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WTO AND REGIONAL TRADE AGREEMENTS

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SUMMARY OF REPORTS

United States

We want to alert you to the following developments:

- ITC announces hearing on foreign markets for logistic services; requests comments.
- USTR quick to reject China currency petition
- FTC announces amendments to appliance labeling rule.
- President Bush grants GSP treatment to Iraq.
- USTR requests comments on GSP designation for Serbia and Montenegro.

Free Trade Agreements

We want to alert you to the following developments:

- President Bush signs implementing legislation U.S.-Morocco FTA.
- US And Bahrain sign FTA; implementation date uncertain.
- ITC releases report on potential economywide and selected sectoral effects DR-CAFTA.
- US and Uruguay conclude Bilateral Investment Treaty.

Customs

We want to alert you to the following customs developments:

- CSI becomes operational in milestone 25 ports.
- COAC Holds Meeting in Buffalo, New York.
- CBP to conduct test for truck manifest data; invites comments.
- APHIS amends wood packaging regulations for imports

Petitions and Investigations

Domestic Industry Files Petition Against Polyvinyl Alcohol

An antidumping petition was recently filed against Polyvinyl Alcohol.

USTR Requests ITC Advice on Probable Effect of Modifications to "NAFTA Rules of Origin" Regarding Fibers And Yarns

A 103 request regarding Fibers and Yarns from Canada and Mexico was recently filed with the ITC.

US – European Union

USTR Requests Comments on Potential Tariffs for Certain EU Goods

On September 10, the United States Trade Representative (USTR) requested comments on a list of goods for which tariff concessions may be withdrawn and duties may be increased in the event the United States cannot reach agreement with the European Union (EU) for adequate compensation owed under World Trade Organization (WTO) rules as a result of EU enlargement and EU changes to its rice import regime. Comments are due by September 28, 2004.

US – Latin America

Argentina

Argentina Skeptical of 2005 FTAA Deadline; Duhalde Supports Integration in South America

Argentine Undersecretary for Economic Integration Eduardo Sigal was quoted in press reports in late July saying that completion of the FTAA by 2005 would be a "miracle". He blamed the US for lack of FTAA progress due to its resistance to negotiate contentious agricultural issues, among other things.

FTAA progress in 2004 has been relatively slow, and significant progress is not expected until after the U.S. elections in November.

In related news, Former President Duhalde has called for the creation of a "Community of South American Nations". He noted that negotiations towards the integration of South America are advancing at a faster pace than the FTAA negotiations.

FTAA

FTAA Could Benefit from WTO Progress; Regional FTAs and U.S. Election Will Influence FTAA Content

The long-stalled talks on the Free Trade Area of the Americas ("FTAA") could get a boost from the recent deal among WTO members on framework agreements to move the Doha Round forward. Besides progress at the WTO, the outlook for the FTAA depends on other factors including FTA activity in the region and U.S. presidential elections. Many countries in the region believe that FTAs can create market-access opportunities in the event that WTO negotiations falter, and serve other regional integration objectives (e.g., Mercosur's regional integration). The strategy of expanding FTA networks on various levels (bilaterally, regionally and multilaterally) is reflective of a broader global trend.

Multilateral

WTO Authorizes EC, Japan, Korea, Mexico, Chile, Brazil, Canada and India To Impose Retaliatory Sanctions Against US Over Byrd Amendment

A Panel of WTO arbitrators has granted authorization to eight WTO Members to impose retaliatory trade sanctions against the United States in the so-called "Byrd Amendment" case. The ruling will permit each of the EC, Japan, Korea, Mexico, Chile, Brazil, Canada and India to impose punitive tariffs on U.S. goods. Each complainant may impose sanctions valued at 72% of duties collected on its exports under the Byrd Amendment, which the arbitrators determined to be the trade effect of this WTO-inconsistent U.S. legislation.

WTO Appellate Body Dismisses US Claim That Canadian Wheat Board Violates WTO Rules

The WTO Appellate Body has dismissed a claim by the United States that the Canadian Wheat Board violates the "state trading enterprises" (STE) rules of the GATT 1994. The Appellate Body, like the Panel before it, read the STE rules in a relatively narrow manner, rejecting U.S. arguments on all major interpretive issues. The Appellate Body stated that "the United States appears to construe [the STE rules] as requiring STEs to act not only as commercial actors in the marketplace, but as *virtuous* commercial actors, by tying their own hands." The Appellate Body stressed that it could not accept the notion that STEs must "refrain from using the privileges and advantages that they enjoy because such use might 'disadvantage' private enterprises."

Major Exporting Countries Offer Varying Perspectives on the Impending Phase-Out of Global Textile Quotas

On September 8, 2004, the Washington International Trade Association (WITA) hosted a discussion on textile and apparel quotas. The speakers included officials from major textile exporting countries China, Pakistan, Bangladesh and Honduras. The officials provided varying perspectives on the implications of the phase out this year of global textile quotas under the WTO Agreement on Textile and Clothing (ATC).

REPORTS IN DETAIL

UNITED STATES

ITC Announces Hearing On Foreign Markets For Logistic Services; Requests Comments

On August 27, 2004, the International Trade Commission (ITC) announced that it has initiated an investigation on foreign markets for logistic services, entitled *"Logistic Services: An Overview of the Global Market and Potential Effects of Removing Trade Impediments"* (Investigation No. 332-463). The investigation was requested by the United States Trade Representative (USTR), who will use it to support U.S. negotiations of bilateral Free Trade Agreements (FTAs) and in the World Trade Organization (WTO).

In particular, the investigation will:

- provide an overview of the global logistic services market, including major industry players, factors driving growth, and industry operations;
- examine trade and investment in selected regional logistic service markets, including impediments to the provision of international logistic services, if any; and
- discuss and analyze the potential effects of removing impediments to logistic services on trade and economic welfare.

The ITC also announced that it will hold a public hearing on November 18, 2004, and requested for comments, which are due by December 14, 2004. The ITC expects to submit the full report by May 6, 2005.

USTR Quick to Reject China Currency Petition

On September 9, 2004, USTR immediately rejected a Section 301 petition to investigate China's currency policy filed earlier that day by the China Currency Coalition (CCC). The petition accuses China of undervaluing its currency the yuan by 40 percent in pegging it to the US dollar and thus giving that country an unfair trade advantage. The CCC also alleges that China's currency policy violates its WTO obligations.

The American Federation of Labor – Congress of Industrial Organizations (AFL-CIO), a CCC member, criticized USTR's decision as hasty, arguing that "the nearly instant rejection of the 200-page petition raises questions as to whether it was even read by administration officials. This is undoubtedly the fastest rejection of such a petition in history." Some Members of Congress including Senator Lindsey Graham (R-South Carolina) also back a tougher stand on China; the proposed Schumer-Graham bill would require China to reform its currency practices within 180 days or face penalties.

However, some members of the Fair Currency Alliance (FCA) - a broader group formed to address China currency policy, oppose the filing. For example, the National

Association of Manufacturers (NAM) stated that the petition is counterproductive in light of ongoing consultations with China on revaluation of its currency. The American Forest and Paper Association stated that the timing of the 301 filing is not useful and believes the Administration is on the right track in addressing the issue.

USTR has responded that accepting the remedy of the 301 petition would, "...create a 40% tariff, hurting US exports, destroying U.S. jobs and endangering our economic recovery...(and) be a retreat into economic isolationism." USTR believes that through bilateral efforts, China is moving in the right direction toward a more flexible market-based exchange rate.

