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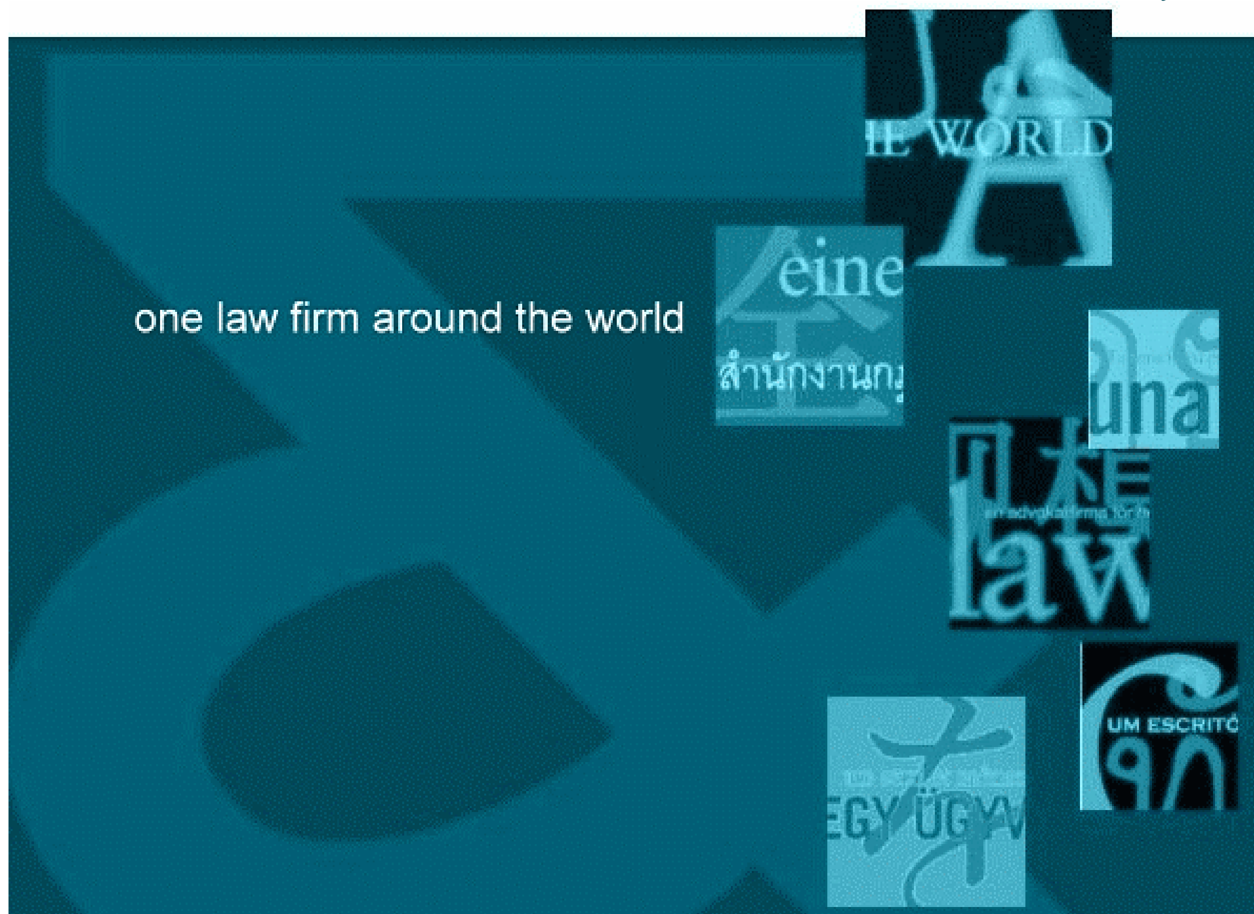
July 2002



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SUMMARY OF REPORTS

U.S. PERSPECTIVES

U.S. Farm Bill Threatens to Undermine WTO Negotiations

President Bush signed into law the Farm Security and Rural Investment Act of 2002 (H.R. 2646) on May 13, 2002. The new law (Public Law No. 107-717) replaces the FAIR Act of 1996 (Freedom to Farm Law), which was scheduled to expire in September. The new farm bill will cover a six-year period (2002-2007 crops) and will continue or modify various agricultural programs under ten titles (see Annex I). Most of the new spending is geared for Title I (commodity programs) and Title II (conservation programs).

The farm bill has drawn criticism from many U.S. trading partners (both developing and developed countries) who claim that the US is moving increasingly toward a more protectionist stance despite its past commitments to pursue liberalization through WTO negotiations.

Lamy and Zoellick Discuss Controversial Trade Issues; WTO Disputes

On June 21, European Union ("EU") Commissioner for Trade Pascal Lamy and his counterpart, U.S. Trade Representative ("USTR") Robert Zoellick met in Washington D.C. to discuss current controversial trade issues between the US and the EU, including:

U.S. progress to bring its tax legislation in compliance with the WTO ruling against the U.S. Extraterritorial Income Exclusion Act ("the ETI Act");

EU retaliation measures against the U.S. Safeguards on steel;

An EU requirement that new Member States alter or cancel altogether their investment treaties with the US;

The EU decision to unbind tariffs on grain and cereals, and;

The status of WTO negotiations, the Doha Development Agenda ("the DDA"), and possible measures to meet the demands of developing countries.

Doha Series Panel #7: "Discoveries, Identities and Trade" – Intellectual Property and the WTO

Participants at a seminar co-sponsored by the Global Business Dialogue, the Washington International Trade Association, and the National Foreign Trade Council on July 17, 2002 discussed intellectual property rights (IPR) in the context of ongoing World Trade Organization (WTO) negotiations. Entitled "TRIPs and the Implementation Issues: Discoveries, Identities and Trade," the symposium was the seventh in an eleven-part series of seminars on WTO negotiations launched at the Doha Ministerial. One of the main speakers, Deputy Assistant

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USTR Claude Burcky, touched upon the U.S. perspective of several pertinent intellectual property issues, such as the TRIPs/Public Health Declaration, compulsory drug licensing, pharmaceutical patents, and copyright protection over the Internet.

The TRIPs/Public Health Declaration, agreed to at the Doha Ministerial on November 12 2001, provides greater flexibility on patent protection obligations set out in the TRIPs Agreement for measures taken to protect public health. During the Doha Round, developing countries, led by Brazil and India, demanded greater flexibility on TRIPs to address public health concerns including AIDS/HIV, malaria, tuberculosis, and other pandemics.

House and Senate Approve TPA Renewal; Expected Boost to WTO Negotiations

After weeks of delay, the House-Senate conference committee reached agreement on the Omnibus trade bill (HR 3009), which contains Trade Promotion Authority (TPA), Trade Adjustment Assistance (TAA), and renewals of the Andean Trade Preferences Act (ATPA) and the Generalized System of Preferences (GSP). The full House approved the conference report 215-212 in the pre-dawn hours of July 27, 2002, before adjourning for the August recess. The Senate followed suit on August 1, 2002, approving the conference report 64-34. President Bush has announced that he will sign the bill on Tuesday, August 6, 2002.

The main issues of contention in the conference were (i) the level of healthcare benefits to be given to trade-displaced workers and (ii) how to deal with the so-called Dayton-Craig amendment that would allow a majority of the United States Senate to amend portions of a trade agreement (e.g. arising from WTO negotiations) which might affect U.S. trade remedy laws.

Trade Promotion Authority has been one of President Bush's main legislative priorities since he took office, and has not been renewed since "fast track" expired in 1994. United States Trade Representative (USTR) Robert Zoellick has stated that the United States will now be able to complete free trade agreements (FTAs) with Chile and Singapore "in short order" as well as initiate new FTAs with Central America, Morocco, Australia, and South Africa. Observers believe that TPA will also propel negotiations for the Free Trade Area of the Americas (FTAA) as well as invigorate the new round of World Trade Organization negotiations launched at the Doha Ministerial in November 2001.

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WTO WORKING BODIES

Update on Negotiations of WTO Rules: Second Submission of the Friends of Antidumping and the First Submission of the EC

On June 28, 2002, Brazil, Chile, Colombia, Costa Rica, Hong Kong, China, Israel, Japan, Korea, Norway, Taiwan, Singapore, Switzerland, and Thailand – coined the "Friends of Antidumping" Group of WTO Members ("Group"), in a joint submission offered eleven new proposals seeking to clarify and improve the existing WTO antidumping ("AD") disciplines pursuant to Paragraph 28 of the Doha Declaration ("the negotiating mandate").[1] The submission was made to the Negotiating Group on Rules – the body coordinating post-Doha negotiations on antidumping, subsidies and other rules.

The recent submission is intended to complement the first submission the Group made on April 26, 2002, which included twelve initial proposals[2] (*Please see our previous report on "Update on WTO Rules Negotiations"*). Mexico and Turkey did not sign onto the second submission, while Taiwan signed onto the second submission, but had not signed onto the first submission. The Group has expressly noted that the order of the issues in its submission is not indicative of negotiating priorities and that the paper does not necessarily represent the full view of every co-sponsor. Further, the submission indicates that the Group may issue additional proposals in the future. In Section II, we discuss each new proposal along with an appraisal of whether it falls within the negotiating mandate.

In addition, on July 5, 2002, the European Communities ("EC") submitted its first set of topics for discussion concerning improvements to be made to the AD Agreement.[3] The EC's submission sets forth a general framework for the discussion of certain topics – arranged by four major objectives. Unlike submissions by India and the Friends of Antidumping, the EC submission is not very detailed. In Section III, we discuss topics raised in the EC's submission, and where applicable an indication of where issues in the EC's submission overlap with prior submissions by other Members. Because of the broad nature of the EC's submission, all of the proposals appear to be within the negotiating mandate – even though some suggested areas of work could go beyond the mandate.

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[1] *See* TN/RL/W/10, Second Contribution to Discussion of the Negotiating Group on Rules on Antidumping Measures, 28 June 2002.

[2] *See* TN/RL/W/6, Anti-dumping: Illustrative Major Issues, 26 April 2002.

[3] *See* TN/RL/W/13, Submission from the European Communities Concerning The Agreement on Implementation of Article VI of the GATT 1994 (Antidumping Agreement), 8 July 2002.

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WTO Fails to Overcome Differences on Textiles Quotas; Extends Deadline on Special and Differential Treatment

WTO Members failed to meet two deadlines set out in the Doha Ministerial texts on whether (i) to allow greater flexibility on textile quota methodology and (ii) to clarify special and differential treatment provisions in existing WTO Agreements, and institutional issues, by July 31, 2002.

The impasse on textiles quota methodology arose as textile importers the US, Canada and the EU, would not agree to more flexibility then set out in the Agreement on Textiles and Clothing (ATC). Due to sharp disagreements, the Chairman of the Council on Trade in Goods (CTG) announced that he would not even present a report summarizing the group's work by the July deadline.

In addition, WTO Members failed to reach agreement on special and differential treatment provisions. Although Members did not conclude their work, the extension of the deadline to December 31, 2002, was marked by less conflict than the textiles debate. For the most part, the extension of the deadline reflected developing country objectives – including treatment of agreement-specific proposals by October 31, 2002.

The continuing lack of progress on expediting the phase-out of textiles quotas and clarification of special and differential treatment provisions, which are priorities for many developing countries, could hinder progress in other negotiations of the Doha Development Agenda.

July Services Week Marks Launch of WTO Market Access Negotiations on GATS

Between July 15-25, 2002, services negotiators in Geneva began a new phase in the GATS negotiations. As set out in the Doha Declaration, June 30, 2002 was the initial deadline for submitting market-access "requests" in all services sectors. Thus, the July "services week" began the phase of bilateral request/offer negotiations on market access as 15 WTO Members are known to have submitted requests. During this time, the Services Council and its subordinate bodies also met, but the bilateral meetings among WTO Member delegations were the clear focus of attention. At this stage, most WTO Members including the US have kept their market-access requests confidential – and have only shared their specific requests with bilateral trading partners.

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WTO DISPUTE SETTLEMENT

Mexico Could Raise First Complaint Against China at the WTO on Investment Incentives

On July 10, 2002, the Mexican Minister of Economy Luis Ernesto Derbez announced that Mexico is considering filing a complaint against China at the World Trade Organization (WTO) due to potentially illegal subsidies granted by China to exporting companies located in China. The dispute could be the first against China since it joined the WTO last December. According to Mexican officials, China is engaging in these trade-distorting practices to attract foreign investment in China to the detriment of foreign investment in Mexico.

In its evaluation on whether to file a WTO dispute, the Mexican Government is conducting a survey among 5,000 companies, requesting information about the reasons why they moved to China or why they are considering doing so. The government seeks evidence on whether China is granting such illegal subsidies.

Derbez also mentioned that if Mexico decides to file the complaint before the WTO and prevails, any retaliatory sanctions should apply to Chinese exports to all WTO member countries, not only on Chinese exports to Mexico.

WTO Panel Interim Report Finds Against U.S. Byrd Amendment

On July 15, 2002 a WTO panel distributed a confidential interim report to the 12 parties in the dispute regarding the U.S. Continued Dumping and Subsidy Offset Act of 2000 (CDSOA, or "Byrd Amendment"). The panel for the most part found that the Byrd Amendment provides a remedy not permissible under WTO rules on antidumping and subsidies. In an usually forward statement, the panel suggests that most appropriate way for the US to comply would be to repeal the law. The WTO panel is expected to issue its final ruling to parties in August, and to release the decision publicly in September. The US will likely appeal the panel finding and buy time for compliance, even though the Byrd Amendment does not appear to be popular with the Bush Administration, like the case with the Clinton Administration.

Report of the Panel in *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, DS213

We analyze here the Report of the Panel in *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* (DS/213) ("*Steel from Germany*"). *Steel from Germany* involved WTO challenges by the EU to the U.S. sunset review determination of the CVD order on corrosion resistant carbon steel from Germany. The dispute centered on the United States' WTO obligations stemming from Article 21.3 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") – the sunset review provision

for CVD measures.[4] The *Steel from Germany* panel addressed procedural issues regarding the panel's terms of reference and three significant substantive issues.

With respect to the procedural matters, the panel ruled that two claims by the EU were outside of the panel's terms of reference. The EU's claims regarding the so-called "expedited" sunset review procedures, and the U.S. CVD law regarding the DOC's obligation to provide ample opportunity for "interested members and parties" to submit evidence in a sunset review, were deemed to be outside of the panel's terms of reference because the EU did not identify the claims in its request for consultations or request for the establishment of a panel.

As for the panel's treatment of the three substantive issues, first, the panel determined that the U.S. CVD law and implementing regulations regarding self-initiation of sunset reviews are consistent with the requirements of the SCM Agreement. The panel thus rejected the EC's arguments that the sunset provision of the SCM Agreement imposes evidentiary standards on national administering authorities in connection with the automatic self-initiation of sunset reviews.

Second, the panel agreed with the EU that the U.S. CVD law and implementing regulations with respect to the use of a 0.5 percent *de minimis* standard to sunset reviews are inconsistent with Article 21.3 of the SCM Agreement. The panel also ruled that the Department's application of the *de minimis* standard in the subject sunset review constituted a violation of Article 21.3.[5]

Third, the panel rejected the EU's argument that the U.S. CVD law is inconsistent on its face with respect to the Department's obligation to determine the likelihood of continuation or recurrence of subsidization in a sunset review. The panel concluded, however, that the Department failed to determine properly the likelihood of continuation or recurrence of subsidization in the sunset review, in violation of the United States' obligations under Article 21.3 of the SCM Agreement.

The United States is likely to appeal the panel's decision of the *de minimis* issue, and the outcome of that appeal is difficult to predict at this time.

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[4] For purposes of antidumping measures, the companion provision of Article 21.3 of the SCM Agreement is Article 11.3 of the AD Agreement, which establishes WTO Members' obligations in connection with the administration of AD sunset reviews.

[5] One of the panelists filed a dissenting opinion on this issue. The dissenting opinion is discussed in greater detail below.

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REGIONAL TRADE AGREEMENT

EFTA and Singapore Sign Free Trade Agreement

The European Free Trade Association (EFTA)[6] and Singapore signed a free trade agreement on June 26, 2002. The comprehensive, WTO-consistent Agreement covers trade in goods (industrial products as well as fish, marine and agricultural products) and trade in services and investment. The Agreement will enter into force on January 1, 2003.

This is the first Agreement of its kind between Europe and East Asia. Analysts expect the Agreement to set a precedent for further trade agreements between the two regions.

Mexico and MERCOSUR Pave Way for Mexico-MERCOSUR FTA

Brazil and Mexico signed a Comprehensive Preferential Tariff Agreement during Mexican President Fox's visit to the region on July 2-5, to participate in the MERCOSUR Presidential Summit in Buenos Aires. The Comprehensive Preferential Tariff Agreement covers a limited list of agricultural and industrial goods (796 tariff codes), not including automotive products.

During Fox's visit, Mexico also concluded bilateral Automotive Agreements with Argentina, Brazil and Uruguay. These bilateral Automotive Agreements will be part of the MERCOSUR-Mexico Automotive Framework Agreement, which will serve as the basis for an eventual Mexico-MERCOSUR Free Trade Agreement.

[6] The European Free Trade Association is a trade group consisting of Switzerland, Liechtenstein, Norway and Iceland.

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REPORTS IN DETAIL

U.S. PERSPECTIVES

U.S. Farm Bill Threatens to Undermine WTO Negotiations

SUMMARY

President Bush signed into law the Farm Security and Rural Investment Act of 2002 (H.R. 2646) on May 13, 2002. The new law (Public Law No. 107-717) replaces the FAIR Act of 1996 (Freedom to Farm Law), which was scheduled to expire in September. The new farm bill will cover a six-year period (2002-2007 crops) and will continue or modify various agricultural programs under ten titles (see Annex I). Most of the new spending is geared for Title I (commodity programs) and Title II (conservation programs).

The farm bill has drawn criticism from many U.S. trading partners (both developing and developed countries) who claim that the US is moving increasingly toward a more protectionist stance despite its past commitments to pursue liberalization through WTO negotiations.

ANALYSIS

I. General Overview of U.S. Farm Bill

The new farm bill raises the level of agricultural subsidies by at least 80 percent, costing roughly $180-190 billion over ten years. Nearly three-quarters of these subsidy programs will be paid out to the largest 10 percent of U.S. farmers. The bill increases subsidies on large staple crops (wheat and soybeans) and introduces new subsides on lentils, peanuts, honey, wool and mohair.[7] Many analysts expect the greatest impact to be felt in the cereal sector. The design of the new farm bill encourages farmers to increase production even when prices fall below specified levels – encouraging U.S. exports and depressing global prices.

There is a $19.1 billion per year limit, set by WTO rules, on the payments the United States may spend on price-linked or production-linked subsidies. This provision is notified under the so-called Amber Box in the WTO. The European Union predicts that because the new farm bill is expected to depress world prices, there is a high probability that the United States will exceed the WTO-set limit. U.S. officials, however, assert that the WTO ceilings will not be reached.

II. Three Mechanisms of Support for Arable Crop Sector

Marketing Loans – These assistance loans are continued at rates fixed for the life of the new farm bill (2002-2007). The rates, except for rice and soybeans, are set higher than in the

[7] Subsidies on honey, wool and mohair were previously eliminated; however, the new bill resurrects them.

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FAIR Act. Most loans are paid as "loan deficiency payments" (LDPs). This is the difference between a fixed price (the loan rate) and a local market price (basically the price estimated by the U.S. administration for each country where the crop is produced).

Fixed Payments – The new fixed payments also remain constant over the six-year period at a higher rate than under the 1996 FAIR Act. In this case, the farmer receives a set payment each year.

Counter-cyclical Payments – This is a new facility in the farm bill. These are new price-linked payments made to producers on the basis of yields and crops grown in a base period. These subsidies are paid out when the market return (plus the fixed payment price and the LDP) falls below a certain target price.

Many analysts have already criticized "LDPs" and "counter-cyclical payments" because they automatically guarantee the U.S. farmer a given level of income, and thus might not encourage a U.S. farmer to follow market signals.

