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Japan External Trade Organization

WTO AND REGIONAL TRADE AGREEMENTS

Monthly Report

April 2004

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SUMMARY OF REPORTS

Special Reports

Administration Continues Push for Competitive Liberalization as Priority for 2004 Trade Agenda

The Administration's 2004 trade policy agenda states that the Administration will continue to pursue multilateral, regional and bilateral trade liberalization. The Administration will use the bilateral and regional trade negotiations to add momentum to the WTO and FTAA negotiations.

Since our last update, the Administration:

- Implemented Free Trade Agreements (FTAs) with Chile and Singapore.
- Concluded FTAs with Australia, Central America (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic), and Morocco.
- Launched negotiations with Bahrain and continued FTA negotiations with the Southern African Customs Union (SACU: Botswana, Lesotho, Namibia, South Africa, and Swaziland).
- Announced FTA negotiations with the Andean countries (Bolivia, Colombia, Ecuador, and Peru), Panama, and Thailand.

In this report, we identify the steps that the Administration has to take under TPA and the status of the negotiations that the Administration has concluded, is conducting, or has announced. We also indicate prospects for other suggested FTAs.

Consideration of VOIP Issues by U.S. Federal Communications Commission Has Global Ramifications for Telecoms and Information Services Sectors

Within the next five years, significant amounts of telephony traffic in the U.S. will be provided via the Internet, using Internet Protocol ("IP") technology (such services generally referred to as "Voice Over Internet Protocol" or "VOIP"). For most customers in the U.S. this will mean that the days of metered phone service charges will soon come to an end, to be replaced by a flat fee for unlimited local and long-distance calling. The disappearance of the distinction between local and long distance service will foreshadow the disappearance of long distance service as a separate line of business (that may be happening already for other reasons). Competition throughout the telecommunications and media sector will intensify, carrying with it further pressures for industry consolidation, perhaps even more so than before across industry segment lines. These pressures will not be unique to the U.S., and can be expected to spread quickly across the globe. Thus, the proliferation of VOIP technology is likely to have significant implications for cross-border trade in telecommunications.

A number of countries besides the U.S. have begun to focus on the regulatory issues associated with the provision of VOIP services. Some of these issues have been raised at the

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World Trade Organization ("WTO") and other international bodies, including the question of whether new technology affects existing classification of telecommunication and other services. Consideration of this issue in the U.S. been triggered by a Notice of Proposed Rulemaking ("NPRM") recently issued by the U.S. Federal Communications Commission ("FCC"), inviting comments on a comprehensive re-examination of the U.S. telecommunications regulatory landscape as affected by the emergency of VOIP services.[1] As the world's largest telecommunications market (in terms of revenues), how these issues are framed and resolved within the U.S. can have a profound impact on the rest of the world.

United States

Profile of Trade Issue Increases in 2004 Presidential Race; Complicates Passage of Trade Legislation

On March 18, 2004, the Global Business Dialogue (GBD) hosted a panel discussion entitled "White Water on the Trade River: Agreements, Negotiations, and the U.S. 2004 Elections." Four panelists, including representatives for the Administration and Congress addressed the Administration's trade agenda, prospects for congressional action on trade related legislation, current free trade agreements, and trade as an issue in the upcoming presidential election. The panelists agreed that while trade is likely to become a higher profile issue during the coming year, Congress will make little progress on trade legislation, particularly FTAs, until the 109th Congress convenes in 2005.

EPA Requests Comments on Petition to Revise Methods for Fuel Economy Estimates

On March 29, 2004, the Environmental Protection Agency (EPA) requested comments on a petition from Bluewater Network to revise the methods to estimate fuel economy. The petition contends that (i) EPA's fuel economy estimates do not accurately reflect results achieved in actual on-road operation, and (ii) more accurate estimates would benefit both consumers and those involved in setting national energy policy.

Comments should be submitted by July 27, 2004.

Bush Administration Considers Sanctions Options for Syria; Lifts Sanctions Against Libya

Bush Administration officials are close to a decision on the imposition of sanctions on Syria required under the Syria Accountability and Lebanese Sovereignty Restoration Act of 2003 [P.L. 108-175]. At a hearing before the House International Relations Committee on March 10, 2004, Assistant Secretary of State William J. Burns stated that sanctions against Syria would be imposed "very shortly." Despite calls from the business community for minimal sanctions, the Administration reportedly is considering imposing significant sanctions, including a possible ban on trade and investment.

[1] Comments on the NPRM are due to filed with the FCC on May 28, 2004, and reply comments are due on June 28, 2004.

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In contrast to the situation regarding Syria, the Bush Administration lifted sanctions against Libya on April 23, 2004. The lifting of sanctions follows Libya's decision in December 2003 to give up its weapons of mass destruction, and to pay compensation to the families of the victims of Pan-Am 103. The end of sanctions against Libya will allow U.S. companies to resume most commercial operations in Libya, as well as pursue new investments. In addition, the U.S. will no longer seek to prevent Libya's entry into the World Trade Organization.

Bureau of Industry and Security Reports on 2003 Progress and Outlines 2004 Objectives

On April 6, 2004, the Bureau of Industry and Security (BIS) of the Department of Commerce released its annual report for 2003. The report analyzes: (i) export control policy and regulations; (ii) export licensing and enforcement; (iii) industry outreach activities; (iv) international cooperation programs and treaty compliance; and (v) defense industrial and technological base program activities.

According to the report, BIS goals for 2004 include:

- Carrying out a comprehensive examination of deemed exports and technology controls, in addition to seeking renewal of the Export Administration Act (EAA), which expired in 2001.

- Expediting the processing of license applications and developing guidelines to guarantee that license conditions will be easily understood and enforceable.

- Ensuring consistency among BIS field offices in their approaches to enforcement cases, whether they result in administrative charges or criminal prosecution.

USTR Publishes 2004 NTE Report on Foreign Trade Barriers

On April 1, 2004, the United States Trade Representative (USTR) published the National Trade Estimate (NTE) Report on Foreign Trade Barriers, which surveys significant trade barriers to U.S. exports. While addressing a wide array of issues, this year's report focuses on the protection and enforcement of intellectual property rights (IPR), and restrictions in the services sector.

With a presidential election just seven months away, the NTE has become fodder for partisan attacks over the Bush Administration's enforcement of trade laws. On the same day that the NTE was released, House Democrats sent a letter to President Bush demanding that the USTR bring additional cases to the WTO against the European Union, China and Japan. In addition, Representative Rangel (D-New York) has introduced legislation to reinstate the "Super 301" process.

We highlight the NTE report's comments on the trade practices of China, Hong Kong, Indonesia, Japan, Korea , Malaysia, Philippines, Singapore and Thailand.

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USTR Identifies Barriers to the Effectiveness of U.S. Telecommunications Trade Agreements; WTO Findings in Mexican Dispute Reinforce U.S. Objectives

The United States Trade Representative (USTR) recently released its 2004 annual review concerning foreign compliance with telecommunications trade agreements. In the report, USTR highlighted three key barriers this year that have impeded access to foreign telecommunications markets: (1) proposed exclusionary standards for equipment and services; (2) high interconnection rates for mobile and wireless networks; and (3) restrictions on accessing wholesale transmission capacity.

USTR also expressed continued dissatisfaction about how the absence of a fully independent regulator in many countries can impede the implementation of WTO commitments, as well as certain other country-specific issues.

The WTO Panel ruling earlier this month on Mexico's failure to comply with its WTO commitments in this sector (subject to appeal) is expected to strengthen USTR's hand in pressing Mexico and other countries to ensure improved market conditions.

USTR Announces Reorganization Plan; Provides Emphasis on China

On April 13, 2004 the U.S. Trade Representative announced the creation of a separate and expanded office of China Affairs. The new office, funded through the Consolidated Appropriations Act of 2004, will feature an increased number of staff dedicated to addressing trade issues involving China. Acting Assistant USTR Charles Freeman, who has been handling the China portfolio since April 2002, will head the new office. As a result of the reorganization, Assistant USTR Wendy Cutler will head a new office that will oversee trade relations with Japan and Korea.

Free Trade Agreements

USTR Hears Testimony on US-Thailand FTA; Negotiations Will Begin in June

On March 30, 2004, the Trade Policy Staff Committee (TPSC) held a public hearing on the proposed United States-Thailand Free Trade Agreement (FTA). The hearing aimed to assist in formulating negotiating objectives and to provide advice on how specific goods and services and other matters should be treated under the agreement.

Sixteen representatives testified at the hearing. Approximately half of the witnesses represented the agriculture sector. The testimonies focused on general liberalization efforts instead of specific objectives, reflecting the early stages of the negotiations.

IPR protection and enforcement, labor and environmental standards, and market access for certain agricultural goods- particularly sugar- will likely be challenging issues. Market access for industrial goods does not seem controversial, with the exception of concerns about the effect of the FTA on the United States automobile industry.

At the start of the hearing, Assistant United States Trade Representative (USTR) Ralph Ives announced that the United States and Thailand will hold the first round of negotiations during the week of June 28, 2004.

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Congress Could Pass US-Australia FTA This Year

Representatives from USTR, Congress and industry on March 12 discussed prospects for the congressional passage of the United States-Australia FTA at an event sponsored by the United States Chamber of Commerce ("Chamber") and the American Australian Free Trade Association Coalition (AAFTAC). Speakers praised the FTA and agreed that it faces little opposition in Congress. Most speakers opined that Congress would pass the FTA this year, possibly by June or July.

The USTR representative stated that President Bush would sign the FTA on May 14 "or shortly thereafter". He added that USTR would submit the FTA to Congress "as soon as possible" and hoped to obtain congressional approval by the end of the year.

President Notifies Congress of Administration's Intention to Enter into FTA with Dominican Republic

On March 24. 2004, President Bush officially notified Congress of the Administration's intent to enter into a Free Trade Agreement (FTA) with the Dominican Republic. Concluded on March 15, 2004, the FTA fully integrates the Dominican Republic into the Central America Free Trade Agreement (CAFTA).

USTR Transmits Trade Advisory Group Reports on CAFTA to Congress; ITC to Hold Hearing on Potential Economywide and Selected Sectoral Effects

On March 22, 2004, the United States Trade Representative (USTR) submitted reports from 32 advisory committees regarding the U.S.-Central America Free Trade Agreement (CAFTA) to the President and to Congress. All the committees supported the CAFTA, with the exception of the Labor Advisory Committee (LAC).

On March 23, 2004, the International Trade Commission (ITC) announced that it had instituted an investigation regarding the potential economywide and selected sectoral effects of the CAFTA.

USTR Releases of Draft Text of US-Morocco FTA; Transmits Trade Advisory Group Reports to Congress

We want to alert you to the following developments regarding the U.S.-Morocco Free Trade Agreement (FTA):

- On April 2, 2004, the United States Trade Representative (USTR) released the draft text of the FTA.

- On April 7, 2004, USTR announced that it had transmitted reports from 32 advisory committees regarding the FTA to the President and to Congress. All the committees supported the agreement, with the exception of the Labor Advisory Committee (LAC).

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TPSC Requests Comments on Interim Environmental Review U.S.-Bahrain FTA; US Signs TIFA With Qatar

On April 5, 2004, the United States Trade Representative (USTR) announced that the Trade Policy Staff Committee (TPSC), an interagency body chaired by USTR, is requesting public comments on the interim environmental review of the proposed U.S.-Bahrain Free Trade Agreement (FTA). Comments are due by April 30, 2004.

In a related development, the United States on March 22 signed a bilateral Trade and Investment Framework Agreement (TIFA) with Qatar.

The FTA and the TIFA are part of a broader strategy aimed at establishing a Middle East Free Trade Area (MEFTA) by 2013.

Free Trade Agreements Highlights

We want to alert you to the following trade developments for the Free Trade Agreements:

- TPSC Requests Comments on Employment Impact of Potential FTAs with Panama and Thailand
- Colombia and Panama Expect to Conclude FTA Negotiations With U.S. by Early 2005
- USTR Initiates Environmental Review of FTAs with Panama, Thailand and the Andean Region
- USTR Publishes Draft Text of the U.S.-Dominican Republic FTA
- US and Colombia Will Launch FTA Negotiations in May; Peru and Ecuador Could Join

Customs

We want to alert you to the following trade developments for Customs:

- CBP Publishes Quarterly IRS Interest Rates for Overdue Accounts and Refunds of Customs Duties
- CBP Signs Export Validation MOU with Commerce to Facilitate Cooperation with Mexico

US-EU

USTR Reports on EU Barriers to American Exports

On April 1, 2004 the Office of the United States Trade Representative (USTR) published the 2004 National Trade Estimate (NTE) Report on Foreign Trade Barriers. The annual report, required by the Omnibus Trade and Competitiveness Act of 1988 (the 1988 Trade Act), is an inventory of the most significant foreign barriers to US exports of goods and services, foreign direct investment by US persons, and the protection of intellectual property rights (IPR). The

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report examines the trade practices of the 58 largest export markets for the US, including the European Union.

With regard to the US – EU relations, the report notes that they operate normally in most respects, with the exception of some "chronic barriers" that have been highlighted in previous reports or some obstacles to trade, resulting from administrative regulations miscalculating the risk the affected products pose. The report classifies EU trade barriers into the following categories: import policies, technical regulations, sanitary and phytosanitary measures, government procurement, export subsidies, IPRs, services, investment measures, E-commerce, and others.

The full report can be found at www.ustr.gov/reports/nte/2004/eu.pdf

The EU and the US Sign Mutual Recognition Agreement on Marine Equipment

On February 27, 2004, the United States and the European Union signed a mutual recognition agreement (MRA) on marine equipment. The MRA aims to (i) facilitate bilateral trade in marine equipment and (ii) promote closer regulatory cooperation between the US and the EU.

Under the MRA, designated products that comply with US requirements will be accepted for sale in the EU without additional testing, and vice versa. The US and the EU further agree to cooperate to establish and improve the quality and level of international requirements for marine equipment.

USTR Releases Report on Trade Barriers in Bulgaria, Hungary, Poland, Romania and Turkey

On April 1, 2004 the Office of the United States Trade Representative ("USTR") published the 2004 National Trade Estimate ("NTE") Report on Foreign Trade Barriers. The annual report, required by the Omnibus Trade and Competitiveness Act of 1988 ("the 1988 Trade Act"), is an inventory of the most significant foreign barriers to US exports of goods and services, foreign direct investment by US persons, and protection of intellectual property rights ("IPR"). It examines the trade practices of the 58 largest US export markets, including some EU candidate countries, namely Bulgaria, Hungary, Poland, Romania and Turkey.

The report notes that US–EU relations are operating normally in most respects, with the exception of some "chronic barriers" that have been highlighted in previous reports and obstacles to trade, resulting from administrative regulations that miscalculate the risk posed by the products concerned. The report divides EU trade barriers into the following categories: import policies, technical regulations, sanitary and phytosanitary measures, government procurement, export subsidies, IPRs, services, investment measures, Ecommerce and others.

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USTR Announces Potential Expansion of WTO Government Procurement Agreement to New EU Member States

On April 5, 2004, the United States Trade Representative (USTR) published a notice in the Federal Register (69 FR 17730), announcing the potential expansion of the WTO

Government Procurement Agreement (GPA) to the 10 new Member States that will join the EU on May 1, 2004.

FTAA

Negotiators Postpone Second Session of FTAA TNC Meeting

The FTAA Trade Negotiations Committee ("TNC") Co-Chairs (the United States and Brazil) announced on March 10 that they decided to postpone the resumption of the Puebla TNC scheduled for March 18-19. The postponement reflects the difficulty negotiators have faced since the November Miami Ministerial meeting in regards to the scope of the framework agreements. Co-Chairs will announce the resumption date after they consult with the delegations.

In related news, Brazil's Ambassador to the United States, Rubens Barbosa, and USTR officials discussed FTAA positions at recent events sponsored by the DC Bar Association, the Washington International Trade Association, the American Chamber of Commerce and the Woodrow Wilson Center in Washington, D.C. Discussion at the events underscored the key obstacles between the United States and Mercosur regarding the FTAA's common set of obligations.

Multilateral

WTO Panel Rules Against U.S. ITC Methodology in Softwood Lumber Dispute with Canada

A WTO Panel has ruled that the U.S. determination of "threat of injury" caused to the domestic industry by softwood lumber imports from Canada violated U.S. obligations under both the WTO Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures (SCM Agreement). The Panel found that the threat of material injury determination made by the U.S. International Trade Commission (USITC) was not one that could have been reached by "an objective and unbiased investigating authority."

The Panel also found that the United States consequently breached its obligation to determine a "causal relationship" between the dumped or subsidized imports and the injury to the domestic industry.

WTO Appellate Body Ruling Could Affect US GSP Program

The WTO Appellate Body has overturned the ruling of a WTO Panel on the issue of the conditions that apply when benefits are granted by developed countries to developing countries under a Generalized System of Preferences (GSP). The Panel had determined that any such preferences had to be provided to *all* developing countries equally, rather than to individual or selected developing countries. The Appellate Body reversed the Panel on this key point, finding that the so-called "Enabling Clause" (a special provision that allows developed countries to grant tariff preferences to developing countries) permitted "additional preferences for developing countries with particular needs." However, the Appellate Body found the EC "Drug Arrangements", which provide additional GSP benefits to a dozen countries engaged in narcotics interdiction efforts, could not be justified under the Enabling

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Clause, because it did not provide identical treatment to all GSP beneficiaries that were similarly affected by the drug problem.

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REPORTS IN DETAIL

SPECIAL REPORTS

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SUMMARY

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Since our last update, the Administration:

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In this report, we identify the steps that the Administration has to take under TPA and the status of the negotiations that the Administration has concluded, is conducting, or has announced. We also indicate prospects for other suggested FTAs.

ANALYSIS

I. Chile and Singapore FTAs Enter Into Force; First Agreements to be Completed and Implemented Under Renewed TPA

On December 31, 2003, the Bush Administration published in the Federal Register proclamations to implement the Chile (68 FR 75787) and Singapore (68 FR 75793) Free Trade Agreements (FTAs).

The US agreed to negotiate the Chile and Singapore FTAs in November 2000, and the United States Trade Representative (USTR) launched negotiations in December 2000. At that time, the U.S. had concluded FTAs with Israel (April 22, 1985), Mexico (NAFTA: December 17, 1992) and Canada (1989, merged with NAFTA in 1994), and Jordan (October 24, 2000).

The Chile and Singapore FTAs were the first agreements to be completed under the renewed Trade Promotion Authority (TPA), which is part of the Trade Act of 2002, signed by the President on August 6, 2002.

According to TPA, the USTR must:

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- Notify Congress of its intention to negotiate at least 90 days before initiating FTA negotiations. In the case of Chile and Singapore, USTR was required to notify Congress of the ongoing negotiations as soon as possible after the enactment of the Trade Act.

- Conduct environmental reviews of future FTAs.

- Conduct reviews of the impact of future FTAs on U.S. employment.

- Submit a report regarding labor rights of the countries with which the U.S. is negotiating FTAs and describe the extent to which these countries have in effect laws governing exploitative child labor.

- Request that the International Trade Commission (ITC) prepare a report assessing the likely impact of the FTA on the U.S. economy as a whole and on specific industry sectors. The request should be made at least 90 days before entering into the FTA. The ITC must submit this report to the USTR and to Congress no later than 90 days after entering into the FTA.

- Notify Congress at least 90 days before entering into an FTA of its intention to enter into the FTA and promptly thereafter publish notice of such intention in the Federal Register.

- Submit to Congress, within 60 days after entering into the agreement, a description of the changes to existing laws that would be required in order for the U.S. to be in compliance with the agreement.

- Submit to Congress, after entering into an agreement, (i) a copy of the final text, (ii) a draft of an implementing bill, (iii) a statement of any administrative action proposed to implement the agreement and (iv) the supporting information. Then Congress votes up-or-down on the implementing bill. If Congress approves the implementing bill, it is enacted into law.

Congress will have a maximum of 90 legislative days from formal introduction to consider the implementing bill.

Furthermore, USTR must consult regularly and upon their request with the Congressional Oversight Group (COG), formed in September 2002, as well as with the Senate Finance Committee, the House Ways and Means Committee, and other Committees that the President deems appropriate.

II. US Concludes FTAs with Central American Countries, Australia, and Morocco

Central America

The Administration concluded a US-Central America FTA (CAFTA) with Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic.

The US first concluded negotiations with El Salvador, Guatemala, Honduras and Nicaragua on December 17, 2003, and with Costa Rica on January 24, 2004.

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On March 15, 2004, the US concluded an FTA with the Dominican Republic, after three negotiating rounds that focused on market access issues. The FTA fully integrates the Dominican Republic into CAFTA.

Australia

The US concluded on February 8, 2004, an FTA with Australia. Difficult negotiations on market access for agricultural goods, such as beef, dairy and sugar, and Australia's Pharmaceutical Benefits Scheme (PBS) delayed conclusion of the agreement, which was originally scheduled to conclude at the end of 2003.

The FTA provides the most significant reduction of industrial tariffs ever achieved in a U.S. FTA.

Morocco

On March 2, 2004, the US concluded FTA negotiations with Morocco. The Administration views the US-Morocco FTA as part of a broader strategy aimed at establishing the Middle East Free Trade Area (MEFTA) by 2013.

