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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

House Republicans, Democrats Introduce Competing Measures on Chinese Trade Practices

After months of hearings and escalating rhetoric in Congress, House Republicans and Democrats have introduced competing bills aimed at China's "unfair" trade practices. Both bills include measures related to U.S. trade remedy laws, China's fixed exchange rate policy, bonding requirements for new shippers, and to address surging imports from China. The bills differ, however, in their approaches to resolving bilateral trade frictions.

House Ways and Means Committee Chairman **Bill Thomas** (R-California) has joined as a sponsor of the Republican bill, the United States Trade Rights Enforcement Act of 2005 (HR 3283). Thomas' support is part of an effort to win crucial votes for the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA).

Congress Considers Legislative Options to Address China Trade and Currency Concerns; Greenspan Criticizes Senator Schumer's Proposal on Punitive Tariffs

Legislative proposals to address trade imbalances with China continue to multiply in Congress. Among the concerns, pressuring China on its fixed exchange rate policy continues to be a top priority among legislators. Senator **Charles Schumer**'s (D-New York) proposal to impose a 27.5 percent tariff on all imports from China unless China floats its currency will be voted upon in the Senate before the August recess. However, at a June 23, 2005, Senate Finance hearing, Federal Reserve Chairman **Alan Greenspan** offered harsh criticism of the tariff bill. He asserted that the imposition of such a tariff would do nothing to aid U.S. manufacturing, and could have an overall negative effect on the U.S. economy.

Other proposals besides punitive tariffs are being considered. One proposal would strengthen the ability of Customs and Border Protection (CBP) to collect anti-dumping duties (AD) on certain goods from China. Another proposal would allow the imposition of countervailing duties (CVD) against China, despite its status as a non-market economy

In related developments, some Members of Congress continue to express reservations about the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA) because of soaring trade deficits with China. House Ways and Means Chairman **Bill Thomas** (R-California) has suggested that action on China is essential to winning support for DR-CAFTA.

China Re-Values Currency; Long-Term Movement and Trade Impact Uncertain

China announced on July 21, 2005, that it is revaluing its currency and moving to a more flexible exchange rate mechanism. The announced revaluation, an appreciation of two percent, has earned guarded praise from the U.S. government and industry groups, who have argued that China's undervalued currency is a detriment to the trade balance. However, the longer-term implications of the modest revaluation remain uncertain. With other fixed currencies in the region matching China's move, and China intervening heavily to prevent

further changes in the value of the yuan, the overall effects of the revaluation on the U.S. economy may be very limited.

United States Highlights

We want to alert you to the following United States developments:

- China Announces Modest Currency Revaluation
- JCCT Concludes With Chinese Commitments on IPR, Services, and Subsidies

Free Trade Agreements

US Continues to Pursue “Competitive Liberalization” Strategy and Possible FTAs in Asia

Despite ongoing focus on the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA), the Bush Administration continues to pursue the “competitive liberalization” strategy, including possible new FTAs in Asia. Several major U.S. trade partners in Asia including Malaysia and South Korea have expressed interest in launching FTA talks. Moreover, negotiations with Thailand are proceeding as another round of talks are being held in Montana in mid-July.

Notwithstanding the growing interest in FTAs in Asia, the prospects for completion and ratification of these FTAs remain uncertain. Issues undermining realization of additional FTAs in Asia include a lack of political will on the part of Asian trading partners, time constraints under Trade Promotion Authority (TPA), and heightened sensitivity to trade agreements in the U.S. Congress.

Future of Trade Pacts Uncertain in the Wake of Close DR-CAFTA Vote

Analysts and pundits have begun to consider the longer-term implications of the hard-fought passage of the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA) on July 27, 2005. While President Bush has been credited with delivering a major win on trade policy, some analysts have suggested that future bilateral and regional agreements may face similar, if not more significant opposition. With only fifteen Democrats crossing party lines to support the agreement, it seems unlikely that the bipartisan coalitions that have passed many U.S. trade agreements will resurface in the near future. Moreover, the bitter debate over passing DR-CAFTA appears to be an indication of the growing public discomfort towards trade liberalization. The tense mood with respect to trade issues may be particularly troubling for ongoing talks with the Andean region and Thailand, among others.

DR-CAFTA Update: House Republican Leadership Promises July Vote, But Timing Remains Uncertain

The Dominican Republic-Central America Free Trade Agreement (DR-CAFTA) continues to await a final vote in the US House of Representatives. Senior House Republicans have promised a final vote before the August recess, which is scheduled to begin on July 29, 2005. Despite the promise of a vote, and continued efforts by the Bush administration, it appears

DR-CAFTA supporters still remain short of the votes needed to ensure passage in the House. With most Democrats expected to vote against the accord, the Administration is working to secure undecided Republicans, including from textile producing states.

Full Senate and House Ways and Means Committee Approve DR-CAFTA; Final Showdown in the House Expected Soon

Over a year after the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA) was signed, it is now headed for a final legislative showdown in Congress. On June 30, 2005, the full Senate and the House Ways and Means Committee approved the agreement. Under Trade Promotion Authority (TPA), the full House now has 15 legislative days to consider the accord, with a maximum of 20 hours of debate. House Republican leaders are aiming to have a final vote during the week of July 11th (after the July 4th week-long recess).

Momentum for the agreement appears to be gaining after the Administration reached understandings with undecided legislators on labor and sugar concerns. Nevertheless, some Senators used the floor debate to criticize the agreement. Senator **Craig Thomas** (R-Wyoming), for example, who had conditionally supported the agreement during the vote in the Senate Finance Committee, faulted the provisions of the so-called sugar deal. Senator **Byron Dorgan** (D-N. Dakota), one of the implementing legislation's chief critics, argued that the agreement is a product of a failed trade policy that was destroying U.S. jobs.

Attention now turns to the Administration's efforts to secure enough votes in the House to pass the agreement. Supporters admit to still being short of votes in the House, but hope that the Senate's action, and the agreements on labor and sugar, will entice enough undecided Members of the House to support the legislation.

US-European Union

US - EU Summit: Transatlantic Unity in Foreign Policy; Expansion of Agenda for Further Economic Integration

A delegation of the European Union's top officials met with President Bush and members of his cabinet at the 2005 US – EU Summit held in Washington on June 20, 2005. The discussions focused on current geopolitical issues, as well as trans-Atlantic economic integration. Among the *geopolitical issues*, EU leaders used the meeting to explain to the US the EU's recent failure to adopt a new 2007-2013 budget, and the defeat of the EU Constitutional referendums in France and the Netherlands. The Parties also discussed the situation in the Middle East and Africa, as well as non-proliferation, the fight against terrorism, promotion of democracy, freedom and human rights, and United Nations reform. The *economic issues* included cooperation on regulatory and standards issues, integration of capital markets, promotion of innovation and technology, transportation security, energy, protection of intellectual property rights, investment regimes, competition policy, government procurement and services.

In preparation for the official US-EU Summit, EU Trade Commissioner Peter Mandelson met with US Trade Representative Robert Portman on June 17, 2005. The two discussed the major trade irritants between the US and the EU, mainly the Boeing – Airbus subsidies dispute, among other issues.

Multilateral

Dalian Mini-Ministerial Acknowledges WTO Doha Round is Lagging; Pressure Intensifies to Achieve Key Targets by Hong Kong Ministerial

High-level participants at the Dalian “mini-Ministerial” meeting on July 12-13, warned that WTO Doha Round targets are lagging, and emphasized that critical work remains between now and the Hong Kong Ministerial in December 2005.

WTO Members have acknowledged that they probably will not achieve by late July agreement in areas outlined in May at the last mini-Ministerial in Paris. They recognize, for example, that more work is necessary for agriculture tariff formulae and domestic support disciplines. Likewise, most Members have expressed disappointment that recent improved offers on services market access have been few and modest. Nevertheless, there is growing convergence towards formulae for non-agricultural market access (“NAMA”), and substantive discussions in rules negotiations, trade facilitation and development concerns are proceeding apace.

Appellate Body Reverses Panel on Korean DRAMS

The WTO Appellate Body has overturned the findings of a Panel that had found that the U.S. imposition of countervailing duties on computer chips from Korea was in breach of the obligations of the United States under the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). The Appellate Body ruled that the Panel misinterpreted the applicable disciplines of the SCM Agreement, and improperly “second-guessed” the determinations of the investigating agency, the U.S. Department of Commerce (DOC).

REPORTS IN DETAIL

UNITED STATES

House Republicans, Democrats Introduce Competing Measures on Chinese Trade Practices

SUMMARY

After months of hearings and escalating rhetoric in Congress, House Republicans and Democrats have introduced competing bills aimed at China's "unfair" trade practices. Both bills include measures related to U.S. trade remedy laws, China's fixed exchange rate policy, bonding requirements for new shippers, and to address surging imports from China. The bills differ, however, in their approaches to resolving bilateral trade frictions.

House Ways and Means Committee Chairman **Bill Thomas** (R-California) has joined as a sponsor of the Republican bill, the United States Trade Rights Enforcement Act of 2005 (HR 3283). Thomas' support is part of an effort to win crucial votes for the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA).

ANALYSIS

We compare here the major provisions of the Republican-sponsored United States Trade Rights Enforcement Act of 2005 (HR 3283) and the Democrat-sponsored Fair Trade with China Act of 2005 (HR 33060):

	United States Trade Rights Enforcement Act of 2005 (HR 3283)	Fair Trade with China Act of 2005 (HR 3306)
Countervailing Duties (CVDs) on Non-Market Economies (NMEs)	<ul style="list-style-type: none"> • Would permit the imposition of CVDs on all NMEs, including China. • Would allow the ITC in determining the level of subsidies in China to use non-Chinese benchmarks for determining subsidy levels. 	<ul style="list-style-type: none"> • Would permit the imposition of CVDs on all NMEs, including China.
Bonding Privileges for New Shippers	<ul style="list-style-type: none"> • Would suspend bonding privileges for three years and require cash deposits for new shippers trading in products subject to an anti-dumping order. • Would require Treasury and 	<ul style="list-style-type: none"> • Would suspend bonding privileges for three years and require cash deposits for new shippers trading in products subject to an anti-dumping order.

	United States Trade Rights Enforcement Act of 2005 (HR 3283)	Fair Trade with China Act of 2005 (HR 3306)
	Customs to submit a report within two years outlining the effectiveness of the suspension in facilitating collection of duties.	
Monitoring of Chinese Compliance with WTO/JCCT Commitments	<ul style="list-style-type: none"> • Would require USTR to submit a biannual report on China's compliance with WTO/JCCT commitments in the areas of intellectual property, market access, and subsidy identification. 	<ul style="list-style-type: none"> • No relevant provisions
China's Exchange Rate Policy	<ul style="list-style-type: none"> • Would require the Treasury Department, within 60-days of enactment, to submit to Congress report outlining what actions by a foreign sovereign would constitute currency manipulation, and recommendations on how current law may be changed to better reflect currency exchange rate practices. 	<ul style="list-style-type: none"> • Would define currency manipulation as intervention by the exchange rate market for the purpose of undervaluing a currency to prevent orderly balance of payments adjustments or to gain a competitive advantage vis-à-vis the United States. • Would make currency manipulation unjustifiable under Section 301 of US trade law, and would require USTR to commence an investigation in China's exchange rate policies.
Remedies for Surging Imports from China (Safeguards)	<ul style="list-style-type: none"> • No relevant provisions 	<ul style="list-style-type: none"> • Would narrow Presidential discretion in denying import relief should the ITC recommend granting relief.
Super 301	<ul style="list-style-type: none"> • No relevant provisions 	<ul style="list-style-type: none"> • Would reinstate the Super 301 process, and make special provision for monitoring of Chinese trade practices.
USTR Funding	<ul style="list-style-type: none"> • Would authorize an additional \$6 million for 	<ul style="list-style-type: none"> • No relevant provisions.

	United States Trade Rights Enforcement Act of 2005 (HR 3283)	Fair Trade with China Act of 2005 (HR 3306)
	USTR budget, and would earmark \$4 million for General Counsel, Office of Monitoring and Compliance, and the Office of China Affairs.	
ITC Funding and Investigation	<ul style="list-style-type: none"> • Would authorize an additional \$4 million for ITC (FY 2007). • Would require, within one year of enactment, a report by the ITC examining the US-China economic relationship. 	<ul style="list-style-type: none"> • Would require the ITC to conduct an investigation into Chinese economic policies aimed at supporting the manufacturing sector.

OUTLOOK

Despite strong support for the proposed China bills among both Democrats and Republicans in Congress, the Administration and Senate Finance Chairman **Charles Grassley** (R-Iowa) have expressed opposition to various provisions contained in both bills. Both are skeptical of allowing the imposition of CVDs on China, and the Administration has expressed some concerns about suspending bonding privileges for new shippers. Despite these concerns, Chairman Thomas has pledged to bring the Republican version of the China legislation to the floor prior to a vote on DR-CAFTA. This move is aimed to help convince undecided House Members to support the Central America trade agreement. Already Representative **Phil English** (R-Pennsylvania), who had previously intended to oppose DR-CAFTA, has changed his position and now supports the agreement.

The short time frame before the August recess would force the bill to be considered under the suspension of House rules. Adoption of the United States Trade Rights Enforcement Act of 2005 prior to the August recess would require two-thirds support in the House under a suspension consideration. Chairman Thomas has expressed confidence that the bill would receive wide support, and pledged to bring it back for regular consideration should it be defeated prior to the August recess. Democrats have opposed linking any China trade bill to DR-CAFTA. However, several Democrats are expected to support the Republican bill when it comes for a vote.

Prospects for approval of the United States Trade Rights Enforcement Act of 2005 beyond the House remain unclear. Chairman Grassley has indicated some willingness to consider legislative action with respect to China, but has been largely unsupportive of measures related to retaliation due to currency policy, or the imposition of CVDs on China.

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The Senate calendar is expected to be full with appropriations bills and the confirmation of at least one Supreme Court nominee. Moreover, once action on DR-CAFTA complete, Chairman Thomas may waver in his support of the bill.

Congress Considers Legislative Options to Address China Trade and Currency Concerns; Greenspan Criticizes Senator Schumer's Proposal on Punitive Tariffs

SUMMARY

Legislative proposals to address trade imbalances with China continue to multiply in Congress. Among the concerns, pressuring China on its fixed exchange rate policy continues to be a top priority among legislators. Senator **Charles Schumer's** (D-New York) proposal to impose a 27.5 percent tariff on all imports from China unless China floats its currency will be voted upon in the Senate before the August recess. However, at a June 23, 2005, Senate Finance hearing, Federal Reserve Chairman **Alan Greenspan** offered harsh criticism of the tariff bill. He asserted that the imposition of such a tariff would do nothing to aid U.S. manufacturing, and could have an overall negative effect on the U.S. economy.

Other proposals besides punitive tariffs are being considered. One proposal would strengthen the ability of Customs and Border Protection (CBP) to collect anti-dumping duties (AD) on certain goods from China. Another proposal would allow the imposition of countervailing duties (CVD) against China, despite its status as a non-market economy

In related developments, some Members of Congress continue to express reservations about the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA) because of soaring trade deficits with China. House Ways and Means Chairman **Bill Thomas** (R-California) has suggested that action on China is essential to winning support for DR-CAFTA.

