WHITE & CASE

May 2008

Japan External Trade Organization WTO and Regional Trade Agreements Monthly Report

IN THIS ISSUE

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

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Summary of Reports

United States

Negotiators Unveil House-Senate Conference Report on Farm Bill; Administration Threatens Veto Action

On May 13, 2008, the House Committee on Agriculture released the conference report on "The Food, Conservation, and Energy Act of 2008" (H.R. 2419), the latest version of the Farm Bill. Completion of a final Farm Ball had been stalled since 2007 due to differences among House and Senate conference negotiators on the substance of the final bill, consequently leading to short-term extensions of the provisions of the 2002 Farm Bill (which formally expired on September 30, 2007). On May 8, 2008, however, House and Senate Farm Bill conference negotiators announced that they had reached agreement on the elements of a final Farm Bill conference report. We highlight here major elements of the conference report on the Farm Bill and reaction to the agreement, as well as discuss next steps for Congress' and the Administration's consideration of the Farm Bill.

United States Highlights

We would like to alert you to the following United States highlights:

- Senate to Re-Do Vote on Farm Bill, Followed by Expected Presidential Veto and Congressional Veto Override
- USTR Announces 2008 Annual GSP Review, Sets Deadlines for Petitions
- Supreme Court Agrees to Hear Case on Application of US Trade Remedy Law to Services
- DOC Publishes Final 2007 Calculation of Expected Non-Market Economy Wages
- DOC Seeks Public Comments on Use of Shorter Cost Averaging Periods in AD Proceedings
- DOC Seeks Public Comments on Proposed Targeted Dumping Methodology

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Free Trade Agreements

USTR Packs Spring Agenda with TIFA Meetings

The Office of the United States Trade Representative (USTR) has met with different US trading partners over the past several weeks under various Trade and Investment Framework Agreements (TIFAs). We highlight here these meetings and their agenda items.

Multilateral

Doha Agriculture, NAMA Chairs Release Latest Revised Draft Texts; WTO Officials Optimistic With "Intensified" Progress

On May 19, 2008, the Chairs of the World Trade Organization's (WTO) Agriculture and Non-Agricultural Market Access (NAMA) negotiating groups issued revised Agriculture and NAMA draft "modalities" texts as part of the Doha Round of multilateral negotiations. The texts are revisions of drafts that the Chairs previously circulated in July 2007 and February 2008, and according to the WTO, they reflect WTO Members' latest positions in the agriculture and NAMA negotiations since September 2007. According to WTO officials, the two revised papers include "what could become the formulas for cutting tariffs and trade-distorting agricultural subsidies in a final [Doha] deal, and will serve as the basis for intensive high-level negotiations in Geneva aimed at securing final agriculture and NAMA agreements over the next several weeks."

WTO "Compliance" Panel Report: *European Communities — Regime for the Importation, Sale and Distribution of Bananas — Recourse to Article 21.5 of the DSU by the United States* (DS27)

Decision: A WTO "compliance" panel has ruled that the revised EC import regime for bananas is WTO-inconsistent. In a claim brought by the United States, the Panel found that the preferences granted by the EC for bananas from the African, Caribbean and Pacific (ACP) countries were inconsistent with the obligations of the EC under GATT Article I (Most Favoured Nation) and Article XIII (non-discriminatory application of quantitative restrictions). Accordingly, the Panel concluded that the EC failed to implement the original, 1997 rulings of the WTO Dispute Settlement Body (DSB).

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WTO Chair Issues Revised Services Text, While Doha Rules Chair Outlines Status of Sector Negotiations

We highlight here several developments in the World Trade Organization (WTO) Doha Round negotiations on Services and on Rules. On May 26, 2008, Chairman of the WTO's Doha Round negotiations on services Fernando de Mateo issued a report on the elements required for the completion of the negotiations. The report is based on consultations that the Services Chair has conducted with WTO Members since the issuance of the first draft "modalities" text on February 13, 2008. Separately on May 28, 2008, the Chair of the Negotiating Group on Rules Guillermo Valles Galmes issued a working document regarding the Doha negotiations on Rules. According to the WTO press release, the document – which includes a cover note and three annexes relating to anti-dumping, horizontal subsidies and fisheries subsidies – "seeks to convey in detail the full spectrum and intensity of the reactions to the Chair's first draft texts and, to the extent possible, to identify the many suggested changes put forward by delegations."

Multilateral Highlights

- WTO Announces Ukraine's Successful Accession; Ukraine Becomes 152nd WTO Member

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Reports in Detail

United States

Negotiators Unveil House-Senate Conference Report on Farm Bill; Administration Threatens Veto Action

Summary

On May 13, 2008, the House Committee on Agriculture released the conference report on "The Food, Conservation, and Energy Act of 2008" (H.R. 2419), the latest version of the Farm Bill. Completion of a final Farm Ball had been stalled since 2007 due to differences among House and Senate conference negotiators on the substance of the final bill, consequently leading to short-term extensions of the provisions of the 2002 Farm Bill (which formally expired on September 30, 2007). On May 8, 2008, however, House and Senate Farm Bill conference negotiators announced that they had reached agreement on the elements of a final Farm Bill conference report. We highlight here major elements of the conference report on the Farm Bill and reaction to the agreement, as well as discuss next steps for Congress' and the Administration's consideration of the Farm Bill.

The full conference report on "The Food, Conservation, and Energy Act of 2008" (H.R. 2419) is available at: http://agriculture.senate.gov/.

Analysis

I. Background

On July 27, 2007, the House of Representatives approved its Farm Bill Extension Act of 2007 (H.R. 2419) by a margin of 231 to 191. The Senate passed its Farm, Nutrition and Bioenergy Act of 2007 (H.R. 2419) on December 14, 2007 by a vote of 79 to 14. Even though Congress' consideration of the Farm Bill began in 2007, the talks have stretched into 2008. Farm Bill talks had stalled over proposed offsets that would allow additional new spending over the current 10-year USD 560 billion Farm Bill baseline. Senate and House negotiators differed over the amount of proposed offsets and the addition of some other provisions to the Farm Bill, including tax provisions supported by the Senate Finance Committee and a disaster-aid program supported by Senate Finance Committee Chairman Max Baucus (D-MT). Specifically, the Senate originally proposed spending an additional USD 12.5 billion (which includes a USD 2.5 billion package of tax credits and a USD 4 billion disaster program) over the Farm Bill's baseline.

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The House of Representatives originally proposed only USD 6 billion in additional spending above the baseline and objected to the inclusion of the tax credits in the Farm Bill.

The stretched-out talks have led Congress and the President to approve several short-term extensions of the 2002 Farm Bill. On May 1, 2008, Congress approved the latest two-week extension of the 2002 Farm Bill in order to provide negotiators with additional time to finalize a Farm Bill deal between the Senate and the House of Representatives. The bill extends provisions of the 2002 Farm Bill until May 16, 2008. This is the fifth extension of the 2002 Farm Bill that Congress has passed since it began deliberating the Farm Bill in 2007. The majority of the 2002 Farm Bill's provisions expired on September 30, 2007, and in December 2007, Congress renewed provisions of the 2002 Farm Bill for an additional three months – until March 15, 2008 – in order to allow enough time for Senate and House negotiators to hammer out differences between the two versions of the Farm Bill. On March 12, 2008, the Senate and the House of Representatives passed a bill (S. 2745) that extended agricultural programs under the 2002 Farm Bill beyond March 15, 2008 (i.e., until April 18, 2008). Congress followed this extension with three more, the most recent (as noted) extending the 2002 Farm Bill until May 16, 2008.

II. House-Senate Farm Bill Conference Report

On May 8, 2008, House and Senate negotiators announced that they had reached agreement on final provisions to include in the Farm Bill. On May 13, 2008, conferees made the conference report on "The Food, Conservation, and Energy Act of 2008" (H.R. 2419) available to the public. We highlight here several of the main provisions of the conference report on H.R. 2419.

A. Commodity Provisions

The following provisions are included under the Commodity Title of the Farm Bill:

- ***Direct Payments.*** The bill states that for each of the 2008 through 2012 crop years of each covered commodity, the Secretary of Agriculture will make direct payments to producers on farms for which base acres and payment yields are established.
- ***Countercyclical Payments.*** The bill states that for each of the 2008 through 2012 crop years for each covered commodity, the Secretary of Agriculture will make countercyclical payments to producers for which payment yields and base acres are established if the Secretary determines that the effective price for the covered commodity is less than the target price for the covered commodity.
- ***Farm Commodity/Disaster Program Benefit Eligibility.*** The bill sets new standards for farm commodity and disaster program benefit eligibility. To receive farm program benefits, an individual's

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non-farm income may not exceed USD 500,000. If farm income exceeds USD 50,000, an individual will no longer be eligible to receive direct payments.

- ***Disaster Assistance.*** The bill includes a disaster assistance program to assist farmers who lose their crops, livestock or trees or suffer from shallow losses due to disasters such as floods or drought. The program complements the existing crop insurance program and provides additional assistance to farmers based on loss of crop revenue for their whole farm operation. The additional payments are based on their level of losses compared to a benchmark proportional to their level of crop insurance coverage purchased at the beginning of the crop year. As noted, Senate Finance Committee Chairman Baucus fought hard for inclusion of this program in the Farm Bill.
- ***Crop Revenue Election Acre Program.*** According to the conference report, producers will have the option, beginning with the 2009 crop year, to participate in a state-level revenue protection system. Participants agree to a 20 percent reduction in direct payments and a 30 percent reduction in loan rates in exchange for eligibility for a state-based revenue guarantee on acres planted.
- ***Target Prices and Loan Rates.*** The bill adjusts loan rates and target prices of existing commodities beginning with the 2010 crop year and provides additional program coverage for certain pulse crops beginning with the 2009 crop year.
- ***Dairy Support.*** The bill replaces the current milk price support of USD 9.90 per hundredweight with separate support prices for cheddar cheese, butter and nonfat dry milk. If the price for one of these dairy commodities is lower than the support price, then the US Department of Agriculture (USDA) will purchase the product at the support level. Under the bill, the Milk Income Loss Contract (MILC) program is restored to cover 45 percent of the shortfall between USD 16.94 per hundredweight and the Boston Class I milk price.
- ***Sugar Support.*** The conference report sets the cane sugar loan rate at 18 cents per pound for the 2008 crop year, 18.25 cents for 2009, 18.50 cents for 2010, and 18.75 cents for 2011 and 2012. The beet sugar loan rate is set at 22.9 cents per pound for the 2008 crop year and a rate that is equal to 128.5 percent of the applicable loan rate per pound of raw cane sugar for the 2009 – 2012 crop years. The sugar marketing allotments are amended and extended through the 2012 crop. The overall allotment quantity for a crop year is not less than 85 percent of the estimated quantity of sugar needed for domestic human consumption for the crop year.
- ***Peanut Support.*** Under the bill, the peanut program is continued under a separate subtitle with program features similar to those for covered commodities. The direct payment rate is USD 36 per

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ton; the target price is set at USD 495 per ton, and the marketing loan rate is USD 355 per ton. The bill requires USDA to cover storage, handling and associated costs for forfeited peanuts.

