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WTO AND REGIONAL TRADE AGREEMENTS

MONTHLY REPORT

August 2005

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

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ECLAC Forecasts 4.3% Growth for Latin America and the Caribbean in 2005

In its annual economic survey of the economies of Latin America and the Caribbean, the Economic Commission for Latin America and the Caribbean (ECLAC) reported that the region grew by nearly 6% in 2004, recovering from its low growth rate of 1.9% in 2003. The improvement in the region’s economic performance in the period 2003-2004 was mainly associated with two factors: (i) favorable external conditions, which in turn were reflected in the export sector’s strong performance and (ii) the expansion of domestic demand. ECLAC estimates that the region will grow 4.3% in 2005.

ECLAC forecasts positive growth figures for the region and a continuation of FDI inflows in 2005.

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We want to alert you to the following US-Latin American developments:

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The new Director-General of the World Trade Organization, Pascal Lamy, will take up his post on 1 September 2005, amid general satisfaction and great expectations that he will be able to breathe new life to the comatose Doha Round.

History seems to repeat itself, and like his predecessor Mike Moore in 1999 in the run-up to Seattle, Lamy will arrive only a few months before a critical Ministerial Conference – this time the Hong Kong Ministerial of 13-18 December – with little time to put his mark on the process.

Given the lack of progress at the end-July meetings of the General Council and the Trade Negotiations Committee, from which much was originally expected, there is a great deal left to be agreed with little time remaining before Hong Kong. Another re-lapse in Hong Kong would imperil hopes to conclude the Round by the anticipated "deadline" of 2006.

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REPORTS IN DETAIL

UNITED STATES

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SUMMARY

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ANALYSIS

Following the completion of the annual high-level JCCT meeting on July 11, 2005, several Administration officials have offered their **off-the-record** assessments of the meeting. We review here those assessments and prospects for US-China trade relations in the short-term:

I. Levine Stresses IPR Issues, Notes Worsening Chinese Enforcement

On July 27, 2005, the Women in International Trade (WIIT) held a luncheon with **Hank Levine**, Deputy Assistant Secretary for Asia, International Trade Administration, US Department of Commerce, to discuss the US-China Joint Commission on Commerce and Trade (JCCT). Mr. Levine discussed the progress made at the JCCT. He highlighted the following issues discussed at the JCCT:

- <u>Intellectual Property</u> – Resolution of all bilateral IPR issues may not be possible through the JCCT process. China did agree to take additional steps to enhance its enforcement such at reducing the thresholds for criminal prosecution. In addition, China pledged to facilitate cooperation between law enforcement authorities in China. Levine stressed, however, that some aspects of China's IPR enforcement have worsened since its 2001 WTO accession. The growing problem lies in the export of pirated music compact discs, computer software and DVD movies.

- <u>Software Procurement</u> - China will roll out a program to use only legal software at government-owned enterprises and ministries. China will also indefinitely suspend proposed regulations that would have barred certain software imports. As a show of good faith, China will appoint an IPR ombudsman at their Washington, DC embassy, who will participate in trade fairs to facilitate identification and removal of products violating US IPR.

II. Freeman Reiterates IPR Concerns, Cites USTR China Review

On July 21, 2005, **Charles Freeman,** Assistant U.S. Trade Representative, Office of China Affairs, addressed a U.S. China Business Council luncheon on the successes and shortcomings of the JCCT meeting. He offered the following observations:

- Lack of Significant Progress – China made few new commitments in the area of IPR, opting instead to focus on better enforcing existing laws. There was also little achieved in the areas of textiles, and film quotas – both major USTR priorities with respect to China.

- USTR China Review **–** USTR is continuing its ongoing top to bottom review of trade policy with China. Included in this process is a review of data available to USTR and the Dept. of Commerce to conduct assessments of the Chinese economy. Greater assistance from the trade advisory councils will be needed to complete the review.

- Chinese Imposition of Trade Remedies – USTR is becoming increasingly concerned about China's use of trade remedies to stifle U.S. exports. Freeman described China's remedy process as opaque and urged U.S. exporters to work with the Dept. of Commerce and Chinese officials to ensure greater transparency.