ANALYSIS

I. Senate Finance Hearing Debates Tariff and CVD Proposals; Greenspan Critical of Punitive Tariffs on China

On June 23, 2005, the Senate Finance Committee held a hearing to review the state of US-China trade relations. The central focus of the hearing was on two legislative proposals aimed at addressing China's perceived unfair trade practices. The first bill, sponsored by Senators **Charles Schumer** (D-New York) and **Lindsey Graham** (R-South Carolina) would impose a 27.5 percent tariff on imports from China should the Chinese government fail to re-value and ultimately float its currency (S.295). A second proposal, sponsored by Senators **Evan Bayh** (D-Indiana), **Susan Collins** (R-Maine), and **Debbie Stabenow** (D-Michigan) would allow the Commerce Department to impose countervailing duties ("CVDs") on China, despite its status as a non-market economy (S.593).

The hearing opened with statements from the Chairman and those Senators sponsoring the above-mentioned proposals. In his prepared remarks Chairman **Charles Grassley** (R-Iowa) expressed opposition to both the tariff and CVD proposals. While imploring China to live up to its commitments under the World Trade Organization (WTO), Senator Grassley stated that the imposition of a tariff would not aid the U.S. manufacturing sector.

Senators Schumer and Graham vigorously defended their tariff proposal. Senator Schumer noted that the bill would not require China to float its currency immediately; rather it would require an immediate revaluation. Both Senators rejected characterizations of the

bill as protectionist. Instead, they claimed that U.S. manufacturers needed protection from China's unfair trade practices.

Perhaps the focal point of the Senate hearing was the testimony of Federal Reserve Chairman Alan Greenspan. In his prepared testimony, Chairman Greenspan rejected outright any assertion that the imposition of a sweeping tariff on Chinese goods would assist U.S. manufacturers. Rather, such a tariff would likely lead to trade diversion and benefit other Asian countries, whose trade surpluses with the US have been in steady decline since 2000 (presumably as Chinese exports have increased). Moreover, the higher prices for certain inputs resulting from the tariff would likely harm the U.S. economy. Greenspan, under questioning from Senators, did note the importance of assuring adequate protection of intellectual property rights, and assisting workers in coping with effects of continued globalization.

II. Carnegie Endowment Policy Brief Suggests China's Surplus and Exchange Rates Not Excessive

The Carnegie Endowment for International Peace, an international think tank, released a policy brief arguing that China's fixed exchange rate has not caused the loss of U.S. manufacturing jobs.¹ Written by Senior Associate **Albert Keidel**, the brief argues that China's trade surplus with the US is not an appropriate measure of China's overall economic position. As a percentage of gross domestic product (GDP), China's overall trade surplus is comparable to Germany, Japan and Thailand. Furthermore, China ranks on roughly equal footing in percentage terms with the Netherlands, Singapore, and Saudi Arabia in terms of overall percentage of the U.S. trade deficit. The report also notes that China's foreign exchange reserves, in terms of the number of months of imports that the reserves could sustain, are similar to Chile, Indonesia and South Korea.

The Carnegie report emphasizes the important role of investment in explaining China accumulating reserves. China as a major investment destination, coupled with its exchange rate policy, has resulted in the accumulation of significant foreign reserves. The brief does note, however, that in order to maintain long-term economic health, China will need to loosen controls on capital and allow the exchange rate to adjust. The report also suggests that Congress should focus on improving U.S. productivity rather than attempting to use legislation to pressure China to end its fixed exchange rate.

III. GAO Report Expresses Concerns on Allowing CVD Cases Against China

On June 20, 2005, the GAO released a report on the application of CVDs to non-market economies (NMEs). The report expressed doubts about the practicality and consequences of allowing CVDs against NMEs including China. According to the GAO, two options exist for allowing CVDs against China. First, the Commerce Department could classify China, or certain industries within China as market economies. However, the report notes that China fails to meet established criteria for classification as a market economy. Furthermore, such a move may diminish the overall levels of antidumping (AD) remedies

¹ Alberta Keidel, China's Currency: Not the Problem, (Carnegie Endowment for International Peace, June 2005) available at: <http://www.carnegieendowment.org/files/PB39.Keidel.FINAL.pdf>.

that could be imposed on China. According to GAO, average AD margins tend to be significantly lower against market economies than NMEs.

A second option available would be to adopt legislation permitting CVD cases against NMEs. Such a move, however, might prove impractical from an economic perspective. The GAO, for example, expresses concerns about the ability of the Commerce Department to determine accurately the subsidy levels in a non-market economy. Employing third-country (surrogate) information might prove somewhat useful, however, it would not overcome problems in identifying subsidies according to the GAO. The GAO recommends in its report that the Commerce Department clarify methodologies for assessing possible CVDs against China before permitting such cases to go forward.

IV. Representative English Introduces China Tariff Bill in the House

Representative **Phil English** (R-Pennsylvania) has introduced a bill in the House that would require the Treasury Department to calculate the extent to which China is manipulating its currency. Based on the calculation, the bill would require that a tariff, equivalent to the level of manipulation, be imposed on all imports from China. Representative English, following the bill's introduction, acknowledged that the bill likely would violate U.S. commitments under the WTO.

V. China's Bid for Unocal Further Complicates Trade Issues

On June 22, 2005, China's state-owned oil company CNOOC made a bid for California-based oil company Unocal. Though still early in the negotiating process, the potential for such a take-over is already stirring controversy in Congress. Senator Graham, for example, has indicated that the bid makes the current trade debate in Congress even more complicated. Administration officials, however, have indicated that commenting on a potential deal involving Unocal is premature.

OUTLOOK

As part of an agreement expediting USTR Portman's confirmation (with Senator Bayh regarding the CVD legislation), the Senate is expected to vote on the Graham-Schumer bill imposing a 27.5 percent tariff on imports from China in late July. Senator Schumer has acknowledged that his bill has little chance of becoming law, but even passage in the Senate would demonstrate a strong level of concern about China in Congress.

Regardless of the outcome of the Senate vote on the Graham-Schumer bill, it is clear that concerns over China continue to permeate the trade debate in Congress. Though solutions involving the sweeping imposition of tariffs appear to have little chance of becoming law, there is an increasing sense that some action will need to be taken. Beyond concerns over currency, and subsidies, China's lack of protection of intellectual property also continues to be a foremost concern in Congress. In addition, several Members of Congress, including House Ways and Means Chairmen Thomas have indicated that addressing Congressional concerns over China may be essential to securing passage of DR-CAFTA (possibly by mid-July).

In mid-July, Chinese and U.S. officials will meet again in the context of the Joint Committee on Commerce and Trade (JCCT). The 2004 JCCT was important in relieving

some Congressional pressure concerning China's trade policies, especially on intellectual property rights (IPR) protection. The run-up to this year's JCCT, however, has been far less hopeful in terms of resolving outstanding trade irritants. Additionally, USTR continues to gauge industry support to mount a WTO case against China's IPR practices, which has put greater pressure on the JCCT process.

China Re-Values Currency; Long-Term Movement and Trade Impact Uncertain

SUMMARY

China announced on July 21, 2005, that it is revaluing its currency and moving to a more flexible exchange rate mechanism. The announced revaluation, an appreciation of two percent, has earned guarded praise from the U.S. government and industry groups, who have argued that China's undervalued currency is a detriment to the trade balance. However, the longer-term implications of the modest revaluation remain uncertain. With other fixed currencies in the region matching China's move, and China intervening heavily to prevent further changes in the value of the yuan, the overall effects of the revaluation on the U.S. economy may be very limited.

ANALYSIS

On July 21, 2005, China's central bank announced a modest revaluation of the yuan to 8.11/US dollar from 8.28. Furthermore, Chinese authorities announced that it would no longer peg the yuan to the US dollar, opting instead to use a yet to be disclosed basket of currencies.² We review here the reactions to the move, and potential consequences:

I. Administration and Congress Welcome Revaluation, Seek Further Actions

For over two years Congress has been pressing the Bush administration and Chinese authorities to re-value the yuan. Senators **Charles Schumer** (D-New York) and **Lindsey Graham** (R-South Carolina) have been particularly vocal about China's "undervalued" currency. Earlier this year, their bill (S. 593) was offered as an amendment to an appropriations bill. The bill would impose a 27.5 percent tariff on imports from China to counteract the effects of China's fixed exchange rate, which they along with some economists claim could be undervalued by as much as 40 percent. Though the amendment was withdrawn, it was an indication of the widespread concern among legislators about China's currency policies.

On the other hand, the Administration's policy on China's currency has been less confrontational, but still marked by persistent pressure. On a number of visits to China, Treasury Secretary **John Snow** pressed Chinese officials to move towards a more flexible exchange-rate regime. The Administration has been joined by leaders from the Group of Eight (G8) in seeking China's move to a more liberal exchange rate mechanism.

China's recent announcement has drawn some praise from Administration and Congressional leaders. Secretary Snow welcomed the news and a spokesman for the White House expressed encouragement at China's move. On Capitol Hill, however, the reaction was far more guarded. Senators Schumer and Graham welcomed the move as "a first step" to greater liberalization. They also cautioned, however, that if China acted in a way that

² Chinese authorities have indicated that the currency basket will be comprised of Dollars, Euros and Yen, though the proportion of holdings has not been disclosed.

thwarted further movement in the yuan's price, they would seek a vote on their bill to impose punitive tariffs.

II. Industry Leaders, Economists Welcome Move But Expect Limited Impact

The manufacturing sector in the US has been a vocal critic of China's exchange rate policies. In hearings on Capitol Hill, manufacturers have alleged that China's fixed exchange rate has been a key factor leading to the exodus of U.S. manufacturing jobs to China. The National Association of Manufacturers (NAM) has applauded the Chinese decision to re-value, however, they have cautioned that real progress depends on how the new mechanism is allowed to work. NAM concedes that without further readjustment, China's currency value will continue to act as a subsidy for Chinese producers.

NAM's concerns about the modest impact of the two percent re-valuation have been echoed by a number of economists. Few expect the two percent change to alter the balance of trade between the US and China. The US trade deficit with China, estimated to be an annual \$162 billion and growing, has been used as a key argument in calls for China to revalue the yuan. Economists have raised a number of points in explaining why the re-valuation is not likely to have any significant effects on trade:

- **Low Value-Added** – China currently adds little value to goods its exports to the US (economists estimate the average percentage of Chinese content at 10 – 33% depending on the sector). This low Chinese-content means that the overall effect of a 2% shift in the value of the yuan in terms of the price of exported goods will be marginal, and certainly not enough to lure producers away from China.
- **Reduced Cost of Components** – Given China's low value-added production, the appreciation of the yuan results in a small decrease in the price components used in production of good exports from China. This reduction in component costs will likely offset any relative increase in the cost of goods exports from China.
- **Other Fixed Currencies Follow China's Lead** – Within minutes of China's announcement, the central bank of Malaysia announced a similar re-valuation of its fixed exchange-rate. The move demonstrates the importance of China to the region's economy. Furthermore, the move by other Asian central banks to ensure relative prices will likely result in few changes to the region's pattern of trade.

III. Chinese Central Bank Indicates Further Movement Unlikely

Chinese authorities have been quick to dismiss the revaluation as the first in a series of moves to appreciate the yuan. Under the new exchange rate policy, China will in theory allow the yuan to fluctuate within a daily band of 0.3%. If allowed to work without intervention, the value of the yuan could appreciate up to 10% on an annual basis. However, Chinese officials have been quick to dismiss such potential movements, as well as the

potential for further revaluations. Officials have stated that China's move was aimed at modifying the exchange rate mechanism, rather than the actual exchange rate.

It appears that China is committed to maintaining the current rate, and not allowing the yuan to appreciate further. In recent weeks, China's central bank has intervened heavily to defend the 8.11yuan/dollar rate. Market analysts suggest that China's actions are an attempt to stave off speculators and avert a flood of so-called "hot" capital.

OUTLOOK

China revaluation has managed to temper momentarily U.S. criticisms of the undervalued yuan. Senators Schumer and Lindsey have agreed to delay indefinitely consideration of their measure to impose tariffs on China. Moreover, the revaluation has earned some praise from U.S. industry groups, though none believe it will be a long-term solution to current trade imbalances. If Members of Congress and industry groups realize limited effects from the revised currency regime, they are likely to intensify their pressure on China, including through legislation (e.g., the Schumer-Graham bill and the recently passed House bill advocating a tougher approach to trade with China, known as the United States Trade Rights Enforcement Act of 2005 (HR. 3283)).

At this stage, it seems unlikely that China's revaluation will have any significant effects on trading patterns between Asia and the US. As economists have noted, the revaluation was modest and unlikely to diminish China's advantages in labor costs. The revaluation may provide a marginal boost to U.S. exporters as the price of U.S. goods in China should fall, though only slightly. Overall, it appears the move by China is a calculated step to allow some movement, but without upsetting its current economic ambitions.

United States Highlights

China Announces Modest Currency Revaluation

The People's Bank of China has announced an immediate revaluation of the Chinese yuan. The upward revaluation to 8.11 yuan/US Dollar represents a 2.1% change in the value of the currency. Additionally, Chinese authorities have announced that yuan will no longer be pegged to the US dollar. Instead the yuan will be pegged to a basket of international currencies, though immediate details on the composition of the basket have not been published.

The US Congress and the Bush administration have been pressuring China to move to a more flexible exchange rate policy for over two years. Earlier this month, consideration of a Senate bill imposing a 27.5% tariff in retaliation for China's pegged exchange rate was delayed after Administration officials indicated that China was planning to act on US concerns. The 2% revaluation is far short of the 40% demanded by some Members of Congress, and concerned industry groups. However, financial analysts have suggested that the revaluation is the first in a series of steps moving China closer to a floating exchange rate.

JCCT Concludes With Chinese Commitments on IPR, Services, and Subsidies

On July 11, 2005, US and Chinese officials met in Beijing under the context of the Joint Committee on Commerce and Trade (JCCT). The US delegation was led by Secretary of Commerce Carlos Gutierrez, Secretary of Agriculture Mike Johanns, and US Trade Representative Rob Portman.

As an annual high-level consultative mechanism, the JCCT provides an opportunity to address outstanding trade irritants. Similar to the 2004 meeting, this year's JCCT was dominated by concerns over the lack of protection of intellectual property rights in China. Officials also discussed other pressing concerns including on distribution services, telecommunications and other issues. The officials, however, did not discuss concerns over China's currency rate.

The major outcomes of this year's JCCT include:

- **Increased Use of Criminal Sanctions for IPR Violators** - China agreed to increase the number of criminal prosecutions for IPR violations. This includes a pledge to focus on curbing exports of infringing goods, and to increase cooperation and coordination among China's law enforcement bodies.
- **Focus on the Software Sector** - China will ensure that the state-owned sector, including central, provincial and local government offices use only licensed software before the end of 2005. In addition, China declared that software piracy is a "harm to the public interest" and will become subject to heightened administrative and criminal sanctions. China also agreed to delay the issuance of regulations that threatened to close off the software sector to US firms, and will instead conduct ongoing public consultations.

- **Ratification of Internet Treaties** - China will ratify global treaties related to the internet by June 2006. This will obligate China to take greater steps to combat internet piracy.
- **Subsidies and Antidumping** - China will provide a detailed accounting to the WTO this year, of its subsidies programs. Additionally, the US and China will continue technical talks to address concerns over China's status as a non-market economy under US trade remedy law.

A summary of the undertakings reached during the JCCT meeting can be found at: [http://www.ustr.gov/Document_Library/Fact_Sheets/2005/The_U.S._China_Joint_Commission_on_Commerce_Trade_\(JCCT\)_Outcomes_on_Major_U.S._Trade_Concerns.html](http://www.ustr.gov/Document_Library/Fact_Sheets/2005/The_U.S._China_Joint_Commission_on_Commerce_Trade_(JCCT)_Outcomes_on_Major_U.S._Trade_Concerns.html).

