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Japan External Trade Organization  
**WTO AND REGIONAL TRADE AGREEMENTS**  
**MONTHLY REPORT**

*January 2005*



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

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## SUMMARY OF REPORTS

### United States

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#### **Congressman Dooley Reflects on Prospects for Trade Issues in 109<sup>th</sup> Congress**

On December 15, 2004, outgoing Congressman Cal Dooley (D-California) spoke at an event hosted by the CATO Institute, a Washington DC think tank. In his remarks, Congressman Dooley suggested that certain structural problems in the US electoral system have made electing pro-free trade moderates to Congress increasingly difficult. Additionally, Dooley suggested that reform of US agricultural programs is essential to make progress both on multilateral and bilateral trade agreements. On the Central America Free Trade Agreement (CAFTA), Dooley offered a bleak assessment, suggesting that assembling a majority in the House would be extremely difficult.

#### **US Official Says China Is Moving Towards Flexible Exchange Rate; USTR Requests Comments Regarding Out-of-Cycle Review For China**

On November 18, 2004, the U.S.-China Business Council hosted a luncheon meeting with Robert Dohner, Director, Office of East Asian Nations, U.S. Department of the Treasury, to discuss China's exchange rate and other financial policies. Dohner noted that China's transition to a flexible exchange rate remains a top Administration priority, and added that in his view China is serious about moving to a flexible exchange rate.

In a related development, the United States Trade Representative (USTR) on December 14, 2004 published a notice in the Federal Register (69 FR 74561), requesting public comments regarding the Out-of-Cycle Review (OCR) under Section 182 of the Trade Act of 1974 for China. In particular, USTR will examine whether China is making substantial progress toward a significant reduction in IPR infringement levels. The comments are due by January 31, 2005.

### United States Highlights

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We also want to alert you to the following developments:

- US Senate approves Miscellaneous Trade Act; repeals 1916 Antidumping Act, grants PNTR to Laos.
- USTR requests comments on annual NTE Report.
- Senate confirms nominations ITC members and Deputy Secretary of Commerce.
- Carlos Gutierrez nominated for Commerce Secretary.
- USTR requests comments regarding Doha Round and WTO review of Dispute Settlement Understanding.
- FDA issues Final Regulation requiring establishment of records on import food.

## **Free Trade Agreements**

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### **USTR Formally Announces Intention To Negotiate FTAs With Oman And United Arab Emirates; ITC To Hold Hearings On Probable Economic Effect; TPSC Initiates Employment Impact Reviews**

On December 6, 2004, the United States Trade Representative (USTR) announced in the Federal Register its intention to negotiate Free Trade Agreements (FTAs) with Oman (69 FR 70498) and the United Arab Emirates (UAE) (69 FR 70500). USTR will hold a public hearing on the FTA with Oman on January 14, 2005, and on the FTA with the UAE on January 12, 2005. Public comments are due by January 25, 2005.

In a related development, the International Trade Commission (ITC) announced on December 13, 2004 that it had instituted investigations regarding the probable economic effect of the FTAs with Oman (69 FR 72216) and the UAE (69 FR 72218). The ITC will hold a public hearing in connection with these investigations on January 5, 2005.

Also, the Trade Policy Staff Committee (TPSC) announced on December 21, 2004 that USTR and the Department of Labor ("Labor") had initiated reviews of the employment impact of the FTAs with Oman (69 FR 76513) and the UAE (69 FR 76514). Public comments are due by February 16, 2005.

### **Senator Baucus and Panelists Urge More Active Approach to Trade Policy With Asia**

Members of Congress and other leading figures have urged the Bush Administration to take a more active role in Asia, including free trade agreement (FTA) negotiations with more Asian countries. Senator Max Baucus (D-Montana) has encouraged the Administration to engage in FTAs with more Asian countries, as well as consider new negotiating approaches. Panelists reiterated this sentiment at an event on FTAs and Asia hosted by the Global Business Dialogue (GBD) on December 9, 2004. Both Senator Baucus and the GBD panelists warned that the US could be marginalized in Asia if it fails to match the FTA ambitions of other regional players such as the Association of Southeast Asian Nations (ASEAN) and China.

## **Free Trade Agreements Highlights**

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We also want to alert you to the following developments:

- Negotiators fail to conclude US-Andean FTA by original deadline and will continue negotiations in 2005.
- US and Panama make good progress during sixth round of FTA negotiations.
- US and SACU will meet "early in 2005" to further discuss FTA negotiations.
- US signs agreement to create QIZs in Egypt as step toward launch FTA negotiations.

## **US-European Union**

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## **USTR Receives Public Comments On US WTO Case Against EU Customs Administration Regime; Comments Support Case**

USTR has received several public comments in its WTO case against the EU customs administration regime. The few comments received support the dispute.

## **US-Latin America and US-Asia**

### **FTAA**

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## **IAD Study Analyzes Prospects for the FTAA Negotiations and Identifies the Countries' Negotiating Positions**

In November 2004, the Inter-American Dialogue released a study outlining possible ways to achieve progress on the Free Trade Area of the Americas (FTAA). The report, titled "Free Trade in the Americas: Getting There From Here" was prepared in consultation with a number of trade exports from the US, Mexico and Brazil. The study is divided in four sections and aims to explain the status and prospects for future FTAA negotiations for the Americas.

### **NAFTA and APEC**

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## **President Bush Meets with President Fox at APEC Summit**

On November 21, 2004, President Fox met privately with President Bush as a prelude to the XII Asia-Pacific Economic Cooperation Forum (APEC) Summit in Santiago, Chile.

The short meeting offered Bush and Fox the opportunity to discuss pending issues in the bilateral relationship and other initiatives, including a temporary-worker program for Mexican workers.

Analysts have concluded that the Bush administration is committed to establishing closer ties with President Fox and re-open the discussion on immigration reform in the United States. However, they question Bush's temporary worker program since it would not necessarily benefit the five million Mexicans that reside illegally in the United States.

## **APEC Leaders in Santiago Agree to Advance WTO Doha Round, Security Cooperation and Other Initiatives**

The leaders of the Asia-Pacific Economic Cooperation forum (APEC) countries agreed to encourage progress in WTO Doha Round and fight terrorism, among other objectives, at their annual summit held in Santiago, Chile, on November 20-21, 2004.

The main themes of the leaders' final declaration were trade and investment liberalization and facilitation, security and good governance. The leaders summit took place after a week of deliberations and meetings by Senior Officials and Trade Ministers of the 21 APEC economies.

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## **Multilateral**

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### **WTO Panel Finds Against U.S. Laws Restricting Internet Gambling**

A WTO Panel has found that certain U.S. federal and state laws against internet gambling violate the market access commitments of the United States under the *General Agreement on Trade in Services* ("GATS"). In ruling in favour of Antigua, the Panel also rejected U.S. arguments that its measures were necessary to protect public morals, maintain public order, and enforce U.S. laws against organized crime and racketeering.

## REPORTS IN DETAIL

### UNITED STATES

#### **Congressman Dooley Reflects on Prospects for Trade Issues in 109<sup>th</sup> Congress**

##### *SUMMARY*

On December 15, 2004, outgoing Congressman Cal Dooley (D-California) spoke at an event hosted by the CATO Institute, a Washington DC think tank. In his remarks, Congressman Dooley suggested that certain structural problems in the US electoral system have made electing pro-free trade moderates to Congress increasingly difficult. Additionally, Dooley suggested that reform of US agricultural programs is essential to make progress both on multilateral and bilateral trade agreements. On the Central America Free Trade Agreement (CAFTA), Dooley offered a bleak assessment, suggesting that assembling a majority in the House would be extremely difficult.

##### *ANALYSIS*

Congressman Cal Dooley, long regarded as a leading pro-free trade Democrat announced in September 2003 that he would not seek re-election after seven terms in Congress. On December 15, 2004, Dooley spoke at the CATO Institute on the prospects for trade policy during the 109<sup>th</sup> Congress, which will convene on January 4, 2005.