B. Conservation Provisions

The following provisions are included under the Conservation Title of the Farm Bill:

- ***Conservation Stewardship Program.*** The bill revamps the Conservation Stewardship Program (CSP), a program focused on incentivizing new conservation while simultaneously rewarding producers for achieving high levels of stewardship and addressing priority resource concerns in their area.
- ***Cooperative Conservation Partnership Initiative.*** The bill creates the Cooperative Conservation Partnership Initiative, a major conservation innovation initiative that provides funds for carrying out cooperative projects that bring together producers, states, nonprofit organizations and other groups.
- ***Other Conservation Initiatives.*** Other provisions of the bill secure conservation benefits on working lands, the preservation of wetland acres, the restoration of the Chesapeake Bay, the protection of US grasslands, and that conservation of habitat on agricultural, forest and tribal land.

C. Trade Provisions

The following provisions are included under the Trade Title of the Farm Bill:

- ***Food Aid.*** The bill addresses US international food aid programs and problems associated with them, such as lack of attention to food aid quality and inadequate assessment of development in recipient countries. The bill also increases the ability of the US government to pre-position US commodities in overseas warehouses, thus allowing expedited food donations to countries facing emergencies.
- ***Specialty Crops.*** The bill increases funding for a program that provides financial assistance to producers and exporters of specialty crops in addressing technical and sanitary and phyto-sanitary barriers against their products in overseas markets.
- ***Export Programs.*** The bill modifies export credit guarantee programs to make them consistent with the ruling in the World Trade Organization (WTO) cotton dispute and reauthorizes the Market Access Program, Foreign Market Development Program, and the Emerging Markets and Facilities Loan Guarantee program.

D. Nutrition Provisions

The following provisions are included under the Nutrition Title of the Farm Bill:

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- ***Food Stamp Program and Assistance.*** The bill provides additional funding (USD 5.4 billion over the next ten years) for the Food Stamp Program. The bill also increases assistance to families with high child care expenses by allowing full deduction for child care expenses in calculating family income/ benefit levels.
- ***Fresh Fruits and Vegetables Program.*** The bill expands the Fresh Fruit and Vegetable Program, which provides free fresh fruits and vegetables to low-income children in schools; over the next ten years, USD 1 billion is invested in this initiative.

E. Agricultural Research and Extension Provisions

The following provisions are included under the Agricultural Research Title of the Farm Bill:

- ***National Institute of Food and Agriculture (NIFA).*** The bill creates the NIFA, which will "strengthen competitively-awarded agricultural research funding and focus on the infrastructure needs of the land-grant university system to deliver research results to the public." All of the authorities under the Cooperative State Research, Education and Extension Service (CSREES) are transferred to NIFA.
- ***Specialty Crop Research.*** The bill provides USD 230 million in mandatory funds for the Specialty Crop Research Initiative, a new grants program for producers of specialty crops involving mechanization, plant breeding, genetics, genomics, pests and diseases and food safety.

F. Forestry Provisions

The following provisions are included under the Forestry Title of the Farm Bill:

- ***Forest Conservation.*** The bill's forestry title establishes national priorities for private forest conservation including: (i) conserving and maintaining working forest landscapes for multiple uses; (ii) protecting forests from threats to forest health; and (iii) enhancing public benefits from private forests.
- ***Illegal Logging.*** The bill amends current law to provide additional tools for the US government to prevent trade in illegal timber.

G. Energy Provisions

The following provisions are included under the Energy Title of the Farm Bill:

- ***Biomass Crops.*** The bill creates and fully funds a program to encourage farmers to establish and grow biomass crops in areas around biomass facilities such as biorefineries. The bill also provides matching payments to producers for harvest, transport and storage of biomass delivered to such a

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facility, as well as USD 320 million in mandatory funding for loan guarantees for commercial scale biorefineries for advanced biofuels.

- ***Renewable Energy.*** The bill provides USD 250 million in mandatory funding to provide grants and loan guarantees for renewable energy and energy efficiency systems for farmers, ranchers and rural small businesses.
- ***Advanced Energy.*** The bill provides USD 300 million in mandatory funding for payments to support the production of advanced biofuels, including biodiesel and cellulosic biofuels.

H. Livestock Provisions

The following provisions are included under the Livestock Title of the Farm Bill:

- ***Origin Labeling.*** The bill requires retailers to label the country of origin of meat, (such as beef, lamb, pork, chicken and goat meat), fish, fruits and vegetables, ginseng, peanuts, pecans and macadamia nuts by September 30, 2008.
- ***Producer Protections and Contracting Fairness.*** The bill ensures producers are not forced into mandatory arbitration in livestock or poultry contracts, and also enables a swine or poultry producer to litigate a contract dispute where the principal part of their production occurs, instead of where the company headquarters is located.

I. Tax Provisions

The following tax provisions are included in the Farm Bill:

- ***Cellulosic Biofuels.*** The bill includes a new tax incentive for developing cellulosic biofuels that will be offset by a gradual reduction of the current ethanol tax credit. The bill also includes a new production tax credit for cellulosic biofuels for up to USD 1.01 per gallon, available through December 31, 2012, at an estimated cost of USD 403 million over 10 years.
- ***Ethanol Credit.*** The bill reduces the current ethanol credit of 51 cents per gallon by 6 cents, after annual production reaches 7.5 billion gallons.
- ***Preventing Tax Shelters.*** The bill limits the amount of farming losses that a taxpayer may use to reduce other non-farming business income to the greater of USD 300,000 or the net farm income for the previous five years if the taxpayer receives Farm Bill commodity payments.

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- ***Self-Employment Taxes.*** The bill modifies the farm optional method so that farmers and ranchers may pay more in optional self-employment taxes so they may be eligible to secure Social Security benefits.

- ***Additional Provisions.*** Additional provisions include requiring the Commodity Credit Corporation to always provide the Internal Revenue Service (IRS) and the farmer with information returns showing the amount of market gain the farmer realizes when he or she repays a CCC market assistance loan, an exclusion of denaturant from eligibility for the alcohol fuel credit, an extended tariff on imported ethanol, and a duty drawback on certain imported ethanol.

J. US Preference Program Provisions

The following provisions on US preference programs are included in the Farm Bill:

- ***Caribbean Trade Partnership Act (CBTPA).*** The bill extends the CBTPA for two additional years. The CBTPA is scheduled to expire on September 30, 2008.

- ***Haitian Hemispheric Opportunity Through Partnership Encouragement Act (HOPE).*** The bill expands the HOPE Act by including six stand-alone rules for apparel and some textile products to qualify for duty-free treatment. The bill also authorizes provisions aimed at promoting compliance with core labor standards and improving textile and apparel sector working conditions.

III. Administration Reaction to Farm Bill Conference Report

The Bush Administration's reaction to the conference report on the Farm Bill was negative. In fact, the Bush Administration has expressed its concern with the increased spending limits and other provisions in the Farm Bill since Congress began drafting the bill in 2007, and has repeatedly threatened to veto a final Farm Bill that does not address the Administration's concerns. On May 13, 2008, President Bush issued a statement reaffirming the Administration's veto threat. In his statement, President Bush stated that he was "deeply disappointed in the conference report . . . as it falls far short of the proposal my Administration put forward" and noted that "if this [Farm Bill] makes it to my desk, I will veto it."

With the release of the conference report on May 13, the Bush Administration was able to highlight its specific objections to the latest version of the Farm Bill, including:

- ***Increased Farm Bill Spending and Subsidies.*** The Administration objects to increased subsidy levels within the Farm Bill. The Administration also objects to the conferees' removal of a limitation under which "crop subsidies kick in only when the price drops below a certain level." The Bush Administration accuses conferees of "allow[ing] unprecedented and uncapped subsidies at any price."

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The Administration also objects to the increased spending in the Farm Bill and reports that "the actual increase in spending under the proposed Farm Bill is nearly USD 20 billion, not the USD 10 billion that Congress is claiming." According to the Administration, the additional spending not being acknowledged by Congress includes: "(i) USD 4.5 billion not counted as a result of a budget gimmick to shift the timing of payments; (ii) USD 4 billion in illusionary savings created by cutting off funding for certain programs, including disaster assistance; and (iii) USD 1.4 billion in new tax provisions."

- ***Lack of Reform.*** The Administration contends that the latest version of the Farm Bill does not contain any real reform for US agricultural programs. According to the Administration, the Farm Bill does not reform **payment limitations** and instead "allows for excessively high limits on the level of allowable income for receiving farm subsidies." The Administration also criticized the Farm Bill for failing to reform: (i) **crop subsidies** by increasing instead of decreasing the subsidy level for several different crops; (ii) the **sugar program** by "actually increasing government intervention to drive up sugar prices;" and (iii) the **marketing loan program** by "refusing to eliminate provisions that allow producers to lock in large subsidies when prices are low but then wait to sell their product when prices are high – collecting both the subsidy and the high market price."

- ***Limited Conservation.*** The Administration also expressed disappointment that the Conservation Title in the Farm Bill is USD 4 billion less than the Administration's proposal. The Administration opined that the Conservation Titles actually "reduces enrollment in Wetlands Reserve Program by thousands of acres, falling short of the President's goal of 250,000 acres enrolled per year."

- ***Other Issues.*** The Administration criticized the Farm Bill's proposed HOPE initiative, and stated that the bill directs Haiti to establish a Technical Assistance Improvement and Compliance Needs Assessment and Remediation Program (TAICNAR Program). According to the Administration, the International Labor Organization (ILO) will operate this program, and will monitor and assess whether Haiti is meeting its requirements on ILO "core" internationally recognized labor rights. Under the conference report, the President "shall consider" these reports as he makes his decision about whether a Haitian textile producer "has failed to comply with core labor standards and with the labor laws of Haiti that directly relate to and are consistent with core labor standards." If he finds that the producer has failed to comply, he "shall withdraw, suspend, or limit" the trade preference for that producer. According to the Administration, this provision subordinates "the President's decision-making on US trade preferences to an international labor agency . . . [and] would mandate that he consider the ILO determinations on Haitian producers in granting or denying trade benefits."

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According to a White House press release, in sum, "conferees wrote a bill that fails to implement any meaningful reform, exceeds the spending baseline by nearly USD 20 billion, and uses budget gimmicks to pay for much of this increased spending . . . [m]oreover, conferees inserted unrelated trade provisions outside the scope of the farm bill." The White House urges Congress to extend provisions of the 2002 Farm Bill for at least one more year so that Congress can draft a new Farm Bill that takes into consideration the Administration's concerns. Otherwise, Bush Administration officials have warned that President Bush will likely veto the Farm Bill, a threat that the Administration has repeated since Congress began considering the Farm Bill in 2007.

IV. Private Sector Reaction to Farm Bill Conference Report

The private sector's initial reaction to the conference report on the Farm Bill from was positive. In a May 13, 2008 letter to the Senate, more than 100 US agricultural producers and agriculture groups urged Senators to vote in favor of the conference report. According to the letter, US agricultural producers "have been waiting too long for this legislation," and voting in favor of the conference report will ensure "significant farm policy reforms and safety net for all of America's food producers." Although the letter acknowledges that the conference report is not "a perfect piece of legislation," it does state that the conference report balances policy priorities that enjoy broad support among agricultural producers and agriculture groups. Groups signing the letter included the American Farm Bureau Federation (AFBF), the American Corn Growers Association (ACGA), the Southern Shrimp Alliance (SSA), and the US Cattlemen's Association, among others.