As announced on May 9, 2003, this strategy contemplates a "building blocks" approach of using the FTA with Morocco and the FTAs the US already had in place with Israel and Jordan as anchors to negotiate FTAs with other Middle Eastern countries. At some point before 2013, the US intends to consolidate these FTAs to form the MEFTA.

We highlight below TPA requirements that apply to these agreements.

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TPA Provision	90-Day Notification Period of Intention to Initiate FTA Negotiations	Environmental Review	Employment Impact Review	Labor Rights Reports	ITC Reports on Economic Effects
Countries					
Australia	-USTR notified Congress on November 13, 2002. (67 FR 76431)	-Initiated on March 13, 2003. (68 FR 12149)	-Initiated on May 8, 2003. (68 FR 24785)	-Initiated on July 18, 2003. (68 FR 42783)	-Initiated on December 20, 2002. (67 FR 79149) -Initiated on March 8, 2004. (69 FR 10755)
CAFTA	-USTR notified Congress on October 1, 2002. (67 FR 63954)	-Initiated on November 22, 2002. (67 FR 70475)	- Initiated on March 19, 2003. (68 FR 13358)	-Initiated on April 21, 2003. (68 FR 19580)	-Initiated on September 16, 2002. (67 FR 59312) -Initiated on March 23, 2004. -ITC will hold a hearing on April 27, 2004. (69 FR 13582)
Dominican Republic	-USTR notified Congress on August 4, 2003 (68 FR 51823)	-Initiated on December 24, 2004. (68 FR 74693)	-Initiated on September 4, 2003 (68 FR 52623)	-Initiated on November 3, 2003 (68 FR 62330)	-Initiated on August 22, 2003 (68 FR 50808) -Initiated on March 23, 2004. -ITC will hold a hearing on April 27, 2004.

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TPA Provision	90-Day Notification Period of Intention to Initiate FTA Negotiations	Environmental Review	Employment Impact Review	Labor Rights Reports	ITC Reports on Economic Effects
Countries					
					(69 FR 13582)
Morocco	-USTR notified Congress on October 1, 2002. (67 FR 63187)	-Initiated on November 22, 2002. (67 FR 70476)	-Initiated on February 7, 2003. (68 FR 6529)	-Initiated on April 21, 2003. (68 FR 19579)	-Initiated on September 13, 2002. (67 FR 59312) -Initiated on March 23, 2004. -ITC will hold a hearing on April 29, 2004. (69 FR 13583)

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TPA Provision	90-Day Notification Period of Intention to Enter Into FTA	Publication Final Text	Congressional Approval	Signing
Countries				
Australia	-President notified Congress on February 13, 2004. (69 FR 7675)	-USTR released the draft text on March 3, 2004.	-USTR hopes to submit the implementing legislation by May 2004 and obtain congressional approval by the end of the year. -Sources indicate that the FTA faces little opposition in Congress, and could pass this year, possible by June or July. -Some congressional leaders, however, have expressed skepticism over considering the FTA prior to the completion of the election cycle.	-USTR officials have indicated that President Bush will sign the FTA on May 14 or "shortly thereafter".
CAFTA	-President notified Congress of intent to enter into CAFTA on February 20, 2004. -President notified Congress of intent to enter into FTA with the Dominican Republic on March 24, 2004. (69 FR 16159)	-USTR released the draft text on January 28, 2004.	-USTR could submit the implementing legislation to Congress by mid-June 2004. -Sources indicate however that USTR may delay submitting the implementing legislation until 2005. -CAFTA awaits a difficult vote in Congress due to growing resistance to trade liberalization in Congress. Also, CAFTA contains many contentious issues, including labor provisions, textiles quotas, the lack of an investor-state dispute settlement mechanism, and	-No official date has been set for signing the agreement.

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TPA Provision	90-Day Notification Period of Intention to Enter Into FTA	Publication Final Text	Congressional Approval	Signing
Countries				
			agricultural market access.	
Morocco	-President notified Congress on March 8, 2004. The notification has not yet been published in the Federal Register.	-USTR released the draft text on April 2, 2004.	-USTR has not indicated when it plans to submit the implementing legislation to Congress. -Due to time constraints, USTR may delay submitting the implementing legislation until 2005. -Sources indicate that the FTA faces little opposition in Congress.	-USTR officials have indicated that the President will sign the FTA in late April or early May 2004.

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III. US Launches Negotiations with Bahrain, Continues Negotiations with SACU

Since the renewal of TPA, the Administration has launched negotiations with the Southern African Customs Union (SACU: Botswana, Lesotho, Namibia, South Africa, Swaziland) and Bahrain. Similar to the FTA with Morocco, the Administration views the FTA with Bahrain as a step to establish the MEFTA by 2013.

We highlight below the status of these negotiations.

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TPA Provision	90-Day Notification Period of Intention to Initiate FTA Negotiations	Environmental Review	Employment Impact Review	Labor Rights Reports	ITC Reports on Economic Effects
Countries					
SACU	-USTR notified Congress on November 4, 2002. (67 FR 69295)	-Initiated on March 13, 2003. (68 FR 12150)	-Initiated on May 7, 2003. (68 FR 24532)	--	-Initiated on November 20, 2002. (67 FR 70757)
Bahrain	-USTR notified Congress on August 4, 2003. (68 FR 51062)	-Initiated on September 30, 2003. (68 FR 56373) -Public comments on the interim environmental review are due by April 30, 2004.	-Initiated on September 4, 2003. (68 FR 52622)	-Initiated on November 3, 2003 (68 FR 62328)	-Initiated on August 26, 2003 (68 FR 51301)

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	Next Steps	Negotiating Structure	Expected Challenges
Countries			
SACU	-A third negotiating round took place from February 23-27, 2004, in Namibia. -So far, negotiations have focused on non-controversial issues such as agricultural and industrial market access, rules of origin, and SPS measures. -Future negotiations will focus on more controversial issues such as investment, services, government procurement, and IPR. -No official date has been set for the next round of negotiations.	-A large plenary group leads the negotiations. Seven working groups discuss specific issues, including (i) market access for agricultural and non-agricultural products, (ii) technical barriers to trade (TBT), (iii) customs, (iv) labor rights, (v) environmental standards, (vi) SPS measures, (vii) investment, (viii) IPR, (ix) services, (x) e-commerce, (xi) and dispute settlement. Negotiations are set to conclude by the end of 2004. Trade officials have indicated however that they will likely miss this deadline. -SACU is negotiating as a bloc.	-Special and differential treatment; IPR; government procurement; investment; market access for agricultural products; and services are challenging issues. -The different levels of economic development between the SACU countries further complicate the negotiations.
Bahrain	-A first negotiating round took place from January 26-30, 2004, in Manama, Bahrain. -A second negotiating round took place from March 1-5, 2004, in Washington. -Specific offers have been made for market access and services. -A third negotiating round will likely take place in May 2004, but no official date has been set.	-The FTA will build on the model of the FTA with Morocco or Jordan. -Negotiations take place in 13 negotiating groups: (i) services, (ii) financial services, (iii) telecommunications, (iv) e-commerce, (v) SPS measures, (vi) environment, (vii) government procurement, (viii) legal and technical barriers to trade, (ix) customs, (x) market access, (xi) IPR, (xii) textiles, and (xiii) labor. -Negotiations are set to conclude by the end of 2004. Trade officials have indicated that the negotiations could be concluded by June 2004.	-U.S. and Bahrain government officials indicate that there are no real controversial issues, and that talks will proceed smoothly. -U.S. industry sources however indicated that IPR protection and a weak copyright law in Bahrain might prove to be a difficult issue. Market access for textiles and apparel could be another challenge.

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IV. US Will Negotiate with Panama, Andean Countries and Thailand

On October 19, 2003, President Bush announced that the US and Thailand intend to negotiate an FTA. The FTA with Thailand is a step towards the Enterprise for ASEAN initiative (EAI), as announced by President Bush on October 26, 2002. The EAI aims to create a "network of FTAs" with the ASEAN countries, using the FTA with Singapore as a model. As precursors to such FTAs, the US has pledged its support for ASEAN members acceding to the WTO. Other preliminary steps would include negotiating Trade and Investment Framework Agreements (TIFAs) or Bilateral Investment Treaties (BITs) with the US.

On November 18, 2003, the Administration announced its intention to negotiate FTAs with Panama and with Andean countries Bolivia, Colombia, Ecuador, Peru, and Bolivia. Both agreements are attempts to move forward with trade liberalization in the Western Hemisphere in light of the stalled negotiations of the Free Trade Area of the Americas (FTAA).

We highlight below the status of these announced negotiations.

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TPA Provision	90-Day Notification Period of Intention to Initiate FTA Negotiations	Environmental Review	Employment Impact Review	Labor Rights Reports	ITC Reports on Economic Effects
Countries					
Andean Countries	-USTR notified Congress on November 18, 2003. (69 FR 7532)	--	--	--	-Initiated on December 31, 2003. (68 FR 75629)
Panama	-USTR notified Congress on November 18, 2003. -Comments are due by April 5, 2004. (69 FR 8518)	--	--	--	-Initiated on December 31, 2003. (68 FR 75630)
Thailand	-USTR notified Congress on February 12, 2003. -Comments Are due by April 8, 2004. (69 FR 9419)	--	--	--	-Initiated on March 9, 2004. -ITC will hold a hearing on April 20, 2004. -Comments are due by April 6, 2004. (69 FR 11042)

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	Next Steps	Negotiating Structure	Expected Challenges
Countries			
Andean Countries	-A first negotiating round with Colombia will take place on May 18-19, 2004. Peru and Ecuador could join, depending on their progress regarding the protection of worker rights and a number of outstanding disputes with U.S. investors. -USTR indicated that Bolivia is not yet ready to negotiate.	-USTR plans to negotiate separate FTAs with all four of the Andean countries. The FTAs will then be merged into a US-Andean FTA. -No official timetable has been set for the completion of the talks.	-So far, the response of the US business sector has been positive. -IPR and investment have been named as possible challenging issues. For example, the American Chamber of Commerce has indicated that a number of investment disputes would first have to be solved. -Market access for sugar and labor and environmental standards will also be challenging issues. -The U.S. sugar industry and labor groups have expressed their opposition against the FTA.
Panama	-A first negotiating round will take place on April 26-30, 2004, in Panama.	-The negotiators would use the U.S.-Chile FTA as a model. The US-Singapore FTA would serve as a model for the service chapter. -Sources indicate that USTR hopes to conclude the agreement by the end of 2004. -USTR Robert Zoellick has indicated that he would like to include (or "dock") the FTA into CAFTA. However, Panama has indicated that it would like its own FTA with the US	-Market access for agricultural products and labor and environmental standards will be challenging issues. -The U.S. sugar industry and labor groups have expressed their opposition against the FTA.
Thailand	-A first negotiating round will take place from June 28-July 2, 2004.	-Both sides hope to conclude the negotiations in 2005.	-Agriculture, IPR, services, investment, customs, labor and environmental standards, and market access for industrial goods -especially automobiles- are likely to be challenging issues. -The U.S. sugar industry and labor groups have expressed their opposition against the FTA.

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V. U.S. Considers other FTAs

Numerous other countries have proposed FTAs with the US, especially after the collapse of the Cancun WTO talks. Below we highlight some of the countries and the prospects of a bilateral/regional FTA with the US.

Middle East

Sources indicate that the US and Kuwait have had informal discussions on an FTA and may launch negotiations before the end of the year. The FTA would be part of an initiative to create one FTA with the countries of the Gulf Cooperation Council (GCC: Bahrain, Oman, Qatar, Saudi Arabia, and the United Arab Emirates).

At a March 10, 2004 Senate Finance Committee hearing on U.S. trade policy in the Middle East, U.S. trade officials named the United Arab Emirates (UAE), Tunisia and Egypt as countries with a strong interest in an FTA with the US. They added however that Egypt has to undertake further reforms, especially in the area of customs, before an FTA could be possible.

ASEAN (Association of South East Asian Nations: Burma, Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, the Philippines, Thailand, Vietnam, Singapore)

Members of Congress have named both the Philippines and Malaysia as possible FTA candidates. Malaysia and the US are expected to sign a Trade and Investment Framework Agreement (TIFA) that would pave the way for an FTA. Sources indicate that the Philippines are interested, but have not yet determined whether to pursue an FTA with the US.

Korea

On January 9, 2001, the ITC instituted an investigation of the likely economic impact of an FTA with Korea (66 FR 4859), but made no recommendations on whether to initiate negotiations.

At a March 11, 2004 hearing by the House Ways and Means Committee on the Administration's 2004 trade policy agenda, USTR Zoellick stated that although he was interested, an FTA with Korea is not feasible because Korea is not prepared to negotiate agricultural market access.

New Zealand

On April 7, 2004, New Zealand Minister of Foreign Affairs and Trade Phil Goff stated at an event sponsored by the Asia Society that New Zealand remains interested in an FTA with the U.S. Goff added, however, that New Zealand would hold back requests for FTA negotiations until after the presidential elections in the U.S.

U.S. officials have indicated that they are having discussions with New Zealand, but that an FTA is unlikely in the short term.

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Sri Lanka

Zoellick has named Sri Lanka as a developing country advanced enough to qualify for an FTA with the US, indicating that it would be "a footprint" for the US in South Asia, where the US does not have any FTAs. USTR officials visited Sri Lanka in October 2003 to discuss an FTA. However, the announcement of an FTA does not appear imminent.

Taiwan

On February 11, 2002, the ITC instituted an investigation of the likely economic impact of an FTA with Taiwan (67 FR 6276), but made no recommendations on whether to initiate negotiations.

Taiwan has indicated repeatedly that it would actively seek an FTA with the U.S., while several Congressmen, such as House Majority Leader Tom DeLay (R-texas) or Senate Finance Committee Ranking Member Max Baucus (D-Montana) have also expressed their interest in an FTA. However, a US-Taiwan FTA does not seem to be a current priority for the Administration.

On March 11, 2004, USTR Zoellick stated before the House Ways and Means Committee that Taiwan first needs to improve the implementation of its WTO commitments on IPR and agriculture.

OUTLOOK

In the 2004 trade policy agenda, the Administration stated that it would continue the strategy of pursuing multilateral, regional and bilateral trade liberalization. Many businesses are concentrating on the bilateral and regional negotiations to liberalize trade for their products in the short term. The Administration remains committed to the FTAA and WTO negotiations, but the scope and timing of these negotiations is unclear. The bilateral and regional FTAs offer the private sector a faster way to access foreign markets and serve as building blocks for larger trade negotiations.

It will be difficult to secure congressional passage of the recently concluded FTAs. Members of Congress have expressed concerns about labor and IPR violations of some of the proposed FTA partners, such as the Central American countries. Members of Congress and some people in the business community also question the commercial significance of some agreements, such as the proposed FTA with Bahrain.

In the politicized atmosphere of the 2004 elections, the Administration could decide to take a less ambitious, and possibly more protectionist stance on trade. Although the Australia and Morocco FTAs might pass this year, there are strong signals from Congress that CAFTA might have to wait until after the 2004 election cycle.

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Consideration of VOIP Issues by U.S. Federal Communications Commission Has Global Ramifications for Telecoms and Information Services Sectors

SUMMARY

Within the next five years, significant amounts of telephony traffic in the U.S. will be provided via the Internet, using Internet Protocol ("IP") technology (such services generally referred to as "Voice Over Internet Protocol" or "VOIP"). For most customers in the U.S. this will mean that the days of metered phone service charges will soon come to an end, to be replaced by a flat fee for unlimited local and long-distance calling. The disappearance of the distinction between local and long distance service will foreshadow the disappearance of long distance service as a separate line of business (that may be happening already for other reasons). Competition throughout the telecommunications and media sector will intensify, carrying with it further pressures for industry consolidation, perhaps even more so than before across industry segment lines. These pressures will not be unique to the U.S., and can be expected to spread quickly across the globe. Thus, the proliferation of VOIP technology is likely to have significant implications for cross-border trade in telecommunications.

A number of countries besides the U.S. have begun to focus on the regulatory issues associated with the provision of VOIP services. Some of these issues have been raised at the World Trade Organization ("WTO") and other international bodies, including the question of whether new technology affects existing classification of telecommunication and other services. Consideration of this issue in the U.S. been triggered by a Notice of Proposed Rulemaking ("NPRM") recently issued by the U.S. Federal Communications Commission ("FCC"), inviting comments on a comprehensive re-examination of the U.S. telecommunications regulatory landscape as affected by the emergency of VOIP services.[2] As the world's largest telecommunications market (in terms of revenues), how these issues are framed and resolved within the U.S. can have a profound impact on the rest of the world.

ANALYSIS

I. VOIP/IP-Enabled Services Defined

At its most elemental level, VOIP (or as the FCC has somewhat broadened and renamed it – "IP-enabled services") is simply the use of the Internet as the means for transporting telephone calls as data packets via the Internet rather than through the establishment of a circuit-switched link provided via the public switched telephone network ("PSTN"). Use of the Internet for this purpose can occur in various ways, the most common of which are:

- Through a **computer-to-computer** connection, in which a voice communication goes from one computer to another via the Internet, without traversing the PSTN at all.

- Through a **phone-to-phone** connection, in which a service provider uses the Internet to provide conventional (typically interexchange or long

[2] Comments on the NPRM are due to filed with the FCC on May 28, 2004, and reply comments are due on June 28, 2004.

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distance) telephone service to customers connected to the PSTN on both ends of the call.

- Through a **computer-to-phone** connection, in which a service provider uses a combination of the Internet and the PSTN to connect a user calling from an IP-enabled device to a user connected to the PSTN.

Currently, most providers in the U.S. and abroad traverse PSTNs to provide local and long-distance telecommunications services. In the next five years, providers are expected to route most telephone calls via the Internet, thus reducing the relevance of PSTNs.

II. The Key Regulatory Issues in the U.S.

Consideration of the proper regulatory treatment to be accorded VOIP services in the U.S. is largely framed by the Telecommunications Act of 1996 ("1996 Act"), which represented the most substantial overhaul of U.S telecommunications legislation since adoption of the Communications Act of 1934. The key element of the 1996 Act is the distinction it draws between "telecommunications services" and "information services."[3]

Telecommunications services are generally subject to a fairly imposing regulatory regime arising from Title II of the Communications Act of 1934, including, in the case of voice communications, the requirement that voice carriers providing inter-exchange services pay access charges to local exchange carriers ("LECs") when such calls terminate on a particular local exchange. Telecommunications services are also subject to a broad array of non-economic or "social policy" regulations. These include public safety (such as handicapped access and E-911 services), law enforcement and national security (facilitating law enforcement surveillance and interception activities in accordance with the Communications Assistance for Law Enforcement Act ("CALEA")) and universal service funding. Information services fall outside the scope of Title II, are generally exempt from the payment of access charges and are potentially exempt as well from most if not all of the previously cited non-economic regulations.

III. Implications of Regulatory Classification

Thus, how VOIP services are categorized – whether as telecommunications services or as information services – can have a major impact on the degree to which they are subject to the "burdens" of regulatory oversight. In addition to addressing this basic classification issue, the FCC must also determine whether the various forms of VOIP should all be classified the same manner, or if different forms warrant different regulatory classification.

[3] "Telecommunications service" means "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used." 47 USC § 153(47). "Information service" means "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications, and includes electronic publishing, but does not include use of such capability for the management, control or operation of a telecommunications system or the management of a telecommunications service." 47 USC § 153(20). It is generally accepted that the two terms are mutually exclusive in application.

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Determining the proper classification is complicated by the fact that VOIP services have characteristics of both telecommunications and information services, and by the presence of a number of conflicting policy considerations.

On the one hand, the FCC has a strong preference for deregulation generally, and in particular is fearful that over-regulation of IP-enabled services will stifle innovation and development. This, coupled with a strong U.S. Congressional sentiment that the Internet not be subject to conventional forms of regulation, pushes strongly in the direction of classifying VOIP services as information services.

Counterbalancing this is the presence of important non-economic or "social policy" objectives that the FCC does not want to forsake. Even with regard to more conventional forms of economic regulation (i.e., imposition of access charges), the FCC does not want to foster a situation in which differing regulatory classifications distort a level playing field between those providing conventional PSTN services and those providing IP-enabled services. These considerations all push in the direction of treating VOIP as a telecommunications service.

The FCC has also expressed an interest in determining what regulatory flexibility it might have to deviate from these rigid classifications or their consequences. Thus, for example, the FCC has requested comments on the extent to which it can ease Title II restrictions if it were to find that VOIP services are telecommunications services and the extent to which it can impose Title II-type regulations even if it were to find that VOIP services are information services. Such flexibility could take the form of forbearance from regulation or assertion of general regulatory authority under Title I of the Communications Act of 1934.

IV. State of Play

In addition to the NPRM, a number of rulemaking petitions have been filed raising many of the individual issues covered by the NPRM. These petitions include:

- A petition filed by pulver.com that its World Dialup Service (a computer-to-computer type of service) should be classified as an information service rather than as a telecommunications service.

- A petition filed by Vonage Holdings Corp. ("Vonage") seeking FCC preemption of the State of Minnesota's jurisdiction over its VOIP service (a computer-to phone type of service) on the basis that it is either an information service or minimally is an interstate service.

- A petition filed by AT&T that its VOIP service (a phone-to-phone type of service) is an information services and therefore not subject to access charges (which AT&T has already stopped paying). Should the FCC deny the AT&T petition, a related issue then is raised as to whether this decision has retroactive or prospective effect, which goes to the question of whether past unpaid access charges can be collected.