#### **I. Lack of Electoral Competition Hurts Pro-Trade Moderates**

The lack of electoral competition is contributing to the extinction of pro-trade moderates in Congress. In his remarks, Dooley noted that of the 435 House races in the November 2004 election, fewer than 20 races were considered competitive. Because of this lack of competition in the general election, candidates are more concerned with the primary process, where they must rely on core constituencies to win nomination. For Democrats, this core constituency usually involves anti-trade labor groups. Furthermore, Dooley noted that the absence of open primaries, where any citizen can vote for a candidate, rather than those registered for the particular party holding the primary, makes it difficult for candidates to moderate the influence of special interest groups.

The structural limitations of the US electoral system, according to Dooley, discourage the nomination of pro-trade moderates to Congress. He noted that pro-trade Congressman Phil Crane (R-Illinois) was defeated in the recent election. He also remarked that a pro-trade agenda will not get candidates elected to Congress, but support for trade could cost a candidate support.

#### **II. Agricultural Reform Essential to Advancing Trade**

Dooley argued that the farm bill adopted by Congress in 2002 seriously damaged US credibility in terms of advancing free trade at the World Trade Organization (WTO). He pointed out that agriculture has time and again been a major impediment to achieving bilateral free trade agreements (FTAs). Reauthorization of the farm bill is not expected until 2007, however Dooley suggested that WTO panels on cotton and sugar could force the US to



consider reforming agricultural programs ahead of the scheduled reauthorization. Asked if the US will need to undertake agricultural reform before progress can be made in the Doha Round, Dooley suggested that some good faith efforts at demonstrating US willingness to undertake the necessary reforms would be useful.

### **III. Voting Math on CAFTA Does Not Add Up**

Congressman Dooley expressed serious concern about the prospects for Congressional approval of CAFTA. He noted that the influence of the sugar lobby, combined with the significant political capital being expended by labor and environment groups will make it difficult to secure a majority in the House of Representatives. Dooley suggested that the battle to pass trade promotion authority (TPA) in 2001, which cleared the House by a single vote, would be instructive as to the divisive debate CAFTA will face. Further complicating the voting math on CAFTA is the fact that 8 of the 21 Democrats who supported TPA in 2001 will not be returning for the 109<sup>th</sup> Congress. Also, unlike for the last four FTAs considered by Congress (Singapore, Chile, Morocco and Australia), senior House Democrats have expressed opposition to the passage of CAFTA.

### ***OUTLOOK***

The vote on CAFTA, the renewal of TPA and the five-year review of US membership in the WTO are likely to be the most important trade issues before Congress in 2005. Congressman Dooley suggested that the vote on CAFTA is likely to be a litmus test for US FTA policy. Failure to approve CAFTA could derail the US-Andean Free Trade Agreement, and could further complicate the already stalled Free Trade Area of the Americas. Despite the almost assured renewal of TPA, Congress is expected to challenge further the President's competitive liberalization strategy. Nevertheless, the US seeks to expand the number of FTAs it is pursuing.

## **US Official Says China Is Moving Towards Flexible Exchange Rate; USTR Requests Comments Regarding Out-of-Cycle Review For China**

### ***SUMMARY***

On November 18, 2004, the U.S.-China Business Council hosted a luncheon meeting with Robert Dohner, Director, Office of East Asian Nations, U.S. Department of the Treasury, to discuss China's exchange rate and other financial policies. Dohner noted that China's transition to a flexible exchange rate remains a top Administration priority, and added that in his view China is serious about moving to a flexible exchange rate.

In a related development, the United States Trade Representative (USTR) on December 14, 2004 published a notice in the Federal Register (69 FR 74561), requesting public comments regarding the Out-of-Cycle Review (OCR) under Section 182 of the Trade Act of 1974 for China. In particular, USTR will examine whether China is making substantial progress toward a significant reduction in IPR infringement levels. The comments are due by January 31, 2005.

### ***ANALYSIS***

#### **I. China Moving Towards Flexible Exchange Rate**

On November 18, 2004, the U.S.-China Business Council hosted a luncheon meeting with Robert Dohner, Director, Office of East Asian Nations, U.S. Department of the Treasury, to discuss China's exchange rate and other financial policies. Dohner noted that China's transition to a flexible exchange rate remains a top Administration priority. The US has been applying pressure in a number of ways:

- **Bilateral Meetings:** President Bush, Treasury Secretary Snow and soon to be departing Commerce Secretary Don Evans have raised the currency issue at every meeting with senior Chinese officials, including with President Hu and Prime Minister Jiabao;
- **Multilateral Fora:** The US has garnered the support of the G-7 finance ministers in urging China to adopt a flexible exchange rate policy. At the Boca Raton Ministerial in February 2004, the G-7 noted that "flexibility in exchange rates is desirable for major countries or economic areas that lack such flexibility." Dohner acknowledged that this statement was directed at China and reflects growing concern among European countries about China's exchange rate; and
- **Technical Cooperation:** Dohner outlined the bilateral cooperation effort aimed at assisting China in developing the necessary financial infrastructure to support a flexible exchange rate. Dohner also noted that China has consulted with Japan, Mexico and Singapore on currency issues.

During the ensuing discussion, Dohner expressed his view that China is serious about moving to a flexible exchange rate. He argued that China's banks have minimum exposure to

transactions in foreign currency, and that China's large supply of foreign reserves would allow it to weather the transition to a flexible exchange rate. Dohner also suggested that China could not indefinitely sustain its fixed exchange rate without serious inflation-related consequences.

## **II. USTR Requests Comments Regarding Out-of-Cycle Review For China**

On December 14, 2004, the United States Trade Representative (USTR) published a notice in the Federal Register (69 FR 74561), requesting public comments regarding the Out-of-Cycle Review (OCR) under Section 182 of the Trade Act of 1974 for the People's Republic of China. Section 182, commonly referred to as the "Special 301" provision, requires USTR to identify countries that deny adequate and effective protection of intellectual property rights (IPR) or deny fair and equitable market access to US persons who rely on IP protection. Countries whose acts, policies or practices have the greatest adverse impact on relevant US products may be identified as Priority Foreign Countries, and are normally the subject of an OCR.

China was designated a Priority Foreign Country in 1994. On May 3, 2004, USTR announced that an OCR would be conducted in early 2005 to assess China's actions to implement:

- its commitments under the Joint Commission on Commerce and Trade (JCCT);
- its WTO commitments; and
- a 1995 bilateral intellectual property agreement with the United States (including national commitments made in 1996).

In particular, USTR will examine whether China's actions are producing substantial progress toward a significant reduction in IPR infringement levels in China.

The comments are due by January 31, 2005.

## **United States Highlights**

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### **US Senate Approves Miscellaneous Trade Act; Repeals 1916 Antidumping Act, Grants PNTR to Laos**

On November 19, 2004, the U.S. Senate approved the Miscellaneous Trade and Technical Corrections Act of 2004 (H.R. 1047) (or "Act") by a voice vote of 88-5. As introduced on March 4, 2003, the Act provides for temporary duty suspensions and other technical corrections to U.S. customs procedures. It will also modify other trade statutes affecting bilateral and WTO matters, including:

- Grant Permanent Normal Trade Relations (PNTR) to Laos. (Only Cuba and North Korea are now denied PNTR status.)
- Repeal the 1916 Anti-Dumping Act, which allowed U.S. companies to seek civil compensation (including treble damages) against those importing "dumped" goods. The World Trade Organization (WTO) had ruled the law illegal in 2000 following a complaint by the EU and Japan. The Act only ends future cases, but does not apply retroactively to existing cases before U.S. courts.
- Repeal the application of Title IV of the Trade Act of 1974 against Armenia. Title IV provides for the maintenance of discretionary trade treatment of former Soviet republics, including the Jackson Vanik Amendment. The repeal would make Armenia eligible for permanent normal trade relations with the US.

The House approved the Act on October 8, 2004, but Senate delays had prevented adoption of the Act thus far. Most recently, Senators Russ Feingold (D-Wisconsin) and Herbert Kohl (D-Wisconsin) had placed a hold on the Act because they objected to granting PNTR to Laos, citing human rights concerns. The Act was finally approved after Senators had invoked cloture to limit further debate on the bill.

The Act will now require the signature of President George Bush. So far, no date has been scheduled for the signature, and approval is expected.