FTC Announces Amendments To Appliance Labeling Rule

On September 9, 2004, the Federal Trade Commission (FTC) published a notice in the Federal Register (69 FR 54558), amending the Rule Concerning Disclosures Regarding Energy Consumption and Water Use of Certain Home Appliances and Other Products Required Under the Energy Policy and Conservation act ("Appliance Labeling Rule").

In particular, the FTC:

- Amends the Appliance Labeling Rule by publishing new ranges of comparability for required labels for standards and compact dishwashers. The current ranges of comparability for central air conditioners and heat pumps remain in effect until further notice.

- Amends Portions of Appendices H (Cooling Performance and Cost for Central Air Conditioners) to reflect the current Representative Average Unit Cost of Electricity.

- Makes a minor correction to the water heater range tables published on July 14, 2004 (69 Fr 42107).

The amendments will enter into effect on December 8, 2004.

President Bush Grants GSP Treatment To Iraq

As announced in the Federal Register on September 9, 2004 (69 FR 54739), President George W. Bush on September 7 issued a Presidential Proclamation, designating Iraq as a beneficiary developing country under the Generalized System of Preferences (GSP) program. The designation will become effective 15 days after the Proclamation, on September 22, 2004.

The GSP program grants duty-free treatment to specified products that are imported from than 140 designated developing countries and territories. The GSP was authorized by the Trade Act of 1974, and was renewed by the Trade Act of 2002.

USTR Requests Comments on GSP Designation for Serbia and Montenegro

The USTR announced in the Federal Register on September 10, 2004 (69 FR 54825), the initiation of a review to consider the designation of Serbia and Montenegro as a beneficiary developing country under the GSP program.

Free Trade Agreements

President Bush Signs Implementing Legislation U.S.-Morocco FTA

On August 17, 2004, President George W. Bush signed the implementing legislation for the United States-Morocco Free Trade Agreement (FTA) (H.R.4842). The signing came after the Senate and the House passed the implementing legislation on July 21 and 22, 2004, respectively, and was the last step before the implementation of the FTA, which will take effect starting January 1, 2005.

Concluded on March 2, 2004, the U.S.-Morocco FTA will eliminate from the date of its enactment tariffs on more than 95 percent of bilateral trade in consumer and industrial products, and phase out remaining tariffs over 9 years.

The FTA is viewed by the Bush Administration as part of a broader free trade 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, the FTAs the U.S. already has in place with Israel and Jordan, and the recently concluded FTA with Bahrain 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.

US And Bahrain Sign FTA; Implementation Date Uncertain

On September 14, 2004, United States Trade Representative (USTR) Robert Zoellick and Bahraini Minister of Finance and National Economy Abdulla Hassan Saif signed the U.S.-Bahrain FTA in Washington DC. Zoellick indicated at the signing ceremony that the FTA will liberalize all two-way trade in consumer and industrial products, and that Bahrain went further in liberalizing services than any other FTA partner.

Senator Max Baucus warned the Administration not to hurry in seeking approval of the FTA prior to Congress adjourning next month. Baucus, however, indicated that the FTA is likely to pass, but he would prefer to act after the Congressional committees had adequate time to review the agreement and propose legislation. Thus, the FTA might not be enacted until sometime early in 2005.

ITC Releases Report On Potential Economywide And Selected Sectoral Effects DR-CAFTA

On August 26, 2004, the International Trade Commission (ITC) released a report entitled *"U.S.-Central American-Dominican Republic Free Trade Agreement: Potential Economywide and Selected Sectoral Effects"* (Investigation No. TA-2104-13, USITC Publication 3717). The Trade Act of 2002 requires the ITC to submit this report to Congress and the President within 90 days of an FTA being signed. Zoellick signed the DR-CAFTA on August 5, 2004.

The report assesses 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
- The interests of U.S. consumers.

The report concludes that the DR-CAFTA will have little impact on overall U.S. economic welfare and will bring (i) a small increase in U.S. exports of textiles, apparel, leather products, petroleum and coal, and machinery and equipment; and (ii) a moderate increase in U.S. imports of textiles, apparel, leather products, and manufactured sugar. The report particularly mentions that air courier and express delivery firms will benefit from the improved customs procedures under the pact.

The full report is available at: ftp://ftp.usitc.gov/pub/reports/studies/pub3717.pdf

US And Uruguay Conclude Bilateral Investment Treaty

On September 7, 2004, USTR Robert Zoellick and Uruguayan Minister of Economy and Finance Isaac Alfie announced that the United States and Uruguay had concluded negotiations for a Bilateral Trade and Investment Treaty (BIT). The US and Uruguay first announced their intention to negotiate a BIT on November 18, 2003, at the conclusion of the Free Trade Area of the Americas (FTAA) Ministerial in Miami, Florida.

The US-Uruguay BIT intends to complement the FTAA negotiations, strengthen trade and investment ties between both countries and establish a framework to:

- protect US investments;
- promote market-oriented policies;
- support the development of international law standards consistent with these objectives; and
- indirectly promote the export of US goods and services.

The text of the US-Uruguay BIT still must undergo a legal review, which is expected to conclude in October. Parties then must sign the agreement before it can enter into force.

Customs

CSI Becomes Operational In Milestone 25 Ports

On August 13, 2004, Bureau of Customs and Border Protection (CBP) Commissioner Robert Bonner announced that the Thai port of Laem Chabang had become operational as part of the Container Security Initiative (CSI). In addition, Bonner announced on August 16, 2004 that the Malaysian port of Tanjung Pelepas had become operational.

As a result, CSI has now become operational in a milestone 25 ports in Europe, Asia, Africa, and North America. Besides Laem Chabang and Tanjung Pelepas, these ports include: Halifax, Montreal, Vancouver, Rotterdam, Le Havre, Bremerhaven, Hamburg, Antwerp, Singapore, Yokohama, Tokyo, Nagoya, Kobe, Hong Kong, Goteborg, Felixstowe, Genoa, La Spezia, Busan, Durban, Port Klang, Piraeus, and Algeciras.

Bonner noted on August 25, 2004 that the 25 ports represent the major seaports, and that CSI will now expand to strategic locations that ship substantial amounts of cargo to the U.S. and that have the infrastructure and technology to participate in the program.

COAC Holds Meeting in Buffalo, New York

On September 10, 2004, the Departmental Advisory Committee on Commercial Operations of the Bureau of Customs and Border Protection ("COAC") held its eight meeting in Buffalo, New York.

Participants reviewed reports by subcommittees including on security (e.g. C-TPAT process review, advanced cargo information), and automation (e.g. ACE funding and development). They also discussed developments in the International Trade Data System (ITDS), the Bioterrorism Act, the Focused Assessment Program and the creation of a new subcommittee focused on infrastructure issues.

CBP to Conduct Test for Truck Manifest Data; Invites Comments

On September 13, 2004, CBP, the Department of Transportation, and the Federal Motor Carrier Safety Administration (FMCSA) announced in the Federal Register (69 FR 55167) plans to conduct a National Customs Automation Program (NCAP) test concerning the transmission of automated truck manifest data. Truck Carrier Accounts that participate will have the ability to transmit electronically their truck manifest data through the Automated Commercial Environment (ACE) Portal or electronic data interchange (EDI) messaging – which are not fully operational at this time.

CBP described the test process, the evaluation methodology to be used, the eligibility requirements for participation, and invited public comment on the planned test.

The test will commence no earlier than November 29, 2004, and will be carried out in phases.

APHIS Amends Wood Packaging Regulations For Imports

On September 16, 2004, the Animal and Plant Health Inspection Service (APHIS) published in the Federal Register (65 FR 55719) a final rule amending the regulations for the importation of unmanufactured wood articles. APHIS issued the rule in order to adopt an international standard entitled "Guidelines for Regulating Wood Packaging Material in International Trade", as approved by the Interim Commission on Phytosanitary Measures of the International Plant Protection Convention on March 15, 2002.