- Legislation Before Congress – Freeman declined to stake out major positions on legislation pending before Congress related to China (e.g. currency, countervailing duties on non-market economies, etc.). However, he did note that China has committed to providing the WTO information on its subsidies by the end of the year.

OUTLOOK

Given the intense focus on Congressional passage of the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA), and the United States Trade Rights Enforcement Act of 2005 (HR. 3283), the results of the JCCT have received little attention from policy makers. Thus, despite the House passage of HR. 3283, which would impose more strict conditions on China trade, Congressional actions toward China might be less severe than originally thought.

Furthermore, pressure on China has been alleviated somewhat by China's decision to revalue its currency modestly, and due to the August recess on Capitol Hill. The Senate is expected to have an extremely active schedule in the Fall, including work on appropriations bill, and at least one Supreme Court nomination – and thus less time to consider a similar legislation as HR. 3283.

On a related note, Charles Freeman will depart USTR in September. It has been reported he will work as a China trade consultant in the private sector. A replacement for Freeman has yet to be named.

United States Highlights

US Congressional Budget Office Releases Report on World Agriculture Subsidies

On August 23, 2005, the United States Congressional Budget Office (CBO) released a report on world agricultural subsidies in order to illuminate the Doha Round's goal of liberalizing world agricultural markets. In *Policies That Distort World Agricultural Trade: Prevalence and Magnitude*, the CBO presents statistics on current policies around the world that distort agricultural production and trade. The report focuses on the three main categories of WTO agricultural negotiations: (1) market access (policies that restrict or regulate imports); (2) domestic support (domestic subsidies and other forms of support to domestic producers); and (3) export subsidies. The CBO's statistics indicate that:

- Policies that distort agricultural trade remain much more pervasive and substantial around the world than policies that distort trade in other goods.
- East Asian countries had the highest average agricultural tariff, with Korea, Taiwan, India, China, Vietnam, Thailand and Japan each maintaining an average tariff of nearly 30 percent or higher. The United States average agricultural tariff was 2.4 percent, and Europe's average was 13.9 percent.
- The European Union provides the largest amount of the most trade-distorting category of domestic ("*amber-box*") support as measured by dollar value, with the United States second and Japan third. The highest *rates* of such support, measured as a percentage of total agricultural output value, are those of the members of the European Free Trade Association (Iceland, Norway, and Switzerland-Liechtenstein), followed by the EU. The United States is ninth.
- The EU provides an overwhelming majority of the world's export subsidies - approximately 85 to 90 percent.

The CBO's findings come as WTO Members' officials attempt to resolve significant differences over agricultural subsidies in anticipation of the December WTO summit in Hong Kong. Less-developed countries have consistently accused their rich counterparts of using subsidies to suppress world agricultural prices. Although the CBO report provides empirical support for such arguments, most of its statistics are from 2002 or earlier. CBO analysts believe, however, that "the conclusions of this paper continue to hold true at least as they relate to members of the OECD."

The full report is available on the CBO's website at http://www.cbo.gov/ftpdocs/66xx/doc6614/08-22-Doha.pdf.

USTR Announces Annual ATPA Product Review

On August 18, 2005, the US Trade Representative (USTR) announced the initiation of its annual review under the Andean Trade Preference Act (ATPA). Under ATPA, USTR reviews petitions to grant or withdraw trade preferences for certain products from the Andean region. ATPA provides for annual reviews, and allows interested private sector groups to make submissions.

Submissions for the 2005 ATPA review are due to USTR by September 19, 2005.

USTR Schedules Annual Public Hearing on China's Compliance with its WTO Commitments

On August 3, 2005, the United States Trade Representative (USTR) announced in the Federal Register that the Trade Policy Staff Committee (TPSC), an interagency body chaired by USTR, will hold a public hearing and seek comments to assist USTR in preparing its annual report to the U.S. Congress on China's compliance with its WTO commitments.

The hearing will take place on September 14, 2005. Written comments to USTR are due by September 6, 2005.

The full notice in the Federal Register can be found at http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/05-15365.htm

Free Trade Agreements Highlights

President Bush Signs DR-CAFTA Implementing Legislation

On August 2, 2005, President Bush signed into law the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA) (HR 3025). Prior to signing the agreement, which cleared Congress following a close House vote on July 27th, President Bush commended Congress and representatives from the DR-CAFTA nations for their efforts to secure the agreement's passage. President Bush also emphasized the economic opportunities for US exporters and the regional stability the agreement will help to facilitate.