Free Trade Agreements

US Continues to Pursue “Competitive Liberalization” Strategy and Possible FTAs in Asia

SUMMARY

Despite ongoing focus on the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA), the Bush Administration continues to pursue the “competitive liberalization” strategy, including possible new FTAs in Asia. Several major U.S. trade partners in Asia including Malaysia and South Korea have expressed interest in launching FTA talks. Moreover, negotiations with Thailand are proceeding as another round of talks are being held in Montana in mid-July.

Notwithstanding the growing interest in FTAs in Asia, the prospects for completion and ratification of these FTAs remain uncertain. Issues undermining realization of additional FTAs in Asia include a lack of political will on the part of Asian trading partners, time constraints under Trade Promotion Authority (TPA), and heightened sensitivity to trade agreements in the U.S. Congress.

ANALYSIS

We review here the status of ongoing and potential U.S. FTA negotiations in Asia, including with Thailand, South Korea and Malaysia.

I. Thai FTA Struggles to Overcome Concerns Over Sensitive Sectors in the US and Thailand

Negotiations between Thailand and the US are now a year old and an eventual agreement must overcome considerable obstacles. Four rounds of negotiations have been completed (the fourth round in Montana was held in mid-July 2005) and little has been done to resolve the most controversial issues. Indeed, to date no formal market access offers have been exchanged. Negotiations have instead focused on resolving approaches (negative versus positive lists), exchange of framework texts and addressing technical concerns. Sensitive areas of the negotiations for both sides include (but not limited to):

US Sensitive Issues / Sectors	Thai Sensitive Issues / Sectors
<ul style="list-style-type: none"> • Sugar – Thailand is one of the world’s biggest producers, and the battle of DR-CAFTA may leave the Administration wary of including sugar in an agreement. 	<ul style="list-style-type: none"> • Services Liberalization – Thailand is particularly concerned about the ability of its banking and telecom sectors, among others, to compete against the US.
<ul style="list-style-type: none"> • Light trucks – US auto works and some Members of Congress have expressed opposition to eliminating the 25% tariff on light trucks imported from Thailand. 	<ul style="list-style-type: none"> • Patent protection – Thailand faces a growing HIV-AIDS problem and is concerned that U.S. IPR demands may jeopardize their ability to combat the disease.
<ul style="list-style-type: none"> • Mode 4 – Thailand is seeking expanded access to the US for its professionals; however, the US Congress has insisted that immigration-related issues be kept 	<ul style="list-style-type: none"> • Agriculture –After the China FTA, Thailand has concerns about deep cuts in its agricultural tariffs. (Likewise, several U.S. sectors beside sugar are resistant to

out of trade agreements.

liberalization.)

Both Thai and U.S. negotiators have acknowledged that there is no deadline for the completion of the negotiations. Nevertheless, an ever-present concern is the expiration of trade promotion authority in 2007. Protracted negotiations run the risk of finishing too late to have the agreement considered under the so-called “fast-track” provisions of TPA. At the same time, given the political fall-out from DR-CAFTA (whether it is approved or not), the Administration may not be eager to face another trade battle in Congress in the near future.

II. South Korea Pushing for FTA Announcement By APEC Meeting in November

South Korea has been a potential FTA candidate for a number of years, and is eager to launch negotiations with the US when it hosts the APEC Summit in November. Members of Congress, notably Senator **Max Baucus** (D-Montana), and major U.S. trade groups, notably the National Association of Manufacturers (NAM), have identified South Korea as a trading partner for which an FTA should be considered. The Bush administration however, has indicated that “significant progress” on of a number of key outstanding issues would need to be accomplished before FTA negotiations could commence:

- **Beef** – The U.S. government and Congress have identified reopening foreign markets, including Korea’s, to U.S. beef as a top priority. Korea banned the importation of U.S. beef after the discovery of a case of Bovine Spongiform Encephalopathy (BSE), or mad cow disease, in the US in December 2003. The US continues to urge the Korean government to base any decision on sound science.
- **Screen Quotas** – Korean law restricts the number of days per year that foreign films may be shown. The U.S. entertainment industry, along with the previous Administrations have lobbied Korea to ease the restrictions. In March 2005, the Korean trade minister indicated that Korea would be willing to ease the restrictions. However, the Korean culture minister has expressed opposition to the easing of restrictions.
- **Autos** – The U.S. automotive industry continues to voice strong concerns about Korea’s closed automotive market, which contrasts sharply with the large and growing market share of Korean producers in the US. Korean auto producers currently command a 5.1 percent and growing market share in the US. Bilateral negotiations between the two countries last year resulted in no agreement; the US had requested that Korea reduce its tariff on autos from 8 percent. The Korean government has said it will only consider tariff reductions in the context of WTO negotiations. Nevertheless, in 2004 the Korean government temporarily reduced the special consumption tax and revised discriminatory environmental testing requirements.
- **Telecommunications** – In the telecommunications sector, the US remains concerned about the Korean government’s influence, directly or indirectly through associations and quasi-governmental organizations, to sway the standard-setting process, foreign licensing, royalty payment

arrangements, technology transfers, and equipment and technology choice. From the U.S. perspective, Korea's track record has been mixed in the standards setting area. After negotiating a resolution to the dispute over the standard for wireless Internet platform for interoperability (WIPI) in April 2004, the U.S. government expressed disappointment in the Korean government's decision in July 2004 to move forward with a new standard for wireless broadband internet services in the 2.3 gigahertz spectrum.

The US and Korea have held a number of meetings this year to discuss current trade frictions, and likewise to explore a possible FTA. The frequency of these meetings have led some to suggest that Korea is hoping to secure the launch of FTA negotiations by the time of the APEC leader summit in Seoul in November. However, as recently as June 24, 2005, US Trade Representative **Rob Portman** has indicated that no agreement to commence FTA negotiations has been made.

III. US and Malaysian Officials Continue to Discuss Launching FTA Talks

Another Asian country currently being considered by the US for an FTA is Malaysia. During a May 2005 Trade and Investment Framework Agreement (TIFA) meeting between the two countries, an outline of a potential agreement was discussed. In addition, representatives from the Malaysian embassy in Washington DC have met with key Congressional officials to discuss an FTA. The NAM and other trade associations have also named Malaysia as a top candidate for an FTA. However, notwithstanding the broad Congressional and industry interest in a Malaysia FTA, a number of concerns remain:

- **IPR** – Malaysia has been repeatedly cited in the annual Section 301 report concerning its lack of effective IPR enforcement. Piracy and copyright infringement continue unabated in Malaysia.
- **Government Procurement and Software** – Malaysia requires government entities to purchase open source software. This policy has effectively excluded U.S. producers, such as Microsoft and Dell, from competing for government contracts.
- **Autos** – Malaysia maintains high tariff and non-tariff barriers on imported cars. The barriers have prevented foreign producers from penetrating the domestic market.

Further bilateral TIFA meetings between Malaysia and the US are expected this year. Both sides hope that progress can be made, though no formal timeline for launching FTA talks has been suggested.

OUTLOOK

Despite strong Congressional and industry interest, the prospects for additional U.S. FTAs in Asia remain uncertain. With respect to Korea, the long list of outstanding trade frictions and Korea's historic inability to deliver on promised reforms leave doubt as to whether "sufficient progress" can be made prior to the informal target of the November APEC meeting. Moreover, divided domestic constituencies in Korea further complicate the

prospects for the start of FTA talks. For example, disagreements between the trade ministry and other ministries, including culture and industry, have stalled promised reforms. USTR officials have indicated that an agreement to launch FTA talks with Korea would need to be finalized by October.

Malaysia's prospects for commencing FTA negotiations with the US remain similarly doubtful. Several domestic constituencies in Malaysia oppose liberalization in the auto and services sectors, which are key sectors for the US. Additionally, U.S. sources have indicated concerns about Malaysia's ability to conclude FTA talks once they are started. Furthermore, with the Thai FTA talks ongoing and talks with Korea being contemplated, there is some concern at USTR about its capacity to support another set of FTA negotiations.

Overshadowing potential U.S. FTA negotiations in Asia is the expiry of Trade Promotion Authority in mid-2007. Even if FTA talks with Korea and/or Malaysia were announced by the end of the year, the parties would have just a year to complete complex talks in order to have the agreements ready for Congressional consideration in early 2007. There is some doubt, both within USTR and among U.S. industry groups about the ability of Korea and Malaysia to undertake the necessary decisions within that time frame to ensure a successful conclusion to any potential FTA talks. In addition, on a broader perspective – negotiations of the WTO Doha Round are moving along quickly, and also aim to conclude by the end of 2006 in time for TPA consideration. Much attention in the United States and elsewhere next year will be focused on WTO negotiations, and perhaps less towards FTA negotiations.

Future of Trade Pacts Uncertain in the Wake of Close DR-CAFTA Vote

SUMMARY

Analysts and pundits have begun to consider the longer-term implications of the hard-fought passage of the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA) on July 27, 2005. While President Bush has been credited with delivering a major win on trade policy, some analysts have suggested that future bilateral and regional agreements may face similar, if not more significant opposition. With only fifteen Democrats crossing party lines to support the agreement, it seems unlikely that the bipartisan coalitions that have passed many U.S. trade agreements will resurface in the near future. Moreover, the bitter debate over passing DR-CAFTA appears to be an indication of the growing public discomfort towards trade liberalization. The tense mood with respect to trade issues may be particularly troubling for ongoing talks with the Andean region and Thailand, among others.

ANALYSIS

We review here the politics and deal making that secured DR-CAFTA's passage in the House on July 27, 2005, by a close vote of 217-215. We also review some of the potential consequences for U.S. trade policy as a result of the DR-CAFTA process:

I. Final Lobbying Effort by President Bush; Side Deals Deliver Key Votes

Early on July 27, 2005, the House Republican leadership decided to hold a final vote on DR-CAFTA late in the day. The move came despite whip counts that showed DR-CAFTA proponents short of the votes needed to assure passage. Republican leaders and other supporters spared no effort in securing undecided votes:

A. President Bush Addresses Republican Caucus

Before midday on July 27th, President Bush made a rare visit to Capitol Hill to persuade undecided Republicans by emphasizing the wider implications of the agreement. The President stressed hemispheric security and export opportunities in his appeal to the Republican House Caucus. Despite Bush's pleas, few undecided Republican Caucus Members emerged from the meeting with their minds made. A group of holdout Members from textile districts held the fate of the agreement in their hands.

B. Side Deals on Textiles (Socks, Pocketing and TPLs) Win Undecided Votes

Originally strategists viewed reconciling with the U.S. sugar industry as essential to winning passage of DR-CAFTA. However, in the days leading up to the final House vote, it became increasingly apparent that no deal on sugar would be achieved. Lobbyists then turned their focus to Members from textile districts, hoping to shore up support. Whip counts in the days leading up to the vote showed pro-DR-CAFTA forces short as many as 10 votes. To win undecided Members from textile districts, the Administration offered a number of side deals:

- **Pocket Fabrics:** US Trade Representative (USTR) Rob Portman secured an agreement in principle from the DR-CAFTA countries to amend the agreement to ensure that U.S. fabrics would be used for pocket linings in

apparel produced in the region. A current loophole in the agreement would permit the use of Chinese fabrics, jeopardizing a US\$100 million export market. In order to achieve such an amendment, legislative changes would need to be made to the agreement. On July 27th, House Ways and Means Chairman **Bill Thomas** (R-California) indicated that he would move quickly to introduce the needed legislative changes;

- **Nicaragua's TPL:** Administration officials also won support for DR-CAFTA by winning a pledge from Nicaragua that it would use equal amounts of U.S. fabrics and non-regional fabrics in the production of trousers destined from the US. Under current trade preference levels (TPLs), Nicaragua may source up to 100 million sq. meters of non-regional fabric for production of apparel that could enter the US duty free. While formally unenforceable, Nicaragua's pledge would ensure equal use of U.S. materials. In exchange for its agreement, the US promised to confer full TPL benefits for ten years, rather than phasing out the TPLs.
- **Socks:** A final pledge related to textiles involves a promise by Administration officials to seek additional protection for U.S. sock producers within DR-CAFTA. In a letter to Representative **Robin Hayes** (R-N. Carolina), Commerce Secretary **Carlos Gutierrez** assured Hayes that he would ask the DR-CAFTA countries to allow the US to phase-out tariffs on socks over 10 years, rather than going to immediate duty free treatment. Secretary Gutierrez also assured that the US would be prepared to use safeguard mechanisms to protect the U.S. sock industry. The DR-CAFTA countries have yet to indicate if they would be willing to allow the 10-year phase out for sock tariffs, or what they might demand in exchange for such a concession.

Many of the promises on textiles will require legislative changes in order to fully implement them. Furthermore, while the DR-CAFTA countries have expressed some willingness to agree to the changes, it remains unclear what concessions the US will need to offer in order to obtain final approval of the proposed changes.

Despite the uncertainty of the Administration's ability to deliver on all of its textiles-related promises, the side deals were enough to win support from undecided Members of Congress. Originally opposed to the agreement, Representative Hayes changed his vote from no to yes, giving supporters the final vote they needed to achieve a 217-215 victory. The bulk of North Carolina's Congressional delegation, however, was not persuaded by the textile promises, with only 2 of 13 Members ultimately voting for the agreement. Nevertheless, the side agreements on textiles did change the votes of at least 15 Republican Members who had opposed the agreement, in addition to the deciding vote by Hayes.

C. Cheney Uses Highway Bill to Win Additional Votes

Vice-President **Richard Cheney** also was involved in the last minute deal making to win votes on DR-CAFTA. Present at the Capitol until an hour before the vote, Cheney used the prospect of obtaining funding from the Highway Transportation Bill to attract additional

votes. Though no Members have formally acknowledged trading votes for transportation funding, Congressional aides from as many as five offices have indicated that assurances on highway funding helped win over their undecided Members.

D. Vote on China Trade Bill Wins English Vote

Though textile Members were a major focus of lobbying, passage of the China trade legislation known as the United States Trade Rights Enforcement Act of 2005 (HR. 3283) helped to secure critical votes. Hours before the final vote on DR-CAFTA, the House approved (255-168) the bill, which would allow the imposition of countervailing duties on non-market economies, remove bonding privileges for new shippers, increase China-related enforcement funding at USTR, among other measures. The bill's passage was instrumental to swaying the vote of Representative Phil English (R-Pennsylvania), and possibly other undecided Members.

II. Mixed Reactions to DR-CAFTA Passage

With DR-CAFTA now passed and signed by President Bush on August 2, 2005, Members of Congress and strategists have begun pondering the future of U.S. bilateral and regional trade agreements. Naturally, the Bush administration has expressed great pride in achieving a key victory on its trade agenda. However, the fact that only 15 Democrats supported the agreement, and that the President had to lean on rank-and-file Republicans – is proof in the minds of advocacy groups that trade policy is becoming increasingly partisan.

A. Democrats Chide Administration for Re-Negotiation and Side Deals

The chief criticism by Democrats in the aftermath of DR-CAFTA's passage has been the willingness of the Administration to open the agreement to changes for textile concerns, but not labor. During the floor debate on DR-CAFTA, Democrats, led by House Ways and Means Ranking Member **Charles Rangel** (D-New York) expressed outrage at the willingness of the President to renegotiate the agreement at all to delay textiles liberalization, after USTR officials had told the Ways and Means Committee that no changes to the agreement would be possible. In addition, Democrats also pointed to the ineffectiveness of side deals made under the North America Free Trade Agreement (NAFTA).

B. Organized Labor Pledges to Target Renegade Democrats

Organized labor has pledged to deny support to Democrats that voted for DR-CAFTA. In a letter dated July 25, 2005, some 15 unions, including the International Brotherhood of Teamsters, and the Teachers Federation, vowed to deny support to the 15 Democrats who supported the agreement. Of the 15, three are considered to be in close races to win re-election: Melissa Bean (Illinois), Jim Matheson (Utah) and Dennis Moore (Kansas).