The regulations will affect all persons using wood packaging material in connection with importing goods into the United States.

APHIS received approximately 970 comments on the proposal. The attached Federal Register notice discusses the issues raised in the comments. After reviewing the comments, APHIS has decided to make the following changes from the proposal in this final rule:

- APHIS is changing the term "solid wood packing material" to "wood packaging material" throughout the regulations; and

- APHIS is excluding from the definition of wood packaging material, and thereby excluding from treatment requirements, pieces of wood that are less than 6 mm (0.24 in) in any dimension, because pieces of wood of this size are too thin to present any significant pest risk.

US-EUROPEAN UNION

USTR Requests Comments on Potential Tariffs for Certain EU Goods

SUMMARY

On September 10, the United States Trade Representative (USTR) requested comments on a list of goods for which tariff concessions may be withdrawn and duties may be increased in the event the United States cannot reach agreement with the European Union (EU) for adequate compensation owed under World Trade Organization (WTO) rules as a result of EU enlargement and EU changes to its rice import regime. Comments are due by September 28, 2004.

ANALYSIS

On September 10, the United States Trade Representative (USTR) requested comments (65 FR 54827) on a list of goods for which tariff concessions may be withdrawn and duties may be increased in the event the United States cannot reach agreement with the European Union (EU) for adequate compensation owed under World Trade Organization (WTO) rules as a result of EU enlargement and EU changes to its rice import regime.

USTR notes that it will continue negotiations with the EU on both of these issues, but if either or both of these issues are not resolved, the United States may seek to exercise its rights under Article XXVIII of the General Agreement on Tariffs and Trade 1994 (``GATT 1994") to withdraw substantially equivalent concessions and raise tariffs on select goods primarily supplied by the EU.

OUTLOOK

Comments are due to USTR by September 28, 2004. The Trade Policy Staff Committee will also hold a public hearing on Friday, September 24, 2004, on the list which may be used for either or both of these issues.

US LATIN AMERICA

Argentina

Argentina Skeptical of 2005 FTAA Deadline; Duhalde Supports Integration in South America

SUMMARY

Argentine Undersecretary for Economic Integration Eduardo Sigal was quoted in press reports in late July saying that completion of the FTAA by 2005 would be a "miracle". He blamed the US for lack of FTAA progress due to its resistance to negotiate contentious agricultural issues, among other things.

FTAA progress in 2004 has been relatively slow, and significant progress is not expected until after the U.S. elections in November.

In related news, Former President Duhalde has called for the creation of a "Community of South American Nations". He noted that negotiations towards the integration of South America are advancing at a faster pace than the FTAA negotiations.

ANALYSIS

I. Argentine Official Says Concluding FTAA by 2005 Would Be a "Miracle"

In late July, the Argentine Undersecretary for Economic Integration Eduardo Sigal said that the FTAA was at an impasse and that it would take a "miracle" to meet the January 1, 2005 deadline.

Sigal charged that the US is responsible for the deadlock in the FTAA, since it refuses to make concessions in agriculture. He concluded that, since there is no political willingness in the US to move forward with the FTAA negotiations, meeting the 2005 deadline would be a "miracle". Due to the U.S. November elections, he said, the US decided to take no risks, and thus make no significant concessions in the FTAA until after the elections.

Some Brazilian officials agree with Sigal that there is "no point" in discussing the FTAA before the November elections. Argentine and Brazilian officials believe it would make more sense to negotiate the FTAA with the political guidance provided by the new presidential mandate.

The results of the U.S. presidential elections could influence the FTAA negotiations significantly. A Democratic administration in the US would result in greater scrutiny of the FTAA, especially in the areas of labor and environment. On the other hand, a Bush administration might refocus attention back on the FTAA.

II. Duhalde Supports South American Integration and Negotiations with Central America and the Caribbean

In July, MERCOSUR held its XXVI Summit in Puerto Iguazu, Argentina. Eduardo Duhalde, former President of Argentina, is now the appointed President of the MERCOSUR Permanent Representatives Committee.

The MERCOSUR Summit held in July consolidated the bloc's relations with other Latin American countries. Peru and Venezuela will be the next associate countries to MERCOSUR while Mexico might follow, after the completion of an FTA with the bloc. *(Please see W&C August 2004 Report).*

In early August, Duhalde declared that the last MERCOSUR Summit took a decisive step towards the creation of the "Community of South American Nations". In other occasions, Duhalde has also referred to the "Community of South American Nations" as a future "United States of South America".

In Duhalde's view, the integration of South America would give more power to the region. He mentioned that among other advantages, an integrated South America would:

- Represent the largest integrated market in the world (in terms of territory);
- Represent the first world producer of agricultural products;
- Hold enormous reserves of oil and natural gas and;
- Contain 30% of the fresh water reserves in the world.

Duhalde also supports a future association agreement between MERCOSUR and the Central American and Caribbean countries. The Brazilian and Argentine governments are exploring the possibility of launching FTA negotiations between MERCOSUR and Central America and the Caribbean.

On August 17, during a visit of President Lula to the Dominican Republic, Central American countries and the CARICOM agreed to study the feasibility of the creation of an FTA with MERCOSUR. It is still to be seen if and how such negotiations will be launched.

OUTLOOK

Duhalde's statements coincide with Brazil's foreign policy in the region. Brazil also aspires to create an integrated South America through an expanded MERCOSUR.

Argentina also is interested in pursuing South American integration. Former Argentine President Eduardo Duhalde has been helping MERCOSUR achieve this objective through his diplomatic role in the bloc. Duhalde has been traveling around Latin America trying to expand MERCOSUR's relations with Andean and Central American countries.

As a second step, after the conclusion of MERCOSUR's association agreements in South America, the bloc will focus on integrating South America with the Central American countries, the Caribbean and with Mexico.

If MERCOSUR succeeds in securing association agreements with these regions, then all of the Western Hemisphere would be integrated through these agreements, excluding the US and Canada.

FTAA Could Benefit from WTO Progress; Regional FTAs and U.S. Election Will Influence FTAA Content

SUMMARY

The long-stalled talks on the Free Trade Area of the Americas ("FTAA") could get a boost from the recent deal among WTO members on framework agreements to move the Doha Round forward. Besides progress at the WTO, the outlook for the FTAA depends on other factors including FTA activity in the region and U.S. presidential elections. Many countries in the region believe that FTAs can create market-access opportunities in the event that WTO negotiations falter, and serve other regional integration objectives (e.g., Mercosur's regional integration). The strategy of expanding FTA networks on various levels (bilaterally, regionally and multilaterally) is reflective of a broader global trend.

ANALYSIS

I. FTAA Progress Influenced by WTO Doha Round, U.S. Elections and FTAs

We analyze the prospects for the FTAA, taking into consideration the following key variables:

- World Trade Organization (WTO) negotiations
- U.S. Presidential elections
- Western Hemisphere FTAs

A. World Trade Organization (WTO) Negotiations

The agreement by WTO Members to adopt frameworks for negotiations on agriculture, industrial products, services and trade facilitation put the Doha negotiations on track again. In themselves, the texts agreed on 31 July do not advance the liberalization of trade, nor do they guarantee eventual success; the real negotiation of binding commitments has yet to begin. But the objective was to avoid another Cancun-like failure and keep the negotiations alive, and that has been achieved.

If WTO Members make progress in the Doha Round and conclude a deal (possibly by 2007), then the FTAA should benefit from the negotiations. Once WTO negotiations achieve progress on sensitive issues like agriculture domestic support, then the US and Brazil and others can shift their attention to market-access negotiations in the FTAA.

