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WTO AND REGIONAL TRADE AGREEMENTS MONTHLY REPORT

April 2005

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

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President's Economic Report Discusses Trade Related Issues

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- the relationship between imports and jobs;
- the role of foreign direct investment in promoting trade; and
- the Administration's accomplishments with respect to bilateral, regional, and multilateral trade liberalization.

The United States-China trade relationship also receives significant attention in the report.

United States

Panelists Debate U.S. Antidumping Policy Toward China and Non-Market Economies

On March 8, 2005, the Cato Institute hosted a panel discussion on U.S. antidumping policy toward China. The panel featured a former Assistant Secretary of Commerce, two trade attorneys and a Cato representative (the invited Chinese Embassy representative did not attend). Panelists debated U.S. antidumping methodology towards China and other Non-Market Economies (NMEs), among other issues.

Cardin Urges Focus on WTO and Enforcement; Expresses Concerns Over CAFTA

On March 10, 2005, the Washington International Trade Association hosted a briefing with Representative **Benjamin Cardin** (D-Maryland), Ranking Member on the House Ways and Means Subcommittee on Trade. Among other things, Cardin noted the following:

- ***WTO:*** The Bush administration is not focusing enough attention on the WTO Doha round.

- ***Enforcement:*** The US needs to pursue enforcement of trade agreements more aggressively, especially issues concerning China.

- ***CAFTA:*** The Administration should strengthen the labor provisions of CAFTA to garner congressional approval.

United States Highlights

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

- Bush Nominates Portman as USTR.

- CATO Releases Review of 108th Congress on Trade Issues.

- USTR Announces Products for 2004 GSP Review.

- USTR Requests Comments Regarding 2004 Import Statistics Relating To Competitive Need Limitations Under GSP.

Free Trade Agreements

Supporters Predict Narrow Victory as CAFTA Rhetoric Sharpens

Advocates and opponents of the Central America Free Trade Agreement (CAFTA) have sharpened their rhetoric as the Bush administration ponders submitting the agreement to Congress by late March. Events and meetings discussing CAFTA have increased, and the future of the agreement has drawn the attention of major news outlets. Supporters of the agreement argue that the agreement will level the playing field by granting U.S. firms access to Central American markets. Opponents counter that CAFTA, like the North America Free Trade Agreement (NAFTA), will result in job losses.

Public polls show a majority of Americans oppose CAFTA. To counter negative congressional and public perception, President Bush has instructed the Secretaries of Agriculture and Commerce to assist the US Trade Representative in garnering support for the agreement.

Panelists Debate "TRIPS-plus" Approach to U.S. Free Trade Agreements and Possible Effects of Strong Patent Laws on Economic Development

Speakers at a recent Washington International Trade Association (WITA) event discussed U.S. trade negotiation policy with respect to intellectual property (IP) protection in free trade agreements, and the connection between IP patent protection, economic development and public health care. Some speakers including Mike Castellano, former Democratic Staffer at House Ways and Means Committee; Maria Fabiana Jorge of MFJ International and Gawain Kripke of Oxfam, were generally not supportive of USTR's focus on expanding IP protection in bilateral agreements with weaker trading partners.

On the other hand, panelists Maher Matalka of the Jordanian Embassy and Professor Michael Ryan of Georgetown University spoke in favor of enhanced IP protection, but did not pass judgment on USTR's "TRIPS-plus" negotiating strategy.

FTA Highlights

We also want to alert you to the following developments:

- USTR Announces Launch FTA Negotiations With United Arab Emirates And Oman.
- USTR Urges State Governments to Adopt Reciprocal Liberalization Under Andean and Panama FTAs.
- TPSC Requests Comments On Interim Environmental Review US-Andean FTA.

US – European Union

We want to alert you to the following development US-EU development:

- US and EU Disagreement Over Aircraft Subsidies Continues

US – Latin America

Inter-American Dialogue "Agenda for the Americas 2005" Emphasizes Importance of Trade Liberalization

On February 24, 2005, the Inter-American Dialogue presented its "Agenda for the Americas 2005". Fernando Henrique Cardoso, Carla Hills and Thomas F. McLarty III, members of the U.S. Policy Task Force at the IAD, presented the IAD's document.

An agenda of partnership in the Americas is promoted, which should advance in four strategic goals: prosperity, security, democracy, and good governance. The partnership would be directed at fostering trade liberalization and economic growth, developing new migration policies, combating crime and violence, and strengthening democratic rule.

Brazil and US Identify WTO as Key Trade Priority

Representatives of the Brazilian and U.S. trade community, including practitioners, government officials and scholars, gathered in February to discuss their views on the future of the Doha Round, FTAA, and MERCOSUR; and the impact of FTAs on the WTO.

Speakers seemed to agree that the Doha Round is the priority for all parties involved, and that success in Doha is attainable provided that countries could overcome the impasse on agriculture and services soon. Due to the focus on WTO negotiations, panelists were pessimistic about FTAA progress in the near future.

FTAA

Brazil and the US Make Little Progress in Recent Talks on the FTAA; Possible Movement By Spring with Upcoming Bilateral and TNC Meetings

In late February, the leading trade negotiators from Brazil and the US met in Washington, D.C. in an effort to overcome current difficulties in the FTAA negotiations. FTAA negotiations have been stalled since early 2004.

Although no significant details of what was discussed in the February meeting were disclosed, it appears that Brazil and the US still face difficulties in trying to reach consensus on issues such as agricultural liberalization and protection of intellectual property rights in the FTAA.

The US and Brazil negotiators are expected to meet again in late March in another effort to move negotiations forward. In addition, the FTAA Trade Negotiations Committee (TNC) – which has not met since February 2004 – is expected to reconvene by April-May 2005.

NAFTA

NAFTA Leaders Announce Security and Prosperity Partnership of North America; Tri-national Think-Tank Urges Creation of New North American Community

On March 23, President Bush, Canadian Prime Minister Paul Martin and Mexican President Vicente Fox met to discuss emerging challenges and urgent issues affecting NAFTA partners. The agenda focused on trilateral issues rather than the various bilateral disputes. Leaders agreed that security and prosperity of their nations are mutually dependent and complementary. In a joint statement North America leaders announced the establishment of the "Security and Prosperity Partnership of North America".

In anticipation of the trilateral summit, the Independent Task Force on the Future of North America released a report intended to stimulate discussion on improving cooperation on security and economic issues.

Multilateral

Appellate Body Rules US Cotton Subsidies Inconsistent With WTO

The WTO Appellate Body has ruled that U.S. cotton subsidies violate the obligations of the United States under the Agreement on Agriculture and the Agreement on Subsidies and Countervailing Measures (SCM Agreement). The Appellate Body found that the U.S. subsidies caused "serious prejudice" to Brazil. The U.S. measures also violated the WTO prohibitions against export subsidies and import substitution subsidies. Indeed, the Appellate Body ruled against the United States on virtually every major interpretive issue.

WTO Panel Issues Mixed Decision On EC Regulations Governing Geographical Indications

On March 15, 2005, a WTO Panel released a mixed decision in the challenge by the United States and Australia to EC rules governing so-called "geographical indications" (GIs). GIs identify a product with a particular region, such as Florida oranges, Parma ham, or Darjeeling tea.

The Panel ruled that the EC Regulation on GIs violated the national treatment obligations of the EC under the WTO *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS), largely because it accorded national treatment only on a reciprocal basis. However, the Panel rejected the portion of the complaint based on the trademarks provisions of TRIPS. Although the Regulation was found to violate WTO trademarks disciplines, it was nevertheless saved as a "limited exception" to trademark rights.

Mini-Ministerial Meeting in Kenya Sets Targets for WTO Hong Kong Ministerial; Other Doha Round Negotiations Proceed Apace

On March 2-4, 2005, ministers and senior trade officials from 30 WTO Members gathered at a 'mini-ministerial' conference in Mombasa, Kenya in an effort to move negotiations forward on the Doha Round. Participants indicated that the meetings were useful in setting a work plan to decide on time frames and modalities for agricultural and non-agricultural market access ("NAMA"), and to encourage progress in other negotiations.

Meanwhile, Members made some progress on the Doha agenda in recent Geneva meetings. During the February round of services negotiations, Members reviewed several new offers and encouraged the tabling of improved offers by the May deadline. Overall, Members aim to conclude a 'first approximation of modalities' for agriculture and NAMA negotiations by the end of July 2005 in order to prepare for the Hong Kong Ministerial Conference in December 2005.

REPORTS IN DETAIL

SPECIAL REPORT

USTR 2005 Trade Policy Agenda Emphasizes Need for Progress in IPR Enforcement, FTAs and the WTO Doha Round

SUMMARY

The US Trade Representative (USTR) has released its 2004 Annual Report and 2005 Trade Policy Agenda. The report, required by the Trade Act of 1974, reviews the accomplishments of USTR in 2005 and outlines the major trade priorities of the Bush Administration for 2005. Progress in the Doha round of the World Trade Organization, continued work on new free trade agreements, and enforcement of intellectual property rights remain key priorities of the Bush administration.

ANALYSIS

The USTR Annual Report reflects on the trade policy accomplishments of the Bush administration during 2004. The report highlights the entry into force of the Chile and Singapore Free Trade Agreements (FTAs), as well as the ratification of the Australia FTA. Additionally, the report discusses U.S. efforts to reinvigorate the Doha negotiations and achieve results by the upcoming Hong Kong Ministerial Conference in December 2005.

In terms of priorities for 2005, the report outlines the following:

I. The Doha Development Agenda

Completion of the Doha round in 2006 remains the top trade policy of the Bush administration. To this end, the report emphasizes the need to make progress on negotiating modalities in agriculture and industrial goods negotiations by the summer of 2005, in order to conclude these modalities by the 2005 Hong Kong Ministerial. The report also emphasizes the importance of achieving balance in the core negotiating areas of agriculture, non-agricultural market access, services, rules and trade facilitation. The US emphasized the need to achieve far-reaching liberalization of the services sector, which has been lagging.