III. Analysts and Pundits Weigh in on DR-CAFTA Implications

On August 3, 2005, Consumers for World Trade and the law firm of Hogan & Hartson hosted a discussion panel on the consequences of DR-CAFTA on U.S. trade policy. Panelists included **Lewis Leibowitz** of Hogan & Hartson, **Burleigh Leonard** of Leonard & Company and **Ed Gresser** of the Progressive Policy Institute. The group discussed the potential impact of DR-CAFTA on U.S. sugar and farm policies, the Doha Round and

pending U.S. FTAs, current Congressional legislation, China relations and Trade Adjustment Assistance programs.

A. U.S. Sugar Industry Overplaying Its Hand?

Mr. Leonard reiterated the struggle arising from the proposed sugar amendments in the Senate Finance Committee mock markup process, but noted strong Republican leadership minimized this issue in the House. He believes the sugar lobby overplayed their hand in CAFTA after the U.S.-Australia FTA passed without sugar concessions. Although DR-CAFTA will likely have a minimal economic impact, its passage might politically hurt the chances of maintaining the current sugar program levels in the 2007 Farm Bill. In response to a question, Mr. Leonard noted that U.S. agriculture groups are usually unified, but DR-CAFTA alerted these groups to the fact that the sugar industry impeded their market access potential. In response to a question on NAFTA, Mr. Leonard indicated that although Mexico is slated to enjoy unfettered access to the U.S. sugar market in 2008, he believes the sugar lobby will fight to curb this quota removal.

B. Political Impact of CAFTA-DR?

Mr. Gresser cited House Minority Leader Nancy Pelosi (D-California) as stating that DR-CAFTA is a pyrrhic victory for the White House and trade liberalization proponents. He noted opinion polls indicating that while the American public supports FTAs, they do not recognize the individual benefits. Also, since trading partners recognized the US encountered great difficulty passing DR-CAFTA, future agreements may be perceived as raising similar sensitive issues like agriculture, textiles and others. Mr. Dresser suggested that the Doha Round will face less controversy surrounding labor and environment issues, but may encounter more hurdles than previous multilateral rounds.

Mr. Leibowitz observed that Republicans wanted to underemphasize the Democratic vote on DR-CAFTA in an attempt to demonstrate the strength of the Republican majority. He suggested, however, that renewed bipartisan cooperation would produce higher quality trade legislation going forward. Nevertheless, he is pessimistic about bipartisan cooperation as the respective parties harden their positions prior to the next mid-term election.

In response to a question, Mr. Gresser observed that USTR Portman is taking an active role in negotiating other FTAs and the Doha Round, especially given the upcoming expiration of Trade Promotion Authority (TPA) in 2007. Similarly, TPA renewal will prove more difficult than in 2002. Mr. Leibowitz warned about failure in the Doha Round, given the need to achieve consensus among 148 WTO Members. He observed that since lesser developed countries often do not get involved in FTAs, they will fall further behind if the Doha Round fails.

OUTLOOK

DR-CAFTA's passage will likely shift trade agreements out of the Congressional spotlight for the remainder of the year. USTR has indicated that the next FTA, the non-controversial US-Bahrain agreement will likely come to the floor prior to 2006. However, the more controversial agreements like those being negotiated with the Andean nations and Thailand are not expected to come to Congress until well into 2006, or 2007.

Among the political payoffs to pass DR-CAFTA, the China trade legislation will now move to the Senate. Senate Finance Committee Chairman **Charles Grassley** has suggested that the bill has little chance of clearing the Senate. Given the busy appropriations calendar, and at least one Supreme Court nomination to consider, both the House and Senate agenda will likely not turn to trade again for the foreseeable future.

Looking ahead, the outlook for U.S. bilateral and regional trade agreements seems far from positive despite DR-CAFTA's passage. Although the Administration touted DR-CAFTA as a critical agreement, the economies of Central America combined total about \$200 billion, roughly the size of Missouri. Thus, DR-CAFTA represented a major political fight over six economies that were relatively small in size. The political capital spent to achieve passage of an agreement of relatively small size does not bode well for agreements with more significant economic partners such as the Andean region and Thailand.

Further complicating the prospects for future agreements is the number of sensitive U.S. sectors that stand to be affected by agreements with Thailand and the Andean region. Already, sugar producers are promising to mount challenges to the Thailand and Andean agreements. Both agreements will also touch on a number of sensitive agricultural sectors. And in the case of Thailand, certain manufacturing sectors, notably light autos, will likely oppose any agreement. The potential coalitions opposing the FTAs with the Andean region and Thailand could be as strong, if not stronger than the opposition mounted during the DR-CAFTA battle.

Notwithstanding, DR-CAFTA's passage was critical to the Administration's policy of "competitive liberalization." DR-CAFTA's failure would have been the first defeat of an FTA, and would have undermined the outlook for future FTAs, and possibly for regional and multilateral negotiations. Thus, the battle over DR-CAFTA is over, but the war over trade policy is far from settled.

DR-CAFTA Update: House Republican Leadership Promises July Vote, But Timing Remains Uncertain

SUMMARY

The Dominican Republic-Central America Free Trade Agreement (DR-CAFTA) continues to await a final vote in the US House of Representatives. Senior House Republicans have promised a final vote before the August recess, which is scheduled to begin on July 29, 2005. Despite the promise of a vote, and continued efforts by the Bush administration, it appears DR-CAFTA supporters still remain short of the votes needed to ensure passage in the House. With most Democrats expected to vote against the accord, the Administration is working to secure undecided Republicans, including from textile producing states.

ANALYSIS

I. Representative Cantor Promises July Vote, But Timing Uncertain

On July 13, 2005, Deputy House Majority Whip Eric Cantor (R-Virginia) stated that a vote on DR-CAFTA would take place before Congress' August recess. The final date for the vote is expected to be announced during the week of July 18th. This move comes despite the fact that DR-CAFTA supporters acknowledge that they still do not have the votes to pass the agreement. Representative Kevin Brady (R-Texas), one of those actively promoting the agreement, has acknowledged that lobbying efforts over the July 4th recess failed to produce any gains in support for the agreement.

The House Ways and Means Committee has delayed filing of the Committee report on the implementing legislation for DR-CAFTA. This tactic stretches out the time available for the full House to consider the bill (HR. 3045). Under Trade Promotion Authority, the House has 15 legislative days to consider the bill after the Committee files its report. Despite indications from the Republican leadership that a vote is imminent in July, it is procedurally possible that a final vote on DR-CAFTA may be delayed until September.

II. House Republicans Offer Legislation on China Trade Enforcement; English Now Expresses Support for DR-CAFTA

On June 14, 2005, House Republicans, led by Ways and Means Chairman Bill Thomas (R-California) and Representative Phil English (R-Pennsylvania) introduced the United States Trade Rights Enforcement Act of 2005 (HR 3283). The bill has long been contemplated by Chairman Thomas as a way of garnering votes on DR-CAFTA from skeptical Republicans including English. Among other things, the bill would:

- ***CVDs and NMEs*** – Allow the imposition of countervailing duties (CVDs) against non-market economies (NMEs);
- ***Compliance reports*** – Require that the President to submit semi-annual reports to Congress on the steps taken by China to meet its international trade commitments, notably the outcomes reached under the Joint Commission on Commerce and Trade (JCCT), and other bilateral and multilateral obligations;

- **Currency manipulation** – Require the Treasury Department to submit to Congress a report defining currency manipulation, including circumstances under which the Treasury Department would find a country to be manipulating its currency;
- **Bonding and AD deposits** – Suspend bonding privileges for new shippers, and require cash deposits in the case of anti-dumping duties; and
- **USTR resources** – Authorize an additional \$6 million in appropriations for USTR, specifically to focus on China's trade compliance.

The bill's introduction has been enough to win the support of Representative English on DR-CAFTA, who previously opposed the agreement. In a press conference unveiling the China bill, English stated that he and other wavering Republicans would now be in a position to support final passage of DR-CAFTA. At the same press conference Chairmen Thomas pledged to bring the China bill to the House floor before a final vote on DR-CAFTA.

III. President Bush Visits North Carolina to Shore Up Textile Support

On July 15, 2005, President Bush visited North Carolina to shore up support among House Members from textile districts. A significant number of North Carolina's House delegation remains undecided about DR-CAFTA's potential impact on the textile sector. President Bush toured a textile factory and urged those undecided Members to support the agreement. US Trade Representative Rob Portman has stated that passage of the agreement would bolster the competitiveness of U.S. textile producers over China imports.

Republican Members from textile states appear to be key to winning passage of DR-CAFTA. The Bush administration has indicated that it will go no further with the sugar industry. Moreover, the promise of additional resources for labor enforcement has thus far failed to win significant support from Democrats in the House. Five House Republicans from textile districts are being lobbied by the Administration and Chairman Thomas to support DR-CAFTA. Representative Bob Inglis (R-S. Carolina) has indicated his willingness to support DR-CAFTA if the Administration can demonstrate that the Central American countries would be willing to modify the agreement's rules of origin with respect to pocket linings. An additional five undecided House Members from Georgia's delegation may also shift from undecided to pro-DR-CAFTA.

Beyond changes to the agreement the Administration is actively pursuing deals to win undecided or anti-DR-CAFTA Members. Pro-DR-CAFTA advocates have pointed to possible deals on energy or highway funding, two bills pending before Congress. Business groups have joined the effort by targeting some 78 House Members for additional lobbying leading up to a final vote on DR-CAFTA.

OUTLOOK

DR-CAFTA's fate rests with the ability of the Administration to whip Republican Members into line. Republican sources have indicated that attempts to win additional Democrats have been mired in failure. Only five Democrats have expressed support for the agreement. An offer on additional resources for labor enforcement has thus far not generated

additional support from Democrats. Pro-DR-CAFTA advocates remain hopeful that possible side-deals, and a vote on a bill on China's trade practices may yet produce the 20 Democrat Members they were hoping would support the deal. If not, then CAFTA's fate will remain in peril, along with the prospects of other ongoing FTA negotiations.

Full Senate and House Ways and Means Committee Approve DR-CAFTA; Final Showdown in the House Expected Soon

SUMMARY

Over a year after the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA) was signed, it is now headed for a final legislative showdown in Congress. On June 30, 2005, the full Senate and the House Ways and Means Committee approved the agreement. Under Trade Promotion Authority (TPA), the full House now has 15 legislative days to consider the accord, with a maximum of 20 hours of debate. House Republican leaders are aiming to have a final vote during the week of July 11th (after the July 4th week-long recess).

Momentum for the agreement appears to be gaining after the Administration reached understandings with undecided legislators on labor and sugar concerns. Nevertheless, some Senators used the floor debate to criticize the agreement. Senator **Craig Thomas** (R-Wyoming), for example, who had conditionally supported the agreement during the vote in the Senate Finance Committee, faulted the provisions of the so-called sugar deal. Senator **Byron Dorgan** (D-N. Dakota), one of the implementing legislation's chief critics, argued that the agreement is a product of a failed trade policy that was destroying U.S. jobs.

Attention now turns to the Administration's efforts to secure enough votes in the House to pass the agreement. Supporters admit to still being short of votes in the House, but hope that the Senate's action, and the agreements on labor and sugar, will entice enough undecided Members of the House to support the legislation.

ANALYSIS

I. Administration Makes Commitments on Labor and Sugar

Essential to the Administration's efforts to secure votes for DR-CAFTA have been agreements reached with legislators on labor and sugar concerns. On June 28, 2005, US Trade Representative (USTR) **Rob Portman** committed the Administration to providing about \$120 million over the next four years in additional money to assist the DR-CAFTA countries further enhance labor law enforcement. Additionally, USTR Portman confirmed that the Administration would seek to expedite completion of compacts (financial, or development assistance agreements) with the DR-CAFTA countries under the Millennium Challenge Corporation. The compacts will include assistance to farmers displaced by the agreement.

The Administration's labor commitments swayed the vote of Senator **Jeff Bingaman** (D-New Mexico). Both at the Senate Finance Committee, and on the Senate floor, Bingaman urged fellow Democrats to support DR-CAFTA and the Administration's commitments on labor.

On June 29, 2005, after weeks of discussions and negotiations the Administration made its final offer to legislators from sugar producing states. Under the offer, the Bush administration pledges to ensure that the sugar program authorized under the 2002 Farm Bill will not be affected by DR-CAFTA. To ensure this situation, the Administration will instruct the Credit Commodity Corporation (CCC) to purchase any excess sugar from DR-CAFTA

countries if total U.S. imports of sugar rise above the 1.52 million tons authorized in the Farm Bill. In addition, the US Department of Agriculture will conduct a feasibility study for the use of sugar in the production of ethanol. (The sugar industry originally sought to secure commitments that excess sugar would be purchased and used in the production of ethanol.)

The offer on sugar earned high praise from Senate Agriculture Committee Chairman **Saxby Chambliss** (R-Georgia) and Senator **Norm Coleman** (R-Minnesota). Both Senators, who initially expressed opposition to the agreement, voted for DR-CAFTA to ensure its final passage in the Senate. Senators from other sugar states including Senators Thomas and **Larry Craig** (R-Idaho), however, expressed outrage at the sugar agreement, describing it as “band-aid for a gun shot wound.” The sugar industry, led by the American Sugar Alliance has rejected the sugar agreement, and has vowed to defeat DR-CAFTA in the House. The American Sugar Alliance claims that the sugar agreement violates the mandate of the USDA, and may violate U.S. commitments under the World Trade Organization.

II. Senate Approves DR-CAFTA By a Small Majority

By a vote of 54-45 the full Senate approved DR-CAFTA late in the day on June 30, 2005. During the floor debate, Senator Dorgan rallied opposition against DR-CAFTA. His attacks cited experiences with Canada and Mexico under NAFTA, and to current trade frictions with China. Senator **Max Baucus** (D-Montana), often a supporter of free trade – decided to oppose the agreement, and chastised the Administration for failing to adequately meet the needs of the sugar industry. Most Democratic Senators voted against DR-CAFTA, and were joined by several Republican Senators.

III. House Ways And Means Approve Agreement Amid Continued Partisan Recrimination

On the same day as the Senate vote on June 30, the House Ways and Means Committee voted 24-11 to pass DR-CAFTA implementation bill H.R.3045. The vote featured few surprises in terms of the outcomes, or individual Members votes. Representative **Dave Camp** (R-Michigan), who had been undecided over concerns related to sugar, voted for the agreement, citing the Administration’s pledges to defend the sugar program. Similarly, Representative **Mark Foley** (R-Florida) voted for the agreement. However, Representative Foley expressed concerns over the sugar pact, and stated that he might vote against DR-CAFTA during the full vote in the House.

The House Ways and Means session that approved DR-CAFTA featured familiar themes. Chairman **Bill Thomas** (R-California) expressed support for the accord, citing the economic benefits for U.S. exporters, as well as the agreement’s role in promoting U.S. political/security interests in the hemisphere. Ranking Members **Charles Rangel** (D-New York) expressed his frustration with the lack of bipartisan cooperation on the agreement, and suggested that the proposed additional resources on labor enforcement were insufficient to satisfy concerns over deficiencies in the region’s labor laws. Trade Subcommittee Ranking Member **Benjamin Cardin** (D-Maryland) echoed Rangel’s concerns, claiming that more effective dispute settlement with respect to labor was necessary. Most Democratic Members of the Committee voted against the agreement, and were joined by Republican **Phil English** (R-Pennsylvania).

