companies. It could also constitute a powerful tool in the economic and social development of Morocco, increasing its productivity and enhancing its economic integration into the Maghreb.

Wal- Mart think a successfully negotiated FTA represents potential for retailers to bring high- quality products at every day low prices (EDLP) to U.S. customers. It will also restore the competitive advantage U.S. business lost when Morocco and the European Union signed a preferential agreement in March 2000, and strengthen the U.S. position in the ongoing DOHA multilateral negotiations.

AFTA does not oppose an FTA with Morocco, but opposes using the intellectual property provisions in the FTA with Jordan as a model because they would change United States IP law, entice the trading partners to adopt provisions inconsistent with US law and would foster the growth of anti-competitive behavior destructive to the global marketplace.

BSA supports U.S. efforts to liberalize trade around the world, whether through multilateral, regional or bilateral negotiations.

AFL-CIO generally welcomes closer economic ties with Morocco, but is concerned that using the labor provisions proposed for the FTAs with Chile and Singapore as a model would not work for working families in Morocco and the United States.

NRF will only support the agreement if it benefits U.S. retailers by substantially improving the terms of trade for consumer products. To realize this, they suggest that the FTA with Jordan should be used as a model for this agreement.

PhRMA strongly supports USTR's decision to negotiate an FTA. The PhRMA believes that this negotiation will provide mutual benefits to the U.S. and Morocco.

III. Intellectual Property Protection

NEMA wants Morocco to fully adhere to the Trade Related Aspects of Intellectual Property Rights (TRIPS) commitments, including better legal and administrative means for pursuing cases of trademark infringement.

AmCham thinks that one of the indirect benefits of an FTA will be that, in order to achieve the objectives of free trade, Morocco will be pressured to enforce intellectual property rights as an improvement to their business environment.

AFTA thinks that using the IP provisions in the FTA with Jordan as a model would alter the complex balance in today's U.S. IP law between the rights of IP owners to control the distribution of their works and of importers, distributors, and consumers to benefit from a freely competitive marketplace. Moreover, the Jordan provisions would be a vehicle for imposing a different set of rules on trading partners. Instead, the US should encourage its trading partners to adopt and enforce intellectual property laws that protect and enforce copyrights, trademarks and patents, and should discourage them from imposing distribution restrictions which would deny true market access and competition.

BSA wants the FTA to ensure that Morocco implements and enforces the highest standards of intellectual property protection, following the standards of intellectual property protection that have been established in the U.S.- Singapore FTA.

AFL- CIO wants the FTA to clarify the TRIPS exception to ensure that all public health crises are considered national emergencies within the agreement, and to ensure that if a government uses this exception it will not be subject to sanctions under the FTA or any other trade law.

PhRMA strongly support inclusion of a chapter in the FTA that establishes adequate and effective standards for intellectual property protection, and which would facilitate the granting and enforcement of rights. As preconditions for initiating negotiations, they recommend that the U.S. seek Morocco's implementation of the Patent Law, which should allow for the protection of pharmaceutical products in compliance with TRIPS, and Morocco's implementation of data exclusivity. Also, negotiations should be conducted in a manner that ensures that Morocco complies with the minimum standards of the TRIPS agreement prior to the conclusion of the agreement.

IV. Liberalization of Services

NEMA supports energy services liberalization, both bilaterally and as a part of the WTO. In this respect, they recommend using a negative list approach for the services negotiations to facilitate obtaining Morocco's commitment.

Wal- Mart encourages negotiators to ensure the greatest possible liberalization of trade rules on services ancillary to retail.

BSA wants the FTA to commit Morocco to providing full market access and national treatment across a broad range of service sectors necessary for e-commerce. Therefore, the U.S. should insist on a negative list approach for the services negotiations.

AFL-CIO notes that the FTA should contain a broad, explicit carve-out for important public services, including those provided on a commercial basis or in competition with private providers. There should be no pressure on governments to open their key public services to more private competition, or to lock in any existing private competition in these sectors. Services rules should be negotiated sector by sector, and should preserve the ability of national, state and local governments to regulate private service providers in the public interest. Services of rules on temporary entry should not be used to expand guest worker programs, as has been proposed in the Chile and Singapore negotiations.

V. Tariffs

NEMA seeks bilateral as well as world- wide WTO tariff elimination for all electrical products. They also suggest that, on a "Most-Favored-Nation" (MFN) basis, the U.S. Government consider the elimination of its "nuisance" duties (duties of 3% or less) on primary batteries in the context of the Morocco FTA.

AmCham notes that tariff reduction and the resulting increase in market access, both for Morocco- based firms to the U.S. market and for U.S.- based firms to the Moroccan market, would be the direct benefits of an FTA.

BSA wants the FTA to ensure duty-free access for high technology products, and seeks the elimination or phase out of all tariffs and non-tariff measures applied to information technology products.

NRF insists that all duties on qualifying textile and apparel products should be eliminated immediately upon implementation of the agreement, as was tentatively agreed to on market access in the U.S.- Singapore FTA negotiations.

VI. Investment

Wal- Mart thinks the FTA represents an opportunity to create a model for investment and streamlined rules affecting trade in goods and services. Since Morocco has begun a process of reforms in recent years that encourage foreign investment, the FTA should advance and lock in these reforms and encourage the Moroccan government to adopt model rules to attract foreign investment.

AFL-CIO objects to the inclusion of investment measures modeled on NAFTA Chapter 11 in a trade agreement with Morocco. Furthermore, the FTA should contain a broad carve-out that allows governments to regulate corporate behavior to protect the public interest. Finally,

investment rules should rely on government-to-government rather than investor-to-state dispute resolution.