V. Congress and Administration Prepare for Upcoming Battle

In response to the Bush Administration's repeated veto threats, some members of Congress have opined that the Farm Bill enjoys broad support among legislators, hinting that Congress may have the required two-thirds majority required to override a veto of the Farm Bill. Senate Agriculture Committee Chairman Tom Harkin (D-IA) stated that the conference report represents a strong, bipartisan Farm Bill that many members of Congress see as beneficial for their constituents. House Agriculture Committee Ranking Member Robert Goodlatte (R-VA) echoed those statements and noted that he is encouraging House leadership "to let members vote based on what is best for their constituents." Rep. Adam Putnam (R-FL) opined that the conference report will receive broad support, "especially because a substantial number of Republicans have farming interests in their states."

The Administration, however, has made it clear that it intends to fight any efforts to override the veto of the Farm Bill. Secretary of Agriculture Ed Schafer and Deputy Secretary of Agriculture Chuck Conner

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have reiterated President Bush's likely veto of the Farm Bill, and noted that the Administration has additional concerns with the conference report on the Farm Bill, namely: (i) that the permanent disaster program included in the Farm Bill may be considered a trade-distorting subsidy under WTO rules; (ii) that the Farm Bill increased the loan rates for 15 crops and target prices for 17 crops; (iii) that the bill includes a new subsidy to domestic textile mills worth an estimated USD 400 million to replace the US cotton "Step 2 "program found to violate WTO rules in the US-Brazilian cotton dispute; and (iv) that the sugar provisions of the Farm Bill would require 85 percent of sugar used in the United States to come from domestic sources. Both Schafer and Connor acknowledged that these four areas of concern would likely be problematic for US trading partners as well, and that US trading partners may challenge the WTO-consistency of some these measures.

VI. Next Steps

With the latest extension of the 2002 Farm Bill set to expire on May 16, 2008, Congressional sources expect the House of Representatives to consider and vote on the conference report on H.R. 2419 before the May 16 deadline, as early as May 14. The timing of Senate consideration of H.R. 2419 is unclear but is also expected during the same week. If the House and the Senate approve the conference report on the Farm Bill, it will be delivered to the President for his signature. At that stage, the President has two options: (i) veto the Farm Bill; or (ii) refuse to sign the Farm Bill, at which stage it will become law ten days after being delivered to the President for his signature. Government sources opine that under the current environment, the first option (a veto) is the most likely scenario to occur, although they have not ruled out a last-minute deal between the President and members of Congress. If the President vetoes the Farm Bill, Congress can override the veto with a two-thirds majority vote in both the House of Representatives and the Senate; this move would enact the Farm Bill into law despite the President's veto.

Outlook

The sparring between the Administration and Congress on the Farm Bill has set the stage for a final showdown that could witness a veto by the President and a Congressional override of that veto. The Bush Administration has remained firm throughout the drafting of the Farm Bill that the final bill should decrease spending (below 2002 Farm Bill levels) and "significantly reform" other agricultural provisions. Members of Congress, however, have finalized a Farm Bill that exceeds the USD 560 billion 10-year baseline by USD 10-20 billion, in addition to adding provisions to the Farm Bill that are sure to frustrate the Administration even more, including tax provisions and provisions that may push US trading partners to challenge the WTO consistency of the Farm Bill. At this stage, it does not seem likely that either side is willing to compromise. The Bush Administration has reiterated its veto threat consistently over the past

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couple of days, and members of Congress have responded with their own veto override threat. Thus, once the House and the Senate approve the conference report on the Farm Bill (and all signs are pointing to Congressional approval of H.R. 2419), the President will likely veto the bill, consequently igniting Farm Bill conferees to scramble in securing the two-thirds majority vote necessary to override the veto.

The showdown between the Administration and Congress is causing fresh concern among US agricultural producers and groups that the Farm Bill will not be implemented in the immediate future. US farmers and the agriculture lobby have already expressed their exasperation with the lengthy debate that surrounded the drafting of the Farm Bill. A Presidential veto of the bill and a Congressional veto override could delay final implementation even more. Provisions of the 2002 Farm Bill are scheduled to expire on May 16, 2008, and although the Administration has pushed for a year-long extension of the 2002 Farm Bill, it has not indicated where it stands on another possible short-term extension. Congress, on the other hand, has not provided any signs that it intends to introduce more short-term extensions, and legislators seem to be barreling through the final phases of Congress' Farm Bill consideration, even in light of the Administration's harsh criticism of H.R. 2419.

With the implementation of the latest Farm Bill in question and with no signs of further short term extensions of the 2002 Farm Bill, the US agriculture sector may be worried that permanent price supports will set in. If the 2002 Farm Bill is not extended after May 16, 2008, then US farm policy would revert to the non-expiring provisions of the Agriculture Adjustment Act of 1938 and the Agriculture Act of 1949. Congressional sources have opined that commodity support provisions of these permanent laws are different from current US farm policy, are inconsistent with current farming, marketing, and trade practices, and are costly to the federal government. For example, the permanent law does not authorize counter-cyclical payments or decoupled direct payments. Acreage allotments and marketing quotas could be implemented for wheat and cotton, and dairy support would be between 75 – 90 percent of parity. Support for rice and soybeans would not be mandatory under permanent law. Thus, as evident in the May 13 letter to the Senate, the US agriculture sector is firmly pushing for a resolution to the Farm Bill debate and successful implementation of H.R. 2419 before permanent price authorities kick in.

On the international front, US trading partners have been relatively quiet on the Farm Bill debate, no doubt because they are waiting to see the final provisions of the Farm Bill and what direction the Administration will take on the final measure. Trading partners' reaction to the latest Farm Bill, however, is likely to be negative. Several US trading partners – such as Brazil and Canada – have already challenged the WTO-consistency of certain provisions of the 2002 Farm Bill. The latest Farm Bill generally maintains – and in some cases, increases – the levels of support for different commodities and

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programs relative as in the 2002 Farm Bill. The Administration has consistently warned Congress that the Farm Bill should not provoke trading partners to challenge the United States at the WTO, an issue that Congress seems to have swept aside in increasing Farm bill spending, among other provisions. Thus, the United States may witness more criticism – and potential dispute action – from other WTO Members by the time the Farm Bill debate is concluded, regardless of the direction the debate takes.

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United States Highlights

Senate to Re-Do Vote on Farm Bill, Followed by Expected Presidential Veto and Congressional Veto Override

The Senate is expected to vote on the long-overdue Farm Bill the week of June 2, following the Memorial Day recess. A clerical error forced the House of Representatives and the Senate to re-do the votes on the Farm Bill, even though the President had already vetoed the version of the Farm Bill sent to him, and both chambers of Congress had overridden his veto.

President Bush vetoed the conference report of the Farm Bill sent to him by Congress (H.R. 2419) on May 21, 2008. That same day, the House of Representatives voted to override President Bush's veto by a vote of 316 to 108, more than the necessary two-thirds majority vote required to override a veto (*i.e.*, 283 votes). On May 22, 2008, the Senate voted 82 to 13 to override the veto, also more than the necessary two-thirds majority vote required to override a veto (*i.e.*, 64 votes).

But the discovery of a clerical error in the version of H.R. 2419 sent to President Bush required both chambers of Congress to re-do their votes. Specifically, the version of H.R. 2419 sent to the President (that he vetoed) did not contain the full 15 titles that the House and Senate had agreed upon in their conference report. The missing title – Title 3 on trade – had been omitted from the version sent to President Bush due to a printing error by the Office of the House Clerk (*i.e.*, only 14 of the 15 titles in the completed Farm Bill were sent to the President). The White House failed to catch the omitted title because they referred to the conference report of H.R. 2419 online rather than look at the printed Farm Bill conference report sent to the President (which omitted the trade title). The President vetoed and signed the printed conference report with the omitted title, and legislators only discovered the error hours before the scheduled veto override votes. Although the House and Senate overrode the veto, both chambers quickly decided to re-do the voting procedures for the full Farm Bill.

Specifically, Republicans complained that Congress was inviting legal action by voting on a Farm Bill that suffered from a serious technical error (*i.e.*, the missing trade title), and Democratic leaders agreed. On May 22, 2008, the House voted to pass the newly-numbered Farm Bill (H.R. 6124) that now contained the missing trade title. The House passed H.R. 6124 by a vote of 306 to 110. H.R. 6124 contains the exact same provisions as H.R. 2419 and was brought up for consideration under suspension of rules, a procedure that barred amendments to the Farm Bill.

Congressional sources state that H.R. 6124 will next move to the Senate likely during the week of June 2 for the Senate's consideration and vote. Congressional sources note that some Senators, such as the

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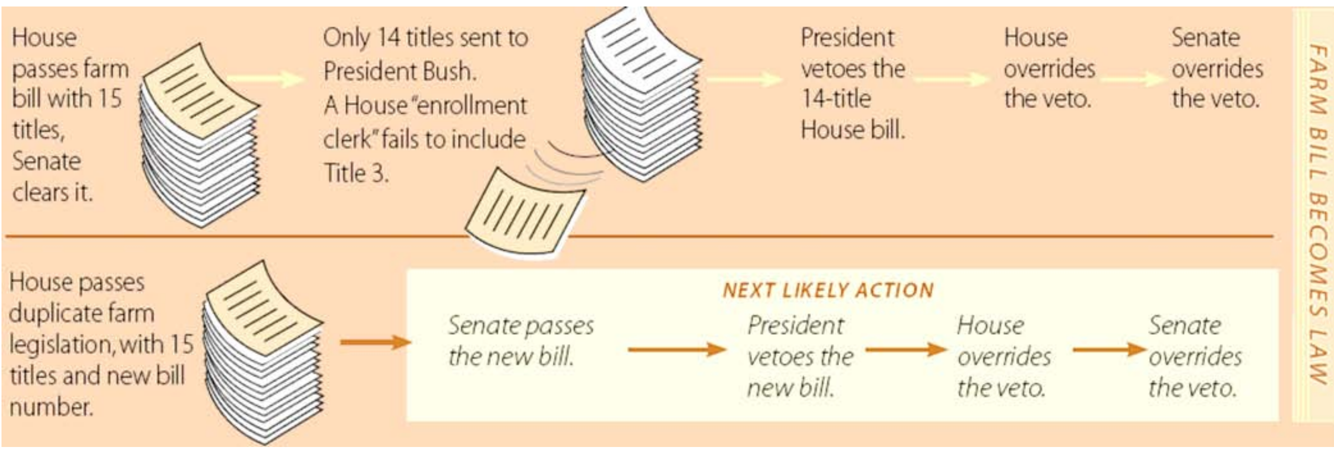
Senate Budget Committee's Ranking Member Judd Gregg (R-NH), have stated they will attempt to amend H.R. 6124, although these sources opine that those efforts are likely to fail in light of the overwhelming support for the legislation lawmakers originally sent to the President. If the Senate approves H.R. 6124 (a likely outcome), then Congress will send the Farm Bill to President Bush for another expected veto. Following the veto, both chambers of Congress will then have to re-do their override votes. Once enacted, H.R. 6124 will replace the erroneous 14-title measure (*i.e.*, H.R. 2419), and become law.