OUTLOOK

DR-CAFTA now faces its final and most difficult legislative hurdle in the full House vote. House Republican leaders have indicated that they plan to schedule a floor vote for the week of July 11th upon the resumption of business after the July 4th recess. Notwithstanding recent momentum, such a vote may come despite the fact that whip counts show supporters are short of as many as 20 votes. USTR and the Administration hope that the Senate's action, combined with the side agreements on labor and sugar, will win over enough moderate Democrats and Republicans to assure passage.

The side agreements on labor and sugar seem to be producing some gains for DR-CAFTA proponents. Undecided House Democrats, including Edolphus Towns (D-New York), Bobby Rush (D-Illinois), and Gregory Meeks (D-New York) are rumored to be considering supporting the accord based on the labor deal reached by Senator Bingaman. Another 20 Democrats remain undecided. To date, only 6 Democrats have expressed support for the accord. Analysts have suggested that closer to 20 Democrats would be needed in order to pass DR-CAFTA. [The Republican leadership also continues to pressure several undecided Republican Members, who remain concerned about sugar interests.]

In any event, the fate of DR-CAFTA will be decided in mid-July since the full House now has 15 legislative days to vote on the agreement (i.e., before the August recess). Moreover, the fate of DR-CAFTA will have a considerable impact on current FTA negotiations and other trade initiatives.

US-European Union

US - EU Summit: Transatlantic Unity in Foreign Policy; Expansion of Agenda for Further Economic Integration

SUMMARY

A delegation of the European Union's top officials met with President Bush and members of his cabinet at the 2005 US – EU Summit held in Washington on June 20, 2005. The discussions focused on current geopolitical issues, as well as trans-Atlantic economic integration. Among the *geopolitical issues*, EU leaders used the meeting to explain to the US the EU's recent failure to adopt a new 2007-2013 budget, and the defeat of the EU Constitutional referendums in France and the Netherlands. The Parties also discussed the situation in the Middle East and Africa, as well as non-proliferation, the fight against terrorism, promotion of democracy, freedom and human rights, and United Nations reform. The *economic issues* included cooperation on regulatory and standards issues, integration of capital markets, promotion of innovation and technology, transportation security, energy, protection of intellectual property rights, investment regimes, competition policy, government procurement and services.

In preparation for the official US-EU Summit, EU Trade Commissioner Peter Mandelson met with US Trade Representative Robert Portman on June 17, 2005. The two discussed the major trade irritants between the US and the EU, mainly the Boeing – Airbus subsidies dispute, among other issues.

ANALYSIS

On June 20, 2005, the representatives of the European Union, including the President-in-office of the European Council, Jean-Claude Juncker; President of the Council, Jean Asselborn;³ President of the European Commission, José Manuel Barroso; Vice-President of the European Commission, Günter Verheughen; Commissioner for Trade, Peter Mandelson; the Commissioner for External Relations and European Good Neighbourhood Policy, Benita Ferrero-Weldner; and High Representative for Common Foreign and Security Policy, and Secretary General of the Council, Javier Solana, met U.S. officials, including President George W. Bush; Secretary of Commerce, Carlos Gutierrez, Deputy Secretary of State Robert Zoellick; US Trade Representative (USTR) Robert Portman and others.

I. Pre-Summit Trade Discussions: Mandelson and Portman Strive to Address Aircraft Dispute

In light of a number of disagreements over trade policy and the need of both sides to achieve positive results in the summit, USTR Robert Portman, and EU Trade Commissioner Peter Mandelson met for three hours on Friday, June 17, 2005, to discuss the most

³ The President-in-office of the European Council is the head of the government of the country holding the Presidency of the Council, while the President of the Council is the Minister of Foreign Affairs of the country. Because Luxembourg held the Presidency of the Council from January 1, 2005 to June 30, 2005, the President of the Council during this period was its Minister of Foreign Affairs, Jean Asselborn, while its President-in-office was the Luxembourg Prime Minister, Jean-Claude Juncker.

contentious trade issue, the US-EU aircraft dispute. After the meeting, both officials said that they were committed to resolving the dispute through a negotiated settlement. However, no new proposals were tabled, and officials on both sides as well as commentators, pointed out that an agreement would be very difficult to achieve. The main reason for difficulty in reaching an agreement is the difference both parties perceive the support provided to their own manufacturers, as well as the way they perceive the subsidies provided by the other party.

Speaking at an WITA event held in Washington on June 22, 2005, Former USTR Clayton Yeutter opined that the WTO would not be the natural forum for successfully resolving the Airbus-Boeing dispute: (1) both parties were very likely to end up having their own subsidies declared illegal, (2) it was unlikely that the losing side would implement the WTO decision (as evidenced by prior WTO aircraft dispute between Canada and Brazil); (3) the WTO Panel would not be able to analyze all the facts in the dispute due to the sensitive nature of the industry (e.g. EU alleges, *inter alia*, that Boeing is continuously subsidized through preferential Department of Defense contracts), and finally, (4) the size of the dispute surpassed the bureaucratic capabilities of the WTO. Another participant in the discussion, Mr. John Veroneau, former general counsel at USTR pointed out that while a negotiated resolution of the dispute was possible, it would require litigation to progress much further.⁴

II. EU and US Further Economic Cooperation by Harmonizing Regulations, Integrating Investment, Services, Procurement, R&D and Capital Markets, and Promoting IP Rights and Energy Efficiency

A. Background on EU-US Bilateral Economic Negotiations

The 2005 EU – US Summit provided the Parties the opportunity to continue the economic negotiations initiated under the **Transatlantic Economic Partnership (TEP)**.⁵ The main element of TEP's action plan was to improve the regulatory cooperation between the two sides. The launch of TEP in 1998 was followed by the Joint US-EU Statement on Early Warning and Problem Prevention Principles and Mechanisms, adopted at the Bonn Summit in June 1999. The statement was in turn followed by the April 2002 **Guidelines for Increased Regulatory Cooperation and Transparency**. The Guidelines, apart from setting out the objectives of the cooperation, provided for specific steps to be taken to lead to greater harmonization, among them consultations and exchange of information between the regulators on both sides, created mechanism for identification and selection of problems to be addressed through regulation, monitoring of forthcoming rulemaking on both sides, or careful selection of regulatory approaches taken.

The first concrete publicly available outline of the regulatory cooperation under the umbrella of TEP came in the **2004 Roadmap for EU-US Regulatory Cooperation and Transparency**, announced during the U.S.- E.U. Summit held in Dromoland Castle, Ireland

⁴ On July 20, 2005, the WTO DSB formed two separate panels to hear both disputes.

⁵ The US-EU cooperation began in 1990 under the so-called "Transatlantic Declaration", followed in 1995 by the announcement of a "New Transatlantic Agenda," implemented through the "New Transatlantic Marketplace" project (designed to be a building block of the forthcoming Transatlantic Free Trade Area), and the creation of the "Transatlantic Business Dialogue" (a forum for EU and US businesses to voice their concern over trade barriers between the two blocks). The "Transatlantic Economic Partnership" followed in 1998 and while being less ambitious than "NTM" in discarding the rhetoric of eliminating trade and investment barriers, focused instead on harmonizing regulations affecting transatlantic trade and investment.

on June 25-26, 2004. The 2004 Roadmap identified a number of sector-specific areas where the EU and US regulators had already cooperated, and could further advance their cooperation, including pharmaceuticals, auto safety, information and communications technology standards, cosmetics, consumer product safety, or nutritional labeling.

Following the 2004 EU-US Summit and the release of the 2004 Roadmap, both the EU and the US consulted the business community on both sides of the Atlantic,⁶ and the agencies involved in regulatory harmonization continued the cooperation pursuant to the 2004 Roadmap.

B. Results of the 2005 US-US Summit

The 2005 EU-US Summit resulted in the release of four new documents: (1) Declaration on the EU – US Initiative to Enhance Transatlantic Economic Integration and Growth, (2) Declaration Annex on Energy Security, Energy Efficiency, Renewables and Economic Development, (3) a new revised 2005 Roadmap for U.S. – E.U. Regulatory Cooperation; and (4) Declaration on Intellectual Property.

C. Declaration on EU-US Initiative to Enhance Transatlantic Economic Integration and Growth: Harmonization of Regulations, Integration of Transatlantic R&D, Investment, Procurement, Services and Capital Markets

In the 2005 Declaration on EU – US Initiative to Enhance Transatlantic Economic Integration and Growth (the 2005 Declaration), the Parties noted that consultations with businesses and citizens following the 2004 Dromoland Summit underscored the respondents' desire for (1) access to “the widest possible range of goods and services while enjoying the protection of high public health, environment and safety standards,” (2) stronger collaboration between regulatory authorities on both sides of the Atlantic, (3) further integration of the transatlantic capital markets, (4) protection of intellectual property rights (IPRs), (5) facilitation of transatlantic investment, (6) progress on movement of services, (7) improvement in procurement opportunities, and (8) further cooperation in competition policy. The Declaration acknowledged that removing impediments to transatlantic trade and investment as well as seeking increased integration of markets would be “a multi-year effort.”

Below we discuss the specific areas of cooperation outlined in the Declaration.

- Regulatory and Standards Cooperation

The Parties recognized the importance of EU-US regulatory cooperation and noted the “rich network of cooperative exchanges already under way.” In order to achieve more effective mechanisms promoting better quality regulation and minimizing unnecessary regulatory divergences to

⁶ Cf. Public Dialogue on Enhancing the Transatlantic Economic Relationship, 69 Fed. Reg. 51139 (August 17, 2004); Update on Public Dialogue on Enhancing the Transatlantic Economic Relationship, 69 Fed. Reg. 65018 (November 9, 2004). For comments filed in response to USTR request for comments see: http://www.ustr.gov/World_Regions/Europe_Mediterranean/Transatlantic_Dialogue/Public_Comments/Section_Index.html

facilitate transatlantic trade and investment, the Parties announced the 2005 Roadmap for EU-US Regulatory Cooperation.

In addition to the 2005 Roadmap, the Parties announced creation of a EU-US high-level Regulatory Cooperation Forum, through which senior European and US regulators would exchange views and experiences. The high-level Regulatory Cooperation forum is intended to compliment the two other venues for regulatory collaboration: (1) the informal cooperation between Office of Management and Budget (OMB) and the European Commission, and (2) talks under the EU-US Financial Markets Regulatory Dialogue. The EU-US Regulatory Forum will organize meetings and conferences on regulatory issues, to which other regulators, academia, businesses, and other organizations will be invited. See the 2005 Roadmap for further details.

- Capital Markets

Noting that dynamic capital markets are “a catalyst for growth and innovation,” the Declaration states that the aims in this area are to increase the integration and efficiency of the respective capital markets and making the transatlantic financial markets operate “seamlessly.” The Parties vow to continue using the EU-US Financial Markets Regulatory Dialogue to anticipate, identify and discuss potential problems in the areas of financial regulation by reviewing legislative and regulatory developments. Among the areas of particular concern, the Declaration lists (1) implementation and enforcement of financial market reforms, (2) promoting *convergence of accounting standards* “as soon as possible,” (3) removing barriers to further integration of *clearing and settlement systems*, (4) encouraging competition among *trade execution venues*, (5) making progress on *deregistration reform* and on insurance issues, (6) making progress on adoption and implementation of *Basel II*, (7) taking steps to help build the transatlantic *venture capital* market, and (8) fight against *financial fraud*, money laundering, tax evasion, corruption and other malpractices.

- Research and Development.

As the EU and the US will increasingly rely on innovation and advanced technologies to stimulate economic growth and prosperity, the aim of cooperation in this area is to “increase synergies” across the Atlantic. To this effect, the Declaration calls on the US and EU to (1) encourage collaboration on long-term basic research within the context of the *EU-US Science and Technology agreement*; (2) promote cooperation using *civilian space-based technologies* for sustainable development, and science/exploration; (3) support an international dialogue for the responsible development and use of *nanotechnology*; (4) renew and reinforce the *EU-US Agreement on Higher Education and Vocational Training*; (5) encourage the commercial application of research by identifying actions to improve rapid *commercialization*, using, *inter alia*,

incubator environments, venture capital and technology transfers; (6) promote *E-accessibility*; (7) encourage development of key innovative technologies such as *broadband* and *radio frequency identification devices* without prejudice to consumer and data protection; (8) encourage collaboration on development of *Intelligent Transport Systems/Telematics* for intelligent vehicles; (9) establish a dialogue on *cyber-security*; (10) support OECD efforts to address *international redress for internet purchases*; (11) cooperate to tackle *spam*, *“spyware,”* and *“malware;”* and (12) explore cooperative work on health and medical technologies.

- Transportation and Trade Security.

Noting that security of people and goods in transit is fundamental to deepening the EU-US relationship, the Declaration aims to develop and adopt effective, compatible security standards and customs benefits. The Parties noted the progress made under the 2004 EU-US Agreement on Enhanced Customs Cooperation, and the joint efforts leading to the development of the World Customs Organization’s framework of standards for security and facilitation in June 2005. In the Declaration, the Parties vowed to (1) continue working towards avoiding adverse consequences of recent security-related regulations for transatlantic shippers, including ensuring the compatibility of the *EU’s Authorized Economic Operator concept* and the *US C-TPAT Program*, (2) seek compatible practices and standards to enhance air transport security and facilitate air cargo traffic, (3) pursue measures to facilitate business and tourist travel, including consideration of a *“trusted persons” initiative*, and continuation of discussions on *reciprocal visa exempt travel* for short-term stays for the citizens of both Parties.

- Energy Efficiency.

The Declaration noted both the EU and the US would work together to advance energy security, renewables, energy efficiency and economic development as outlined in the Special Annex on Energy Security , Energy Efficiency, Renewables and Economic Development (Annex on Energy). The Annex on Energy noted the long tradition of EU and US working together to promote economic growth and energy security, in particular the International Energy Agency, the G-8 Initiatives, and the Bonn “Renewables 2004” Action Plan. It pointed out the EU and US intend to promote sound energy policies, improve energy security, and reduce the economic impact of high and volatile energy prices.

The two Parties recognized that the “greatest needs” of the *developing countries* to provide the basic energy services necessary to lift them out of poverty, but stated that the solution to the problem was the advancement, deployment, and development of clean, efficient, affordable energy technologies. The EU and the US promised to focus on: (1) working in partnership with developing countries to help them

reduce poverty by promoting energy efficiency, renewable energy sources, and advanced, efficient, and affordable technologies to help meet their energy needs; (2) collaborating through the Carbon Sequestration Leadership Forum to develop clean technologies, especially in key developing countries; (3) promoting hydrogen technologies and the International Partnership for the Hydrogen Economy; (4) cooperation in ensuring safe operation of existing nuclear generation; (5) cooperation to promote cleaner and more efficient diesel vehicle technologies, seeking to better align regulatory standards for diesel engines and fuels, and (6) cooperation in international Methane to Markets Partnership to capture and use methane as a clean-burning energy source.

- Intellectual Property Rights.

The Declaration noted that growing global piracy and counterfeiting threatens the competitiveness of innovative industries, livelihood of artists, and health and safety of consumers. The Parties vowed to enhance the effectiveness and efficiency of the patent system *via* progress in international fora and vowed to coordinate their efforts as outlined in the special Declaration on Working Together to Fight Against Global Piracy and Counterfeiting (IP Declaration). The IP Declaration noted the threats posed by global piracy, new technologies facilitating faster production of infringing goods, and use of Internet and global trading lanes to distribute the goods. The IP Declaration also noted the new developments in protecting intellectual property rights (IPRs) across the Atlantic: (1) EU Directive adopted in April 2004 aimed at harmonizing enforcement of IPRs within the EU; (2) EU Regulation passed in July 2004 improving mechanisms for customs action against counterfeit and pirated good; (3) EU's strategy for enforcement of intellectual property rights in third countries announced in November 2004; and (4) the Strategy Targeting Organized Piracy (STOP!) announced in the US in October 2004 to reduce trade in pirated and counterfeit goods.