III. U.S. Farm Bill and Developing Countries

Developing countries in Africa and Asia will be particularly hard hit because agriculture plays such a big role in their economies – accounting for more than 50 percent of GDP in some instances. The large subsidies paid out to U.S. farmers may contribute to global overproduction of wheat, corn, cotton and other basic crops. This, in turn, likely will drive down world commodity prices, making it more difficult for small, unsubsidized Third World farmers to compete.

Many U.S. trading partners have criticized the farm bill and fear that it could threaten to kill future WTO negotiations. During the WTO Ministerial in Doha, the United States promised that phasing out agricultural subsidies and improving access for agricultural exports from developing countries to the United States and Europe would be a priority of the new round of WTO negotiations. Many developing countries share the opinion that when developed countries subsidize their farmers, it creates a direct disadvantage for farmers from developing countries, as they cannot afford to provide the same amount of support. In addition, some analysts contend that this will lead to the displacement of those farmers who simply cannot compete with subsidized imports. In the case of China, the new farm bill may encourage China to increase its own agricultural subsidies, making it more difficult for China to comply with its WTO commitments. Other countries may follow suit, in effect moving away from liberalization.

OUTLOOK

Senior Republican Senator Charles Grassley (R-Iowa) has warned that the new farm bill will undermine efforts by the United States to reduce agricultural subsidies in Europe and other countries around the world. In addition, the passage of the new bill threatens to portray the Bush administration as protectionist. After slapping stiff tariffs on global steel imports as well as on

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softwood lumber from Canada, the Bush administration faces an uphill battle in its quest to convince the world that the United States is the leader of global free trade.

During a business forum in Rio de Janeiro, Brazilian Minister of Development, Industry and Trade Sérgio Amaral asserted that successful negotiations for the Free Trade of the Americas Agreement (FTAA) are threatened as well due to the "protectionist measures adopted by the United States." Other countries, including Australia, have also signaled their frustration over the perceived "protectionist move" by the Bush administration. Australian farmers fear the new farm bill will depress commodity prices across the board and directly harm their own agricultural sectors.

Finally, the farm bill has also complicated the trade relationship between the EU and the US. The bill's provisions have cast serious doubt regarding U.S. commitment to the goals agreed to at the WTO Doha Ministerial last November where the US and the EU agreed to sharply reduce subsidies that depress crop prices and damage developing countries' economies. In light of these events, EU Commissioner for Trade Pascal Lamy now faces a daunting challenge to persuade European politicians to restrain from increasing subsidies under the Common Agricultural Policy.

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ANNEX I

Title I: Commodity Programs

Direct payments, counter-cyclical payments, and marketing loans will provide income support to farmers of wheat, feed grains, upland cotton, rice and oilseeds. These three programs as well as a quota buyout will be applied to peanuts. The sugar program will operate, to the extent possible, as a "no net cost" program. Finally, a new dairy income support program will be introduced.

Title II: Conservation

The new farm bill emphasizes conservation on working land by increasing funding for the Environmental Quality Incentives Program. It also allocates funds for the establishment of a new Conservation Security Program. This program pays producers to adopt or maintain practices that address resources of concern. Other issues covered under this section include land retirement, the creation of a new Grassland Reserve to help landowners restore and conserve grassland, and a new provision to ensure regional equity in conservation funding.

Title III: Trade

Under this title, new programs designed to develop and expand commercial opportunities for U.S. commodities and international food assistance are created. These include the McGovern-Dole International Food for Education and Nutrition Program, the Biotechnology and Agricultural Trade Program, Technical Assistance for Specialty Crops Program, and an online Exporter Assistance Initiative.

Title IV: Nutrition Programs

The new farm bill reinstates food stamp eligibility for legal immigrants who have resided in the United States for at least five years, and for all legal immigrant children and disabled persons. This title increases funding for the Emergency Food Assistance Program and modifies commodity distribution programs.

Title V: Credit

The new farm bill relaxes Farm Service Agency (FSA) farm loan eligibility rules to increase the number of eligible Federal farm credit assistance borrowers. In addition, it modifies lending rules for beginning farmers and ranchers to increase eligibility and to provide more benefits.

Title VI: Rural Development

The new farm bill provides new funding for broadband Internet services, value-added agricultural programs, rural business investments, and training for rural emergency personnel.

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The bill continues funding for rural areas to undertake strategic planning, feasibility assessments, and coordination activities with other local, State, and Federal officials as well as water and wastewater programs.

Title VII: Research & Related Matters

Under this title, new agricultural research and extension programs are established. The bill also expresses the "sense of Congress" that agricultural research funding double over the next five years and increases funding for the Initiative for Future Agriculture and Food Systems. In addition, it establishes a biosecurity planning and response program, as well as grant programs for biotechnology risk assessment research and biotechnology research on crops important for developing countries.

Title VIII: Forestry

The new bill provides for a forestland enhancement program to provide financial, technical, educational and related assistance to State Foresters.

Title IX: Energy

This title provides for federal procurement of biobased products, biodiesel and biorefinery development grants and educational programs, renewable energy systems and energy efficiency improvement programs, and other cooperative research and extension projects. The Office of Energy Policy and New Uses (OEPNU) will assist the Secretary of Agriculture in developing the Department's policy positions on energy-related policies and programs and on new uses for agricultural products.

Title X: Miscellaneous

This title modifies crop insurance and organic agriculture programs, and includes new provisions on country-of-origin labeling, animal health and welfare, and some support for specialty commodities.

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Lamy and Zoellick Discuss Controversial Trade Issues; WTO Disputes

SUMMARY

On June 21, European Union ("EU") Commissioner for Trade Pascal Lamy and his counterpart, U.S. Trade Representative ("USTR") Robert Zoellick met in Washington D.C. to discuss current controversial trade issues between the US and the EU, including:

- U.S. progress to bring its tax legislation in compliance with the WTO ruling against the U.S. Extraterritorial Income Exclusion Act ("the ETI Act");
- EU retaliation measures against the U.S. Safeguards on steel;
- An EU requirement that new Member States alter or cancel altogether their investment treaties with the US;
- The EU decision to unbind tariffs on grain and cereals, and;
- The status of WTO negotiations, the Doha Development Agenda ("the DDA"), and possible measures to meet the demands of developing countries.

ANALYSIS

I. Background

During his two day visit to Washington D.C., Commissioner Lamy met with senior USTR, Congressional and Administration officials. Discussions were broad and focused on bilateral trade disputes and multilateral trade issues, including progress of the DDA and the status of the WTO trade negotiations. Below, we summarize some of the major issues brought up during Lamy's visit.

II. The ETI Act ("FSC Dispute")

During his meetings with USTR and the press, Lamy pointed out that the EU is pleased with progress made so far by the US in bringing its tax legislation into compliance with the WTO ruling against the U.S. Extraterritorial Income Exclusion Act. He promised that the EU would not undertake any sanctions against the US as long as the US is "moving forward towards compliance with the WTO ruling." Lamy further announced that Chairman of the House Ways and Means Committee Bill Thomas has assured him that the Committee is aiming to finish new draft legislation before the Congressional August recess.

The EU has threatened to retaliate against the US if it fails to comply with the WTO ruling. While the retaliation measures proposed by the EU envisaged restrictions on U.S. imports in the amount of 4 billion U.S. dollars, the US has argued that this amount should not exceed 1 billion U.S. dollars.

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III. U.S. Steel Safeguards Retaliation

Another controversial issue brought up during Lamy's visit was the trade dispute over the U.S. Safeguards on steel. The EU recently challenged Bush's decision at the WTO and threatened to retaliate by imposing tariff rates for a wide variety of products. The EU also threatened to impose some of these tariffs even before the WTO ruling if the US did not compensate the EU immediately for the damages incurred by EU steel producers.

However, a move by the Bush Administration last month to exclude a number of steel imports originating in the EU caused the EU to postpone its decision. During the last days of June, the Bush Administration issued two lists of exclusions, which among others contained exclusions of products strongly opposed by the U.S. steel industry. As a result, Lamy backed away from his previous position that product exclusions would not be sufficient to make the EU postpone its retaliation measures. He even went on to say that, "the frontier between compensation and exclusions may become blurred if a good package of exclusions is on the table." Lamy further announced that he would make his decision whether or not to proceed with the short-term retaliation measures around mid-July and that this decision would depend on the product exclusions offered by the US at that time.

If Lamy decides to proceed with the retaliation measures, he will have to make recommendations to the EU Member States, which will then have to approve the proposal with a qualified majority. Sources indicate that despite the latest developments, such a scenario is likely, since the exclusions offered by the US so far cover only an insignificant part of the compensation requested by the EU.

IV. Bilateral Investment Treaties

Another issue discussed at the summit was a recent request by the EU that candidates for EU membership must alter or cancel their bilateral investment treaties with the US. The US has such treaties with Poland, the Check Republic, Slovakia, Estonia, Latvia, Lithuania, Bulgaria and Romania. The EU argues that these treaties offer higher protection to U.S. investors and thus violate European common trade policy. EU officials worry that these treaties open to foreign investors several service sectors, which the EU has so far kept closed to foreign entities. An EU official recently pointed out that these treaties thus "constitute openings that could facilitate the circumvention of investment rules in the EU."

The US, however, alleges that the EU applies a double standard, as it has not required its current members to alter their existing "Friendship, Commerce, and Navigations" Agreements with the US. The US further has accused the EU that the decision targets only the US. It does not require potential new EU members to alter their investment agreements with current EU members or other third countries. The EU rejected these accusations and announced that it is currently preparing a list of incompatibilities between EU law and the provisions of these agreements. The EU intends to present this list to candidate countries on the next session on enlargement on July 5.

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This development seriously disconcerted U.S. businesses. In a letter recently sent by U.S. industry representatives to President Bush, business executives warned that a termination of these agreements might significantly affect decisions of U.S. companies to make investments in these countries.

V. Tariffs on Grain and Cereals

Commissioner Lamy and USTR Zoellick also discussed the EU's decision to alter its current import regime for grain and cereals and to replace it with a new system, "possibly based on tariff quotas and fixed duties." The EU complains that the current method for setting the levels of import duties for grain and cereals is not working as it leads to increased imports and low duties, creating market imbalances. The EU currently sets its import duties according to world market prices as shown in U.S. Commodity Exchange Quotations. The EU argues that the latter however does not account for low prices in some countries.

The European Commission ("the Commission") issued a draft proposal to the Council several days after the meeting. The Commission proposed that the EU open up negotiations with other "appropriate" WTO members to renegotiate its current obligations on this issue. If the Council endorses the Commission's proposal, the EU will start negotiations with the WTO members who are major exporters of cereals to the EU. However, the proposal does not stipulate any specific timetable for such negotiations.

VI. WTO Negotiations and Developing Countries

Commissioner Lamy also commented on the slow progress of WTO negotiations. He pointed out some EU concerns that the negotiations might be seriously jeopardized if industrialized countries do not find a way to meet the demands of developing countries, especially in making existing trade agreements more beneficial for them. He does not believe that there has been much progress among WTO members regarding provisions in existing trade agreements granting special or differential treatment for developing countries. While the WTO has set a July 31 deadline to report to the General Council on how these provisions can be made more effective in addressing the needs of developing countries, Lamy warned that the US must intensify its efforts in the negotiations.

OUTLOOK

Commissioner Lamy's visit to Washington did ease trade tensions between both Parties. Officials agree that Lamy and Zoellick's commitment to continued cooperation is the best way to further progress in future negotiations, both on a multilateral and bilateral level.

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Doha Series Panel #7: "Discoveries, Identities and Trade" – Intellectual Property and the WTO

SUMMARY

Participants at a seminar co-sponsored by the Global Business Dialogue, the Washington International Trade Association, and the National Foreign Trade Council on July 17, 2002 discussed intellectual property rights (IPR) in the context of ongoing World Trade Organization (WTO) negotiations. Entitled "TRIPs and the Implementation Issues: Discoveries, Identities and Trade," the symposium was the seventh in an eleven-part series of seminars on WTO negotiations launched at the Doha Ministerial. One of the main speakers, Deputy Assistant USTR Claude Burcky, touched upon the U.S. perspective of several pertinent intellectual property issues, such as the TRIPs/Public Health Declaration, compulsory drug licensing, pharmaceutical patents, and copyright protection over the Internet.

The TRIPs/Public Health Declaration, agreed to at the Doha Ministerial on November 12 2001, provides greater flexibility on patent protection obligations set out in the TRIPs Agreement for measures taken to protect public health. During the Doha Round, developing countries, led by Brazil and India, demanded greater flexibility on TRIPs to address public health concerns including AIDS/HIV, malaria, tuberculosis, and other pandemics.

ANALYSIS

On July 17, 2002, the Global Business Dialogue, the Washington International Trade Association, and the National Foreign Trade Council sponsored a symposium on intellectual property rights (IPR) and WTO negotiations. The symposium was the seventh in an eleven-part series of seminars on WTO negotiations. Speakers included Mr. Claude Burcky, Deputy Assistant United States Trade Representative (DAUSTR) for Intellectual Property Rights; Mr. Amir Attaran, Professor from Harvard University; Mr. Salvador Behar, Legal Counsel, Embassy of Mexico; and Mr. Mark Orr, Vice President, Pernod-Ricard. We highlight below the remarks by DAUSTR Burcky – which were most relevant to Doha negotiations. Other speakers commented very briefly on Doha negotiations, or address more general themes on developing country concerns on balancing patent protection and fighting epidemics.

I. U.S. Perspective on TRIPS Discussion at the WTO

Deputy Assistant United States Trade Representative (DAUSTR) Claude Burcky began the discussion by highlighting the U.S. position toward intellectual property rights at the Doha Ministerial. He stated that going into Doha, the United States did not support new negotiations on the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), but rather advocated for the implementation of existing obligations under the Agreement. Burcky outlined some of the pertinent issues on the TRIPs Council agenda, including:

- ***Geographical indications*** – Possibly extend protection on geographical indications for products other than wines and spirits. While the United States has agreed to a working party on geographical indications for wines and spirits, the

United States does not support a position put forth by the EU and others to initiate WTO negotiations on expanding global protection for geographical indications beyond wines and spirits to food products such as cheeses, beers, yogurts, rice and tea. Article 23 of the TRIPs Agreement provides protection for geographical indications only for wines and spirits.

- ***Biotech patents*** – Review provisions on Biotech Patents, including application of patents to plants and animals.
- ***WHO essential drugs*** – Exceptions/flexibility on patent protection to essential drugs designated by the World Health Organization.
- ***Article 71.1*** review – Implementation of Article 71.1 (the Review Mechanism) of the TRIPs Agreement.
- ***Traditional knowledge/folklore*** – Consider new rules on traditional knowledge and folklore.
- ***Convention on Biological Diversity*** – Amend Article 27.3(b) so as to take into consideration the Convention on Biological Diversity and the International Undertaking (in particular to ensure the continuation of traditional farming).
- ***Internet/IT*** – Consider new technologies and copyright protection on the Internet.

II. TRIPs Agreement and the Declaration on Public Health

Burcky commented on the Declaration on TRIPs and Public Health, which was advocated by Brazil, India and the Africa Group (and vocal NGOs in the United States, among others) in the run up to the Doha Ministerial in November 2001. This separate declaration reaffirms and clarifies existing flexibility in the TRIPs Agreement on parallel imports and compulsory licensing for pharmaceuticals. While not amending the TRIPs Agreement, this separate declaration serves as a strong political statement that the TRIPs Agreement could be part of the solution to address health crises (e.g. HIV/AIDS, malaria, tuberculosis and other pandemics) around the globe. Burcky pointed out that the very admission by developing countries that the TRIPs Agreement could be beneficial for them is markedly different from their pre-Doha mindset.

Burcky also stressed that there is only a short time left to "settle a lingering controversy in the WTO over the application of patents for medicines in developing countries" to fight "pandemic" diseases. During the Doha Ministerial, some developing countries argued that compulsory licensing could be used to develop local production in order to facilitate technology transfer in instances where a patented product is not produced domestically. The United States and Switzerland, which have significant pharmaceutical industries, opposed language that would weaken the TRIPs Agreement (on compulsory licensing) and claimed that efforts to strengthen local industry involves industrial development policy and not health policy.

While the United States still holds that the separate Declaration is primarily a political statement and therefore not binding, Burcky asserted that the United States is willing to be flexible about allowing compulsory licensing for such drugs in those developing countries that do not have the infrastructure or resources to develop their own pharmaceutical industries.

III. TRIPs Agreement and LDCs

WTO members approved a proposal on June 27, 2002 that would extend to 2016 the deadline for least developed countries (LDCs), which includes 29 WTO members mainly in sub-Saharan Africa, to apply patent rights to all medicines. The original deadline was set at 2005. Burcky stressed that the United States desires to find a solution for patent drugs that addresses the needs of LDCs. He believes this can be addressed through:

- A more transparent mechanism whereby the patent holder is aware of the need in LDCs and can respond by eliminating the compulsory licensing requirement;

- A guarantee of sorts that ensures that generic medicines end up in the intended countries, rather than diverted into more lucrative developed-country markets; and

- Reassurance to pharmaceutical companies that incentives for future innovation and research will remain a priority.

The United States and the European Union also agreed to rely on existing compulsory licensing agreements (mentioned in Article 31 of the TRIPs Agreement) to save time, especially as there are only a handful of meetings left this year.

IV. Copyright Protection on the Internet and WIPO Internet Treaties

Burkey concluded his remarks by saying that the United States would use the Doha mandate to strengthen copyright protection on the Internet. However, he noted that the United States was not ready to incorporate two World Intellectual Property Organization (WIPO) treaties on Internet copyright protection into WTO rules. These two treaties are the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. These treaties, which entered into force in the spring of 2002, clarify international copyright rules and will likely be among the "new developments" raised under the review of the TRIPs Agreement in December 2002.

OUTLOOK

The WTO TRIPs Council has only two more meetings (one in September and one in November) before the December WTO General Council meeting. Mr. Burcky stressed that the United States is primarily interested in securing a high degree of transparency in the final resolution to ensure that compulsory drug licensing "continues as a last resort for developing countries."

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In the event that negotiations this year fail to reach an acceptable resolution on compulsory licensing, some WTO Members such as Brazil and India may become disillusioned and take matters into their own hand. If Members proceed with domestic production and flaunt certain patents in the name of public health, serious conflicts would result. These conflicts could threaten other negotiations launched at Doha, and the WTO's public image overall.

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House and Senate Approve TPA Renewal; Expected Boost to WTO Negotiations

SUMMARY

After weeks of delay, the House-Senate conference committee reached agreement on the omnibus trade bill (HR 3009), which contains Trade Promotion Authority (TPA), Trade Adjustment Assistance (TAA), and renewals of the Andean Trade Preferences Act (ATPA) and the Generalized System of Preferences (GSP). The full House approved the conference report 215-212 in the pre-dawn hours of July 27, 2002, before adjourning for the August recess. The Senate followed suit on August 1, 2002, approving the conference report 64-34. President Bush has announced that he will sign the bill on Tuesday, August 6, 2002.

The main issues of contention in the conference were (i) the level of healthcare benefits to be given to trade-displaced workers and (ii) how to deal with the so-called Dayton-Craig amendment that would allow a majority of the United States Senate to amend portions of a trade agreement (e.g. arising from WTO negotiations) which might affect U.S. trade remedy laws.

Trade Promotion Authority has been one of President Bush's main legislative priorities since he took office, and has not been renewed since "fast track" expired in 1994. United States Trade Representative (USTR) Robert Zoellick has stated that the United States will now be able to complete free trade agreements (FTAs) with Chile and Singapore "in short order" as well as initiate new FTAs with Central America, Morocco, Australia, and South Africa. Observers believe that TPA will also propel negotiations for the Free Trade Area of the Americas (FTAA) as well as invigorate the new round of World Trade Organization negotiations launched at the Doha Ministerial in November 2001.

ANALYSIS

I. Trade Bill Renews TPA After Close Vote

After weeks of delay, the House-Senate conference committee reached agreement on the omnibus trade bill (HR 3009), which contains Trade Promotion Authority (TPA), Trade Adjustment Assistance (TAA), and renewals of the Andean Trade Preferences Act (ATPA) and the Generalized System of Preferences (GSP). Like all of its previous votes on TPA, the full House approved the conference report by a very close 215-212 vote in the pre-dawn hours of July 27, 2002, before adjourning for the August recess. The Senate followed suit on August 1, 2002, approving the conference report by a comfortable 64-34 vote. President Bush has announced that he will sign the bill into law on Tuesday, August 6, 2002.