### **USTR Requests Comments On Annual NTE Report**

On November 24, 2004, the United States Trade Representative (USTR) published a notice in the Federal Register (69 FR 68437), announcing that the Trade Policy Staff Committee (TPSC), an interagency body chaired by USTR, is requesting public comments with respect to the annual National Trade Estimate Report on Foreign Trade Barriers (NTE). The comments will assist TPSC in identifying significant barriers to U.S. exports of goods, services and overseas direct investment for inclusion in the NTE. TPSC is particularly interested in impediments that materially affect the actual and potential financial performance of an industry sector.

The comments should relate to one or more of the following categories of barriers:

- Import policies;
- Standards, testing, labeling, and certification;
- Government procurement;
- Export subsidies;
- Lack of intellectual property protection;
- Services barriers;
- Investment barriers;
- Anticompetitive practices with trade efforts tolerated by foreign governments;
- Trade restrictions affecting electronic commerce; and
- Other barriers.

USTR asks that particular emphasis be placed on any practices that may violate U.S. trade agreements. USTR is also soliciting any new or updated information relevant to the barriers covered in last year's report.

The comments are due by December 21, 2004.

### **Senate Confirms Nominations of ITC Members And Deputy Secretary Of Commerce**

On November 20, 2004, the U.S. Senate confirmed the executive nominations of Daniel Pearson and Charlotte A. Lane as members of the U.S. International Trade Commission (USITC). President George Bush appointed both nominees during the Congressional recess on August 22, 2003, for the period that would have expired at the end of the second session of the 108th Congress on December 31, 2004. However, now that the Senate has confirmed the nominations, Pearson and Lane will serve the ongoing 9-year terms for their positions, until June 16, 2011 and December 16, 2009, respectively.

On the same day, the Senate also confirmed the executive nomination of Theodore William Kassinger, as Deputy Secretary of the U.S. Department of Commerce. Kassinger was first nominated for this position in February 2004 and appointed in July 2004, after having served as the General Counsel of the Department since May 2001.

### **Carlos Gutierrez Nominated for Commerce Secretary**

On November 29, 2004, President Bush nominated Carlos Gutierrez to replace the outgoing Don Evans as Secretary of the Commerce Department. Gutierrez has been CEO of the Kellogg Company since April 1999. He came to this country as a political refugee from Cuba more than 40 years ago. Gutierrez joined Kellogg in 1975 and worked his way to the

top of the Kellogg management team. He is credited with successfully refocusing Kellogg's marketing strategy and reducing the company's debt.

### **USTR Requests Comments Regarding Doha Round And WTO Review Of Dispute Settlement Understanding**

On December 9, 2004, USTR published a notice in the Federal Register (69 FR 71466), announcing that the TPSC is requesting public comments on the following:

- General U.S. negotiating objectives and country-, product-, and service-specific priorities for the multilateral negotiations and work program under the World Trade Organization's (WTO) Doha Development Agenda (DDA); and
- Proposals advanced in the WTO review of the Dispute Settlement Understanding (DSU).

The comments are due by January 31, 2005.

### **FDA Issues Final Regulation Requiring Establishment Of Records On Import Food**

On December 9, 2004, the U.S. Food and Drug Administration (FDA) published the following in the Federal Register:

- A final regulation to implement section 306 of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 ("Bioterrorism Act"), requiring persons who manufacture, process, pack, transport, distribute, receive, hold, or import food to establish and maintain records that will identify the immediate previous source of all food received, as well as the immediate subsequent recipient of all food released (69 FR 71561).
- Draft Guidance to FDA staff and industry, detailing the circumstances under which FDA may access and copy records under the Bioterrorism Act and the internal procedures that the FDA agency will follow before requesting access to records.

The FDA further announced (69 FR 71655) that it will hold public meetings to explain the requirements of the final rule and to answer questions. The meetings will take place on January 13, 25, and 27, and on February 1, 2005.

## **Free Trade Agreements**

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### **USTR Formally Announces Intention To Negotiate FTAs With Oman And United Arab Emirates; ITC To Hold Hearings On Probable Economic Effect; TPSC Initiates Employment Impact Reviews**

#### *SUMMARY*

On December 6, 2004, the United States Trade Representative (USTR) announced in the Federal Register its intention to negotiate Free Trade Agreements (FTAs) with Oman (69 FR 70498) and the United Arab Emirates (UAE) (69 FR 70500). USTR will hold a public hearing on the FTA with Oman on January 14, 2005, and on the FTA with the UAE on January 12, 2005. Public comments are due by January 25, 2005.

In a related development, the International Trade Commission (ITC) announced on December 13, 2004 that it had instituted investigations regarding the probable economic effect of the FTAs with Oman (69 FR 72216) and the UAE (69 FR 72218). The ITC will hold a public hearing in connection with these investigations on January 5, 2005.

Also, the Trade Policy Staff Committee (TPSC) announced on December 21, 2004 that USTR and the Department of Labor ("Labor") had initiated reviews of the employment impact of the FTAs with Oman (69 FR 76513) and the UAE (69 FR 76514). Public comments are due by February 16, 2005.

#### *ANALYSIS*

##### **I. USTR Formally Announces Intention To Negotiate FTAs With Oman And United Arab Emirates**

On December 6, 2004, the United States Trade Representative (USTR) announced in the Federal Register its intention to negotiate Free Trade Agreements (FTAs) with Oman (69 FR 70498) and the United Arab Emirates (UAE) (69 FR 70500). U.S. trade with both countries is worth \$5.6 billion. Major exports include machinery, aircraft, vehicles, and electrical machinery, while major imports include mineral fuel and woven apparel.

The agreements would build on the Trade and Investment Framework Agreements (TIFAs) that the United States recently concluded with both countries, and are viewed by the 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.

##### **II. ITC To Hold Hearings On Probable Economic Effect Of FTAs With Oman And UAE**

On December 13, 2004, the International Trade Commission (ITC) announced in the Federal Register that it has instituted the following investigations:

- Investigations Nos. TA-131-30 and TA-2104-16, regarding the probable economic effect of providing, under an FTA between the United States and Oman, duty-free treatment for imports of products of Oman (69 FR 72216).
- Investigations Nos. TA-131-31 and TA-2104-17, regarding the probable economic effect of providing, under an FTA between the United States and the UAE, duty-free treatment for imports of products of the UAE (69 FR 72218).

USTR requested that the ITC conduct these investigations on December 1, 2004 pursuant to section 131 of the Trade Act of 1974 and section 2104 (b) (2) of the Trade Act of 2002.

### **III. USTR Initiates Employment Impact Reviews US-Oman And US-UAE FTAs**

On December 21, 2004, the Trade Policy Staff Committee (TPSC), an interagency body chaired by USTR, announced in the Federal Register that the USTR and the Department of Labor ("Labor") are initiating reviews of the impact of the FTAs with Oman (69 FR 76513) and the UAE (69 FR 76514) on U.S. employment, including labor markets.

#### ***OUTLOOK***

USTR will hold a public hearing on the FTA with Oman on January 14, 2005, and on the FTA with the UAE on January 12, 2005. USTR also requests written comments, which are due by January 25, 2005. The hearings and the comments aim to assist in amplifying and clarifying negotiating objectives for the proposed FTAs and to provide advice on how specific goods and services and other matters should be treated under the proposed FTA.

The ITC will hold a public hearing in connection with its investigations of the probable economic effect of the FTAs on January 5, 2005. Any prehearing statements or briefs were due by December 21, 2004, while the deadline for filing posthearing statements or briefs is January 12, 2005. The ITC expects to submit its reports to USTR by February 28, 2005.

USTR and Labor are seeking public comments on potentially significant sectoral or regional employment impacts in the United States, as well as other likely market impacts of the FTAs. Comments are due by February 16, 2005.



## **Senator Baucus and Panelists Urge More Active Approach to Trade Policy With Asia**

### ***SUMMARY***

Members of Congress and other leading figures have urged the Bush Administration to take a more active role in Asia, including free trade agreement (FTA) negotiations with more Asian countries. Senator Max Baucus (D-Montana) has encouraged the Administration to engage in FTAs with more Asian countries, as well as consider new negotiating approaches. Panelists reiterated this sentiment at an event on FTAs and Asia hosted by the Global Business Dialogue (GBD) on December 9, 2004. Both Senator Baucus and the GBD panelists warned that the US could be marginalized in Asia if it fails to match the FTA ambitions of other regional players such as the Association of Southeast Asian Nations (ASEAN) and China.