The steps agreed by the US and EU include: (1) promotion of strong and effective enforcement of IP laws, both internally and at the borders (specifically: promotion of laws providing customs authorities with the power to retain, and suspend the release of suspected goods without the need for a formal complaint from a private party; judicial authority to seize suspected infringing goods; disposal and destruction of pirated and counterfeit goods, as well as equipment and materials used to produce such goods; strong deterrence against piracy and counterfeiting, predictable and clear judicial legal proceedings and transparent policies and guidelines related to IP enforcement, as well as publishing information related to IP enforcement actions, including statistical information); (2) strengthening of cooperation to reduce global piracy and counterfeiting worldwide (specifically: inclusion of effective IPR protection in regional and bilateral agreements; sending a "clear

message” to “priority countries” on the importance of effective IP enforcement and working with such countries to secure commitments and implement actions to reduce piracy and counterfeiting; making IPR enforcement a key focus of trade capacity building technical assistance to third countries and establishing informal mechanisms for IPR, customs and law enforcement experts to exchange views based on best practices); and (3) fostering public-private partnerships to protect intellectual property.

- Investment.

Noting that investment flows are a vital part of the transatlantic economic relationship, the Declaration urges the Parties to facilitate transatlantic investment opportunities “to the fullest” by providing efficient, comprehensive and easily accessible information on investment regimes and policies to attract investment. The Parties agree to discuss any significant remaining obstacles to transatlantic investment identified by the other party.

- Competition Policy.

Noting that enforcement of competition laws by authorities on one side of the Atlantic increasingly has consequences for the other jurisdiction, the Declaration recalls the cooperation between the European Commission and US competition authorities under the 1991 and 1998 agreements, under which the respective authorities coordinate enforcement activities and exchange non-confidential information. As the next step, the Declaration urged further exploration of ways in which confidential information may be exchanged.

- Government Procurement.

The Parties acknowledge the “benefits of the open competitive procurement markets”, and that they should reinforce their efforts fostering progress in plutilateral negotiations on government procurement, both through expanding the membership of the WTO Agreement on Government Procurement (GPA), as well as through expanding the coverage scope of the GPA. The Parties also vowed to discuss expanding procurement opportunities on bilateral basis, going beyond the GPA commitments. Specifically, the Declaration singles out enhancing the use of electronic procurement on both sides.

- Services.

The Declaration notes that the US and the EU should continue cooperation on aviation issues, including safety, security and liberalization, including achievement of a comprehensive first-step EU-US air services agreement “as soon as possible”, pointing out that benefits of such agreement would provide new business opportunities for

EU and US airlines, airports, tourism, business links, cargo transporters and consumers. In addition, the Declaration stresses the need for *mutual recognition of professional qualifications*, which could facilitate the movement of professionals, encourage greater opportunities, and foster competition in services. The Parties urge both sides to look into the mutual recognition of professional qualifications, in particular in sectors where economic interests or need has been substantiated by suppliers and/or users. In this context, the Declaration singles out *architectural services*.

D. 2005 Roadmap for EU – US Regulatory Cooperation: Recap of Existing Efforts, Setting New Aims, and Expanding the Scope of Cooperation

While the Declaration on EU – US Initiative to Enhance Transatlantic Economic Integration and Growth, listed regulatory harmonization as only one of the TEP projects, regulatory cooperation is by far the most elaborate and multidirectional part of the TEP. The Roadmaps announced during EU – US Summits are a detailed list of specific projects of regulatory harmonization: they list the status quo of the current projects, as well as set the goals for further work. The 2005 Roadmap builds on the 2004 Roadmap, by outlining the results of the regulatory cooperation achieved under the 2004 Roadmap, and use them as the benchmark for further progress.

With regards to the general *horizontal initiatives*, the 2005 Roadmap specifically mentions the (1) informal cooperation between the U.S. Office of Management and Budget and the relevant departments within the European Commission; and (2) U.S.-E.U. Experts Exchange Program (aimed at promoting exchanges between US and EU regulatory experts in the specific areas of mutual interest).

With regards to the *sector-specific initiatives*, in addition to summarizing the results of cooperation and pointing to new aims in the areas listed in the 2004 Roadmap, the 2005 Roadmap also adds new areas, including consumer protection enforcement cooperation, unfair commercial practices, food safety, marine equipment, energy efficiency, telecommunications and radio communications equipment, and medical devices.

- Pharmaceuticals

With regards to the *human medicinal products*, the 2005 Roadmap points to (1) the Confidentiality Letter signed by the US Food and Drug Administration (FDA) and Directorate General (DG)⁷ - Enterprise and Industry in 2003, (2) the Implementation Plan for Medicinal Products for Human Use concluded in September 2004, and (3) a pilot program to support parallel scientific advice on pharmaceuticals. The Roadmap urges the FDA, DG Enterprise and Industry, and European Medicines Agency (EMA) to continue the steps outlined in the Implementation Plan, including sharing of regulatory and inspectional information,

⁷ Directorates General are administrative units of the European Commission, the executive body of the European Union.

scientific exchanges and parallel scientific advice, as well as continued cooperation in the new field of parallel advice – pharmacogenomics.

With regards to the *veterinary medicinal products*, the 2005 Roadmap urges the FDA and the Commission to continue their cooperation, basing on the International Cooperation on Harmonization of Technical Requirements for Registration of Veterinary Products (VICH).

- Automobile safety

The 2005 Roadmap points to the exchange of letters between the U.S. National Highway Traffic Safety Administration (NHTSA) and DG Enterprise and Industry, in which the two agencies agreed to cooperate on safety hydrogen fuel cell vehicles, and vehicle compatibility. The 2005 Roadmap calls on the agencies to develop workplans for these projects and proceed with their implementation, as well as to consider additional topics for cooperation, including future collision mitigation technologies, electronic stability systems and harmonization at the global level of dummies used in side-impact crash tests.

- Information and Communications Technology Standards

The 2005 Roadmap notes the establishment in March 2005 of Terms of Reference for cooperation between the U.S. Department of Commerce on one side, and DG Enterprise and Industry and DG Information Society on the other. The 2005 Roadmap calls for development of work plans and time tables for the topics identified under this dialogue, including e-accessibility, security, and biometrics.

- Cosmetics

The 2005 Roadmap lists as objectives the cooperation between FDA and DG Enterprise and Industry/Cosmetics Unit regarding non-animal testing methods, hair dyes and sunscreen ingredients (UV filters) and other projects of mutual interest. The Roadmap takes note of the cooperation in cosmetics and over-the-counter drugs harmonization activities under the Cosmetics Harmonization and International Cooperation (CHIC) process, and the new terms of reference agreed on between the two parties in March 2005.

- Consumer Product Safety

The 2005 Roadmap notes (1) the exchange of letters between the U.S. Consumer Product Safety Commission on the one hand, and DG SANCO and DG Enterprise and Industry on the other, in February 2005; and (2) the establishment of Guidelines for Information Exchange intended to strengthen bilateral communication and to improve consumer health and safety protection on both sides of the Atlantic. The 2005 Roadmap calls for both sides to now develop an agreed implementation

plan on specific cooperative projects in the area of consumer safety, possible including an “exchange of rapid alerts.”

- Consumer Protection Enforcement

Noting the existing informal dialogue between the DG SANCO and the U.S. Federal Trade Commission (FTC), conducted in the EU under EU Regulation 2006/2004 on Consumer Protection Cooperation (EU Regulation on CPC), and the passage in the U.S. Senate of legislation mirroring the EU Regulation on CPC, the 2005 Roadmap states that after formal passage of the legislation in US Congress, the EU Commission will undertake the necessary formal steps to seek EU Council’s authorization for negotiation of an agreement with the U.S., possibly covering mutual assistance.

- Unfair Commercial Practices

As this areas has been recently added to the regulatory cooperation project, the 2005 Roadmap spells out a general goal of establishing a general regulatory dialogue between the FTC and DG-SANCO on unfair commercial practices, and calls on both agencies to compare the newly drafted EU Directive on unfair commercial practices with the U.S. federal law on unfair practices.

- Nutritional Labeling

The 2005 Roadmap notes the discussions had between the FDA and DG SANCO experts on health claims, nutritional labeling, fortification, supplements, and infant formulas. Specifically, the Roadmap points to discussion on possible collaboration on the EU Estimated Average Requirement and the U.S. Recommended Daily Allowances (RDA) for nutrients, as well as cooperation on food labels. The next steps urged by the 2005 Roadmap include identification of specific steps which could be taken, such as establishment of reference values for nutrients labeling, nutrient definition, and energy conversion factors, as well as pursuit of a confidentiality arrangement to facilitate sharing of non-public information.

- Food Safety

As for *general cooperation*, the 2005 Roadmaps noted (1) the launch of discussions between the FDA and DG SANCO aimed at better understanding the respective food safety systems, building confidence, exploring the new ways to accomplish food safety goals and regulatory cooperation projects of mutual interests, (2) identification by experts specific regulatory cooperation projects in the area of *seafood* and *dairy*, (3) an exchange of letters in June 2005 between the FDA and DG SANCO on *sharing of non-public data*. The 2005 Roadmap calls of

identifying new projects and specific information that can be shared by the two agencies.

With respect to *general food safety issues*, the 2005 Roadmap points to (1) the regulatory dialogue between the FDA and the European Food Safety Authority (EFSA), (2) talks on a confidentiality agreement to facilitate sharing of non-public information and data, and (3) FDA's help in development of a strategy for the conduct of *microbial risk assessments*. As the next step, the Roadmap identifies conclusion of the confidentiality agreement.

With respect to *meat and meat products*, the 2005 Roadmap notes the efforts of DG SANCO and US Department of Agriculture (specifically its Food Safety Inspection Service) to coordinate its efforts on harmonizing legislation regulating this topic. It noted a September 2004 seminar which explored the respective food safety systems, in particular the Hazard Analysis and Critical Control Point system, and concluded that, even though both regulatory systems are based on similar principles, significant differences nevertheless exist. On this note, the 2005 Roadmap calls for further pursuit of an equivalency system with respect to HCAAP-based control systems for meat and meat products.

Finally, with respect to the new regulatory dialogue between the USA, EFSA, and DG SANCO in the area of *greater transparency in development of risk assessment* for animal, plant and consumer safety, the 2005 Roadmap calls for informal dialogue between the USDA and EFSA for the purpose of establishing risk assessments methodologies and identifying possible areas for further discussion and sharing of information.

- Marine Equipment

The 2005 Roadmap noted the conclusion of an U.S.-E.U. Marine Equipment Mutual Recognition Agreement in 2004, and named as objectives further regulatory dialogue between the U.S. Coast Guard on the one hand, and DG Energy and Transport, DG Trade, and the European Marine Safety Agency (EMSA) on the other with the purpose of increased convergence of technical regulations for marine equipment. As next steps, the Roadmap calls for the development of a work plan for regulatory cooperation bilaterally as well as in the International Maritime Organization, aimed at equivalent regulations for specific maritime equipment and further expansion of the Marine Equipment MRA's product scope.

- Eco-design

The 2005 Roadmap sets out as an objective cooperation between the U.S. Environmental Protection Agency (EPA) on the one hand, and DG Energy and Transport, DG Environment, and DG Enterprise and

Industry on the other. As the next steps, the Roadmap identified exploring cooperation in actions relative to eco-design of energy-using products, Integrated Product Policy, restrictions on hazardous substances, and waste from electrical and electronic equipment.

- Chemicals

The 2005 Roadmap noted (1) the 2nd Transatlantic Environment Conference on chemicals hosted by the US EPA, addressing the EU's proposed Registration, Evaluation and Authorization of Chemicals Initiative (REACH), the globally harmonized system for the classification and labeling of chemicals, pollution prevention techniques, and access to information and genomics; and (2) the cooperation between the EPA and the European Commission in OECD framework for development of the Global High Production Volume chemicals information portal. The Roadmap indicates as the next step the continued work by the US EPA, DG Environment, DG Enterprise and Industry, and DG Health and Consumer Protection on the Global HPV Portal.

- Energy Efficiency

The 2005 Roadmap noted the existing "Energy Star" Agreement (Energy-Efficient Labeling Programs for Office Equipment), the conditions for renewing of which both the U.S. and E.U. are currently considering. The Roadmap notes that the Energy Star Agreement covers computers, monitors, printers, fax machines, copiers, scanners, and multi-function devices, and that both parties will continue on revising the specification for the covered imaging equipment and computers, with the intention of making the specifications more stringent, so that models qualifying for the ENERGY STAR designation would represent top performers in the market. As the next step, the Roadmap named further work in the program to encourage energy efficiency while retaining the "philosophical basis" and "market-focused approach" of the existing program.

- Telecommunications and Radiocommunications Equipment

The 2005 Roadmap noted (1) the regulatory dialogues between the U.S. Federal Communications Commission (FCC) and the European Commission, and (2) the general U.S. – E.C. Mutual Recognition Agreement, covering, *inter alia*, telecommunications equipment. As the objective of cooperation in this field, the Roadmap names enhanced cooperation on regulatory approaches in these areas, and identifies consultation on regulatory developments in both markets and consideration of cooperative approaches for achieving consistent regulatory treatment of telecommunications and radiotelecommunications products, whenever possible.

- Medical Devices

As an objective in this field, the 2005 Roadmap names enhancing the existing regulatory dialogue on medical devices between the FDA on the one hand, and DG Enterprise and Industry, DG Trade on the other, building upon ongoing cooperative activities in the Global Harmonization Task Force and consistent with the existing general U.S. – E.C. Mutual Recognition Agreement, covering, *inter alia*, to medical devices. As the next step, the Roadmap names further work among the name participants and the USTR in implementing the provisions of the existing Mutual Recognition Agreement as applied to medical devices.

III. EU and the US Reaffirm Unity on Major Geopolitical Issues

While the economic agenda dominated the preparatory phase preceding the Summit, the discussion held by the EU and US leaders focused predominantly on the current geopolitical issues. Both parties used the Summit to show transatlantic unity on major geopolitical issues. Following bitter disagreements surrounding the Iraq war, global warming, alleviation of poverty in Africa, and dealing with nuclear ambitions of North Korea and Iran, both sides were very eager to show unity on major geopolitical problems of today.

Accordingly, a series of joint declarations were adopted, including declarations on:

- *Democracy, Freedom and Human Rights*
- *Non-proliferation and the Fight Against Terrorism*
- *Non-proliferation of Weapons of Mass Destruction*
- *60th Anniversary of the Signing of the San Francisco Charter*⁸
- *Working Together to promote Peace, Stability, and Good Governance in Africa*
- *Working Together to Promote Peace, Stability, Prosperity and Progress in the Middle East*

In addition, the EU leaders updated President Bush and the members of his cabinet on the status of EU integration, mainly their failure to achieve a compromise over the future financing of the EU during the EU Summit held in Brussels, June 16-18, 2005, and the negative results of referendums on the EU Constitution in France and the Netherlands. EU leaders expressed a view that EU's internal problems are only temporary and would not distract the EU from pressing international issues, mainly in the Balkans and Ukraine. As summarized by the President-in-office of the European Council, Jean-Claude Juncker, EU "is not on its knees, but that the European Union is playing the role it has on the international scene".