A. House Vote Count

190 Republicans and 25 Democrats voted in favor of the trade conference report, while 27 Republicans, 183 Democrats, and 2 Independents voted against it.

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B. Senate Vote Count

43 Republicans and 21 Democrats, including Senate Finance Committee Chairman Max Baucus (D-Montana), Conferee John Breaux (D-Louisiana), Senate Majority Leader Thomas Daschle (D-South Dakota), and John Kerry (D-Massachusetts), voted in favor of the trade conference report. 5 Republicans and 29 Democrats voted against the trade conference report. Senators Daniel Akaka (D-Alaska) and Jesse Helms (R-North Carolina) did not vote.

C. Conference Report Incorporates Provisions from House and Senate Trade Bills

On July 26, 2002, the House-Senate conference committee agreed on a conference report, reconciling the trade bills passed earlier by the House and Senate. The main issues of contention in the conference were the level of health benefits for trade-displaced workers (Trade Adjustment Assistance) and the so-called Dayton-Craig amendment to TPA that would allow a majority of the United States Senate to amend portions of a trade agreement affecting U.S. trade remedy laws. The conferees also reconciled the differing House and Senate renewals of the Andean Trade Preferences Act (ATPA) and the Generalized System of Preferences (GSP).

II. Trade Adjustment Assistance (TAA)

In terms of Trade Adjustment Assistance (TAA), the conferees compromised at a 65 percent healthcare benefit for trade-displaced workers. Originally, the Senate had approved a 70 percent benefit, while the House approved a 60 percent benefit.

III. Trade Promotion Authority (TPA)

Formally titled the “Bipartisan Trade Promotion Authority Act of 2002” (“the TPA bill”), the TPA package in the conference report incorporates provisions from both the House and Senate versions of TPA. TPA sets out negotiating objectives and other priorities to guide the President and the United States Trade Representative (USTR) in trade negotiations with other countries. TPA also sets forth a schedule of Congressional consultations and notifications as well as various reporting procedures, which the President must follow in order for trade agreements to receive “fast-track” treatment (*i.e.,* an up-or-down vote without amendment) in Congress. Many of these procedures were contained in the last fast-track law, the Omnibus Trade and Competitiveness Act of 1988, which expired in 1994 after the Uruguay Round was concluded and approved by Congress.

The Act extends TPA or fast-track treatment to agreements entered into before June 1, 2005, with the possibility of extension through June 1, 2007. (The date happens to coincide with the expected conclusion of the Doha Development Agenda negotiations – by January 1, 2005.) If the President asks Congress to extend TPA through June 1, 2007, the United States International Trade Commission (USITC) must submit a report to Congress by May 1, 2005, analyzing the economic impact on the United States of all trade agreements implemented between enactment of TPA and the extension request.

A. Conferees Drop Dayton-Craig Amendment

The Senate-passed Dayton-Craig amendment, which would have imposed Congressional oversight in trade negotiations involving U.S. trade remedy laws, was the most contentious issue dealt with in conference. Conferees ultimately decided to drop the provision from the conference report.

Although a majority of the Senate voted in favor of the Dayton-Craig amendment during the Senate debate on the trade bill, the conferees ultimately decided to drop its provisions from the conference report *(Please see W&C May 14, 2002 Report).* The Bush Administration strongly opposed the Dayton-Craig amendment and threatened to veto a trade bill containing it. Senate Majority Leader Thomas Daschle (D-South Dakota) had stated that he would still support the trade bill in the absence of Dayton-Craig.

In place of the Dayton-Craig amendment, conferees included several other provisions intended to protect U.S. trade remedy laws and to preserve Congress' role in protecting those laws. Supporters of the Dayton-Craig amendment, however, point out that the new provisions do not go as far as the original amendment in protecting U.S. trade remedy laws. The provisions that replace the Dayton-Craig amendment include:

- **A new principal negotiating objective** to (i) preserve the ability of the United States to enforce its trade laws, including the antidumping, countervailing duty, and safeguard laws, and avoid agreements that lessen the effectiveness of domestic and international unfair trade disciplines, especially dumping and subsidies, or that lessen the effectiveness of domestic and international safeguard provisions; and (ii) address and remedy market distortions that lead to dumping and subsidization, including overcapacity, cartelization, and market-access barriers.

- **New reporting procedures:** The President must submit a report to the House Ways and Means Committee and the Senate Finance Committee at least 180 days in advance of entering into a trade agreement regarding proposals advanced in trade negotiations that could require amendments to trade remedy laws. The President must submit the report 90 days before finalizing the agreements already underway with Chile and Singapore.

    - Any Member of Congress may introduce a privileged, non-binding resolution, stating that the proposed changes to U.S. trade remedy laws (as detailed in the report mentioned above) are inconsistent with the U.S. trade negotiating objectives. The resolution would be referred to either the House Ways and Means Committee or the Senate Finance Committee and would receive "privileged" status if the committee of jurisdiction approved it and reported it the full House or Senate. "Privileged" status means that the full House or Senate would be required to consider the resolution immediately. Analysts note that although Congress could demonstrate its

disapproval through this resolution mechanism, it could not actually stop the trade agreement from moving forward as it was already negotiated.

- The conference report allows only one "privileged" resolution per agreement. In addition to the non-binding resolution mentioned above, any Member of the House or Senate may introduce a procedural disapproval resolution that would revoke the "fast-track" procedures from being applied to an agreement. In order to revoke fast-track procedures, the House and Senate would have to agree within the applicable 60-day period that the Administration failed to do one or more of the following: (i) notify or consult with Congress in accordance with the provisions set out in the TPA bill (the U.S.-Singapore FTA, the U.S.-Chile FTA, the Free Trade Area of the Americas, and the new round of WTO negotiations are exempt from some of these requirements); (ii) develop or meet guidelines regarding consultations with the USTR and the Congressional Oversight Group; or (iii) meet with the Congressional Oversight Group. A Member can also introduce a procedural disapproval resolution if the agreement fails to make progress in achieving the purposes, policies, priorities, and objectives of the TPA bill.

- Reportedly, the conferees linked the privileged resolution procedures in this way (i.e. allowing only one such privileged resolution per agreement) to make it difficult for Congress to actually force changes to be made in the negotiated provisions (i.e. the sections regarding trade remedy laws) or in revoking the fast-track procedures from being applied to an agreement.

B. Negotiating Objectives

In reconciling the overall and principal negotiating objectives in the two competing trade bills, the conferees decided to use the negotiating objectives contained in the House-passed TPA bill, with several modifications and additions, including the new principal negotiating objective regarding trade remedy laws described above:

OVERALL NEGOTIATING OBJECTIVES OF THE UNITED STATES

- **Trade Barriers and Distortions:** To obtain more open, equitable, and reciprocal market access. To further strengthen the system of international trading disciplines and procedures, including dispute settlement. To foster economic growth, raising living standards, and promote full employment in the United States. To enhance the global economy.

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- **Trade and Environment:** To ensure that trade and environmental policies are mutually supportive. To seek to protect and preserve the environment and enhance the international means of doing so, while optimizing the use of the world's resources.

- **Trade and Worker Rights:** To promote respect for worker rights and the rights of children consistent with International Labor Organization (ILO) core labor standards. To promote an understanding of the relationship between trade and worker rights.

- **Weakening of Labor and Environmental Standards:** To seek provisions in trade agreements under which parties to those agreements strive to ensure that they do not weaken or reduce the protections afforded in domestic environmental and labor laws as an encouragement for trade.

- **Small Businesses:** To ensure that trade agreements afford small businesses strong access to international markets and reduce barriers that disproportionately affect small business exports.

  Senator Olympia Snowe (R-Maine) offered similar provisions during the Senate Finance Committee mark-up of the TPA bill *(Please see W&C December 12, 2001 Report).*

- **Labor Standards:** To seek commitments by trade agreement parties to vigorously enforce their own laws prohibiting the worst forms of child labor and to promote universal compliance with the ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Chile Labor.

  Senator Tom Harkin (D-Iowa) originally sponsored a similar amendment during Senate debate of the trade bill.

PRINCIPAL NEGOTIATING OBJECTIVES

- **Trade Barriers and Distortions:** To expand competitive market opportunities for U.S. exports. To obtain fairer and more open conditions for trade by reducing or eliminating tariff and nontariff barriers and policies and practices of foreign governments directly related to trade that decrease market opportunities for U.S. exports or distort U.S. trade. To obtain reciprocal tariff and nontariff barrier elimination agreements with particular attention to certain tariff categories contained in the Uruguay Round Agreements Act.[8]

[8] Section 11(b) of the Uruguay Round Agreements Act (19 U.S.C. 3521(b)).

- **Trade in Services:** To reduce or eliminate barriers to international trade in services, including regulatory and other barriers that deny national treatment and market access or unreasonably restrict the establishment or operations of services suppliers.

- **Foreign Investment:** To reduce or eliminate artificial or trade-distorting barriers to foreign investment, while ensuring that foreign investors are not accorded greater rights than U.S. investors in the United States.

  Conferees added a technical modification to the principal negotiating objective on foreign investment to clarify that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States. This modification expresses Congress' intent that the substantive investment protections (e.g., expropriation, fair and equitable treatment, and full protection and security) should be consistent with U.S. legal principles and practice and not provide greater rights to foreign investors in the United States. This language applies to substantive protections only and is not applicable to procedural issues, like access to investor-state dispute settlement, dismissal of frivolous claims, the exhaustion of remedies, access to appellate procedures, or other similar issues. Senate Finance Committee Chairman Max Baucus originally offered a similar provision in the Senate to assuage the concerns of Senator John Kerry, but Kerry ultimately offered his own investor-state amendment that the Senate rejected *(Please see W&C May 14 and May 21, 2002 Reports).* The conferees also added a provision to the principal negotiating objective on foreign investment that negotiators should seek to provide for an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements.

- **Intellectual Property:** To further promote adequate and effective protection of intellectual property rights. To ensure accelerated and full implementation of the Agreement Trade-Related Aspects of Intellectual Property Rights of the Uruguay Round Agreements Act, particularly its enforcement obligations. To ensure that any trade agreement entered into by the United States reflects a standard of protection of intellectual property rights similar to that found in U.S. law. To secure fair, equitable, and non-discriminatory market access opportunities for U.S. persons that rely on intellectual property protection.

  The principal negotiating objective on intellectual property was expanded to include a provision to support the Declaration on the TRIPs (Trade-Related Aspects of Intellectual Property Rights) Agreement on Public Health adopted at the Doha Ministerial. Senator Edward M. Kennedy (D-Massachusetts) originally sponsored this amendment in the Senate *(Please see W&C May 14, 2002 Report).*

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- **Transparency:** To obtain wider and broader application of the principle of transparency through (i) increased and timely public access to information regarding trade issues and the activities of international trade institutions, and (ii) increased openness at the WTO and other international trade fora.

- **Anti-corruption:** To obtain high standards and appropriate domestic enforcement mechanisms to prohibit attempts to influence the acts, decisions, or omissions of foreign government. To ensure that such standards do not place U.S. persons at a competitive disadvantage in international trade.

- **Improvement of the WTO and Multilateral Trade Agreements:** To achieve full implementation and extend the coverage of the WTO and such agreements to products, sectors, and conditions of trade not adequately covered. To expand country participation in and enhancement of the Information Technology Agreement (ITA) and other trade agreements.

- **Regulatory Practices:** To achieve increased transparency and opportunity for the participation of affected parties in the development of regulations. To require that proposed regulations be based on sound science, cost-benefit analysis, risk assessment, or other objective evidence. To establish consultative mechanisms among parties to trade agreements to promote increased transparency in developing guidelines, rules, regulations, and laws for government procurement and other regulatory regimes. To achieve elimination of government measures such as price controls and reference pricing, which deny full market access for U.S. products.

- **Electronic Commerce:** To ensure that current obligations, rules, disciplines, and commitments under the WTO apply to electronic commerce. To ensure that electronically delivered goods and services receive no less favorable treatment under trade rules and commitments than like products delivered in physical form. To ensure that governments refrain from implementing trade-related measures that impede electronic commerce. To ensure that regulations on electronic commerce are the least restrictive on trade, nondiscriminatory, and transparent, and promote an open market environment. To extend the WTO moratorium on duties on electronic transmissions.

- **Agriculture:** To obtain competitive opportunities for U.S. exports of agricultural commodities in foreign markets substantially equivalent to the competitive opportunities afforded foreign exports in the U.S. markets. To achieve fairer and more open conditions of trade in bulk, specialty crop, and value-added commodities.

- **Labor and Environment:** To ensure that a party to a trade agreement with the United States does not fail to effectively enforce its environmental and labor laws in a manner affecting trade between the US and that party after the

entry into force of a trade agreement between those countries. To recognize that parties to a trade agreement retain the right to exercise discretion with respect to the enforcement of their labor and environmental laws. To recognize that a country is effectively enforcing its laws if a course of action or inaction reflects a reasonable exercise of such discretion. In this case, no retaliation can be authorized based on the exercise of such discretion. To strengthen the capacity of U.S. trading partners to promote respect for core labor standards and to protect the environment through sustainable development. To seek market access for U.S. environmental technologies, goods, and services. To ensure that labor, environmental, health, or safety policies and practices of the parties to a trade agreement with the US do not arbitrarily or unjustifiably discriminate against U.S. exports or serve as trade barriers.

According to Senate Finance Committee Chairman Max Baucus, the conference report fully incorporates the standard set by the U.S.-Jordan Free Trade Agreement in terms of labor and environmental issues.

- **Dispute Settlement and Enforcement:** To seek provisions in trade agreements providing for dispute resolution in an effective, timely, transparent, equitable, and reasoned manner. To require determinations based on facts and the principles of the agreements with the goal of increasing compliance with the agreements. To seek to strengthen the capacity of the WTO Trade Policy Review Mechanism. To seek provisions encouraging the early identification and settlement of disputes through consultation. To seek provisions to encourage trade-expanding compensation if a party to a dispute does not comply with its obligations under the agreement. To seek provisions to impose penalties upon a party to a dispute that encourage compliance with the agreement; are appropriate to the violation; and do not adversely affect outside parties or interests. To seek provisions that treat U.S. principal negotiating objectives equally with respect to dispute settlement.

  Conferees also added a provision to seek adherence by WTO dispute settlement panels and the Appellate Body to the standard of review applicable under the Uruguay Round Agreement involved in the dispute, including greater deference, where appropriate, to the fact-finding and technical expertise of national investigating authorities.

- **WTO Extended Negotiations:** To adhere to objectives set forth in the Uruguay Round Agreements Act regarding trade in civil aircraft and rules of origin.

- **Border Adjustments for Internal Taxes:** To seek a revision of WTO rules on the treatment of border adjustments for internal taxes to redress the

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disadvantage to countries relying primarily on direct taxes for revenue rather than indirect taxes.

The conferees agreed that such a revision of WTO rules is one among a number of options that the United States can take to redress such a disadvantage. Other options include domestic legislation.

- **Textiles:** To obtain reciprocal market access for U.S. textile and apparel exports. Senator John Edwards (D-North Carolina) originally sponsored this amendment in the Senate *(Please see W&C May 15, 2002 Report).*

- **Child Labor:** To seek commitments by trade agreement parties to vigorously enforce their own laws prohibiting the worst forms of child labor.

C. Promotion of Certain Priorities

In addition to the negotiating objectives described above, the conference report contains a number of other priorities the President must address in the course of trade negotiations:

- To seek greater cooperation between the WTO and the ILO.

- To seek to establish consultative mechanisms among parties to trade agreements to strengthen the capacity of U.S. trading partners to promote respect for core labor standards and to promote compliance with ILO Convention No. 182, and report to the House Ways and Means Committee and the Senate Finance Committee on the content and operation of such mechanisms.

- To seek to establish consultative mechanisms among parties to trade agreements to strengthen the capacity of U.S. trading partners to develop and implement standards for environment and human health based on sound science and to report to the House Ways and Means and Senate Finance Committees on their operation.

- To conduct environmental reviews of future trade agreements and report their results to the House Ways and Means and Senate Finance Committees.

- To review the impact of future trade agreements on U.S. employment, including on labor markets, for the House Ways and Means and Senate Finance Committees and to make the report public.

- To take into account the protection of legitimate health or safety, essential security, and consumer interests in negotiating trade agreements.

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- To require the Secretary of Labor to consult with foreign parties to trade negotiations regarding their labor laws and provide technical assistance where needed.

- To submit to the House Ways and Means and Senate Finance Committees a meaningful labor rights report of the countries with which the US is negotiating trade agreements.

- To report to Congress on the extent to which parties to an agreement have in effect laws governing exploitative child labor.

- To continue to promote consideration of multilateral environmental agreements ("MEAs").

- To report to the House Ways and Means and Senate Finance Committees, no later than twelve months after the imposition of a penalty or remedy by the US permitted by a trade agreement to which the Act applies, on the effectiveness of the penalty or remedy applied under U.S. law to enforce U.S. rights under the trade agreement. The report must also address whether the penalty or remedy was effective in changing the behavior of the targeted party and whether the penalty or remedy had any adverse impact on outside parties or interests.

- To seek to establish consultative mechanisms among parties to trade agreements to examine the trade consequences of significant and unanticipated currency movements. To scrutinize whether a foreign government engaged in a pattern of manipulating its currency to promote a competitive advantage in international trade.

D. Congressional Consultations

The conference report requires the President and USTR to consult regularly with Congress regarding trade negotiations. The President is also required to notify Congress prior to and during various stages of negotiations and to submit reports to Congress in order to receive fast-track consideration of trade agreements.

In the case of agreements for which negotiations have already begun, the consultation and notification procedures have been modified so Congress cannot deny fast-track consideration to these agreements. These agreements include the U.S.-Singapore FTA, the U.S.-Chile FTA, the Free Trade Area of the Americas, and agreements entered into under the WTO.

E. Congressional Oversight Group

The conference report creates a Congressional Oversight Group to enhance Administration consultations with Congress. The USTR is required to consult closely and on a timely basis with the Congressional Oversight Group and keep it fully apprised of the

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negotiations. The Congressional Oversight Group must be convened within sixty days after the date of enactment of the trade bill.

The Group will be comprised of the following members of the House:

- Chairman and Ranking Member of the Ways and Means Committee;
- Three additional members of the Ways and Means Committee (not more than two from the same party); and
- Chairman and Ranking Member of the Committees of jurisdiction over provisions of law affected by a trade negotiation or agreement, as determined under the rules of the House.

The Group will be comprised of the following members of the Senate:

- Chairman and Ranking Member of the Finance Committee;
- Three additional members of the Finance Committee (not more than two from the same party); and
- Chairman and Ranking Member of the Committees of jurisdiction over provisions of law affected by a trade negotiation or agreement, as determined under the rules of the Senate.

The Chairmen of the House Ways and Means Committee and the Senate Finance Committee will chair the Congressional Oversight Group. The members of the Congressional Oversight Group are to be accredited as official advisers to the U.S. delegation in negotiations. The Congressional Oversight Group will consult with and provide advice to the USTR regarding the formulation of specific objectives, negotiating strategies and positions, the development of the applicable trade agreement, and compliance and enforcement of the commitments negotiated under the agreement.

The USTR must develop guidelines to facilitate the useful and timely exchange of information between USTR and the Group, including regular briefings, access to pertinent documents, and the closest possible coordination at all critical periods during the negotiations, including at negotiation sites. The USTR must also develop guidelines for consultations regarding ongoing compliance and enforcement of the commitments negotiated under an agreement after the trade agreement is concluded. In addition, upon the request of a majority of the Congressional Oversight Group, the President must meet with the Group before initiating negotiations or at any other time during negotiations.

The USTR must also consult closely with all committees of jurisdiction over any law that would be affected by a trade agreement resulting from negotiations and the Congressional

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Advisers[9] for trade policy and negotiations. In terms of agriculture negotiations, the USTR must consult closely and on a timely basis with the House and Senate Agriculture Committees.

F. Adherence to Uruguay Round Obligations

The conference report requires that the President take into account the extent to which a country has implemented, or has accelerated the implementation of, its obligations under the Uruguay Round Agreements, in determining whether to enter into negotiations with that country.