II. Bilateral and Regional Initiatives

Pursuit of "competitive liberalization" via bilateral free trade agreements will remain an important part of the U.S. trade agenda in 2005. The drive towards creating a Middle East Free Trade Agreement (MEFTA) by 2013 remains a major goal of the Bush administration. To this end, the U.S. will pursue FTA negotiations with Oman and the United Arab Emirates, as well as finalize ratification of the Bahrain FTA. In addition, the U.S. intends to work with Algeria, Lebanon, Saudi Arabia and Yemen on their accessions to the WTO.

In Asia, the Bush administration intends to pursue an active trade agenda. Progress on the Thailand FTA negotiations is a top priority, as well as continued consultations with South Korea, Pakistan, Malaysia and other countries under existing trade and investment

framework agreements (TIFAs). The US also seeks to advance Vietnam's accession to the WTO in 2005.

In the Western Hemisphere, the Free Trade Area of the Americas remains a priority despite the lack of recent progress. The report notes that the November 2005 Summit of the Americas meeting might help generate the political will needed to press forward with negotiations.

III. Enforcement/Protection of US Rights

The report gives considerable attention to the enforcement of U.S. intellectual property rights under existing trade agreements. China will continue to be a top target for enforcement and monitoring. The report details the use of the US-China Joint Committee on Commerce and Trade (JCCT) during 2004, and reaffirms U.S. intentions to continue using the JCCT as a forum for resolving outstanding trade disputes. Nevertheless, some U.S. officials have indicated recently that USTR might launch a formal WTO dispute against China in the near future if bilateral negotiations fail to resolve the problem.

The protection of intellectual property both domestically and with trade partners will continue to draw attention in 2005. In 2004, the U.S. launched the Strategy Targeting Organized Piracy (STOP) to prevent the entry of counterfeit goods into the US. The STOP initiative, along with the Special 301 process will serve as a dual-track strategy to pressure trading partners to crack down on the production and distribution of pirated goods.

OUTLOOK

The upcoming year is expected to be challenging one for USTR and others involved with U.S. trade policy. USTR will continue to pursue liberalization on all levels, but must exert considerable effort to achieve U.S. objectives in bilateral FTAs and the WTO. For bilateral FTAs, USTR and the Administration will face its most significant test to date – seeking passage of legislation on the controversial DR-CAFTA. If the agreement were voted down in Congress, the outcome would probably undermine passage and pursuit of other FTAs including with Thailand, the Andean countries and other partners.

At the WTO, USTR is pressuring trading partners to make ambitious commitments in areas including agriculture, market access, services and trade facilitation. At the same time, the US faces increasing pressure from trading partners to take more progressive positions in difficult areas including "Mode 4" movement of temporary workers, antidumping rules, and subsidies in sensitive sectors like cotton. These issues will likely gain greater attention during the upcoming Congressional discussions and vote on U.S. membership in the WTO.

In the near future, USTR will depend on a new U.S. Trade Representative Robert Portman to provide leadership. As a current Member of Congress who has been active in trade matters, Portman appears to have the necessary background and credentials to guide U.S. trade policy. He certainly faces considerable challenges as well as opportunities in the coming years.

President's Economic Report Discusses Trade Related Issues

SUMMARY

The Bush administration has published the 2005 Economic Report of the President. The report, released annually with the President's budget proposals, includes a discussion of trade issues and their effect on the health of the U.S. economy. This year's report features discussion on:

- the relationship between imports and jobs;
- the role of foreign direct investment in promoting trade; and
- the Administration's accomplishments with respect to bilateral, regional, and multilateral trade liberalization.

The United States-China trade relationship also receives significant attention in the report.

ANALYSIS

We highlight below the trade-related comments in the Economic Report of the President.

I. Free Trade Has Little Effect on U.S. Employment

The United States experience has shown that increased trade has had little impact on employment levels. The increase in imports as a percentage of gross domestic product (GDP) over the past several decades has not led to any significant trend in the overall unemployment rate. Over the past decade, the U.S. economy has experienced historically low unemployment, while exports and imports have grown considerably.

From 1960 to the third quarter of 2004, the current account balance moved from a surplus of 0.5 percent of GDP to a deficit of roughly 5.6 percent of GDP. Yet the average unemployment rate in 2004 was 5.5 percent, the same as the average unemployment rate in 1960. Over this period, the U.S. economy has created more than 75 million jobs—an increase of roughly 140 percent. Increased trade has neither inhibited overall job creation nor contributed to an increase in the overall rate of unemployment.

The Administration continues to support assistance to those workers displaced as a result of international trade. Programs coordinated between the private sector, community colleges and federal agencies include: the High Growth Job Training Initiative at the Department of Labor and through the recently-enacted Community-based Job Training Grants, the proposed establishment of Personal Reemployment Accounts for displaced workers who can use these funds for training and other services that best fit their needs, and the Trade Adjustment Assistance program, which provides training and income support to workers directly hurt by import competition.

II. United States Continues to Enjoy Advantages in Service Trade

The United States trade surplus in services has increased in recent years. Moreover, U.S. services exports tend to involve relatively highly-skilled and highly-paid occupations, such as engineering, financial services, and architectural services. Annual U.S. exports in the category of "business, professional, and technical services" have grown by almost $25 billion since 1989, compared to a $10 billion increase in imports over this period.

U.S. advantages in services have fueled job gains both directly in firms that export services and indirectly in firms that hire more workers in the United States as a result of the efficiencies gained through trade. One study of the effect of services trade in the information technology sector found that it created over 90,000 net new jobs in the United States in 2003 and is expected to create 317,000 net new jobs by 2008. New hires tend to be in positions requiring relatively high levels of skills or creativity, such as software development.

III. Foreign Direct Investment Abroad Contributes to Domestic Capital Investment

Recent research shows that each dollar of spending on capital investments abroad by U.S. firms is associated with an additional 3.5 dollars of spending on capital investment at home. Contributions are being made by subsidiaries of foreign firms operating in the United States, which employed 5.4 million U.S. workers in 2002; nearly 5 percent of total private-sector employment. This figure is up from 3.9 million workers in 1992 (4.3 percent of total private employment at that time).

The globalization of the supply remains important to U.S. competitiveness. In 2002, intra-company trade accounted for 35 percent of total U.S. trade in goods. In addition to providing lower cost inputs, the global supply chains has had important spillover effects, including the diffusion of technologies, skills and techniques to local companies. Technology transfers to U.S. firms accounted for approximately 14% of the productivity growth in U.S. manufacturing firms between 1987 and 1996.

According to a recent study, the United States remains highly competitive in terms of ease in establishing new businesses, ranking 2nd among 145 other countries. In comparison, China was ranked the 42nd-best and India 120th. The high ranking is in part due to every U.S. sector being open to FDI from all countries, and without having performance requirements for such investments.

IV. Trade With China Remains Top U.S. Trade Priority

Since China's 2001 WTO accession, the Administration has worked to secure access to China's market for U.S. companies and their workers, farmers, and service providers, and to protect U.S. rights within Chinese markets. When possible, the Administration has tried to resolve differences through negotiation as demonstrated at the April 2004 meetings of the Joint Commission on Commerce and Trade where seven potential WTO disputes were resolved involving high-technology products, agriculture, and intellectual property protection.

When negotiations have not yielded results, however, the Administration has pursued dispute resolution under WTO procedures. The United States filed the first-ever WTO case against China to address discriminatory tax treatment of U.S. semiconductors in China.

Within four months of the filing, the Chinese government agreed to eliminate the problematic tax program to address U.S. concerns, resolving the dispute without lengthy litigation.

For goods trade through November 2004, China ranked as the third-largest trading partner of the United States and has created a growing bilateral trade deficit. However, data suggests that the increased imports from China are largely coming at the expense of imports from other countries in the Pacific Rim. This change is due in large part to China's role as a final assembly platform for exports for Asian manufacturing firms. The total share of imports from the Pacific Rim has fallen from its recent high in the mid-1990s. This helps to demonstrate why bilateral trade deficits may have little economic significance and why they may not be a useful measure of the benefits of a trading relationship.

A central point of discussion with the Chinese has been about the benefits of moving to a flexible, market-based exchange rate, which would allow for smooth adjustments in international accounts and help protect China from the "boom-bust" economic cycles of the past. The Department of the Treasury has been actively engaged with the Chinese in working toward such a transition and has established a technical cooperation program to address areas the Chinese view as impediments to greater flexibility, leading to three missions in 2004 that covered currency risk management, banking system best practices, and developing an exchange rate futures market in China.

V. IPR Protection Produces Trade Benefits

In Fall 2004 the Administration launched the Strategy Targeting Organized Piracy (STOP). The initiative is a government-wide effort to empower American businesses to secure and enforce their intellectual property rights in overseas markets, prevent the entry of counterfeit goods, expose international pirates and counterfeiters, keep global supply chains free of infringing goods, dismantle criminal enterprises that steal America's intellectual property, and reach out to like-minded trading partners and build an international coalition to stop piracy and counterfeiting worldwide.

Empirical studies have shown that improvements in a nation's intellectual property protection can lead to increased trade. These studies found the effect to be particularly strong in goods that were easy to imitate, providing evidence that theft of intellectual property displaces legitimate imports. One study found that strengthened patent protection in large developing countries could increase their imports by almost 10 percent.

OUTLOOK

The annual Economic Report of the President is intended to set out the broad economic background for the President's budget proposals. In addition, the report provides some of the Administration's views with respect to trade policy over the next year.

Congress will spend the next few months probing the Administration on its economic outlook. The high budget deficit and the President's proposals to overhaul Social Security will pique congressional interest in the economic outlook submitted by the President. The House and Senate likely will hold hearings on the President's trade agenda before Memorial Day.

UNITED STATES

Panelists Debate U.S. Antidumping Policy Toward China and Non-Market Economies

SUMMARY

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ANALYSIS

I. Cato's Ikenson Asserts U.S. Antidumping Methodology Unfair for China and NMEs

Mr. Dan Ikenson of the Cato Institute explained that the methodology used by U.S. authorities to calculate duties on Chinese imports often does not involve the actual prices and/or costs of the Chinese companies targeted in an antidumping (AD) petition. Rather, for NMEs like China, the US Department of Commerce (DOC) instead uses a surrogate value from third country(s) to determine the "normal value" for the subject merchandise. DOC does not accept values involving a NME currency (e.g., RMB) or a NME entity because of the concern that such values are not determined by market forces, but are tainted by the control exerted by the Chinese central government.