The following chart provides the current status of the Farm Bill (*Source* - Congressional Quarterly):



The do-over Farm Bill voting procedures come in light of the expiration of provisions of the 2002 Farm Bill. The latest extension of the 2002 Farm Bill expired May 23, 2008, but Senate Agriculture Chairman Tom Harkin (D-IA) has stated that there was no immediate need for Congress to extend the 2002 Farm Bill again, noting that he had spoken with officials at the Department of Agriculture and the US Agency for International Development and was assured that their programs (which fall under the missing trade title in H.R. 2419, and which include international food aid and school lunch programs) could continue for several weeks without an extension.

USTR Announces 2008 Annual GSP Review, Sets Deadlines for Petitions

In a May 15, 2008 Federal Register (FR) notice, the Office of the United States Trade Representative (USTR) announced the initiation of the "2008 Annual Generalized System of Preferences (GSP) Product and Country Eligibility Practices Review," and deadlines for filing petitions (73 FR 28174-28175). Specifically, USTR will receive petitions in 2008 to modify the list of products that are eligible for duty-free

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treatment under the GSP program and to modify the GSP status of certain GSP beneficiary developing countries because of country practices.

Interested parties, including foreign governments, may submit petitions to:

- Designate additional articles as eligible for GSP benefits, including to designate articles as eligible for GSP benefits only for countries designated as least-developed beneficiary developing countries, or only for countries designated as beneficiary sub-Saharan African countries under the African Growth and Opportunity Act (AGOA);
- Withdraw, suspend or limit the application of duty-free treatment accorded under the GSP with respect to any article, either for all beneficiary developing countries, least-developed beneficiary developing countries or beneficiary sub-Saharan African countries, or for any of these countries individually;
- Waive the competitive need limitations (CNL) for individual beneficiary developing countries with respect to specific GSP-eligible articles (these limits do not apply to either least-developed beneficiary developing countries or AGOA beneficiary sub-Saharan African countries); and
- Modify GSP coverage.

The **deadline for submission of product petitions**, other than those requesting CNL waivers, and country practice petitions for the 2008 Annual GSP Review is **June 18, 2008** by 5:00 PM. The **deadline for submission of product petitions requesting CNL waivers** is **November 13, 2008** by 5:00 PM. The list of product petitions and country practice petitions accepted for review will be announced in the FR at later dates. All submissions must conform to the GSP regulations as set forth by USTR. Public versions of all documents relating to the annual review will be available for public review approximately 30 days after the due date by appointment in the USTR Public Reading Room (*i.e.*, product petitions will be publicly available around July 18, 2008, and product petitions requesting CNL waivers will be publicly available around December 13, 2008).

Supreme Court Agrees to Hear Case on Application of US Trade Remedy Law to Services

On April 21, 2008, the United States Supreme Court accepted a petition to review a case involving US trade law. The Court's acceptance of the petition marks the first time it has reviewed a case involving US trade law since the Court ruled on a 1985 case involving US and Japanese consumer electronics manufacturers Zenith Radio and Matsushita Elec. Industrial Co. The Supreme Court will review the 2005

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decision by the US Court of Appeals for the Federal Circuit (CAFC) in *Eurodif v. United States*, in which the Court ruled that services are not subject to antidumping duties under US trade remedy law, which applies only to goods. The CAFC's decision upheld an earlier decision by the Court of International Trade (CIT), which ruled that the US Department of Commerce's (DOC) determination that separative work unit (SWU) contracts for the provision of low enriched uranium (LEU) constituted a contract for the sale of goods, and was therefore subject to US antidumping duties, was unsupported by substantial evidence and contrary to law. LEU generally is sold through either SWU contracts or enriched uranium product (EUP) contracts. Under EUP contracts, monetary payment is made for the natural uranium component as well as the enrichment services required to process the natural uranium into LEU. Under SWU contracts, a utility buyer pays only for the enrichment services (SWU component), as the natural uranium is provided by the utility to the enricher, who never takes title to the uranium.

The CIT had found DOC's original final determinations in 2002 in the antidumping and countervailing duty investigations on LEU imports from France, Germany, the Netherlands, and the United Kingdom to be contrary to law, as uranium enrichment contracts were contracts for the sale of services, not goods, and should not be subject to US trade remedy laws. The CIT ruled that DOC's determination was inconsistent with DOC's determinations in other cases involving toll processing. The CAFC affirmed the CIT's decision and referenced one of its prior determinations in a government contracts case that held that SWU contracts were contracts for services and therefore imports pursuant to such service contracts were not subject to US trade remedy laws.

The USEC Inc. and the United States Enrichment Corporation and the Solicitor General, together with the Departments of Commerce, State, Defense and Energy, filed petitions for certiorari with the Supreme Court challenging the CAFC determination. The petitions state that the CIT and CAFC decisions failed to give proper deference to DOC's determination, which was based on a reasonable interpretation of the antidumping statute, thus threatening DOC's ability to administer the antidumping law because of the potential loophole created by allowing carefully drafted contracts to escape coverage of the antidumping laws. The petitions also assert that the CAFC and CIT decisions threaten US foreign policy and national security interests, because of the potential implications it could have on another antidumping case involving uranium from the Russian Federation. The Supreme Court will consider the case in its term beginning October 6, 2008.

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DOC Publishes Final 2007 Calculation of Expected Non-Market Economy Wages

In a May 9, 2008 Federal Register (FR) notice, the Department of Commerce (DOC) published the finalization and effective date of 2007 expected non-market economy (NME) wage calculations (73 FR 26363-26364). On April 11, 2008, DOC published the preliminary 2007 expected NME wages, and provided the public with an opportunity to comment on potential clerical errors (73 FR 19812). (April 11, 2008). The 2007 calculation was based on both 2005 data and the methodology described in the FR notice entitled "Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments" (71 FR 61716).

DOC received two sets of comments in response to the May 9 FR notice:

- **Madagascar.** Two parties commented that DOC used the incorrect exchange rate for Madagascar when converting wages reported for that country into US dollars, and that Madagascar has two currencies: (i) the ariary and (ii) the Malagasy franc (FMG). The parties also commented that the International Labor Organization (ILO) reported wage data for Madagascar in FMG, but that the exchange rate used by DOC was an ariary rate per US dollar. The parties noted that the rate of ariary to FMG was 1 to 5.
- **India and South Korea.** Two parties also commented that DOC should have excluded Indian and South Korean wage rates from the regression analysis because of subsidy programs in both these countries. The parties argue that DOC's normal practice is to exclude surrogate data from countries with generally available subsidies and that India and South Korea are countries in which these subsidies are available. One party argued that the DOC's "Ordinary Least Squares" (OLS) regression analysis will inherently lead to inaccurate results when applying it to the data set used in the expected NME wages calculation because the dataset exhibits heteroscedasticity. The parties contend that DOC should use a "Generalized Least Squares" (GLS) regression to predict NME wages because this method would give more reliable results.

With respect to the use of the incorrect exchange rate in converting Madagascar's labor rate, DOC agrees that this was a clerical error and will change the 2007 calculation. The ILO wage data for Madagascar are reported in FMG per hour. However, instead of converting the ILO wage data reported for Madagascar directly into US dollars using the exchange rate suggested by the parties, DOC converted the Madagascar wage data from FMG to ariary, and then from ariary to US dollars, using the ariary/FMG rate in an International Monetary Fund (IMF) Report and the ariary/dollar rate as provided by International

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Financial Statistics. The IMF Report notes that Madagascar's two currencies are convertible at the rate of 1 ariary per 5 FMG.

With respect to the comments regarding Indian and South Korean wage rates, DOC finds that the suggestion that the wage rates from India and South Korea should be excluded from the expected NME wage rate analysis is a comment on the calculation methodology and not a clerical error. According to DOC, India and South Korea are countries that DOC has reason to believe or suspect maintain generally available export subsidies; DOC is of the opinion, however, that this practice has no bearing on the use of domestic prices, including labor rates, within these countries. DOC also determines that the argument over the use of a GLS regression instead of an OLS regression is a comment on the methodology and not a clerical error.

Therefore, following the data compilation and regression methodology described in the "Antidumping Methodologies notice," and using Gross National Income and wage data for 2005, the regression results are: Wage = 0.2721729 + 0.0004477* GNI. The final expected NME wage rates are:

Country	2005 GNI (USD per annum)	Expected NME wage (USD per hour)
Armenia	1,470	0.93
Azerbaijan	1,270	0.84
Belarus	2,760	1.51
China	1,740	1.05
Georgia	1,300	0.85
Kyrgyz Republic	450	0.47
Moldova	960	0.70
Tajikistan	330	0.42
Uzbekistan	530	0.51
Vietnam	620	0.55

The May 9 FR notice constitutes DOC's announcement of the finalization and effective date of the 2007 calculation. These expected NME wage rates are finalized on the date of publication of this notice in the FR and will be in effect for all antidumping proceedings for which DOC's final decision is due after the publication of this notice.

DOC Seeks Public Comments on Use of Shorter Cost Averaging Periods in AD Proceedings

In a May 9, 2008, Federal Register (FR) notice, the Department of Commerce (DOC) requested public comments regarding its development of a predictable methodology for determining when the use of shorter cost averaging periods is more appropriate than the established practice of using annual cost averages due to the occurrence of significant cost changes throughout the period of investigation (POI) or

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period of review (POR) in antidumping investigations (73 FR 26364-26367). The notice states that DOC maintains that the established practice of using annual cost averages is the most appropriate methodology to use in a majority of proceedings, but that it may be preferable to use an alternative methodology in certain cases. Specifically, DOC seeks public comments on the factors to consider, the tests to apply, and the thresholds to adhere to in determining whether shorter cost averaging periods are more appropriate.

DOC's methodology for calculating the cost of manufacture (COM) of subject merchandise in less-than-fair-value investigations and antidumping administrative reviews is based on the cost over the entire POI or POR. This annual-based methodology results in a normalized, weighted-average production cost that can then be compared to sales prices covering the same extended period of time. Consequently, DOC's questionnaire requests that all respondents report their costs of producing merchandise on an annual average basis over the entire POI or POR. DOC has in a limited number of cases, however, deviated from its normal methodology of calculating costs on an annual average basis over the entire POI/POR and resorted to shorter cost averaging periods. DOC intends to continue its practice of using annual cost averages in proceedings as the most appropriate methodology, and intends to deviate from this practice only under limited circumstances. According to the FR notice, "the use of annual cost averages results in an approach that normally evens out swings in production costs that a respondent may have experienced over short periods (i.e., months or quarters) of time, and reasonably reflects the COP for sales made throughout the year; [h]owever, in certain cases, possible distortions may result when an annual-average cost method is used during a period of significant cost changes." Consequently, many factors may result in distortions when using shorter period average costs. Therefore, DOC requests comments and suggestions on the factors to consider, tests to apply, and thresholds to adhere to when deciding to rely on cost averaging periods of less than a year.

DOC included in its FR notice a list of specific questions it would like parties to comment on:

- Are there other factors relevant to the consideration of whether and when to rely on shorter cost averaging periods besides significant cost changes and the linking of sales and costs during the same shorter period? If so, identify the factor(s) and explain in detail why such factor(s) should be considered.
- How should the significant cost changes factor be analyzed and what numeric threshold should we rely upon as a basis for resorting to shorter cost averaging periods? Provide the basis for your suggested threshold number. Should the nature of the industry (e.g., steel, consumer electronics,

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perishable products, etc.) affect the analysis? If so, explain in detail how the analysis would be affected.