DR-CAFTA will enter into force on January 1, 2006, for those countries that have ratified the accord. Those ratifying after January 1, 2006 will be entitled to benefits under the agreements 90-days following their ratification. Currently, Costa Rica and the Dominican Republic have yet to ratify the agreement.

President Bush's full statement on DR-CAFTA can be found at: http://www.whitehouse.gov/news/releases/2005/08/20050802-2.html.

US-LATIN AMERICA

ECLAC Forecasts 4.3% Growth for Latin America and the Caribbean in 2005

SUMMARY

In its annual economic survey of the economies of Latin America and the Caribbean, the Economic Commission for Latin America and the Caribbean (ECLAC) reported that the region grew by nearly 6% in 2004, recovering from its low growth rate of 1.9% in 2003. The improvement in the region's economic performance in the period 2003-2004 was mainly associated with two factors: (i) favorable external conditions, which in turn were reflected in the export sector's strong performance and (ii) the expansion of domestic demand. ECLAC estimates that the region will grow 4.3% in 2005.

ECLAC forecasts positive growth figures for the region and a continuation of FDI inflows in 2005.

ANALYSIS

I. Background

On August 3, 2005, the Economic Commission for Latin America and the Caribbean (ECLAC) released an economic survey of the economies of Latin America and the Caribbean in 2004. The survey analyzes the external sector, macroeconomic policy and domestic economic performance of Latin American and Caribbean economies in 2004. The report also offers an economic forecast for the region in 2005.

The full survey is available at www.eclac.org

II. ECLAC Report Findings

External Sector

- The region ran a trade surplus of US$ 18 billion in 2004. Overall, the sector benefited from exceptional export growth fueled by the recovery of the world economy.

- Exports far surpassed their 2003 growth rate of 8.8% and expanded 22.8% in 2004. Imports also increased sharply and grew 21.7% in 2004. The increase in exports varied among regions. South American countries registered the largest export levels while Mexico and Central America registered the lowest.

- Terms of trade for goods in Latin America will continue to improve in the medium term. The growing participation of Asian countries in international trade fostered the region's terms of trade.

- Foreign direct investment in 2004 recovered and amounted to US$ 44 billion, 38.4% higher than the figure in 2003.

Macroeconomic Policy and Domestic Performance

- Countries kept in balance their fiscal accounts in 2004 and Central Banks succeeded at controlling inflationary pressures.
- Countries continued to maintain flexible exchange-rate regimes and to lift restrictions on foreign-exchange operations.
- Unemployment remained at high levels and reached 10% in 2004.
- The Latin American region reduced its level of indebtedness from 42.7% to 37.5% of GDP in 2004.

III. Projections for Latin American Countries

- If the external sector remains positive and current domestic conditions prevail, the strong performance of Latin American economies should continue.
- Economic growth in the region is expected to increase on average 4.3% in 2005. ECLAC estimates that Argentina will grow 7.3%, Venezuela 7%, Uruguay 6%, Chile 6%, Peru 5.5%, Panama 4.5%, Colombia 4%, Mexico 3.6% and Brazil 3%.
- FDI flows should continue recovering and surpass current levels.
- Inflation is expected to remain low in 2005 (6.5%) while unemployment is expected to improve only slightly.

OUTLOOK

The ECLAC report delivers good news for Latin American and Caribbean economies, which have been plagued with economic malaise and financial crisis in the past few years.

The report forecasts a positive outlook for the region that could be attained if countries continue to maintain macroeconomic and political stability. Domestic demand is expected to be a core engine of economic growth in 2005. According to ECLAC, the challenge for Latin America will be to preserve economic stability while tackling other problems (i.e. unemployment, social unrest) that continue to affect the region.

In addition, the report comments that Latin American countries will have to find solutions to reverse the high unemployment rates, including the adoption of policies to create high value-added jobs that boost labor productivity.