B. U.S. Presidential Elections

No significant progress is expected in the FTAA negotiations until after the 2004 U.S. presidential elections. FTAA negotiators in the United States (as well as trading partners) await guidance from whichever candidate, President Bush or Senator Kerry, who wins the election.

The next Administration is expected to either renew engagement in FTAA negotiations (likely with Bush), or insist on stronger provisions that might delay FTAA negotiations even further (likely with Kerry).

A Democratic president, or Democratic control of Congress would result in greater scrutiny of the FTAA, including insistence on the inclusion of labor and environment provisions. A Democratic President might also be more open to groups that are sensitive to reducing certain barriers in goods trade (e.g. automotive labor unions). These concerns could prolong, or raise more controversial issues in FTAA negotiations.

Continued Republican control of the Presidency and Congress would likely not alter the negotiating approach to the FTAA. In fact, once progress is made at the WTO, the Bush administration in its second term might refocus attention to the FTAA and to getting the negotiations back on track. If Zoellick departs as USTR (likely), the new USTR will also shape the pace of negotiations at the FTAA.

C. Western Hemisphere FTAs

There is currently in the Americas an intricate network (or "spaghetti-bowl") of more than 30 regional trade agreements (i.e. FTA agreements or customs unions) between FTAA countries. In addition, many other trade agreements are under negotiation. A failure or a delay in the conclusion of the FTAA negotiations could serve as an incentive for the creation of more FTAs within the hemisphere.

Supporters of the FTAA emphasize that a meaningful hemisphere-wide FTAA would help "clean up" the existing network of agreements. Failure to agree on important issues could result in an FTAA that essentially consists of numerous bilateral agreements, which would further exacerbate the complex network of FTAs in the hemisphere.

Moreover, economists and some businesses (especially small and medium sized businesses), however, warn that pursuing many FTAs could result in a "spaghetti bowl" of trade agreements. The "spaghetti bowl" could increase the cost of business due to a myriad of rules of origin, standards, and other rules established in the various FTAs.

1. US Actively Pursues FTAs

The Bush Administration is forging ahead with its competitive liberalization strategy by negotiating trade agreements at the bilateral, regional, and multilateral level.

After the FTAs with Chile and Singapore (both signed in 2003), the US has signed FTAs with Australia, the Central American Countries (including Panama and the Dominican Republic), Australia and Bahrain. Prior to the renewal of TPA, the U.S. concluded FTAs with Israel (1985), Mexico (NAFTA: 1992) and Canada (1989, merged with NAFTA in 1994), and Jordan (2000). The US is expected to conclude FTAs with the South African Customs Union and Thailand next.

In the Western Hemisphere, aside from NAFTA and Chile, the US has negotiated FTAs with CAFTA, to which the U.S. "docked" FTAs with the Dominican Republic and Panama, and has announced future negotiations with the following Andean countries: Bolivia, Peru, Ecuador, and Colombia.

Upon entrance into force of CAFTA and conclusion and entrance into force of FTAs with the Andean countries, MERCOSUR will be the only significant area in the Western Hemisphere with which the US will not have an FTA.

2. MERCOSUR Active in Regional and External FTAs

Within the Hemisphere, MERCOSUR has signed FTA agreements with Chile, Bolivia and more recently, with Peru (a member of the CAN). In addition, the MERCOSUR-CAN FTA negotiations have been concluded but the agreement has not entered into force yet.

The next significant agreement that MERCOSUR has agreed to negotiate within the Hemisphere is an FTA with Mexico. In addition, the Brazilian government is exploring the possibility of launching FTA negotiations between MERCOSUR and Central America and the Caribbean.

On August 17, during a visit of President Lula to the Dominican Republic, Central American countries and the CARICOM agreed to study the feasibility of the creation of an FTA with MERCOSUR. It is still to be seen if and how such negotiations will proceed.

Beyond the Western Hemisphere, MERCOSUR is in negotiations with the EU. MERCOSUR is also in discussions with other countries including China, India and South Africa.

II. Possible Scenarios for the FTAA

The FTAA negotiations need momentum, especially political momentum from the US and Brazil. The negotiations are stalled at the moment, but this does not mean that the negotiations will not be "back on track" in 2005.

The following are key dates and events between now and 2007:

NOV 04	**JAN 05**	**OCT 06**	**JAN 07**	**MID-07**
U.S. Presidential Election	U.S. President takes office	Presidential Election in Brazil	Brazil's President takes office	TPA Expires FTAA concluded?

The following table summarizes the key factors that might affect the FTAA in the next years:

Issue	Scenario	Effect on FTAA Negotiations
Political Administrations in the US and Brazil *(Please see table above).*	Kerry Administration in the US	Kerry is expected to continue FTAA negotiations. However, his focus on labor and environment likely would alter the U.S. position on these issues, which would increase tensions between the US and some of its FTAA partners. More complicated negotiations could further extend the negotiating timeline as negotiators consult with their capitals, and negotiate with other countries.
	Bush Administration in the US	The Bush administration is expected to continue advocating similar positions that it has adopted thus far. However, the progress in the WTO and other liberalization efforts in the hemisphere (the EU-MERCOSUR FTA, for example) could result in more flexible U.S. positions.
	Change in Brazilian Leadership	The Lula administration has identified South America as its first priority and is spending resources on efforts within the region. Strengthening ties with other developing countries, such as China and India, are also a priority for the Brazilian government. Brazilian officials note that, although Brazil actively participates in the FTAA, it is not Brazil's first priority. A change in the Brazilian presidency in 2007 may change the Brazilian FTAA position. President Lula's mandate ends in December 2006 and it is not clear if the voters will reelect him for another four-year term. If President Lula loses the next elections, another candidate may be more enthusiastic about the FTAA.
WTO Negotiations	WTO Makes Progress; Provides Momentum to FTAA Talks	The July framework agreements, particularly the deal on agriculture, should encourage Brazil and the US to achieve progress at the FTAA level. Progress at the WTO would ease pressure in the FTAA negotiations on certain issues, such as agricultural domestic support. Countries could transfer gains made in the WTO to the FTAA negotiations, and focus their resources on other issues in the FTAA.
	If WTO Negotiations Stall; FTAA Would	Lack of progress at the WTO level would undermine FTAA negotiations. Failure to

Issue	Scenario	Effect on FTAA Negotiations
	Suffer	agree on sensitive issues in the WTO could delay FTAA negotiations, and lead to a less comprehensive FTAA core agreement.
Other FTAs	FTAA Countries Continue Negotiating FTAs	More FTAs in the hemisphere could either: 1) Encourage FTAA negotiations, since countries would not want to be at a competitive disadvantage to other countries which have negotiated FTAs 2) Reduce enthusiasm for the FTAA negotiations, if countries decide it is more beneficial to "pick and choose" only certain countries for FTAs. This situation could further exacerbate the "spaghetti bowl" effect.
Economic Prospects in the Hemisphere	Region Continues to Experience Growth	Generally, there will be more support for trade liberalization, including the FTAA
	Economies in the Region Decline	Populist groups advocating anti-free trade views could become more popular, which could diminish support for the FTAA.
TPA	TPA Expires in 2007; U.S. Administration Requests Renewal in 2005.	Both Kerry and Bush are expected to favor renewal of TPA, but the composition of the U.S. Congress will determine if Congress extends TPA beyond 2007, and if the TPA terms will remain the same. Protracted U.S. congressional debate on post-2007 TPA renewal could delay FTAA negotiations.
	TPA Expires in 2007; U.S. Congress Fails to Grant Administration's Request for Renewal	Latin American countries would be very hesitant to negotiate sensitive issue in the FTAA if the U.S. Congress has authority to amend the agreement.