G. Report on the Impact of Trade Promotion Authority

Within one year of the enactment of the trade bill, the USITC must report to the House Ways and Means and Senate Finance Committees regarding the economic impact on the United States of the following trade agreements, which were negotiated under the previously expired fast-track procedures:

- The U.S.-Israel Free Trade Agreement;
- The U.S.-Canada Free Trade Agreement;
- The North American Free Trade Agreement (NAFTA);
- The Uruguay Round Agreements; and
- The Tokyo Round of Multilateral Trade Negotiations.

III. Renewal of the Andean Trade Preferences Act (ATPA)

The conference report renews the Andean Trade Preferences Act (ATPA) through December 31, 2006. The benefits are retroactive to the date on which the ATPA expired, December 4, 2001. The conference report expands ATPA benefits *inter alia* to allow the President to proclaim duty-free treatment for particular articles that were previously excluded from duty-free treatment under the ATPA, if the President determines that the article is not import-sensitive in the context of imports from beneficiary countries.

One of the key differences between the House and Senate ATPA bills was the final treatment of imports of tuna from ATPA beneficiary countries.[10] Conferees decided to grant duty-free benefits only to tuna packed in flexible airtight pouches,[11] and not canned tuna. They also retained the Senate's rule-of-origin language, requiring the tuna to be caught by U.S. or

[9] Congressional Advisers are appointed under section 161 of the Trade Act of 1974 (19 U.S.C. 2211).

[10] Bolivia, Colombia, Ecuador, and Peru.

[11] Tuna must be packaged in foil or other flexible airtight pouches weighing not more than 6.8 kilograms each to receive beneficiary treatment.

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Andean vessels. In addition, they altered the current tuna tariff-rate quota by calculating it based on U.S. consumption, rather than production. The compromise struck in the conference report provides fewer benefits for tuna imports than those provided for in the original House bill.

The conference committee added new eligibility criteria that the President must take into account in designating an ATPA beneficiary country:

- Whether a country has demonstrated a commitment to undertake its WTO obligations and participate in negotiations toward the completion of the FTAA or comparable trade agreement;
- The extent to which the country provides intellectual property protection consistent with or greater than that afforded under the Agreement on Trade-Related Aspects of Intellectual Property Rights;
- The extent to which the country provides internationally recognized worker rights;
- Whether the country has implemented its commitments to eliminate the worst forms of child labor;
- The extent to which a country has taken steps to become a party to and implement the Inter-American Convention Against Corruption; and
- The extent to which the country applies transparent, nondiscriminatory and competitive procedures in government procurement equivalent to those included in the WTO Agreement on Government Procurement and otherwise contributes to efforts in international fora to develop and implement international rules in transparency in government procurement.

IV. Renewal of the Generalized System of Preferences (GSP)

The conference report renews the Generalized System of Preferences (GSP) through December 31, 2006, and provides retroactive benefits to December 31, 2001, when the last GSP extension expired.

The conference committee established a new eligibility requirement for GSP: beneficiary countries must have taken steps to support the efforts of the United States to combat terrorism. Senator Kay Bailey Hutchinson (R-Texas) originally sponsored this requirement during Senate debate of the trade bill *(Please see W&C May 17, 2002 Report)*. In addition, the conference report updates the definition of core worker rights to include a prohibition on the worst forms of child labor. The addition is meant to more fully reflect the ILO's 1998 definition of core worker rights. During Senate debate of the trade bill, Senator Tom Harkin (D-Iowa) sponsored a similar provision to make the vigorous enforcement of domestic law prohibiting the worst forms of child labor a new principal negotiating objective of the United States.

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V. Miscellaneous Provisions

The trade bill conference report also contains *inter alia* the following:

- A $50 million settlement fund within the USTR Office to be used for settling WTO disputes.

- Budget authorization for the U.S. Customs Service, including funds to implement and deploy terrorist and narcotics detection equipment along the U.S.-Mexico border, the U.S.-Canada border, and Florida and the Gulf of Mexico seaports. This equipment would include vehicle and inspection systems;

- A provision that provides immunity for Customs inspectors who act in good faith by following federal inspection procedures.

- A provision directing the Secretary of the Treasury to develop regulations regarding the electronic transmission to the Customs Service of advanced manifest information for air, land, and water-based carriers entering or departing the United States.

- A provision establishing requirements concerning proper documentation of ocean-bound cargo prior to a vessel's departure from the United States.

- A provision directing the Secretary of the Treasury to establish a task force to evaluate, prototype, and certify secure systems of transportation.

- A provision that allows Customs officers to search outbound mail in excess of 16 ounces for unreported monetary instruments, weapons of mass destruction, firearms, and other terrorist contraband. Customs officers may not, however, read such mail without a warrant.

- A provision directing the Comptroller General of the General Accounting Office (GAO) to conduct an audit of the systems at the Customs Service to monitor and enforce textile transshipment and report on recommendations for improvements.

- A provision providing funds for the Customs Service to enhance its textile transshipment enforcement operations.

- Budget authorization for USTR, including the addition of two new individuals to assist the office of Congressional Affairs due to the substantial increase in trade negotiation work to be conducted by the USTR and the associated need for consultations with Congress.

- Budget authorization for the USITC.

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- A provision increasing the current $400 duty exemption for travelers returning from abroad to $800.

- A provision requiring that Customs duties be paid within ten working days without extension. In addition, the Customs Service is required to create a monthly billing system upon the building of the Automated Commercial Environment (ACE).

OUTLOOK

The conference report will now go to the President, who will sign it on Tuesday, August 6, 2002. Trade Promotion Authority has been one of President Bush's main legislative priorities since he took office, and lately, has gained attention as a response to the slowing economy. Bush hailed the approval of the conference report as an historic moment that will allow the United States to reclaim a position of leadership in world trade.

USTR Robert Zoellick has stated that the United States will now be able to complete free trade agreements (FTAs) with Chile and Singapore "in short order" as well as initiate new FTAs with Central America, Morocco, Australia, and South Africa.

TPA renewal will also give needed momentum to negotiations for the Free Trade Area of the Americas (FTAA) and the new round of World Trade Organization negotiations launched at the Doha Ministerial in November 2001. U.S. negotiating credibility had been undermined this year by U.S. steel safeguards and the new Farm Bill's dramatic increase in spending. WTO negotiations also hit a slump in July as WTO Members failed to meet Doha mandate deadlines on special and differential treatment for developing countries and granting more flexibility in calculation of textiles quotas. Thus, TPA renewal comes at a critical time as the Bush Administration attempts to respond to both a domestic downturn, and the threat of global economic retrenchment. In any event, much work lies ahead in order for the US to conclude bilateral FTAs as well as FTAA and WTO negotiations.

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WTO WORKING BODIES

Update on Negotiations of WTO Rules: Second Submission of the Friends of Antidumping and the First Submission of the EC

SUMMARY

On June 28, 2002, Brazil, Chile, Colombia, Costa Rica, Hong Kong, China, Israel, Japan, Korea, Norway, Taiwan, Singapore, Switzerland, and Thailand – coined the "Friends of Antidumping" Group of WTO Members ("Group"), in a joint submission offered eleven new proposals seeking to clarify and improve the existing WTO antidumping ("AD") disciplines pursuant to Paragraph 28 of the Doha Declaration ("the negotiating mandate").[12] The submission was made to the Negotiating Group on Rules – the body coordinating post-Doha negotiations on antidumping, subsidies and other rules.

The recent submission is intended to complement the first submission the Group made on April 26, 2002, which included twelve initial proposals[13] (*Please see our previous report on "Update on WTO Rules Negotiations"*). Mexico and Turkey did not sign onto the second submission, while Taiwan signed onto the second submission, but had not signed onto the first submission. The Group has expressly noted that the order of the issues in its submission is not indicative of negotiating priorities and that the paper does not necessarily represent the full view of every co-sponsor. Further, the submission indicates that the Group may issue additional proposals in the future. In Section II, we discuss each new proposal along with an appraisal of whether it falls within the negotiating mandate.

In addition, on July 5, 2002, the European Communities ("EC") submitted its first set of topics for discussion concerning improvements to be made to the AD Agreement.[14] The EC's submission sets forth a general framework for the discussion of certain topics – arranged by four major objectives. Unlike submissions by India and the Friends of Antidumping, the EC submission is not very detailed. In Section III, we discuss topics raised in the EC's submission, and where applicable an indication of where issues in the EC's submission overlap with prior submissions by other Members. Because of the broad nature of the EC's submission, all of the proposals appear to be within the negotiating mandate – even though some suggested areas of work could go beyond the mandate.

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[12] *See* TN/RL/W/10, Second Contribution to Discussion of the Negotiating Group on Rules on Antidumping Measures, 28 June 2002.

[13] *See* TN/RL/W/6, Anti-dumping: Illustrative Major Issues, 26 April 2002.

[14] *See* TN/RL/W/13, Submission from the European Communities Concerning The Agreement on Implementation of Article VI of the GATT 1994 (Antidumping Agreement), 8 July 2002.

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ANALYSIS

I. The Group's Proposals

A. Definition of the Product Under Investigation/Consideration and Like Product

The Group is seeking to have what constitutes the product under investigation clarified to prevent overly broad scope as defined by an administrating authority's discretion. As an example, the Group cites a situation where the product under investigation is composed of tires used for buses and tires used for tractors. A dumping margin exists on the tractor tires, but there is no dumping margin on the bus tires, yet an antidumping duty order is issued covering both. Under such circumstances, the Group questions the reasonableness of the current AD Agreement that would allow such a result.

Comment:

The Group correctly notes that the AD Agreement does not prevent the administering authority from combining distinct products into one group for purposes of calculating a dumping margin. For example, in the recent U.S. investigation of folding tables and chairs (from China), the U.S. International Trade Commission found that there were two separate domestic industries, one producing tables and one producing chairs. Nevertheless, the U.S. Department of Commerce issued a single antidumping duty order with one margin applying to both tables and chairs.

Narrowing the range of products that can be included within the scope of an investigation would have a beneficial effect by limiting the number of instances where the same AD rate is assigned to different products some of which might have no margins, or would have lower margins. It is difficult, however, to see any Member accepting a requirement to calculate separate dumping margins based on different widths, sizes and/or shape of a product. But Members might seek to limit instances in which diverse products such as tables and chairs would be considered within the same scope. The proposal appears to be aimed at clarifying and improving disciplines, and thus should fall within the negotiating mandate.

Another issue that arises from the Group's proposal is methodological. Even if a scope is broad in nature and encompasses diverse products, such as bus tires and tractor tires, should a separate dumping margin be calculated for each product? While the primary focus of the Group's proposal appears to be on eliminating the possibility for such a situation to arise, a similar result could be obtained by requiring separate margins to be calculated for distinct products. It is not clear how Members would react to such a proposal, but it would likely be opposed by the United States because it would lead to fewer products being covered by an antidumping duty order and it could raise circumvention issues. Discussions on such a topic appear to be within the negotiating mandate because they would be aimed at clarifying and improving an existing discipline.

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B. **Definition of Domestic Industry**

Article 4.1 of the AD Agreement defines the term "domestic industry" as either the producers as a whole of the like products, or those producers whose collective output of the products constitutes a major proportion of total domestic production of those products. The Group proposes that clear criteria be established to define the term "major proportion."

Comment:

In antidumping investigations, the administering authority must find that the domestic industry has been materially injured or is threatened with material injury from imports. The language in the current AD Agreement allows the administering authority to arrive at an injury or threat finding even if the entire domestic industry is not injured or threatened, provided that a "major proportion" of the industry is injured or threatened.

The Group's proposal appears to reflect a desire to have an objective standard (such as those appearing in provisions related to standing) replace the existing subjective one. For instance, major proportion would be defined as more than fifty percent. Alternatively, and perhaps more acceptable to some Members, major proportion could be defined as more than fifty percent under normal circumstances. Regardless of whether the proposal is viewed as within the negotiating mandate, some Members will view it as an attempt to weaken the antidumping laws. Therefore, it will likely encounter resistance, particularly from the United States.

C. **Standing Rules**

The Group notes that the current AD Agreement (Article 5.4) allows an investigation to be initiated when domestic producers that account for only 25 percent of production support it. As an example, the Group cites a situation where producers accounting for 25 percent of domestic production file a petition. At the same time, producers accounting for 20 percent of production expressly oppose the petition while producers accounting for 55 percent of production remain silent. But, as permitted by the AD Agreement, the case is initiated. The Group asks whether initiation of such a case is appropriate. Moreover, in the example, only the domestic producers supporting the petition provide data on injury (and no data from those in support or silent). The Group then asks in the event that injury is found, whether such a finding is appropriate. Finally, the Group asks whether support for a petition should include a requirement for the supporter to provide complete data.

Comment:

The first aspect of the Group's example illustrates the absurd, yet permissible situation where an antidumping duty investigation is initiated based on support from a fraction of the domestic industry. Even though most cases are initiated based on a significant level of support from the domestic producers, the proposal to raise the 25 percent standing requirement will likely encounter strong resistance from some Members. Whether this aspect of the proposal is within the negotiating mandate is also likely to be an issue as some Members might assert that

altering the 25 percent standing requirement would amount to a renegotiation of a key provision of the AD Agreement.

The second aspect of the Group's example pertains to what level of participation from the domestic industry should be deemed sufficient for purposes of deciding injury. Theoretically, an injury finding could be made if only a very few of the most poorly performing producers provided data. In practice, however, administering authorities are reluctant to base an injury finding on limited data from domestic producers. For example, in the United States, the U.S. International Trade Commission has found no injury by citing a poor response from domestic producers as a reason. To the extent that the Group is seeking to have an objective standard put in place for determining when a domestic industry's response is adequate, the proposal will likely encounter resistance. The proposal does appear, however, to be within the negotiating mandate because it seeks to clarify an existing discipline.

The final aspect of the Group's proposal on standing relates to how thorough an expression of support for a petition must be. Currently, a domestic producer needs only to indicate support in some written form, but the expression of support does not require much detail. A requirement that the expression of support contain data relevant to the assessment of injury might discourage some producers from expressing support, and therefore could result in some cases not being initiated.

Currently, a petition must be supported by domestic producers accounting for 25 percent or more of domestic production. Of those domestic producers taking a position on the petition, supporters must account for at least 50 percent of production for the case to be initiated. If some producers are discouraged from supporting the petition because of the heightened requirement to express support, and those opposed only need express their opposition without also providing data, then some cases might fail to gain the necessary support.

In most cases, a modest increase in the standard for expressing support would probably not have much of an impact. Usually supporters of the petition account for more than 50 percent of domestic production and have hired counsel to assist them in the preparation of the petition. The added burden of providing data would not likely discourage such producers from expressing support for the petition. Because this proposal will be viewed as an attempt to make the filing of a petition more burdensome, it will likely face resistance by some Members. Furthermore, it is not clear that the proposal is entirely within the negotiating mandate.

D. Initiation Standards

The Group notes that Article 5.3 of the AD Agreement requires the administering authorities to examine the accuracy and adequacy of the evidence in the petition to determine whether there is sufficient evidence to justify the initiation of an investigation. The Group asks whether the examination of the accuracy and adequacy of the evidence should be made more rigorous.

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Comment:

The Group is seeking a more thorough examination by the administering authority of the information provided in the petition before a case is initiated. The proposal is unlikely to attract much support from other Members because it would place a greater burden on the relevant governmental agencies to do a task for which a very short time frame is contemplated.

One area that could be addressed with regard to initiation is an opportunity for respondents to comment on the accuracy and adequacy of the information provided in the petition. Currently, there is nothing in the AD Agreement that provides a respondent an opportunity to comment on the information provided in the petition before the case is initiated. Allowing a respondent to comment on the accuracy and adequacy of the information in the petition could be useful.

As the proposal stands, it likely falls within the negotiating mandate because it appears to be aimed at clarifying and improving disciplines. Whether adding a requirement that respondents be provided an opportunity to comment on the accuracy and adequacy of the petition is within the negotiating mandate is less clear.

E. Determination of Normal Value – Affiliated Parties and Their Transactions

In this proposal, the Group calls for increased clarity with respect to what constitutes affiliation in the AD Agreement and the circumstances under which prices between affiliated parties can be disregarded or revised to determine normal value (e.g. home-market sales to affiliates). As an example, the Group cites a situation where one company owns six percent of another company's stock. A finding of affiliation between the two companies is made, the transaction price is adjusted, and a dumping margin is found. No margin would have existed but for the revised transaction price caused by the affiliation finding.

Comment:

This proposal raises two issues. First, it raises the issue of what degree of control is necessary to find that affiliation between two parties exists. Second, it raises the issue of how a transaction between two affiliated parties should be treated.

Regarding the first issue, any change to the AD Agreement that would increase the level of control necessary to find affiliation would make it more difficult for authorities to impose AD measures in a case involving related parties. There may be a slight benefit in having objective standards to clarify what constitutes affiliation expressly incorporated into the AD Agreement because, in some instances, respondents could structure their transactions to avoid affiliation issues. Even if the AD Agreement is not changed, unreasonable affiliation findings could be challenged through the dispute settlement process. Because some of the major AD users, like the United States, have detailed domestic legislation concerning affiliation, it is unlikely that they would accept any changes to the AD Agreement that deviated from those found in their domestic legislation. This aspect of the proposal does appear to be within the negotiating mandate as it seeks to clarify an existing provision.

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Regarding the second issue, in the United States, for example, there are three possible approaches to related party transactions: 1) to use the actual price; 2) to revise the price to reflect what the actual price between unaffiliated parties would have been; or 3) to disregard the sale entirely. Currently, the AD Agreement appears to allow Members the ability to choose any of the three approaches listed above, or any number of other approaches. The adoption of an objective standard for deciding when a transaction between related parties was for fair market value would assist respondents in preparing for and effectively defending their interests in AD investigations. However, it is unlikely that Members would want to limit their discretion to choose which approach they could take. Further, an unreasonable application of an approach could be challenged through the dispute settlement process. This aspect of the proposal also appears to be within the negotiating mandate by seeking to clarify existing provisions of the AD Agreement.

F. Injury Determinations

In this proposal, the Group notes that Article 3.4 of the AD Agreement lists factors that must be considered by the administering authority when deciding whether the domestic industry is injured, but does not specify how the factors are to be evaluated. The Group also notes that the relationship of Article 3.4 to other provisions of Article 3 is unclear and should be clarified.

Comment:

Article 3.4 of the AD Agreement lists a number of factors that the administering authority must consider in deciding what impact dumped imports have had on the domestic industry. The factors examined should include all relevant economic factors and indices having a bearing on the state of the industry. Article 3.4 then sets forth a number of specific factors that must be examined, while noting that the list is not exhaustive. While providing some of the factors that must be examined, Article 3.4 does not specify how the administering authority is to evaluate the factors. For example, does a certain level of profitability preclude an injury finding? However, it is unlikely that Members would agree to replace the existing approach, which leaves the administering authority a great deal of discretion, to injury findings with objective standards, which would remove that discretion.

The Group's call for greater clarity with respect to the relationship between Article 3.4 and other provisions of Article 3 could prove beneficial. For example, Article 3.5 of the AD Agreement states that "[i]t must be demonstrated that the dumped imports, *are through the effects of dumping*, as set forth in [Articles 3.2 and 3.4] causing injury . . . ." An unresolved question is whether this language means that the dumping must be considered in evaluating the factors in Article 3.4 (as well as 3.2). In other words, does the price discrimination between markets result in the domestic industry being injured? The proposal, as worded, appears to fall within the negotiating mandate because it seeks to clarify existing disciplines. Members might agree to negotiate on this proposal to the extent that the Group does not seek to remove the administering authority's discretion to consider the factors.

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G. Price Undertakings

In this proposal, the Group calls for clarifying the language in Article 8 of the AD Agreement concerning price undertakings. The Group would like to make it easier for individual exporters to obtain voluntary price undertakings. As an example, the Group cites a situation where a company accounts for forty percent of subject imports. The company has a ten percent margin of underselling, even though the dumping margin is found to be twenty five percent. The company proposes a price undertaking in which it agrees to raise its price by fifteen percent to eliminate all underselling, and it also agrees to report its export and home market prices to the administering authority on a quarterly basis. The undertaking is rejected because the country has a policy of not accepting undertakings from an exporter that does not represent the majority of all imports from a country.