US-Latin America Highlights

Mexico Imposes Retaliatory Tariffs on US Goods for US Failure to Repeal the Byrd Amendment

On August 18, Mexico's Ministry of Economy imposed tariffs worth $20.9 million on 10 U.S. exports, in retaliation to the United States' failure to comply with a World Trade Organization (WTO) ruling against the Continued Dumping and Subsidy Offset Act of 2000 (the "Byrd Amendment"). The Mexican Government stated that it will impose the punitive tariffs until Mexico has reached the $20.9 million in retaliatory measures authorized by the WTO in November 2004.

The Mexican duties range from nine to 30 percent on products such as chewing gum, wine and dairy blends used for baby formula. The sanctioned products are classified under Mexican tariff codes 1704.10.01, 1704.90.99, 1901.90.05, 2204.10.01, 2204.21.01, 2204.21.02, 2204.21.03, 2204.21.04, 2204.21.99, and 2204.29.99.

Mexico is the fourth WTO Member to announce retaliatory tariffs on US goods based on the United States' refusal to repeal the contentious law. The European Union, Canada, and Japan have already imposed retaliatory measures, with only Brazil, Chile, India and Korea yet to do so.

The Byrd Amendment requires U.S. Customs authorities to forward antidumping and countervailing duties to the domestic firms that petitioned for relief. Previously, the duties collected went directly to the General Treasury of the United States. In January 2003, the WTO Appellate Body ruled that the Byrd Amendment was inconsistent with the WTO's Antidumping Agreement and recommended that the U.S. repeal the law.

Mexico's Ministry of Economy publicly stated that if the United States does not repeal the Byrd Amendment during the next year, Mexico could continue to apply the duties beyond 2005.

MULTILATERAL

WTO Doha Round Racing Against Time and History: Will the Hong Kong Ministerial Become Another "Seattle"?

SUMMARY

The new Director-General of the World Trade Organization, Pascal Lamy, will take up his post on 1 September 2005, amid general satisfaction and great expectations that he will be able to breathe new life to the comatose Doha Round.

History seems to repeat itself, and like his predecessor Mike Moore in 1999 in the run-up to Seattle, Lamy will arrive only a few months before a critical Ministerial Conference – this time the Hong Kong Ministerial of 13-18 December – with little time to put his mark on the process.

Given the lack of progress at the end-July meetings of the General Council and the Trade Negotiations Committee, from which much was originally expected, there is a great deal left to be agreed with little time remaining before Hong Kong. Another re-lapse in Hong Kong would imperil hopes to conclude the Round by the anticipated "deadline" of 2006.

ANALYSIS

I. Director-General Designate Lamy Faces Daunting Task with Little Time

A. History (1999) Repeating Itself, or a Break in the Pattern?

Former EU Trade Commissioner Pascal Lamy will take office on 1 September with much unfinished business left to address prior to the Hong Kong Ministerial. WTO Members did not meet their objectives by late July of defining "first approximations of modalities" (targets and approaches) for negotiations in agriculture, non-agricultural market access ("NAMA"), as well as goals for other areas including services trade and development concerns.

On the bright side, the general reaction to Lamy's appointment has been favorable, and he is expected to be a strong, decisive leader who will restore morale in the Secretariat and momentum to the Round. WTO Members were also pleased with the smooth efficiency of the selection process, contrasting strongly with the acrimonious and divisive process of 1999 (that undermined preparations for the Seattle Ministerial in December of that year), which resulted in the "split-term" appointments of Mr. Michael Moore of New Zealand and Dr. Supachai Panitchpakdi of Thailand.

Like Moore in 1999, Lamy will be confronted by the immediate necessity to prepare for an imminent and critically important Ministerial Conference within three months. Dr. Supachai was relatively fortunate to have had one year in office before the Cancun Ministerial in 2003. Even so, the regime of biennial Ministerial meetings and short-stay Directors-General means that the contribution of the WTO Secretariat to the management of Ministerial Conferences will often be seriously handicapped by lack of experience among the top leadership. Fortunately, that will not apply to Lamy, who has been a prime mover in the

Doha Round from the start (and over the past five years), and knows all the issues in detail. Nevertheless, the Hong Kong conference promises to be difficult.

B. Appointment of Deputy DGs Less Political; DG Supachai Remains Engaged

There had been the usual intense speculation about Lamy's senior appointments, especially at the level of Deputy Directors-General ("DDG"), but there was universal surprise at his unprecedented decision to invite applications for four DDG posts, through a public announcement on the WTO website. The decision was an assertion of transparency, and of independence from governmental pressures. Lamy made the selection personally and took "into account the need to ensure adequate gender and geographical balance."