OUTLOOK

The chances for a comprehensive and meaningful FTAA have been declining since the Miami Ministerial in November 2003. The failure of countries at the Miami meeting to agree on the scope of an FTAA has resulted in a two-prong negotiating approach. FTAA countries are struggling to define the substance of the core agreement, which has to focus on all areas of negotiation.

The core agreement can then be augmented by plurilateral agreements, which may develop additional liberalization and disciplines for the countries that so chose. Although this approach provides greater flexibility, it is not likely to result in comprehensive liberalization. At this stage, since the scope of the FTAA core agreement has not been defined, it is too early to determine how meaningful the final FTAA will be. It appears that there will be little movement in the FTAA until Brazil hosts the next Ministerial, now expected sometime early 2005.

It is likely that FTAA countries will want to conclude an agreement by 2007, so as the 2007 deadline approaches, negotiations should intensify. The depth and breadth of the core agreement will become more apparent as negotiations progress.

Other negotiations in the hemisphere and the WTO negotiations will affect significantly the FTAA scope. The WTO negotiations could ease pressure to deal with some sensitive issues in the FTAA context. The conclusion of other FTAs, such as the EU-MERCOSUR FTA, could pressure countries to make more meaningful concessions in the FTAA to secure a deal.

MULTILATERAL

WTO Authorizes EC, Japan, Korea, Mexico, Chile, Brazil, Canada and India To Impose Retaliatory Sanctions Against US Over Byrd Amendment

SUMMARY

A Panel of WTO arbitrators has granted authorization to eight WTO Members to impose retaliatory trade sanctions against the United States in the so-called "Byrd Amendment" case. The ruling will permit each of the EC, Japan, Korea, Mexico, Chile, Brazil, Canada and India to impose punitive tariffs on U.S. goods. Each complainant may impose sanctions valued at 72% of duties collected on its exports under the Byrd Amendment, which the arbitrators determined to be the trade effect of this WTO-inconsistent U.S. legislation.

ANALYSIS

I. Background

The *Continued Dumping and Subsidies Offset Act of 2000* (the CDSOA or the Byrd Amendment) mandates the payment of anti-dumping and countervailing duties to U.S. producers who bring or support such trade remedies petitions. In 2002, both a WTO Panel and the Appellate Body found that the Byrd Amendment was inconsistent with U.S. obligations under the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures.

Following the expiration of the compliance period, eight (listed above) of the eleven original complaining parties sought authorization to retaliate. (Australia, Thailand and Indonesia agreed to extend the compliance period for the United States until December 27, 2004.) The United States contested the requested retaliation through binding arbitration.

II. Amount Of Retaliation Sought

The complainants in this case sought to retaliate against the United States in an amount to be determined each year by reference to the amount of the payments made to U.S. domestic producers under the Byrd Amendment.

Each of the eight complaining parties claimed the amount of Byrd Amendment duties collected on its products. In addition, all of the complaining parties except Chile also claimed a proportionate amount of the balance of total Byrd Amendment payments (less the duties collected on products of the other Members authorized to retaliate). They sought a 1/7 "share of the remaining annual illegal disbursements."

III. Arbitrators Reject Claim For Total Byrd Amendment Disbursements

The complainants thus argued that the level of nullification or impairment in this case corresponded, at a minimum, to the total amount of disbursements made by the U.S. government under the Byrd Amendment. The arbitrators rejected this argument, saying that a basic distinction needed to be made between (a) the violation; and (b) the nullification or

impairment that resulted from that violation. The arbitrators reasoned that, "while a violation of an obligation may affect all Members, this does not *ipso facto* result in a nullification or impairment of a given Member's benefits up to the 'value' of the violation."

The arbitrators stressed the need to "clearly differentiate between two stages in WTO dispute settlement." The first stage was "the establishment of the *existence* of nullification or impairment by panels and the Appellate Body." The second stage was a separate, subsequent process where a Member requested authorization to retaliate, and the arbitrators determined "the *level* of the benefit nullified or impaired." Thus, in the view of the arbitrators, "a violation is the *precursor* to establishing the nullification or impairment of a benefit." [original emphasis]

IV. WTO-Inconsistent Measure "As Such": Arbitrators May Consider The Law "As Applied"

The United States argued that the Byrd Amendment was found to be WTO-consistent only "as such", and so the arbitrators could not take account of the measure "as applied", i.e. actual disbursements under the law. The arbitrators rejected this argument, reasoning as follows:

- We take the view that the CDSOA *mandates* disbursements whenever certain conditions are met; that these disbursements have been found by the Panel and the Appellate Body to be a core element in their conclusion that the CDSOA violates the WTO Agreement, and that there is no reason, *for the purpose of assessing nullification or impairment*, to exclude instances of the application of the CDSOA from our consideration.

- This approach is in line with the practice of other arbitrators. For instance, the arbitrator in *US - 1916 Act (EC) (Article 22.6 - US)* considered that instances of application could be taken into account in assessing nullification or impairment by a law as such. [original emphasis]

As a result, the arbitrators concluded that they were entitled to take into account instances of the application of the Act for the purpose of assessing the level of nullification caused by the Byrd Amendment to each complainant.

V. Determining Level Of Nullification Or Impairment: The "Trade Effect" Of The Byrd Amendment

The arbitrators indicated that they did not agree with the United States that "nullification or impairment is to be limited in all instances to the direct trade loss resulting from the violation." However, they noted that the "trade effect" approach had been regularly applied in other retaliation arbitrations, and was generally accepted by Members as *a* correct approach. They therefore concluded that they should determine the trade effect, on each complainant, of the violation by the United States of its WTO obligations through the application of the Byrd Amendment.

VI. "Inducing Compliance" Not The Exclusive Purpose Of Retaliation

The arbitrators noted the importance attached by complainants to the position that retaliation was intended to induce compliance, and that this purpose should guide the determinations of the arbitrators. However, the arbitrators expressed some discomfort with this argument, noting that "the concept of 'inducing compliance'...is not expressly referred to in any part of the DSU and we are not persuaded that the object and purpose of the DSU - or of the WTO Agreement - would support an approach where the purpose of suspension of concessions or other obligations...would be exclusively to induce compliance." In the view of the arbitrators, "at most it can be only one of a number of purposes" in authorizing retaliation. They also expressed concern that by relying on "inducing compliance" as the benchmark, they could "run the risk of losing sight of the requirement...that the level of suspension be *equivalent* to the level of nullification or impairment." [original emphasis]

VII. Economic Modeling - Establishing A "Trade Effect Coefficient"

The arbitrators then turned to economic modeling to determine the trade effect of the Byrd Amendment. After assessing the relative merits of the economic models proposed by each of the two sides, the arbitrators used a modified version of the model proposed by the complainants.

One of the difficult methodological problems the arbitrators faced was the so-called "pass-through" effect, i.e. the extent to which Byrd Amendment disbursements are applied by U.S recipients to reducing the price of their products. The United States argued that the pass-through factor was zero, a position the arbitrators dismissed as "highly unrealistic." The complainants argued that there was a pass-through of 100%, which the arbitrators similarly rejected as "quite unlikely in reality." The arbitrators then estimated that the "trade effect coefficient" of the disbursements could be estimated at 0.72, i.e. an effective pass-through effect of 72%. With this approach, the arbitrators defined a coefficient by which future disbursements under the Byrd Amendment would be multiplied to reach a value of the trade effect for each complainant.