Comment:

If accepted, this proposal would have a beneficial effect for respondents that were willing to undergo the procedures that are required to verify the prices agreed upon in the undertaking. Rather than being subject to a dumping margin, which may be higher than the amount of underselling, a respondent would only have to raise its price to a level that did not undersell the domestic like product. This would be particularly useful for non-market economy companies where the dumping margins are often extremely high, and bear little resemblance to the realities of the market place. However, any proposal that would require administering authorities to accept price undertakings will likely encounter strong resistance and would likely be deemed as outside of the negotiating mandate. For example, in the United States, the price undertaking must involve producers accounting for at least 85 percent of production and the price floor is not established on the level of underselling but on the dumping margin. To the extent that the proposal seeks to make undertakings more accessible and available to individual exporters, the proposal appears to fall within the negotiating mandate, and some agreement might be possible, but again, the United States is likely to resist.

H. Reviews

In this proposal, the Group seeks clarification of the concepts, procedures, and methodologies to be applied in reviews under Article 9.3 (anti-dumping duty assessment), Article 9.5 (new shipper reviews), Article 11.2 (revocation reviews), and Article 11.3 (sunset reviews). The Group then notes that the lack of "explicit rules" makes it possible for administering authorities to apply procedures that differ from those used in the initial investigations, thereby resulting in a lack of certainty for the respondents involved in the reviews. The Group also proposes that Article 11 reviews should be limited to twelve months.

Comment:

The Group is correct to note that there is a lack of clarity concerning the procedures that must be applied in the different types of reviews. For example, Article 11 specifies that Article 6 (governing procedure and evidence) applies to reviews concerning revocation of existing orders and sunset reviews. However, Article 11 does not specify what factors are to be considered in

assessing whether antidumping duty orders should be revoked in Article 11 reviews. Likewise, Article 9 does not specify how anti-dumping duty assessment or new shipper reviews are to be conducted. Greater specificity and clarity on the procedures to be employed in reviews would be beneficial to respondents – especially since the review stage could be equally, or more problematic than the original investigation.

It also remains questionable whether the proposal to add "explicit rules" on different types of reviews falls within the negotiating mandate. In as much as the proposal seeks to require that methodologies used in the original investigation are used in subsequent reviews, it is unlikely to attract much support. For example, the United States uses a different methodology to calculate the dumping margin in a duty assessment review than it does in an investigation, and would not be willing to change its practice. This particular element of the proposal also appears to be outside of the negotiating mandate because it seeks to change the existing regime. Although, a panel reviewing a sunset review conducted by the United States recently found that rules applied in investigations must be applied in reviews.[15] Based on this decision, it could be argued that negotiating on a requirement that methodologies used in original investigations be used in reviews is within the negotiating mandate as a clarification of existing disciplines. Finally, the proposal to limit Article 11 reviews to a maximum of twelve months will likely be challenged as outside of the negotiating mandate because it seeks to change an existing provision of the AD Agreement.

I. Constructed Export Price: Methodology for Construction

The Group is seeking clarification of the existing rules governing how "constructed export price" ("CEP") may be calculated under Article 2.3 of the AD Agreement, asserting that current practices result in inconsistent deduction of costs and profits from CEP and normal value. As an example, the Group cites a situation where profits are deducted from the sales price in the importing country because all sales were at the same level of trade, but were not deducted from sales in the home market because sales were at different levels of trade – thus resulting in an inconsistency in the deductions of costs and expenses between CEP and normal value. The result is often an dumping margin that is inflated, or should not exist.

Comment:

It would be beneficial for respondents to face one set of rules governing CEPs in all WTO Member trade regimes. Harmonization of the rules governing CEP calculations appears to be within the scope of the negotiating mandate. However, it is likely that Members with established practices with respect to calculating CEPs will be unwilling to sacrifice their practice. Thus, the proposal will likely encounter resistance from Members that have methodologies that would differ from what is ultimately proposed.

[15] *See* United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany, WT/DS213/R, 3 July 2002.

The example provided by the Group poses a different issue, which is under what circumstances can a Member adjust the constructed export price without adjusting the normal value. This proposal is likely to encounter resistance from Members because it seeks to establish a rule on how dumping margins are calculated. In this regard, the proposal could be seen as falling outside of the negotiating mandate.

J. "All Others" Rate

The Group proposes to change the calculation of the "all others" rate in Article 9.4 of the AD Agreement in order to prevent administering authorities from disregarding zero or *de minimis* margins (currently the practice). The "all others" rate is used in investigations where the number of producers in the exporting country is too large to allow for an individual margin. The "all others" rate is calculated based on the weighted average margin of dumping found for each of the producers investigated, except those with zero or *de minimis* margins. As an example, the Group cites a situation where three companies are selected. One company receives a three percent margin, and the other two receive zero and *de minimis* margins. The "all others" rate is set at 3 percent because the zero and *de minimis* margins are disregarded. Therefore, all producers in the exporting country that were not examined will have to pay 3 percent antidumping duties.

Comment:

The Group's proposal would benefit respondents that were not selected for individual examination by the administering authority. Including zero and *de minimis* margins in calculating the "all others" rate would always lower the calculated margin. However, because the AD Agreement currently provides that zero and *de minimis* margins are to be excluded from calculating the "all others" rate, the proposal probably falls outside of the negotiating mandate.

K. The Authorities' Discretion on the Use of Cost Data

The Group is seeking to clarify the circumstances under which the administering authority can require a respondent, whose accounting method corresponds with its country's generally accepted accounting principles ("GAAP"), to report costs in a different manner. The Group notes that the Article 2.2.1.1 expresses a preference for calculating costs on the basis of the records kept by the foreign producer, provided that the records are maintained in accordance with the foreign producer country's GAAP. However, the AD Agreement allows the administering authority to require a foreign producer to submit costs in a different manner if the method of recording costs does not "reasonably reflect the costs associated with the production and sale of the product under consideration."

As an example, the Group cites a situation where a company maintains costs on a plant-wide basis in accordance with its home country GAAP, but is required to report its costs in an antidumping duty investigation on a production line basis. The result is that a dumping margin is inflated, or only exists because of the different accounting method employed in the antidumping duty investigation.

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Comment:

It would benefit respondents to have the cost data that the respondents actually maintain in the ordinary course of business used by the administering authorities in an AD investigation or review. However, it should be noted that there may be times when a respondent will benefit by using cost data that differs from that which it keeps in accordance with its home market GAAP.

For example, some companies may allocate a greater amount of costs to high revenue items for tax purposes. This kind of allocation may be completely in accordance with the respondents' home market GAAP. In an AD investigation or review, however, this kind of accounting methodology could lead to a significant number of sales being found below cost. Thus, respondents need some flexibility to allocate costs differently than they may ordinarily maintain them in accordance with home market GAAP.

The most frequent problem for respondents regarding the allocation of costs in AD investigations and reviews is that there is no limit on what cost data the administering authority can request. An alternative way to frame the proposal, to take this problem into account, would be to state that the administering authority is prohibited from requiring a respondent to provide cost information that it does not maintain. This is only slightly different from the current proposal, but the difference is in the emphasis on what the administering authority is prohibited from doing, rather than on what the administering authority must accept. The different emphasis would allow respondents to allocate costs differently from what may be done in the ordinary course of business, where so doing would be beneficial to their interests. Clarification of when costs must be reported in a manner in which they are not normally maintained appears to be within the negotiating mandate.

I. EC's Proposals

The EC's first submission on antidumping issues begins by noting that "times have changed" since the Uruguay Round was concluded. The EC points to the following developments since the creation of the WTO:

- Increasing use of AD measures by numerous countries;
- Diverging application between Members of the current rules;
- Increasing use of the WTO Dispute Settlement System;
- Increasing cost to the affected economic operators;
- Increasing instances of inadequate protection of economic operators' procedural rights;
- Increasing opportunities to and instances of circumvention of dumping orders; and,

- Increasing recourse to AD measures by countries in the process of liberalizing their trade regimes.

The EC points out that at least 65 countries have incorporated anti-dumping provisions into their national law. Thus, anti-dumping is now a "global" instrument and therefore all Members are now both potential users and targets of antidumping. In light of these developments the EC believes that the (four) objectives of negotiations for "users" and "targets" should be to: (i) strengthen the current disciplines; (ii) preserve the effectiveness of the AD instrument and its objectives; (iii) simplify and clarify certain provisions, and (iv) take into account the needs of developing countries. We discuss below each of these four major objectives.

A. Strengthening the AD Disciplines

The EC focused on five areas of the current AD Agreement where the disciplines could be strengthened. First, the EC noted that access and disclosure of non-confidential documents needs to be improved. Second, the EC noted that application of the lesser duty rule (whereby only the duty necessary to remove the injury is imposed) significantly limits the level of measures necessary to remove injury. Third, the EC notes that consideration of the public interest (*i.e.*, impact of measures on the economic operators) could be a useful prerequisite to imposing measures. Fourth, the EC notes that dispute settlement is a lengthy process and that the initiation of an investigation should be eligible for swift dispute settlement. Fifth, the EC notes the high costs of participating in AD investigations and believes that procedures, such as standardized information collection, can be tightened to reduce the costs of participation.

Comment:

- Increased disclosure of information: Improving the transparency of the process has been called for by Canada[16], which has not, however, expressly cited the need to increase the amount of information disclosed in non-confidential documents. This proposal would likely not be contentious for some of the major AD users, such as the United States which already has an intricate procedure for making information public.

- Lesser duty rule: India has proposed that application of the lesser duty principle be mandatory with respect to developing countries. The Friends of Antidumping proposed the increased use of the lesser duty principle in their first submission. While there appears to be a high level support for greater use of the lesser duty principle, it is likely to encounter resistance by the United States. The United States has never applied the lesser duty principle in its investigations, and in light of the strong domestic sentiment against "weakening" existing antidumping laws, the United States will likely oppose efforts to negotiate on this issue.

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[16] *See* TN/RL/W/1, Improved Disciplines under the Agreement on Subsidies and Countervailing Measures and the Anti-Dumping Agreement, Communication from Canada, 15 April 2002.

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- Public interest: Canada's and the first submission by the Friends of Antidumping each touched on improving the administering authorities' consideration of the public interest. However, neither went as far as the EC in suggesting that consideration of the public interest be a precondition to imposing an antidumping duty. A strong public interest requirement would likely encounter resistance from the United States. Consideration of the public interest is not an express factor in the United States trade regime. However, a moderate requirement on consideration of the public interest might be acceptable to the United States, particularly in light of the fact that it has become an increasing "target" of antidumping duty investigations. Also, a moderate public interest requirement would not automatically offend domestic interests in the United States, because some end users have powerful voices with the current Administration and Congress.

- Improving the speed of dispute settlement proceedings: Canada's submission and the Friends of Antidumping second submission each touched on areas related to initiation. However, neither discussed the relationship between initiation and swifter dispute settlement proceedings. Based on the approach taken by the Friends of Antidumping, it appears that they would be willing to join the EC's proposal to improve the speed with which a dispute over an initiation could be resolved at the WTO.

- It is not clear how the United States will react to this proposal. The United States' position could depend on whether the United States views itself as a "target" or a "user" in the future. One factor weighing against the United States supporting such a proposal is the anti-WTO panel and Appellate Body sentiment in the U.S. Congress because of the numerous rulings against the United States. It is unlikely that Congress would want to see the WTO dispute settlement process with a capability to promptly end a U.S. initiated antidumping investigation. Nevertheless, U.S. exporters are increasingly becoming targets of antidumping actions – more often by developing countries, and have often complained about delays and extended proceedings by foreign authorities.

- Reducing the costs of participation: Expensive investigations usually benefit the petitioning domestic industry by making it less likely that some target countries will defend their interests. While the EC appears to be the first to address the issue of increased costs of participating in AD investigations, the EC has done so in a general manner that raises a multitude of potential issues. The reason for this is the fact that the EC has stated that strengthening the disciplines will reduce the cost of participating. Under the EC proposal, almost any provision of the AD Agreement would be eligible for clarification or improvement. The EC somewhat limits the broadness of the proposal by noting that information collection is one area that could be standardized in order to lower costs. Nevertheless, this proposal has the potential to pull in a number of provisions of the AD Agreement. It is not clear how the United States or other Members will react to this proposal.

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B. Preserving the Effectiveness of the AD Agreement

The EC notes that antidumping investigations are costly, and once measures are imposed the measures should not be easily circumvented. Yet, owing to increased globalization, the EC believes that circumvention is an "easy option" and that enforcing measures can be difficult.

Comment:

Canada also called for improved disciplines concerning enforcement of AD measures. While the EC has not provided specific details, the United States would likely support negotiations on strengthening the disciplines preventing circumvention. Such negotiations would have strong U.S. domestic support.

C. Clarifying and Simplifying the AD Agreement

The EC calls for the clarification and simplification of the AD Agreement in light of the findings set out in various WTO panel and Appellate Body reports, and asks that Members who have raised this issue to "specify their objectives soon."

Comment:

The EC makes a general statement in support of consideration of certain interpretations of the AD Agreement made by panels and the Appellate Body. While some Members are likely to greet this proposal with enthusiasm, the United States will almost certainly oppose any effort to codify WTO panel and Appellate Body interpretations. Based on its poor performance as an AD "user," and the domestic sensitivities on the issues where the United States lost, it is unlikely that the United States will want to engage in negotiations on this proposal. Nevertheless, there are certain WTO findings in favor of U.S. trade remedy laws and practice that the United States might wish to support during the negotiations.

D. Developing Country Issues

The EC's approach with respect to developing country issues is two-fold in that Members should (i) first agree to clarifying and improving the rules that will apply generally; and then (ii) prepare a "special and clearly defined developing country package" of issues of priority to developing countries. The EC believes that a two-step approach will better identify areas that can be tailored to the needs of developing countries. In addition, the EC refers to the "implementation" proposals made prior to the Doha Ministerial as important issues to consider in the current exercise.

Comment:

Although almost every submission on the AD Agreement has commented on developing country issues, the EC's submission appears to be the first proposing a two-step approach. The EC's proposal is sensible in that proposes to establish basic principles before turning to specific issues intended for developing countries.

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At the end of the first stage of negotiations, the developing countries should have a clearer set of provisions to evaluate. This could prove beneficial in that it could isolate areas of the AD Agreement that need to be specifically tailored to developing countries' needs. For example, *de minimis*, negligibility, and cumulation standards are all issues that could be handled separately. However, by waiting to negotiate the developing country agenda until after the developed country agenda has been negotiated, developing countries could lose bargaining leverage against the developed countries.

OUTLOOK

The second submission from the "Friends of Antidumping" Group goes further in scope and is more specific than the first submission. The submission attempts to stay within the Doha mandate of clarifying and improving certain concepts in the AD Agreement, for example, on definition of product under investigation, initiation standards, determination of affiliation, factors in injury determination and the use of cost data. The submission, however, questions controversial provisions of the AD Agreement and appears to propose re-negotiation or new rules beyond the Doha mandate, including on standing rules, price undertakings, Article 11 reviews, calculation of "all others" rates, and constructed export price. Also, for some of these issues – it is uncertain whether the proposals fall within the Doha mandate or not.

In comparison to submissions by the Friends of Antidumping and India, the EC's first submission on antidumping issues is rather general in nature. The EC's four objectives support both strengthening disciplines (an offensive approach) on antidumping activity as well as preserving their effectiveness (a defensive approach). Nevertheless, some issues raised by the EC are certain to provoke controversy, such as the EC's support for the use of the lesser duty principle – which has strong support by most Members except the United States. The EC also goes further than even Canada and the Friends of Antidumping, for example, in proposing that the public interest be a precondition to imposing an antidumping duty – and that certain precedents from WTO panel and Appellate Body findings be taken into account in the negotiations exercise.

Although the United States is likely to oppose most proposals on antidumping issues, especially those by the Friends of Antidumping, it may support certain efforts – including a defensive approach on strengthening the effectiveness of the AD Agreement. Furthermore, it is in U.S. interests to improve transparency and the handling of confidential information in foreign jurisdictions on behalf of its exporters. Nevertheless, the United States has strong systemic concerns about preserving U.S. trade remedy laws and domestic procedures – and might sacrifice stronger disciplines on abuse abroad in order to protect sensitive domestic industries.

Finally, the Friends of Antidumping and other Members have reportedly refrained from issuing their more controversial proposals in their early submissions due to the delicate situation in the United States regarding the legislative debate over renewal of trade promotion authority ("TPA" legislation). TPA legislation is currently being reconciled by a Congressional

conference committee of key legislators and could be voted upon before the August recess.[17] This deference, however, appears to be waning as evidenced by the more pointed issues raised in the second submission of the Friends of Antidumping and likely to be raised in future submissions by other Members. If TPA renewal is delayed yet again, the linkage between the two issues could undermine the prospects of both TPA renewal and WTO negotiations on the AD and SCM Agreements.

[17] One particularly controversial provision in the Senate version of TPA, known as the "Dayton-Craig" amendment, is designed to prevent the weakening of U.S. trade remedy laws in post-Doha negotiations. The amendment would effectively impose Congressional oversight in U.S. negotiations on trade remedy issues by requiring Congressional debate and a majority vote to approve provisions that affect trade remedy laws. Opponents argue that the amendment severely hampers, if not undermines the Administration's negotiating authority on these issues. The Bush Administration has opposed the amendment, and it is unlikely to remain in the final version of a TPA bill.

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WTO Fails to Overcome Differences on Textiles Quotas, Extends Deadline on Special and Differential Treatment

SUMMARY

WTO Members failed to meet two deadlines set out in the Doha Ministerial texts on whether (i) to allow greater flexibility on textile quota methodology and (ii) to clarify special and differential treatment provisions in existing WTO Agreements, and institutional issues, by July 31, 2002.

The impasse on textiles quota methodology arose as textile importers the US, Canada and the EU, would not agree to more flexibility then set out in the Agreement on Textiles and Clothing (ATC). Due to sharp disagreements, the Chairman of the Council on Trade in Goods (CTG) announced that he would not even present a report summarizing the group's work by the July deadline.

In addition, WTO Members failed to reach agreement on special and differential treatment provisions. Although Members did not conclude their work, the extension of the deadline to December 31, 2002, was marked by less conflict than the textiles debate. For the most part, the extension of the deadline reflected developing country objectives – including treatment of agreement-specific proposals by October 31, 2002.

The continuing lack of progress on expediting the phase-out of textiles quotas and clarification of special and differential treatment provisions, which are priorities for many developing countries, could hinder progress in other negotiations of the Doha Development Agenda.

ANALYSIS

I. Background on ATC Phase-out of Textiles Quotas

The WTO Agreement on Textiles and Clothing (ATC) that entered into effect on January 1, 1995 establishes that along with the progressive application of the General Agreement on Tariffs and Trade (GATT) rules, there will be a progressive four-steps-phasing out of quotas[18] for textiles and clothing. After a 10-year period, the ATC will expire along with the abolition of such quotas on January 1, 2005.

[18] These quotas were inherited from the Multifibre Agreements (MFA), a framework for bilateral agreements or unilateral actions that established quotas limiting imports into countries whose domestic industries were facing serious damage from rapidly increasing imports.

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Step	Percentage of products to be brought under GATT (including removal of any quotas)	How fast remaining quotas should open up, if 1994 rate was 6%
Step 1 **1 Jan 1995 to 31 Dec 1997**	**16%** (minimum, taking 1990 imports as base)	**6.96%** per year
Step 2 **1 Jan 1998 to 31 Dec 2001**	**17%**	**8.7%** per year
Step 3 **1 Jan 2002 to 31 Dec 2004**	**18%**	**11.05%** per year
Step 4 **1 Jan 2005** ➢ Full integration into GATT (an final elimination of quotas). ➢ Agreement on textiles and Clothing	**49%** (maximum)	***No quotas left***

The ATC also provides for enlargement of such quotas until the quotas terminate. The ATC does not include provisions to give rise to new negotiations. The agreement does however, provide for major reviews at the end of each stage, but these are intended only to assess the developments in the transition process.