The candidates Lamy selected were announced on 29 July and will take up their posts on 1 October, and are as follows:

- Mr. Alejandro Jara of Chile, currently Chile's Ambassador to the WTO and Chair of the Negotiating Group on Services;
- Ms. Valentine Rugwabiza of Rwanda, currently Rwanda's Ambassador to the WTO; she is the first woman ever to be appointed Deputy Director-General;
- Mr. Harsha Singh of India, currently Secretary of India's Telecom Regulatory Authority and a former member of the WTO Secretariat; and
- Mr. Rufus Yerxa of the United States, a former Deputy United States Trade Representative (USTR) and currently a Deputy Director-General; he will continue in his role.

The present Director-General Dr. Supachai will become Secretary-General of the United Nations Conference on Trade and Development (UNCTAD) on 1 September, and is expected to remain active in supporting the Doha Round.

II. Assessment of the Doha Round: Widespread Brinksmanship, Some Hope

It has been generally understood that to have a reasonable chance of concluding the Doha Round by the end of 2006 – sufficiently in advance of the expiry of U.S. negotiating authority in July 2007 – it will be essential to make fundamental decisions, especially on the modalities for negotiations on agriculture and industrial tariffs (NAMA), at Hong Kong. But, the General Council meetings in Geneva ending on 29 July have shown that wide divergences remain on these and other key issues. Moreover, the time available to resolve them is dangerously short.

The original objective for late July had been to agree on detailed "first approximations" to the agreements which will be needed at Hong Kong. In agriculture and NAMA these would in effect be interim agreements – the first drafts by the respective Chairs of the modalities whose application will dictate the outcome of those negotiations. Expectations for the Round have been progressively reduced as negotiations failed to close the gaps between positions by the 29 July General Council meeting.

A. Supachai's Final Outook: Crisis Deepening as Positions Harden

It has been pointed out by Director-General Supachai that repeated expressions of commitment to the negotiations at the highest political levels have not been reflected in the Geneva process. Supachai has commented with increasing severity on the lack of progress: on July 8, the day following a strong statement of support of the Doha Round by the G-8 Summit at Gleneagles, he told Geneva Heads of Delegations that "these negotiations are in trouble" and spoke of a "crisis of immobility" resulting from "the familiar defensive positions." In a meeting of the Trade Negotiations Committee on 21 July its Chairman, Dr. Supachai, spoke of the linkage between agriculture and other subjects as a brake on progress and admitted that since his warning on 8 July, and despite similar frustrations expressed at the Dalian mini-Ministerial meeting 12-13 July, the crisis of immobility had deepened every day.

Not surprisingly, intensive consultations on agriculture and tariffs between the TNC meeting on 21 July and the General Council on 27 and 29 July did not succeed in bridging these differences by late July. Some Ministers including EU Commissioner Peter Mandelson and U.S. Trade Representative Robert Portman made brief visits to Geneva in late July, but were unable to persuade WTO Members to reach any key decisions.

Dr. Supachai on 29 July provided his final comprehensive assessment of the Round as Director-General and Chair of the Trade Negotiations Committee ("TNC"), and remarked that overall since July of last year, "progress made has been insufficient." Supachai nevertheless acknowledged a strong level of engagement among Members, but warned that the negotiations were still marked by "a tendency towards brinkmanship among negotiators who should know better." Supachai urged Members to be pragmatic in their approach and suggested a "checkpoint" by mid-October to achieve convergence on the key outstanding issues leading up to the Hong Kong Ministerial.

It appears that, precisely because the agriculture modalities will largely decide final outcomes in other areas, governments will only make concessions on them at the last minute. This is for political, not technical reasons; the negotiations are certainly very complex but the parameters are well understood and the range of possible outcomes is limited. It was perhaps always unrealistic to expect fundamental decisions to be taken a year or more before the end. Notwithstanding this situation, continued brinkmanship will demolish the Hong Kong strategy and leave too little time next year for productive negotiations in services, NAMA and other areas which are held hostage to agriculture.