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- Petitions filed separately Level-3 Communications seeking to have the FCC generally forbear from Title II regulation of VOIP services and by SBC Communications seeking to have the FCC forbear at least with respect to "IP Platform" services.

- A petition jointly filed by the FBI, DOJ and DEA for determination that IP-enabled services are subject to CALEA, irrespective of how they may be categorized under the 1996 Act.

With the exception of the pulver.com petition, which the FCC granted contemporaneously with the issuance of the NPRM, the FCC has attempted to roll the issues raised by these petitions into the broader scope of the NPRM, while at the same time reserving flexibility to act separately on any or all of the petitions mentioned above. In fact, most of the petitions have been subject to separate notice and comment proceedings, so full administrative records have been developed on each of them independently. But to the extent that the FCC takes action on any of the individual rulemaking proceedings outside the scope of the broader NPRM, this effectively starts to limit its overall flexibility. This is already evidenced by the decision on the pulver.com petition. The FCC's flexibility may also already be constrained by a federal court decision in Minnesota that has declared the Vonage service to be an information service under the 1996 Act, and therefore not subject to the jurisdiction of the State of Minnesota.

V. International Regulatory and Trade Implications

As part of the NPRM, the FCC specifically asked for comment about the potential international implications raised by the use of IP-enabled services, such as the potential impact on international settlement rates and the ability of consumers to take the IP customer premises equipment ("CPE") overseas and continue to make and receive calls. It also sought comment on whether the growing use of IP-enabled services presents any foreign policy or international trade issues.

There is also little doubt that the FCC will vigorously encourage its "light touch" approach to regulating VOIP services to the rest of the world. Such a philosophy is likely to manifest itself in the negotiation of future Free Trade Agreements and in the U.S.'s approach to WTO-related telecom and network services issues.

In the WTO, for example, Member governments are discussing whether the introduction of new technologies like the Internet, would require the re-classification of particular services. Some developing country Members are reluctant to accept a technology-neutral approach, and might argue that new commitments under the General Agreement on Trade in Services (GATS) would be required to cover the delivery of telecommunications and other services over the Internet.

On a similar note, the VOIP phenomenon and the ultimate marriage of the PSTN network and the Internet will heighten global concerns about the "digital divide" and management of the Internet, such as have already surfaced as the first session of the World Summit on the Information Society ("WSIS"). This will be accompanied by major questions of how telephone service will be provided in the future to end users who do not have readily

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available Internet access of any sort and whether the concept of universal service needs to be expanded to included universal Internet or broadband access.

OUTLOOK

The previously identified conflicting interests notwithstanding, it is fair to say that the FCC would be extraordinarily loathe either (1) to classify most VOIP services as telecommunications services or (2) completely exempt VOIP services from the various social policy objectives it is otherwise attempting to promote (*e.g.*, under the existing regulations applied to telecommunications services). Whatever form this latter type of regulation takes, however, the FCC will look for ways to apply it with as much of a "light touch" as possible.

The one area where the likely outcome could deviate from this approach is with respect to phone-to-phone VOIP services, such as those covered by AT&T's petition. Indeed, the general expectation in the industry seems to be that the FCC will find that the AT&T service in question is a telecommunications service subject to the access charge regime. What the FCC will do about the retroactivity issue (which some observers have estimated could come to $400M or more already in unpaid access charges) is less clear.

The emergence of VOIP may also finally prod the FCC to conclude its efforts, pending for more than two years, to overhaul its current intercarrier compensation arrangements, including access charges. Such reform could lessen the impact of how VOIP services are classified under the 1996 Act. Indeed, as the FCC itself readily acknowledges, the current intercarrier compensation regime has a number of problems and inequities, which means that subjecting VOIP services to that regime, even in the case of the phone-to-phone type of VOIP services, is not without difficulty.

However these other issues play out, the FCC is likely to determine that VOIP services are fundamentally interstate in nature, and should not be subject to separate regulation by the public utility commissions in individual states throughout the U.S. The notion of potentially having more than 50 different regulatory approaches apply to VOIP is something that the FCC would find totally unacceptable.

From a multilateral perspective, the FCC's actions are likely to have profound implications for cross-border trade in telecommunications and information services. If the FCC decides to classify most VOIP services as information services, its actions might cause trading partners to question whether existing market-access commitments on telecommunications services in trade agreements would be applicable to VOIP services. Moreover, some countries might insist on separate negotiations on information services prior to ensuring cross-border access for VOIP services. The debate at the WTO on these issues has been preliminary and inconclusive. Nevertheless, the rapid evolution of the telecommunications and information industries will no doubt raise the issues of classification and regulation to the forefront of WTO and free trade agreement negotiations in these sectors.

* * *

White & Case will continue to follow developments relating to the FCC's consideration of VOIP-related matters including any international ramifications, and will provide further updates as appropriate. If you are interested in specific matters relating these

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developments, please contact Maury J. Mechanick, Telecommunications Counsel in the Washington, D.C. office of White & Case for further details: mmechanick@whitecase.com.

A copy of the FCC press release announcing issuance of its NPRM is attached hereto.

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UNITED STATES

Profile of Trade Issue Increases in 2004 Presidential Race; Complicates Passage of Trade Legislation

SUMMARY

On March 18, 2004, the Global Business Dialogue (GBD) hosted a panel discussion entitled "White Water on the Trade River: Agreements, Negotiations, and the U.S. 2004 Elections." Four panelists, including representatives for the Administration and Congress addressed the Administration's trade agenda, prospects for congressional action on trade related legislation, current free trade agreements, and trade as an issue in the upcoming presidential election. The panelists agreed that while trade is likely to become a higher profile issue during the coming year, Congress will make little progress on trade legislation, particularly FTAs, until the 109th Congress convenes in 2005.

ANALYSIS

I. Assistant Trade Representative Defends Administration's Trade Agenda

Christopher Padilla, Assistant U.S. Trade Representative for Intergovernmental Affairs and Public Liaison, defended the Bush Administration's commitment to a free trade agenda, criticizing "economic isolationists". Acording to Padilla, the 2004 election and new economic challenges, such as increased competition in the services sector, will shape the trade debate during 2004. Padilla discussed the importance of the four-pronged trade agenda of the president:

- ***Encourage Global Cooperation on Trade*** – The US is committed to the competitive liberalization of trade. Its aggressive pursuance of bilateral FTAs in the wake of Cancun has generated momentum for free trade and will energize the advancement of the Doha Round. USTR Zoellick's recent trip to several foreign capitals ensures that 2004 will not be a lost year for the World Trade Organization.

- ***Ensure Competition on a Level Playing Field*** – The US has taken steps to open important foreign markets to U.S. products. Padilla noted the opening of the Chinese market to soybeans, and Administration action to pursue dispute settlement with Mexico over high fructose corn syrup, and China over taxes on semiconductors.

- ***Help U.S. Individuals Take Hold of Their Economic Futures*** – The Administration has taken significant steps, including the President's "Jobs for the 21st Century" initiative, to help individuals manage changes demanded by trade. The Administration has tripled levels of trade adjustment assistance and contributed $1.3 billion in retraining assistance. Padilla reinforced the importance of the public-private partnership in achieving these goals.

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II. International Trade Advisor Advocates Trade Adjustment Assistance

Greg Mastel, Chief International Trade Advisor at D.C. law firm, Miller & Chevalier, predicted that the election year will hinder passage of trade legislation. Mastel highlighted the three most important trade issues:

- ***Free Trade Agreements*** –Mastel commended the Bush Administration for its aggressive pursuance of free trade agreements. Differences among Republicans in the House and Senate will make passage of Australia, Morocco, and CAFTA free trade agreements difficult this year.

- ***FSC/ETI*** – Attempts to repeal the Extraterriotrial Income Exclusion (ETI) Act FSC/ETI have become entangled in the offshoring debate, rendering resolution even more difficult. Mastel predicts that European retaliation will rise, by the end of this year, to a level sufficient to induce congressional action. Mastel endorsed the manufacturing tax credit as a formidable alternative to FSC/ETI.

- ***Trade Adjustment Assistance (TAA)*** – Trade Adjustment Assistance receives backing from both Democrats and Republicans because economic *and* political cases in support of retraining workers are so strong. Mastel criticized the Bush Administration for proposed cuts to TAA benefits in his FY2005 budget and poor implementation of TAA. Political ownership and leadership of the program, which it has thus far lacked, would temper losses experienced from trade.

III. Financial Times Reporter Explains Why Trade Makes Headlines

Ted Alden, reporter for the Financial Times, outlined the top three reasons why trade has become a top news story this year:

- ***New Developments*** – Trade has attracted greater attention as offshoring has moved to the information technology sector. This sector is vocal, well organized, and adds a new dimension to the offshoring debate. In addition, the accelerated decline of the manufacturing sector has produced "wrenching" changes in employment figures and attracted notable publicity. Alden highlighted the recent AFL-CIO petition to the Administration to impose economic sanctions on China for unfair labor policies.

- ***Unified Democratic Voice*** – The Democrats are gaining strong political exposure on trade issues by unifying their voice and appealing to the American public's anxieties over job losses. "Democrats are using trade to score political points and get in the papers," said Alden.

- ***Trade and the Swing States*** – Many states critical to the 2004, election, such as North Carolina, Michigan, Ohio, and Pennsylvania, have large manufacturing constituencies, most of which have been negatively

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affected by trade. Votes in these states will help determine the outcome of the presidential race.

IV. Congressional Representative Discusses "Trade Chores"

Janet Nuzum, Senior Policy Advisor to Congressman Cal Dooley (D-California), discussed the current climate on Capitol Hill and the prospects for FTAs in Congress this year. She highlighted the following issues:

- ***Anxiety Surrounding the Jobless Recovery –*** Debates about outsourcing and pending FTAs stem more from the realities of a jobless recovery than from concerns over trade policy per se.

- ***Rising Democratic Support of Free Trade*** –Nuzum indicated that Democratic willingness to support free trade is on the rise, as long as agreements are based on sound economic policies. "We must not demand perfection and exaggerate the benefits of any agreement," she said.

- ***The Congressional Trade Agenda*** – A vote will likely take place this year on either the Morocco or Australia FTA. Nuzum predicted that next year will be even more difficult, with controversial issues such as CAFTA and the renewal of WTO membership already on the trade agenda. congressional debates on these issues could be either "constructive" or "confrontational."

OUTLOOK

The panelists offered diverging perspectives on current U.S. trade priorities and the Bush Administration's execution of its trade agenda. Their comments revealed broad areas of friction and uncertainty that surround the trade debate in Congress and between the presidential candidates.

Panelists concurred that trade has become intertwined with politically charged issues such as offshoring, outsourcing, and the "export" of American jobs.

Trade issues are likely take on a higher profile in the 2004 election in comparison with past elections, and could become an important focal point in the race between President Bush and Senator Kerry (D-Massachusetts). The upcoming election will make legislators hesitant to tread in domestically charged arenas, which could hinder passage of trade legislation, including the FTAs pending congressional consideration.

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EPA Requests Comments on Petition to Revise Methods for Fuel Economy Estimates

SUMMARY

On March 29, 2004, the Environmental Protection Agency (EPA) requested comments on a petition from Bluewater Network to revise the methods to estimate fuel economy. The petition contends that (i) EPA's fuel economy estimates do not accurately reflect results achieved in actual on-road operation, and (ii) more accurate estimates would benefit both consumers and those involved in setting national energy policy.

Comments should be submitted by July 27, 2004.

ANALYSIS

On March 29, 2004, the Environmental Protection Agency (EPA) published a notice in the Federal register (69 FR 16188), requesting comments on a petition from Bluewater Network to "revise the test procedures, calculation methods and/or correction factors employed in the calculations used to determine the fuel economy information relayed to consumers and policy makers so that they more accurately reflect the actual, real-world fuel economy that vehicles are achieving on the road". The petition contends that (i) EPA's fuel economy estimates do not accurately reflect results achieved in actual on-road operation, and (ii) more accurate estimates would benefit both consumers and those involved in setting national energy policy.

The comments should focus on:

- Whether current national driving patterns have changed in a way that directionally impacts fuel economy;
- Any recent data that compares in-use fuel economy with the EPA city and highway label values, including data from vehicles operated on gasoline, diesel, and alternative fuels, and hybrid electric vehicles;
- How any specific conditions that may have an impact on fuel economy may have changed over time and why any changes in those conditions could have an impact on fuel economy.

OUTLOOK

Comments should be submitted by July 27, 2004.

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Bush Administration Considers Sanctions Options for Syria; Lifts Sanctions Against Libya

SUMMARY

Bush Administration officials are close to a decision on the imposition of sanctions on Syria required under the Syria Accountability and Lebanese Sovereignty Restoration Act of 2003 [P.L. 108-175]. At a hearing before the House International Relations Committee on March 10, 2004, Assistant Secretary of State William J. Burns stated that sanctions against Syria would be imposed "very shortly." Despite calls from the business community for minimal sanctions, the Administration reportedly is considering imposing significant sanctions, including a possible ban on trade and investment.

In contrast to the situation regarding Syria, the Bush Administration lifted sanctions against Libya on April 23, 2004. The lifting of sanctions follows Libya's decision in December 2003 to give up its weapons of mass destruction, and to pay compensation to the families of the victims of Pan-Am 103. The end of sanctions against Libya will allow U.S. companies to resume most commercial operations in Libya, as well as pursue new investments. In addition, the U.S. will no longer seek to prevent Libya's entry into the World Trade Organization.

ANALYSIS

We review here recent policy developments with respect to U.S. sanctions on Libya and Syria:

I. Administration Promises "Firm" Implementation of Sanctions Against Syria

Since the passage of the Syria Accountability and Lebanese Sovereignty Restoration Act of 2002 [P.L. 108-175] in December 2003, the Bush Administration has been weighing what, if any, sanctions to impose on Syria. During questions at a March 10, 2004 hearing of the House International Relations Committee, Assistant Secretary of State William J. Burns promised that implementation of the sanctions would take place "very shortly" and that the sanctions imposed would be "very firm." Since Burns' testimony, the Administration has given no further indication of when it will make a decision regarding the sanctions. Sources in the Administration have claimed that developments in Israel/Palestine have forced a delay in decisions regarding sanctions on Syria.

Business groups have urged the Bush Administration to impose minimal sanctions against Syria. A February 25, 2004 letter from the U.S Chamber of Commerce expressed concern about the possible loss of "U.S. jobs and growth […] as well as to U.S. interests overseas, without achieving desired changes in Syrian [policy]."

In line with Burns' testimony, sources within the Administration have indicated that sanctions against Syria will likely entail at least one major sanction, coupled with at least one minor sanction. The major sanction is likely to take the form of an outright ban on either the export of U.S. goods to Syria, or on U.S. investment in Syria. A minor sanction may include a ban on Syrian aircraft operating in the US; currently no Syrian aircraft operate within the United States. The Bureau of Industry and Security (BIS) of the Department of Commerce is

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also considering a partial ban on the export of duel use items on the Commerce Control List (CCL) to Syria.

Syria has been negotiating a free trade agreement (FTA) with the European Union (EU) in the hopes of mitigating the possible effects of U.S. sanctions. However, the FTA talks with the EU broke down in early April 2004 as a result of EU demands with respect to weapons of mass destruction (WMD). Syria claims that added EU demands on WMD was the result of increased U.S. pressure.

II. "Unprecedented" Cooperation By Libya Opens Door to Further Easing of Sanctions

On April 23, 2004, the Bush Administration lifted trade sanctions against Libya in accordance with the provisions of the Iran and Libya Sanctions Act of 1996. (PL 104-172) The decision to lift the sanctions follows Libya's decision in December 2003 to give up its weapons of mass destruction, and to pay compensation to the families of the victims of Pan-Am 103. The end of sanctions against Libya will allow U.S. companies to resume most commercial operations in Libya, as well as pursue new investments. In addition, the U.S. will no longer seek to prevent Libya's entry into the World Trade Organization.

Despite the lifting of sanctions, Libya remains on the State Department's State Sponsors of Terrorism List. As such, certain U.S. export controls will remain in place with respect to Libya, including a prohibition on the export of dual-use goods to Libya. Libyan assets in the U.S. remain frozen.

OUTLOOK

Under the Syria Accountability and Lebanese Sovereignty Restoration Act of 2003, the President must report to Congress on what sanctions, if any, he plans to impose prior to mid-June 2004. Despite promises for rapid action, the Administration has demonstrated its willingness to delay a decision given the volatile situation in the Middle East. The Administration may continue to use the threat of sanctions as a negotiating tool with Syria. The collapse of FTA talks between the EU and Syria may further strengthen the position of the United States.

Libya's designation as a state-sponsor of terror is likely to remain in place through the end of 2004 due to the upcoming U.S. Presidential election. However, U.S. and Libyan officials have confirms that efforts to unfreeze Libyan assets in the U.S., valued at over $1 billion, are underway.

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Bureau of Industry and Security Reports on 2003 Progress and Outlines 2004 Objectives

SUMMARY

On April 6, 2004, the Bureau of Industry and Security (BIS) of the Department of Commerce released its annual report for 2003. The report analyzes: (i) export control policy and regulations; (ii) export licensing and enforcement; (iii) industry outreach activities; (iv) international cooperation programs and treaty compliance; and (v) defense industrial and technological base program activities.

According to the report, BIS goals for 2004 include:

- Carrying out a comprehensive examination of deemed exports and technology controls, in addition to seeking renewal of the Export Administration Act (EAA), which expired in 2001.
- Expediting the processing of license applications and developing guidelines to guarantee that license conditions will be easily understood and enforceable.
- Ensuring consistency among BIS field offices in their approaches to enforcement cases, whether they result in administrative charges or criminal prosecution.

ANALYSIS

I. Background

On April 6, 2004, the Bureau of Industry and Security (BIS) of the Department of Commerce released its annual report for 2003. The report analyzes: (i) export control policy and regulations; (ii) export licensing and enforcement; (iii) industry outreach activities; (iv) international cooperation programs and treaty compliance; and (v) defense industrial and technological base program activities. The report also sets the goals for 2004.

The full report is available at www.bis.doc.gov

II. Accomplishments

Export Control Policy and Regulations

BIS implemented the following measures:

- Published a rule that updated U.S. export controls on dual-use encryption items.[4] The rule clarifies U.S. encryption export policy in response to

[4] The rule is in agreement with the changes made to the Wassenaar Arrangement List of Dual-Use Goods & Technologies in December 2002. The Waassenaar Arrangement, created in 1996, is a multilateral agreement regarding export controls on conventional arms and sensitive dual-use goods and technologies.

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the generalized use of encryption products by businesses and governments.

- Issued revised guidance on the content and scope of controls on the re-export of U.S.- origin items. The Bureau translated this guidance into several foreign languages.

- Led a U.S. Government initiative to strengthen export control compliance and improve bilateral high-technology cooperation with India.

- Expanded export controls on designated terrorists by imposing a license requirement on exports and re-exports. In addition, BIS extended the scope of export controls on explosive detection equipment.

Export Licensing and Enforcement

BIS accomplished the following in the export licensing area:

- Processed an increased number of export license applications. The most relevant increase of applications subject to export licensing was for thermal imaging and light intensifying cameras.

- Reviewed 12,443 license applications, a 17% increase over fiscal year 2002.

- Processed 846 deemed export license applications, a 20% increase over 2002.

- Enforced U.S. export control laws by improving compliance with export license conditions.

- Completed 34 administrative enforcement cases, the most relevant being the settlement agreement with Sigma Aldrich Corporation regarding exports of biological toxins.

- Divulged proposed penalty guidelines for the settlement of administrative cases.

Industry Outreach Activities

BIS completed the following activities:

- Held educational seminars on various topics, including technology export controls and the application of the deemed export rule.

- Conducted several export control outreach seminars in China, Japan, South Korea, and Singapore.

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- Held instructional seminars to raise awareness of updates regarding U.S. encryption export policies and regulations in several U.S. states.

Treaty Compliance and International Cooperation Programs

The Bureau engaged in the following tasks:

- Worked with other U.S. Government agencies to strengthen multilateral nonproliferation regimes and initiatives.

- Hosted nine on-site inspections of U.S. chemical production facilities to comply with the Chemical Weapons Convention. BIS conducted 12 site assistance visits to prepare U.S. companies for on-site inspections.

- Dispatched enforcement agents to various countries to conduct pre-license checks and post-shipment verifications.

- Increased cooperation with major transshipment hubs (Cyprus, Hong Kong, Malaysia, Malta, Panama, Singapore, Taiwan, Thailand, and the United Arab Emirates) on illegal transshipment trade and export controls.

U.S. Defense Industrial and Technological Base Programs

BIS promoted the following initiatives:

- Supported the U.S. technological and defense industrial base.

- Carried out contracts to support Operation Enduring Freedom, Operation Iraqi Freedom and other homeland security activities.

- Aided U.S. companies to secure defense contracts to supply various governments, including Japan, Poland, Hungary, and Sri Lanka.

- Finalized six major reports to monitor the strength of the U.S. technological and defense industrial base.

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III. Challenges

BIS outlined the following goals for fiscal year 2004:

- Carry out a comprehensive examination of deemed exports and technology controls, in addition to seek renewal of the Export Administration Act (EAA), which expired in 2001.
- Expedite the processing of license applications and develop guidelines to guarantee that license conditions will be easily understood and enforceable.
- Ensure consistency among BIS field offices in their approaches to enforcement cases, whether they result in administrative charges or criminal prosecution.
- Schedule 40 outreach programs to the business community regarding export controls.
- Lead and support U.S. Government efforts to strengthen multilateral export controls and nonproliferation regimes (Wassenaar Arrangement and the Chemical Weapons Convention).
- Support the production and delivery of industrial resources required for national defense and homeland security objectives.