The arbitrators thus concluded that the level of nullification or impairment was deemed to correspond, for each complainant and for a given year, to the amount of disbursements under the Byrd Amendment for the most recent year for which data was available relating to the duties paid on imports from that complainant, multiplied by 0.72.

VIII. Arbitrators Reject Award For "Share Of The Remaining Illegal Disbursements"

The United States objected to the fact that the complainants (except Chile) had sought authorization to retaliate for duties collected under the Byrd Amendment for imports from the other countries, i.e. non-complaining parties affected by Byrd. The arbitrators accepted the U.S. position on this issue, concluding that a complainant could only request retaliation with respect to the trade effect caused by Byrd Amendment disbursements relating to its own exports.

IX. Varying The Level Of Authorized Retaliation: The "Cost Of The Violation For The United States Could Decrease"

The United States argued that the arbitrator should establish a single level of suspension for each complainant, and that the DSU did not permit a complainant to alter the level of suspension in the future. The arbitrators rejected this argument, saying that there was no obligation to "identify a single and enduring level of nullification or impairment." The arbitrators saw "no limitation in the DSU to the possibility of providing for a variable level of suspension if the level of nullification or impairment also varies." The arbitrators added that:

We have been presented with convincing evidence that, if the CDSOA remains in force, the amount of disbursements is likely to increase in the coming years. We are conscious of the fact that higher countermeasures may not actually induce compliance in all instances. However, if we were to decide on a level of suspension fixed once [and] for all on the basis of the first years of application of the CDSOA, it is possible that the level of suspension of concessions or other obligations would become, as time goes by, significantly less than the actual level of nullification or impairment resulting from the continued application of the CDSOA. In other words, the cost of the violation for the United States could decrease. In such a case, the incentive to comply would most probably decrease too. We believe that such a risk exists in the present case and justifies that we determine a variable level of nullification or impairment and, consequently, a variable level of suspension of concessions or other obligations.

The arbitrators also stated that they agreed with the arbitrators in *EC - Hormones* and *US - 1916 Act* that the United States could have recourse to the appropriate dispute settlement procedures in the event that it considered that the application of the retaliation by a complaining party exceeded, for a given period, the level of nullification or impairment.

The eight parallel decisions of the arbitrators in *United States - Continued Dumping and Subsidy Offset Act of 2000: Recourse to Arbitration by the United States under Article 22.6 of the DSU* were released on August 31, 2004.

OUTLOOK

Under WTO rules, a complaining party can retaliate against a defending party where the defendant has failed to comply with a prior panel or Appellate Body ruling. It can do by "suspending concessions", i.e. hiking duties on the imports of the defending party. However, such retaliation will be authorized only to the extent that arbitrators agree that the "level of the suspension of concessions" is "equivalent to level of the nullification or impairment", i.e. the trade damage sustained by the complainant as a result of the defendant's WTO-inconsistent measures.

In assessing equivalence in this case, the arbitrators determined the trade effect of the Byrd Amendment on each complainant. This, in turn, highlighted a major difference between the two sides on the so-called "pass-through" effect, or the extent to which Byrd Amendment disbursements are applied by U.S recipients to reduce the price of their products. The United States argued that the pass-through effect was zero, i.e. that U.S. producers receiving the Byrd Amendment payments did not lower their prices at all. The complainants argued that the pass-through factor was 100%, i.e. the U.S. recipients applied the full amount received to

the price of their products. The arbitrators rejected both of these positions, and used economic modeling to determine that a reasonable "trade effect coefficient" of the disbursements could be estimated at 0.72.

Setting aside the technicalities of "trade effect coefficients", this means that each complainant will be able to impose annual punitive sanctions on U.S. imports up to a value of 72% of the Byrd Amendment duties paid on imports from that complainant.

Significantly, the arbitrators ruled that the level of retaliation could vary from year to year. They rejected the notion that they had to "identify a single and enduring level of nullification or impairment." They saw "no limitation...to the possibility of providing for a variable level of suspension if the level of nullification or impairment also varies." This means that, in future, the prospect of retaliation against the United States will be linked directly - at least at the level of 72% - to the level of disbursements under the Byrd Amendment.

As the arbitrators found, payments under the Byrd Amendment are mandatory rather than discretionary. Once the conditions set out in the law have been met, the U.S. government is required to make the payments. The arbitrators stated that "the United States would control the levers to make the actual level of suspension of concessions or other obligations go down." However, to the extent that the payments are mandatory, such "levers" really remain in the hands of U.S. industry. Absent a repeal of the measure, the U.S. government will have no ability to control the amount of retaliation that could be imposed on the United States each year.

At the same time, an authorization to retaliate is not a requirement to retaliate. Although these eight WTO Members will presumably seek formal DSB approval of the arbitrators' report, many of the authorized countries may be reluctant to implement the decision, given the well-known costs that retaliation imposes on the economy of the complaining party. They will likely use the decision, at least initially, to put additional political pressure on an unwilling U.S. Congress to repeal the WTO-inconsistent law.

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WTO Appellate Body Dismisses US Claim That Canadian Wheat Board Violates WTO Rules

SUMMARY

The WTO Appellate Body has dismissed a claim by the United States that the Canadian Wheat Board violates the "state trading enterprises" (STE) rules of the GATT 1994. The Appellate Body, like the Panel before it, read the STE rules in a relatively narrow manner, rejecting U.S. arguments on all major interpretive issues. The Appellate Body stated that "the United States appears to construe [the STE rules] as requiring STEs to act not only as commercial actors in the marketplace, but as *virtuous* commercial actors, by tying their own hands." The Appellate Body stressed that it could not accept the notion that STEs must "refrain from using the privileges and advantages that they enjoy because such use might 'disadvantage' private enterprises."

ANALYSIS

I. Background: Applicable WTO provisions - disciplines on State Trading Enterprises

GATT Article XVII sets out the principal rules applicable to STEs. Much of the Appellate Body decision in this case turned on the relationship between the first two paragraphs of this provision, Article XVII:1(a) and Article XVII:1(b). For ease of reference, these two paragraphs are set out below.

- ***Article XVII:1(a):*** Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, such enterprise shall, in its *purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in [the GATT] for governmental measures affecting imports or exports by private traders*. [emphasis added]

- ***Article XVII:1(b):*** The provisions of subparagraph (*a*) of this paragraph shall be understood to require that such enterprises shall, having due regard to the other provisions of this Agreement, *make any such purchases or sales solely in accordance with commercial considerations,* including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales. [emphasis added]

II. Appellate Body decision

Interpreting the STE disciplines - Appellate Body's analytical approach

The Appellate Body began by describing paragraph (a) as an "anti-circumvention" provision, in that it seeks to ensure that a Member cannot, through the creation or

maintenance of an STE, engage in or facilitate "conduct that would be condemned as discriminatory under the GATT 1994 if such conduct were undertaken directly by the Member itself." The tribunal added that STEs, when they are involved in certain types of transactions ("purchases or sales involving either imports or exports"), must comply with the requirement to act consistently with certain principles in the GATT 1994 ("general principles of non-discriminatory treatment ... for governmental measures affecting imports or exports by private traders").

The parties differed over the interpretive issue of the relationship between subparagraphs (a) and (b) of Article XVII:1. Canada claimed that subparagraph (b) did not create an independent obligation, but simply "interpreted and tempered" the "operative" obligation set out in subparagraph (a). The United States argued that these each subparagraph contained "separate, independent obligations."

The Appellate Body rejected the U.S. position on this issue, reasoning that the wording of subparagraph (b) "makes it abundantly clear" that it is "dependent upon the content of subparagraph (a), and operates to clarify the scope of the requirement not to discriminate in subparagraph (a)." Thus, in the view of the Appellate Body, subparagraph (b) is "dependent upon, rather than separate and independent from, subparagraph (a)."