B. Agriculture Talks Still Lagging, and Dragging Others Along

On 23 May the Chairman of the agriculture negotiations, Ambassador Tim Groser of New Zealand, was relieved of his ambassadorial post following his decision to stand as a candidate for the opposition National Party in the forthcoming elections. He stayed on in the agriculture Chair until end of July, where his contribution has been extraordinary both in terms of intellectual input and managerial skill. He would be extremely difficult to replace, though his successor appointed on 29 July, New Zealand's new Ambassador Crawford Falconer, is another outstandingly able diplomat.

At the end of June Mr. Groser issued a very frank and detailed assessment of the state of the agriculture negotiations, identifying the many issues on which convergence and further guidance from Members was needed for a useful first approximation to be possible in July. He stressed the development aspect of the negotiations, which is indeed at the root of the entire Round. His objective for July was to produce a paper setting out areas of convergence within the three "pillars" of market access, domestic support and export subsidies, leaving until the autumn the political negotiations on the level of the reductions to be implemented. But, consultations in the last days of July on the major issue of blockage – market access, were marked by disagreement on an EU proposal for tariff reductions, which was found by Australia, Brazil, the US and others to be far too modest, especially in cutting the highest tariffs.

Supachai's report on 29 July confirmed the lack of progress in market access, and stressed in particular the need to define "key elements of the structure of the tiered formula for tariff reductions" as well as allowing for certain flexibilities, including treatment of sensitive products and of Special Products (SP). Supachai indicated the need for urgent progress in domestic support disciplines (e.g. formula for final bound total Aggregate Measure of Support) and export competition (e.g. state trading enterprises and food aid). Supachai also called for urgent development assistance to cotton dependent countries, given the fall in world prices.

C. NAMA Talks on Unbound Tariffs: Hope for Liberation

The Chairman of the NAMA negotiations, Ambassador Stefan Johannesson of Iceland, issued a similarly realistic assessment on 8 July, concluding that on the most fundamental element of the negotiations, the tariff reduction formula, "we have reached an impasse", and expressing concern over the apparent hardening of positions in recent days. There had been some convergence towards a "Swiss formula" that would result in deeper cuts on higher tariffs, and towards flexibility for developing countries on "sensitive products," but wide differences remain and Johannesson said that without further convergence it would be impossible for him to issue a text that would bridge these differences. He also suggested that linkage to agriculture was impeding progress.

Supachai's report on 29 July confirmed this assessment: "unfortunately, like in Agriculture, and probably because of it…progress has been insufficient and much remains to be done." Supachai described the impasse as a "chicken and egg" situation where some Members do not want to discuss reduction targets (or the formula) without a structure, while other Members resist discussing the structure without the numbers for the formula. He noted that the formula and treatment of unbound tariffs remain the highest priorities. Supachai was also encouraged by the growing convergence in recent weeks towards a non-linear mark-up approach for unbound tariffs.

D. Services Expectations: Not Yet Dashed, But Far From Dashing

The negotiations on services were expected to offer the most important gains in this Round for the EU and the US, to offset concessions which they must make elsewhere, especially in agriculture. It now appears more likely, on the contrary, that lack of progress in services will pose a threat to the Round as a whole, because there will be no such offsetting gains. Only 68 countries have yet submitted initial offers of commitments – more than two years after the target date – and only 24 have submitted the "improved" offers for which the target was the end of May. In a late-June assessment of the state of play, Ambassador Jara of

Chile, chairing the negotiations, deplored the absence of offers in many sectors, the lack of real improvements in market access in the offers which have been tabled and the large number of Members who have made no offers at all.

Efforts have been made to supplement the bilateral request-offer process with "benchmarks" – meaning agreed criteria or standards by which offers might be assessed. These ideas, however, have been opposed by some developing countries who see them as introducing a "formula" approach to the negotiations. In other areas, the negotiations on Domestic Regulation of services have made some progress, but on Safeguards, Subsidies and Government Procurement there are few signs of serious negotiation. Chairman Jara in his report to the Trade Negotiations Committee, included a summary of the expectations and objectives of members in the market access and rules negotiations. He was encouraged that Members clarified their expectations, including their views on key barriers on a sector-by-sector and cross-modal basis.