Since the implementation of the ATC, exporting[19] (developing) WTO Members have complained that importing[20] (developed) Members have not faithfully complied with the phase-out of quotas. According to a recent Report of the WTO Textiles Monitoring Body on the implementation of the ATC,[21] exporting members' main concerns include the following:

- There are still a high number of restrictions and lack of integration of textiles and clothing products. Specifically the US and the E.U. only have liberalized about 20 percent of imports under specific quota restrictions, leaving most restrained products to be liberalized towards the end of the implementation period, or January 1, 2005.

- There are still in place a significant number of restrictions and lack of integration of products having a potential significance to trade. These developments have reduced

[19] Such as China, Korea, Chinese Taipei, Turkey, Hong Kong, and India.

[20] Such as the United States, Germany, United Kingdom, France, Italy, Japan, Belgium-Luxembourg, Netherlands, and Switzerland.

[21] G/L/459 "Comprehensive Report of the Textiles Monitoring Body to the Council for Trade in Goods on the Implementation of the ATC During the Second Stage of the Integration Process," 31 July 2001.

the expectations towards progressive integration and implementation of the ATC's provisions.

- Increases in the restraint levels and the resulting augmentation of access should not be viewed as a substitute for the eventual integration of the textile and clothing products.

Importing countries respond that they have experienced a continuous increase of imports of textiles and clothing, including products subject to restraints. Canada, the E.U. and the U.S. have reiterated their commitment towards a full and timely implementation of the ATC. They believe they have complied with the integration requirements, and have committed to the continuous application of the growth provisions of the ATC and its effect during the remaining 3 years of the ATC implementation.

After the full implementation of the ATC, importing countries would face lower import prices as a consequence of the elimination of quotas. Although competitive exporting countries could reach higher market shares, this will not be the case for less-competitive exporters.

II. Doha Implementation Decision Proposals on Textiles Methodology

The Decision on Implementation-Related Issues and Concerns[22] reached at the Doha Ministerial mandated further consideration of developing country concerns regarding certain methodology applicable to the ATC:

- Para. 4.4: *That when calculating the quota levels for small suppliers for the remaining years of the Agreement [ATC], Members will apply the most favorable methodology available in respect of those Members under the growth-on-growth provisions from the beginning of the implementation period; extend the same treatment to least-developed countries; and, where possible, eliminate quota restrictions on imports of such Members.*

- Para. 4.5: *That Members will calculate the quota levels for the remaining years of the Agreement with respect to other restrained Members as if implementations of the growth-on-growth provision for stage 3 had been advanced to January 1, 2000.*

Developing countries in Doha pushed for the adoption of the so-called "growth-on-growth" methodology, which would have expedited the phase-out of quotas. Developed countries resisted, and Members agreed to delay the decision until July 31, 2002. But, not surprisingly, the extension of time was not enough to settle these controversial provisions.

The Chairman for the Council for Trade in Goods ("CTG") held meetings to discuss the proposals, both informally and through formal meetings on May 2, May 23-24 and June 13. The Chairman reported that developing country textile exporters believed that only few quotas were eliminated by importing members at this stage. In addition, they complained about new barriers

[22] WT/MIN(01)/W/10, 14 November 2001, paragraph 4.

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in importing countries, including customs and administrative formalities and antidumping actions.

The CTG Chairman reported that importing countries believe the integration process had led to significant growth of imports and that they were fully living up to their obligations under the ATC. The US for example, presented statistics on its increased importation of textiles and declining employment in its domestic sector – as evidence of industry restructuring as a result of the implementation of the ATC. The US, Canada and EC in particular, argued that the two growth-on-growth proposals would "alter and disrupt the carefully balanced transitional integration process

The CTG Chairman had prepared a draft report to submit by the July 31 deadline, which included the following language in place of formal recommendations:

> "Para. 10: The Council notes the views and the understandings of Members which were presented during the examination of the two proposals. It further notes the fundamental differences in these views and understandings.
>
> Consequently, the Council is not in a position to make recommendations to the General Council.
>
> Or
>
> Due to the rejection of the two proposals by the restraining members, it is impossible for the Council to make recommendations to the General Council for appropriate actions as mandated by the Ministerial Conference under its Decision cited in Paragraph 1, above."

The CTG Chairman's draft report reflected the lack of consensus, and proposed stronger alternate language (last phrase) which would have put blame on "restraining members" – namely the US, Canada and EC, for their "rejection of the two proposals" on growth-on-growth methodology.

Ultimately, the CTG Chairman opted not to submit a report to the General Council, arguing that it would be too difficult to reach agreement on language even without recommendations. Furthermore, members did not extend the deadline for discussion – as was the case with special and differential treatment (to December 31, 2002). Thus, it remains uncertain whether the textiles proposals will be taken up again.

III. Special and Differential Treatment Deadline Extended

WTO Members also were unable to reach agreement on clarification of provisions on special and differential treatment, as mandated by the Doha Ministerial Declaration – by July 31, 2002.[23] The Committee on Trade and Development ("CTD") issued a report on July 24, 2002,

[23] WT/MIN(01)/DEC/1, 14 November 2001, paragraph 44 and WT/MIN(01)/W/10, 14 November 2001, para. 12.1.

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stating that it would need until December 31, 2002, to review special and differential ("S&D") treatment provisions with a view to "strengthening them and making them more precise, effective and operational" and to report back to the General Council with clear recommendations for a decision. Developing countries have warned that failure to address these issues will discourage them from supporting other negotiations launched at Doha.

A. Cross-Cutting vs. Agreement-Specific Issues

The CTD considered treatment of special and differential provisions in special sessions, beginning March 5, 2002 and during five more formal meetings and numerous informal meetings. Most of the work was divided into two areas: (1) cross-cutting/institutional issues; and (2) agreement-specific proposals and issues.

Cross-cutting issues include assessing the effectiveness of S&D treatment provisions; single or multi-tiered structure of rights and obligations; technical assistance; universal or differentiated treatment, including graduation (from developing country status). For example, the Africa Group proposed the establishment of a Monitoring Mechanism to ensure compliance with obligations under S&D provisions.

Agreement-specific issues (about 80 proposals submitted thus far) are central to developing countries' objectives of realizing flexible treatment under many of the WTO Agreements. Developing countries had pushed for two separate processes because they feared linking the two areas could slow progress on making recommendations on agreement-specific proposals. The CTD report states that members should provide detailed responses to the agreement-specific proposals by October 31, 2002.

B. Other Issues and Timeframe

The CTD report also recommends that the General Council establish a Monitoring Mechanism for S&D treatment, and instruct the CTD to elaborate the functions, structure and terms of reference for the Mechanism. In addition, the General Council should instruct the CTD to consider how S&D treatment may be incorporated into the architecture of WTO rules.

Officials from the EU and US questioned whether a blanket approach that offers the same S&D treatment to all developing countries irrespective of their economic status is ideal. They asserted that a "one size fits all" policy might not be beneficial when applied to developing countries as a whole than when applied to all WTO Members.

Developing countries succeeding in reaching consensus for the shorter extension (of December 31) rather than later date of the Cancun Ministerial in September 2003. The Quad countries the US, EU, Canada and Japan favored the Cancun Ministerial as the new deadline for S&D issues, but developing countries rejected this. Developing countries feared that work would be further delayed, and that they would be forced to trade off S&D provisions with the Singapore issues – which are slated for consideration at the next Ministerial. The December deadline is ambitious considering that members have submitted many proposed changes to

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strengthen and in some cases make mandatory certain S&D provisions. The Committee does not indicate that Members have bridged their substantive differences on many issues.

OUTLOOK

WTO Members, not surprisingly ended up delaying action on textiles quota methodology and S&D treatment – two priority areas designated by developing countries in the Doha Ministerial texts. The indecision on textiles nearly erupted into a wider conflict, and would have cast blame on the US, EC and Canada as being inflexible to developing country concerns. As the deadline approached, the Chairman of the CTG decided to release no report rather than a critical report. It remains uncertain if the fight will be taken up again, and how much damage has resulted from developing country frustration over textile quotas.

Despite the united front among textiles exporters in the recent debate, the gains of the ATC, however, are not the same for all countries. Increased competition among exporters will result as quotas are removed. Exporting countries could achieve at the same time higher market shares for their competitive exporters and loss of market share for their less-competitive exporters. Importing countries should, however, enjoy lower import prices due to the elimination of quotas, as well as a higher level of resources allocation.

Regarding S&D treatment consideration, the short postponement of the deadline is considered a victory for developing countries. Most WTO Members did not anticipate concluding discussion on S&D treatment by July 31 – the debate over S&D treatment covers an enormous range of complex issues. Most developing countries were pleased that the deadline did not spill over into 2003 and did not coincide with the Cancun Ministerial. At the Ministerial, the trade-offs would likely involve the Singapore issues of competition and investment, which are not popular among certain developing countries. They also succeeded in requiring "detailed responses" to their many (over 80) agreement-specific proposals on S&D treatment by October. The earlier target date should ensure that more attention will be paid to S&D treatment by December, but is no guarantee that work will wrap up by this year.

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- July Services Week Marks Launch of WTO Market Access Negotiations on GATS

SUMMARY

Between July 15-25, 2002, services negotiators in Geneva began a new phase in the GATS negotiations. As set out in the Doha Declaration, June 30, 2002 was the initial deadline for submitting market-access "requests" in all services sectors. Thus, the July "services week" began the phase of bilateral request/offer negotiations on market access as 15 WTO Members are known to have submitted requests. During this time, the Services Council and its subordinate bodies also met, but the bilateral meetings among WTO Member delegations were the clear focus of attention. At this stage, most WTO Members including the US have kept their market-access requests confidential – and have only shared their specific requests with bilateral trading partners.

ANALYSIS

I. Bilateral Request/Offer Negotiations Launched

A. Initial Requests Submitted by 15 WTO Members

Fifteen WTO Members are understood to have submitted lists of requests for improved commitments to trading partners by, or soon after, the agreed target date of June 30, 2002. They include the US, EU, Japan, Canada, Australia, New Zealand and Norway, but also a significant number of developing countries, including China, Brazil, Korea, Uruguay, Taiwan and Hong Kong. Many other Members will certainly also make requests as the negotiations proceed; as yet none have been made by India, Pakistan or Egypt, for example. The target date for the submission of offers is March 31, 2003, but that also will be treated flexibly.

The US has addressed the largest number of partners, some 130, followed by the EU with 109. Canada has submitted 90 lists, Korea 40. Members have kept the precise content of their requests confidential, but several countries, including the US, EU, Canada and Australia have issued explanatory statements of their objectives and the general scope of their requests. The WTO and its Members have come under criticism for the lack of transparency – not only from NGOs, but industry groups who also have not been privy to the formal requests. Most Members assert that the public release of the negotiating proposals would undermine their negotiating leverage. Furthermore, the WTO Secretariat has not received any requests as Members have distributed them only among trading partners.

B. Proposals Respond to Criticism on Social Services

The overall objective of the negotiations is of course to expand the coverage and improve the quality of national commitments on market access and national treatment for services, but each negotiating country has its own priorities. The US has placed high priority throughout the negotiations on transparency in the formulation and administration of regulations and has made requests in most of the major service sectors. In particular, express delivery, energy,

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environmental, distribution and education and training are among sectors due to receive more high-focus attention than in the past. The US emphasizes, however, that its requests on education services are restricted to higher education and training and educational testing; they do not address primary and secondary education, nor do they have any implications for the public sector.

The EU and Canada also take similar care as the US to emphasize that their requests pose no threat to public service provisions. The EU makes no requests on health (or audiovisual) services, and on education only to the US. The EU also emphasizes that its requests in the environmental area do not affect access to and regulation of water supplies. Canada has stated that it is not seeking commitments on health, public education social services or culture. These cautious statements from the US, EU and Canada are a reaction to attacks on the GATS and the services negotiations as being designed to force privatisation of public services and undermine the right to regulate. Though quite unfounded, these charges have been widely repeated and believed, and have forced governments to respond.

II. Services Council (Special Session and Regular Session)

The negotiating emphasis on bilateral meetings inevitably reduces the importance of formal meetings of the Services Council ("Council") and subsidiary bodies. In July, the Special Session of the Council, which oversees the negotiations, pursued discussion of modalities for the treatment of autonomous liberalization, though it did not reach agreement. Members remain divided on whether and how to assign credit for autonomous liberalization. The Council also discussed modalities for special treatment of least-developed countries. In addition, the EU submitted a new paper on computer-related services.

In regular session the Council discussed preparations for China's Transitional Review Mechanism ("TRM"). China refused to accept that the TRM exercise should take place during October, and insisted that it should tale place during the December 2-13 "services week" – closer to the required year-end report by the General Council. However, this could make it impossible to report in time for the General Council review of China's implementation of commitments on December 10-11. The Chair of the Council will consult various WTO Members on the matter.

III. Committee on Specific Commitments

The Committee on Specific Commitments discussed approaches to incorporate into Members' schedules the new commitments that will result from the Doha round. The Committee reached agreement in principle that new commitments should be consolidated with the existing commitments, instead of being added to them in the form of additional Protocols. This approach will entail withdrawal of existing schedules and submission and verification of consolidated schedules at the end of the round. There was wide agreement that the offers to be submitted in March 2003 should be in consolidated form. It was agreed that the Secretariat should now prepare a draft consolidated schedule, containing all current commitments, for each Member. (Essentially this involves combining commitments made in the Uruguay Round with those made in subsequent negotiations on financial services, telecoms, etc.)

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IV. Working Party on GATS Rules

The Working Party on GATS Rules adopted a programme of future work, but made slow progress on its three issues for negotiation: (1) emergency safeguards, (2) subsidies and (3) government procurement.

New papers were submitted by Australia on safeguards (on the temporary suspension of commitments), by Argentina, Chile, Hong Kong and China on subsidies (relating to the exchange of information) and by the EU on government procurement. The EU proposes that Members might make commitments on access and national treatment in relation to services procurement on a sectoral basis, as in current GATS schedules. Some countries expressed interest; others favoured continued exclusion of government procurement from the GATS.

V. Committee on Financial Services

The Committee on Financial Services had little to discuss as Members' attention on financial services was almost entirely focused on bilateral negotiations. Even the oversight of bilateral negotiations will take place in the special sessions of the Council and not the Committee. The Committee discussed regulatory reform in Taiwan, Mexico and Canada and preparations for the transitional review of China's implementation of its financial services commitments, on which there is again no agreement.

VI. Working Party on Domestic Regulation

The Working Party on Domestic Regulation is seeking to develop horizontal or generally-applicable disciplines on domestic regulation, using the existing disciplines established for the accountancy sector as a starting point. At its July meeting, the Working Party examined specific examples of regulatory measures with a view to identifying common elements.

OUTLOOK

Following the initial tabling of requests in June 2002, the negotiating process as of the July "services week" has become an intense series of bilateral meetings between visiting and Geneva-based delegations from WTO Members. Most of these take place in Geneva and are concentrated in the "services weeks" so as to facilitate the presence of experts from capitals. During the July "week", for example, the EU held 43 bilaterals, bringing a team of negotiators from Brussels for the purpose. The US had some 20 bilaterals, and other Members held between 10 and 20.

In addition, Members agreed to try to coordinate the presence of sectoral experts through the WTO Secretariat, so that future "services weeks" will have more sectoral focus. Meetings of the Special Session of the Services Council will also be curtailed to allow more time for bilaterals, on which delegations will report progress to the Council, if they wish, at the end of each session of the "services week."

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Negotiations are expected to accelerate during the next clusters of services meetings, from October 21-November 1 and December 2-13. By then, more WTO Members including developing countries are expected to table their initial requests for market access. Activity will also increase as many WTO Members prepare to respond to the requests of the growing number of demandeurs – as initial offers are anticipated by March 2003.

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WTO DISPUTE SETTLEMENT

Mexico Threatens First Complaint Against China at the WTO on Investment Incentives

SUMMARY

On July 10, 2002, the Mexican Minister of Economy Luis Ernesto Derbez announced that Mexico is considering filing a complaint against China at the World Trade Organization (WTO) due to potentially illegal subsidies granted by China to exporting companies located in China. The dispute could be the first against China since it joined the WTO last December. According to Mexican officials, China is engaging in these trade-distorting practices to attract foreign investment in China to the detriment of foreign investment in Mexico.

In its evaluation on whether to file a WTO dispute, the Mexican Government is conducting a survey among 5,000 companies, requesting information about the reasons why they moved to China or why they are considering doing so. The government seeks evidence on whether China is granting such illegal subsidies.

Derbez also mentioned that if Mexico decides to file the complaint before the WTO and prevails, any retaliatory sanctions should apply to Chinese exports to all WTO member countries, not only on Chinese exports to Mexico.

ANALYSIS

I. Mexico May File First WTO Complaint Against China

Mexico has threatened to take China to the World Trade Organization (WTO) dispute settlement body, alleging that China is granting unfair subsidies to attract foreign investment. The complaint would be the first complaint filed against China since it joined the WTO in December 2001.

Mexico intends to file a complaint before the WTO within six months to a year if it manages to obtain evidence that the Chinese Government is granting credits and tax exemptions in violation of WTO rules. Mexico believes that some of China's investment incentives could arise from hidden and illegal export subsidies to exporting companies established in China. According to Mexican Government sources, China's actions are unfairly benefiting the competitiveness of companies established in China to the detriment of Mexican companies.

According to Mexican Minister of Economy Luis Ernesto Derbez, China's investment incentives have caused some companies established in Mexico to move their operations to China, resulting in an increasing number of lost jobs in Mexico.

Derbez argues that if Mexico takes the issue to the WTO and wins the case, any retaliatory sanctions should apply to Chinese exports bound for all WTO member countries, and not only to Chinese exports bound for Mexico.

In order to obtain evidence of injury, the Mexican Government is conducting a survey among 5,000 companies, requesting information about the reasons why they decided to maintain their operations in Mexico or move their operations to China. The Government is particularly interested in factors those companies are taking into account when considering whether to move their operations out of Mexico. The survey should be completed in August.

The Mexican Government intends to use the results of this survey to determine whether the Chinese Government is offering WTO-inconsistent incentives to attract exporting companies to China. Futhermore, Mexico is concerned whether such potentially illegal export subsidies have the effect of lowering the price of Chinese exports. Mexico will then decide whether to raise a formal WTO dispute against China, or perhaps to raise the dispute bilaterally.

II. Mexican Maquiladora Industry Particularly Vulnerable to Chinese Competition

Mexico's National Maquiladora Industry Council (CNIME) contends that China is granting unfair subsidies to exporting companies established in China by providing exemptions on rent, land taxes, credits, and even land itself. In contrast, Mexico only grants limited investment incentives, including training, and programs to reduce or eliminate import duties on some imports to exporting companies established in Mexico. CNIME claims that the maquiladora industry has been particularly affected and vulnerable to these Chinese policies.

According to the Director General of CNIME Carlos Palencia, the competitiveness of the Mexican maquiladora industry has been affected by the lack of certainty in the tax regime, over-regulation, and increasing security costs – especially to protect foreign executives working in Mexico. Palencia argues that the Mexican Government must grant greater legal certainty to the maquiladora industry to improve the general business environment and increase incentives for investment. Industry representatives are currently discussing with the Ministries of Economy and Finance regarding the types of incentives that would encourage foreign companies to maintain their operations in Mexico.

According to the CNIME, since 2001, approximately 700 maquiladora companies and f300-500 production lines have closed their operations in Mexico, and only 350 maquiladoras have started new operations in Mexico. From October 2000, the maquiladora industry in Mexico has lost 350,000 jobs. Currently, there are 3,230 maquiladoras in Mexico with a total of one million jobs.

In addition to the effects of China's policies on the Mexican maquiladora industry, the maquiladora industry has been affected by the recent slow-down of the U.S. economy and the weakened currency, the Peso. Regardless of these setbacks, the CNIME expects the industry to experience a recovery during the second half of the year.

OUTLOOK

Mexico's threat of raising the first WTO dispute against China is not surprising, especially considering the intense level of competition between the two advanced developing

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countries. Mexico also was the last to conclude WTO negotiation talks with China, and did so only after gaining the right to maintain a substantial number of antidumping orders against China.