⁸ Founding document of the United Nations

On the other hand, President Bush used the Summit to show that his second term “charm offensive” aimed at restoring relations with US’ traditional allies in Europe has worked. In particular, the President made it clear that US is supportive of the European Union as an institution, not merely collection of countries, something no U.S. President has done before. “The United States continues to support a strong European Union as a partner in spreading freedom and democracy and security and prosperity throughout the world,” he said.

OUTLOOK

As reaffirmed by the recent EU – US Summit, trans-Atlantic cooperation will continue including on matters of foreign policy, as well as commercial exchange. On **foreign policy**, the US administration seems to have come to the conclusion that help from the European Union will be necessary in areas of top priority for the US government’s foreign policy: rebuilding Iraq and Afghanistan, support of the Middle East peace process, negotiations with Iran over its nuclear programme, and combat of terrorism, and that these goals will be difficult to come by without a substantial help from the EU. The European Union, on the other hand, is also keen on restoring its relations with the US. The prior disagreements with the US have led to bitter disagreements *within* the EU, which in turn slow down the process of internal reform. Of special significance in this area is the European attempt at forging a common, EU foreign policy.⁹ Thus a period of good relations with the US allows Europe to work constructively on tackling their internal problems. The EU also needs the US’s backing for the success of its major foreign policy goals: Israel – Palestine peace process, stabilization of Iraq and diffusing the nuclear showdown with Iran. Without U.S. backing, the EU policy lacks “a stick”.

However, it appears that both parties seemed to go out of their way to *show* transatlantic unity, belying the underlying disagreements, which persist. The Declarations adopted at the 2005 Summit upon careful review seem superficial to some extent and failed to resolve the problems plaguing EU – US cooperation: the EU-US Declaration on Energy Efficiency belies the underlying disagreements over U.S. rejection of the Kyoto protocol, the Declaration on Africa hides the disagreement over the proper form of debt relief and development assistance, the Declaration on the Middle East belies the disagreements over the proper policy towards Israel and the Palestinian Authority. In addition, the Declaration on the 60th Anniversary of UN Charter may not have much practical weight as the European Union as an institution is not a member of the United Nations, and its members are divided over the ongoing United Nations reform, in particular whether Germany should become a Permanent Member of the UN Security Council, and whether the current UN Security Council Members, France and United Kingdom, should swap their individual UNSC membership for a joint EU membership.

The only three areas where notable progress on EU – US difference in has been achieved are (1) the end of discussions over the causes and justifiability of the Iraq war, which has plagued prior EU – US relations, (2) disagreements over the proper conduct towards Iran and its alleged nuclear ambitions (progress evidenced by US support of EU negotiation efforts expressed in the joint Declaration on Non-proliferation and Fight Against

⁹ A post of EU Minister of Foreign Affairs, and EU Diplomatic Service has been created by the EU Constitution, currently in the process of ratification by member states.

Terrorism), and (3) US recognition that the European Union, as an entity, is a worthy partner for the United States. Until President Bush's second term, the European Union has never been treated as a partner for the U.S; the successive US governments consistently preferred to deal with the government of individual European nations.

On **economic partnership**, the cooperation will also continue given that the US and the EU are each others main trading partners and the largest sources of each other's inflows of foreign investment. In addition, they both face the same challenges: adjusting their economy to successfully compete with China and Asian producers, as well as competing with the Asian economies for important resources. Notable is the lack of EU – US progress in typical FTA areas, such as government procurement, services, facilitation of investment, and competition policy, suggesting that the either the vested interests on both sides of the Atlantic are protective of their markets, or the main players consider the current market access conditions in these areas satisfactory.

With respect to regulatory cooperation, the annual roadmaps seem to establish achievable goals, i.e. goals which had previously been agreed on by the regulatory authorities involved in the process. Accordingly, progress is slow, but steady. The steps set out are generally achieved, and the subject-matter scope of the cooperation is expanding. It is also worth emphasizing the seemingly significant impact of the Transatlantic Business Dialogue ("TABD"), a grouping of major transatlantic businesses created in 1995, which has facilitated the official EU-US TEP agenda. A comparison of TABD policy issues for the 2005 EU-US summit,¹⁰ with the actual results of the Summit demonstrates a strong resemblance between the two documents.

Finally, the big non-issue was whether or not the United States and the European Union should engage in free trade negotiations. While most commentators and government officials indicate that due to very low tariffs in industrial goods, and generally similar regulations – there is no compelling need for a free trade agreement. Others, however, point out that in certain areas such as professional services or agriculture, certain technical regulations, and so on – the barriers still exist. Moreover, much of global trade is now conducted at the preferential level given the recent proliferation of regional trade agreements. In addition, many observers assert that multilateral trade is more preferable and attention, including US-EU leadership, should be focused on concluding the WTO Doha Round.

¹⁰ See: TransAtlantic Business Dialogue Report to the 2005 EU-US Summit: A Framework for Deepening Transatlantic Trade and Investment, available at: <http://128.121.145.19/tabd/media/TABD2005SummitReportFINAL062.PDF>

MULTILATERAL

Dalian Mini-Ministerial Acknowledges WTO Doha Round is Lagging; Pressure Intensifies to Achieve Key Targets by Hong Kong Ministerial

SUMMARY

High-level participants at the Dalian “mini-Ministerial” meeting on July 12-13, warned that WTO Doha Round targets are lagging, and emphasized that critical work remains between now and the Hong Kong Ministerial in December 2005.

WTO Members have acknowledged that they probably will not achieve by late July agreement in areas outlined in May at the last mini-Ministerial in Paris. They recognize, for example, that more work is necessary for agriculture tariff formulae and domestic support disciplines. Likewise, most Members have expressed disappointment that recent improved offers on services market access have been few and modest. Nevertheless, there is growing convergence towards formulae for non-agricultural market access (“NAMA”), and substantive discussions in rules negotiations, trade facilitation and development concerns are proceeding apace.

ANALYSIS

I. Dalian “Mini-Ministerial” Scales Back Ambition for July, Focuses on Hong Kong Preparations

Ministers and senior trade officials from about thirty WTO Members attended a “mini-Ministerial” conference in Dalian, China from July 12-13 2005, in an effort to add political momentum to the Doha Round. At the previous mini-Ministerial gathering in Paris in May, officials targeted the Dalian meeting for their negotiators to present draft “first approximations” on negotiating modalities for agriculture and NAMA, benchmarks to assess services offers, among other issues. Participants in Dalian acknowledged, however, that these objectives would not be met at this meeting or by July.

Nevertheless, Ministers indicated that the upcoming July TNC and General Council meetings are key “launching pads” to achieve progress in the autumn. In particular, they targeted the Hong Kong meeting as the deadline for establishing “comprehensive modalities” for agriculture and NAMA; a “critical mass” of services offers; “meaningful and substantial progress” in rules and Trade Facilitation negotiations, and “substantive integration” of development objectives. Ministers also “remain convinced” that conclusion of the Doha Round by the end of 2006 is their “highest common priority in trade policy.”

A. Supachai Warns “Negotiations Are in Trouble”

Prior to the meeting of the Trade Negotiations Committee (“TNC”) on July 8, WTO Director-General Supachai Panitchpakdi, who chairs the TNC expressed serious concerns that Doha Round priorities had not been met, and preparations for Hong Kong could be jeopardized. Supachai indicated frankly that negotiations “are in trouble” and “progress is nowhere near sufficient.” In particular, Supachai made the following assessment:

- **Agriculture** – Agreement on ad-valorem equivalents (“AVEs”) in May has yet to “sufficiently galvanize” market access negotiations on formulae for tariff cuts, or other areas.
- **NAMA** – Growing convergence, but positions are “hardening” due to lack of progress in agriculture.
- **Services** – Quality of offers remain poor despite new revised offers since May.
- **Rules** – Need to consolidate discussions; progress being made in Trade Facilitation and regional trade disciplines.
- **Development** – “Some hope” for agreement on special and differential treatment provisions, especially relating to least-developed countries.

Supachai remarked that the political guidance at recent Ministerial gatherings has not resulted in the anticipated progress at the technical level in Geneva. He reminded WTO Members that only three months of work remain until Hong Kong, and urged Members to “change gear” and “change our mindset and our approach” in the final preparations for the Ministerial.

B. Dalian Provides Guidance on Five Key Areas of Negotiations

Ministers in Dalian acknowledged Supachai’s concerns, but were unable to strike any significant deals. They nonetheless provided guidance in five key areas of negotiation between now and the July 27 TNC meeting in Geneva, and in preparation for the Hong Kong Ministerial:

- **Agriculture formulae needed** – Cited need for critical work between September to December in the three “pillars” of agricultural reform, and in particular on market access formulas and domestic support.
- **Services offers lacking** – Expressed concern that market-access offers still “fell short of our expectations in terms of both numbers and quality.” Moreover, acknowledged that the present state of negotiations “will not yield a balanced and substantive outcome for this Round.” Also recognized the difficulty of setting benchmarks to assess offers. Nevertheless, envision a new deadline for revised offers in 2006 and urged Members to make commitments which would create “commercially meaningful market opportunities.”
- **NAMA convergence** – Noted growing convergence on use of a Swiss formula with different tariff reduction coefficients, binding of all tariffs, and subjecting them to reduction formulas. Mandated work on a methodology to convert specific tariffs to ad valorem equivalents (“AVEs”) by the end of July. Also, stated “aspiration for agreeing on full modalities” by the Hong Kong Ministerial.

- **Rules to produce texts** – Reached a “broad agreement” that text-based negotiations should begin on rules negotiations, and at Hong Kong at the latest. Moreover, the Hong Kong meeting should consider “areas where improvements are recognized as necessary.” (e.g. antidumping, subsidies, regional trade disciplines, etc.)
- **Development S&D provisions:** Noted growing attention at international gatherings (e.g. G-8 Summit). Seek to “firm up” some proposals on Special and Differential (“S&D”) treatment by the end of July. Also, cited other priorities including tropical products and simplification of rules of origin.

C. Ministers Shift Focus to Hong Kong and Away from July Targets

EU Trade Commissioner Peter Mandelson remarked after the Dalian meeting that hope remains prior to Hong Kong, “but not at this rate of progress.” He suggested more frequent participation of senior officials in Geneva and additional ministerial-level meetings. He acknowledged that Members need to lower their expectations for July, and to intensify work in the autumn.

Deputy USTR Peter Allgeier commented in Dalian that negotiators are not at the stage where they would like to be. Nevertheless, Allgeier underlined the broad support for the negotiations among Ministers in Dalian and that “the stakes are understood.” Moreover, he said it was essential to translate this political will into negotiating texts in Geneva. (Allgeier has recently been appointed as the new USTR Representative to the WTO in Geneva, and will be an integral part of this process.)

USTR Rob Portman attended the Dalian meeting but had to depart early given pressing concerns at home on rallying votes in Congress to pass the Dominican Republic-Central American Free Trade Agreement (“DR-CAFTA”) – which is the Bush Administration’s highest trade priority prior to the Congressional summer recess in August.

In other reactions, India’s Minister of Commerce and Industry Shri Kamal Nath emphasized that developing countries like India would insist on the need for “policy space” in negotiations on NAMA tariff reductions. He also cited as priorities the protection of biodiversity and traditional knowledge, non-tariff barriers and disciplines on antidumping actions.

II. Doha Round Negotiating Groups Assess Substantive Work

A. Agriculture: Chair Groser Offers Sober, But Hopeful Assessment of Talks

At the end of June 2005 the Chairman of the WTO Agriculture Negotiations, Ambassador Tim Groser, issued an assessment of the issues WTO Members must address before their summer break at the end of July if the Members are to complete the First Approximation in July. The goal of the First Approximation is to establish a set of structures for the three pillars that will form the basis of the political negotiations between September and the December Ministerial in Hong Kong. However, since he issued his assessment

Chairman Groser has also been quoted in media reports as being downbeat about the possibilities for achieving the First Approximation of the Agriculture Negotiations in July.

In general the Chairman's Assessment encouraged members to engage in informal dialogue to support the formal negotiations, especially with respect to negotiations on market access. The Chairman cautioned that Members cannot force "elegant" technical formulae upon other Members. In the Assessment the Chairman explained that he needs clear guidance from the Members on several issues and that they should remember this is a development round and agriculture is an essential component to many Members' development goals. Chairman Groser specifically mentioned that Developing Countries and Least Developed Countries have a particular interest in the negotiations because for many such countries their people are dependent upon agriculture and see new opportunities once distorting mechanisms are removed from the global agriculture market.

The Chairman's Assessment sought to strike a tone to the July negotiations that recognizes Members cannot address all of the July 2004 Framework issues at once. Chairman Groser asserted that the WTO Members understand that agriculture issues must be addressed in particular sequences. The Chairman expressed his goal to produce a paper by the end of July that sets out Members' convergence on key structural issues within the three pillars and to leave the political negotiation on how ambitious the commitments will be to negotiations after the summer break. However, Chairman Groser emphasized that he needs guidance from the Members to accomplish this goal.

1. Domestic Support Pillar: Defining Tiered Reductions

Chairman Groser urged WTO Members to reach convergence on the structure of reduction commitments, not on the magnitude, for trade-distorting support ("TDS") and for the aggregate measure of support ("AMS"). He believes the Members need to define a structure for a tiered formula for cuts in final bound AMS and a structure for a tiered formula for cutting overall TDS. The Chairman further encouraged Members to develop both formulae on the basis of absolute and not relative levels of TDS. Chairman Groser believes this approach will illustrate the Members are targeting the real problem of large market distortions rather than trying to score political points. He also recognized that the formulas will be driven by the schedules of the EC, US and Japan, which account for 82% of the AMS among WTO Members. The Chairman would like Members to agree on the number of tiers that will be used to determine reductions, the largest users of TDS and where developing countries fit in each tier.

The Chairman urged more work on the Blue Box during July but encouraged members to wait until after the summer break to address the size of subsidy reductions. Likewise, the Chairman reported that Members could reach some convergence on Green Box principles in July. He commented that Members generally fall into one of two schools of thought on Green Box issues: 1) a concern among light users of Green Box subsidies that its provisions continue to only permit non-distorting support, and 2) Developing Countries that seek to ensure that Green Box principles permit support programs that address their unique needs.

2. Export Competition Pillar: Elaboration of Further Disciplines

Chairman Groser's Assessment commented that Members have already achieved convergence on the structure and goal of this pillar, which is the complete elimination of export support. The Chairman now urges Members to further elaborate on disciplines on export credits, state-trading enterprises ("STEs"), and food aid.

3. Market Access Pillar: Most Complex Area; Formulae and Tiered Reductions

In his Assessment the Chairman commented that the Market Access Pillar is the most complex and the least developed pillar. In light of the work to be done he urged Members to use July to agree on the structure of the central elements of the core formulae for the negotiations. The Chairman particularly emphasized that progress in this area must be conditional and completed in particular sequences given the interrelationship of market access elements. He further suggested that after the July Agriculture Week Members may be in a position to make choices between different combinations of variables.

The Chairman also commented that the negotiations to date have focused on two schools of thought: 1) the number of tiers required for reductions, and 2) the number of tiers and the nature of the formulae within the tiers. By the end of July Chairman Groser wants Members to have first agreed upon a description of the type of formulae to be used and then to have agreed on the on number of tiers and their thresholds.

4. Cotton Sector Needs Structure; U.S. Seeks to Implement Cotton Dispute Findings

Chairman Groser, who also chairs the Sub-Committee on Cotton, advised that if the Members have clear structures on the three pillars then they can engage in a parallel evaluation of the structures' implications for the cotton sector. He cautioned, however, that if the Members do not reach convergence on key points in the three pillars by the end of July then it will become increasingly difficult to fulfill the cotton mandate. Chairman Groser emphasized that Members will soon need to show that they have achieved some progress in twelve months of negotiation on the cotton sector.