Supachai's report on 29 July indicated that services talks have "shown moderate signs of improvement" given the recent offers.

E. Rules Advance: Expediting Talks in Trade Facilitation

Negotiations on Dumping and on Countervailing Measures have been active, with many detailed proposals tabled on the "clarification and improvement" of the Anti-dumping Agreement. However, in the view of the Chairman as reported to the TNC, an agreement on anti-dumping could not be self-balancing, but would have to be linked closely with acceptable results in agriculture and NAMA (in order to provide benefits offsetting the concessions the US and others would make on dumping). In regards to reform of the Subsidies and Countervailing Measures (SCM) Agreement, few proposals have been made and the level of activity suggests that little should be expected by way of changes in the existing disciplines under the SCM. In regards to fisheries subsidies, by contrast, there has been progress, with the focus on the content of possible new disciplines rather than on the question whether disciplines are needed at all.

Negotiations on Trade Facilitation, a subject which offers real benefits to business, are reported to be proceeding satisfactorily. A joint proposal by India and the US is a notable recent development.

Supachai's report on 29 July acknowledged the Rules negotiations have "substantially intensified" their discussions this year. He cited some progress including in work to improve transparency for regional trade agreements. He also was encouraged that negotiations on Trade Facilitiation are "progressing well and are on schedule" and encouraged attention towards technical assistance to developing countries in order to implement the anticipated reforms.

F. Development: Implementation Lacking, Concerns Abound

Consultations on the long list of outstanding "implementation issues" raised by developing countries concerning the operation of the Uruguay Round agreements have been unproductive. On all of the issues concerned, ranging from Customs Valuation to the enhanced protection of geographical indications for products other than wines and spirits, Dr. Supachai reported to the TNC that there had been no progress and no convergence since his last report in May. The overhang of these unresolved development issues could be a serious problem at the end of the Round – not because they are important in themselves but because they will be said to represent neglect of the "development agenda" which is supposed to symbolize this Round.

Supachai's report on 29 July made similar warnings of the lack of progress in addressing development and implementation concerns, and urged Members to overcome their differences in terms of the "nature and extent of this flexibility" provided to developing countries. Supachai also indicated that the deadlock on implementation issues is primarily due to political disagreements over the issue of extending geographical indications to other products.

III. WTO Dispute Settlement: When Negotiation Falters, Litigation Proliferates

While the Doha Round falters, the WTO continues to perform its function as the world trade court efficiently. The political significance of this function can only increase if the Members continue to fail to agree at the multilateral level. Nevertheless, most countries claim to prefer law-making by negotiation to legislation by dispute settlement panels. But, if negotiations continue to lag, the most contentious barriers could be subject to a proliferation of litigation.

A. No Cow or Subsidy is Sacred

In one prominent example of this approach, the WTO Appellate Body confirmed in May that EU sugar subsidies violated the export subsidy disciplines of the Agreement on Agriculture. As a result, the European Commission in June proposed major reforms to its sugar regime, provoking complaints from developing and least developed countries concerned about losing preferential access to the protected EU sugar market. The finding, which followed closely on a WTO ruling against U.S. subsidies to cotton producers (similarly, the US in July announced it would seek to repeal certain cotton subsidies as a result of the dispute), was the first WTO decision against a major EU agricultural subsidy program. More recently, Uruguay announced it would challenge another major and sensitive agricultural commodity – U.S. rice subsidies. Thus, failure to cut agricultural subsidies substantially in the Doha Round will certainly result in growing legal challenges to other programs.

B. And All Challenges Between the Sunset and Sky

In June, a Panel ruled that the U.S. "Sunset Policy Bulletin", which preordains when the US Department of Commerce will find "likely dumping" and therefore extend the duration of anti-dumping orders, violates the Anti-Dumping Agreement. The Panel found that the Bulletin established an "irrebuttable presumption" of likely continued dumping, contrary to the obligation to ensure a "sufficient factual basis" to extend anti-dumping orders. This is important because in every one of 232 cases since 1 January 1995 in which U.S. industry has participated the Department of Commerce has found that continued dumping was "likely" if the order was allowed to expire.