- How should the correlation between prices and shorter cost averaging periods be analyzed to reasonably assess that the prices and shorter period average costs are accurately linked?
- Should it matter whether costs are trending consistently up, consistently down, or up and down throughout the POI/POR in the decision to use shorter cost averaging periods? Explain in detail why or why not.
- If shorter cost averaging periods are used based on the argument that it is distortive to rely on a single average cost when costs have changed significantly throughout the year, should the recovery of cost test be modified in any way? That is, should sales that are below the shorter cost averaging period still be considered to provide for the recovery of costs within a reasonable period time if they are above the annual average cost?
- To what extent should the costs from the window periods in reviews affect the overall analysis?
- If we were to gather information at the outset of every segment of a proceeding in order to determine early on whether a respondent needed to provide cost information for shorter cost averaging periods, what information should we request? Provide specific questions that could be incorporated into the section A questionnaire.
- Should shortening the cost averaging period affect price comparisons? For sales comparison purposes, should prices be compared across cost-averaging periods?
- Are there other points you deem relevant to the issue at hand?

Interested parties wishing to comment should file a signed original and six copies of each set of comments within 30 days of the publication of this FR notice (i.e., by June 9, 2008). DOC requires that comments be submitted in written form, and also requests submission of comments in electronic form to accompany the required paper copies. Written comments should be sent to the Secretary of Commerce, Attn: Import Administration, APO/Dockets Unit, Room 1870, US Department of Commerce, 14th Street & Constitution Ave., NW, Washington, DC 20230.

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DOC Seeks Public Comments on Proposed Targeted Dumping Methodology

In a May 9, 2008 Federal Register (FR) notice, the Department of Commerce (DOC) requested public comments on its proposed targeted dumping methodology and related issues (73 FR 26371-26372). According to the FR notice, DOC will normally calculate dumping margins in investigations by comparing weighted-average export prices to weighted-average normal values or transaction-specific export prices to transaction-specific normal values. DOC will, under certain circumstances, use an alternative methodology for determining the extent of dumping in an investigation vis-à-vis a comparison of transaction-specific export prices to weighted-average normal values. In order to use this alternative methodology, DOC must (under law) find that there is a pattern of export prices (or constructed export prices) that differ significantly among purchasers, regions, or periods of time. In addition, DOC must explain why the differences cannot be taken into account using one of the normal calculation methodologies.

DOC's experience with regard to analyzing targeted dumping claims, however, is limited, and to date, no standard targeted dumping test for general application has been adopted. In order to establish a standard test for general application in analyzing a targeted dumping allegation, DOC solicited and received a first round of comments on the principles and standards that should be employed as part of a targeted dumping test. DOC also reports that in the recent post-preliminary determination memorandum in the antidumping investigations of certain steel nails from the United Arab Emirates (UAE) and from the People's Republic of China, DOC announced and applied a new targeted dumping standard and methodology for analyzing a targeted dumping allegation. DOC proposes to adopt this new methodology for determining whether targeted dumping exists in future cases.

The specific methodology that DOC used in its post-preliminary determination memorandum in the antidumping investigations of certain steel nails from the UAE and from China (and is now proposing for all future cases) involves a two-stage test: (i) a first stage which addresses the pattern requirement and (ii) a second stage which addresses the significant difference requirement. According to DOC, all price comparisons would be done on the basis of identical merchandise:

- **First Stage.** The first stage of the test (the “standard deviation test”) would provide that DOC determine, on an exporter-specific basis, the share of the allegedly targeted customer's purchases of subject merchandise, by sales value, that are at prices more than one standard deviation below the weighted-average price to all customers of that exporter, targeted and non-targeted. If that share exceeds 33 percent of the total value of the exporter's sales of subject merchandise to the allegedly

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targeted customer, then the pattern requirement is met. The calculation of the standard deviation would be done product-by-product using period of investigation (POI)-wide average prices (weighted by sales value) for each allegedly targeted customer and each distinct non-targeted customer.

- **Second Stage.** If the first test is met, in the second stage, DOC would examine all the sales of identical merchandise by that exporter to the allegedly targeted customer for which the standard deviation requirement is met and determine the total sales value for which the difference between: (i) the sales-weighted average price to the allegedly targeted customer and (ii) the next higher sales-weighted average price to a non-targeted customer exceeds the average price gap (weighted by sales value) for the non-targeted group. Each of the price gaps in the non-targeted group would be weighted by the combined sales associated with the pair of prices to non-targeted customers that make up the gap. If the share of the sales that meet this test exceeds five percent of the total value of sales of subject merchandise to the allegedly targeted customer, the significant difference requirement is met and DOC would determine that customer targeting has occurred.

DOC seeks public comments on the methodology described above, in addition to comments on appropriate criteria and standards for the definitions of “region” and “time period.” DOC specifically seeks comment on the extent to which the definitions for region and time period in a targeted dumping allegation should be reflective of the industry and commercial market in the United States. DOC also requests comments on how it should handle multiple allegations made with respect to one respondent, and comments on what standards, if any, it should adopt for accepting an allegation of targeted dumping. Finally, DOC requests comments on the application of the alternative calculation methodology (average-to-transaction comparison) and the conditions, if any, under which the alternative methodology should apply to all sales to the target even if some sales of a control number do not pass the targeted dumping test.

Interested parties wishing to comment should file a signed original and six copies of each set of comments within 30 days of the publication of this FR notice (i.e., by June 9, 2008). DOC requires that comments be submitted in written form, and also requests submission of comments in electronic form to accompany the required paper copies. Written comments should be sent to David Spooner, Assistant Secretary for Import Administration, US Department of Commerce, Central Records Unit, Room 1870, 14th Street & Constitution Ave., NW, Washington, DC 20230.

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Free Trade Agreements

USTR Packs Spring Agenda with TIFA Meetings

Summary

The Office of the United States Trade Representative (USTR) has met with different US trading partners over the past several weeks under various Trade and Investment Framework Agreements (TIFAs). We highlight here these meetings and their agenda items.

Analysis

I. Background

TIFAs are limited trade agreements that establish joint councils of trade and economic officials to discuss trade issues. Specifically, the United States and its TIFA partner(s) agree to establish a joint ministerial-level council as the overall mechanism for consultation with the possibility of establishing issue-oriented working groups. Under US trade policy, TIFAs are usually the first step towards the initiation of formal bilateral or regional Free Trade Agreement (FTA) negotiations. The next step in the process would be for the countries to enter into a Bilateral Investment Treaty (BIT), which protects the rights of foreign subsidiaries and investors in the countries' home markets. A TIFA is a non-binding agreement and does not involve changes in US law; consequently, TIFAs do not require US Congressional approval.

Please refer to the **Annex** in this report for a list of current US TIFA trading partners and TIFA signing dates.

II. US-Mauritius TIFA

On April 28, 2008, US and Mauritian officials met to discuss implementation of the US-Mauritius TIFA. Assistant USTR for Africa Florizelle Liser led the US delegation and Mauritian Secretary for Foreign Affairs Anand Neewoor led the Mauritian delegation. The meeting was the second held under the TIFA's bilateral Trade and Investment Council (TIC) since the United States and Mauritius signed the TIFA in September 2006. According to USTR, the TIFA Council – which monitors trade and investment relations, identifies opportunities for expanding trade and investment, and provides a forum for addressing challenges in the two countries' trade ties – discussed and "reviewed a common work plan that the United States and Mauritius are jointly undertaking to implement the TIFA, including a wide-range of programs and activities to support, facilitate, and ensure progress and success in strengthening the US-Mauritian trade and investment relationship." During the meeting, both sides reviewed progress in implementing

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the TIFA and discussed, among other issues, cooperation in the World Trade Organization (WTO) Doha Round negotiations, implementation of the African Growth and Opportunity Act (AGOA), trade capacity-building and technical assistance, intellectual property rights (IPR) protection, export diversification, trade promotion, and development.

III. US-Uruguay TIFA

On May 1, 2008, officials from the United States and Uruguay convened the second meeting of the US-Uruguay TIC, established under the US-Uruguay TIFA (which the United States and Uruguay signed in January 2007). Deputy USTR John Veroneau led the US delegation and Uruguayan Minister of Foreign Affairs Gonzalo Fernández led the Uruguayan delegation. The meeting's agenda covered a broad range of topics, including issues relating to the TIFA Work Program. Both sides also acknowledged that progress had been made in deepening US-Uruguayan trade ties, especially vis-à-vis cooperation by the Agriculture departments in the United States and Uruguay on key bilateral sanitary and phytosanitary (SPS) issues and the signing of a Science and Technology Cooperation Agreement on April 29, 2008 that, according to USTR, "provides an important mechanism through which the United States and Uruguay can broaden cooperation in all scientific and technology fields, and move forward in areas of collaboration such as energy, health issues, science and technology education, engineering, sustainable development, agriculture, and natural resources." Both sides also discussed trade facilitation, labor, environment, e-commerce, and innovation. Officials agreed to convene the next TIC meeting by November 2008.

IV. US-Indonesia TIFA

On May 2, 2008, US and Indonesian officials convened a meeting in Bali, Indonesia under the US-Indonesia TIFA. USTR Susan Schwab led the US delegation and Indonesian Minister of Trade Mari Pangestu led the Indonesian delegation. Both sides discussed further work needed under the TIFA that could strengthen US-Indonesia economic relations and cooperation on regional issues. The two sides also discussed the lagging WTO Doha Round negotiations. During the meeting, USTR Schwab and Minister Pangestu welcomed progress being made in implementing the bilateral US-Indonesia Memorandum of Understanding (MOU) on Combating Illegal Logging and Associated Trade, and expressed satisfaction with the outcome of the fourth meeting of the US-Indonesia logging working group on March 24-25, 2008. Other agenda items included investment and recent changes to Indonesia's investment regime, IPR, agriculture, industrial products, and the transshipment of textiles and apparel. Business representatives from the United States and Indonesia also met with the two sides and exchanged views on ways to expand and improve US-Indonesian trade and investment links.

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Outlook

USTR's packed TIFA agenda over the past several weeks indicates that the Bush Administration is still interested in deepening trade ties and linkages with US trading partners, in light of the uncertainty surrounding US Congressional consideration of the three pending Free Trade Agreements (FTAs) with Colombia, Korea and Panama. Prospects for Congressional consideration of these three bilateral agreements by the end of 2008 have diminished over the past month, especially after the House of Representatives voted to suspend the Trade Promotion Authority (TPA)-driven timeline that dictated consideration of the Colombia agreement. Observers are uncertain if and when Congress will consider any of these agreements, and although USTR and the Bush Administration have launched aggressive campaigns to obtain support for these FTAs, their ultimate passage is not guaranteed.