OUTLOOK

The Department of Commerce will use the BIS report to improve the protection of U.S. national security and economic interests. The DOC aims to continue to streamline export controls, while strengthening nonproliferation initiatives worldwide.

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USTR Publishes 2004 NTE Report on Foreign Trade Barriers

SUMMARY

On April 1, 2004, the United States Trade Representative (USTR) published the National Trade Estimate (NTE) Report on Foreign Trade Barriers, which surveys significant trade barriers to U.S. exports. While addressing a wide array of issues, this year's report focuses on the protection and enforcement of intellectual property rights (IPR), and restrictions in the services sector.

With a presidential election just seven months away, the NTE has become fodder for partisan attacks over the Bush Administration's enforcement of trade laws. On the same day that the NTE was released, House Democrats sent a letter to President Bush demanding that the USTR bring additional cases to the WTO against the European Union, China and Japan. In addition, Representative Rangel (D-New York) has introduced legislation to reinstate the "Super 301" process.

We highlight the NTE report's comments on the trade practices of China, Hong Kong, Indonesia, Japan, Korea , Malaysia, Philippines, Singapore and Thailand.

ANALYSIS

On April 1, 2004, the United States Trade Representative (USTR) published the 2004 National Trade Estimate (NTE) Report on Foreign Trade Barriers. The annual report, as required by the Omnibus Trade and Competitiveness Act of 1988 (the 1988 Trade Act), is an inventory of the most significant foreign barriers to U.S. exports of goods and services, foreign direct investment by U.S. persons, and protection of intellectual property rights (IPR).

The 2004 NTE report classifies foreign trade barriers into ten different categories, covering all governmental measures and policies, whether consistent or inconsistent with international trading rules, that restrict, prevent, or impede the international exchange of goods and services. These categories include:

- Import policies
- Standards, testing, labeling, and certification
- Government procurement
- Export subsidies
- Lack of intellectual property protection
- Services barriers
- Investment barriers
- Anticompetitive practices with trade effects tolerated by foreign governments

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- Trade restrictions affecting electronic commerce
- Other barriers

The report examines the trade practices of 56 countries, which are the largest export markets for the US. We summarize below the report's findings on trade barriers of China, Hong Kong, Indonesia, Japan, Korea , Malaysia, Philippines, Singapore and Thailand.

China

While acknowledging the growth of U.S. exports to China, the NTE is critical of China's diminished attention to implementation of its commitments under the World Trade Organization (WTO). The NTE notes that in the areas of agriculture, intellectual property rights (IPR), and services, China continues to impose significant non-tariffs barriers on U.S. exports. Specific issues raised in the NTE include:

- Joint ventures between Chinese and U.S. firms were to have been granted full trading rights by December 2003. However, China continues to limit the trading rights of joint ventures to the importation of inputs for manufacturing, and equipment related to production.
- Despite China's formal elimination of "import substituting" policies, various levels of the Chinese government continue to pursue policies aimed at encouraging domestic production at the expense of imports. Taxation policy aimed at encouraging domestic production of integrated circuits prompted the US to seek consultations with China at the WTO in March 2004. Local content requirements in the automotive sector are also cited as a form of "import substitution."
- The development of China-only technical standards presents a significant obstacle to U.S. exports. Obtaining the necessary testing of goods is often a slow and cumbersome process, with theft of intellectual property during standards testing commonplace. In the case of Wireless Local Area Networks (WLANs), China plans to provide the necessary algorithms to domestic producers, forcing foreign competition to enter into joint venture agreements.
- Notwithstanding China's laws and regulations, IPR protection remains seriously inadequate. Losses due to the piracy of copyrighted materials are estimated at US$1.8 billion annually. China's reliance on administrative rather than criminal sanctions for IPR violators has had seemingly little deterrent value. Additional procedural impediments, such as threshold requirements in terms of the value of counterfeiting or piracy alleged remain high and therefore prevent meaningful enforcement of IPR laws.
- High capitalization requirements, and a lack of transparency in the licensing process hinder entry for U.S. service providers. Banking,

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insurance, and wholesale distribution services remain heavily regulated despite China's WTO accession commitments.

Hong Kong, Special Administrative Region

The NTE report provides a generally favorable report of Hong Kong's policies with respect to IPR enforcement, a long-standing source of friction between Hong Kong and the United States. The NTE encourages Hong Kong to focus on a crackdown of end-users of pirated materials in addition to prosecuting producers of counterfeit merchandise. Pharmaceutical companies in the U.S. have expressed concern about the repackaging of counterfeit drugs that are then exported abroad.

Indonesia

Despite macroeconomic stability, a poor investment climate perpetuated by a lack of regulatory transparency and high rates of corruption remain the core barriers to trade and investment in Indonesia. Trade related concerns cited in the NTE include:

- Continued high tariffs on agricultural commodities and other sensitive goods such as alcohol and automotive products. Domestic constituencies continue to push for higher tariffs on agricultural products, though the Indonesian government has managed to resist.

- De-facto quantitative restrictions on certain agricultural imports such as meat and poultry, and mandatory labeling.

- Rampant copyright and patent infringement continues unabated despite passage of additional IPR laws in 2001. A lack of understanding among law enforcement and judicial officers, combined with a poor prosecution record has rendered the Indonesian justice system an ineffective deterrent against IPR violations.

- Barriers on services remain high in some sectors, notably distribution, financial, accounting, banking, and telecommunications. Corruption further deters foreign service producers from entering Indonesia.

Japan

In June 2001, President Bush and Prime Minister Koizumi established the Regulatory Reform and Competition Policy Initiative, which works to, *inter alia*, facilitate regulatory reforms related to trade. Through this mechanism, the U.S. has been able to make recommendations aimed at gaining great entry for its exports. The NTE reiterates several ongoing U.S. requests to Japan for regulatory reform in various sectors including the telecommunications, energy, information technology, medical devices, and financial services.

With respect to import barriers, the NTE expresses several concerns:

- Serious restrictions on U.S. agricultural remain in the form of tariff rate quotas (TRQs), domestic use requirements for corn and potatoes, and sanitary and phytosanitary measures with respect to beef and pork;

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- Government procurement practices in Japan continue to deny effective entry of U.S. computer equipment, and construction, architecture, and engineering services;

- Despite a strong IPR protection regime, Japan's patent administration system is slow to render to final judgment in patent litigation. In addition, Japan needs to take steps to tighten use of copyrighted materials via the Internet.

- Legal and regulatory barriers in the service sector, notably insurance, accounting, legal, and medical, continue to prevent effective entry into the Japanese market by U.S. firms. The insurance sector is the most heavily regulated, with domestic firms enjoying regulatory and tax advantages over foreign competitors.

Beyond general regulatory concerns, the NTE reviews sector specific obstacles. The aerospace, auto and auto parts, civil aviation, electric utilities, paper, and sea transport sectors are all cited as sectors with barriers to U.S. exports.

Korea

Despite progress in enhancing IPR enforcement, and liberalization of rules restricting foreign investment, Korea's economy remains, according to the NTE, one of the more highly regulated economies in Asia. The NTE cites a strong anti-import bias, and a lack of regulatory transparency as key barriers to U.S. exports. Protectionist sentiments arising from anti-import campaigns in the 1990s remain strong, despite attempts by the Korean government to reverse this view. This anti-import bias is most strongly felt in the automotive, pharmaceuticals, and telecommunications sectors. In addition, the NTE raises several other areas of concern:

- High tariffs and low quotas, particularly in the agricultural sector are a major barrier to U.S. exports. Korea is scheduled to phase out tariffs on a number of products, including steel and semiconductors, in 2004. However, tariffs on textiles remain high, and will likely remain so with the expiration of the multi-fiber agreements.

- The use of "Korea-only" technological and health standards is of growing concern. In the telecommunications sector, Korea has or is developing standards regarding wireless Internet platforms that seem designed to deter foreign competition. The use of health standards and inspections is a significant barrier in the agricultural sector.

- Despite the existence of a comprehensive IPR regime, enforcement and piracy problems remain in Korea. Some government licensing requirements may actually facilitate IPR violations by requiring foreign companies to make detailed disclosures regarding product composition, specification or design.

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- Korea maintains a "negative list: approach to the service sector, and has done little to liberalize in sensitive sectors such as advertising, cable TV, accounting, and legal services. Furthermore, IMF mandated reforms in the banking and financial sectors as a result of the Asian financial crisis have not been completely implemented and suffer from a lack of regulatory transparency.

Malaysia

High tariffs remain Malaysia's preferred tool for preventing the entry of foreign goods. Combined with high duties, Malaysia's average effective tariff rate remains close to 20%. Motor vehicles and textiles have been targeted for protection by high tariffs. In addition, Malaysian auto producers continue to enjoy rebates on excise taxes.

Piracy of optical media such as CDs and DVDs remains a serious concern. Optical media pirated in Malaysia has been found in several countries throughout the Asia-Pacific region. In 2003, Malaysia did make efforts to enhanced prosecution of digital pirates, however an inefficient judiciary has limited the effectiveness.

The service sector remains highly protected and Malaysia has yet to offer further liberalization in the context of the Doha Round. In some sectors, such as legal services, foreign entities may not provide services of any kind. In other sectors, such as accounting, banking and engineering, foreign companies are required to partner or affiliate with Malaysian firms. Most affiliate agreements require government licenses and investment by foreign companies in the Malaysian service sector is restricted.

Philippines

Corruption and a lack of regulatory transparency continue to undermine trade with the Philippines. Three-quarters of firms surveyed had direct knowledge of corruption ongoing in their industry or sector. The NTE also raises concerns of backsliding on commitments in the area of tariff reduction and IPR enforcement. Political instability has made further legislative and regulatory efforts difficult. The NTE also criticizes the Philippines for various trade deterring policies:

- In early 2004, the Philippine Tariff Commission recommended increasing tariffs in several sensitive sectors, and a slow-down of reductions in other sectors. While the increased tariffs remain within the Philippines bound tariff commitments under the WTO, the increasing protectionist sentiment is concerning. Tariffs in the agricultural and automotive sectors have seen the largest increases.

- IPR protection and enforcement is of increasing concern, with the Philippines having been elevated to the USTR Special 301 Watch List in 2003. A lack of legislation and enforcement resources has resulted in increasing rates of piracy of optical media such as CDs and DVDs.

- Restrictions in the services sector are pervasive, with financial services, insurance, and banking sectors restricted in terms of foreign competition.

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Compounding this is a series of investment restrictions in the services and manufacturing sectors.

Singapore

The NTE sounds a generally positive note about access for exports into Singapore, reflecting the benefits resulting from the entry into force of the U.S.-Singapore Free Trade Agreement. Tariffs on U.S. exports have been eliminated, and previous barriers to the telecommunications sector have been overcome through the FTA.

The biggest barriers in Singapore's economy remain in the service sector. Foreign audiovisual ad media service provides are effectively shut out of the market, and the use of direct-to-home satellite television remains prohibited. In addition, foreign entities are prohibited from owning majority stake in domestic media firms, and the directors and executive officers of audiovisual service providers are generally required to be citizens of Singapore.

IPR enforcement in Singapore has improved, however the absence of criminal penalties for the use of unlicensed software remains a problem. Singapore, in its FTA agreement with the US has pledged to close this loophole in its criminal law. Transshipment of pirated goods through Singapore's ports has yet to be addressed meaningfully.

Thailand

The NTE report on Thailand points out a number of barriers that are burdensome for U.S. companies, including:

- The complicated tariff regime and the high tariff structure. The highest rates apply to imports of agricultural products, autos and auto parts, alcoholic beverages, fabrics, and some electrical appliances.

- The tax administration, which is complicated and not transparent, and the customs valuation authority, which tends to be non-transparent and often arbitrary and irregular. These last two barriers are acute in the automotive sector.

- The required standards, testing, labeling, and certification permits for all imports of food and pharmaceutical products.

- The barriers in the sectors of telecommunications, legal, financial, construction, architecture, engineering, and accounting services.

- Discriminatory and non-transparent government policies, especially regarding government procurement. The government protects several government firms from foreign competition, retains authority to set price ceilings for a number of products, and uses control review mechanisms that are non-transparent.

- High-level IPR piracy.

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OUTLOOK

With a presidential election just seven months away, the NTE has become fodder for partisan attacks over the Bush Administration's enforcement of trade laws. On the same day that the NTE was released, House Democrats sent a letter to President Bush demanding that the USTR bring additional cases to the WTO against the European Union, China and Japan.

House Ways and Means ranking member Charles B. Rangel (D-New York) has introduced legislation to reinstate the "Super 301" process that lapsed in 2001. Under the bill (H.R. 4120), the USTR would be required to use the NTE to develop a priority list of countries to be approached for bilateral consultations on barriers to U.S. exports. A country that fails to correct concerns raised by USTR within 90 days could then be subject to possible sanctions. The Super 301 process is similar to that used in the case of Special 301 investigations, which deal with countries alleged to be deficient in their protection of intellectual property. President Clinton maintained the use of the Super 301 by executive order (EO), but the Bush administration allowed the EO to lapse in April 2001.

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USTR Identifies Barriers to the Effectiveness of U.S. Telecommunications Trade Agreements; WTO Findings in Mexican Dispute Reinforce U.S. Objectives

SUMMARY

The United States Trade Representative (USTR) recently released its 2004 annual review concerning foreign compliance with telecommunications trade agreements. In the report, USTR highlighted three key barriers this year that have impeded access to foreign telecommunications markets: (1) proposed exclusionary standards for equipment and services; (2) high interconnection rates for mobile and wireless networks; and (3) restrictions on accessing wholesale transmission capacity.

USTR also expressed continued dissatisfaction about how the absence of a fully independent regulator in many countries can impede the implementation of WTO commitments, as well as certain other country-specific issues.

The WTO Panel ruling earlier this month on Mexico's failure to comply with its WTO commitments in this sector (subject to appeal) is expected to strengthen USTR's hand in pressing Mexico and other countries to ensure improved market conditions.

ANALYSIS

I. Overview of Foreign Compliance Efforts

On April 7, 2004, the United States Trade Representative (USTR) issued its annual review of the operation and effectiveness of U.S. telecommunications trade agreements, as required under Section 1377 of the Omnibus Trade and Competitiveness Act of 1988 (19 U.S.C. § 3106). This review was based, among other things, upon the input provided by comments and reply comments submitted by twelve parties.

While acknowledging the many positive results that recent free trade agreements (FTAs) and countries' implementation of WTO commitments have produced, USTR remains fully committed to actively engaging our trading partners through various means, including negotiations, consultation and, if necessary, litigation, in its ongoing effort to eliminate or reduce trade barriers.

The three areas warranting greatest attention in 2004 will be: (1) proposed exclusionary standards for equipment and services; (2) high interconnection rates for mobile and wireless networks; and (3) restrictions on accessing wholesale transmission capacity. The first of these is a relatively new concern that is just now surfacing, while the second and third are perennial concerns that USTR has cited in prior annual reviews. We examine these three areas in further detail below.

Other areas warranting attention include a number of country-specific concerns, political or legislative efforts aimed at undermining the effectiveness of independent regulators and the extended tardiness of two countries – Mexico and South Africa – in implementing WTO commitments to liberalize the resale of basic telecom services. Mexico in particular has become a focus of attention after a WTO Panel found earlier this month that the government has not fully complied with its commitments under the WTO Basic Telecommunications Agreement of 1997.

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II. Priority Concerns Warranting Greatest Attention

A. Discriminatory and/or Unjustified Standards

USTR has expressed major concerns about the introduction of mandatory, single-technology standards. Such restrictions have been proposed or are being considered for wireless telecommunications services and equipment in China, Korea and Japan. These single technology standards can serve to restrict market access by favoring local firms that hold exclusive rights to certain technologies. They do so by manipulating the standards process to exclude foreign technologies, by unfairly promoting locally developed standards or technology or by restricting the testing of new technologies so as to limit their eligibility in upcoming licensing activities.

USTR intends to monitor the situation closely in each of the affected countries and will raise these issues with appropriate government officials as warranted. In the case of China, for example, USTR has asserted that the proposed new standard for wireless services is not compatible with international standards, and might violate WTO rules.

B. Excessive Rates for Mobile/Fixed Line Interconnection

USTR has repeatedly expressed concerns about the reasonableness of rates imposed for termination of international calls into mobile networks and is firmly committed to application of the principle of cost-orientation to international mobile termination rates. While some countries have begun to act on this issue or minimally have attempted more meaningfully to monitor the situation, other countries seem reluctant to take action, possibly in the hopes that marketplace forces will correct potential distortions over time. Countries with noticeably high termination rates include France, Germany, the Netherlands and Greece in the European Union, as well as Australia, Japan, New Zealand, Peru, Switzerland and Venezuela.

Of particular concern are reports that mobile operators in many countries are introducing rate increases for calls to mobile networks. USTR views this as clear evidence that market forces are not particularly effective at constraining rates in those countries. USTR intends to continue to monitor the situation and may revisit the issue later in the year or undertake more active regulatory engagement on these matters. Additionally, USTR noted that the U.S. Federal Communications Commission (FCC) is initiating a proceeding to examine the effect of high mobile termination rates on U.S. interests.

C. Reasonable Access to Leased Lines and Submarine Cable Capacity

With regard to access to leased lines for local access, USTR identified a number of concerns regarding unreasonable and potentially discriminatory practices and lack of adequate legal protections, resulting excessive pricing and lengthy provisioning times. These practices hinder the ability of basic and value added service suppliers to provide competitive services using these wholesale inputs.

Two countries in particular were singled out for concern in this area – Germany and India. In the case of Germany, a lack of regulatory clarity and authority was cited as a major contributor to provisioning delays. With regard to India, USTR had received formal complaints about access to and use of submarine cable capacity that the dominant

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international carrier controls through its cable landing station. In seeking to remedy these situations, the ultimate objective is to ensure that leased lines are provided on reasonable and nondiscriminatory terms and conditions.

III. Other Concerns: Independence of Regulatory Bodies

In addition to the barriers described above, the lack of an independent regulator with adequate regulatory authority remains a key USTR concern. This was identified as a priority item for a number of countries, including China, Colombia, France, Germany, Japan, Mexico, and South Africa. This problem can manifest itself in a variety of forms, from imposition of legislative limits on the power or authority of the regulator, to favoritism shown towards the incumbent operator either as a result of government ownership or undue influence, as well as a failure to institute a structurally separate regulator.

USTR cited the inability of a regulator to control abusive practices as a serious impediment to effective market access. In pursuing this matter further, USTR indicated its commitment to develop criteria for an independent regulator that have become a standard element of bilateral FTAs and which could form the basis of further initiatives in the WTO.

Although many WTO Members have incorporated the "Reference Paper" (on anticompetitive practices) into their schedule of commitments on telecommunications services, these disciplines have not been tested until now. On April 2, 2004, the WTO ruled against Mexico's failure to ensure regulatory independence in its telecommunications sector. The decision is the first-ever to examine the Reference Paper disciplines. No doubt, the ruling (subject to appeal) will strengthen USTR's hand in pressing Mexico and other countries to ensure the independence of their regulatory bodies.

IV. Country-Specific Issues

In the case of the following countries, USTR also identified issues of a more specific nature requiring further monitoring on its part:

- ***Austria—*** Lack of effective dispute resolution and of timely management of interconnection disputes, which contributes to excessively high interconnection rates;

- ***China—*** Delays in finalization of the pending Telecom Law; confusion over standards development process; imposition of excessive capitalization requirements on foreign entities engaged in the provision of provision of basic services and improper classification of value-added services as basic telecom services, subjecting value-added suppliers to these higher capitalization requirements;

- ***Japan***—Regulatory acquiescence in recent increases in interconnection rates for incumbent operators accompanied by cost shifts to competitors without adequate demonstration of inadequacy of existing fixed subscriber charges;

- ***Mexico—***Slow implementation of its commitments to permit resale of basic telecommunications services; weak regulatory body, which USTR

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has pursued (successfully, so far) in the context of current WTO litigation; and

- ***South Africa*—**Restrictions on resale of basic telecommunications services.

OUTLOOK

Many of the concerns raised this year, both general and specific, carry over from USTR's 2003 annual review. As such, analysts expect there to be increasing urgency for resolution. The exclusionary standards for equipment and services now loom as a major new threat to market access to certain critical markets including China. Continuing concerns are present about excessive mobile termination rates, the effects of which will now also be considered by the FCC.

After the precedent-setting WTO Panel finding this month on Mexico's telecommunications market, USTR can be expected to pursue more aggressively its concerns of a structural nature (*e.g.*, absence of an independent regulator). USTR no doubt will refer to the Mexican dispute (subject to appeal) in its efforts to ensure greater transparency, reasonable standards, market access and regulatory fairness, in its bilateral trade negotiations as well as at the WTO.

* * *

For further information, please contact Maury J. Mechanick, Telecommunications Counsel in the Washington, D.C. office of White & Case: mmechanick@whitecase.com.