The Appellate Body found that "subparagraph (a) of Article XVII:1 of the GATT 1994 sets out an obligation of non-discrimination, and...subparagraph (b) clarifies the scope of that obligation." Subparagraph (a) is "the general and principal provision", and subparagraph (b) "explains it by identifying types of differential treatment in commercial transactions." The Appellate Body stated that "[w]e therefore disagree with the United States that subparagraph (b) establishes separate requirements that are independent of subparagraph (a)." At the same time, it added that "because both subparagraphs (a) and (b) define the scope of that non-discrimination obligation, we would expect that panels, in most if not all cases, would not be in a position to make any finding of violation of Article XVII:1 until they have properly interpreted and applied both provisions."

The Appellate Body thus concluded that "a failure to identify *any* conduct alleged to constitute discrimination contrary to the general principles of the GATT 1994 for governmental measures affecting imports or exports by private traders *before* undertaking an analysis of the consistency of an STE's conduct with subparagraph (b) of Article XVII:1 would constitute an error of law." [original emphasis]

Making purchases and sales "solely in accordance with commercial considerations"

As noted above, XVII:1(b) provides in part that STEs will make purchases or sales "solely in accordance with commercial considerations." The United States argued that this provision had to be interpreted as prohibiting STEs "from using their exclusive or special privileges to the disadvantage of 'commercial actors'."

The Appellate Body agreed that "the determination of whether or not a particular STE's conduct is consistent with the requirements of the first clause of subparagraph (b) of Article XVII:1 must be undertaken on a case-by-case basis, and must involve a careful analysis of the relevant market(s)." It added that "only such an analysis will reveal the type

and range of considerations properly considered "commercial" as regards purchases and sales made in those markets, as well as how those considerations influence the actions of participants in the market(s)."

At the same time, drawing on the interpretive approach discussed above, the Appellate Body stated that the scope of the inquiry under subparagraph (b) had to be governed by the principles of subparagraph (a). It stressed that:

Subparagraph (b) does not give panels a mandate to engage in a broader inquiry into whether, in the abstract, STEs are acting "commercially". The disciplines of Article XVII:1 are aimed at preventing certain types of discriminatory behaviour. We see no basis for interpreting that provision as imposing comprehensive competition-law-type obligations on STEs, as the United States would have us do.

The United States also argued that Article XVII:1(b) prevented an STE from using its privileges in a way that created "serious obstacles to trade and disadvantages...commercial actors." The Appellate Body rejected this argument, reasoning that whether an STE was in compliance with the disciplines in Article XVII:1 had to be assessed by means of a market-based analysis, "rather than simply by determining whether an STE has used the privileges that it has been granted." It added that:

In arguing that Article XVII:1(b) must be interpreted as prohibiting STEs from using their exclusive or special privileges to the disadvantage of "commercial actors", the United States appears to construe Article XVII:1(b) as requiring STEs to act not only as commercial actors in the marketplace, but as *virtuous* commercial actors, by tying their own hands. We do not see how such an interpretation can be reconciled with an analysis of "commercial considerations" based on market forces. In other words, we cannot accept that the first clause of subparagraph (b) would, as a general rule, require STEs to refrain from using the privileges and advantages that they enjoy because such use might "disadvantage" private enterprises. STEs, like private enterprises, are entitled to exploit the advantages they may enjoy to their economic benefit. [original emphasis]

The Appellate Body added that Article XVII:1(b) "merely prohibits STEs from making purchases or sales on the basis of non-commercial considerations."

"Competing for participation in purchases or sales" does not mean competing with STEs

As indicated above, XVII:1(b) also provides that STEs "shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales." The Panel had interpreted this provision to refer to enterprises that wished to *buy* from an STE, but not to enterprises that wanted to *sell in competition with an STE*. The United States appealed on this point as well, arguing that the Panel approach "impermissibly narrows the reach of Article XVII's disciplines".

The Appellate Body also rejected the U.S. position on this issue, stating that:

[T]he requirement to afford an adequate opportunity to compete for participation (*i.e.*, taking part with others) in "such" purchases and sales (import or export transactions

involving an STE) must refer to the opportunity to become the STE's counterpart in the transaction, *not* to an opportunity to replace the STE as a participant in the transaction. [original emphasis]

Other issues: national treatment

On an unrelated issue, the Panel had ruled that Canadian legislative measures on imported grain created a series of statutory advantages for domestic grain over imported like products, in violation of Canada's obligations under GATT Article III. Canada did not appeal that ruling.

The decision of the Appellate Body in Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain (DS276) was released on August 30, 2004.

OUTLOOK

The importance of this decision lies less with the specific ruling on the Canadian Wheat Board than with the Appellate Body's general interpretive approach to the STE disciplines of GATT Article XVII.

STEs are governmental or non-government enterprises that have been granted "exclusive or special rights or privileges" by a WTO Member government, "in the exercise of which they influence through their purchases or sales the level or direction of imports or exports." While STEs appear in a variety of forms, the most prevalent type of STE is a marketing board, typically for agricultural products. STEs are maintained in both developed and developing countries.

The rules on STEs are set out principally in Article XVII of the GATT. This provision, which was part of the original GATT 1947, sought to ensure that countries could not circumvent their GATT obligations through the use of marketing boards or other organizations. However, until this case, the STE rules had not been clearly defined through GATT or WTO dispute settlement. It was unclear what STEs could do, or could not do, consistently with Article XVII.

A key interpretative issue in the present case related to the requirement that STEs must make purchases or sales "solely in accordance with commercial considerations." The United States argued that this was an independent, stand-alone obligation that circumscribed the behaviour of STEs. The Appellate Body rejected that position, finding that the "commercial considerations" provision was not a stand-alone requirement, but rather was subsidiary to, and intended to clarify, the general non-discrimination provision of Article XVII. In other words, the Appellate Body has eschewed the notion of any independent "commercial considerations" requirement, and so it will be necessary to demonstrate that the failure of the STE to act in accordance with commercial considerations was a component of a broader breach by the STE of the rules of non-discrimination.

Moreover, in interpreting "commercial considerations", the Appellate Body added that it saw "no basis for interpreting that provision as imposing comprehensive competition-law-type obligations on STEs, as the United States would have us do."

Thus, in the first major case to interpret the STE disciplines of GATT 1994, the Appellate Body has adopted a relatively narrow reading of Article XVII. This decision will obviously serve as an important precedent in assessing the WTO-consistency of STEs in other countries. The Appellate Body has confirmed that there is a high threshold for any successful challenge to the actions of an STE.

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Major Exporting Countries Offer Varying Perspectives on the Impending Phase-Out of Global Textile Quotas

SUMMARY

On September 8, 2004, the Washington International Trade Association (WITA) hosted a discussion on textile and apparel quotas. The speakers included officials from major textile exporting countries China, Pakistan, Bangladesh and Honduras. The officials provided varying perspectives on the implications of the phase out this year of global textile quotas under the WTO Agreement on Textile and Clothing (ATC).

ANALYSIS

I. Background on the Phase-out of Textile Quotas under the ATC

A significant volume of trade in the textiles and clothing sector is currently subject to bilateral quotas negotiated under the Multifibre Arrangement (MFA). The WTO Agreement on Textiles and Clothing (ATC) requires the integration of the textiles and clothing sector, into the General Agreement on Tariffs and Trade (GATT) 1994 so that trade in this sector is governed by GATT rules and disciplines. Integration into the GATT would result in the elimination of quantitative restrictions on textiles and clothing trade. The ATC mandates integration in four stages over a 10-year period ending on January 1, 2005.