Following this trend of high-profile disputes, on 20 July the Dispute Settlement Body agreed to establish two panels to examine, respectively, the U.S. complaints about European Community subsidies to Airbus and EC complaints against U.S. subsidies to Boeing. These cases have been referred to as the largest and most complex to come before the WTO, and some fear that they may stretch the political capacity of the system – the capacity to adjudicate major and intensely politicized issues – to the breaking point. Nevertheless, both sides have indicated that they would prefer to find a negotiated solution, since neither is likely to be a clear winner in the WTO.

In the meantime, however, the functional dispute settlement system provides the major benefit of recourse to law as opposed to the unilateral sanctions and retaliation, which are the only alternative.

OUTLOOK

The Doha Round is in serious difficulty, particularly given WTO Members' failure to meet expectations at the end of July. There is reason to doubt whether the process can produce results in short time and whether the package of results likely to emerge in Hong Kong and beyond will be sufficient to carry key governments through the political difficulties entailed by reform in agriculture and other sensitive areas of policy.

Clearly, the autumn will be a crucial period in which Members must abandon their persistent posturing and entrenched positions. If Lamy and other key players are unable to plot the necessary reforms in agriculture and NAMA by December, then the landscape will quickly become infertile for all areas of the Doha Round. As a result, the start of winter in Hong Kong will turn into a fruitless exercise where the poorer countries stand to suffer the most.

If the Doha Round fails, the current rush to negotiate regional and preferential agreements can only be exacerbated. Nevertheless, in over 50 years of the GATT/WTO, no round has yet failed: the Uruguay Round was written off many times before producing the biggest of all post-war trade agreements. Rather, the anticipated "deadline" of end-2006 might have to be re-evaluated and postponed again if key decisions are not made by the Hong Kong Ministerial. If indeed the Doha Round is too important to fail for most of the WTO membership (which is not entirely clear despite the political statements), then it might require more time and effort to conclude.

In any case, the WTO system is the indispensable legal underpinning of world trade and is not to be judged solely on its ability to generate new agreements. Still, the harvest of a major deal as the Doha Development Agenda would be far more preferable to stunted growth and yet another bitter, winter gathering. Thus, it remains to be seen if Hong Kong in 2005 will repeat Seattle's fate in 1999, or more importantly, whether the Doha Round will mimic the historical trends favoring WTO/GATT negotiations.

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For further information, please contact David Hartridge in Geneva (dhartridge@whitecase.com).

After seven years at White & Case following WTO developments, Mark Nguyen is departing on 19 August 2005, and can be reached afterwards at markdn99@aol.com.

A special thanks to David, and to our loyal readers.

Multilateral Highlights

Mexico and United States Appeal WTO Panel Decision in US - OCTG Case

On August 10, 2005, the Mexican Delegation circulated to WTO Members its notification of an appeal of the WTO Panel Decision in *United States - Anti-dumping Measures on Oil Country Tubular Goods Oil Country Tubular Goods (OCTG) from Mexico* (WT/DS282). The Mexican Delegation asked the Appellate Body to make the following determinations:

- The Sunset Review Determination of the US International Trade Commission ("USITC") in *OCTG from Mexico* was inconsistent with the Anti-Dumping Agreement ("ADA") and Article VI of the GATT 1994 because the USITC did not establish the required causal link between the likely dumping and the likely injury;

- The Sunset Review Determination of the USITC was WTO-inconsistent because the USITC failed to comply with the conditions for a WTO-consistent likelihood of injury analysis;

- The Panel did not comply with its obligation under Article 11 of the Dispute Settlement Understanding (DSU) to make an objective assessment of the matter before it; and

- The United States had no legal basis to continue its anti-dumping measure on OCTG from Mexico beyond the five-year period established by Article 11.3 of the Anti-Dumping Agreement.

On August 19, 2005, the delegation of the United States filed its own appeal of the Panel's decision. In its notification statement, the US Delegation asked the Appellate Body to review the Panel's finding that the Sunset Policy Bulletin is inconsistent with Article 11.3 of the ADA. The United States argued that the Panel failed to apply the correct burden of proof and that it failed to apply the correct standard in evaluating whether the Sunset Policy Bulletin is inconsistent with Article 11.3 of the ADA.

These appeals follow the Panel Report, issued on June 20, 2005. The Appellate Body Report is expected to be circulated no later than November 2, 2005.