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USTR Announces Reorganization Plan; Provides Emphasis on China

On April 13, 2004 the U.S. Trade Representative announced the creation of a separate and expanded office of China Affairs. The new office, funded through the Consolidated Appropriations Act of 2004, will feature an increased number of staff dedicated to addressing trade issues involving China. Acting Assistant USTR Charles Freeman, who has been handling the China portfolio since April 2002, will head the new office. As a result of the reorganization, Assistant USTR Wendy Cutler will head a new office that will oversee trade relations with Japan and Korea.

In addition to this reorganization, USTR announced that:

- Ralph Ives, in addition to his responsibilities as Assistant USTR for Southeast Asia and Pacific Affairs, will be come the new Assistant USTR for Pharmaceutical Policy; and

- Mary Ryckman will be promoted to Assistant USTR for Trade Capacity Building.

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Free Trade Agreements

USTR Hears Testimony on US-Thailand FTA; Negotiations Will Begin in June

SUMMARY

On March 30, 2004, the Trade Policy Staff Committee (TPSC) held a public hearing on the proposed United States-Thailand Free Trade Agreement (FTA). The hearing aimed to assist in formulating negotiating objectives and to provide advice on how specific goods and services and other matters should be treated under the agreement.

Sixteen representatives testified at the hearing. Approximately half of the witnesses represented the agriculture sector. The testimonies focused on general liberalization efforts instead of specific objectives, reflecting the early stages of the negotiations.

IPR protection and enforcement, labor and environmental standards, and market access for certain agricultural goods- particularly sugar- will likely be challenging issues. Market access for industrial goods does not seem controversial, with the exception of concerns about the effect of the FTA on the United States automobile industry.

At the start of the hearing, Assistant United States Trade Representative (USTR) Ralph Ives announced that the United States and Thailand will hold the first round of negotiations during the week of June 28, 2004.

ANALYSIS

I. TPSC Holds First Hearing on US-Thailand FTA

On March 30, 2004, the Trade Policy Staff Committee (TPSC), an interagency body chaired by the United States Trade Representative (USTR), held a public hearing on the proposed US-Thailand Free Trade Agreement (FTA), as announced in the Federal Register on February 27, 2004 (69 FR 9419). The objective of the hearing was to assist in formulating negotiating objectives and to provide advice on how specific goods and services and other matters should be treated under the agreement.

II. Testimonies from Associations and Others on the FTA

A. The US-ASEAN Business Council ("the Council")

The Council wants the FTA to eliminate comprehensively all tariff and non-tariff barriers to trade and investment. The Council thinks that this elimination would increase U.S. (i) trade in goods, (ii) trade in services, and (iii) the competitiveness of U.S. farm products in Thailand. When asked which specific service sectors would benefit from the FTA, the Council representative named the digital media, life sciences, and biotechnology services sectors.

Responding to a question on how the FTA could impact the other ASEAN countries, the Council representative said it would stimulate the other countries to move forward with trade liberalization. He named Malaysia and Brunei, who have expressed an interest in an FTA with the US, as examples.

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B. The US Chamber of Commerce ("the Chamber")

The Chamber wants a comprehensive FTA with strong chapters on (i) investment, (ii) anticompetitive practices, (iii) government procurement, (iv) non-performing loans, (v) customs cooperation, (vi) intellectual property rights (IPR), (vii) tariff elimination, (viii) rules of origin, and (ix) labor and environment.

When asked which specific sectors had an interest in the FTA, the Chamber representative named the telecommunications, audiovisual, accounting, and express delivery services (EDS) sectors, as well as the agriculture, textiles, pharmaceuticals, and e-commerce sectors.

C. Pharmaceutical Research and Manufacturers of America (PhRMA)

PhRMA wants the FTA to (i) recognize innovation and non-discrimination for medicines, (ii) provide strong IPR protection, and (iii) build a science-based Thai drug regulatory program.

D. The International Intellectual Property Alliance (IIPA)

IIPA urges the USTR to negotiate an FTA that increases IPR protection and enforcement, particularly regarding copyright piracy. When asked if there were any particular aspects of the model IPR-chapter that needed to be modified, the PhRMA representative responded that the FTA needed to contain strong provisions regarding optical disc piracy and the production in Thailand of pirate video games.

Responding to a question on Thailand's wish to provide its own system of identification codes, the IIPA said that this could decrease control over copyright piracy.

E. The Coalition of Service Industries (CSI)

CSI named as priorities for its members: (i) improved market access in most service sectors; (ii) the negative list approach; (iii) investor protections; (iv) transparency in domestic regulations; and (v) regulations regarding the movement of people.

When asked if the US-Australia FTA could be used as a model for the FTA with Thailand, the CSI representative replied that the Australia FTA was a good template, but that the FTA with Thailand should not exclude investor-state dispute settlement procedures. Responding to a question on which financial sectors in Thailand could be controversial, the CSI noted the insurance and the banking sectors.

F. National Association of Manufacturers (NAM)

NAM said that immediate elimination of industrial tariffs was its principal negotiating objective. NAM further wants strong chapters regarding (i) non-tariff barriers, (ii) investment, (iii) IPR protection and enforcement, (iv) currency controls, (v) duty drawback and deferral programs, (vi) tax barriers, (vii) anti-corruption, (viii) government procurement, and (ix) competition policy.

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When asked about how the "Buy Thai" Act affected U.S. companies, the NAM representative replied that eliminating this Act would increase the competitiveness of U.S. companies.

G. American Federation of Labor – Congress of Industrial Organizations (AFL-CIO)

The AFL-CIO opposes using FTAs that the US previously concluded as a model. The AFL-CIO wants the FTA to (i) reform the labor laws in Thailand and improve their enforcement, (ii) protect sensitive sectors such as the U.S. pickup industry, and (iii) promote equitable and sustainable development.

Responding to a question about what the measures that the Thai government should take in the short term to improve its labor laws, the AFL-CIO representative said that the government had to reduce the restrictions on unions.

When asked if it was possible to deal with the problem of illegal immigrants from Burma in Thailand through the FTA, the AFL-CIO representative replied that they could reduce the illegal immigrants by improving the Thai customs system.

H. Other Associations

The following associations also testified at the hearing:

- The California Cling Peach Board ("the Board")
- The Grocery Manufacturers of America (GMA)
- Dupont Teijin Films, Mitsubishi Polyester Films of America, and Toray Plastics (America), Inc.
- The Footwear Distributors and Retailers of America (FDRA)
- The National Potato Council
- The Sweeteners Users Association (SUA)
- The Blue Diamond Growers
- The American Sugar Alliance (ASA)
- The National Milk Producers Federation (NMPF) and the U.S. Dairy Export Council (USDEC)

These associations and groups for the most part represented particular sectors or commodity groups. Among these groups, the sugar producers (ASA) were the most resistant to the FTA. Other agriculture groups are mixed in their opinions on the FTA since Thailand is a major agricultural exporter. *(Please let us know if you would like further information on these, or other testimonies.)*

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OUTLOOK

The upcoming launch of the US-Thailand FTA comes after the conclusion of several FTAs that will serve as some model for negotiations with Thailand. The Australia FTA, for example, demonstrates that sensitive sectors like sugar were able to gain a complete exclusion. No doubt, sugar and other sectors, will seek similar exclusions in negotiations with Thailand. The Central American (CAFTA) negotiations are an indicator of the labor and environment related provisions that the United States will seek in the FTA with Thailand.

Among other U.S. priorities, industries will seek stronger IPR protection and enforcement, and meaningful market access for goods and services. Some sensitive issues are likely to arise in these issues and sectors, for example, copyright and patent enforcement; market access for automotive products; access to financial and telecommunications sectors, among others.

Assistant USTR Ralph Ives has confirmed that technical negotiations will begin soon, starting the week of June 28, 2004. Negotiations will likely continue well into 2005, and the agreement will not be implemented until January 2006, or later.

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Congress Could Pass US-Australia FTA This Year

SUMMARY

Representatives from USTR, Congress and industry on March 12 discussed prospects for the congressional passage of the United States-Australia FTA at an event sponsored by the United States Chamber of Commerce ("Chamber") and the American Australian Free Trade Association Coalition (AAFTAC). Speakers praised the FTA and agreed that it faces little opposition in Congress. Most speakers opined that Congress would pass the FTA this year, possibly by June or July.

The USTR representative stated that President Bush would sign the FTA on May 14 "or shortly thereafter". He added that USTR would submit the FTA to Congress "as soon as possible" and hoped to obtain congressional approval by the end of the year.

ANALYSIS

On March 12, 2004, the U.S. Chamber of Commerce ("Chamber") and the American Australian Free Trade Association Coalition (AAFTAC) held a discussion on the U.S.-Australia Free Trade Agreement (FTA).

The speakers included:

- Assistant United States Trade Representative (USTR) for the Asia Pacific region Ralph Ives;
- Representative Calvin Dooley (D-California);
- A panel consisting of representatives from (i) Caterpillar, (ii) the National Association of Manufacturers (NAM); (iii) the National Pork Producers Council (NPPC); (iv) FedEx; (v) Time Warner, Inc.; (vi) Pharmaceutical Research and Manufacturers of America (PhRMA); and (vii) the Automotive Trade Policy Council (ATPC).
- A panel consisting of, among others (i) Tim Punke, International Trade Counsel of the Senate Finance Committee; and (ii) Tim Reif, Chief Trade Counsel of the Trade Subcommittee of the House Ways and Means Committee.

We highlight their comments below.

I. Ives Says Australia FTA Will Give "Vital Boost" to US Manufacturing Sector; USTR Considers Possibility of US-New Zealand FTA

Ives described the U.S.-Australia FTA as "a state-of-the-art agreement" that will give a "vital boost" to U.S. manufacturers. He highlighted the following benefits of the agreement:

- The elimination of industrial and agricultural tariffs;

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- The mechanism to resolve animal and plant health issues;
- The negative-list approach for services and, particularly, the expanded access to the insurance and express delivery services;
- IPR protection;
- Government procurement.

When asked why the FTA excluded certain agriculture products, Ives said that USTR had to exclude these products to have an agreement that Congress would pass.

Responding to a question regarding the possibility of an FTA with New Zealand, Ives said that USTR continues to explore the issue and noted that U.S. and New Zealand negotiators would meet "in the near future" under the Joint Council.

Regarding the status of the U.S.-Thailand FTA, Ives stated that USTR will launch negotiations in the second quarter of the year. USTR does not expect to conclude these negotiations before the presidential elections in November.

II. Dooley Confident of Congressional Passage; Says Sugar Exclusion Eliminated Most Opposition

Describing the FTA as "balanced, but not perfect", Dooley said that the agreement generated the strongest bipartisan Congressional support "in some time" and Congress would approve it this year. He noted that the exclusion of sugar had eliminated the bulk of the opposition.

Dooley was confident that outstanding sanitary and phytosanitary (SPS) issues would be resolved before the FTA is submitted to Congress. He opined that the presidential elections would not significantly influence passage of the FTA. Dooley stated that the U.S.-Australia FTA "does not lend itself to be used as a vehicle for opponents of trade with the outsourcing issue".

III. Industry Representatives Support FTA, but Prefer Inclusion of Investor-State Dispute Settlement Provisions

The **Caterpillar** representative described the FTA as "the most important agreement for Caterpillar until now", particularly because of the tariff elimination.

ATCP considered the agreement a "natural FTA" that is "a plus to the existing relationship" between the United States and Australia.

The **NAM** representative praised the tariff elimination for manufactured goods, the government procurement provisions and the investment chapter.

The **NPPC** representative said that the FTA solves non-tariff issues, such as some SPS-issues, and improves risk-assessment. He added that there are some outstanding issues, but negotiators could deal with these issues later.

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FedEx was very pleased with the strong commitment for the express delivery services (EDS) sector in the agreement. The representative praised the separate annex that defines EDS as a separate service, the expedited customs clearance and the level-playing field provisions of the FTA.

Time Warner, Inc. supports the market access provisions and the "groundbreaking" provisions regarding digital trade.

PhRMA "greatly appreciated" the FTA and the representative mentioned that the pharmaceutical annex would significantly improve the transparency of the Pharmaceutical Benefits Scheme (PBS).

The representatives noted that they would have preferred the inclusion of investor-state dispute settlement provisions.

IV. Congressional Staffers Urge Administration to Focus on Economically Meaningful FTAs

Reiff said that there were no particular concerns in the House regarding the FTA, although some representatives criticized the exclusion of sugar. He thought that the Administration's decision to exclude sugar had "weakened its ability to challenge the Europeans in the future".

Punke said that the FTA was a good agreement for the manufacturing sector, but noted that some Senators had concerns about the agricultural provisions. He noted that the current political situation on the Hill is "not good" to get trade agreements through Congress. He added, however, that if Congress considers any trade agreements, Congress would probably choose to consider the Australia or Morocco FTAs.

Reiff and **Punke** urged the Administration to negotiate FTAs with larger economies, instead of small bilateral agreements, and to focus more on the WTO and the Free Trade Area of the Americas (FTAA) negotiations.

OUTLOOK

Ives stated that the President would sign the U.S.-Australia FTA on May 14 "or shortly thereafter". He added that USTR would submit the FTA to Congress "as soon as possible" and hoped to obtain congressional approval by the end of the year.

Dooley, the congressional staffers, and most industry representatives opined that Congress could approve the FTA this year. Dooley said that Congress could pass the FTA by June or July.

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President Notifies Congress of Administration's Intention to Enter into FTA with Dominican Republic

SUMMARY

On March 24. 2004, President Bush officially notified Congress of the Administration's intent to enter into a Free Trade Agreement (FTA) with the Dominican Republic. Concluded on March 15, 2004, the FTA fully integrates the Dominican Republic into the Central America Free Trade Agreement (CAFTA).

ANALYSIS

On March 24. 2004, President Bush officially notified Congress of the Administration's intent to enter into a Free Trade Agreement (FTA) with the Dominican Republic, and subsequently published that notification in the Federal Register on March 26 (69 FR 16159). The notification is required under the Trade Act of 2002 (Trade Promotion Authority).

The U.S. and the Dominican Republic concluded the FTA on March 15, 2004. The FTA fully integrates the Dominican Republic into the Central America Free Trade Agreement (CAFTA) that the United States concluded with El Salvador, Guatemala, Honduras, and Nicaragua, on December 17, 2003, and with Costa Rica, on January 25, 2004.

OUTLOOK

Sources indicate that CAFTA awaits a difficult vote in Congress due to growing resistance to trade liberalization and election year politics. Also, CAFTA contains many contentious provisions, including enforcement of labor rights, textiles quotas, and agricultural market access.

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USTR Transmits Trade Advisory Group Reports on CAFTA to Congress; ITC to Hold Hearing on Potential Economywide and Selected Sectoral Effects

SUMMARY

On March 22, 2004, the United States Trade Representative (USTR) submitted reports from 32 advisory committees regarding the U.S.-Central America Free Trade Agreement (CAFTA) to the President and to Congress. All the committees supported the CAFTA, with the exception of the Labor Advisory Committee (LAC).

On March 23, 2004, the International Trade Commission (ITC) announced that it had instituted an investigation regarding the potential economywide and selected sectoral effects of the CAFTA.

ANALYSIS

I. USTR Transmits Trade Advisory Group Reports on CAFTA to Congress

On March 22, 2004, the United States Trade Representative (USTR) announced that it had transmitted reports from 32 advisory committees regarding the U.S.-Central America Free Trade Agreement (CAFTA) to the President and to Congress, as required by the Trade Act of 2002. All the committees supported the CAFTA, with the exception of the Labor Advisory Committee (LAC), which urged Congress to reject the FTA. The LAC also opposed the FTAs with Chile, Singapore, and most recently Australia.

The trade advisory system was established by the Trade Act of 1974, and revised in late 2003. It consists of 32 committees representing a diverse range of sectors and whose roles are to provide the Administration and Congress with advice and assistance on proposed and ongoing trade initiatives.

The full text of the advisory committee reports is available at www.ustr.gov.

II. ITC to Hold Hearing on Potential Economywide and Selected Sectoral Effects

On March 23, 2004, the International Trade Commission (ITC) announced in the Federal Register (69 FR 13582) that it had instituted investigation No. TA-2104-13, regarding the potential economywide and selected sectoral effects of the CAFTA.

The investigation will assess the likely impact of the FTA on the U.S. economy as a whole and on specific industry sectors, including the impact on:

- The gross domestic product;
- Exports and imports;
- Aggregate employment and employment opportunities;
- The production, employment, and competitive positions of industries likely to be significantly affected by the agreement; and

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- The interests of U.S. consumers.

OUTLOOK

The Trade Act of 2002 requires that the ITC submit its reports to the President and the Congress within 90 days after the President enters into the agreement, which he can do 90 days after notifying Congress of his intent to do so. The President notified Congress of his intent to enter into CAFTA on February 20.

The ITC will also hold a public hearing on the investigation. The hearing will take place on April 27, 2004.

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USTR Releases Draft Text of US-Morocco FTA; Transmits Trade Advisory Group Reports to Congress

SUMMARY

We want to alert you to the following developments regarding the U.S.-Morocco Free Trade Agreement (FTA):

- On April 2, 2004, the United States Trade Representative (USTR) released the draft text of the FTA.
- On April 7, 2004, USTR announced that it had transmitted reports from 32 advisory committees regarding the FTA to the President and to Congress. All the committees supported the agreement, with the exception of the Labor Advisory Committee (LAC).

ANALYSIS

I. USTR Releases Draft Text US-Morocco FTA

On April 2, 2004, the United States Trade Representative (USTR) released the draft text of the US-Morocco Free Trade Agreement FTA.

The draft text is available at http://www.ustr.gov/new/fta/Morocco/text/index.htm

II. USTR Transmits Trade Advisory Group Reports to Congress

On April 7, 2004, USTR announced that it had transmitted reports from 32 advisory committees regarding the FTA to the President and to Congress, as required by the Trade Act of 2002. All the committees supported the agreement, with the exception of the Labor Advisory Committee (LAC), which urged Congress to reject the FTA because of alleged deficiencies in local labor laws. The LAC also opposed the FTAs with Chile, Singapore, and most recently, Australia and Central America.

The trade advisory system was established by the Trade Act of 1974, and revised in late 2003. It consists of 32 committees representing a diverse range of sectors and whose roles are to provide the Administration and Congress with advice and assistance on proposed and ongoing trade initiatives.

The full text of the advisory committee reports is available at www.ustr.gov.

OUTLOOK

The US-Morocco FTA is part or a broader strategy aimed at establishing the Middle East Free Trade Area (MEFTA) by 2013. Administration officials hope that Congress will approve the agreement before the end of 2004.

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TPSC Requests Comments on Interim Environmental Review U.S.-Bahrain FTA; US Signs TIFA With Qatar

SUMMARY

On April 5, 2004, the United States Trade Representative (USTR) announced that the Trade Policy Staff Committee (TPSC), an interagency body chaired by USTR, is requesting public comments on the interim environmental review of the proposed U.S.-Bahrain Free Trade Agreement (FTA). Comments are due by April 30, 2004.

In a related development, the United States on March 22 signed a bilateral Trade and Investment Framework Agreement (TIFA) with Qatar.

The FTA and the TIFA are part of a broader strategy aimed at establishing a Middle East Free Trade Area (MEFTA) by 2013.

ANALYSIS

I. TPSC Requests Comments on Interim Environmental Review U.S.-Bahrain FTA

On April 5, 2004, the United States Trade Representative (USTR) published a notice in the Federal Register (69 FR 17729), announcing that the Trade Policy Staff Committee (TPSC), an interagency body chaired by USTR, is requesting public comments on the interim environmental review of the proposed U.S.-Bahrain Free Trade Agreement (FTA). This review focuses on the environmental impact of the FTA in the United States, and also takes into account global and transboundary environment impacts.

The Administration views the FTA with Bahrain as part of a broader strategy aimed at establishing the Middle East Free Trade Area (MEFTA) by 2013. As announced on May 9, 2003, this strategy contemplates a "building blocks" approach of using the recently concluded FTA with Morocco and the FTAs the U.S. already had in place with Israel and Jordan as anchors to negotiate FTAs with other Middle Eastern countries. At some point before 2013, the U.S. intends to consolidate these FTAs to form the MEFTA.

The review is available at http://www.ustr.gov/environment/environmental.shtml.

II. US Signs TIFA With Qatar

On March 22, 2004, the United States signed a bilateral Trade and Investment Framework Agreement (TIFA) with Qatar. The TIFA creates a Joint Council on Trade and Investment, in which both parties will cooperate and coordinate to enhance and liberalize trade and investment at the bilateral, regional, and multilateral levels.

TIFAs deal primarily with trade facilitation, tackling administrative and regulatory problems that can be an irritant to trade and investment. They are often used as a first step toward the negotiation of an FTA.

The TIFA with Qatar is the ninth between the United States and a Middle Eastern country. The TIFA is also part of President Bush's initiative to establish a MEFTA.

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OUTLOOK

Comments on the interim environmental review are due by April 30, 2004.

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Free Trade Agreements Highlights

TPSC Requests Comments on Employment Impact of Potential FTAs with Panama and Thailand

On April 20, 2004, the Trade Policy Staff Committee (TPSC), an inter-agency committee that co-ordinates U.S. trade policy, issued requests for comments on the possible employment impact that potential free trade agreements with Panama and Thailand may have on the United States. (69 FR 21177, 21178) The Trade Act of 2002 requires the President to "review the impact of future trade agreements on United States employment" and to submit the findings of that review to Congress. (19 U.S.C. 3802(c)(5))

In order to be considered in the report, comments must be filed with the U.S. Trade Representative by May 24, 2004.