DOC assumes that all entities in a NME country are controlled by the central government. An exporter can be eligible for its own separate dumping rate (as opposed to the PRC-wide rate) only if the company can prove that its export activities are independent from central government control by answering Section A of the DOC questionnaire. Given the limited resources to investigate Chinese industries, DOC has limited the number of Chinese companies subject to full investigation (i.e., mandatory respondents), but has allowed other Chinese companies (i.e., Section A voluntary respondents) to get their own dumping rate (based on the average rates calculated for the mandatory respondents). Recent cases indicate that DOC is making the standard much more difficult for Chinese respondents to obtain their separate rate, particularly for the Section A respondents. DOC's change in practice is resulting in many Chinese respondents being denied a more favorable Section A voluntary respondent rate, and instead being stuck with the PRC-wide rate, which is usually calculated based on the Petitioner's inflated values.

Ikenson asserted that U.S. AD law does not level the playing field. Ikenson suggested that remedial action may not be necessary just because goods may have been sold below the cost of production. Such alleged "dumping" findings often fail to account for seasonality, supply and demand conditions, a cheaper and larger labor pool, and use of advanced technologies, which would not be remedied by dumping duties. Supporters, on the other hand, claim that the law helps to counter market distortions.

Ikenson noted that the Bush Administration promotes trade and diplomatic ties with China at the same time it restricts trade. He pointed out that an antidumping case has been filed against China about every 45 days since Bush took office in 2001. Nevertheless, the U.S. imports almost six times as many goods from China as it exports to China.

Ikenson also indicated that the DOC has considerable discretion in determining whether to graduate China and other NMEs to Market Economy (ME) status. For example, Russia and Kazakhstan have benefited from revocation of NME status, but it is arguable that the economies of these countries are more or less liberal or free of central government control than the Chinese economy.

II. Former DOC Official Jochum Examines the Pros and Cons of Trade Remedy Laws

Mr. James Jochum, former Assistant Secretary of the US Department of Commerce for Import Administration (and now at the law firm of Mayer, Browne, Rowe & Maw), remarked that trade remedy laws focus on the symptoms, not the problem of unfair international trade. AD laws are part of the bargain for accepting free trade in the US. Moreover, the impact of AD laws on international trade is small; AD cases affect less than one percent of overall U.S. imports and less than one percent of all US-bound Chinese exports.

Notwithstanding, AD laws may give false promise to industries because it is difficult to determine foreign industry prices within NMEs. Jochum also believes the NME methodology is too straightforward in assessing duties; it should evolve to reflect China's economy, which has 70 percent of its exports originating from foreign owners. For example, the wooden bedroom furniture AD case incorporated prices from U.S. lumber used in the final product to determine duties. Because China allows for economic inefficiencies, Jochum believes it should remain as a NME for the time being.

III. Attorney Marshak Criticizes U.S. Trade Remedy Actions

Mr. Ned Marshak of the law firm of Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt observed that the average China-wide antidumping rate is 127 percent. The China-wide dumping rate on average is 70 percent higher than the dumping rates calculated for Chinese respondents who prove only that they are eligible for their own separate rate (i.e., Section A voluntary respondents) and is over 90 percent higher than Chinese respondents who obtain a dumping rate that is not based on Adverse Facts Available (AFA). Moreover, the surrogate values used for Chinese and other NME investigations are unpredictable in determining dumping prices. Marshak also argued that international court proceedings (like at the WTO or CIT) are too time consuming to lower the AD duties to have any meaningful market effect.

Marshak pointed out that a proposal is on the table where Chinese companies who are targeted for AD duties would have only one chance to apply with the DOC for an individual AD rate. However, the proposal would not give those companies a second chance to apply for a separate rate, if the first application is rejected. He noted this situation might be too restrictive.

Marshak observed in general that price discrimination is ineffective and only harms U.S. consumers, workers and U.S. companies that export to China.

IV. Attorney Stewart Indicates China More Active in Trade Remedy Filings Against US; Delinquent in Payment of AD Duties

Mr. Terence Stewart of the law firm of Stewart and Stewart observed that, at any time, a Chinese industry that meets the U.S. criteria can submit a request to DOC to graduate from its NME status. There are six criteria that must be met in order to qualify for market economy or market oriented status, and the application is reviewed through an open proceeding.

Stewart pointed out that China has filed 15 antidumping cases against the US since joining the WTO in 2001. The US has filed 45 cases over this timeframe. Based on a proportionate level of trade (e.g., approximately 6 Chinese products sent to the US for every US product sent to China), the rate of Chinese AD petition filings is almost double the rate of U.S. AD filings.

Stewart indicated that the problem with the imposition of U.S. AD duties is collecting them. About $250 million in duties is outstanding, and Chinese orders account for about 80 percent of this total. Thus, U.S. trade remedies are not as efficient as petitioners would prefer.

During the question and answer period, Stewart noted that the U.S. government does not file countervailing duty (CVD) cases against China or other NME countries. CVD cases are not filed against these countries due to the difficulty in assessing potential government subsidies. Ikenson added that subjecting China to U.S. CVD laws would force petitioners to identify subsidies, which could prove difficult. In AD cases, subsidies do not need to be identified.

OUTLOOK

US-China bilateral trade is expected to expand in the near future, despite recent political and economic tensions. The expiration of the Multi-Fibre Agreement along with continued economic growth for both the US and China should contribute to growth in bilateral trade, but also may trigger new antidumping or safeguard actions. Already, trade frictions between the US and China are increasing due to new methodologies and actions taken in recent antidumping and other trade remedy proceedings. Both U.S. AD petitions against China, and Chinese filings against the US have been increasing since China's entry into the WTO.

China remains at a greater disadvantage in AD proceedings due to its classification as an NME, which China agreed to be applied for up to 15 years after its WTO accession. Some question whether this NME classification is justified, given the free-market conditions prevalent in many industries. Although procedures exist to revoke NME prior to 2016, many believe that the prospects are slim given domestic industry resistance. Thus, trade remedy and other barriers will continue to impede US-China trade in the near future.

Representative Cardin Urges Focus on WTO and Enforcement; Expresses Concerns Over CAFTA

SUMMARY

On March 10, 2005, the Washington International Trade Association hosted a briefing with Representative **Benjamin Cardin** (D-Maryland), Ranking Member on the House Ways and Means Subcommittee on Trade. Among other things, Cardin noted the following:

- ***WTO:*** The Bush administration is not focusing enough attention on the WTO Doha round.
- ***Enforcement:*** The US needs to pursue enforcement of trade agreements more aggressively, especially issues concerning China.
- ***CAFTA:*** The Administration should strengthen the labor provisions of CAFTA to garner congressional approval.

ANALYSIS

Representative Cardin, who earlier this year was named the Ranking Member on the House Subcommittee on Trade, discussed a number of trade issues expected to surface in Congress this year. He opened by expressing concern about the U.S. trade deficit, describing it as "unsustainable." Cardin then remarked on several policy issues:

I. Administration Should Focus on WTO and Enforcement

Doha Round

Cardin stated that the top trade priority of the Bush administration should be the successful completion of the Doha round at the WTO. He added that the Doha agenda must provide a significant reduction in agricultural subsidies, and must seek a high level of ambition with respect to trade in services.

Trade Remedy Laws

When asked about remedy laws, Cardin stated that he saw little reason to renegotiate what was agreed to under the Uruguay Round.

Mode 4 Issues

Cardin noted that the US has not done a good job of listening to the concerns of other countries on Mode 4 issues. He expressed confidence that some accommodations on Mode 4 could be reached as part of a final negotiated package.

WTO Cases

Cardin faulted the Bush administration for failing to bring more cases before the WTO. According to Cardin, during his first term, the Bush administration filed 11 cases before the WTO, compared to the 12 per year that the Clinton administration averaged.

Cardin focused on China's currency regime and its failure to adequately protect intellectual property rights as "ripe targets" for litigation before the WTO. In addition, he urged to the Administration to make greater use of remedies under China's WTO accession agreement to protect U.S. industries from unfair competition.

II. CAFTA Negotiating Process and Substance Criticized

Cardin criticized both the negotiating process and the provisions of CAFTA.

Regarding the ***negotiating process***, he stated that Democrats had not been adequately consulted.

Regarding the ***provisions***, Democrats continue to harbor serious reservations about the lack of enforceable labor standards in the core agreement. Cardin suggested that the Administration consider renegotiating the agreement, rather than attempting to achieve progress on labor through side agreements. Cardin added that the Democrats were not whipping (urging members to vote a particular way) on CAFTA, and he urged Republicans not to do so either. He warned that politicizing CAFTA would complicate passage of future trade agreements.

Cardin also rejected the idea that the defeat of CAFTA would undermine global or regional trade negotiations.

III. Ukraine Closer to PNTR but Russia Stalled

Cardin discussed the prospects for permanent normal trade relations (PNTR) with Russia and Ukraine.

Ukraine

Cardin expressed support for the Orange Revolution and welcomed Ukraine's desire to become more economically integrated with Europe and the world. Cardin conceded that Congress is not ready to approve PNTR for Ukraine, owing to concerns over intellectual property rights. However, Cardin hoped PNTR for Ukraine could be granted "sooner rather than later."

Russia

PNTR for Russia could be more difficult. Cardin argued that Russia has implemented some "undemocratic" reforms that would make it difficult for Congress to approve PNTR in the near future.

OUTLOOK

Representative Cardin has a long history of supporting free trade is Congress. He has cast votes in favor of every major piece of trade legislation considered by Congress during the last 15 years. As the Ranking Member of the House Subcommittee on Trade, Cardin is a leading voice for his party on trade issues. He will play an instrumental role in helping shape Congressional Democrats' policy on trade and the process of congressional consideration of trade issues in Congress.

United States Highlights

Bush Nominates Portman as USTR

On March 17, 2005, President George W. Bush announced his intention to nominate Representative Rob Portman (R-Ohio) as the new United States Trade Representative (USTR). First elected in 1993, Portman has been best known on the Hill for his work on retirement savings issues during his tenure on the House Ways and Means committee. A lawyer by trade, Portman practiced trade law at Patton Boggs (Washington, DC) and served as Director of Legislative Affairs in the first Bush White House prior to being elected to Congress.