In light of the current trade environment, the Bush Administration is thus exploring other venues through which it can strengthen its trade partnerships, including the TIFA route. As noted, TIFAs do not fall under the auspices of TPA: they are non-binding agreements that do not require Congressional approval. Consequently, USTR can pursue any number of TIFAs in an effort to reach out to more trading partners without the constraints associated with TPA-driven FTAs. That said, TIFAs are certainly not as binding as FTAs and they do not afford the same trading preferences or assurances as FTAs. Nonetheless, the recent meetings with Mauritius, Uruguay and Indonesia – three trading partners from three distinct regions – indicate that USTR still views US TIFAs as another viable route through which they can increase US global market access and enhance trade relations with various partners vis-à-vis the work of TICs under the TIFAs.

USTR's recent meetings with its TIFA partners may also be another way through which the Bush Administration maintains close relations with trading partners that may become BIT and FTA partners in the future. The current lack of TPA limits USTR from negotiating formal FTAs, and USTR may be under pressure to strengthen linkages with trading partners that are being courted aggressively (for FTAs and other agreements) by other global competitors, such as the EU or China. USTR may be of the opinion that the foundations for an FTA can be laid through TIFAs. By using TIFAs as a forum through which it can clear any unresolved trade issues with a particular trading partner, USTR may be providing its trade policy with some additional cushioning and insurance. Without TPA, current FTA negotiations with TIFA partners are impossible. The trade environment, however, may change in the future and FTAs with TIFA partners may be more feasible at a later time, thus requiring strengthened trade linkages and solid partnerships and foundations that can be easily achieved through TIFAs.

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Annex: US TIFA Partners and TIFA Signing Dates

US TIFA Partner	Date Signed
Africa	
Algeria	July 13, 2001
Common Market for Eastern and Southern Africa (COMESA)	October 29, 2001
Egypt	July 1, 1999
Ghana	February 26, 1999
Liberia	February 15, 2007
Mauritius	September 18, 2006
Mozambique	June 21, 2005
Nigeria	February 16, 2000
Rwanda	June 7, 2006
South Africa	February 18, 1999
Tunisia	October 2, 2002
West African Economic and Monetary Union (WAEMU)	2002
Latin America and the Caribbean	
Uruguay	January 25, 2007
Caribbean Common Market	1991
Asia - Pacific	
Afghanistan	September 21, 2004
Association of Southeast Asian Nations (ASEAN)	August 25, 2006
Brunei	December 16, 2002
Cambodia	July 14, 2006
Indonesia	September 21, 2004
Malaysia	May 10, 2004
Mongolia	July 15, 2004
New Zealand	October 2, 1992
Philippines	November 9, 1989
Singapore	October 11, 1991
Sri Lanka	July 25, 2002
Taiwan	September 19, 1994
Thailand	October 2002
Vietnam	June 21, 2007
Middle East- Central Asia	
Afghanistan	September 21, 2004
Central Asia (Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan)	June 1, 2004

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Georgia	June 20, 2007
Iraq	July 11, 2005
Kuwait	February 6, 2004
Lebanon	November 30, 2006
Oman	July 7, 2004
Pakistan	June 25, 2003
Qatar	March 19, 2004
Saudi Arabia	July 31, 2003
Turkey	September 29, 1999
United Arab Emirates	March 15, 2004
Yemen	February 6, 2004

Source: Office of the United States Trade Representative. "2008 Trade Policy Agenda and 2007 Annual Report of the President of the United States on the Trade Agreements Program."

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Multilateral

Doha Agriculture, NAMA Chairs Release Latest Revised Draft Texts; WTO Officials Optimistic With "Intensified" Progress

Summary

On May 19, 2008, the Chairs of the World Trade Organization's (WTO) Agriculture and Non-Agricultural Market Access (NAMA) negotiating groups issued revised Agriculture and NAMA draft "modalities" texts as part of the Doha Round of multilateral negotiations. The texts are revisions of drafts that the Chairs previously circulated in July 2007 and February 2008, and according to the WTO, they reflect WTO Members' latest positions in the agriculture and NAMA negotiations since September 2007. According to WTO officials, the two revised papers include "what could become the formulas for cutting tariffs and trade-distorting agricultural subsidies in a final [Doha] deal, and will serve as the basis for intensive high-level negotiations in Geneva aimed at securing final agriculture and NAMA agreements over the next several weeks."

The revised Agriculture and NAMA texts can be found at:
http://www.wto.org/english/news_e/news08_e/ag_nama_may08_e.htm.

Analysis

The revised agriculture and NAMA texts are the Chairs' assessment of what might be agreed for the formulas for cutting tariffs and trade-distorting agricultural subsidies, and other related provisions. The papers were circulated simultaneously because of the strong political linkage established by WTO Members between these two negotiations.

I. Agriculture

The May 19 Agriculture text does not differ greatly from the February 2008 draft, and includes all three pillars: domestic support, export competition and market access. We discuss below some highlights of the text:

- **Tariff and subsidy cuts.** The draft includes a minimum average agriculture tariff cut of 54 percent for developed countries and a maximum overall average reduction of 36 percent for developing countries. Specifically, the revised text proposes tariff cuts for developed countries of 50 percent on products with tariffs of 20 percent or less, tariff cuts of 57 percent on products with tariffs between 20-50 percent, tariff cuts of 64 percent on products with tariffs between 50-75 percent, and tariff cuts of

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66-73 percent on products with tariffs above 75 percent. Developing countries would make cuts of two-thirds of those for developed countries, between 33 percent in the lowest tariff band (*i.e.*, for tariffs of 30 percent or less) and 44-48 percent in the highest band (*i.e.*, tariffs above 130 percent). The text's proposals regarding cuts in subsidies are unchanged. Under these proposed numbers, the United States would have to accept a spending cap on overall trade-distorting domestic support between USD 13 billion-16.4 billion per year, whereas the EU would have to accept a cap between EUR 16.5 billion-27.6 billion per year. At the start of the Agriculture agreement, an immediate 33-percent down-payment would go into effect.

- **Special products.** The revised text proposes that developing countries be entitled to self-designate "special products" guided by indicators "based on the criteria of food security, livelihood security and rural development." The text notes that for these developing countries, "there shall be a maximum entitlement of 20 percent and a minimum entitlement of 8 percent of tariff lines available for self-designation as special products."
- **Sensitive products.** On "sensitive products," the revised draft proposes that developed WTO Members be allowed to designate between 4-6 percent of their tariff lines as sensitive, therefore qualifying for lower tariff reductions. For developed WTO Members with more than 30 percent of their tariff lines subject to the top band of tariff cuts, the draft proposes that they may increase the number of "sensitive products" by two percent (*i.e.*, a 6-8 percent designation allowance). The text states that developing WTO Members will have the right to designate up to one-third more (than developed WTO Members) of tariff lines as "sensitive products."
- **Tariff rate quotas (TRQs).** The draft text differs from the February 2008 draft in that it increases TRQ volumes for agricultural products designated as sensitive. The increase in volumes subject to the lower in-quota tariff rates is intended to compensate for the lower tariff cuts for sensitive products.

II. NAMA

While the Agriculture text did not differ greatly from the February 2008 version, the revised NAMA text includes significant changes. We discuss below some highlights of the latest revised text:

- **Tariff cuts.** The text proposes new coefficients under the Swiss tariff-cutting formula for both developed and developing countries (under the Swiss formula, the lower the coefficient, the greater the tariff cuts, with the coefficient also determining the maximum tariff). The draft suggests a Swiss formula coefficient between 7-9 for developed countries (the February draft suggested a coefficient between 8-9). For developing countries, the revised text suggests three ranges of coefficients: (i) 19-

21; (ii) 21-23; and (iii) 23-26 (the February draft suggested a simple 19-23 range). According to the draft, developing countries that are prepared to accept a coefficient between 19-21 would be allowed to shield between 12-14 percent of their industrial tariff lines from the formula cuts as long as the products concerned do not exceed 12-19 percent of the total value of industrial imports; or these countries would have the flexibility to exempt 6-7 percent of tariff lines from the formula cuts altogether, provided total trade value does not exceed 6-9 percent of total imports. Developing countries prepared to accept a coefficient between 21-23 would be eligible to shield 10 percent of their industrial tariff lines from the formula cuts, applying instead half the agreed cuts, with total value of imports not exceeding 10 percent of the total value of industrial imports; or these countries could take flexibility to exempt five percent of industrial tariff lines from any tariff cut as long as their total value of imports did not exceed five percent of total imports. Developing countries that are only prepared to accept a coefficient between 23-26 would have no flexibilities.

- **Special provisions.** The revised text includes the possibility of additional special provisions for developing countries, including a provision designed for developing countries participating in sectoral negotiations aimed at deeper tariff cuts on products of export interest: these countries would earn additional points on their chosen Swiss formula coefficient. The revised text also offers: (i) the possibility of special terms for South Africa and Venezuela; (ii) a special calculation on volume of trade for developing country members of customs unions that submit a single list of products subject to the flexibilities; and (iii) options for addressing US and EU demands that the special developing country flexibilities should not cover entire product categories. The first option would prohibit the exclusion of entire Harmonized System (HS) product chapters from the full formula cuts, whereas the second option would prohibit the exclusion of more than half of six-digit tariff lines under a product chapter from the full formula cuts or six-digit tariff lines accounting for more than 50 percent of the value of imports under the product chapter.
- **Other provisions.** The revised text adds other provisions, including: (i) a proposed range of flexibilities for countries with relatively few tariff bindings, such as Cameroon, Congo, Cuba, Kenya, and Sri Lanka; (ii) requiring least-developed countries (LDCs) that are exempt from tariff reduction commitments to increase their level of tariff binding commitments; and (iii) a grace period of two to three years for newly-acceded WTO Members – such as China and Taiwan – to implement tariff reduction commitments (and exempting other recently acceded Members, such as Macedonia, Moldova, Saudi Arabia, Tonga, and Vietnam, from tariff reduction commitments altogether).

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III. Next Steps

WTO Members will now review the revised texts, and the agriculture and NAMA negotiating groups will convene separately in the week of May 26 to discuss the texts and Members' reactions to them. After these meetings, senior officials from key WTO Members will convene "horizontal" negotiations aimed at narrowing differences in both areas. WTO Director-General Pascal Lamy has expressed hope that the "horizontal" negotiations will serve as the final step before trade ministers from WTO Member economies meet to hammer out final Agriculture and NAMA agreements.

IV. Reaction

Upon the release of the revised texts, WTO officials – including Director-General Lamy – expressed optimism that the Doha negotiations were moving forward. Lamy noted that the texts detail areas of convergence and disagreement among Members, and predicted that "the negotiating process will intensify as Members begin to look across these two important sectors, consider other key areas and seek to find the balance that will deliver for us all an ambitious and development oriented round." A spokesman for the Office of the United States Trade Representative (USTR), meanwhile, indicated that the United States would review both texts in detail over the coming days, specifically "looking to see how the world's largest and fastest growing economies are going to make market-opening contributions commensurate with their increasing participation and role in the world economy." Other WTO Members – including Australia – made similar statements and noted that they too would review the texts in detail prior to the May 26 Agriculture and NAMA meetings in Geneva.