Mexico seeks to discourage the migration of Mexican companies and foreign investors to China, a trend which apparently has accelerated after China's WTO membership. There is, however, no basis in existing WTO Agreements for compensation to be paid to Mexico because some companies have chosen to move from there to China. If a panel were to be established, it would consider specific allegations of illegal export subsidies by the Chinese government; if proven, their removal would be recommended, and failing that, countermeasures would be authorized.

Mexico's complaint against China is not typical of WTO dispute settlement activity, but appears more a politically-driven strategy than a legal initiative at this stage. The threat of a WTO dispute could force domestic and foreign businesses to think twice before moving their operations to China. Indeed, if Mexico succeeds at the WTO or through bilateral negotiations to discourage China from granting potentially illegal subsidies, then China's promised investment incentives could be curtailed. As Minister Derbez has warned, a Mexican dispute with China could have wide-reaching implications because it could result in countervailing duties against Chinese exports to Mexico and perhaps other WTO member countries that feel threatened by Chinese exports.

An interesting question is whether Mexico's basis for such a complaint would improve or damage the prospects for launching negotiations on investment rules at the WTO. Some observers might think Mexico's claims demonstrate the dangers of getting into the subject: China may have to defend itself under the Subsidies Agreement, but is not subject to other disciplines on investment – and would be even less supportive of stronger disciplines of investment. It is known that Mexico and other Latin-American countries have tried to generate a serious debate in the WTO about investment incentives, and have been blocked by opposition from certain Asian countries and some major OECD countries – which all offer some level of investment incentives. In this light, China is seen as an acute threat considering its ability to attract investment through various incentive programs. In addition to putting China on warning, Mexico may be sending two signals to others: first, that they cannot go on ignoring the issue now that China is in the WTO – a point that might well appeal to China's Asian neighbours; and second, that if serious discussion or negotiation of investment incentives is not possible, there is another way of getting at them, through the Subsidies Agreement and dispute settlement. In other words, Mexico may be pressuring opponents of investment negotiations to launch negotiations at the next Ministerial Conference in Cancan – especially as China poses a greater threat of investment diversion.

At this stage, it remains uncertain whether the Mexican Government will gather enough evidence to make a strong case alleging China's granting of WTO-inconsistent subsidies. For the forseeable future, many forms of investment incentives are beyond the reach of WTO rules and disciplines. In the meantime, Mexico's threat of a dispute could be effective as a political deterrant to China even if the legal arguments are not as sound.

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WTO Panel Interim Report Finds Against U.S. Byrd Amendment

SUMMARY

On July 15, 2002 a WTO panel distributed a confidential interim report to the 12 parties in the dispute regarding the U.S. Continued Dumping and Subsidy Offset Act of 2000 (CDSOA, or "Byrd Amendment"). The panel for the most part found that the Byrd Amendment provides a remedy not permissible under WTO rules on antidumping and subsidies. In an usually forward statement, the panel suggests that most appropriate way for the US to comply would be to repeal the law. The WTO panel is expected to issue its final ruling to parties in August, and to release the decision publicly in September. The US will likely appeal the panel finding and buy time for compliance, even though the Byrd Amendment does not appear to be popular with the Bush Administration, like the case with the Clinton Administration.

ANALYSIS

I. Background

Congress passed the Continued Dumping and Subsidy Offset Act of 2000 (CDSOA, or "Byrd Amendment") as part of the farm appropriations bill, which was signed into law (at the objection of the Clinton Administration, many Congressmen and foreign trading partners) on October 28, 2000. The Byrd Amendment provides that the U.S. Customs Service can distribute money collected from antidumping and countervailing duties to U.S. firms deemed to have been harmed by the unfair trade practices for which the duties were collected. These "affected" domestic producers are defined as the petitioners who requested the original antidumping or countervailing orders. In 2001, disbursements were over $200 million.

The Byrd Amendment provoked the largest WTO challenge ever, involving eleven WTO Members, including Brazil, Canada, the European Union, India, Japan, Mexico and Thailand, among others. Most of these Members argued that the law amounted to a remedy beyond what is allowable under the Antidumping Agreement, and some argued it had the effect of an illegal subsidy. The US defended the measure as fiscal measure that was available to all petitioners and which did not provide specific relief to the domestic industry.

II. Interim Ruling Finds Against Byrd Amendment

The panelists Luiz Wasescha of Switzerland, Maamoun Abdel-Fattah of Egypt, and William Falconer of New Zealand, ruled that the Byrd Amendment is in violation of certain aspects of the Antidumping Agreement and Agreement on Subsidies and Countervailing Measures (SCM Agreement). In a rather usually forward statement, they recommended that there is "no other method which would be more appropriate and/or effective than the repeal of the CDSOA measure." The findings in the interim report are not expected to differ from the final ruling. Both complainants and the US are permitted to submit comments on the interim report before a final ruling is circulated to the parties around mid-August.

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The interim ruling supports the complainants' claim that the Byrd amendment is a specific form of action outside the scope of WTO agreements. In particular, the panel cited violations of Article 18.1 of the Antidumping Agreement (Final Provisions), Article 32.1 of the SCM Agreement (Other Final Provisions), and Articles VI:2 and VI:3 of the General Agreement on Tariffs and Trade (GATT) (Anti-dumping and Countervailing Duties). Article VI.2 and 3 of the GATT, in particular, limit the level of any antidumping or countervailing duty to that of the dumping margin, or estimated bounty or subsidy determined to have been granted.

The interim panel also sided with the complainants on the issue of whether the Byrd Amendment short-circuited restrictions on mandating anti-dumping and countervailing investigations by creating a financial incentive for domestic producers to file petitions. Because the Byrd Amendment provides for remedies outside of definitive anti-dumping duties, provisional measures or undertakings, some complainants argued the Byrd Amendment is not permitted by the Agreements.

On the other hand, the panel rejects the complaints' claim that the Byrd amendment prevents the U.S. government from securing voluntary "undertaking" agreements. Through such undertakings, exporters negotiate a particular price band for their products which would allow them to avoid antidumping or countervailing duties. Additionally, the panel rejected the argument that law nullified or impaired, under the SCM agreement, "benefits accruing directly or indirectly to other Member of GATT 1994…" – Mexico referred in particular to reverses in tariff benefits.

III. Bush Administration Criticizes Decision Publicly, Perhaps Supportive Privately

On July 18, Deputy U.S. Trade Representative Peter Allgeier publicly criticized the decision, stating that the panel had overstepped its authority by calling for the repeal of the Byrd Amendment. Allgeier emphasized that it was up to individual Members to determine how to bring an inconsistent measure into compliance, and did not appreciate the prescriptive language of the panel's ruling in this case. Allgeier also stated that the US would soon be proposing reforms of the WTO's dispute settlement process, and would seek to limit this type of prescriptive rulings by WTO panels.

Several Congressmen issued strong statements criticizing the ruling. Senate Finance Committee Chairman Max Baucus (D-Mont.) stated that the ruling undermines U.S. trade remedies and warned that it could harden U.S. negotiating position toward Doha negotiations. Baucus also cited the need for the "Dayton-Craig Amendment," which would impose Congressional oversight into U.S. negotiations of trade remedy laws. Senator Robert Byrd (D-W.Va), the original sponsor of the law claimed that the WTO was undermining the ability of U.S. lawmakers to design and implement what was exclusively domestic policy.

Despite the rhetoric of U.S. lawmakers and U.S. officials, there is a sense among the multilateral community in Geneva that the U.S. administration discretely welcomes the interim ruling. It was no secret that the Clinton Administration and pro-trade Congressmen opposed the

Byrd Amendment. The Bush Administration has inherited the controversial law, and now can point to outside pressure for seeking its repeal.

OUTLOOK

Despite the unpopularity of the Byrd Amendment among pro-trade circles in Washington, the US will likely appeal the panel's final ruling – to buy time, at the least. Domestic action on the ruling will be difficult due to the importance of states such as West Virginia (Byrd's state) in U.S. domestic politics. It was after all the politics of West Virginia and other steel states that had prompted the Bush Administration to announce steel safeguards earlier this year.

Nevertheless, if the unusually strong language advising repeal of the law survives – in the panel's final report, or perhaps in the Appellate Body findings, then there should be more pressure on the US to fix or repeal the law. The danger of inaction, or further delay on the Byrd Amendment is that other countries have threatened to replicate the law. If such a measure is replicated widely, exporters will face more obstacles in markets abroad as domestic industries gain a lucrative incentive to initiate antidumping cases. Such a scenario would seriously undermine the liberalization gains of the Uruguay Round, and discourage post-Doha negotiations.

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Report of the Panel in *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*

SUMMARY

We analyze here the Report of the Panel in *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* (DS/213) ("*Steel from Germany*"). *Steel from Germany* involved WTO challenges by the EU to the U.S. sunset review determination of the CVD order on corrosion resistant carbon steel from Germany. The dispute centered on the United States' WTO obligations stemming from Article 21.3 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") – the sunset review provision for CVD measures.[24] The *Steel from Germany* panel addressed procedural issues regarding the panel's terms of reference and three significant substantive issues.

With respect to the procedural matters, the panel ruled that two claims by the EU were outside of the panel's terms of reference. The EU's claims regarding the so-called "expedited" sunset review procedures, and the U.S. CVD law regarding the DOC's obligation to provide ample opportunity for "interested members and parties" to submit evidence in a sunset review, were deemed to be outside of the panel's terms of reference because the EU did not identify the claims in its request for consultations or request for the establishment of a panel.

As for the panel's treatment of the three substantive issues, first, the panel determined that the U.S. CVD law and implementing regulations regarding self-initiation of sunset reviews are <u>consistent</u> with the requirements of the SCM Agreement. The panel thus rejected the EC's arguments that the sunset provision of the SCM Agreement imposes evidentiary standards on national administering authorities in connection with the automatic self-initiation of sunset reviews.

Second, the panel agreed with the EU that the U.S. CVD law and implementing regulations with respect to the use of a 0.5 percent *de minimis* standard to sunset reviews are <u>inconsistent</u> with Article 21.3 of the SCM Agreement. The panel also ruled that the Department's application of the *de minimis* standard in the subject sunset review constituted a violation of Article 21.3.[25]

Third, the panel rejected the EU's argument that the U.S. CVD law is inconsistent on its face with respect to the Department's obligation to determine the likelihood of continuation or recurrence of subsidization in a sunset review. The panel concluded, however, that the Department failed to determine properly the likelihood of continuation or recurrence of

[24] For purposes of antidumping measures, the companion provision of Article 21.3 of the SCM Agreement is Article 11.3 of the AD Agreement, which establishes WTO Members' obligations in connection with the administration of AD sunset reviews.

[25] One of the panelists filed a dissenting opinion on this issue. The dissenting opinion is discussed in greater detail below.

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subsidization in the sunset review, in violation of the United States' obligations under Article 21.3 of the SCM Agreement.

The United States is likely to appeal the panel's decision of the *de minimis* issue, and the outcome of that appeal is difficult to predict at this time.

ANALYSIS

I. Procedural Issues Regarding the Panel's Terms of Reference

The panel ruled that two claims by the EU were outside of the panel's terms of reference. The EU's claims regarding the so-called "expedited" sunset review procedures, and the U.S. CVD law regarding the DOC's obligation to provide ample opportunity for "interested members and parties" to submit evidence in a sunset review, were outside of the panel's terms of reference because the EU did not identify the claims in its request for consultations or request for the establishment of a panel. The panel stated that the EU's request for establishment of a panel did not specifically articulate such challenges and that the request did not contain "any all-encompassing reference" to U.S. sunset review procedures (para. 8.8).

The panel nevertheless considered whether the expedited review procedure was "sufficiently related to a measure or measures that are specifically identified [in the EU's request] so as to bring it within our terms of reference" (para. 8.10). Against this standard, the panel ruled that the EU failed to set out claims with respect to (i) the U.S. expedited sunset review procedures; and (ii) the U.S. CVD law regarding the investigating authority's obligation to provide ample opportunity to interested parties to submit relevant evidence in a sunset review.

II. Automatic, "Self"-Initiation of the Sunset Review

The panel rejected the EU's arguments regarding self-initiation of sunset reviews – essentially that the non-application of evidentiary standards to the automatic, self-initiation of sunset reviews constitutes a violation of Article 21.3 of the SCM Agreement. The EU asserted that the evidentiary requirements of Article 11.6 of the SCM Agreement[26] apply to the initiation of a sunset review by the administering authorities in "special circumstances," such that administering authorities must be in possession of evidence under the standard applied to the domestic industry based on a "duly substantiated request."

The principal question before the *Steel from Germany* panel was whether the text of Article 21.3 imposes any evidentiary requirements on national authorities in the self-initiation of sunset reviews. The panel observed "that nothing in the text of Article 21.3 specifically provides that the evidentiary standards applicable to the initiation of investigations are also applicable to the initiation of sunset reviews" (para. 8.26). Pursuant to the applicable rules of treaty interpretation that guide a panel's reading of WTO agreements, the panel noted that it was not

[26] The evidentiary requirements of the AD Agreement are set forth in Article 5.6.

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"limited to a literal reading of the text of Article 21.3" (para. 8.29), and that it would examine the provision in light of the object and purpose of countervailing duties and the sunset provision.[27]

In this respect, the panel then examined the relationship between Articles 21.1, 21.2, and 21.3, of the SCM Agreement (the mirror image provisions of Article 11.1, 11.2, and 11.3 of the AD Agreement). The panel cited Article 21.1's fundamental obligation that "A [CVD] shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury." The panel continued, explaining "Articles 21.2 and 21.3 are, therefore, further articulations, in respect of certain specific scenarios, of the ongoing obligation contained in Article 21.1. Article 21.2 provides the modalities for compliance with this obligation during the period of application of a CVD, while Article 21.3 provides the modalities for compliance with this obligation upon expiry of that period" (para. 8.33). The panel concluded that both provisions reinforce a basic discipline on the imposition of CVDs that such measures can only apply where subsidization causes or is likely to cause injury. (The mirror image provisions of the Article 11.1, 11.2 and 11.3 have the same functions with respect to the imposition, maintenance, and termination of antidumping measures.)

Against this framework, the panel reasoned that:

> We cannot, however, see how the automatic self-initiation of sunset reviews runs afoul of that obligation in any way. The initiation of a review is merely the beginning of a process leading to a determination as to whether or not subsidization and injury are likely to continue or recur. The standards for the initiation of a review – whether on the initiative of an investigating authority or upon request by the domestic industry – in no way prejudge the standards applied by an investigating authority in reaching the substantive determination to be made in that review. In sum, it seems to us that the European Communities' argument is based upon an incorrect equation of the standards for the initiation of a review with those for the substantive determination to be made in a review.
>
> . . . We see no difficulty, however, with an interpretation under which investigating authorities may not self-initiate investigations without certain evidence, but may self-initiate sunset reviews without any evidence. Given that evidentiary standards for the self-initiation of investigations are understood to exist for the purpose of avoiding trade harassment, the drafters could very reasonably have intended such standards to be inapplicable to the self-initiation of sunset reviews, as sunset reviews do not have the same potential for trade harassment as investigations, as discussed above (*See* paragraph 8.36, *supra*). We consider it perfectly rational for them to have established a set of disciplines in

[27] See *Vienna Convention on the Law of Treaties*, art. 31, 8 I.L.M., 679 ("*Vienna Convention*"); Report of the Appellate Body, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, p. 16. Article 31 of the *Vienna Convention* provides that the words of the treaty form the foundation for the interpretive process: "interpretation must be based above all upon the text of the treaty". Report of the Appellate Body, *Japan – Taxes on Alcoholic Beverage*, WT/DS8/AB/R-WT/DS10/AB/R-WT/DS11/AB/R, adopted 1 November 1996, p. 12 (footnote deleted)).

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> respect of investigations, and have some of them apply to sunset reviews and others not. To accept the European Communities' proposition would require us first to accept as fact that "the purpose and effect of initial investigations and of sunset reviews are the same", and then to conclude that this purpose and effect somehow override conclusions based on our reading of the text itself. We see no sound legal basis for the conclusion that the purpose and effect of proceedings governed by certain provisions trump textual analysis of those provisions in their context and in light of the object and purpose of the treaty.

(paras. 8.42-43) The panel thus concluded that no evidentiary standards are applicable to the automatic, self-initiation of sunset reviews under Article 21.3 and, hence, that the U.S. CVD law and implementing regulations were consistent with the United States' obligations under the SCM Agreement.

III. The *De Minimis* Standard Applied to Sunset Reviews

A. *Steel from Germany* Panel Ruling: Majority Decision

The panel majority rejected the United States' two primary arguments that (1) there is no explicit *de minimis* standard for sunset reviews in Article 21.3 or elsewhere in the SCM Agreement; and (2) that a contextual analysis of the sunset provision in light of the object and purpose of the SCM Agreement fails to provide support that the *de minimis* standard for investigations applies to sunset reviews.

While the panel majority conceded that "nothing in the text of Article 21.3 specifically provides that the de minimis standard applicable to investigations is also applicable to sunset reviews" (para. 8.58), the majority did not view such silence to be dispositive. The panel's analysis of Article 21.3 in its context and in light of the object and purpose of the SCM Agreement, pursuant to the applicable rules on treaty interpretation (*i.e.*, Article 31 of the *Vienna Convention*, as reaffirmed by the WTO Appellate Body) led the panel to conclude that the *de minimis* standard does apply to sunset reviews:

> In sum, we consider that the rationale for the *de minimis* standard set out in Article 11.9 is clearly that CVDs are to be used to counter injurious subsidization, and the threshold set out in this provision demarcates the level below which subsidization is deemed to be so small as to be non-injurious for purposes of the imposition of CVDs. Having found this to be the case, and having established that one of the objects and purposes of the SCM Agreement is to regulate the imposition of CVDs and to create a disciplinary framework therefore, we are of the view that the *de minimis* standard must be applicable to sunset reviews as it is to investigations. Finding otherwise would compromise the very object and purpose of the SCM Agreement and the disciplinary framework that the drafters sought to create through the Agreement (para. 8.79).

As part of this framework, for example, the panel observed that "[t]o hold that a threshold of injurious subsidization that applies for the first five years of the life of a CVD becomes

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inapplicable for the remainder of its life, should the CVD be continued, would seem to us to run counter to the object and purpose of the Agreement, which is to provide Members a framework within which to offset injurious subsidization" (para.8.66). The panel rejected several subsidiary U.S. arguments based on the premise that because there is no obligation to quantify subsidization in sunset reviews, there can be no obligation to apply a *de minimis* standard. The panel stated (in somewhat circular reasoning) that because the de minimis standard applies to sunset reviews, "there is a consequential obligation to quantify the likely future rate of subsidization" (para. 8.72).

With respect to the relationship between the likely rate of future subsidization and the *de minimis* standard, the panel stated the following:

> When asked by the Panel, supposing application of a *de minimis* standard to sunset reviews, whether this standard would be based on (i) the rate of subsidization during the period of application of the CVD, (ii) the rate of subsidization at the time of sunset review, or (iii) the rate at which subsidization is likely to continue or recur, the European Communities argues that "[t]he rate that should determine the outcome of a sunset review is . . . the rate likely to continue or recur if the CVD measure were allowed to expire." The United States, on the other hand, responds that "all of these options might inform a determination of the likelihood of continuation or recurrence of subsidization – but they just as easily might not." While we accept that, depending on the facts of the case before the investigating authorities, one, two, or all of the above-mentioned rates might be relevant to an assessment of the likelihood of continuation or recurrence of subsidization, there is no doubt in our minds that the rate to which the *de minimis* standard is to be applied in sunset reviews is the likely future rate of subsidization.
>
> Whatever the rate of subsidization at the time of sunset review, any *de minimis* standard could not be applicable to that rate, as such a practice would encourage deliberate diminution of subsidies at the time of sunset review with a view to ensuring that the rate falls below the *de minimis* threshold. Nor could a de minimis standard apply to the past rate of subsidization – that during the period of application of the CVD – as that would mean that non-subsidization during that period is determinative of the likelihood of continuation or recurrence, which cannot be the case. Such an interpretation would seriously call into question the notion of recurrence contained in Article 21.3. Of course this is not to suggest that the past level of subsidization is not a relevant consideration in an assessment of likelihood of continuation or recurrence; it is without doubt a relevant factor in such an assessment. But the existence or absence of past subsidization cannot be dispositive of the likelihood of continuation or recurrence of subsidization. Accordingly, the *de minimis* standard applicable to sunset reviews could only be based on the rate at which subsidization is likely to continue or recur. This also reflects the purpose and substance of a sunset review, i.e., an assessment of the likelihood of continuation or recurrence of subsidization and injury (paras. 8.76 and 8.77).