Portman has an established record of supporting free trade. During the 108th Congress he cast votes in support of the Australia, Chile, Morocco, and Singapore Free Trade Agreements (FTAs). He also voted to approve trade promotion authority (TPA) in 2002, reduce sugar subsidies in 2001, grant China permanent normal trade relations in 2000, and against the imposition of steel quotas in 1999.

Portman's nomination now requires Senate confirmation. Both the White House and House Ways and Means Chairman Bill Thomas (R-California) have called on the Senate to quickly confirm Portman.

CATO Releases Review of 108th Congress on Trade Issues

On March 16, 2005, the CATO institute, a Washington, DC, free trade think tank, released its ratings of the 108th Congress with respect to trade issues. The biannual report reviews votes cast in Congress on trade-related legislation such as free trade agreements, subsidies, miscellaneous tariff reduction, and trade with Cuba. Based on this assessment, the report assigns members of Congress to one of four categories:

- **Free Traders** - those who vote to reduce subsidies (farm supports, Ex-Im Bank, etc) and reduce tariffs via free trade agreements;
- **Internationalists** - those who vote to reduce tariff barriers but maintain support for subsidies;
- **Isolationists** - those who oppose subsidies but also oppose tariff reduction; and
- **Interventionists** - those who support subsidies and oppose tariff reductions.

The report recognizes Representative Jim Flake (R-Arizona) and Senator John Sununu (R-New Hampshire) as the leading free traders during the 108th Congress. The report describes senior members of the trade-related House committees, including Bill Thomas (R-California), Charles Rangel (D-New York), and Ben Cardin (D-Maryland) as internationalists. On the Senate side, CATO identifies Senator Max Baucus as an internationalist.

The full report is available at http://www.freetrade.org/pubs/pas/tpa-028es.html.

USTR Announces Products for 2004 GSP Review

The US Trade Representative (USTR) has announced the list of products that are being considered under the annual review of the Generalized System of Preferences (GSP). The products selected include certain building stones, carpets, dates, and leather products. A final determination will be announced by June 30, 2005.

USTR Requests Comments Regarding 2004 Import Statistics Relating To Competitive Need Limitations Under GSP

On March 29, 2005, the United States Trade Representative (USTR) published a notice in the Federal Register (70 FR 15970), providing full year 2004 import statistics relating to competitive need limitations (CNLs) under the Generalized System of Preferences (GSP) program. The GSP program grants duty-free treatment to specific products that are imported from more than 140 designated developing countries and territories, and CNLs are used to determine whether certain products from beneficiary countries may still qualify for GSP benefits.

USTR also requested comments on (i) de minimis CNL waivers with respect to particular articles, and (ii) possible redesignations under the GSP program of articles that are currently not eligible for GSP benefits because they previously exceeded the CNLs. The comments are due by April 22, 2005.

Free Trade Agreements

Supporters Predict Narrow Victory as CAFTA Rhetoric Sharpens

SUMMARY

Advocates and opponents of the Central America Free Trade Agreement (CAFTA) have sharpened their rhetoric as the Bush administration ponders submitting the agreement to Congress by late March. Events and meetings discussing CAFTA have increased, and the future of the agreement has drawn the attention of major news outlets. Supporters of the agreement argue that the agreement will level the playing field by granting U.S. firms access to Central American markets. Opponents counter that CAFTA, like the North America Free Trade Agreement (NAFTA), will result in job losses.

Public polls show a majority of Americans oppose CAFTA. To counter negative congressional and public perception, President Bush has instructed the Secretaries of Agriculture and Commerce to assist the US Trade Representative in garnering support for the agreement.

ANALYSIS

The Bush administration is contemplating submitting CAFTA to Congress by the end of March. With formal congressional debate over the agreement growing closer, think tanks, news outlets and lobby groups have worked to increase the profile of the agreement.

We highlight below recent developments concerning CAFTA

I. CSIS Event Highlights Concerns Over Labor and Environment, Competitiveness

On March 3, 2005, the Center for Strategic and International Studies (CSIS) and The Economist magazine hosted a discussion panel on the prospects for CAFTA's passage in Congress. Panelists generally supported the agreement, but the event highlighted concerns among Congressional Democrats over the agreement's labor and environment provisions.

A. Brady Warns of Competitive Losses to China; Predicts Narrow Victory on CAFTA

Representative **Kevin Brady** (R-Texas), the Republican point person in the House for CAFTA, stated that passage of CAFTA is essential to allow U.S. firms to access Central America's markets on a reciprocal basis. He noted that CAFTA countries have access to the U.S. market under the Caribbean Basin Initiative and other agreements, where 80% of their goods are already sold to the US without tariffs. Brady also emphasized the importance of CAFTA to U.S. agricultural interests, suggesting that the agreement could bring in $1.5 billion annually to US farmers.

In a separate appearance on CNN (see below), Brady expressed support for CAFTA because of the positive impact the agreement would have on the U.S. textile industry. He noted that 60 –90% of t-shirts exported from Central America to the US are made with US threads and yarns. The agreement's rules of origin would ensure that the region's textile industry remains competitive with China.

With respect to labor, Brady argued that CAFTA countries have made significant progress on enhancing labor laws and enforcement over the past 10-15 years. He states that the CAFTA countries meet the core labor standards set out by the International Labor Organization (ILO). Absent "red herring" labor issues, meaning that they are meant to lead potential supporters away from the real issues, Brady suggested that the agreement would overwhelmingly pass Congress.

On congressional passage Brady concluded "in the end, while it will be close, we will have the votes in the House to pass [CAFTA]."

B. Becerra Decries Lack of Meaningful Labor Standard and Enforcement Mechanisms

Representative **Xavier Becerra** (D-California) remarked that CAFTA does not meet global labor standards on prohibiting child labor, labor discrimination, forced labor, or recognizing the right to associate bargain collectively. Furthermore, he argued that CAFTA countries have neither the capacity nor the desire to enforce labor laws, and that some of their laws have weakened since parties concluded the agreement. CAFTA's provision for a $15 million fine for each labor law infraction would be insufficient to force CAFTA countries to abide by the agreement.

C. CAFTA Ambassadors Defend Labor Standard

Costa Rican Ambassador **Tomas Duenas**, and Guatemalan Ambassador **Guillermo Castillo** defended their countries' commitment to upholding the ILO's core labor standards. Duenas noted that the CAFTA countries are working with the Inter-American Development Bank to enhance labor conditions in their countries. Castillio stated that Guatemala has hired additional labor law judges and is working to introduce stiffer penalties for companies violating labor rights.

II. CNN's Lou Dobbs Hosts Weeklong Debate on CAFTA

During the week of February 28, 2005, CNN's Lou Dobbs featured discussion of CAFTA on his evening program Lou Dobbs Tonight.[1] Supporters of CAFTA appearing on the program focused on Central America's existing access to the U.S. market and the need to level the playing field for U.S. exporters. Detractors pointed to the alleged failure of NAFTA to create opportunities for U.S. workers, and the record U.S. trade deficit.

A. Padilla Defends CAFTA as Balanced Agreement

Assistant USTR **Chris Padilla** appeared on Lou Dobbs Tonight and faced questioning about the effect CAFTA would have on the U.S. trade deficit. Padilla responded that, while not able to erase the current U.S. trade imbalance, CAFTA would give U.S. exporters similar benefits CAFTA exporters already enjoy. Padilla noted that over 80% of goods from CAFTA enter the US duty free, and that 99% of agriculture products from Central America face no U.S. duties. To that end, CAFTA will give U.S. exporters a chance to exploit new markets.

[1] The transcripts of Lou Dobbs Tonight can be found at http://www.cnn.com/CNN/Programs/lou.dobbs.tonight/.

B. AFL-CIO Threatens to Oppose Members of Congress Supporting CAFTA

American Federation of Labor and the Congress of Industrial Organization (AFL-CIO) Secretary Treasurer **Richard Trumka** stated during his appearance on CNN that the AFL-CIO plans to oppose any member of Congress supporting CAFTA in coming elections. Trumka pointed to the failure of NAFTA to create jobs in the manufacturing sector and described CAFTA as an extension of the failed policies of NAFTA. He also suggested that Democrats would be united in opposing CAFTA.

C. Dobbs Expresses Opposition to CAFTA; Calls CAFTA Countries "Poor and Small"

In an opinion piece published on March 4, 2005, Lou Dobbs expresses opposition to CAFTA. Citing low wages and financial instability, Dobbs argues that CAFTA countries are in no position to boost their demand for U.S. products, which would lead to few gains for U.S. exporters. In addition, Dobbs argues that textile manufacturers are likely to send US jobs to cheaper labor markets in CAFTA countries if the deal is implemented. Finally, Dobbs points to the mounting trade deficit as a sign that the US needs to re-think trade policy.

III. Bush Raises Stakes of CAFTA Debate as Poll Indicates Popular Opposition

A poll released on March 2, 2005, by Americans for Fair Trade, an organization that opposes CAFTA, suggests that 51% of Americans oppose CAFTA. The poll found that majorities in both parties oppose the agreement, and that concerns over job losses are paramount among opponents. The poll also showed that an overwhelming majority (83%) have heard little about the agreement.

In response to growing concerns over opposition to CAFTA, President Bush has tapped Agriculture Secretary **Mike Johanns**, and Commerce Secretary **Carlos Gutierrez** to assist USTR in securing congressional approval of CAFTA. Gutierrez has already met with CAFTA ambassadors, who are planning visits to key U.S. cities to generate support for CAFTA among industry leaders.

OUTLOOK

The controversy over CAFTA is likely to increase as the White House prepares to send the agreement to Congress for consideration. Pro-CAFTA forces, including CAFTA country ambassadors have been organizing trips to major U.S. industrial centers to gain support for the agreement. Opponents, including the sugar industry and labor groups, are coordinating their to maximize their resources. CAFTA trade ministers have been working to quell concerns over labor rights by issuing briefing books detailing the steps being taken in their respective countries to correct any deficiencies in their labor laws.