Outlook

The release of the revised Agriculture and NAMA texts comes after several weeks of uncertainty and stalled negotiations. WTO Members had expressed concern at the Agriculture and NAMA chairs' mid-April announcement that they would not be able to release revised texts until mid-May, putting into jeopardy a proposed mid-May mini-ministerial meeting. Members were concerned that the delay in the papers' issuance would further delay a final Doha agreement. WTO officials, including Director-General Lamy, have not mentioned the possibility of a ministerial meeting following the release of the revised texts, and it now seems clear that there will be no such meeting before July. Over the coming weeks, work on these texts will be done in the Agriculture and NAMA negotiating groups, and the senior-level "horizontal" meetings. Depending on the progress made during these next few weeks, the WTO may then see fit to organize a meeting at ministerial level in order to secure final agriculture and NAMA agreements. Such a ministerial meeting is highly dependent on WTO Members' reactions to the texts, and it is too early to tell

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how WTO Member economies will respond to them. Positive reactions – especially from key WTO Members such as the United States, the EU, Brazil, and India – could provide enough momentum to the "horizontal negotiations." Negative reactions will likely delay the Doha negotiations even further. WTO Members have given themselves an informal end-2008 deadline to complete the Doha Round, although many observers, including some Members, are skeptical that they can achieve a Doha agreement by the end of year. Besides completing the Agriculture and NAMA negotiations, WTO Members must also contend with the Services and Rules negotiations, both of which have been stalled by the lack of movement in the Agriculture and NAMA talks. Thus, although the revised Agriculture and NAMA texts may indicate some forward momentum in the Doha negotiations, WTO Members still have several different hurdles to overcome in reaching a final Doha agreement.

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WTO "Compliance" Panel Report: *European Communities — Regime for the Importation, Sale and Distribution of Bananas — Recourse to Article 21.5 of the DSU by the United States* (DS27)

Summary

Decision: A WTO "compliance" panel has ruled that the revised EC import regime for bananas is WTO-inconsistent. In a claim brought by the United States, the Panel found that the preferences granted by the EC for bananas from the African, Caribbean and Pacific (ACP) countries were inconsistent with the obligations of the EC under GATT Article I (Most Favoured Nation) and Article XIII (non-discriminatory application of quantitative restrictions). Accordingly, the Panel concluded that the EC failed to implement the original, 1997 rulings of the WTO Dispute Settlement Body (DSB).

Significance of Decision / Commentary: The Bananas case is one of the oldest and most contentious disputes in the history of the multilateral trading system. It has generated considerable litigation in both the GATT and the WTO, which has resulted in multiple rulings by panels, the Appellate Body, and special arbitrators. All of this litigation has been targeted at the preferences that the EC maintains for ACP bananas to the disadvantage of bananas from Latin America (sometimes referred to as "dollar bananas" or "MFN bananas").

In the present proceeding, the EC defense hinged principally on a series of preliminary procedural arguments. Indeed, the EC did not contest the US claim that the preferences for the ACP countries breached the MFN obligation of GATT Article I.

In its preliminary arguments, the EC asserted that (i) the United States did not have a sufficient legal interest (or "standing") to bring this complaint; (ii) the US claims were barred by a 2001 EC-US agreement (the "Bananas Understanding"), which the EC claimed constituted a mutually agreed solution to the dispute; and (iii) the current EC import regime for bananas could not be considered as a "measure taken to comply" for the purposes of a compliance panel proceeding under Article 21.5 of the WTO Dispute Settlement Understanding ("DSU"). The Panel dismissed all of these preliminary arguments, and ruled that the EC preferences for the ACP countries violated GATT Articles I and XIII.

An important systemic issue raised by this dispute is the status and enforceability of "mutually agreed solutions" between WTO Members, and whether they bar subsequent compliance proceedings or other litigation on the same issue. This matter has been raised in a couple of WTO disputes to date, but has never been resolved. The Panel in the present case found it unnecessary to rule on the legal status of mutually agreed solutions in WTO dispute settlement. Instead, it stated that the particular terms of the

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Bananas Understanding did not provide an effective settlement to the dispute, and therefore did not prevent the United States from bringing compliance proceedings.

It will fall to a future panel or the Appellate Body to rule on whether a definitive mutually agreed solution is binding and would prevent a compliance challenge. On the one hand, it could be argued that mutually agreed solutions, which are intended to settle WTO disputes, should be considered as derivative of the DSU and could be enforced as such. On the other hand, WTO Panels have jurisdiction to resolve disputes only under the listed WTO covered agreements, and bilateral accords such as the “Bananas Understanding” are obviously not one of the covered agreements. A WTO panel faced squarely with the broader systemic issue of the legal status of mutually agreed solutions may be very reluctant to rule that such agreements bar subsequent compliance panel proceedings, given the lack of any clear textual authority in the DSU to this effect.

The Panel’s decision that the current EC bananas import regime is WTO-inconsistent, if upheld on appeal, will presumably trigger a new round of negotiations between the EC and the affected countries. However, despite extensive negotiations in the past, the Bananas case remains a chronically unresolved, intractable trade dispute.

Analysis

A. Panel’s Preliminary Rulings

1. *US claim not barred by lack of “standing”*

The EC argued that even if the preferences to the ACP countries were WTO-inconsistent, this measure did not cause any nullification or impairment to the United States. The EC argued that the Panel needed to determine whether the alleged violation of a WTO rule “sufficiently 'touches' upon the interests of the complaining party” so as to justify the complaining party's “standing” to commence dispute settlement proceedings.

The Panel decided it did not need to make a “general determination regarding whether panels may be required to assess when a Member has ‘standing’ to initiate dispute settlement proceedings under the DSU.” Instead, it simply noted that the United States was a complaining party in the original proceedings, and that the United States had “a particular interest in ensuring that the measure in question is brought into conformity with the WTO agreements.” It therefore affirmed the US right to initiate the compliance panel proceedings.

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2. *US claim not barred by the "Bananas Understanding"*

As noted above, the EC argued that the 2001 Bananas Understanding constituted a "mutually agreed solution" that barred the current US claims.

The Panel began its analysis on this issue by stating that it did not need to address the "more general issue" of "whether or not mutually agreed solutions or legally binding agreements between parties to a dispute may prevent parties to such instruments from bringing compliance disputes." Instead, it stated that the Bananas Understanding did not provide an effective settlement to the dispute, and therefore did not prevent the United States from bringing a compliance challenge. The Panel cited three cumulative reasons for this.

First, it said that the Bananas Understanding "provides only for a means, i.e. a series of future steps, for resolving and settling the dispute." The Panel referred to DSU Article 3.7, which states in part that a "solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred." The Panel reasoned that it was

> "difficult to see how the Bananas Understanding, even if it were an alleged mutually agreed solution or a binding agreement, could be an effective solution to a dispute in the absence of parties' full compliance with all the steps set out therein." [original emphasis]

Second, the Panel considered, as "relevant context", the fact that the adoption of the Bananas Understanding post-dated the DSB recommendations and rulings. In the view of the Panel, the "parties' compliance with all future steps set out in the Bananas Understanding is an even more important precondition of a positive solution and an effective settlement of the dispute."

Third, the Panel noted that the parties made conflicting communications to the WTO concerning the Bananas Understanding. Several days after the EC notified the Understanding to the DSB as a mutually agreed solution under DSU Article 3.6, the United States sent its own communication to the DSB. The US statement indicated that the Bananas Understanding "identifies the means by which the long-standing dispute over the EC's banana import regime can be resolved, but, as is obvious from its own text, it does not in itself constitute a mutually agreed solution pursuant to Article 3.6 of the DSU." [Panel emphasis] Thus, the Panel noted that "almost immediately after the European Communities' attempt to accord a potential multilateral element to the Bananas Understanding, the United States called into question the multilateral status of that Understanding and its role in definitively resolving the dispute."

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In light of these and other factors, the Panel concluded that "even if the Bananas Understanding qualified as a mutually agreed solution or a legally binding bilateral agreement at the time of its signature, it does not prevent the United States from bringing this compliance dispute."

3. *Current EC bananas import regime found to constitute a "measure taken to comply" with the original DSB rulings*

The EC argued that the United States had "erroneously" brought its complaint under the compliance panel procedures of DSU Article 21.5, because the current EC import regime for bananas was not a "measure taken to comply" with the 1997 recommendations and rulings of the DSB.

The Panel, applying earlier Appellate Body jurisprudence, concluded that there was "clearly a 'continuum of events' between the original DSB recommendations and rulings…and the current EC bananas import regime." It noted that the EC made a first, unsuccessful attempt to bring itself into compliance with the original DSB rulings by end of the compliance period on January 1, 1999. It then found that the current EC bananas import regime, introduced on 1 January 2006, constituted "an integral part of that second EC attempt to comply."

The Panel therefore dismissed the EC argument that its current import regime for bananas, including the preference for ACP countries, was not a "measure taken to comply" with the original DSB rulings.

B. Panel's Substantive Rulings

1. *MFN: US claim uncontested by the EC*

GATT Article I:1 provides in part that "[w]ith respect to customs duties and charges of any kind imposed on or in connection with importation…any advantage, favour, privilege or immunity granted by any contracting party to any product originating in…any other country shall be accorded immediately and unconditionally to the like product originating in…all other contracting parties."

Under the new EC regime for bananas, the EC maintains a tariff-rate quota with a current volume of 775,000 metric tons reserved exclusively for bananas of ACP origin. ACP bananas within the quota enter duty-free, while quantities above the TRQ are subject to duties of €176 per metric ton.

The EC did not contest US claim that the preference granted to bananas of ACP origin was inconsistent with GATT Article I. The Panel agreed that "the preference granted by the European Communities to an annual duty-free tariff quota of 775,000 mt of imported bananas originating in ACP countries constitutes an advantage for this category of bananas, which is not accorded unconditionally to like bananas originating in non-ACP WTO Members." The Panel concluded that "this preference is inconsistent with

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Article I:1 of GATT 1994." The Panel also noted that although the Doha Ministerial Meeting granted the EC a waiver from its GATT Article I obligations with respect to bananas, this waiver expired on January 1, 2006.

2. *Article XIII: imports from ACP countries were "not similarly restricted"*

GATT Article XIII sets out certain disciplines to ensure the "non-discriminatory administration of quantitative restrictions." Article XIII:1 provides in part that no restriction can be applied by a WTO Member on the importation of any product from any other WTO Member "unless the importation of the like product of all third countries" is similarly restricted. Article XIII:2 adds that in applying import restrictions to any product, an importing country must "aim at a distribution of trade in such product approaching as closely as possible" the shares which the various WTO Members "might be expected to obtain in the absence of such restrictions…."

The Panel stated that "the main purpose of Article XIII:1 of the GATT 1994 is that products from WTO Members should not have restrictions imposed upon them, unless similar restrictions are placed on the like products of other countries." The Panel also recalled that the GATT disciplines on the use of restrictions were not meant to protect trade flows, but rather the "competitive opportunities of imported products."

Turning to the EC measure at issue, the Panel stated that "[s]ince bananas from MFN countries do not have access to [the] preferential tariff quota reserved for bananas from ACP countries, on its face, the importation into the European Communities of bananas from ACP countries is not 'similarly restricted' compared to that of bananas from MFN countries." The Panel thus concluded that "the European Communities' current bananas import regime, in particular its preferential tariff quota reserved for ACP countries, is inconsistent with Article XIII:1 of the GATT 1994."