Integration of the sector into the GATT would take place as follows: first, on 1 January 1995; each party would integrate into the GATT products from the specific list in the Agreement which accounted for not less than 16 per cent of its total volume of imports in 1990. At the beginning of Phase 2, on 1 January 1998, products which accounted for not less than 17 per cent of 1990 imports would be integrated. On 1 January 2002, products, which accounted for not less than 18 per cent of 1990 imports would be integrated. All remaining products would be integrated at the end of the transition period on 1 January 2005. At each of the first three stages, products should be chosen from each of the following categories: tops and yarns, fabrics, made-up textile products, and clothing.

II. Speakers from Major Textile Exporting Countries Comment on Post-2005 Textiles Trade

On September 8, 2004, the Washington International Trade Association (WITA) hosted a discussion on textile and apparel quotas featuring representatives of developing countries that are major textile exporters. The four panelists were Fakrul Ashan from the Embassy of Bangladesh, Maria Bennaton from the Embassy of Honduras, Ashraf Hayat from the Embassy of Pakistan and Haiyun Liu from the Embassy of China. The discussion was moderated by Troy Cribb of Steptoe and Johnson LLP, a former Deputy Assistant Secretary of Commerce for Textiles, Apparel, and Consumer Goods and Assistant Secretary of Commerce for Import Administration.

Cribb began by explaining that the general consensus is that China and India will be the main beneficiaries in 2005 after the elimination of textile and apparel quotas. Each representative commented on the expected impact of the elimination of apparel and textile quotas on their country's industries.

A. Bangladesh Indicates Phase-Out of Quotas Will Reduce Its Exports

Fakrul Ashan of the Embassy of Bangladesh, expressed concern that Bangladesh's advantage will be lost once quotas are eliminated. She noted that 85 percent of its exports to the United States are apparel and textile products. In earlier periods, for products integrated in January 2002, Bangladesh lost 60.71 percent of exports in the U.S. market. The country anticipates a similar outcome in January 2005, with a 35-50 percent sales decline expected in products such as shirts and pants.

Ashan also cited the U.S. Trade and Development Act of 2000, along with U.S. bilateral treaties and free trade agreements, as other sources of difficulty for Bangladesh. She suggested that the United States give Bangladesh preferential market access, as the U.S. is the only country among developed country markets that does not give Bangladesh duty-free status. Among the advantages of doing business with Bangladeshi textile and apparel manufacturers, Ashan cited the ability to reduce lead-time as a result of modernized facilities, and the large number of Bangladeshis who speak English. She also stated that Bangladesh is a cost effective source because of low living costs. In addition, she emphasized Bangladesh's commitment to comply with environmental and labor standards. One of Bangladesh's priorities is to eliminate child labor from the apparel and textile industries.

B. Honduras Confident Exports Will Grow After 2005; Emphasize Need to Implement CAFTA

Maria Bennaton of the Embassy of Honduras pointed out that Honduras is the third largest supplier of textile and apparel to the United States, and apparel constitutes 98 percent of Honduran trade. She emphasized that Honduras has made significant efforts to improve corporate social responsibility, including environmental, labor and other standards. In addition, Honduras and other Central American countries collectively comprise the largest buyer of U.S. cotton yarn.

Unlike the speaker from Bangladesh, Bennaton expressed a great deal of optimism with regard to the state of Honduran textile and apparel industries after 2004. She emphasized the need for Honduras to build on its advantages, namely its proximity to the United States. She did, however, stress the importance that the enactment of CAFTA would have in ensuring that the Honduran apparel and textile industries remain viable after January 2005. Bennaton remains optimistic that companies will continue to do business in Honduras even after textile and apparel quotas are eliminated. Whether these advantages will outweigh cost advantages offered by other countries remains to be seen.

C. Pakistan Optimistic of Industry Competitiveness; Cites Improvement in Social Conditions

Ashraf Hayat of the Embassy of Pakistan noted that textile trade accounts for 65 percent of total Pakistani exports. The industry is an integrated manufacturer of goods, with its greatest strength in spinning and wheeling. Pakistan favors free trade and believes it can increase exports if quotas are removed. Hayat cited current low interest rates in Pakistan and its investment in improving social conditions as two advantages to conducting trade with the country. In regards to "social compliance," Hayat indicated that Pakistan has implemented a certification process to examine companies' efforts toward improving social standards.

D. China Critical of WTO Textile Safeguard Mechanism; Downplays Threat of Export Growth After 2005

Haiyun Liu of the Chinese Embassy indicated that China firmly supports the elimination of quotas and opposes the Istanbul Declaration's (issued by several countries) desire to continue quotas. He emphasized that China objects to safeguard measures and urges the US government to abide by its WTO commitment. The textile-specific safeguard provision[1] in the Report of the Working Party on the China's WTO accession allows WTO Members to institute quotas if China's textile exports were found as "impeding or threatening to impede the orderly development of trade" through "market disruption." This safeguard is unique to China and is more stringent than the disciplines under the WTO Safeguards Agreement.

The Committee for the Implementation of Textiles Agreements (CITA), an inter-agency group chaired by the Department of Commerce, promulgated the procedures administering the special safeguard against textiles and clothing imports from China on May 21, 2003. The Chinese representative stated that the procedures do not allow for safeguard cases based on the "threat of" market disruption, and that China had a right to challenge threat-based petitions at the WTO.

Under the procedures, "A request [for the safeguard] will only be considered if the request includes the specific information set forth below in support of a claim that the Chinese origin textile or apparel product is, due to market disruption, threatening to impede the orderly development of trade in like or directly competitive products." Citing this provision from CITA's regulations, the Chinese representative claimed that this language *first* requires the demonstration of market disruption in order to then establish a threat to the orderly development of trade.

He warned that more cases based on "threat of" (market disruption) would open a floodgate of more bilateral trade disputes. China's position was that threat-based cases should not be allowed and specific information must be provided in accordance with WTO rules. He also criticized the procedures for not defining the "market disruption" standard, which he considered would hinder CITA's ability to make an objective and fair decision.

Liu downplayed the impact of the Chinese textile and apparel industries upon the global economic arena, claiming that Chinese exports cannot sustain such intense economic growth and that China's textile exports are already slowing down. According to Liu, the average wage for textile workers increased ten-fold between 1980 and 2001. As the labor cost in China increases, its textile exports could also decrease.

OUTLOOK

The impending phase-out of global textile and apparel quotas this year has caused anxiety among many parties, including many developing country exporters as well as developed country manufacturers. Most believe that competitive exporters including China and India stand to gain the most at the expense of other developing and developed country

[1] Paragraph 242, Report of the Working Party on the Accession of China, Working Party on the Accession of China, WT/ACC/CHN/49, 1 October 2001.

manufacturers. Some countries like those in Central America and Pakistan are touting improved social standards in an effort to attract production by corporations that favor social compliance. Others like Bangladesh, African countries and U.S. textile manufacturers, among others have initiated efforts to delay the phase-out of quotas. The chances of any delay are slim, and most are looking to other options.

Although the phase-out of quotas in 2005 should increase global textile imports by developed country markets, the end of quotas by no means assures free trade. Besides quotas, remaining tariffs and potential trade remedy actions can impede trade. China stands to be affected most by trade remedy actions, given the lesser standards for imposing emergency safeguards under China's WTO accession agreement. Already, U.S. domestic manufacturers have invoked this mechanism successfully against China. U.S. and other industries are expected to pursue trade remedies more actively against China and other countries as imports increase after 2005.