There seems little doubt that the final vote on CAFTA in the House of Representatives will be close. No Democrats have yet to express full support for CAFTA. Some, like Senator **Max Baucus** (D-Montana) have expressed qualified support, urging the Administration to work with CAFTA countries to enhance labor protections. The AFL-CIO threat to seek political retribution against any Member of Congress supporting CAFTA could create difficulties for Democrats.

Negative association between CAFTA and NAFTA threatens to make passage of CAFTA more difficult. Even if concerns over labor can be overcome, the perceived failures of NAFTA, coupled with high trade deficits, make it politically difficult for Members of Congress to support CAFTA.

Panelists Debate "TRIPS-plus" Approach to U.S. Free Trade Agreements and Possible Effects of Strong Patent Laws on Economic Development

SUMMARY

Speakers at a recent Washington International Trade Association (WITA) event discussed U.S. trade negotiation policy with respect to intellectual property (IP) protection in free trade agreements, and the connection between IP patent protection, economic development and public health care. Some speakers including Mike Castellano, former Democratic Staffer at House Ways and Means Committee; Maria Fabiana Jorge of MFJ International and Gawain Kripke of Oxfam, were generally not supportive of USTR's focus on expanding IP protection in bilateral agreements with weaker trading partners.

On the other hand, panelists Maher Matalka of the Jordanian Embassy and Professor Michael Ryan of Georgetown University spoke in favor of enhanced IP protection, but did not pass judgment on USTR's "TRIPS-plus" negotiating strategy.

ANALYSIS

On March 2, 2005, the Washington International Trade Association (WITA) held an event on the United Stated Trade Representative's (USTR's) policy of negotiating bilateral free trade agreements (FTAs) which grant intellectual property (IP) protection greater than the one envisioned by the WTO TRIPS Agreement[2] ("TRIPS-plus" provisions). Due to the apparent unequal bargaining position of U.S. FTA partners (such as Jordan, Israel, Singapore, Chile, Morocco, Panama, Bahrain, or Central American countries), and the fact that U.S. industries stand to benefit most from enhanced IP protection as a result of these TRIPS-plus FTAs, concern has been raised that these agreements are unfair to the developing world. Discussion centered upon patent protection for pharmaceuticals, and its possible implications on public health care and economic development.

Among the speakers were Mike Castellano, former Democratic Staffer at House Ways and Means Committee; Maria Fabiana Jorge of MFJ International, an international consulting firm; Gawain Kripke of Oxfam; Maher Matalka of the Jordanian Embassy; and Prof. Michael Ryan of Georgetown University.

[2] Agreement on Trade-Related Aspects of Intellectual Property Rights.

I. Former W&M Congressional Staffer Castellano Criticizes TRIPS-plus Approach

Mike Castellano, former Democratic Staffer at the House Ways and Means Committee, discussed the theoretic issues underlying patent protection, and identified major points of contention in TRIPS-plus FTAs. He pointed out that intellectual property[3] differs from other forms of property in three significant ways: (1) IP does not exist as such, and is only created by the government giving the creator a temporary exclusive license to use an idea; (2) the use of IP by one person does not prevent another person from simultaneously using it; and (3) the exclusive nature of IP limits competition and may raise antitrust concerns.

Mr. Castellano stated that USTR has a model of an FTA which contains "TRIPS-plus" provisions that it "tries to force" on its FTA partners. The problem with TRIPS-plus is exacerbated, according to Mr. Castellano, by the fact that the TRIPS-plus provision focus on the pharmaceutical industry, an area of trade that is developing very fast and is highly lucrative.

Mr. Castellano identified four contentious issues which have been central to the TRIPS-plus debate:

1) ***Compulsory licensing*** – TRIPS-plus FTAs considerably limit the circumstances when a government can grant a compulsory license: (a) may be issued only in response to a national or extreme emergency; and (b) restricts the purpose of the license to public non-commercial use, a requirement present in TRIPS only with respect to semi-conductors.[4]

2) ***Test data exclusivity*** – With the growing importance of clinical test data in the pharmaceutical registration process, securing exclusivity of test data has become a significant means of protection, sometimes even preferred to patent protection.[5] Due to the high costs of clinical trials, most generic producers do not conduct their own clinical tests to get regulatory approval, but instead rely on the tests conducted by the brand name producers who also have the patent. Securing exclusivity of test data for a drug would therefore mean that registration of generic versions of brand-name drugs would be delayed generic competitors would not be able to register their drugs because most could not afford to launch their own trials (and, for an extended period, could not use the data already on the record).

[3] The following three points apply essentially only to patent protection. For example, U.S. trademarks, copyrights and trade secrets can all exist (and have value as IP) without any government registration.

[4] TRIPS Art. 31(c).

[5] In many developing countries, pharmaceutical companies do not patent their products, but rely on test data exclusivity for protection.

3) ***Parallel imports***[6] - USTR's model of FTAs restricts parallel imports. The U.S. government has traditionally taken a defensive position on this issue (since many developing countries have an interest in exporting their products to the US, thus raising parallel import concerns). However, U.S. consumer raised concerns against a TRIPS-plus FTA with Australia, including the ability to supply cheaper drugs from Australia.

4) ***Interplay between IP and investment*** – Many FTAs and Bilateral Investment Treaties (BITs) include provisions that protect a country's investment in the other country. However, because intellectual property rights are sometimes included in the definition of "investment" – countries might have to bind themselves to protecting intellectual property to the same extent as other forms of investment. They would also be subject to dispute resolution procedures included in the BITs (e.g. investor-state dispute arbitration, International Center for the Settlement of Investment Disputes, etc).

II. Jordan's Matalka Shares Country's Positive Experience with TRIPS and FTA

Maher Matalka from the Jordanian Embassy shared the Jordanian perspective on TRIPS-plus provisions in FTAs. He explained that when Jordan joined the WTO in 2000, it had to redo completely its intellectual property laws.

Soon after, the FTA with the United States concluded in 2000 led to further strengthening of IP protection in Jordan by: 1) imposing severe limitations on parallel imports, banning parallel imports of copyrighted products, and not regulating parallel imports with respect to patented or trademarked material; 2) granting five-year data exclusivity for new chemical compounds and three-year exclusivity for new uses of old chemical compounds; 3) compensation for the time lost during the regulatory approval process by extending the term of the patent. Mr. Malatka also noted that TRIPS-plus provisions can pose many new legal questions, for example, whether or not countries can issue a compulsory license on regulatory approval data, or the status of "paragraph IV" certification requirements.[7]

[6] The import of products produced and protected in accordance with IP laws of one country, but not the importing country. These products are then exported to a second country without the consent of the owner of IP rights for the same material in the importing country.

[7] "Paragraph IV certification" refers to the Hatch-Waxman Amendment passed in the U.S. in 1984, which facilitated marketing of generic drugs. When a generic drug manufacturer files an Abbreviated New Drug Application with the Food and Drug Administration (FDA) for regulatory approval, it should also file a statement as to the patent protection of the original brand name drug on which the generic is based. A generic applicant can either file a "paragraph III certification" (identifying the valid patent and the term of its expiry), or a "paragraph IV certification" (identifying the patent and claiming that the patent is either invalid, or will not be violated).

III. Oxfam's Kripke Urges Balance Between Incentives for R&D and Accessibility of Drugs

Gawain Kripke, Senior Policy Advisor at Oxfam America noted that the objective of trade agreements' intellectual property provisions is to balance the support for research and development on the one hand, and accessibility of medicines for persons who need them on the other.

Kripke explained that the TRIPS Agreement concluded in 1994 embodied the multilateral trading system's consensus on where that balance between the two should be struck. Civic society and the developing countries, however, believed that the TRIPS was tilted towards protecting the revenues of big pharmaceutical companies from the developed countries. Before a new trade round was launched, therefore, that imbalance had to be addressed.

The Doha Ministerial Declaration (Paragraph 17), as well as the separate Declaration on the TRIPS Agreement and Public Health ("Declaration on Public Health"), both adopted on November 14, 2001, sought to restore the objective of public health in WTO Members' IP regimes. In August 2003, Members reached an agreement allowing for the implementation of the Declaration on Public Health.[8] However, the Declaration has yet to be fully implemented due to ongoing disagreements over the procedures on invoking compulsory licensing.

Mr. Kripke also pointed out that the Kennedy-Feinstein-Feingold Amendment to the Trade Promotion Authority (TPA) passed in 2002 sought to reintroduce the balance between strong IP laws and governments' flexibility in the area of public health. In particular, the Amendment instructs that a principal negotiating objective in the area of intellectual property is "to respect the Declaration on the TRIPS Agreement and Public Health."[9]

In Mr. Kripke's view, therefore, the TRIPS-plus approach to FTAs is dangerous because it undermines and violates the balance struck at the international level on the role of IP protection and public health. His concern is that not only would these FTAs keep medicines out of the reach of people who need them, but could also jeopardize the passage of future FTAs (citing strong opposition in many countries to TRIPS-plus FTAs, including in the US).

IV. MFJ International's Maria Fabiana Jorge Asserts that TRIPS-plus FTAs Expand IP Protection Beyond What Has Been Agreed

Ms. Maria Fabiana Jorge of MFJ International, an international consulting firm, asserted that TRIPS-plus FTAs expand IP protection beyond standards existing in TRIPS, and even U.S. domestic law.

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[8] Decision of the General Council of 30 August, 2003 Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health WT/L/540, available at: http://www.wto.org/english/tratop_e/trips_e/implem_para 6_e.htm

[9] Bipartisan Trade Promotion Authority Act of 2002 § 2102(b)(4)(C), 19 USC § 3802 (2004)

She pointed out that international trade negotiations on intellectual property have an entirely different dynamic than other trade negotiations: while the purpose of the successive trade agreements is to lower barriers to trade by reducing tariffs and non-tariff barriers, the purpose of negotiations on intellectual property is just the opposite: to increase one entity's monopoly on intellectual ideas to longer periods, new types of ideas and concepts (e.g. data exclusivity) and in general, to reduce competition. In this context, she mentioned the recently released Federal Trade Commission report, which pointed out that there must be a balance between IP protection and competition.[10]

Ms. Jorge emphasized that for many developing countries, acceptance of TRIPS was a major concession, and that they are reluctant to expand IP protection further. It was troubling to observe, as have some Members of Congress, that the US is pursuing bilateral FTAs mostly with smaller, weaker countries. The reason for this strategy, according to Ms. Jorge, is to set a precedent for an expanded level of IP protection in future negotiations at the international level.