The Panel also found that as the MFN countries were excluded from the preferential ACP tariff quota, the ACP preference could not and did not "aim at a distribution of trade in [bananas] approaching as closely as possible" the shares which the various Members, including both ACP and MFN countries, might be expected to obtain in the absence of such restrictions. The Panel therefore found that the EC's measure, including its preferential ACP tariff quota, was also inconsistent with GATT Article XIII:2.

The decision of the WTO Panel in *European Communities – Regime for the Importation, Sale and Distribution of Bananas: Recourse to Article 21.5 of the DSU by the United States* was released on May 19, 2008.

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Note: On April 7, 2008, the Panel issued a similar ruling in a complaint brought by Ecuador – please see our report of April 14.

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WTO Chair Issues Revised Services Text, While Doha Rules Chair Outlines Status of Sector Negotiations

Summary

We highlight here several developments in the World Trade Organization (WTO) Doha Round negotiations on Services and on Rules. On May 26, 2008, Chairman of the WTO's Doha Round negotiations on services Fernando de Mateo issued a report on the elements required for the completion of the negotiations. The report is based on consultations that the Services Chair has conducted with WTO Members since the issuance of the first draft "modalities" text on February 13, 2008. Separately on May 28, 2008, the Chair of the Negotiating Group on Rules Guillermo Valles Galmes issued a working document regarding the Doha negotiations on Rules. According to the WTO press release, the document – which includes a cover note and three annexes relating to anti-dumping, horizontal subsidies and fisheries subsidies – "seeks to convey in detail the full spectrum and intensity of the reactions to the Chair's first draft texts and, to the extent possible, to identify the many suggested changes put forward by delegations."

Analysis

I. Doha Services Negotiations

On May 26, 2008, Chairman of the WTO's Doha Round negotiations on services Fernando de Mateo issued a report on the elements required for the completion of the negotiations. The report is based on consultations that the Services Chair has conducted with WTO Members since the issuance of the first draft "modalities" text on February 13, 2008. The annex to the latest report contains an updated draft "modalities" text outlining elements of a possible Services agreement that WTO Members may adopt in an effort to move the stalled negotiations forward. To date, many WTO Members have complained that the Services negotiations have been overshadowed and stalled by the lack of movement in the Agriculture and Non-agricultural Market Access (NAMA) negotiations. The revised Services text comes just one week after the May 19 issuance of revised Agriculture and NAMA draft "modalities" texts.

The revised Services text continues to set the framework for the "request-offer" process that has characterized the Services negotiations to date. The Annex containing the revised text – titled "Elements Required for the Completion of the Services Negotiations" – notes (in bracketed language) that "[Services] negotiations must be driven by the same level of ambition and political will as reflected in the Agriculture and NAMA modalities" and urges WTO Members to "respond to bilateral and plurilateral requests by offering commitments that substantially reflect current levels of market access and national

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treatment and provide new market access and national treatment in cases where significant trade impediments exist." The text also highlights the need to fix dates for WTO Members' submission of revised services offers and the submission of final draft schedules of commitments; the text, however, does not include concrete dates for these submissions, and observers expect that WTO Members will broach possible submission dates in late June or July, when the WTO could hold a ministerial meeting to finalize Agriculture and NAMA agreements. During the ministerial meeting, WTO Members will participate in a Services "pledging" conference at which point it is hoped that Members will indicate the revisions and improvements they are willing to make in their current Services offers.

The revised Services text also highlights the need for "further discussion" on WTO Members' level of ambition in the negotiations, their willingness to bind existing and improved levels of market access and national treatment (the United States and the EU, among others, have called on developing WTO Members to bind the current market access they offer to foreign service providers in their WTO schedules), and the contentious issues of "Mode 1" and "Mode 4" with respect to the treatment of sectors and modes of supply of export interest to developing countries (India and other developing WTO Members have called on developed WTO Members to ensure that their revised offers "provide market access in sectors and modes of supply of export interest to developing countries, such as Modes 1 and 4 . . ."). Mode 1 covers the cross-border supply of services from firms not physically present in the importing country, and Mode 4 covers movement of natural persons traveling from their own country to supply services in another.

Initial reaction to the release of the revised Services text has been negative. The Global Services Coalition – comprised of the leading service industry associations from Australia, Barbados, Brazil, Canada, the EU, Hong Kong, Japan, New Zealand, Taiwan, Trinidad and Tobago, the United States, and other countries – released a press statement noting its disappointment with the Services text. The press release stated that "at this point in the negotiations, a text is needed that provides political guidance on the level of ambition in the Doha Round services negotiations . . . [the revised] version illustrates that members are still 'consulting' and demonstrates how little progress has been made in the Services negotiations." The European Services Forum echoed these sentiments, and noted that one of the key components of the revised text "[operative language calling for new market access and bindings of existing market access] has been left in brackets, indicating that it is only provisional or subject to further discussion. We believe that the bracketed language must be made an integral part of the final services text." According to the European Services Forum, the revised Services text "greatly diverges from the recently released texts on agriculture and NAMA which include strong binding obligations."

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The revised Services draft “modalities” text is available at:
http://www.wto.org/english/news_e/news08_e/serv_may08_e.htm.

II. Doha Rules Negotiations

Separately on May 28, 2008, the Chair of the Negotiating Group on Rules Guillermo Valles Galmes issued a working document regarding the Doha negotiations on Rules. According to the WTO press release, the document – which includes a cover note and three annexes relating to anti-dumping, horizontal subsidies and fisheries subsidies – “seeks to convey in detail the full spectrum and intensity of the reactions to the Chair's first draft texts and, to the extent possible, to identify the many suggested changes put forward by delegations.” Chairman Valles Galmes issued the first draft “modalities” text on Rules in November 2007. Several WTO Members had criticized that first draft for the Chairman’s inclusion of the United States’ controversial “zeroing” methodology in anti-dumping investigations.

The May working document states that there has been no real forward movement in addressing WTO Members’ differing opinions and “sharply conflicting views” as to what should be included in a final Rules agreement. And although several WTO Members – including the EU, Japan and South Korea – have called for the issuance of a revised draft “modalities” text, Chairman Valles Galmes has stated that he has “received no hints on possible middle-ground approaches nor suggestions for possible compromises or trade-offs” consequently making the issuance of a revised text a difficult maneuver. In place of a revised text, he has instead opted, “as an interim step forward - to table this working document.”

Specifically, the working document compiles all proposals put forward to date that cover anti-dumping rules, subsidy and countervailing duty rules, and rules specific to fisheries subsidies:

- **Zeroing.** The May working document includes Members’ criticisms on the Chairman’s decision to include language in the initial draft text allowing some forms of “zeroing,” even in light of recent WTO Dispute Settlement Body (DSB) decisions that have declared different forms of “zeroing” WTO-inconsistent. The November 2007 draft “modalities” text specifically allowed “simple zeroing” in original investigations, allowed all forms of “zeroing” in sunset, administrative, and periodic reviews, and allowed “zeroing” in an authority's determination of final liability for payment of anti-dumping duties. The May working document notes that “numerous delegations expressed the view that zeroing is a biased and partial method for calculating the margin of dumping which inflates antidumping duties, and that its use could nullify the results of trade liberalization efforts, and therefore considered that the chairman's text on zeroing was unacceptable.” Chairman Valles Galmes noted that twenty delegations co-sponsored a Working Paper that proposed alternative

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language prohibiting a Member from "disregarding the amount by which the export price exceeds the normal value for any comparisons in all proceedings, including original investigations . . . and in respect of all methodologies." The United States was the only Member that submitted comments to the Chairman supporting the inclusion of zeroing in the draft text and "a restoration of zeroing in all contexts [that is] necessary to return to the status quo that emerged from the Uruguay Round." The working document also noted, however, that some WTO Members felt that zeroing vis-à-vis a "targeted dumping" methodology could be permitted, even though these Members also suggested that such zeroing would not be applicable to original investigations.

- **Anti-dumping.** The working document consolidates all proposals submitted to the Rules Group and includes numerous delegations' reactions to the first draft text, including a detailed description of positions advanced by delegations on issues such as the proposal that all WTO Members terminate anti-dumping duty orders no later than ten years after the duties were first imposed and a proposal requiring authorities to take to take the public interest into account before deciding to impose an anti-dumping duty order.

- **Horizontal subsidies.** The working document notes that "in this area fewer proposals were tabled and therefore fewer changes [were] proposed in the Chairman's text . . ." The annex shows those portions of the Chairman's text where significant changes to the existing Agreement were proposed as well as summarizing delegations' reactions to the Chairman's text.

- **Fisheries subsidies.** According to the working document, there is no existing WTO text on fisheries subsidies and "therefore no agreed structure on the basis of which [the Chairman] could construct a consolidation." The annex in the working document identifies the "core issues" in the negotiations and includes relevant language proposed by delegations.

In concluding the working document, Chairman Valles Galmes noted that all proposals and issues remain on the table, and that he will continue to consult with WTO Members in an effort to reach consensus on a final Doha Rules agreement.

The Rules working document is available at:
http://www.wto.org/english/news_e/news08_e/rules_28may08_e.htm.

Outlook

As noted, the Chairs of the Services and Rules Groups will continue to consult with WTO Members on their reactions to these texts. In both cases it appears that only a powerful political stimulus resulting from the ministerial meeting envisaged in late June or July will be able to unblock these negotiations.

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The issuance of the revised Services text and the Rules working document indicate that sharp differences still exist between WTO Members on the broad array of issues that fall under each of these sectors. As noted, many WTO Members have complained that the Agriculture and NAMA negotiations have taken precedence in the Doha negotiations, overshadowing and stultifying the Services negotiations. These complaints seem to have reached a boiling point as the revised Services text has received more criticism than praise. The fact that the revised Services text adds nothing significant to the first text and that the issuance of a "working document" is not a revised draft for Rules indicate how badly these negotiations are lagging behind Agriculture and NAMA. WTO Director-General Pascal Lamy will be pushing WTO Members for their support for a ministerial meeting over the coming weeks, but with Agriculture negotiations beginning to slowly move forward and NAMA facing more contention between developing and developed countries, it remains to be seen if a ministerial will produce the momentum that the Services and Rules Groups need for their respective sectors, or if WTO Members will continue to focus on Agriculture and NAMA, as they have done over the past several years. Regardless, it is clear that both the Services and Rules texts require much additional work and more flexibility from WTO Members.

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Multilateral Highlights

WTO Announces Ukraine's Successful Accession; Ukraine Becomes 152nd WTO Member

On May 16, 2008, the Ukraine joined the World Trade Organization (WTO) as the newest member. Ukraine – which started its WTO accession negotiations in 1993 – becomes the WTO's 152nd Member. In announcing Ukraine's successful accession, WTO Director General Pascal Lamy stated that Ukraine's members "will strengthen the multilateral trading system," and he pledged the WTO's continuing work to help other world economies accede to the WTO.

The WTO General Council approved and adopted Ukraine's accession package on February 5, 2008. The accession package – which spells out the terms of Ukraine's accession – include the Working Party Report for Ukraine's Accession, the Protocol of Accession, and the Schedules of Ukraine's commitments on Market Access for Goods and Services. Ukraine had until July 4, 2008 to ratify its accession package, but instead ratified its accession package on April 16, 2008. Under WTO rules, Ukraine would fully join the WTO 30 days after it ratified its accession package (*i.e.*, May 16, 2008).

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