Colombia and Panama Expect to Conclude FTA Negotiations With U.S. by Early 2005

At an event hosted by Women in International Trade on April 1, 2004, the Colombian Ambassador to the US, Luis Alberto Moreno, and the Panamanian Ambassador to the US, Roberto Alfaro, said that they expect their countries to complete FTA negotiations with the US quickly, so that the FTAs can be presented to the U.S. Congress early next year, before Trade Promotion Authority ("TPA") expires.

The U.S.-Panama FTA negotiations will begin on April 26, 2004, and negotiations with Colombia are scheduled to start on May 18, 2004.

Panama and Colombia expect the Bush administration to be able to send the FTAs to the U.S. Congress during the first half of 2005, before the expiration of TPA. Ambassador Moreno predicted that Colombia and the US could finish negotiations by January or February of 2005. Ambassador Alfaro said that the U.S.-Panama negotiations could be wrapped up as early as August 2004.

In the case of Panama, negotiations should not take too long as Panama, unlike its Central American neighbors, is mostly a service-oriented economy, with few sensitive issues in the agriculture and the industrial sectors, according to Ambassador Alfaro. Panama's distinct economic structure is one reason that Panama did not want to be included in the CAFTA negotiations. Ambassador Alfaro acknowledged that the U.S.-Panama FTA would probably be presented to the U.S. Congress in the "same package" with CAFTA and the Dominican Republic FTA.

Ambassador Moreno said that Colombia has been assembling the negotiation team, which will be lead by Colombia's former Ambassador to the WTO, and consulting with law firms, think tanks and the intellectual community. He said he was having a very active dialogue with the U.S. and Colombian legislatures.

Colombia intends to use the Andean Trade Preferences Program as a building block for the FTA. According to Moreno, Colombia is interested in having the other Andean countries as part of the FTA. Colombia's Ambassador said Colombia expects the FTA to:

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- Open market for agriculture products;
- Address sanitary and phytosanitary measures;
- Open market for textile products;
- Address obstacles for the entry of Colombians to the US; and
- Improve Colombia's investment climate.

USTR Initiates Environmental Review of FTAs with Panama, Thailand and the Andean Region

On April 12, 2004, the United States Trade Representative (USTR) announced in the Federal Register the initiation of environmental reviews for the proposed FTAs with Panama, Thailand, and the Andean Region (Bolivia, Ecuador, Colombia, and Peru) by the Trade Policy Staff Committee (TPSC), an interagency committee responsible for coordinating U.S. trade policy [69 FR 19261-65]. Environmental reviews of prospective FTAs are required under Section 2102(c)(5) of the Trade Act of 2002.

Environmental reviews, conducted in accordance with guidelines set forth in Executive Order 13141 [67 FR 70305], seek to establish the possible environmental impacts, both positive and negative, a proposed FTA might have on the US. In addition, the TPSC will review any potential effects on current U.S. laws and regulations, as well as transboundry issues where appropriate.

Parties interested in submitted comments for the record must do so by the following dates:

Andean Region:	May 14, 2004
Panama:	May 14, 2004
Thailand:	June 1, 2004

USTR Publishes Draft Text of the U.S.-Dominican Republic FTA

On April 9, 2004, the United States Trade Representative (USTR) published the draft text of the U.S.-Dominican Republic Free Trade Agreement (FTA). Negotiations between the U.S. and the Dominican Republic concluded on March 15, 2004, and the agreement is expected to become part of the U.S.-Central America FTA (CAFTA).

The draft text of the Dominican Republic FTA can be found at http://www.ustr.gov/new/fta/Dr/texts.htm.

US and Colombia Will Launch FTA Negotiations in May; Peru and Ecuador Could Join

On March 23, 2004, the United States Trade Representative (USTR) announced that the United States and Colombia will launch FTA negotiations on May 18-19, 2004. USTR made the announcement after USTR Robert Zoellick met with Colombian President Alvaro

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Uribe to discuss U.S.-Colombian trade issues, the launching of the FTA negotiations, and the ongoing Free Trade Area of the Americas (FTAA) and WTO Doha negotiations.

USTR added that Peru and Ecuador could join the first negotiating round, depending on their progress regarding the protection of worker rights and a number of outstanding disputes with U.S. investors.

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

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Customs

CBP Publishes Quarterly IRS Interest Rates for Overdue Accounts and Refunds of Customs Duties

On April 6, 2004, the Bureau of Customs and Border Protection (CBP), Department of Homeland Security (DHS), published in the Federal Register (69 FR 18097) the quarterly interest rates used by the Internal Revenue Service (IRS) to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties.

For the period April 1, 2004-June 30, 2004, the interest rate for underpayments is 5 percent. The interest rates for overpayments are 4 percent for corporations and 5 percent for non-corporations.

CBP Signs Export Validation MOU with Commerce to Facilitate Cooperation with Mexico

On April 7, 2004, U.S. Customs and Border Protection (CBP) and the Department of Commerce announced the signing of a memorandum of understanding (MOU) to provide Mexico with certain export validation information. The shared information will be limited in content and scope, and no company-specific data will be provided. It is hoped that the exchange of information will enhance mutual border security and help combat revenue fraud. U.S. Federal Law limits access to export information, and this MOU applies narrowly to cooperation with Mexico.

The press release announcing the MOU can be found at http://www.customs.gov/xp/cgov/newsroom/press_releases/04072004.xml

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US-EU

USTR Reports on EU Barriers to American Exports

SUMMARY

On April 1, 2004 the Office of the United States Trade Representative (USTR) published the 2004 National Trade Estimate (NTE) Report on Foreign Trade Barriers. The annual report, required by the Omnibus Trade and Competitiveness Act of 1988 (the 1988 Trade Act), is an inventory of the most significant foreign barriers to US exports of goods and services, foreign direct investment by US persons, and the protection of intellectual property rights (IPR). The report examines the trade practices of the 58 largest export markets for the US, including the European Union.

With regard to the US – EU relations, the report notes that they operate normally in most respects, with the exception of some "chronic barriers" that have been highlighted in previous reports or some obstacles to trade, resulting from administrative regulations miscalculating the risk the affected products pose. The report classifies EU trade barriers into the following categories: import policies, technical regulations, sanitary and phytosanitary measures, government procurement, export subsidies, IPRs, services, investment measures, E-commerce, and others.

The full report can be found at www.ustr.gov/reports/nte/2004/eu.pdf

ANALYSIS

On April 1, 2004 the USTR published its 2004 National Trade Estimate (NTE) Report on Foreign Trade Barriers. In accordance with the Omnibus Trade and Competitiveness Act of 1988, the USTR prepared the report pursuant to consultations with other government agencies and based on information provided by the public and private sector. The report sheds light on the trade practices of the 58 largest export markets of the United States, including the European Union, by focusing on barriers to US exports of goods and services, foreign direct investment by US persons, and protection of intellectual property rights (IPR).

The report exceeds 500 pages in length. Below we highlight the section of the report analyzing the barriers existing in the EU market, which have been classified into the following categories:

I. ***Import policies –*** comprising tariffs and other import charges, quantitative restrictions, import licensing, and customs barriers. Such EU measures include:

a. Restrictions affecting U.S. wine exports – for almost 20 years, U.S. wines have been imported into the EU on the basis of derogations from several EU wine regulations. These derogations were set to expire on December 31, 2003, but the EU extended them for an additional 2 years in order to facilitate current EU-U.S. wine negotiations. These bilateral negotiations have been ongoing since 1999. The U.S. seeks better access to EU market through the acceptance of some U.S. wine-making practices. The EU seeks more significant

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protection of its wine names in the U.S. and discontinuation of the use of EU names on the labels of wines of non-EU origin.

b. Customs administration procedures – EU Member states' customs administrations have different working practices, especially in the fields of data processing systems, risk criteria, VAT levels, foodstuff licenses, certificate of origin requirements, and treatment of express shipments. The absence of opportunities for reviews of customs actions further aggravates the problem.

c. EU enlargement – particular concern caused by: increase in tariff rates in new Member states for some products; withdrawal or modification of market access commitments for services; use of non-tariff barriers (technical, sanitary, and phytosanitary requirements); adjustment of quotas for agricultural products.

d. Market access restriction for pharmaceuticals – Member states' governments place various price, volume and access controls on medicines. In some Member states, regulatory practices (approval process for new medicines, placing a product on the list of reimbursable drugs, use of reimbursement schemes) cause difficulties for U.S. pharmaceutical companies in terms of lost sales and delays in bringing products to the market.

II. ***Standards, testing, labeling and certification*** – among which is the restrictive application of SPS and environmental measures; and non-acceptance of U.S. manufacturers' self-certification of conformity to foreign product standards. Divergent regulations cause delays in bringing products to the market and impose costs on importers. Furthermore, regulatory measures impede the access to EU market of U.S. wine, poultry and agricultural biotechnology products.

a. Standardization – certain problems exist that hamper the access of U.S. products to EU market – belated development of EU standards; belated introduction of legislation; overlap between Directives pertaining to specific areas; implementation of design-based (not performance-based) standards.

b. Agricultural biotechnology – since 1998 there has been a de facto moratorium on the approval of new biotechnology products. In May 2003 the U.S. threatened it would initiate a WTO dispute settlement case on this topic. Also, some EU Member states have imposed bans on biotechnological products despite existing EU approval for those products.

c. Barriers affecting trade in cattle and beef products – since 1988 the EU has banned the application of substances that have a hormonal growth promoting effect in food-producing animals. In September 2003 the EU has introduced a modified hormone directive, pursuant to a successful WTO challenge of the old ruling by the U.S.

d. Animal by-product legislation – after May 1, 2004 the EU is expected to enforce a directive regulating the imports of animal by-products not fit for

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human consumption. U.S. exports worth USD 400 million may be adversely affected.

e. Poultry restrictions – due to the use of anti-microbial treatment substances, U.S. poultry has been banned from the EU market since 1997. The parties are finalizing a series of measures aimed at reopening the EU market for U.S. exports of poultry.

f. Triple Superphosphate (TSP) fertilizer – the EU and U.S. are working to alter the existing water solubility requirement for TSP, which currently is 93 percent.

g. Emerging regulatory barriers – the ongoing development of a number of regulations raises concerns in the U.S. These developing regulations relate to chemicals, cosmetics, waste management, batteries, energy-using products, phase-outs of ozone-depleting substances and greenhouse gases

III. ***Government procurement*:** Discrimination in the utilities sector – according to the report the EU discriminates against bids with less than 50 percent EU content, except for some sectors (heavy electrical sector, telecommunications). Adoption of new Directives is under way, but they will not be implemented before 2005. Moreover, Member states have their own national practices regarding government procurement, such as pro-EU bias, excessive bureaucracy and/or limited transparency.

IV. Export subsidies

Government support for Airbus – France, Germany, Spain and the United Kingdom have subsidized the company since 1967 and have actually incurred the development costs for virtually all Airbus aircrafts models. This provides significant benefits for Airbus in comparison with its U.S. competitors. The most recent subsidy case took place in 2001, with seven EU Member states contributing more than USD 4 billion for the development of Airbus A380. The report then lists specific measures that EU Member states implemented to provide government support for Airbus suppliers in Belgium, France and Spain; government support for aircraft engines producers in the United Kingdom and France.

V. ***Intellectual property rights (IPR) protection*** - patent, copyright, and trademark regimes. Generally, the EU implements strict IPR protection. However, some Member states have failed to fully implement the TRIPS agreement. The report mentions specific areas such as copyrights, designs, patents, patenting of biotechnologies and trademarks, but the only issues of concern mentioned are the high patent fees in the EU, resistance in Austria and France against the directive on the legal protection of biotechnological inventions and certain inconsistencies of the EU system for protection of geographical indications with the TRIPS agreement. The report also notes the practices in certain Member states regarding piracy, especially with regard to software, music and movies.

VI. ***Services*** – for instance, limitations on financial services, data flow regulation, restrictions on the use of foreign data processing

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a. Concerns related to the 1995 EU enlargement – the parties held initial consultations on the modification of certain GATS commitments of Austria, Finland and Sweden.

b. Television broadcast directive – some Member states have implemented legislation hindering the free flow of programmes because of their origin or language; or legislation allowing authorities to restrict the sales of some films because of their contents.[5] Also, in some countries there is a film quota system in place ensuring EU-made films are shown on a constant basis.

c. Postal services – postal monopolies in some Members restrict foreign competitors' access to the market. Full liberalization of the market is not expected before 2009.

d. Professional services – among Member States, requirements for foreign lawyers and accountants willing to practice in the EU differ to a great extent. Thus, varying requirements can complicate access to the EU market for U.S. lawyers and accountants. In Austria there is also a requirement that only EU and EEA nationals can provide architectural services, which appears inconsistent with Austria's GATS commitments.

e. Telecommunications market access – market liberalization has been uneven throughout the EU; technical and administrative problems in some countries restrict operators' access to the market. In some countries the implementation of existing EU legislation is impeded by complicated procedures. Also, in some countries the existing telecoms have systematically hampered slowed the entrance of competition through lengthy – and often unsuccessful – appeals of their national regulators' decisions.

VII. ***Investment barriers*** – restrictions on foreign equity participation; local export performance requirements; and restrictions on repatriation of profit. Under the Maastricht Treaty free movement of capital is the EU's responsibility. Nevertheless, in certain Member States some barriers to investment still exist; they vary from sector to sector. Also, Member States can conclude bilateral investment protection and taxation treaties. They also remain responsible for their investment regimes. The EU and the U.S. are exploring ways to make the bilateral investment treaties between the U.S. and several EU candidate states compatible with the candidates' conditions of EU membership.

Member State practice concerning ownership restriction encompasses a wide range of sectors – from maritime transport to financial services. Certain requirements exist in some Member states with regard to banking, investment, energy sector and arms.

[5] U.S. industry agrees that countries have a legitimate interest in protecting minors from certain film contents. However, the report points out that the legislation should be designed in a way minimizing the impact on the overall market.

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VIII. ***Electronic commerce*** – there are no significant barriers to electronic commerce in the EU. Potential problems may exist with regard to data privacy as well as taxation of electronic transactions, VAT in particular.

IX. ***Other barriers include:*** subsidies for fruit and canned fruit (peaches, prunes, grapes, cherries and clementines); use of vitamins and health food products (particularly in Spain).

OUTLOOK

As the USTR Robert Zoellick put it, the United States "employs a variety of tools to make sure Americans are treated fairly, from consultations to negotiations to litigation". All these approaches are used in order to enforce existing trade agreements. Moreover, the NTE report is not the sole instrument used to identify obstacles to trade. The Special 301 provision of U.S. trade law requires the Office of the USTR to announce by April 30 the measures it intends to take against trading partners that fail to protect copyrights, patents and other intellectual property. Also, as per Section 1377, USTR should announce the measures it will take against violations of telecommunications agreements.

The full report can be found at www.ustr.gov/reports/nte/2004/eu.pdf

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The EU and the US Sign Mutual Recognition Agreement on Marine Equipment

SUMMARY

On February 27, 2004, the United States and the European Union signed a mutual recognition agreement (MRA) on marine equipment. The MRA aims to (i) facilitate bilateral trade in marine equipment and (ii) promote closer regulatory cooperation between the US and the EU.

Under the MRA, designated products that comply with US requirements will be accepted for sale in the EU without additional testing, and vice versa. The US and the EU further agree to cooperate to establish and improve the quality and level of international requirements for marine equipment.

ANALYSIS

I. MRA Aims to Facilitate Bilateral Trade and Increase Regulatory Cooperation

On February 27, 2004, the United States and the European Union signed a mutual recognition agreement (MRA) on marine equipment. Through the MRA, the US and the EU hope to:

- Facilitate bilateral trade in marine equipment; and
- Promote closer regulatory cooperation in order to increase the effectiveness of their respective regulatory actions.

The agreement is an initiative of the US and the EU under the Transatlantic Economic Partnership (TEP). Announced at the Birmingham summit of May 1998, the TEP is the current framework for transatlantic economic cooperation.

II. MRA Allows Products Complying with US Requirements to be Sold in EU, and vice versa

The MRA lays out the conditions under which the Regulatory Body of each party will recognize the Certificates of Conformity issued by the other party. Annex III of the MRA identifies the Regulatory Authorities of the parties (one for the United States and one for each EU Member State) that have the authority to regulate issues concerning safety at sea and marine pollution, and to control the use or sale of marine equipment. The Certificates of Conformity will be issued by special Conformity Assessment Bodies of each party.

Under the MRA, designated products that comply with US requirements will be accepted for sale in the EC without additional testing, and vice versa.

The initial MRA product scope includes 43 products in the following three main categories:

- Life saving equipment (e.g. distress signals, rigid life rafts);

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- Fire protection equipment (e.g. deck coverings, flame retardant materials);

- Navigational equipment (e.g. GPS equipment, echo-sounding equipment).

With respect to each of these products, each party will accept the Certificates of Conformity issued by the other party as complying with its respective legislation and technical regulations.

A Joint Committee will be responsible for the application of the MRA. In particular, the Joint Committee will:

- Develop and maintain the list of products falling within the scope of the MRA and the respective equivalent standards and regulations

- Resolve issues concerning the functioning of the agreement, including questions of equivalence of the technical regulations

- Take all measures necessary for the smooth implementation of the MRA, including developing guidelines and providing assistance and control

- Providing guidelines for the harmonization of the technical requirements of the parties

The Parties have also agreed to establish "contact points" to answer inquiries from the other party and other interested parties.

The enforcement of the MRA is not likely to encounter significant difficulties. Both US and EU conformity assessment requirements are in compliance with the International Maritime Organization (IMO) conventions. The initial product scope is based on a detailed product-by-product determination of the equivalency of US and EU marine equipment requirements, and includes only products facing identical requirements in each market. However, if one party changes its requirements for a certain product and the equivalency is therefore not maintained, the product in question will be taken out of the scope of the MRA. The parties also emphasize that the levels of safety and protection in the EU and the US – concerning safety at sea as well as prevention of marine pollution – will not deteriorate as a result of the implementation of the MRA.

The US industry estimates that the current two-way trade in these initial products is worth USD 150-200 million annually. However, the parties aim to expand the scope of the agreement to other marine equipment products; the overall turnover of the bilateral trade in the sector exceeds USD 1 billion.

The US and the EC further agree to cooperate in the IMO and other relevant international organizations, to establish and improve the quality and level of international requirements for marine equipment.

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OUTLOOK

Negotiations on the MRA in the framework of the Transatlantic Economic Partnership lasted for more than four years. Both US Trade Representative Robert Zoellick and EU Trade Commissioner Pascal Lamy emphasize that the MRA will facilitate bilateral trade by enhancing regulatory cooperation, which in turn will save economic agents time and money.

The MRA will enter into force later this year, one month after the parties have exchanged letters confirming their completion of the ratification procedures. The parties agreed to review the MRA periodically, in order to enhance it in accordance with their evolving policies. The first review should take place no later than two years after the MRA enters into force.

The full agreement is available at http://www.ustr.gov/regions/eu-med/westeur/2004-02-27-agreement-marine.pdf

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USTR Releases Report on Trade Barriers in Bulgaria, Hungary, Poland, Romania and Turkey

SUMMARY

On April 1, 2004 the Office of the United States Trade Representative ("USTR") published the 2004 National Trade Estimate ("NTE") Report on Foreign Trade Barriers. The annual report, required by the Omnibus Trade and Competitiveness Act of 1988 ("the 1988 Trade Act"), is an inventory of the most significant foreign barriers to US exports of goods and services, foreign direct investment by US persons, and protection of intellectual property rights ("IPR"). It examines the trade practices of the 58 largest US export markets, including some EU candidate countries, namely Bulgaria, Hungary, Poland, Romania and Turkey.

The report notes that US–EU relations are operating normally in most respects, with the exception of some "chronic barriers" that have been highlighted in previous reports and obstacles to trade, resulting from administrative regulations that miscalculate the risk posed by the products concerned. The report divides EU trade barriers into the following categories: import policies, technical regulations, sanitary and phytosanitary measures, government procurement, export subsidies, IPRs, services, investment measures, Ecommerce and others.

The full report can be found at www.ustr.gov/reports/nte/2004/eu.pdf

ANALYSIS

On April 1, 2004 the USTR published its 2004 NTE Report on Foreign Trade Barriers. In accordance with the 1988 Trade Act, the USTR prepared the report following consultations with other government agencies and using information provided by the public and private sectors. The report sheds light on the trade practices of the 58 largest US export markets, by focusing on barriers to US exports of goods and services, foreign direct investment by US persons and protection of intellectual property rights (IPR).

The report is over 500 pages long. We summarize below the sections analyzing barriers in Bulgaria, Hungary, Poland, Romania and Turkey:

I. Bulgaria

The country's total trade turnover with the US is not more than USD 600 million.

1. Import policies

- *Tariffs* – Bulgaria's trade policy is formed on the basis of its WTO membership, its EU candidate status and its system of trade agreements with EU, EFTA, CEFTA and several other countries. The NTE report emphasizes that the high MFN tariff rates and preferential trade agreements are in effect a barrier for U.S. exporters. In addition, high *ad valorem* duties act as an incentive for customs fraud. Other barriers are the arbitrary use of minimum import prices and the preferential tariff rates Bulgaria extends to the EU.