### ***ANALYSIS***

On December 8 and 9, 2004, respectively, the Institute for International Economics (IIE) and the GBD held events that featured discussions on U.S. trade policy in Asia. We review here those discussions and the prospects for enhanced U.S. free trade activity in Asia in the coming year.

#### **I. Baucus Urges More FTAs with Asia; Says Sugar is Likely Out of Thailand FTA**

Speaking before the IIE, Senator Baucus accused the Bush Administration of ignoring lucrative trade opportunities in Asia, notably with countries like Japan, South Korea and Taiwan. He expressed frustration with the pursuit of less commercially significant FTAs with Bahrain and Morocco. Baucus noted that ASEAN and others in the region (like China) were actively pursuing FTAs, and that failure by the US to keep pace could hurt the country economically in the medium to long-term.

Senator Baucus also urged the Bush Administration to consider other opportunities, such as sector-specific arrangements in the areas of advanced medical technologies. Such arrangements could generate quick returns while broader FTAs are negotiated.

In related remarks made during the discussion, Senator Baucus stated that he expects that sugar will not be included as part of an FTA with Thailand. Baucus, who traveled to Thailand earlier this year, suggested that Thai officials understand the sensitivity of the sugar issue.

#### **II. GBD Event Features Discussion on APEC and Policy on Asian FTAs**

The panel hosted by GBD on FTAs and Asia featured a number of speakers representing public and private interests. We summarize their comments below:

- **H.E. Ambassador Andrés Bianchi**, Chilean Ambassador to the US, offered a positive assessment of the APEC meeting hosted in Santiago in late November. The ambassador also made remarks about Chile's trade priorities in 2005, noting that Asia was poised to become Chile's more important region in terms of trade. He also noted that China represented

an opportunity for those Latin American economies with a broad base of exports. The ambassador argued that competition from China was not an obstacle to completing the Free Trade Area of the America. Rather, conflicts between Brazil and the US on how to best move forward on the FTAA remains the biggest challenge.

- **Andrea Smith**, Counselor (Trade & Economics), Embassy of New Zealand, stated that progress in the Doha Development Round represented the best avenue to advance the trade interests of New Zealand. However, she also noted New Zealand's interest in pursuing certain strategic FTAs in the Asia-Pacific region. New Zealand and China have agreed to commence comprehensive free trade negotiations, and New Zealand remains interested in pursuing an FTA with the US.
- **Myron Brilliant**, Vice-President for Asia, US Chamber of Commerce, expressed the Chamber's satisfaction with the recently held APEC leaders meeting in Chile and stated that, in terms of opportunities to engage Asian leaders, APEC remained a premier forum for the business community. Brilliant urged the US government to put an increased focus on trade in Asia, and noted that the US-Thailand FTA represented an important opportunity for the business community.
- **Hal Shapiro**, Miller & Chevalier, urged the US to move to a more flexible negotiating position with respect to FTAs. He noted that ASEAN FTA with China dealt exclusively with tariffs on goods. Shapiro suggested that the US could assist certain U.S. sectors, notably manufacturing, by pursuing sector specific agreements while dealing with thornier issues services and subsidies separately.

### **OUTLOOK**

Despite the call for greater attention to trade policy and FTAs with Asia, 2005 is unlikely to see any dramatic change in U.S. trade policy in the region. Major trade priorities for the Bush Administration in 2005 are likely to include Congressional approval of the Central America Free Trade Agreement (CAFTA), renewal of trade promotion authority and reauthorization for continued membership in the World Trade Organization. Elections in Thailand are likely to prolong bilateral FTA negotiations until well into 2005. (Thailand has requested postponement of the third negotiating round, which was scheduled for mid-December.) It also remains uncertain if the US will announce more Asian FTAs as the latest focus has been on expanding FTAs in the Middle East.

Consideration by the US and Asian partners of other arrangements including sector specific agreements proposed by Baucus and Shapiro, while practiced by a number of other countries, is unlikely to gain significant traction within the Bush Administration. Comprehensive FTAs remain the top priority of the US Trade Representative. Moreover, the Trade Act of 2002 specifies that comprehensiveness is a major priority of U.S. trade policy.

Nevertheless, at the APEC Ministerial in Santiago last month, it was apparent that countries in the Asia-Pacific are stepping up their efforts to conclude FTAs and other

cooperative arrangements. China and ASEAN recently concluded a historic deal that will reinforce ties between China and the region. In related developments, Asia countries including Japan and China have revisited the idea of stronger intra-Asian economic cooperation. Thus, the US must at some stage move beyond the status quo and explore ways to expand its engagement in the region. Otherwise, its influence will be marginalized as Senator Baucus and other observers have warned.

## **Free Trade Agreements Highlights**

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### **Negotiators Fail To Conclude US-Andean FTA By Original Deadline And Will Continue Negotiations In 2005**

From November 30-December 5, 2004, US negotiators and their counterparts from Colombia, Ecuador, and Peru held a sixth negotiating round on the US-Andean Free Trade Agreement. Assistant United States Trade Representative (USTR) for the Americas Regina Vargo announced on December 4 that although they had made significant progress, the parties had agreed to extend the negotiations beyond the original deadline of December 31, 2004 and to hold negotiating rounds during the week of January 31, 2005 in Colombia and in mid-March. She added that the parties hoped to conclude the negotiations by early 2005.

### **US And Panama Make Good Progress During Sixth Round Of FTA Negotiations**

From December 6-12, 2004, US negotiators and their counterparts from Panama held a sixth negotiating round on the US-Panama FTA. Assistant USTR for the Americas Regina Vargo announced on December 13 that both parties had:

- concluded negotiations on telecommunications, sanitary and phytosanitary (SPS) measures, and financial and professional services;
- made progress on industrial goods, government procurement, services and investment;
- held constructive talks on agriculture, which remains the most challenging issue.

Vargo stated that prospects for completing the agreement at the next round of negotiations (January 10, 2005) remain good.

### **US And SACU To Meet “Early In 2005” To Further Discuss FTA Negotiations**

From December 10-13, 2004, USTR Robert Zoellick met in Namibia and Lesotho with trade ministers from the countries of the Southern African Customs Union (SACU: Botswana, Lesotho, Namibia, South Africa, and Swaziland) to discuss ways to further advance in the negotiations on the US-SACU FTA. Zoellick announced afterwards that both parties would hold a senior level meeting “early in 2005” to establish a framework that would help them move forward with the negotiations.

### **US Signs Agreement To Create QIZs In Egypt As Step Toward Launch FTA Negotiations**

On December 14, 2004 the US, Egypt and Israel signed an agreement to create Qualified Industrial Zones (QIZs) in Egypt that would allow for duty-free export to the US of certain Egyptian goods that contain Israeli inputs. USTR Zoellick noted after the signing that the US sees the agreement as a step towards the eventual launch of FTA negotiations with Egypt and, more broadly, towards the creation of a Middle East Free Trade Area (MEFTA) by 2013.

The agreement will enter into effect as soon as it is notified in the Federal Register.

## **US-EUROPEAN UNION**

### **USTR Receives Public Comments On US WTO Case Against EU Customs Administration Regime; Comments Support Case**

#### *SUMMARY*

USTR has received several public comments in its WTO case against the EU customs administration regime. The few comments received support the dispute.

#### *ANALYSIS*

#### **I. USTR Receives Public Comments On US WTO Case Against EU Customs Administration Regime; Comments Support Case**

The United States Trade Representative (USTR) recently received public comments on the World Trade organization (WTO) dispute that the US filed against the EU on September 21, 2004 regarding the EU customs administration regime. USTR had requested the comments on October 8, 2004.

The following associations submitted comments:

- Customs Advisory Services, Inc.;
- the National Milk Producers Federation; and
- Rockland Industries, Inc.

The associations supported the US charge that the EU's lack of a uniform customs administration and of procedures for prompt EU-wide review of national administrative decisions constitutes a barrier to US exports in violation of WTO rules. Nevertheless, few interested parties commented on the dispute.