Ms. Jorge also pointed out that in TRIPS-plus FTAs, USTR is seeking concessions that would give investors higher protections than those enjoyed under U.S. domestic law. She cited the example of compulsory licensing and indicated that some of the TRIPS-plus FTAs restrict the government in its right to issue a compulsory license only to cases of emergencies. She noted that such a requirement is not present under TRIPS,[11] or even U.S. law.[12]

[10] Federal Trade Commission, To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy, October 2003, available at: http://www.ftc.gov/opa/2003/10/cpreport.htm

[11] Art. 31 of TRIPS does not restrict the right to issue a compulsory license only to cases of national emergency. However, it does provide that in cases of "national emergency" (and certain others) the government can issue a compulsory license without the need to negotiate with the patent owner first.

[12] Ms. Jorge recalled the Anthrax scare in October 2001, when drug pricing and supply concerns led to speculation as to whether or not German manufacturer Bayer's patent on Cipro, the most successful anti-anthrax antibiotic available on the market, should be disregarded and a compulsory license granted. Most sources quoted 28 U.S.C. 1498 as the statutory basis for the U.S. compulsory license scheme. Some companies had allegedly satisfied requirements for regulatory approval of Ciprofloxacin, Cipro's generic competitor, but could not sell it in the US until the expiration of Bayer's patent on Cipro. Ultimately, the Government negotiated with Bayer a new supply contract at highly reduced price. Nevertheless, the media at the time had speculated that US Government might threaten to issue compulsory licenses to Bayer's generic competitors. It is widely believed that simultaneous WTO negotiations to launch the Doha Round had influenced the US' and Canada's decision not to invoke compulsory licensing in order not to set a bad precedent for negotiations on IP rights.

Among other concerns, Mr. Jorge mentioned USTR attempts to link regulatory approvals to the status of IP rights,[13] as well as USTR's lack of support for the "Bolar provision" in FTAs.[14] Finally, Ms. Jorge concluded that the true economic effects of TRIPS are not yet known, and cautioned the governments not to provide additional IP protection until the impact of TRIPS on the economy and health care can be fully assessed.

V. Georgetown's Ryan Makes Controversial Assertion that TRIPS is Not Linked to Quality of Public Healthcare

Professor Michael Ryan of Georgetown University contested the widely held belief that there exists a direct link between the TRIPS Agreement and the quality of health care in the developing world. Ryan outlined his presentation along three dimensions: a) impact of TRIPS on the economic development of the developing countries; b) impact of TRIPS on the world's pharmaceutical industry; and c) impact of TRIPS on the fight against AIDS, with AIDS symbolizing problems in international health care. Ryan stated that while public discourse is focusing on the relationship between TRIPS and AIDS, the real issue is the impact that TRIPS has on economic development of the developing countries.

Ryan noted that the purpose of IP laws is the promotion of innovation. However, he pointed out that patents are subject to many limitations, including: a) scope, which restricts the protection to a very narrow group of ideas contained in the patent; b) disclosure, which enables the public to become immediately familiar with the innovative idea;[15] c) time limit on the exclusivity offered by the patent; d) patent's function as facilitator of transactions;[16] and e) patents' inferiority to other IP rights, which provide absolute protection with no time limit (e.g. trade secrets). All these limitations act to soften the impact of the monopoly granted by the government to one company on the use of a new idea.

A. Impact on Economic Development

[13] Under USTR model FTA, regulatory approval cannot be granted, if the pharmaceutical violates IP rights of the patent holder.

[14] The "Bolar provision" allows companies to research and analyze a patented product, as long as it is not sold or offered on the market. Many generic companies use the "Bolar provision" to secure regulatory approval of a generic drug before the patent on a given pharmaceutical expires. Thus, when the patent does expire the product is ready to be marketed and sold. Most FTAs contain vague and "weak" language on whether the Bolar provision would apply.

[15] In fact, Ryan noted that the Patent Gazette, where all the patents and patent applications are published, is a regular source of research and development news for the scientific community. (In addition to the Patent Gazette, the USPTO website discloses published patent applications as well as granted patents. Websites of other PTO agencies outside the U.S. also disclose published applications and granted patents.)

[16] Ryan explained that patents should be viewed as a way in which companies divide tasks between inventing a product and selling it to the public. A patent allows one company to invent a new idea, and allow other market players to develop commercial uses for the invention, market it, distribute and offer to the clients.

When discussing the relationship between IP laws and economic development, Ryan focused on the experience of Jordan. He noted that Jordan's lack of natural resources forced it to focus its economic development on knowledge-based technologies. Jordan's adoption of strict IP laws after WTO accession and the enactment of the FTA had a very favorable impact on its economy. Jordan already boasts almost 20 big generic drug producers, which dominate the export markets in the Middle East. Jordan's emergence as a significant generic drug producer has motivated many European companies to invest in and cooperate with the Jordanian industry. Moreover, stricter IP laws motivated many U.S. and European pharmaceutical companies to conduct their clinical trials in Jordan. These tests have boosted the local economy and medical science, resulting in a significant increase in "medical tourism" (which accounts for 65% of overall tourism in Jordan). Ryan emphasized that introduction of strict IP laws clearly helped Jordan develop a viable pharmaceutical and medical industry.

Ms. Jorge of MFJ International vigorously contested the notion that strict IP laws necessarily would result in the increase of know-how and technology transfers. Noting that there is no statistical data to support that conclusion, she pointed to Chile as an example of a country that had been promised great investments in the pharmaceutical sector prior to concluding many FTAs, including with the US. The effect of those agreements on Chile's pharmaceutical development has been minimal thus far: no new investments, closure of Chilean pharmaceutical factories, significant increase in pharmaceutical imports, and little transfer of technology (except of intra-company transfers among branches of multinational companies).

Ryan countered that the manufacturing of pharmaceuticals is not a significant value-added operation, does not pay well, and requires only low labor skills. The biggest value, in his opinion is in the increase in spending on research and development (R&D) and marketing.

Ms. Jorge responded that since there was little transfer of technology, and the marketing staff must have been in place prior to factory closings, the net economic effects on the Chilean pharmaceutical industry must have been negative. Regarding R&D, Ms. Jorge noted that the bulk of financing always comes from the government, leaving pharmaceutical companies in the developing world underprivileged due to governments' meager R&D resources.

Ryan made the counter-point that over 15% of R&D financing granted by the U.S. National Institutes of Health is used abroad. He suggested foreign companies should reach out to NIH and other sources for R&D funding.

B. Impact on the Pharmaceutical Industry

Ryan next discussed the nature of the global pharmaceutical industry and pointed out that while most brand name pharmaceutical companies are in the developed world, most of the generic production is located in the developing world.[17] Moreover, Ryan noted that TRIPS discussions have clear market segment implications – the battle is being fought

[17] Leading developing country producers include India, China, Brazil, Argentina, South Africa, Thailand, among others.

between "rich countries'" brand name producers, and "developing countries'" generic producers.

C. Impact on Public Health

Finally, Ryan made the controversial assertion that there is a prevailing misconception about TRIPS and its direct influence on public health. He noted that over 90% of AIDS drugs are not covered by patents, which would almost entirely remove the relevance of TRIPS to the substantial numbers of HIV/AIDS patients in the developing world.[18]

Ryan also believes that pharmaceutical companies made a mistake by claiming that their resistance to TRIPS and allowing compulsory licensing was based on their concerns over recovery of R&D costs, when in fact it was driven by their concern for profit. In Ryan's opinion, the R&D claim was unfounded and the pharmaceutical sector was proven to be dishonest.

Finally, Ryan pointed out that many public health crises in the developing world are the result of the governments' failure in organizing public health care, and less so because of their TRIPS obligations. He also pointed out that in many developing countries private health care is of superior quality, and the AIDS, HIV, malaria epidemics affect only the poorest (and disproportionately large) parts of the populations, which rely only on the government for health care.

OUTLOOK

As Professor Ryan pointed out, the intersection of intellectual property protection and international trade is one of the most "intellectually stimulating" areas of international trade law. Not doubt, this juncture will continue to be at the forefront of discussions between the developed and developing world, both on the bilateral front as well as the multilateral level.

On the bilateral front, it seems that developed countries, including the United States and the members of the European Union, will continue to pursue free trade negotiations aimed at securing TRIPS-plus protection for intellectual property. Nevertheless, an aggressive "TRIPs-plus" approach to FTAs will probably face greater scrutiny in future FTAs.

The upcoming debate in the U.S. Congress over the Central American FTA (CAFTA), for example, will focus to an extent on the validity of the agreement's extensive IP protections, including the data exclusivity provisions. Some Members of Congress and consumer groups question whether these provisions are reasonable negotiating objectives, especially vis-à-vis weaker negotiating partners. Moreover, some Members of Congress believe the US-Australia FTA's IP provisions are counter to Congressional efforts to loosen restrictions on the import of cheaper drugs. The result of the CAFTA debate could influence future negotiations with other FTA partners including Thailand (which can claim to face

[18] This assertion, however, seems to be disputed by majority of NGOs, which directly link the passage of new FTAs and adoption of new IP laws in developing countries to the global campaign against HIV/AIDS. Please see recent controversy regarding India's newly adopted patent law, and its impact on the availability of generic drugs in Africa.

more significant health crises). As suggested by Mr. Kripke at the WITA event, the defeat of legislation implementing CAFTA in the Congress this year could trigger a reconsideration of IP policy objectives in FTAs.

Notwithstanding recent pressures, as demonstrated by USTR's success at including certain TRIPS-plus provisions in all of its FTA agreements (as well as India's and Israel's recent concessions in revision of their domestic IP laws), the TRIPS-plus trend in FTAs and other trade initiatives will probably continue.

At the multilateral level, the battle over TRIPS reform is centered upon improving developing countries' access to generic drugs, as envisioned by the Declaration on Public Health. As many WTO Members expected, the March 31, 2005 deadline to increase developing countries' access to generic drugs has lapsed without an agreement.