In related developments, the United States, in accordance with WTO findings against the U.S. cotton subsidy program, is taking steps to implement the dispute. The findings urged that the US should withdraw the inconsistent subsidies by July 1, 2005. At the Dispute Settlement Body (DSB) meeting on July 15, Brazil requested authorization to retaliate, including possibly on TRIPS and GATS concessions offered to the US. Moreover, African countries that were third parties to the dispute called upon the US to implement the findings immediately, and no later than the Hong Kong Ministerial.

B. Non-Agriculture Market Access (Industrial Goods): Convergence Towards "Swiss Formula" but Work Still Contentious

The Chairman of the Negotiating Group Ambassador Stefan Johannesson in an assessment on July 8 acknowledged that NAMA negotiations are at a critical state, and emphasized that the key priority is to define the coefficients for tariff reductions and the related flexibilities. Another priority is to agree on treatment of unbound tariffs (which

Ministers in Dalian agreed would be bound and subject to tariff reduction). Some Members including Malaysia are concerned that their current applied rates for certain unbound tariffs are already low, and they do not want to be penalized for unilateral liberalization.

There has been growing convergence of views towards some version of a “Swiss formula” that would result in deeper cuts in higher tariffs. Moreover, developing countries would be entitled to flexibilities in reducing tariffs on certain sensitive products. Nevertheless, there remain significant differences in the approaches favored by the U.S. and EU on the one hand, and Argentina, India and Brazil on the other.

At the meeting of the Negotiating Group in early July, Johannesson warned that positions were hardening and therefore Members were probably not in a position to agree on a first approximation of modalities by July. In particular, Johannesson warned that Members had “reached an impasse... on the most fundamental element, the formula.” He further cautioned that lack of agreement on a formula would threaten conclusion of modalities at the Hong Kong Ministerial, and urged Members to overcome the deadlock.

C. Services: New Offers Tabled; Criteria for Benchmarks Not Agreed

More than 20 Members have tabled revised services since the May 31 deadline and by the recent “cluster” of meetings on services from June 20-July 1. These Members include the US, EU, Canada, Japan, Australia, Hong Kong, Egypt, Brazil, Chile, Colombia, Mexico, among others. Many of these offers are considered as modest, and not creating meaningful new business opportunities. To date, nearly 70 Members have tabled offers including initial offers, many of which have been poor in quality.

Members also attempted to define benchmarks, possibly quantitative and qualitative, to measure improved offers – but did not agree on any particular criteria. Developing countries in particular resisted the establishment of such benchmarks.

D. Trade Facilitation: Work Moving Towards Draft Principles and Assessment of Needs

The Negotiating Group on Trade Facilitation held its latest round of meetings in mid-June, at which Members discussed nine new proposals, including on GATT Article V (on freedom of transit), Article VIII (on fees and formalities), and Article X (on transparency). To date, the negotiations have been among the most active in the Round with nearly fifty proposals tabled.

Members in June reviewed a compilation of proposals prepared by the WTO Secretariat, which could form the basis for the structure of an agreement. They are moving towards identification of the needs and priorities of developing countries and least-developed countries as well as the existing level of trade facilitation in these countries should be assessed. This assessment should then be taken as a basis for the eventual establishment of relevant trade facilitation rules, the arrangement of special and differential treatment, and the provision of technical assistance and capacity building support. The African Group also called for the establishment of an appropriate mechanism on technical assistance to be agreed not later than July 2005.

E. TRIPS: Implementation of Public Health Declaration Unresolved; Brazil Takes Unilateral Action

The TRIPS Council is still attempting to implement the TRIPS and Public Health Declaration. WTO Members are attempting to reach agreement on an amendment to the TRIPS Agreement to improve developing countries' access to generic drugs, but were unable to do so at the Council in mid-June. In related developments, Brazil sought to override the patents for certain HIV/AIDS drugs, but appears to have negotiated a solution with one of the leading U.S. patent holders.

OUTLOOK

There appears to be a yawning gap between statements of political support, as at the recent G-8 meeting in Scotland and the mini-Ministerial in Dalian – and the immobility and growing cynicism in Geneva negotiations. Hope now rests on leadership from incoming Director General Lamy (who takes office September 1); Lamy can make a big difference, but he will have only three months before Hong Kong. Lamy's efforts would not be enough without strong U.S. and EU leadership, especially in agriculture negotiations. Likewise, the other members of the "new Quad" Brazil and India, are under pressure to demonstrate appropriate flexibility, including on NAMA issues.

The overriding question is, is there enough on the table in other areas of the Doha Round to generate the political and private sector support needed for the US and EU to offer real concessions to developing countries on agriculture? The answer remains uncertain, but perhaps not –given the current state of negotiations. Notwithstanding, the EU is under pressure including from the United Kingdom's current Presidency, to undertake serious reforms of the Common Agricultural Policy ("CAP") – but is facing its own political impasse on this and other budget-related issues. The US appears to be taking steps to reform the agriculture sector, including to face up to resistance by the cotton and other sectors (e.g. sugar in FTA negotiations). Nevertheless, bilateral support for trade in Congress has eroded substantially and trade initiatives have become increasingly difficult to implement.

In historical perspective, the last round the Uruguay Round had experienced numerous political crises before producing an important multilateral trade framework. But, the Uruguay Round agenda was huge and too much to lose; the Doha Round agenda is not as ambitious in comparison, and therefore more susceptible to collapse.

Nevertheless, Ministers in Dalian and most WTO Members acknowledge that much is at stake and some hope remains to achieve success in Hong Kong this December. It is apparent that key targets on agriculture and NAMA will probably be missed in July, and success depends upon progress in the critical months in the autumn. Without an agreement in Hong Kong, the Doha Round will be in peril as the understood deadline approaches at the end of 2006.

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Appellate Body Reverses Panel on Korean DRAMS

SUMMARY

The WTO Appellate Body has overturned the findings of a Panel that had found that the U.S. imposition of countervailing duties on computer chips from Korea was in breach of the obligations of the United States under the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). The Appellate Body ruled that the Panel misinterpreted the applicable disciplines of the SCM Agreement, and improperly "second-guessed" the determinations of the investigating agency, the U.S. Department of Commerce (DOC).

ANALYSIS

I. Factual Background: DOC determination of subsidies to Hynix

This dispute arose from a countervailing duty investigation by the DOC on imports of dynamic random access memory semiconductors (DRAMs) from Korea. The DOC imposed countervailing duties after making a determination that one of the Korean DRAMs exporters, Hynix Semiconductor Inc., received subsidies in the form of financial contributions by its creditors.

The United States argued that the Government of Korea had established a policy to save Hynix from its financial difficulties because of the importance of the Korean semiconductor industry. The DOC found that financial contributions were provided by a number of banks owned or controlled by the Korean government, as well as by a larger number of private bodies that were "entrusted or directed" by the Korean government to do so.

On February 21, 2005 [see our report of February 25], a WTO Panel found that the DOC did not have a sufficient evidentiary basis to conclude that the Korean government had entrusted or directed private creditors to provide financial contributions to Hynix. This finding was reversed the Appellate Body.

II. Applicable disciplines: "entrusting or directing" a private body to provide a financial contribution

Article 1 of the SCM Agreement provides when a subsidy will be deemed to exist. In general terms, the definition of a "subsidy" comprises two elements: a "financial contribution" by a government, and the conferral of a "benefit" on the recipient.

The Agreement also defines what is meant by a "financial contribution by a government." Such a financial contribution will exist where:

- There is a direct transfer of funds (such as by a grant or loan) or a potential direct transfer of funds or liabilities (such as a loan guarantee);
- Government revenue that is otherwise due is foregone or not collected (such as tax credits);

- The government provides goods or services; or
- The government makes payments to a funding mechanism, or "entrusts or directs a private body" to carry out one or more of the type of functions listed above, which "would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments."

The Appellate Body focused on the meaning and scope of the term "entrusts or directs", as discussed below.

III. Appellate Body defines the scope of "entrusts" and "directs"

The Appellate Body noted that the "entrusts or directs" provision identified "the instances where seemingly private conduct may be attributable to a government for purposes of determining whether there has been a financial contribution within the meaning of the *SCM Agreement*." It overturned the Panel's findings that the terms "entrusts" and "directs" were limited, respectively, to acts of "delegation" and "command." In the view of the Appellate Body, this was "too narrow" an interpretation. The Appellate Body said that the "entrusts or directs" discipline was "in essence, an anti-circumvention provision", to prevent governments from using private bodies to take actions that would otherwise fall under the Agreement if they were taken directly by governments. It added that a finding of entrustment or direction required that "the government give responsibility to a private body - or exercise its authority over a private body - in order to effectuate a financial contribution."

The Appellate Body emphasized that not all government acts would necessarily amount to entrustment or direction. For example, "mere policy pronouncements" would not, by themselves, constitute entrustment or direction. Similarly, the Appellate Body said that entrustment or direction could not be "inadvertent" or a "mere by-product of government regulation."

IV. Panel's failure to examine the evidence "in its totality"

The Appellate Body found that the Panel erred by failing to examine the DOC's evidence of "entrusts or directs" in its totality. Instead, according to the Appellate Body, the Panel erroneously required that individual pieces of evidence, in and of themselves, establish entrustment or direction by the Government of Korea of Hynix's creditors.

The Appellate Body said that where an investigating authority relied on individual pieces of circumstantial evidence, viewed together, as support for a finding of entrustment or direction, a panel reviewing such a determination "normally should consider that evidence in its totality, rather than individually, in order to assess its probative value with respect to the agency's determination." The Appellate Body cautioned that "[w]here a panel examines whether a piece of evidence could directly lead to an ultimate conclusion - rather than support an intermediate inference that the agency sought to draw from that particular piece of evidence - the panel risks constructing a case different from that put forward by the investigating authority." In doing so, the panel "ceases to *review* the agency's determination and embarks on its own *de novo* evaluation of the investigating authority's decision." [original emphasis]

The Appellate Body ruled that the Panel made other errors in its review of the DOC determination. It faulted the Panel for excluding evidence that was on the record of the CVD investigation, even though it had not been cited in the DOC decision. It said that the Panel had no basis to exclude such evidence, as the Agreement "does not require the agency to cite or discuss *every* piece of supporting record evidence for each fact in the final determination." [original emphasis] Similarly, the Appellate Body ruled that the Panel failed to make an "objective assessment" of the matter before it under Article 11 of the DSU because it made a finding in the absence of supporting evidence on the record of the underlying investigation.

V. Panel's failed to apply the proper standard of review by 'second-guessing' the investigating authority

The Appellate Body also ruled that the Panel breached its obligations under DSU Article 11 by failing to apply the proper standard of review. The Appellate Body recalled that "a panel may not conduct a *de novo* review of the evidence or substitute its judgement for that of the investigating authority." According to the tribunal, these general principles "reflect the fact that a panel examining a subsidy determination should bear in mind its role as a *reviewer* of agency action, rather than as an *initial trier of fact*." [original emphasis]

The Appellate Body added that in the present case, the Panel's examination of the DOC's determination "reflected its own view of whether entrustment or direction existed in this case; the Panel thereby engaged, improperly, in a *de novo* review of the evidence before the agency." The Appellate Body reviewed the legal errors of the Panel (cited above) and concluded that the Panel "essentially 'second-guessed' the investigating authority's analysis of the evidence and thus overstepped the bounds of its review."

VI. Appellate Body reverses Panel's findings of WTO-inconsistency by the United States

In light of the legal errors of the Panel, the Appellate Body reversed the Panel's finding that there was insufficient evidence to support the DOC's finding of entrustment or direction. Having reversed the Panel's finding that the DOC's determination of entrustment or direction was WTO-inconsistent, the Appellate Body said that there was no basis to uphold the Panel's finding that the Department's finding of benefit and specificity breached the Agreement. Thus, all findings by the Panel that the DOC determination was WTO-inconsistent were reversed by the Appellate Body.

At the same time, the Appellate Body stated that it was not expressing any view as to whether the DOC's determination of entrustment or direction, which was a necessary component of the Department's determination of financial contribution, was supported by sufficient evidence. Instead, it stressed that "[w]e conclude only that the Panel's finding of inconsistency, which resulted from its flawed approach to reviewing the evidence, is in error."

Moreover, the United States did not appeal the findings of the Panel that the U.S. International Trade Commission (USITC) had not properly demonstrated a "causal link" between the imports of the Korean products and the injury to the U.S. industry. The Panel concluded that the USITC violated its obligation not to attribute to subsidized imports the

injury caused by other factors. As this issue was not appealed, it was not before the Appellate Body, and this finding of WTO-inconsistency will be adopted by the DSB.

The decision of the Appellate Body in *United States - Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea* was released on June 27, 2005.

OUTLOOK

This decision marks the first major interpretation by the Appellate Body of the disciplines of the SCM Agreement related to the key issue of when a government "entrusts or directs" a private entity to make a "financial contribution", which is an essential component of the definition of a subsidy.

The Panel had interpreted the terms "entrusts" and "directs" as meaning, respectively, "delegation" and "command." The Appellate Body found these definitions to be "too narrow." For example, in considering the definition of "directs", the Appellate Body stressed that governments may exercise their authority over private bodies not just through "commands", but also through "more subtle" means, that may "not involve the same degree of compulsion." In the view of the Appellate Body, a finding of entrustment or direction can be made where the government gives responsibility to a private body, or exercises its authority over a private body, in order to effectuate a financial contribution.

This broader definition will make it easier for an investigating authority to make a WTO-consistent determination of "entrusts or directs", and thus makes it more likely that countervailing duties can be imposed on this basis.

Similarly, the Appellate Body faulted the Panel for "second guessing" the investigating agency, i.e., for not merely reviewing the DOC determination, but for asserting the Panel's own view as to whether entrustment or direction existed in this case. The Appellate Body found that the Panel "thereby engaged, improperly, in a *de novo* review of the evidence before the agency."

This Appellate Body decision raises some fundamental questions about the role of WTO Panels in reviewing the determinations of investigating agencies in trade remedies cases. The Appellate Body affirmed that "a panel may not conduct a *de novo* review of the evidence or substitute its judgement for that of the investigating authority." In principle, this statement is unobjectionable. It is widely accepted that WTO Panels may not conduct *de novo* reviews (i.e., new reviews, as if the initial review of the investigating authority had not occurred). In practice, however, some respondent importing countries accuse WTO Panels of conducting *de novo* reviews when, in many such cases, such Panels did nothing more than apply the WTO agreements, and make an "objective assessment of the facts of the case", as they are required to do under the Dispute Settlement Understanding (DSU). The Appellate Body decision in the present case may have an unwelcome chilling effect on Panels, which may be wary of being overturned on appeal for supposedly "substituting their judgement for that of the investigating authority." This, in turn, can lead to undue deference by WTO Panels to investigating authorities, something clearly not intended by the drafters of the Uruguay Round agreements. For this reason, the principles set out by the Appellate Body

may be limited to cases in which the investigating authority has developed an extensive factual record relating to complex transactions, such as were at issue in this dispute.

Another potentially difficult aspect of the Appellate Body's decision was its ruling that the SCM Agreement "does not require the agency to cite or discuss *every* piece of supporting record evidence for each fact in the final determination." [original emphasis] This means that the WTO-consistency of an investigating authority could be upheld if there is some factual basis for it somewhere on the record, even if the authority never *relied* on these facts in its determinations. This may encourage investigating authorities to seek to "immunize" their determinations from WTO challenges by casting their factual net as widely as possible during investigations.

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For further information, please contact Brendan McGivern in Geneva (bmcgivern@whitecase.com). Thank you.