The above passage could have implications for the effect of *de minimis* findings in an original antidumping duty investigation versus a *de minimis* finding pursuant to an administrative review.

B. *Steel from Germany Panel Report:* Dissenting View of Panel Member

A member of the panel issued a dissenting opinion in which he concluded that no *de minimis* standard is applicable to sunset reviews and, as such, the U.S. CVD law and implementing regulations are consistent with the United States' obligations under the SCM Agreement. The dissenting member dismissed the majority's approach of reading into provisions of the SCM Agreement by implication obligations that are not explicit:

> I am of the opinion that to consider provisions relating to investigations applicable by implication under provisions relating to sunset reviews does not give meaning and effect to the explicit statements of cross-application in the SCM Agreement, and effectively renders such statements redundant. In other words, if all provisions are applicable to sunset reviews, except perhaps where impracticable, then there would be no need for such explicit statements to exist.

Thus, according to the dissenting panelist, the drafters of the SCM Agreement could have included a clear indication that they intended for the *de minimis* standard to apply to sunset reviews by including in Article 21.3 a cross-reference to Article 11.9 (the *de minimis* provision). The dissenting panelist noted, in this regard, that Article 21 contained cross-references to other SCM Agreement provisions, such as Articles 12 (dealing with evidence) and 18 (dealing with suspension agreements).

The same rationale can be applied to the operation and effect of the *de minimis* standard in the AD Agreement. The drafters could have included in Article 11.3 of the AD Agreement a reference to the AD *de minimis* rule in Article 5.8. They did not. As with Article 21 of the SCM Agreement, Article 11 of the AD Agreement contains cross-references to Article 6 9 (evidence) and Article 8 (suspension agreements), suggesting that for at least certain obligations, there was a clear desire to cross-reference and specifically incorporate additional obligations in the context of a sunset review.

Although not discussed in the panel report, there are counter-arguments to the cross-referencing argument embraced by the dissenting panelist. For example, there was no need for the drafters to cross-reference in Article 11.3 (the AD sunset review provision), the obligations contained in Article 2 (related to dumping calculations), because Article 2 of the AD Agreement applies to reviews conducted under Article 11 because Article 2.1 defines "dumping" "for the purposes of the Agreement", and not just Article 2. Similarly, footnote 9 to Article 3 (related to injury determinations) provides that

> Under this Agreement, the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of injury to a domestic

> industry or material retardation to the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.[28]

IV. Determination of Likelihood of Continuation or Recurrence of Subsidization

The EU challenged the U.S. CVD law on its face with respect to the United States' obligation (under Article 21.3 of the SCM Agreement) to "determine" the likelihood of continuation or recurrence of subsidization. The EU argued that the provision imposes on WTO Members a "positive obligation" for the national investigating authority to examine whether subsidization continues to exist. Thus, according to the EU, a WTO consistent "determination" requires a "likelihood" analysis that considers the same factors used by the investigating authorities in an original CVD investigation. The EU argued that because the U.S. CVD law and implementing regulations failed to provide such a framework, the U.S. law was by its terms ("as such") inconsistent with the SCM Agreement (paras. 8.86-87).

The panel rejected the EU argument and concluded that the U.S. CVD law, implementing regulations, and statement of policy practices are consistent with Article 21.3 of the SCM Agreement with regard to the obligation to determine the likelihood of continuation or recurrence of subsidization in sunset reviews. According to the panel "unless US CVD law mandates WTO-inconsistent behavior, we will find that it is not inconsistent with the SCM Agreement"

> Having considered the provisions challenged by the European Communities, we find no provision in US law that mandates WTO-inconsistent behavior. We also note that the Regulations, the Sunset Policy Bulletin and the SAA do not contain any provision that changes US law in this respect. We therefore find that US law is not inconsistent with Article 21.3 of the SCM Agreement with respect to the obligation that the investigating authorities determine the likelihood of continuation or recurrence of subsidization in a sunset review (para. 8.106).

The panel also determined, however, that the United States, in failing to determine properly the likelihood of continuation or recurrence of subsidization in the sunset review, acted in violation of Article 21.3 of the SCM Agreement. The panel explained that the Department "failed to properly determine the likelihood of continuation or recurrence of subsidization in the instant sunset review *because its decision regarding the rate at which subsidization was likely to continue or recur lacked an adequate factual basis*" (para. 8.119) (emphasis added). In reaching its conclusion, the panel stated "as far as the adequacy of the factual basis for a determination is concerned, we see no reason to distinguish between injury determinations in a safeguard investigation and a determination of the likelihood of continuation or recurrence of subsidization

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[28] The Report of the Panel in *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) Of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999 *("DRAMS from Korea")*, involved a dispute related to Article 11.2 of the AD Agreement (dealing with administrative reviews). The panel stated that "[w]e note that, by virtue of note 9 of the Anti-Dumping Agreement, the term 'injury' in Article 11.2 shall be interpreted in accordance with the provisions of Article 3." Para. 6.59, note 501. The reasoning of that panel applies with equal force and effect to reviews under Article 11.3 of the AD Agreement.

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in a CVD sunset review" (para. 8.92). In this respect, the panel reasoned that in the context of a sunset review under Article 21.3, the national investigating authority "should collect relevant facts and base its likelihood analysis on those facts." In *Steel from Germany*, the Department's factual basis for its sunset review determination was confined to the original rate of subsidization and the fact that two of the original subsidy programs were terminated after the imposition of the original order (paras. 8.115-117). The panel held that this was an insufficient factual basis for the Department's determination.

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REGIONAL TRADE AGREEMENTS

EFTA and Singapore Sign Free Trade Agreement

SUMMARY

The European Free Trade Association (EFTA)[29] and Singapore signed a free trade agreement on June 26, 2002. The comprehensive, WTO-consistent Agreement covers trade in goods (industrial products as well as fish, marine and agricultural products) and trade in services and investment. The Agreement will enter into force on January 1, 2003.

This is the first Agreement of its kind between Europe and East Asia. Analysts expect the Agreement to set a precedent for further trade agreements between the two regions.

ANALYSIS

On June 26, 2002, Singapore and European Free Trade Association (EFTA) officials signed an all-inclusive Free Trade Agreement (FTA) covering trade in goods and services, investment, competition, government procurement and intellectual property. The EFTA-Singapore FTA aims to lower trade barriers, increase investment and open up opportunities for the business communities of all signatories.

The FTA was signed in Egilsstadir, Iceland, on the occasion of the EFTA spring Ministerial Meeting under the chairmanship of Icelandic Minister for Foreign Affairs Halldor Asgrimsson. During the signing of the Agreement, Singaporean Minister for Trade and Industry George Yeo noted that the Agreement, " [being] WTO-consistent, [would hope to] make a modest contribution to global trade liberalization." The Agreement is expected to enter into force on January 1, 2003 after each signatory has completed the ratification process.

I. Background

EFTA-Singapore Free Trade negotiations were launched on May 4, 2001 through a joint press communiqué, following the successful conclusion of exploratory talks on March 5-6, 2001. Officials formally concluded negotiations in Singapore on November 8, 2001. Both Parties initialed the FTA text at the chief negotiators' level on April 11, 2001 in Geneva, Switzerland and endorsed the final version in Iceland on June 26, 2001.

[29] The European Free Trade Association is a trade group consisting of Switzerland, Liechtenstein, Norway and Iceland.

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Highlights of the EFTA/ Singapore FTA

- The EFTA/ Singapore FTA is the nineteenth EFTA agreement of its kind.[30]
- This is Singapore's third FTA after New Zealand and Japan.
- It is the first FTA Agreement between European countries and an East-Asian country. The FTA will cover a population of 325 million.
- The Agreement will strengthen bilateral linkages and promote greater trade and investment between the Parties.
- In 2001, EFTA States exported goods worth 1.24 billion US dollars to Singapore and imported goods worth 312 million US dollars from Singapore. Roughly ninety-eight percent of the trade in goods was in industrial products. In 2001 total trade between EFTA and Singapore amounted to 3.2 billion US dollars.
- Once the FTA enters into force, up to 99.8 percent of Singapore's domestic exports to EFTA will enjoy preferential market access treatment through tariff liberalization. Previously, only 23.6 percent of Singapore's domestic exports retained duty-free access into EFTA countries.

II. Main Provisions of the EFTA/ Singapore FTA[31]

A. Trade in Goods

- All trade in industrial goods (including key sectors such as electronics, chemicals and other manufactured articles) as well as trade in fish and other marine products will benefit from duty-free access to the respective markets.
- The Agreement provides for concessions regarding processed agricultural products. In addition, individual bilateral agreements between EFTA States and Singapore cover trade in basic agricultural products.
- The Rules of Origin will determine the type of products eligible for preferential tariff treatment. Most of Singapore's top exports to EFTA will qualify for preferential tariff treatment.
- The Agreement prohibits the use of antidumping measures on another Party's originating products.

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[30] EFTA also has signed FTAs with Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Israel, Jordan, Latvia, Lithuania, Macedonia, Mexico, Morocco, PLO, Poland, Romania, the Slovak Republic, Slovenia, and Turkey.

[31] The full text of the FTA is available at: http://secretariat.efta.int/library/legal/fta/singapore/01-.pdf

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B. Trade in Services

- The FTA covers all modes of supply, as defined under the WTO General Agreement on Trade in Services (GATS), including professional services, distribution services, telecommunication services and transport services.

- The FTA includes a specific framework of rules on financial services, including all insurance and banking services

- The Parties have agreed upon complementary rules such as data processing and prudential measures as well as a right to consultations within the area of services.

- Analysts expect that steps will be taken to start negotiations on agreements providing for mutual recognition of diplomas and professional degrees no later than three years of the entry of force of the FTA

C. Investment

- The FTA covers market access for EFTA and Singapore investors and the protection of existing and future investments.

- The FTA includes provisions on promotion and protection, national and MFN treatment, taxation, expropriation and compensation, domestic regulation, transfers and key personnel.

D. Intellectual Property Rights (IPR)

- The FTA provides an augmented standard of IPR protection beyond what is provided for under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Areas covered include patents, trademarks, and copyright.

E. Competition

- Both Parties recognize that anti-competitive behavior could hinder trade. If the governments of one or both of the Parties suspect anti-competitive behavior, the FTA provides for a framework of consultations on the matter.

F. Government Procurement

- The FTA establishes contact points for the exchange of information on rules and regulations to facilitate access to the other Party's procurement market.

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G. Dispute Settlement

- The FTA sets out consultations and binding settlement mechanisms to settle disputes between the Parties.

H. Reviews

- The Parties will hold a review every two years to ensure the smooth operation of the FTA.

OUTLOOK

Besides the direct benefits to business and industry for the countries involved, this FTA is viewed as a possible model for future free trade agreements. On the part of EFTA, an FTA of this kind acts as a gateway to further expand EFTA trade in Asia. Contacts have already been established with countries such as Japan and South Korea to explore possibilities for furthering free trade relations. On the part of Singapore, analysts expect the FTA to lead to further agreements with the European Union. Between June 27 and July 1, 2002, Singapore sent delegations to the Netherlands, Belgium and Finland to strengthen bilateral ties and to explore opportunities for increased trade and investment.

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Mexico and MERCOSUR Pave Way for Mexico-MERCOSUR FTA

SUMMARY

Brazil and Mexico signed a Comprehensive Preferential Tariff Agreement during Mexican President Fox's visit to the region on July 2-5, to participate in the MERCOSUR Presidential Summit in Buenos Aires. The Comprehensive Preferential Tariff Agreement covers a limited list of agricultural and industrial goods (796 tariff codes), not including automotive products.

During Fox's visit, Mexico also concluded bilateral Automotive Agreements with Argentina, Brazil and Uruguay. These bilateral Automotive Agreements will be part of the MERCOSUR-Mexico Automotive Framework Agreement, which will serve as the basis for an eventual Mexico-MERCOSUR Free Trade Agreement.

ANALYSIS

I. Brazil - Mexico Comprehensive Preferential Tariff Agreement

Officials from Brazil and Mexico concluded a Comprehensive Preferential Tariff Agreement within the ALADI (Latin American Integration Association) framework in Brasilia, on June 11-12, 2002. President Fox and Brazilian President Fernando H. Cardoso signed the Comprehensive Preferential Tariff Agreement during Fox's visit to Brasilia on July 2-3, 2002.

The Agreement covers a limited list of agricultural and industrial goods (796 tariff codes), not including automotive products.

The Parties finally reached an agreement on chemical products, an extremely sensitive sector for Brazil. The negotiations for this Comprehensive Preferential Tariff Agreement were very important for the automotive negotiations between Brazil and Mexico. Mexico linked the negotiations to press Brazil to agree to trade-offs between sensitive sectors for Brazil (i.e. chemical products) and concessions to Mexico in the Brazil-Mexico Automotive Agreement.

The main products covered by the Agreement include chemicals, machinery, electric equipment, food and beverages, tobacco, plastics, agricultural products, and optical and photography equipment *(Please see full list of products attached).*

The Agreement between Brazil and Mexico stands out because it foresees the same level of benefits for the exports of both countries. Only five products out of 796 involve asymmetric concessions (i.e. different margins of preferential treatment). The preferential margins for the products covered by the agreement range from 20 percent to 100 percent (i.e. duty-free). Another interesting aspect of the Agreement is that the rules of origin regime includes specific requirements for certain products.

This Agreement will be in effect until the entry into force of a MERCOSUR-Mexico free trade agreement (FTA) that will replace the existing Preferential Bilateral Agreements between

Mexico and the MERCOSUR countries (i.e. Argentina-Mexico ECA No. 6; Uruguay-Mexico ECA No. 5; and, Paraguay-Mexico ECA No. 38).

For Mexico, the Agreement with Brazil is part of its strategy to weaken Mexico's dependency on the U.S. market. According to the Mexican Ambassador to Brazil, currently 89 percent of Mexico's international trade is with the United States (75 percent prior the advent of the NAFTA). In this context, Latin America, and especially Brazil, is an important region in which Mexico could vary its exporting markets.

The new Agreement will be registered in ALADI as a Protocol to the Partial Scope Agreement No 9. Unlike the other MERCOSUR countries, all tariff preferences between Brazil and Mexico, except for the automotive sector, expired in 1997.

II. Brazil-Mexico Automotive Agreement

Brazilian and Mexican negotiators met in Buenos Aires on June 12-14, 2002, to participate in the last round of negotiations for a Bilateral Automotive Agreement. The Brazil-Mexico Automotive Agreement will be part of the MERCOSUR-Mexico Automotive Framework Agreement. The Parties signed the final Agreement on July 3, in Buenos Aires.

A. Reciprocal Preferences

According to the Brazil-Mexico Automotive Agreement, the Parties will grant each other the following reciprocal preferences:

Autos

- For the first year of the Agreement, a tariff-rate quota of 119,000 vehicles, at a 1.1 percent import duty. The tariff-rate quota under the current temporary Bilateral Automotive Agreement is 50,000 vehicles with an 8-percent duty;
- For the second year of the Agreement, a tariff-rate quota of 140,300 vehicles duty-free;
- For the third year of the Agreement, a tariff-rate quota of 153,600 vehicles duty-free;
- For the fourth year of the Agreement, a tariff-rate quota of 174,300 vehicles duty-free;
- There will be free trade in autos in the fifth year of the Agreement.

Light vehicles

- For the first year of the Agreement, a tariff-rate quota of 21,000 vehicles, with a 1.1-percent import duty;

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- For the second year of the Agreement, a tariff-rate quota of 24,700 vehicles duty-free;
- For the third year of the Agreement, a tariff-rate quota of 31,400 vehicles duty-free;
- For the fourth year of the Agreement, a tariff-rate quota of 35,700 vehicles duty-free;
- There will be free trade in light vehicle products in the fifth year of the Agreement.

Auto parts

The Automotive Agreement between Brazil and Mexico provides for free trade in auto parts for various products, starting on July 1, 2002.

B. Rules of Origin

Regarding rules of origin, the Brazil-Mexico Automotive Agreement includes the following provisions:

Auto parts and materials:

For auto parts and materials to be considered as originating in the region, the covered products must comply with one of the following rules of origin:

- Be totally produced in the territory of one of the Parties with originating materials;
- Include non-originating materials but, after the production process, the final product must have experienced a tariff shift; or
- Include non-originating materials but, after the production process, the final product must contain at least 50-percent originating materials.

Autos, light vehicles, body, engines, and chassis:

- For Brazil, the regional content requirement is 60 percent since the enforcement of the Agreement.
- For Mexico, the regional content requirement is 20 percent in 2002 and 2003; 25 percent in 2004; 27 percent in 2005; and 30 percent by 2006.

Brazilian auto executives have recognized that the Brazil-Mexico Automotive Agreement will benefit Brazil more than Mexico. However, the liberalization of the automotive sector was

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part of the trade-off for a broader trade liberalization agreement between Brazil and Mexico. In other words, through liberalization of its auto sector, Mexico intends to gain better market access for its other exports to Brazil. Mexican companies are encouraged by the agreement because they will be able to invest and conduct trade operations in the Brazilian market that reaches 170 million consumers, as well as in MERCOSUR, which includes 200 million consumers.

III. Argentina-Mexico Automotive Agreement

The bilateral agreement between Argentina and Mexico provides for a reciprocal tariff-rate quota of 50,000 autos and light vehicles that can be imported duty-free upon the entry into force of the Bilateral Agreement. This 50,000-unit quota is applicable for each year from 2002 to 2005.[32] The Parties will reach free trade in autos and light vehicles in 2006.

This bilateral agreement excludes auto parts. The Parties agreed to hold a new round of negotiations on auto parts within 90 days after signing the MERCOSUR-Mexico Automotive Framework Agreement.

Regarding rules of origin, the provisions applicable to the Argentina-Mexico Automotive Agreement are the same as those applicable to the Brazil-Mexico Automotive Agreement mentioned above.

IV. Uruguay-Mexico Automotive Agreement

The Automotive Agreement between Mexico and Uruguay provides for duty-free imports of autos and vehicles imported under the following tariff-rate quotas.[33]

	2002	**2003**	**2004**	**2005**
Uruguay	5,000	7,000	9,000	10,000
Mexico	2,000	2,800	3,600	4,000

In 2005, the Parties will negotiate the market access preferences for 2006.

This bilateral agreement excludes auto parts. The Parties agreed to hold a new round of negotiations on auto parts within 90 days after signing the MERCOSUR-Mexico Automotive Framework Agreement.

Regarding rules of origin, the provisions applicable to the Uruguay-Mexico Automotive Agreement are the same as those applicable to the Brazil-Mexico Automotive Agreement mentioned above.

[32] Each year is counted from May 1 to April 30.

[33] Each year is counted from May 1 to April 30.

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OUTLOOK

As a result of the completion of Bilateral Automotive Agreements between Mexico and Argentina, Brazil and Uruguay, the MERCOSUR bloc and Mexico concluded the MERCOSUR-Mexico Automotive Framework Agreement during the MERCOSUR Presidential Summit on July 5. Paraguay does not produce automobiles domestically, and, therefore, Paraguay and Mexico did not negotiate a bilateral automotive agreement. Nevertheless, as a member of MERCOSUR, Paraguay had to grant its consent for the conclusion of the Automotive Framework Agreement.

The new Comprehensive Preferential Tariff Agreement between Brazil and Mexico and the MERCOSUR-Mexico Automotive Framework Agreement will serve as a basis to negotiate a MERCOSUR-Mexico FTA. According to the Mexican Ministry of Economy, the negotiations for a MERCOSUR-Mexico FTA have already begun, but the Parties have not settled a target date for concluding the FTA. Some analysts argue that because the Parties have already concluded bilateral comprehensive tariff agreements and automotive agreements, the FTA negotiations should not be particularly difficult. A MERCOSUR-Mexico FTA could have important implications for the negotiations for the Free Trade Area of the Americas (FTAA) since Mexico and the MEROCUR countries could present a stronger front by negotiating en bloc.

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