Developed and developing countries remain divided over the content of an amendment to the TRIPS. The main point of contention concerns the legal status of a statement by the chairman of the General Council when the Decision implementing the Declaration was agreed in August 2003.[19] Many developing countries would rather not refer to the statement in the TRIPS amendment. The African Group of countries, with support from Brazil and Korea, have rejected references to the chairman's statement in the amendment, as they assert this would elevate its legal status. On the other hand, the US, Japan, Switzerland and other developed countries insist there would have been no agreement on the TRIPS decision without the chairman's statement, and the statement should be reflected in an amendment.

Some observers fear the lack of agreement over the TRIPS amendment could undermine work towards preparing the agenda for the WTO Hong Kong Ministerial Conference in December. Moreover, a failure to conclude an amendment this year would exacerbate the North-South divide at the WTO, and could undermine efforts to conclude the Doha Round by next year.

[19] The chairman's statement includes pledges that developing countries will only take advantage of the modified TRIPS provisions to respond to public health crises. The statement lists 11 advanced developing countries that pledged not to invoke TRIPS provisions to import generic drugs manufactured under a compulsory license, except in the most extreme emergencies. The statement also set out guidelines on "best practices" used to differentiate generic drugs manufactured under a compulsory license for export to a developing country with no pharmaceutical industry. Moreover, special labelling is suggested to prevent diversion of such generics to third country markets.

Free Trade Agreements Highlights

USTR Announces Launch FTA Negotiations With United Arab Emirates And Oman

On March 8, 2005, the United States Trade Representative (USTR) announced that the United States had launched negotiations on a Free Trade Agreement (FTA) with the United Arab Emirates (UAE) and would launch negotiations with Oman on March 12, 2005. Assistant USTR for Europe and the Mediterranean Catherine Novelli will lead the U.S. negotiating team.

The proposed FTAs will build upon the Trade and Investment Framework Agreements (TIFAs) that the United States already has in place with the UAE and Oman. The FTAs are viewed by the Administration as part of a broader strategy aimed at establishing the Middle East Free Trade Area (MEFTA) by 2013. As announced on May 9, 2003, this strategy contemplates a "building blocks" approach of using the FTA with Morocco, the FTAs the U.S. already has in place with Israel and Jordan, and the recently concluded FTA with Bahrain as anchors to negotiate FTAs with other Middle Eastern countries. At some point before 2013, the U.S. intends to consolidate these FTAs to form the MEFTA.

USTR Urges State Governments to Adopt Reciprocal Liberalization Under Andean and Panama FTAs

The US Trade Representative (USTR) is urging state governments to amend their government procurement practices to cover the US-Andean and US-Panama Free Trade Agreements (FTA). In an information circular published on February 24, 2005, USTR outlines the new "reciprocity" policy under which participating states will be able to compete for government procurement contracts in Panama and the Andean countries upon adoption of the FTAs. The reciprocity policy for state level government procurement would apply only to the Panama and Andean FTAs.

The USTR circular emphasizes the potential economic benefits of liberalization in government procurement policies. In addition, the circular outlines the voluntary nature of the program, and exclusions for sensitive goods and services.

TPSC Requests Comments On Interim Environmental Review US-Andean FTA

On March 3, 2005, the United States Trade Representative (USTR) published a notice in the Federal Register (70 FR 10463), announcing that the Trade Policy Staff Committee (TPSC), an interagency body chaired by USTR, is requesting public comments on the interim environmental review of the proposed Free Trade Agreement (FTA) between the United States and the Andean countries (Bolivia, Colombia, Ecuador, and Peru). As required under Trade Promotion Authority (TPA), this review focuses on the environmental impact of the FTA in the United States, and also takes into account global and transboundary environment impacts.

The comments are due by April 15, 2005.

US-EUROPEAN UNION

US And EU Disagreement Over Aircraft Subsidies Continues

On March 19, 2005, the United States Trade Representative's (USTR) spokesman Richard Mills released a statement on the status of the negotiations between the EU and the US to resolve the dispute regarding their alleged unfair subsidization of Airbus and Boeing.[20] Mills said that in a phone call that took place on March 18, 2005, US Deputy Secretary of State Robert Zoellick had indicated to EU Trade Commissioner Peter Mandelson that the EU seems to be straying away from the matter. He did not mention however whether the US would challenge the EU on its subsidies in the WTO.

Launched with the signing of the "EU-US Agreement on Terms for Negotiation to end Subsidies for Large Civil Aircraft (LCA)"[21] on January 11, 2005, the negotiations aim to eliminate all subsidies to LCA producers and have to be concluded by April 11, 2005. The EU has already indicated that it would not be prepared to extend the negotiations after this deadline because it would disrupt plans by both Boeing and Airbus to develop new aircraft.

[20]http://www.ustr.gov/Document_Library/Spokesperson_Statements/Statement_from_USTR_Spokesman_Richard_Mills_on_the_Status_of_U.S.-EU_Large_Civil_Aircraft_Subsidy-Litigation_Talks.html

[21]http://europa.eu.int/comm/trade/issues/respectrules/dispute/pr110105_agr_en.htm

US-LATIN AMERICA

Inter-American Dialogue "Agenda for the Americas 2005" Emphasizes Importance of Trade Liberalization

SUMMARY

On February 24, 2005, the Inter-American Dialogue presented its "Agenda for the Americas 2005". Fernando Henrique Cardoso, Carla Hills and Thomas F. McLarty III, members of the U.S. Policy Task Force at the IAD, presented the IAD's document.

An agenda of partnership in the Americas is promoted, which should advance in four strategic goals: prosperity, security, democracy, and good governance. The partnership would be directed at fostering trade liberalization and economic growth, developing new migration policies, combating crime and violence, and strengthening democratic rule.

ANALYSIS

We review here the remarks of the presented IAD's Agenda on Trade Liberalization.

I. An Agenda of Partnership in the Americas: Partnership for Trade Liberalization

The Agenda emphasizes the importance of fostering trade liberalization and economic growth. It focuses on:

Agriculture. By joining in partnership with Latin America's agricultural exporters, especially Brazil, the United States can substantially increase the prospects for a successful outcome of the Doha Round. Like the United States, Brazil and other Latin American nations want to curtail export subsidies and trade distorting internal supports to agricultural producers – but progress at Doha will require agreement with Europe and many other nations. Because each is influential with different constituencies, U.S. cooperation with Brazil can contribute significantly to that process.

FTAA. A breakthrough in Doha on agriculture could set the stage for the successful completion of a strong FTAA, which would provide the essential underpinnings for long-term productive ties between the United States and Latin America. A robust FTAA would stimulate regional economic activity by opening markets for Latin America producers and enhancing the region's ability to attract foreign investment and inflows of new technology. The FTAA would firmly lock in the policy reforms that have been widely adopted across Latin America in the past 15 years and help to reinforce transparency, the rule of law, and property rights. All this would, in turn, contribute in numerous ways to the prosperity and security of the United States.

U.S. bilateral Free Trade Agreements. Free trade agreements with specific countries and subregions can also encourage domestic reform, make trade and investment rules more transparent, and generally contribute to Latin America's economic advancement. The US now has agreements in force with Chile and Mexico. A similar one, the CAFTA, has been signed with five Central American countries and the Dominican Republic, but not yet

ratified. Negotiations are under way with Panama, Colombia, Ecuador, and Peru. The early approval of CAFTA by the U.S. Congress would be an important signal of U.S. commitment to the regional trade agenda, and to Latin America's development. However, these smaller agreements cannot substitute for the FTAA, an accord that would bring every economy in the Americas together in a single, inclusive agreement.

Free trade. In general, this is a contentious issue in the U.S. and the Latin American Countries. Citizens across the hemisphere need to be persuaded that trade agreements will, in fact, bolster growth and raise standards of living. The U.S. must join other nations to take steps to mitigate the severe dislocations that free trade can produce.

OUTLOOK

A special IAD task force on U.S. policy in the Western Hemisphere produced the Agenda. The task force was assembled in response to the growing concerns of its members that U.S. policy is not adequately serving the interests of either the United States or the nations of Latin America and the Caribbean. They focused on identifying policies and approaches that would enable Washington to take better advantage of the opportunities for mutually beneficial cooperation with the governments of the region.

This document emphasizes the importance of free trade in the region as a key factor for economic development. It encourages U.S. and Latin Americans countries to work towards reducing the disruptions in the economy and work force that these kinds of agreements can produce.

The FTAA is preferable, the document states, but if it is not possible, bilateral or regional trade agreements could be used to reduce trade barriers all over the region. The United States has signed a few agreements with Latin American countries, and is negotiating others. However, the failure of Brazil and the United States to agree on key issues has stymied FTAA negotiations.

Brazil and US Identify WTO as Key Trade Priority

SUMMARY

Representatives of the Brazilian and U.S. trade community, including practitioners, government officials and scholars, gathered in February to discuss their views on the future of the Doha Round, FTAA, and MERCOSUR; and the impact of FTAs on the WTO.

Speakers seemed to agree that the Doha Round is the priority for all parties involved, and that success in Doha is attainable provided that countries could overcome the impasse on agriculture and services soon. Due to the focus on WTO negotiations, panelists were pessimistic about FTAA progress in the near future.

ANALYSIS

On February 4, 2005, the Brazilian Lawyers for International Trade (ABCI), the Brazilian Embassy, the Center of Studies of Law Firms (CESA)[22] and the Brazilian Institute of Studies on Competition, Consumer Affairs and International Trade (IBRAC) held a "Symposium on International Trade" at Georgetown University Law Center.

The event included panels discussions focusing on: (1) the future of the Doha Development Agenda, and (2) impact of free trade agreements ("FTAs") on the WTO, among other topics.

I. Success in Doha Possible, but Requires Hard Work

The speakers on the "Doha Development Agenda: The Way Forward" panel included Christopher Parlin, a lawyer with Loeffler Tuggey Pauerstein Rosenthal LLP, Dorothy Dwoskin, Assistant U.S. Trade Representative for the WTO and Multilateral Affairs, Evandro de Sampaio Didonet, Minister Counselor Economic at the Brazilian Embassy in Washington, D.C.; and Tim Reif, Chief Democratic Trade Counsel at the U.S. House of Representative Ways and Means Committee. The speakers concluded that success in Doha was possible, but required focus and hard work.