## US-LATIN AMERICA AND US-ASIA

### FTAA

#### IAD Study Analyzes Prospects for the FTAA Negotiations and Identifies the Countries' Negotiating Positions

##### *SUMMARY*

In November 2004, the Inter-American Dialogue released a study outlining possible ways to achieve progress on the Free Trade Area of the Americas (FTAA). The report, titled "Free Trade in the Americas: Getting There From Here" was prepared in consultation with a number of trade experts from the US, Mexico and Brazil. The study is divided in four sections and aims to explain the status and prospects for future FTAA negotiations for the Americas.

##### *ANALYSIS*

We review here the major findings of an FTAA study prepared by the Inter-American Dialogue:

#### **I. US Has Strong Economic Interests in Latin America**

**Carla Hills**, former US Trade Representative (USTR), opens the study with a summary of the relations between the US and Latin America and points out reasons for continued delays in the FTAA negotiating process. Her primary finding include:

- The FTAA progress has been harmed by waiting for a solution to agriculture trade in the global (WTO) talks;
- A solution will only be likely after the U.S. presidential elections;
- Economically, Latin America is very interesting for the US in view of its 500 million people with an output of US\$ 2 trillion; and
- The FTAA should be a priority for the U.S. trade policy because prosperity in Latin American would create commercial opportunities for U.S. companies.

#### **II. "Spaghetti Bowl" in the FTAA is the Most Likely Scenario**

**Jaime Zabudovsky**, Mexican deputy chief negotiator during the NAFTA negotiations, analyzes the prospects for the FTAA negotiations and the countries' positions. The primary conclusions include:

- Between 1994 and 2000, the FTAA negotiations practically did not move much. The US dropped its leadership role during this period;

- In 2001, when the Bush administration assumed office, the US seemed more aggressive in its pursuit of FTAA negotiations;
- In view of the resistance of other FTAA countries, the US started to pursue bilateral trade negotiations within the Hemisphere (for instance, with Chile, Central America, Andean Community);
- A major problem for the FTAA negotiations is the imbalance of interests between the US and MERCOSUR. While the US has offensive interests in most negotiating areas, it has defensive interests in two areas, namely antidumping (AD) and agriculture. (See below);
- Those two areas are the key targets of MERCOSUR's offensive interests. On the other hand, MERCOSUR has defensive interests in practically all the other negotiating areas (industrial goods, services, IPR, investments and government procurement). (See below);
- The US has asserted that it will only negotiate AD and agriculture at the WTO level. Consequently, MERCOSUR's view is that there is little for the US to offer in the FTAA if those items are excluded from the agenda;
- The Miami Ministerial held in late 2003 offered no concrete solutions for the impasse in the FTAA negotiations. "The common set of rights and obligations" shared by all countries is a concept that yet has to be developed; and
- There are three possible scenarios for the FTAA: i) the "FTAA à la carte", in which countries undertake different levels of commitments; ii) the "Spaghetti Bowl", in which the US continues to negotiate bilateral FTAs within the Hemisphere and iii) the "Docking Station", in which there would be hemispheric disciplines for trade in goods, but the rest of the negotiating agenda would be bilateral. The "Spaghetti Bowl" scenario, though not efficient, is the most likely outcome.



*FTAA Countries' Negotiating Positions Divided by Areas*

**Table 1**

**The FTAA "Lockshop": Summary of Participants' Main Defensive and Offensive Interests**

Country/group	Market access	Agriculture	Investment	Services	Government procurement	Intellectual property	Antidumping/Countervailing Duties	Competition	Dispute settlement
United States	* BBB	*** BBB	BBB	* BBB	BBB	BBB	***	BB	BB
Canada	* BBB	** B	BB	** BBB	BB	BB	BBB	BB	BB
Mexico	** BB	*** B	* BB	* B	BB	BB	BBB	B	BB
Chile	* B	** BBB	* B	* BBB	*	B	BBB	BB	BB
Central America	* BBB	** BBB	*	*	*	*	BB	*	BB
Mercosur	*** B	* BBB	***	**	**	** B	BBB	* B	BB
Andean Community	** BB	* BBB	**	*	**	**	BBB	*	BB
Caribbean	*** BB	* BBB	**	*	**	**	BB	*	BB

\* Defensive Interests      \*\*\* Strong  
 B Offensive Interests      \*\* Regular  
    \* Weak

### **III. FTAA Should Negotiate Market Access in Sensitive Sectors**

**Jeffrey Schott** of the Institute for International Economics, argues that the FTAA's success depends on market access negotiations on sensitive issues. His assessments include:

- The FTAA negotiations are still difficult despite the Miami mandate because a balanced package of market access would have to include issues sensitive to both the US and Brazil;
- Without such a basic deal, the FTAA talks will make no progress, despite discussions of a plurilateral or multi-tiered approach to negotiations as the Miami Ministerial suggested;
- Little mention is made of the small economies in the FTAA. Small economies need to diversify their output, increase efficiency in traditional export sectors and develop new service exports. The FTAA should help them in adjusting to more competition; and
- While there is no progress in the FTAA talks, the US will proceed with the strategy of negotiating bilateral FTAs. In addition, FTAA negotiations will occur in parallel to progress in the WTO Doha Round.

### **IV. FTAA May Not Be Very Substantial Under the Current Negotiating Structure**

**Marcos Jank** and **Zuleika Arashiro**, from the Brazilian Institute for International Trade Negotiations, criticize the FTAA framework that emerged from the Miami Ministerial in November 2003. They suggest that:

- The FTAA framework that emerged from Miami breaks the single undertaking rule and regional MFN principle. In addition, there is reason to believe that the FTAA will not conform with the "substantially all trade" requirement of Article XXIV of the General Agreement of Tariffs and Trade;
- The strategy of negotiating bilateral FTAs that the US is pursuing will be harmful for the Hemisphere in the long term. There will be high costs in terms of rules and harmonization under this scheme. This approach seems to appeal MERCOSUR as well, since the bloc has negotiated an FTA with the Andean Community and is negotiating with Mexico and Central America; and
- Protectionist forces have been more active in the FTAA negotiations than those representing sectors that might favor the agreement.

### ***OUTLOOK***

The prospects for the conclusion of FTAA negotiations remain uncertain. After ten years, FTAA countries are still discussing the negotiating framework and have yet to make substantial progress on market-access issues. However, recent press reports indicate that Brazil and the US intend to put the FTAA negotiations back on track by February 2005.

A first step would be to announce the date of the next Ministerial, to be hosted by Brazil. In the long-term, FTAA negotiations will also depend on progress at the WTO on the issues of agriculture and trade remedies, among others.

## **NAFTA and APEC**

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### **President Bush Meets with President Fox at APEC Summit**

#### *SUMMARY*

On November 21, 2004, President Fox met privately with President Bush as a prelude to the XII Asia-Pacific Economic Cooperation Forum (APEC) Summit in Santiago, Chile.

The short meeting offered Bush and Fox the opportunity to discuss pending issues in the bilateral relationship and other initiatives, including a temporary-worker program for Mexican workers.

Analysts have concluded that the Bush administration is committed to establishing closer ties with President Fox and re-open the discussion on immigration reform in the United States. However, they question Bush's temporary worker program since it would not necessarily benefit the five million Mexicans that reside illegally in the United States.

#### *ANALYSIS*

On November 21, 2004, President Fox met privately with President Bush as a prelude to the XII APEC Summit in Santiago, Chile. Bush and Fox discussed a broad range of issues and agreed to increase cooperation in the areas of trade, border security, and immigration. They also noted the importance of finding ways to improve North American competitiveness and spur economic development in Mexico in order to reduce illegal immigration to the United States.

The short meeting offered both leaders the opportunity to raise the profile of bilateral issues as well as discuss hemispheric issues of mutual concern, including the future of the Free Trade of the Americas (FTAA).

Fox aligned himself with Bush on the most relevant issues of the Summit's agenda: advancing development through trade and investment liberalization and promoting good governance.

President Fox also pushed Bush for details on his temporary work program initiative announced early in 2004 and repeated during the US Presidential campaign. Bush expressed his commitment to the temporary worker program and assured Fox that the issue is on the administration's legislative agenda. However, he was unable to provide further details, including a timeline to propose legislation to the U.S. Congress. Since he took office in 2000, Fox has been trying to get an immigration agreement from Bush, who postponed immigration reform after the September 11 attacks.