PhRMA requests that USTR seek Morocco's agreement to i) retain full ownership of their local investment ii) the entitlement to register their products under their name in Morocco regardless of capital structure and local manufacturing capabilities and iii) to amend the definition of a pharmaceutical company in the Law of 1960 (which states that only companies that are controlled and majority-owned by individual pharmacists can be licensed to be "pharmaceutical companies" in Morocco).

VII. Labor and Environment

NEMA calls for full consultation with the business community on the labor and environmental provisions.

AmCham believes that an FTA will generate pressure for Morocco to create a balanced and coherent labor code, a transparent and efficient justice system and a closer match between educational curricula and labor market needs.

AFL- CIO oppose using the same labor language as was used for the proposed Singapore and Chile FTA's, urging the U.S. to include binding, enforceable commitments to respect internationally recognized workers' rights in the core of the FTA, and to provide Morocco with the resources and technical assistance necessary to meet these obligations.

VIII. Customs

BSA wants the FTA to contain a requirement that the customs value of imported carrier media bearing digital products be determined according to the cost or value of the carrier medium alone, without regard of the content stored on the carrier medium.

PhRMA stressed the importance that the FTA removes custom duties applicable to U.S.-origin pharmaceutical products. They also suggest adopting "linkage" regulations, (i.e. establishing a formal link between health and patent authorities) to ameliorate the coordination between health authorities and patent officials.

IX. E- Commerce

BSA thinks that the agreement should contain a high quality chapter on e-commerce, with obligations that ensure clarity and predictability in the international trade rules applicable to e-commerce, that prevent the arising of barriers to e-commerce, and that preserve the current liberal trading environment for digital products. A key goal must be to ensure that software delivered electronically receives the same benefits and concessions that software traded on a physical medium currently enjoys under existing WTO agreements.

AFL- CIO argues that, if the agreement commits the parties to refrain from "imposing unnecessary barriers on electronic transmissions, including digitized products", it is important that it clarifies that such a clause would not be a barrier to any future state initiatives to tax goods

sold over the Internet or other non- discriminatory tax measures. Therefore, they request that the agreement explicitly exempt existing state sales tax regimes and non- discriminatory taxation more generally from any new disciplines on e-commerce.

X. Government Procurement

NEMA emphasizes the need for openness and transparency in government procurement.

AFL-CIO thinks the agreement should not constrain those procurement rules that serve important public policy aims such as environmental protection, local economic development and social justice, and respect for human rights and workers' rights.

XI. Debt and Finance

AFL-CIO thinks the FTA must allow Morocco to regulate the flow of speculative capital in order to protect its economy. Also, the FTA must address the possibility of massive currency devaluations and the impact these devaluations have on fair competition in the region. Both countries should consider whether debt relief measures are needed to allow Morocco adequately to fund education, health care, and infrastructure needs.

XII. Local Standards

NEMA requests Morocco's acceptance of the open, transparent development of standards and regulations in compliance with WTO Technical Barriers to Trade (TBT) requirements. Furthermore, NEMA wants Morocco to accept that the definition of "international standards" in the WTO TBT treaty is not restricted to only IEC, ISO and ITU standards, but should also include widely-used norms such as some North American standards and safety installation practices that meet TBT guidelines. Finally, they want Morocco to accept that voluntary, market-driven standards and conformity assessment should be encouraged over mandatory government regulations. Non-discriminatory, international conformity assessment by means of one standard/one test is appropriate, as determined by market sector and customer requirements.

XIII. Rules of Origin

NRF argues that an important goal in the negotiations should be the establishment of flexible rules of origin that are "commercially viable" and promote trade and investment. Therefore, U.S. negotiators should use the model of the U.S.- Jordan FTA.

XIV. Tax Issues

AmCham wants a simplification of the Moroccan tax system, a reduction of tax fraud and an equal application of the tax code to all. They also want Morocco to create and advertise investment tax incentives.

XV. Transparency

AFL- CIO thinks that that citizens in both countries should be informed on what the draft FTA proposals are, which ones their government is supporting and opposing and, once the agreement is concluded, which would be the dispute resolution measures.

The following businesses and organizations also submitted comments:

- American Dehydrated Onion & Garlic Association (ADOGA)
- Rubber & Plastic Footwear Manufacturers Association (RPFMA)
- North American Export Grain Association (NAEGA)
- Northwest Horticultural Council (NHC)
- American Textile Manufacturers Institute (ATMI)
- Blue Diamond Growers
- Distilled Spirits Council of the United States (DISCUS)
- National Juice Products Association (NJPA or Association)
- National Cattlemen's Beef Association (NCBA)
- National Milk Procedures Federation & U.S. Dairy Export Council (NPMF & USDEC)
- U.S. Association of Importers of Textile and Apparel (USA-ITA)
- U.S. Ceramic Tile Industry (TCA)
- American Sugar Alliance (ASA)

OUTLOOK

At the public hearing held on November 21, 2002, Catherine A. Novelli, Assistant USTR for Europe and the Mediterranean, stated that the administration has begun developing its negotiating objectives, and that the U.S. International Trade Commission (USITC) is preparing a report on the likely impact of the FTA on the U.S. economy.

On November 26, 2002, Novelli and Morocco's lead negotiator for the talks, Fassi Fihir, agreed to establish 10 negotiating groups dealing issues ranging from market access, services, and labor and environmental issues to intellectual property protection. The negotiations will be conducted simultaneously in all groups, and are due to begin at the end of January, though no specific date has been set.