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- *Non-tariff barriers* – the main impediment to US exports to Bulgaria is the Pan-European cumulation system, especially the recently introduced elimination of the duty drawback on products originating in the US. Burdensome and arbitrary customs procedures, excessive documentation requirements and alleged corruption are further barriers to trade.

2. Standards, testing, labeling and certification – the report notes Bulgaria's effort to harmonize its standards with those of the EU. It also highlights potential barriers: sanitary and phytosanitary requirements on imports of plant and animal origin, as well as slow and non-transparent registration and reimbursement of pharmaceuticals.

3. Government procurement – the main problems in this area are associated with implementation of procedures, some unclear tendering processes and time-consuming complaint review procedures.

4. Protection of IPR – the NTE report notes that Bulgaria has modern patent and copyright laws, but emphasizes that lack of protection for trademarks is a barrier to investment. Moreover, music piracy and copyright violations are frequent; software piracy has been reduced but is still a source of concern.

5. Investment barriers – the report lists some of the major barriers to investment, such as prohibition of land ownership by foreign persons; poor enforcement of the Commercial Code; and delay in privatization of major players (e.g., telecommunications) which has slowed down market liberalization. Much-needed steps towards improving the investment environment include: improvements to bankruptcy law and procedures; judicial system reform; improved accounting standards; and reducing corruption.

6. Other barriers – the report mentions tax evasion by domestic companies and the multitude of licensing regimes

II. Hungary

In 2003 the US exported goods worth $934 million to Hungary and imported goods from Hungary worth USD 2.7 billion.

1. Import policies

- *Tariff barriers* - Hungary's trade policy is formed on the basis of its WTO membership and its EU accession on May 1, 2004. In 2002, to address the US trade deficit with Hungary, the parties signed a trade package reducing tariffs on $180 million of annual US exports to Hungary. Many US products remain subject to MFN rates; following accession most rates on industrial goods will go down, but rates on some agricultural products will increase.

- *Non-tariff barriers* - import licenses are needed for shoes, clothes, dry goods, and fish imported from non-WTO countries. Customs duty on products intended for re-export is refunded slowly.

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2. Standards, testing, labeling and certification – import restrictions delay imports of breeding animals, livestock semen, seeds for planting and new plant varieties. Moreover, unclear certification under the "EU-harmonized" certificate requirements may obstruct exports of certain animal products to Hungary. Adoption of legislation governing the use of biotechnological products in agriculture could lead to an increase of up to USD 25 million in US exports.

3. Government procurement – three provisions in the existing legislation grant preferential treatment to Hungarian companies. Some US companies question the transparency of government tenders. Some offset requirements represent a significant barrier to US companies, particularly with regard to defense exports.

4. Protection of IPR – with the exception of protection of confidential pharmaceutical test data, Hungary's laws are adequate, though enforcement is sometimes slow. Some aspects of patent protection are inconsistent with Hungary's WTO obligations. Also, inadequate enforcement means that music, software and audiovisual piracy are widespread.

5. Services barriers – certain barriers exist in civil aviation, broadcasting, professional services (in particular for lawyers and accountants), and – potentially – direct marketing.

6. Investment – foreign companies are restricted in varying degrees with regard to ownership in civil aviation, defense and broadcasting. Only Hungarians are allowed to possess farmland; this will progressively change after EU accession. Liberalization of the natural gas market is expected soon.

7. Electronic commerce – this is a relatively new area for Hungary and usage. Legislation and infrastructure lag far behind the EU. Internet and PC penetration are only 22 percent.

8. Other barriers –concern reimbursement of pharmaceuticals and prices of some medicines.

III. Poland

2003 US exports to Poland amounted to USD 759 million, while US imports from Poland were USD 1.3 billion.

1. Import policies

   - *Tariff barriers* – in 2003 some three quarters of Polish imports were duty-free; about one quarter were subject to MFN duties and about 3 percent to preferential tariffs. Following Poland's EU accession on May 1, 2004, about 3 percent of US exports to Poland (mainly agricultural products) will face higher tariffs, while the rest will enjoy lower duty rates. To date Poland has favored goods originating from its free trade partners (EU, EFTA, CEFTA, Estonia, Latvia, Lithuania, Israel, Turkey,

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Croatia, and the Faeroe Islands). A major disadvantage for exporters is the prohibitively high duty rate on alcoholic beverages (up to almost 300 percent *ad valorem*).

- *Non-tariff barriers* – some agricultural products are subject to import quotas and can be imported only by individual import permits. Poland will also implement EU sanitary requirements from May 1 onwards, which will effectively block imports of US red meat and poultry. Another barrier is the highly regulated pharmaceutical market and the barriers to registration and reimbursement of certain medicines. Also, Poland should notify certain amendments to its safeguards and antidumping procedures to the WTO this year.

2. Standards, testing, labeling and certification – Poland does not currently accept the "CE" mark or international product standards automatically. It should therefore be much easier for US exporters to sell their goods in Poland after May 1, when the country will implement EU standards, certificates and labels. Furthermore, Poland has had an arbitrary sanitary and phytosanitary policy that has caused significant losses to exporters (especially grain and oilseed exporters). Poland has already adopted laws on biotechnological products compatible with EU laws.

3. Government procurement – main concerns include lack of transparency and suspicion of corruption. After EU accession US companies should find it easier to participate in tenders, due to the elimination of preferences for Polish companies.

4. Export subsidies – the government's efforts to boost exports have not been very successful, due to the absence of export credit and export promotion institutions, coupled with low utilization of available incentives by Polish companies. After May 1 direct support will be assumed by EU bodies. Products that enjoy special export support include milk, sugar, rapeseed and grain.

5. Protection of IPR - the main problems remain inadequate copyright and trademark protection, as well as the absence of mechanisms protecting pharmaceutical patents and test data. The high piracy rates also stem from cumbersome IPR law enforcement. For pharmaceuticals, following EU accession the period of data exclusivity will increase from the present three years to six to ten years.

6. Services – barriers remain in the audiovisual and telecommunications sectors. The anticompetitive behavior of the **national** telecommunications **operator** TPSA (a virtual monopolist in the sector) is the main reason for the underdeveloped and non-liberalized market.

7. Investment – main barriers include lack of transparency in government decision-making processes, unclear tax regulations, excessive state presence in the economy, inefficient public administration and corruption.

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8. Electronic commerce – only about 20 percent of companies use ecommerce. Although a number of taxation problems have been cleared up, unresolved matters include the issue of electronic invoices and the free flow of digital products and services. Transferring personal data to the US may be problematic due to EU regulations.

9. Other barriers – weak (and sometimes hostile) public administration, ineffective judicial system and corruption.

IV. Romania

2003 US 2003 exports to Romania amounted to USD 367 million, while US imports from Romania were USD 730 million.

1. Import policies

   - *Tariff barriers* - Romania's trade policy is formed on the basis of its WTO membership and its EU candidate status. Romania's high MFN rates on spirits, wine and textiles effectively prevent US export to Romania of these products. As with the other EU candidates, US imports are often in a disadvantageous situation compared to EU imports.

   - *Non-tariff barriers* – they include arbitrary customs valuation, abolition of some tax incentives and an extremely inefficient VAT refund process.

2. Standards, testing, labeling and certification – almost 90 percent of the new standards adopted are in line with EU or ISO standards. The country is currently harmonizing its sanitary and phytosanitary measures with those of the EU; this will have severe consequences for US exports of poultry, beef and GMOs.

3. Government procurement – existing practices and the electronic government public procurement system represent important steps towards improving efficiency and curbing corruption.

4. Protection of IPR – despite modern legislation, enforcement, especially against copyright piracy and trademark violation, remains insufficient. Software and music piracy are widespread, as is the sale of illegal decoder devices for stealing video signals.

5. Services – barriers exist with regard to content broadcast on radio and TV stations and to professional services (lawyers, doctors, insurance companies). The telecommunications company retains a monopoly on fixed-line services.

6. Investment – the main impediment is the unstable legal and regulatory system.

7. Electronic commerce – the high rate of cyber-crime in Romania has forced the government to pass a law defining and punishing such crimes (mainly associated with credit card fraud).

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8. Other barriers – state-owned enterprises frequently hamper market liberalization in their sectors, not without the aid of the Romanian government (in the form of debt or tax rescheduling or cancellation). The instability of the legislation and poor enforcement are major problems. The high tax burden has led to a significant gray economy.

V. Turkey

2003 US exports to Turkey amounted to USD 2.9 billion, while US imports from Turkey were USD 3.8 billion.

1. Import policies

   - *Tariffs and quantitative restrictions* – due to its customs union with the EU, Turkey applies EU customs tariffs on third country imports. It does not impose duties on industrial imports from the EU and EFTA. The highest MFN rates are imposed on food and agricultural products and alcoholic beverages

   - *Import licenses and other restrictions* – licenses are required for products that need after-sales service. Non-tariff barriers cause delays and other uncertainties for business. At times import policies are applied non-transparently, including absence of written guidelines or refusal of import licenses.

2. Standards, testing, labeling and certification – major problems seem to be constant changes and the lack of information on sanitary and phytosanitary measures.

3. Government procurement – foreign companies sometimes face lengthy and non-transparent bidding procedures. In some cases tenders have been revised and re-opened. The current legislation gives a price preference of 15 percent to Turkish companies.

4. Export subsidies are applied to wheat, sugar and 16 other agricultural products. Exporters enjoy export insurance, credits and bank guarantees.

5. Protection of IPR - Turkey does not prohibit circumvention of technological protection measures. Turkish courts do not impose adequate penalties on pirates. Enforcement needs to be significantly improved. Pharmaceutical companies' confidential test data is not adequately protected. Trademark piracy is widespread.

6. Services – competition is limited in areas where the state-owned Turk Telekom has a monopoly or significant presence. The privatization of the company is pending. In addition there are certain barriers with regard to financial services, the oil sector, broadcasting, civil aviation, maritime transportation and professional services (lawyers, doctors and several others).

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7. Investment – despite Turkey's liberal investment regime, foreign companies often complain of excessive bureaucracy, political and economic uncertainty, an inefficient judicial system, poor corporate governance and frequent changes in the legal and regulatory system.

8. Anticompetitive practices – government monopolies have been significantly reduced. Corruption is regarded as a major problem, especially in government procurement and in the judicial system.

9. Other barriers – they include government activities in the energy sector, prohibitive taxation of cola drinks and weak corporate governance.

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USTR Announces Potential Expansion of WTO Government Procurement Agreement to New EU Member States

On April 5, 2004, the United States Trade Representative (USTR) published a notice in the Federal Register (69 FR 17730), announcing the potential expansion of the WTO Government Procurement Agreement (GPA) to the 10 new Member States that will join the EU on May 1, 2004.

Suppliers from countries that are party to the GPA are able to participate, on a reciprocal basis, in the government procurement of the other countries, subject to the terms and conditions set out in the GPA. The GPA contains a list of the entities from each country that are subject to the GPA rules.

The EU intends to make the GPA binding on the Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, and Slovakia (the accession countries), as of May 1, 2004. Prior to May 1, 2004, USTR will publish in the Federal the list of approved entities from the accession countries that will be parties to the GPA.

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FTAA

Negotiators Postpone Second Session of FTAA TNC Meeting

SUMMARY

The FTAA Trade Negotiations Committee ("TNC") Co-Chairs (the United States and Brazil) announced on March 10 that they decided to postpone the resumption of the Puebla TNC scheduled for March 18-19. The postponement reflects the difficulty negotiators have faced since the November Miami Ministerial meeting in regards to the scope of the framework agreements. Co-Chairs will announce the resumption date after they consult with the delegations.

In related news, Brazil's Ambassador to the United States, Rubens Barbosa, and USTR officials discussed FTAA positions at recent events sponsored by the DC Bar Association, the Washington International Trade Association, the American Chamber of Commerce and the Woodrow Wilson Center in Washington, D.C. Discussion at the events underscored the key obstacles between the United States and Mercosur regarding the FTAA's common set of obligations.

ANALYSIS

I. Negotiators Postpone Puebla TNC Meeting

In early February 2004, the FTAA Co-Chairs, the US and Brazil, announced that delegations at the FTAA Puebla TNC meeting needed "more time to consult with their capitals and other delegations." Negotiators were expected to reconvene in mid-March. *(Please see W&C March 2004 Report).*

Some FTAA negotiators[6] met informally in Buenos Aires the week of March 8, but failed to reach agreement on key obstacles.

A March 10 Joint Communique from the Co-Chairs explained that some delegations requested additional time to continue informal negotiations. Therefore, the Co-Chairs again postponed the resumption of the TNC meeting. During the break, delegations are expected to meet informally to attempt to resolve differences on the scope of the common set of rules and obligations in the FTAA and the procedures for plurilateral agreements. *(Please see W&C December 2003 Report).*

The TNC meeting is expected to resume in April. The Co-Chairs will announce a specific date after they consult with all of the delegations.

[6] Countries that participated in this informal meeting were: the US, Brazil, Argentina, Paraguay, Urugay, Canada, Chile, Costa Rica, Mexico, Venezuela and a representative from the Caribbean Community.

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II. US and Brazilian Officials Discuss FTAA Scope

During February, USTR and Brazilian officials discussed the scope of the common set of FTAA obligations at events sponsored by the DC Bar, the Washington International Trade Association, the American Chamber of Commerce and the Woodrow Wilson Center.

A. US Rejects "Tariff Only" FTAA

The following USTR officials discussed the U.S. position:

- Ambassador Ross Wilson - Senior Negotiator for the FTAA.
- Christopher A. Padilla – Assistant USTR for Intergovernmental Affairs and Public Liaison.
- Karen Lezny – Deputy Assistant USTR for the FTAA.

According to these USTR officials, the FTAA Puebla Trade Negotiations Committee (TNC) meeting needed to recess, as there were substantial differences in almost every area under negotiation. The differences between the US and 13 other "ambitious" countries vs. the Mercosur group have persisted since the Miami Ministerial meeting.

The officials suggested that the FTAA will now proceed on two tracks based on plutilateral agreements among 14 countries, and a standard framework agreement that all 34 countries could sign. (*Please see W&C February 13, 2004 Report).*

We highlight their comments below.

Scope of FTAA

- One of the outstanding issues at the Puebla meeting was agreement on an appropriate balance between the commitments and obligations of the different countries.
- Mercosur countries want to take on services commitments that do not go beyond its WTO/GATS commitments. They also refuse to undertake market access commitments in government procurement (except transparency) and to make commitments beyond TRIPS in intellectual property.
- USTR officials characterized the Mercosur proposal as a "tariff-only" agreement, which is unacceptable to the US.

Plurilateral Agreement

- The US and a group of 13 other countries[7] are prepared to include commitments that go beyond the WTO and other international

[7] Canada, Mexico, Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica, Panama, the Dominican Republic, Colombia, Ecuador, Peru and Chile.

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regulations in areas such as services, investment, government procurement and intellectual property rights.

- The US intends to move forward with the group of 14 to conclude a plurilateral agreement that will include a wide range of issues. The US considers the FTAA negotiations now as a two-track process, with all 34 countries agreeing on a common set of rules and obligations and the group of 14 going forward with more ambitious and comprehensive commitments.

- According to Padilla, the U.S. strategy provides leverage to the countries that want to go forward, whereas before, countries that wanted to restrain the liberalization process held the leverage.

- Responding to a question about whether the plurilateral could jeopardize the broader FTAA agreement if the plurilateral moves too fast, USTR officials said that Brazilian officials stated in Miami that Brazil would not pull back those who wanted to go further.

- According to Wilson, the U.S. Administration envisions the plurilateral as a way of linking together and harmonizing the various FTAs that exist or are under negotiation between the 14 countries. Negotiations on the core FTAA and the plurilateral are likely to move in tandem and conclude at the same time.

B. Mercosur Insists U.S. Position "Unbalanced"

Ambassador Barbosa of Brazil commented on the following:

Scope of FTAA

- Clarifies that Brazil does not want an FTAA "Light", as some USTR officials have said. On the contrary, Brazil wants a comprehensive and balanced agreement, where everything is on the table for negotiation.

- Insists that it is the US that is limiting the comprehensiveness of the FTAA by leaving out issues like domestic support for agricultural products and antidumping and preferring to pursue bilateral FTA negotiations instead of negotiating with the 34 countries of the region.

- Emphasizes that the U.S. FTAA proposal is very unbalanced, as it excludes from the negotiations issues that are very relevant for Mercosur, like agricultural support and antidumping, but requires Mercosur to be ambitious in its sensitive areas, like services, IPR, investment and government procurement. The US proposes that countries that are not prepared to negotiate more ambitious commitments in services, IPR and other areas be offered less market access. However, the US is not prepared to offer ambitious proposals on agriculture subsidies and antidumping.

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- Notes that the US has suggested that Mercosur countries wait until the end of the Doha Round to secure commitments in agriculture subsidies and antidumping. However, nobody knows when the Doha round will conclude.

U.S. Trade Politics

- Refers to a changing mood in Washington, which he believes is unfavorable to free trade. He cited the recently concluded FTAs with Central America and Australia, in which the US either refused to put sensitive sectors on the table – such as sugar in the FTA with Australia – or insisted on lengthy phase out periods.

Mercosur Position

- Mercosur is negotiating with a single voice in the FTAA, because Mercosur is something that for their members goes beyond the FTAA. For Brazil, Mercosur is a strategic project, a political decision supported by economic measures. It is a sign of the priority that Brazil gives to South America.

- To understand Mercosur's position in the FTAA negotiations, it needs to be understood that Mercosur is the least dependent Latin American region on trade with the US. Not all countries need the same rules and disciplines to promote trade and investment within the Hemisphere. For example, Brazil has not signed trade agreements with the US or the EU, but it was the second largest recipient of FDI to emerging economies in 2002. Therefore, Brazil does not need an investment agreement in the FTAA to receive foreign investment, unlike some other Latin American countries.

OUTLOOK

USTR officials and Ambassador Barbosa at the February events stated that the January 1, 2005 deadline could be met. However, analysts are skeptical about the feasibility of the FTAA January 1, 2005 deadline, especially after the second postponement of the TNC. It appears that negotiators have made very little progress since the Miami Ministerial last November.

It is unclear if and how the US and Brazil as they key players in the region will resolve their differences regarding the scope of the common set of obligations. Not surprisingly, the areas in which the US urges greater commitments from Brazil are sensitive sectors in Brazil. Brazilian analysts note that WTO plus commitments in intellectual property could affect Brazilian public health programs on AIDS-related issues. In addition, analysts indicate that greater commitments in government procurement could hinder the government's use of government procurement legislation as a tool to promote domestic industries.

From the U.S. perspective, election year politics further complicates the ability of U.S. negotiators to discuss sensitive issues. Powerful domestic lobbying groups will scrutinize the

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negotiations closely, and would politicize any attempt to lower barriers in sensitive sectors and rules-related issues.

The TNC is expected to resume discussions in April, although the Co-Chairs have not set a specific date.

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MULTILATERAL

WTO Panel Rules Against U.S. ITC Methodology in Softwood Lumber Dispute with Canada

SUMMARY

A WTO Panel has ruled that the U.S. determination of "threat of injury" caused to the domestic industry by softwood lumber imports from Canada violated U.S. obligations under both the WTO Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures (SCM Agreement). The Panel found that the threat of material injury determination made by the U.S. International Trade Commission (USITC) was not one that could have been reached by "an objective and unbiased investigating authority."

The Panel also found that the United States consequently breached its obligation to determine a "causal relationship" between the dumped or subsidized imports and the injury to the domestic industry.

ANALYSIS

I. Background: Determining "injury"

In the United States, the conduct of anti-dumping and countervailing duty investigations are divided between the Department of Commerce (DOC) and the USITC. For dumping investigations, the DOC determines the existence and the margin of dumping. For countervailing duty investigations, the DOC similarly determines the existence of and the amount of the subsidy. For both dumping and countervailing duty cases, the USITC determines injury to the domestic industry caused by the dumped or the subsidized imports.

"Injury" is defined in both the Anti-Dumping Agreement and the SCM Agreement to mean: (i) material injury to a domestic industry; (ii) threat of material injury to a domestic industry; or (iii) material retardation of the establishment of such an industry.

Canada challenged the WTO-consistency of the USITC's injury determination in the context of both the anti-dumping and countervailing duty investigations of Canadian softwood lumber imports.

II. Threat of injury: USITC's findings could not have been reached by "an objective and unbiased investigating authority"

Article 3.7 of the Anti-Dumping Agreement provides that a determination of threat of material injury shall be "based on facts and not merely on allegation, conjecture or remove possibility." It adds that the "change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent." The provision also sets out a non-exhaustive list of factors that the authorities "should consider" in making a threat of injury determination, including a significant rate of increase of dumped/subsidized imports, sufficient disposable capacity or imminent substantial increase in capacity, price depression and suppression, and inventories. Article 15.7 of the SCM Agreement provides a parallel obligation for countervailing duty cases.

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(i) "Change in circumstances": evaluating "how the future will be different from the immediate past"

The Panel complained that the text of Article 3.7 and 15.7 concerning "change of circumstances" was "not a model of clarity." However, the Panel rejected the argument that the change in circumstances "must be identified as a single or specific event." Instead, the Panel reasoned that "the change in circumstances that would give rise to a situation in which injury would occur encompasses a single event, or a series of events, or developments in a situation of the industry, and/or concerning the dumped or subsidized imports, which lead to the conclusion that injury which has not yet occurred can be predicted to occur imminently." The Panel stressed that it must be clear from the determination that the investigating authority "has evaluated how the future will be different from the immediate past, such that the situation of no present material injury will change in the imminent future to a situation of material injury, in the absence of measures."