#### *OUTLOOK*

The Bush administration is clearly committed to establish close ties with President Fox and engage in the discussion of immigration reform in the US.

The temporary worker program falls short of Mexico's objectives since it is not an amnesty program, as President Fox initially sought. However, the proposal, if it commands

the political will of the White House, represents a step towards accomplishing immigration reform. Fox and his cabinet will concentrate their efforts on lobbying the U.S. Congress to approve the program before Fox leaves office in 2006.

Policy analysts, however, question Bush's temporary worker program since it would not necessarily benefit the five million Mexicans that reside illegally in the United States. In addition, the Bush administration has provided very few details about the program and it is unclear whether the U.S. Congress will approve the program during the next legislative session.

## **APEC Leaders in Santiago Agree to Advance WTO Doha Round, Security Cooperation and Other Initiatives**

### ***SUMMARY***

The leaders of the Asia-Pacific Economic Cooperation forum (APEC) countries agreed to encourage progress in WTO Doha Round and fight terrorism, among other objectives, at their annual summit held in Santiago, Chile, on November 20-21, 2004.

The main themes of the leaders' final declaration were trade and investment liberalization and facilitation, security and good governance. The leaders summit took place after a week of deliberations and meetings by Senior Officials and Trade Ministers of the 21 APEC economies.

### ***ANALYSIS***

#### **I. Background on Santiago Leaders Meeting and APEC Objectives**

On November 20-21, 2004, the leaders of the 21 economies of the Asia-Pacific Economic Cooperation forum (APEC) gathered in Santiago, under the theme "One Community, Our Future" for their 12<sup>th</sup> annual meeting. The leaders' agenda focused on the issues of trade and investment liberalization and facilitation, security and good governance. A meeting of the Senior Officials and a meeting of Ministers of the 21 economies preceded the leaders Meeting.

APEC started in 1989 as a gathering to boost trade among Pacific Rim nations, but its focus has broadened to include security matters in recent years.

APEC's members include Australia, Brunei, Canada, Chile, China, Hong Kong, Indonesia, Japan, Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, the Philippines, Russia, Singapore, South Korea, Taiwan, Thailand, the United States and Vietnam. These economies combined represent nearly 50% of all world trade and more than half of the world's product.

#### **II. Leaders Encourage Progress in Trade Liberalization, Security Cooperation and Good Governance**

The main aspects of the leaders declaration are set forth below:

##### **A. Promoting Further Trade Liberalization**

The leaders reaffirmed their commitment towards the advancement of the Doha Development Agenda, which is considered as a first priority to achieve trade liberalization. The leaders agreed in committing all their political will in achieving substantially greater market access in agriculture, goods and services, along with the elimination of distortions, notably the end of agricultural export subsidies. The leaders also supported the accession of Russia and Vietnam to the WTO, "as soon as possible."

A senior US. trade official indicated that one of the reasons for the renewed statement of support for trade liberalization was to put other nations, that might want to block further

the already slow pace of the ongoing Doha Development Agenda in Geneva, on notice that the 21 APEC economies intend to move toward increasing free trade.

With regard to Regional and Free Trade Agreements, the leaders stated their belief that such arrangements can make a positive contribution to the process of trade liberalization. They endorsed a set of Best Practices for convergence of these preferential arrangements.

In recent years, the Asia-Pacific region has experienced a dramatic increase in the number of FTAs. According to a study prepared by Chile for the Meeting, there are currently 90 FTAs within APEC economies, a number that could be increased to 190 in the next years. Some analysts and trade officials have criticized this surge in the number of FTAs, as they consider that they undermine the global trade liberalization effort.

Stuart Harbinson, chief of staff of WTO Director-General Supachai Panitchpakdi's office, asserted that the "expanding web" of FTAs drains resources from multilateral talks and creates complex regulations that burden business. Harbinson spoke at the CEO Summit that takes place each year during the APEC forum meetings.

APEC leaders also launched the *Santiago Initiative for Expanded Trade in APEC*, aimed at achieving trade and investment liberalization and trade facilitation in the region. With regard to the latter, the leaders agreed to continue working to reduce business transaction costs by cutting red tape, embracing automation, harmonizing standards and eliminating unnecessary barriers to trade. They also agreed to work together to advance the trade facilitation negotiations in the WTO, promote secure trade, and build on the *APEC Best Practices for RTAs/FTAs* in the area of trade facilitation.

APEC's Business Advisory Committee (ABAC) had proposed the idea of an APEC free trade agreement. The leaders considered the proposal as relevant, but did not endorse it. According to ABAC representatives, some leaders were concerned that an APEC FTA could weaken the negotiations in the WTO. Hernan Somerville, chairman of ABAC, and Juan Villarzu, Chilean representative in ABAC, considered that another reason for the lack of endorsement of the APEC FTA proposal was the fear that it would contradict one of APEC's salient characteristics – the voluntary nature of its agreements. According to Villarzu, the US was one of the nations that did not agree with the APEC FTA proposal. Analysts also mentioned China as a country opposed to the proposal.

Villarzu and Osvaldo Rosales, former Head of Chile's International Economic Relations Office, believes that the ABAC proposal was not rejected, and that ABAC will continue to work in this proposal. According to Villarzu, in case the Doha Development Agenda does not make enough progress there is a chance that the ABAC proposal will be reconsidered by the leaders

#### B. Increased Cooperation on Security Initiatives

The leaders encouraged APEC economies to take action towards ratification and implementation of, or the commitment to ratify, all basic universal antiterrorist conventions. The US in particular was keen to secure cooperation on various security initiatives. APEC leaders agreed to take steps to cut off terrorists' access to the international financial system,

including implementing standards and agreements on combating terrorist financing and money laundering.

C. Efforts to Improve Good Governance

The leaders also endorsed the *Santiago Commitment to Fight Corruption and Ensure Transparency*. This Commitment includes an APEC Course of Action to fight corruption. Implementation of this initiative will be undertaken between now and APEC leaders' next Annual Meeting in Seoul in 2005.

Leaders also reaffirmed their commitment to promote structural reform in the APEC region, including improvements in the functioning of markets. They approved the *Agenda to Implement Structural Reform*, known as LAISR.

**OUTLOOK**

Among the major achievements on trade objectives, the APEC leaders declaration intends to give a sense of urgency to the Doha Development Agenda, given the setbacks that WTO negotiations have suffered since the Cancun Ministerial meeting in September 2003. Nevertheless, negotiations have been revived since WTO Members reached framework agreements in July 2004. The leaders endorsed a proposal by the US to have a small-summit in mid-2005 so as to arrive at the next Ministerial Conference to be held in Hong-Kong in December 2005 with agreements that guarantee the success of that meeting. Ban Ki-moon, Foreign Minister of South Korea, told reporters: "when we hold this APEC leaders meeting in 2005, Korea will place more emphasis so that APEC can give much bigger and stronger impetus" to the WTO talks to be held in Hong-Kong.

Within the APEC framework, leaders and ministers also reaffirmed their commitment towards achieving the "Bogor Goals" of free and open trade and investment in the Asia-Pacific by 2010 for developed economies and 2020 for developing economies.

Notwithstanding APEC's long-term vision, it appears that many APEC economies are pursuing more narrow interests as witnessed by the proliferation of free trade agreement negotiations in recent years. The trend towards bilateral FTAs is expected to continue and perhaps increase if liberalization is not achieved at the regional or multilateral levels. It remains to be seen whether bilateral trade initiatives will spur, or deter wider liberalization efforts in the Asia-Pacific region.



## MULTILATERAL

### WTO Panel Finds Against U.S. Laws on Internet Gambling

#### SUMMARY

A WTO Panel has found that certain U.S. federal and state laws against internet gambling violate the market access commitments of the United States under the *General Agreement on Trade in Services* ("GATS"). In ruling in favour of Antigua, the Panel also rejected U.S. arguments that its measures were necessary to protect public morals, maintain public order, and enforce U.S. laws against organized crime and racketeering.

#### ANALYSIS

##### I. Background

###### *Scheduling "Specific Commitments" for Trade in Services*

Under the GATS, each WTO Member sets out in a separate schedule - similar to a tariff schedule - the sector-specific commitments it has undertaken for trade in services. Under the terms of the treaty, Members' schedules of specific commitments are "an integral part" of the GATS.

This dispute centered upon the interpretation of the scope of specific commitments set out in the U.S. Services Schedule. The case related exclusively to the cross-border supply of services, *i.e.*, the so-called "mode 1".

##### II. Panel Findings

###### A. U.S. Specific Commitments for Gambling and Betting Services

###### *Determining the meaning of "recreational services"*

The U.S. Services Schedule does not include the words "gambling and betting services." However, the United States undertook a full commitment - *i.e.*, with no market access limitations - under the subheading of "*Other Recreational Services (except sporting)*." In interpreting this term - and therefore the scope of the U.S. commitments - the Panel adopted the ruling of the Appellate Body in the 1998 *Computer Equipment* case, which stated that "while each Schedule represents the tariff commitments made by *one* Member, they represent a common agreement among all Members [original emphasis]." Although the Appellate Body made this statement in the context of a GATT tariff schedule, the Panel said that this finding was "equally relevant for GATS schedules." Thus, the Panel said it needed to determine "the *common* intention of the parties concerning the U.S. Schedule [original emphasis]."

*Secretariat scheduling guidelines provide context*

As part of the context for interpreting the U.S. Services Schedule, the Panel relied on two documents prepared by the GATT Secretariat during the Uruguay Round:

- the 1993 *Scheduling Guidelines* which, as the title suggests, provided guidance on the scheduling of specific services commitments; and
- the 1991 *Services Sectoral Classification List* ("W/120"), which provided a breakdown of service sectors and sub-sectors, based on the U.N. provisional Central Product Classification list ("CPC").

The Panel acknowledged that the *Scheduling Guidelines* did not represent an authoritative interpretation of the GATS, and there was no obligation imposed on WTO Members to use the Secretariat's W/120 list. Nevertheless, the Panel concluded that both documents "were agreed upon by Members with a view to using such documents, not only in the negotiation of their specific commitments, but as an interpretive tool in the interpretation and application of Members' scheduled commitments." As such, the Panel considered these documents to constitute "context" for the interpretation of GATS Schedules within the meaning of the *Vienna Convention on the Law of Treaties*.

*U.S. Schedule corresponds to the Secretariat's list - which includes gambling services*

As noted above, the Secretariat's services classification list (W/120) corresponds in part to the U.N. list (CPC). The U.S. Schedule did not include any explicit reference to the CPC. However, the Panel reasoned that "[w]here the U.S. Schedule follows W/120 without any clear departure and in the absence of any specific definition, the United States has created an expectation that its commitments must be interpreted in light of W/120 and the corresponding CPC numbers [original emphasis]." In examining the "corresponding CPC numbers", the Panel observed that the U.S. reference to "*Other Recreational Services (except sporting)*" corresponded to a CPC sub-sector called "*Sporting and other recreational services*." This CPC category, in turn, included the sub-category of "*gambling and betting services*." Given this correlation, the Panel concluded that the U.S. Schedule "is to be understood to include a specific commitment on gambling and betting services."

The Panel affirmed this conclusion through "supplementary means of interpretation", including the fact that the cover note to the U.S. draft Services Schedule, sent a week before the conclusion of the Uruguay Round, stated in part that "the scope of the sectoral commitments of the United States corresponds to the sectoral coverage in the Secretariat's *Services Sectoral Classification List*." In other words, the U.S. commitments were said to correspond to "W/120." The Panel observed that "the fact that this reference to W/120 was made at a crucial stage during the services market access negotiations...cannot be ignored as it would have led participants to believe in good faith that the 'scope' of the U.S. commitments 'corresponded' to the 'sectoral coverage' of W/120." The Panel also noted that a 1997 report of the U.S. International Trade Commission stated that the U.S. Services Schedule corresponded in part to the CPC.

*The United States "may well have inadvertently undertaken commitments" on gambling*

During the Panel proceedings, the United States repeatedly argued that it had no intention during the Uruguay Round of scheduling a commitment for gambling and betting services. The Panel said that it had "some sympathy" with the U.S. position. However, it added that "the scope of a specific commitment cannot depend on what a Member intended or did not intend to do at the time of the negotiations." It recalled the Appellate Body statement in the *Computer Equipment* case that the purpose of treaty interpretation was to ascertain the *common* intention of the parties, and that such a common intention "cannot be ascertained on the basis of the subjective and unilaterally determined 'expectation' of *one* of the parties to a treaty [original emphasis]." The Panel noted that the United States "may well have inadvertently undertaken specific commitments on gambling and betting services." However, the Panel said that its role was not to "second-guess the intentions of the United States at the time the commitment was scheduled" but to "interpret and apply the GATS in light of the facts and evidence before us."

#### B. U.S. Federal and State Laws Found to Violate U.S. Market Access Commitments

The Panel noted that with respect to "*Other recreational services (except sporting)*" in the U.S. Services Schedule (i.e. with respect to gambling services), the United States had inscribed "None" under the column for "limitations on market access." The Panel noted that "when a Member has the inscription 'None' in the market access column of its schedule, it must maintain 'full market access' within the meaning of the GATS", without limitation. The Panel added that if a Member made a market access commitment in a particular sector, that commitment covered all services that fell within the scope of that sector. It reasoned that if a Member wanted to exclude market access with respect to the supply of a service through one, several or all means of delivery included in mode 1, it "should do so explicitly in its schedule."

Applying these tests to the U.S. measures in dispute, the Panel found that three federal and four state anti-gambling statutes violated U.S. market access obligations under GATS Articles XVI:1 and XVI:2(a) and (c).

The three federal laws include the U.S. *Wire Act*, which prohibits the use of wire communications (including the internet) in interstate foreign bets or wagers. In addition, the *Travel Act* prohibits the use any facility (including the internet) in interstate or foreign commerce with the intent of distributing the proceeds of any 'unlawful activity', committing any crime of violence to further any 'unlawful activity', or otherwise to carry on any 'unlawful activity.' The Act defines 'unlawful activity' to include gambling in violation of state laws. Finally, the *Illegal Gambling Business Act* prohibits anyone from conducting, financing, managing or supervising an 'illegal gambling business', i.e. a gambling business that violates state law.

The Panel concluded that these three federal statutes, as well as the anti-gambling laws of four states, violated U.S. obligations under Articles XVI:1 and XVI:2 of the GATS. The Panel reasoned that a ban on the use of one, several or all means of delivery included in mode 1 effectively constituted a "zero quota" for such means of delivery. The Panel found that the U.S. federal and state laws prohibited all means of delivery included in mode 1 for gambling and betting services, in breach of U.S. obligations under the GATS.

C. U.S. Defense Under Article XIV Exceptions Rejected: U.S. Measures Not "Necessary" to Protect Public Morals and Public Order

This was the first WTO case to interpret the exceptions provided for in Article XIV of the GATS. GATS Article XIV(a) allow Members to take measures "necessary to protect public morals or to maintain public order." Article XIV(c) permits measures "necessary to secure compliance" with certain WTO-consistent laws. In its interpretation of these provisions, the Panel drew from the jurisprudence under GATT Article XX, on which the parallel provision of the GATS was based.

*Defining "Public Morals and Public Order"*

The Panel noted that the concept of "public morals" and "public order" could "vary in time and space, depending on a range of factors, including prevailing social, cultural, ethical and religious values." Moreover, it acknowledged that WTO Members "should be given some scope to define and apply for themselves the concepts of 'public morals' and 'public order' in their respective territories, according to their own systems and scales of values." The Panel considered that the term "public morals" denoted "standards of right and wrong conduct maintained by or on behalf of a community or nation." It said that "public order" referred to "the preservation of the fundamental interests of a society, as reflected in public policy and law." It added that these fundamental interests could relate, among other things, to "standards of law, security and morality."

*U.S. measures "vital and important in the highest degree"*

The Panel noted statements by various parts of the U.S. government, particularly the Congress, indicating that the laws in question were adopted to address concerns pertaining to money laundering, organized crime, fraud, underage gambling and pathological gambling. It determined that the three U.S. statutes, read in conjunction with the state laws, were indeed measures designed to "protect public morals" and/or to "maintain public order" within the meaning of Article XIV(a). The Panel found that the interests and values protected by the U.S. laws in question "serve very important societal interests that can be characterized as 'vital and important in the highest degree' in a similar way to the characterization of the protection of human life and health against a life-threatening health risk" by the Appellate Body in *EC-Asbestos*.