(ii) Determining the threat of material injury: considering "the totality of factors"

As noted above, Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement require the authorities to "consider" a number of factors in determining the threat of material injury.

The Panel stated that that in order to conclude that the investigating authorities had "considered" the listed factors, it had to be apparent from the determination that the authorities "have given attention to and taken into account" those factors. In the view of the Panel, this consideration "must go beyond a mere recitation of the facts in question, and put them into context." However, the authorities are not required to make an explicit 'finding' or 'determination' with respect to the factors considered.

The Panel noted that both provisions used the term "should consider", indicating that the examination of each of the factors was not mandatory. A failure to consider a particular factor would not necessarily demonstrate a violation. Instead, the Panel said that whether a violation existed would depend on "the totality of the factors considered and the explanations given."

(iii) Factors considered by USITC: no "rational explanation"

The Panel noted that the "fundamental basis" of the USITC's affirmative threat determination was the conclusion that dumped and subsidized imports from Canada would increase "substantially." However, in examining the evidence relied on by the United States to support this determination, the Panel said that it could not accept that such a conclusion "is one that could be reached by an objective and unbiased decision maker." In the view of the Panel, the evidence relied upon by the USITC could at most support a conclusion that imports of softwood lumber would continue at historical levels, and "might increase somewhat, in keeping with increased demand." However, it found "no rational explanation" for the USITC's determination that there would be "a substantial increase in imports imminently."

The Panel found that the USITC considered each of the non-exhaustive list of factors sets out in Articles 3.7 and 15.7. However, the other factors considered by the USITC,

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including the effects of the expiration of the bilateral Softwood Lumber Agreement, did not support the conclusion of an imminent substantial increase in imports.

Therefore, the Panel concluded that the USITC's determination violated both Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement. The Panel concluded that the USITC's finding of a "likely imminent increase in imports" was not one that could have been reached by "an objective and unbiased investigating authority."

III. "Causation" requirement: need to "separate and distinguish" other factors causing injury

Canada also argued that the USITC had failed to determine a "causal relationship" between the dumped or subsidized imports and the injury to the domestic industry, in violation of Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement.

The Panel recalled that it had already ruled that the United States was in breach of the requirements of Articles 3.7 and 15.7 regarding the determination of threat of material injury. Therefore, according to the Panel, it followed that the causation analysis could not have been WTO-consistent. It found that "[t]he entire analysis of the USITC with respect to causation rests upon the likely effect of substantially increased imports in the near future. Having found that a fundamental element of the causal analysis is not consistent with the Agreements, it is clear to us that the causal analysis cannot be consistent with the Agreements."

The Panel also considered the so-called "non attribution" requirement, the obligation not to attribute to dumped or subsidized imports the injurious effects of other causal factors. This was the first time that a WTO Panel has considered "non attribution" in a countervailing duty case, and the Panel stated that the requirement was the same in both dumping and CVD cases.

The Panel recalled that the Appellate Body in the *U.S. Steel Safeguards* case [see our report of November 12, 2003] stated that non-attribution requires "separation and distinguishing of the effects of other causal factors from those of the dumped imports so that injuries caused by the dumped imports and those caused by other factors are not 'lumped together' and made 'indistinguishable'."

Having found that the USITC's causal analysis was WTO-inconsistent, the Panel considered that it could not "meaningfully evaluate" the question of non-attribution, and so it made no specific ruling on this issue. However, it nevertheless expressed its "serious concern" with the USITC's approach to non-attribution in a number of specific instances.

IV. "Positive evidence" and an "objective examination": no consequential violation

Article 3.1 of the Anti-Dumping Agreement provides that a determination of injury shall be based on "positive evidence" and involve an "objective examination" of the volume of dumped imports and the effect of dumped imports on prices in the domestic market for like products, as well as consequent impact of these imports on domestic producers. Article 15.1 of the SCM Agreement sets out a parallel obligation with respect to subsidized imports.

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Canada had argued that Article 3.1 and Article 15.1 contained "substantive, overarching obligations" that had to be observed by investigating authorities in making injury determinations. In Canada's view, the violations of other, more specific provisions of Article 3 of the Anti-Dumping Agreement or Article 15 of the SCM Agreement would demonstrate the violations of Article 3.1 and Article 15.1.

The Panel declined to make such a finding of consequential violation. The Panel said that if any aspect of the USITC determination were found to be inconsistent with Articles 3 or 15, "we can see no reason to conclude, in addition, that it also violates Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement." The Panel said that "additional arguments" would be required to support a violation of those two provisions. No such additional arguments were made by Canada, and so the Panel declined to rule on Articles 3.1 or 15.1.

The Panel also found it unnecessary to make findings on Canada's claim that the USITC did not take "special care" in making its threat of injury determination. Therefore, the Panel similarly chose not to rule on Canada's claims under Article 3.8 of the Anti-Dumping Agreement or Article 15.8 of the SCM Agreement.

V. Other Canadian challenges rejected

Canada had argued that the USITC determination breached Articles 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement, which require an investigating authority to consider whether there has been a significant increase in the volume of the dumped or subsidized imports, whether there has been significant price undercutting by those imports, or whether the effect of such imports is to depress or suppress prices to a significant degree. Canada also alleged a breach of Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement, which provide for the examination of the impact of dumped/subsidized imports on the domestic industry.

The Panel said that in every case in which threat of material injury is found, there must be an evaluation of the condition of the industry in light of the factors enumerated in such provisions, to establish the "background" against which the impact of future dumped or subsidized imports must be assessed. However, once such an analysis had been carried out, there was no need for what Canada referred to as a second, "predictive analysis" of these injury factors.

VI. No recommendation on implementation

Canada had requested that the Panel recommend that the United States bring its measures into conformity with its WTO obligations by "revoking the final determination of threat of injury, ceasing to impose anti-dumping and countervailing duties and returning the cash deposits imposed" as a result of U.S. actions. However, the Panel declined to make any recommendation as to implementation, indicating that "the choice of means of implementation is decided, in the first instance, by the Member concerned." The Panel saw "no particular need to suggest a means of implementation."

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VII. Amicus briefs rejected

The Panel received an unsolicited *amicus curiae* ("friend of the court") brief from an environmental NGO. The Panel rejected it, in the light of "the absence of consensus among WTO Members on the question of how to treat *amicus* submissions."

The decision of the Panel in *United States - Investigation of the International Trade Commission in Softwood Lumber from Canada* (DS 277) was released on March 22, 2004.

OUTLOOK

This decision in noteworthy, in that it is one of the very few WTO cases to have examined the requirements that apply when a WTO Member determines that there is a "threat of material injury" to its domestic industry as a result of dumped or subsidized imports.

The "threat of injury" provisions of both the Anti-Dumping Agreement and the SCM Agreement, as drafted, impose stringent conditions. The determination of threat must be "based on facts and not merely on allegation, conjecture or remote possibility." Moreover, the "change of circumstances" referred to in the provision must be "clearly foreseen and imminent." However, until now, there has been very little guidance from Panels as to how this provision should be applied in practice.

The Panel emphasized that it must be clear from the determination that the investigating authority "has evaluated how the future will be different from the immediate past, such that the situation of no present material injury will change in the imminent future to a situation of material injury, in the absence of measures [emphasis added]." It will be difficult for investigating authorities to meet this rigorous test. At the same time, the exacting standard set out by the Panel is consistent with the strict language of the Agreements. The Panel's decision confirms that threat of injury determinations will not be easy to justify in practice.

Canada challenged U.S. law only "as applied" in this specific case, and so any implementation will not require any changes to U.S. law. The Panel also declined Canada's request to make a recommendation as to how the United States could implement. If the United States implements by asking the USITC to make a redetermination, and the Commission issues another injury determination, this could well generate new litigation.

This report is one of several recent Panel and Appellate Body cases on Softwood Lumber, many of which have handed down split decisions. As with previous cases, this new decision seems unlikely to move the two sides any closer to the settlement of this longstanding, multi-billion dollar trade dispute.

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WTO Appellate Body Ruling Could Affect US GSP Program

SUMMARY

The WTO Appellate Body has overturned the ruling of a WTO Panel on the issue of the conditions that apply when benefits are granted by developed countries to developing countries under a Generalized System of Preferences (GSP). The Panel had determined that any such preferences had to be provided to *all* developing countries equally, rather than to individual or selected developing countries. The Appellate Body reversed the Panel on this key point, finding that the so-called "Enabling Clause" (a special provision that allows developed countries to grant tariff preferences to developing countries) permitted "additional preferences for developing countries with particular needs." However, the Appellate Body found the EC "Drug Arrangements", which provide additional GSP benefits to a dozen countries engaged in narcotics interdiction efforts, could not be justified under the Enabling Clause, because it did not provide identical treatment to all GSP beneficiaries that were similarly affected by the drug problem.

ANALYSIS

I. Background: Measures at issue and key GATT/WTO provisions

Background: the EC "Drug Arrangements"

The European Communities grants tariff preferences to certain goods from developing countries as part of its Generalized System of Preferences. In addition to the regular GSP benefits, the EC provides further preferences to a dozen countries (Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Pakistan, Panama, Peru and Venezuela) included in the "Drug Arrangement", a special program designed to assist such countries to combat drug production and trafficking. The tariff reductions granted to the twelve countries under the Drug Arrangements are better than the preferences granted by the EC to all other developing countries. This required an assessment of the MFN obligations of the EC in light of the "Enabling Clause."

GATT Article I: Most Favored Nation obligation

GATT Article I:1 provides the basic "most favoured nation" obligation applicable to trade in goods. It provides in part that "any advantage, favour, privilege or immunity" granted by any WTO Member to any product of any other country must be accorded "immediately and unconditionally" to the like products of all WTO Members. The MFN obligation is very broad, and has generally been given a broad reading by WTO Panels and the Appellate Body.

The Generalized System of Preferences (GSP)

The GSP originated in debates that took place within the United Nations Conference on Trade and Development (UNCTAD) in the 1960s. In 1971, a number of developed country GATT parties obtained a ten-year waiver to enable them to establish "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries." In 1979, prior to the expiration of the waiver, the GATT Contracting Parties adopted the so-

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called "Enabling Clause", which incorporated and expanded the 1971 waiver. The Enabling Clause, in turn, became part of GATT 1994.

The "Enabling Clause"

The Enabling Clause states that notwithstanding the MFN obligations of GATT Article I, "contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties." The Enabling Clause applies to "preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences."

The Enabling Clause also states that any differential or more favourable treatment provided by developed countries to developing countries "shall…be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries."

II. Panel Decision, December 1, 2003: Preferences must be provided to all developing countries equally

On December 1, 2003 [see our report of December 3], a WTO Panel found that the EC violated its WTO obligations by providing additional tariff preferences to developing countries under the Drug Arrangements. The Panel found that this was inconsistent with the MFN obligations of the EC under GATT Article I, and could not be justified either under the Enabling Clause, or as an exception to "protect human life or health."

The Panel ruled that under the Enabling Clause, any preferences must be provided to *all* developing countries equally, rather than to *individual* or selected developing countries.

III. Appellate Body decision, April 7, 2004: Treating different developing countries differently

The Enabling Clause as an exception to the MFN principle

The Panel had found that the Enabling Clause was an exception to GATT Article I, and that the EC had to invoke the Enabling Clause as an "affirmative defence" to India's MFN claim under Article I. The EC contested this finding, arguing on appeal that the Enabling Clause was not an exception to Article I, but rather was a "positive rule setting out obligations" that existed "side-by-side and on an equal level" with Article I. Therefore, in the EC's view, any challenge by India to the Drug Arrangement had to be made under the Enabling Clause itself.

The Appellate Body's determination on this issue had direct implications for the burden of proof, as discussed below. Under the normal rules of WTO dispute settlement, the complaining party must prove that a responding party has violated its obligations, while the burden is on the respondent to prove that its measure satisfied the conditions that would entitle it to a valid defence.

The Appellate Body noted that the Enabling Clause, by its own terms, was said to apply "notwithstanding" Article I. It therefore agreed with the Panel that the Enabling Clause

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had to be read as an exception to GATT Article I. The Appellate Body found that the Enabling Clause exempted WTO Members from complying with the MFN obligations in GATT Article I for the purpose of providing differential and more favourable treatment to developing countries, provided that such treatment met the conditions set out in the Enabling Clause.

Burden of Proof: complainant must "define the parameters" of the defence

Having established that the Enabling Clause was an exception to GATT Article I, the Appellate Body recalled that, as a general rule, the burden of proof for an exception falls on the respondent.

However, the Appellate Body said that the particular circumstances of this case called for a "special approach", given "the fundamental role of the Enabling Clause in the WTO system, as well as its contents." It said that the Enabling Clause played a vital role in promoting trade as a means of stimulating economic growth and development, and as such was "not a typical 'exception' or defence' in the style of Article XX of the GATT 1994, or of other exception provisions identified by the Appellate Body in previous cases."

Therefore, the Appellate Body ruled that "it is insufficient in WTO dispute settlement for a complainant to allege inconsistency with Article I:1 of the GATT 1994 if the complainant also seeks to argue that the measure is not justified under the Enabling Clause." In the view of the Appellate Body, alleging a mere inconsistency with GATT Article I would fall short of the requirement in Article 6.2 of the Dispute Settlement Understanding for panel requests to "present the problem clearly." Accordingly, a complaining party was required to identify the relevant provisions of the Enabling Clause in its panel request. Otherwise, there would be an "unwarranted burden on the responding party." The tribunal reasoned that:

Exposing preference schemes to open-ended challenges would be inconsistent, in our view, with the intention of Members, as reflected in the Enabling Clause, to "encourage" the adoption of preferential treatment for developing countries and to provide a practical means of doing so within the legal framework of the covered agreements. Accordingly, although a responding party must defend the consistency of its preference scheme with the conditions of the Enabling Clause and must prove such consistency, a *complaining* party has to define the parameters within which the *responding* party must make that defence. [original emphasis]

Thus, although the burden of justifying the Drug Arrangements under the Enabling Clause fell on the EC, India was required to identify, in its panel request, which obligations in the Enabling Clause the Drug Arrangements allegedly breached, and to make submissions in support of this allegation. The Appellate Body found that India had done so in this case.

Providing "non discriminatory" treatment: "needs of developing countries are varied and not homogenous"

As noted above, the Enabling Clause allows developed countries to provide "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries", without according such treatment to other WTO Members. The Panel had found that the term "non discriminatory" required that "*identical* tariff preferences under GSP schemes [must] be provided to *all* developing countries without differentiation…."

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The Appellate Body overturned the Panel on this issue. It stated that the term "non discriminatory" did "not prohibit developed country Members from granting different tariffs to products originating in different GSP beneficiaries", provided that such differential tariff treatment met the remaining conditions in the Enabling Clause. However, the Appellate Body cautioned that in granting such differential tariff treatment, identical treatment must be available to all "similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the 'development, financial and trade needs' to which the treatment in question is intended to respond."

The Appellate Body rejected the Panel's concerns that allowing tariff preferences such as those under the Drug Arrangements would result in what the Panel said would be "the collapse of the whole GSP system and a return back to special preferences favouring selected developing countries." The Appellate Body found this conclusion "unwarranted", as "the term 'generalized' requires that the GSP schemes of preference-granting countries remain generally applicable."

The Appellate Body also recalled that the Enabling Clause stated that the differential and more favourable treatment provided by developed countries to developing countries "shall…respond positively to the development, financial and trade needs of developing countries." The Appellate Body disagreed with the Panel's conclusion that this provision did not permit the granting of preferential tariff treatment exclusively to a sub-category of developing countries. It noted that the purpose of such special and differential treatment under the Enabling Clause was to foster the economic development of developing countries, and that it was "simply unrealistic to assume that such development will be in lockstep for all developing countries at once, now and for the future." Moreover, the Appellate Body stressed that the Enabling Clause authorized developed countries to "'respond positively' to 'needs' that are *not* necessarily common or shared by all developing countries. Responding to the 'needs of developing countries' may thus entail treating different developing-country beneficiaries differently." [original emphasis]

Therefore, the Appellate Body concluded that "by requiring developed countries to 'respond positively' to the 'needs of developing countries', which are varied and not homogenous", a GSP scheme could be 'non discriminatory' even if "identical" tariff treatment was not accorded to "all" GSP beneficiaries. The Appellate Body found that the Enabling Clause allowed for "the possibility of additional preferences for developing countries with particular needs." The tribunal added that under the Enabling Clause, any positive response of a preference-giving country to the varying needs of developing countries must not "impose unjustifiable burdens on other Members." The Appellate Body provided no guidance as to what would constitute such an "unjustifiable burden."

"Closed List" EC Drug Regulation falls short of the Enabling Clause Standards

The Appellate Body stated that while the Enabling Clause did not prohibit the granting of different tariffs to products originating in different sub-categories of GSP beneficiaries, the EC Drug Arrangements was not available to all GSP beneficiaries that are "similarly affected" by the drug problem. The Drug Arrangements were limited to twelve beneficiary countries, with no mechanism to add new beneficiaries to the list.

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The Drug Arrangements did not set out any clear prerequisites, or "objective criteria" that, if met, would allow for other developing countries, similarly affected by the drug problem, to be included as beneficiaries. Moreover, the regulation provided no means by which a beneficiary could be removed from the Drug Arrangements on the ground that it was no longer "similarly affected by the drug problem."

Therefore, the Drug Arrangements failed to meet the "non discriminatory" requirement under the Enabling Clause, i.e. it did not provide that identical tariff treatment was available to all similarly-situation GSP beneficiaries. In the view of the Appellate Body, "such a 'closed list' of beneficiaries cannot ensure that the preferences under the Drug Arrangements are available to all GSP beneficiaries suffering from illicit drug production and trafficking." Moreover, the Drug Arrangements had no criteria or standards to provide a basis for distinguishing beneficiaries under the Drug Arrangements from other GSP beneficiaries. The EC regulation did "not define the criteria or standards that a developing country must meet to qualify for preferences", and therefore there was "no basis to determine whether those criteria or standards are discriminatory or not."

Therefore, the EC Drug Arrangements regulation was inconsistent with the MFN obligations of the EC under GATT Article I, and was not justified under the exception provided by the Enabling Clause.

The decision of the Appellate Body in European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (DS246) was released on April 7, 2004.

OUTLOOK

This decision is of critical importance in determining the parameters under which developed countries may extend benefits to developing countries under GSP schemes. Many developed countries operate extensive GSP programs, and so the ramifications of the Appellate Body's decision extend far beyond this particular case.

The December 2003 Panel ruling – that GSP benefits had to be provided to all developing countries equally, without any differentiation – potentially jeopardized the programs provided by the EC and the United States, which offer special benefits to support countries engaged in efforts to combat drug production and trafficking. However, the Appellate Body determined that developed countries may tailor their GSP programs to address the specific needs of similarly-situated developing countries. Essentially, the Appellate Body rejected the "one size must fit all approach" adopted by the Panel in this case.

In this particular case, the Appellate Body found that the EC Drug regulation fell short of the requirements of the Enabling Clause, in that it operated on the basis of a "closed list", with no possibility of modifying the list of beneficiaries. The program was not available to all developing countries that were similarly affected by the narcotics problem.

However, the deficiencies identified by the Appellate Body could easily be remedied by the EC. If the EC chose to do so, it could make relatively minor adjustments to its regulation to ensure that other affected countries had the opportunity to benefit. Thus, the principal impact of this decision relates not to the WTO-inconsistency of the EC's current

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regulation, but as stated earlier, the broader principle enunciated by the Appellate Body that GSP benefits may be extended to selected, albeit "similarly situated", developing countries.

Another noteworthy aspect of this report is that the Appellate Body has partially modified the burden of proof that applies in WTO dispute settlement, at least for disputes involving the Enabling Clause. The Appellate Body noted that the Enabling Clause is an exception to the MFN obligation, and that as general rule, the burden falls on the responding party to demonstrate that an exception applies. However, the Appellate Body adopted a "special approach" to the burden of proof, in the light of the "fundamental role of the Enabling Clause in the WTO system, as well as its contents." The tribunal said that a complainant was required to identify the relevant provisions of the Enabling Clause in its panel request, in order to meet the requirement of Article 6.2 of the Dispute Settlement Understanding to "present the problem clearly." Although the responding party retained the ultimate burden of proving that the exception applied, the complainant nevertheless must refer to the Enabling Clause in its panel request. In the view of the Appellate Body, the complaining party had to "define the parameters within which the responding party must make that defence."

If the Enabling Clause is indeed an exception to a WTO obligation, then seems highly anomalous that a complaining party should have to cite the exception in its panel request. It should be up to the respondent, not the complainant, to raise any exceptions or defences that might apply.

The ruling of the Appellate Body on this issue may spur even more challenges to the terms of reference of panels under DSU Article 6.2. In other disputes, responding parties may seek to argue that a particular exception, set out in another agreement, also plays a "fundamental role", such that a complainant was required to cite it in the panel request. At a minimum, the Appellate Body's ruling on this issue will create additional uncertainty about the requirements applicable to panel requests.

This marks the first time in WTO dispute settlement that a complaining party has been required to "define the parameters" of a defence, and this approach does not appear to be justified either by the jurisprudence or by DSU Article 6.2.

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