*U.S. measures nevertheless not "necessary"*

However, drawing on jurisprudence developed under GATT Article XX, the Panel said that a Member must "first explore and exhaust all GATT/WTO compatible alternatives before resorting to WTO-inconsistent alternatives."

The United States argued that there were concerns with money laundering, fraud, health and underage gambling that were specific to the remote (internet) supply of gambling and betting services, that did not apply to physical gambling operations, such as casinos, that were licensed domestically.

Nonetheless, the Panel attached great importance to the fact that the United States declined Antigua's offer to consult with Antigua on these issues. The Panel stated that "a key

element in the application of the 'necessity' test of Article XIV in this dispute is whether the United States has explored and reasonably exhausted available WTO-consistent alternatives to the U.S. prohibition on the remote supply of gambling and betting services that would ensure the same level of protection." In the view of the Panel, by "rejecting Antigua's invitation to engage in bilateral or multilateral consultations and/or negotiations, the United States failed to pursue in good faith a course of action that could have been used by it to explore the possibility of finding a reasonably available WTO-consistent alternative." Thus, the Panel concluded that the U.S. measures could not be considered as "necessary" under Article XIV(a).

*Measures against organized crime similarly not "necessary"*

The Panel reached a similar conclusion with respect to the U.S. argument that its measures were necessary to secure compliance with WTO-consistent laws under Article XIV(c).

The Panel first ruled that the Article XIV(c) defense was not available with respect to state laws, in part because these laws had already been found to be WTO-inconsistent. With respect to the three federal statutes, the Panel agreed that they were all used to secure compliance with the 1970 RICO (Racketeer Influenced and Corrupt Organizations) Act.

In considering the "necessity" of the measures taken to secure compliance, the Panel stated that "the interests protected by the RICO statute are very important society interests that can be characterized as 'vital and important in the highest degree', again in a similar way to the characterization of the protection of human life and health under GATT Article XX. The Panel also found that the three U.S. statutes all made significant contributions to ensuring that efforts to enforce criminal laws against organized crime, including the RICO statute, were not undermined.

The United States argued that the *Wire Act*, the *Travel Act*, and the *Illegal Gambling Business Act* were indispensable to defeating organized crime. The Panel rejected this, stating that "it cannot be enough that the United States believes and maintains that a measure is 'indispensable.' The onus lies on the United States to show that it has explored WTO-consistent alternatives." The Panel re-iterated its view that "the United States should have engaged in good faith bilateral or multilateral consultations and/or negotiations with Antigua when invited to do so, with a view to exploring whether there were any ways of meeting its concerns with regard to organized crime in a WTO-consistent manner." The United States had not "explored and exhausted WTO-consistent alternatives in the form of consultations and/or negotiations to determine whether there is a way of ensuring that its organized crime concerns can be addressed in a WTO-consistent manner." Therefore, the U.S. measures were not considered by the Panel to be "necessary" within the meaning of Article XIV(c).

*U.S. failed to demonstrate that its measures did not constitute "arbitrary or unjustifiable discrimination"*

If the U.S. measures had been found to be "provisionally justified" under one of the paragraphs of Article XIV, then the Panel would still have needed to assess the WTO-consistency of the measures against the so-called "chapeau", or opening paragraph, of this provision. In the present case, the U.S. measures were *not* found to be consistent with Article

XIV(a) or (c), and so the Panel had no need to consider the "chapeau." However, the Panel opined on this matter nonetheless. The Panel pointed to a federal statute that appeared to permit wagering for horse racing over the telephone and the internet (although the two sides differed on the meaning of the statute). The Panel said that the U.S. measures therefore did not meet the tests set out in the chapeau. It found that the United States had failed to demonstrate that it did not apply its prohibition on the remote supply of horse racing wagering services in a manner that did not constitute "arbitrary and unjustifiable discrimination" or a "disguised restriction on trade."

The decision of the Panel in United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS285) was released on November 10, 2004.

### ***OUTLOOK***

On one level, this decision relates to the technical issue of scheduling services commitments. On another level, it raises troubling questions about the flexibility of WTO Members to legislate in vital areas of social policy.

#### *Panel's determination on classification of services: Schedule reflects a common intent*

The United States argued before the Panel that it did not intend to schedule any commitments for gambling services. However, during and after the Uruguay Round, the U.S. government conducted itself in such a manner that U.S. trading partners could reasonably have concluded that the United States had scheduled its services commitments according to a classification system prepared by the Secretariat - a list that clearly included gambling and betting services. Indeed, a week before the Uruguay Round concluded, the United States forwarded its Services Schedule under a cover note indicating that the U.S. commitments corresponded to the Secretariat's classification.

It is well-established in WTO jurisprudence that a tariff schedule reflects not simply the unilateral intentions of the party offering it, but the common intention of all of the Members of the WTO, as it forms part of the treaty text. The Panel in the present case applied this jurisprudence to the services context, and concluded, not unreasonably, that the U.S. Schedule encompassed gambling services.

#### *Panel elevates form over substance in finding that the U.S. laws were not "necessary"*

However, the Panel dismissed some very strong arguments made by the United States that it was nevertheless entitled to invoke the exception provided for in the GATS for measures related to "public morals", "public order", and the enforcement of WTO-consistent legislation, including U.S. federal law on organized crime.

The United States acknowledged that certain forms of gambling are legal domestically, but argued that internet gambling posed unique regulatory problems that required that this activity be largely prohibited. For example, it may be impossible to prevent minors from gambling on the internet, while minimum age laws can be enforced at the door of a "bricks and mortar" establishment, such as a casino.

The Panel found that the U.S. measures could not be considered as "necessary" within the meaning of the exception provided for in Article XIV of the GATS. The Panel placed decisive weight on the fact that the United States declined to consult with Antigua with respect to U.S. concerns about maintaining the efficacy of federal and state law on gambling and organized crime. In the view of the Panel, this failure to consult was proof that the United States had not exhausted all WTO-consistent alternatives.

The Panel's reasoning on GATS Article XIV is highly suspect. It elevates form over substance by effectively imposing a requirement to consult. In interpreting the requirement of "necessity" in the parallel provision of the GATT (Article XX), it is settled law that a measure cannot be considered as "necessary" if there is another, WTO-consistent (or less inconsistent) measure reasonably available to allow the Member to achieve its objectives. This requires what the Appellate Body has described as a "weighing and balancing process" to determine the extent to which a WTO-consistent alternative measure contributes to the realization of the end pursued. The Appellate Body has also made clear that the more important the Member's objective, the easier it is to accept as "necessary" the measures designed to achieve those ends. In the 2001 *EC-Asbestos* case, for example, the Appellate Body stated that the EC's objective of preserving human life and health through the elimination of asbestos was a value that was "both vital and important in the highest degree."

The *Gambling* Panel acknowledged that the jurisprudence under GATT Article XX was readily applicable to Article XIV of the GATS. The Panel also found that the U.S. anti-gambling laws served "very important societal interests" and also could be characterized as "vital and important to the highest degree", in a similar way to the Appellate Body's characterization of human life and health in *Asbestos*. But the Panel's analysis stopped there. It did not undertake the substantive exercise of determining whether there were WTO-consistent alternatives reasonably available to the United States to achieve its objectives. There was no "weighing or balancing" by this Panel. Instead, the mere failure to consult, without more, was sufficient for the Panel to reject the U.S. position on public morals, public order, and the enforcement of other laws.

The Panel's approach can hardly be what was intended when the drafters of the GATS inserted this exception into the Agreement. It fails to accord substantive meaning to Article XIV, a provision which could quite legitimately have covered the impugned U.S. measures in this case. It also virtually guarantees that WTO Members seeking to invoke this exception in the future - whether under the GATS or under the comparable provision of the GATT - will likely engage in *pro forma* consultations to demonstrate to Panels such a requirement has been met.

The United States has announced its intention to appeal this decision. The Panel's findings on Article XIV clearly would be vulnerable to reversal by the Appellate Body.

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