A. Parlin – No Leadership in Agriculture and No Business Support Might Kill Doha

Mr. Parlin shared a pessimistic view of the future of the Doha Round ("Round"), doubting whether the ministerial conference to be held in Hong Kong in December 2005 would prove as successful as many expected. Three factors contributed to his skepticism: lack of progress in agriculture negotiations, WTO members' failed reliance on the US to provide leadership in the Round, and lack of business community's visible support for the Round.

On ***agriculture***, Mr. Parlin said that while it was at the top of the "to-do" list, he had not seen any substantive progress in months. Referring to the world's "failed reliance" on the ***US*** for ***leadership***, Mr. Parlin commented that in contrast to the previous WTO rounds, the shifts in political clout among influential groups in the US made it impossible for the US to

[22] *Centro de Estudos de Sociedades de Advogados*

offer an attractive package to trading partners. In particular, Mr. Parlin listed (1) rise in prominence of the "***antidumping community***", whose influence he called "economically unjustified", and (2) loss of influence by the U.S. agricultural lobby. He said, that in past, the US status as the world's leading producer of agriculture meant that the agricultural lobby was able to push the pro-trade agenda in Washington. However, the changes in Washington's power structure lead to a significant rise to power of various protectionist groups, such as textile or steel producers. This trend diminished the power of ***U.S. agricultural lobby***, to trump other protectionist interests.

Finally, Mr. Parlin listed the world ***business community's disengagement*** from the Round as the factor responsible for lack of progress. He contrasted the silence of big exporters with the loud support given all around the world by business to the Uruguay Round. In his opinion, the extent of the business community's wills to support openly the Doha Round might be the factor determining the outcome of the Round.

B. USTR's Dwoskin – Hong Kong Ministerial Can Be Successful

Ms. Dorothy Dwoskin, Assistant USTR for the WTO and Multilateral Affairs, disagreed with Mr. Parlin's pessimistic view of the Doha Round. She emphasized that all preparations for the Hong Kong ministerial were on track, and pointed out that according to the January framework agreed, the Hong Kong ministerial did not have to be the decisive conference of the Round. In her opinion, that "took a lot of pressure off" and allowed countries to engage in more constructive discussions.

Referring to negotiations on ***services***, Ms. Dwoskin commended India for realizing that a "broad approach" to negotiations could yield substantial benefits. She suggested that if Members could not agree on a "broad approach" to services, she encouraged the countries to identify specific sectors in which progress could be made. Discussing negotiations on ***rules***, Ms. Dwoskin expressed excitement about the possibility of agreement on ***trade facilitation***, enabled by the separation of trade facilitation from the rest of the "Singapore issues" (investment, competition policy, and transparency in government procurement). She added that the US is also interested in discussions on certain substantive issues, e.g. ***subsidies***.

Commenting on her experience in dealing with the ***developing countries***, Ms. Dwoskin pointed to three issues that developing countries should improve: too frequent changes to negotiating positions, negotiators' frequent lack of substantive knowledge of the industries whose interests are affected by the negotiations, and failure to engage in sectoral initiatives. She cited the Information Technology Agreement as an example of a very successful sectoral initiative, which Brazil did not, but should, join.

Finally, Ms. Dwoskin dismissed Mr. Parlin's ***comparison between the Doha Round and the Uruguay Round***, noting that it was to be expected that the negotiations had different dynamics. She pointed out that issues under discussion are different, the economic situations of the Member countries are different, and that there was a larger number of negotiating countries, and the dynamics among them are different. She also argued that the successful conclusion of the "Davos mini-ministerial" in January activated the business community, whose meaningful contribution would "energize" the Round.

C. Brazil's Didonet – 2005 Is a Year of Opportunity and Brazil Is Ready to Move Forward

Evandro de Sampaio Didonet, Minister Counselor Economic at the Brazilian Embassy, called year 2005 "the window of opportunity" for the Doha Round, pointing to 2007 as the year in which President Bush' trade promotion authority, and the Farm Bill, would expire. Mr. Didonet said he believes the political will to conclude the Doha Round is there, but the challenges are daunting.

Discussing ***agriculture***, Mr. Didonet said the WTO members have a lot of catch-up to do. He disagreed with describing Brazil's negotiating position on agriculture as that of a "free rider", by pointing out that while Brazil's average tariff in agriculture was 10%, the corresponding average U.S. tariff was 12%.

He pointed out that even though Brazil was a developing country, it applied no quotas on agricultural goods, and its highest applied tariff is only 20%. While acknowledging that Brazil has a number of defensive concerns in the area of ***non-agricultural market access*** ("NAMA"), Mr. Didonet emphasized that Brazil knows it must contribute to the success of the Round. He acknowledged that while Brazil's average tariff rate for NAMA is 10%, Brazil pays an effective tariff of 5%, because of special regimes.

Mr. Didonet added that while Brazil is interested in **services**, its chief concern in the Doha Round is agriculture. Unless Brazil secures an attractive offer on agriculture, it will not make major concessions on services and NAMA, he emphasized.

Finally, Mr. Didonet strongly endorsed Ambassador Luis Felipe de Seixas Correa, Brazil's candidate to fill the post of the WTO Director-General. Responding to his call for the US to support Mr. Seixas Correa, Ms. Dwoskin responded noncommittally: "He is a qualified candidate".

D. Tim Reif from US House of Representatives – US Needs to Refocus on Doha; WTO Negotiations Should Move to Incremental Approach

Tim Reif, Chief Democratic Trade Counsel, U.S. House of Representatives, Ways and Means Committee expressed cautious optimism about the future of the Doha Round. He is very critical of the US focus on bilateral and regional activities, and blamed the strategy for draining the resources and time needed to finish the Round successfully. He hopes the U.S. government will refocus on the WTO. Mr Reif is very critical of the Geneva system of big negotiating rounds. He expressed dissatisfaction that the Uruguay Round was not the last round before moving to incremental approach.

Mr. Reif called on Members of Congress and government officials to be more responsible and condemned the defeatism of some U.S. government officials who had been "quietly portraying the Round as dead". He said he believes the Doha Round could conclude successfully provided that all parties made it their priority. He cited a proposal by one Democrat Congressman during the deliberations over the 2002 Farm Bill to cap the individual support government was allowed to pay farmers (eventually defeated) as an example that there were responsible free traders in the U.S. Congress. He also emphasized that while a few years ago the discussion in Congress revolved around *whether* to expand free trade, the discussion today focused on *how*.

Finally, Mr. Reif cautioned that the U.S. Congress had been very critical of the Appellate Body's expansive interpretations of the WTO Agreements. He pointed to the Byrd Amendment and argued that while a subsidies case could arguably be brought against the U.S. for Byrd Amendment payments, there was nothing in the WTO Agreements prohibiting countries from disbursing AD/CVD duties to the affected companies.

II. Diverging Views on Role of FTAs; Brazil – US Relationship Key to FTAA

Two speakers addressed the topic of the interplay between regional trade agreements and the WTO during the event. Prof. Jagdish N. Bhagwati from Columbia University delivered a lunch keynote address arguing that regional trade agreements are detrimental to the world trading system.

Next, the speakers on the "Regional Trade Agreements & WTO – Complimentary or Competing?" panel, including Jaime Granados from the Inter-American Development Bank; Jeffrey Schott, Senior Fellow at the Institute for International Economics; Mark Smith, Executive Vice-President for the U.S. Section at the Brazil - U.S. Business Council; and Thomas B. Felsberg, a partner with the Brazilian law firm of Felsberg, Pedretti, Mannrich e Aidar, discussed various themes relating to regional trade agreements.

A. Bhagwati – Bilateral and Regional FTAs Kill Free Trade

Prof. Jagdish N. Bhagwati from Columbia University delivered a luncheon keynote address condemning regional and bilateral free trade agreements (FTAs) as dangerous to the notion of free trade.

First, Prof. Bhagwati dissected the popular belief that the "***business community supports bilateral and regional FTAs***". In his opinion, that support stems from the economics of lobbying and market access. In multilateral WTO negotiations, market access is granted to all WTO members, regardless of which WTO member bore the most cost of opening the other member's market. On the other hand, in FTA negotiations, only parties to the FTA benefit from liberalized access to a foreign market, i.e. there are no "free-riders". Thus, in his opinion, the business community feels that it receives a higher and more predictable return on its investment if it is lobbying for an FTA, than when it is lobbying for a multilateral agreement.

Prof. Bhagwati pointed out that FTAs intrinsically could not liberalize the trade in ***agricultural products,*** of most interest to the developing world, and therefore could not bring the full benefits to these countries. Because the main barrier to trade in agricultural goods are production subsidies, which by definition affect the entire production of the good, a trade agreement between two or three countries could not effectively deal with subsidies. For that reason, according to Bhagwati, most FTAs to which developing countries are a party cannot meaningfully represent their full interests and cannot enable comparative advantage, the principle underlying international trade, to fully work.

Prof. Bhagwati then reminded the audience that free trade agreements should be an exception to the principle of ***nondiscrimination,*** pursuant to which all countries should be treated the same. He pointed out that with the recent proliferation of FTAs, nondiscrimination would no longer be the norm, but the exception, and tariffs bound under art. II of GATT would no longer be applicable to "everyone", but only to a limited number

of countries that did not enjoy preferential access to the market under an FTA. He suggested that "free trade agreements" be renamed to "preferential trade agreements (PTAs)" to debunk their real nature.

Prof. Bhagwati also identified the problem of the proliferation of various ***rules of origin***. Because today's businesses are so integrated, and almost every product contained foreign parts, the existence of different rules of origin in different FTAs leads to "absurd" results, e.g. the same product could have a number of different country of origins, depending on which rules it was examined under. Prof. Bhagwati illustrated his point by recounting former-USTR Carla Hills' treatment of cars made in the US by Japanese car manufacturers as Japanese for the purpose of voluntary export restraint agreements with Japan, and as American for the purpose of U.S. trade with Europe.

Finally, Prof. Bhagwati noted that the experience of Mexico proves that free trade agreements do not automatically increase living standards. He noted that while Mexico's FTAs resulted in an exponential growth in exports, the increase was matched by a more modest and only industry-specific growth in gross domestic product.

B. IIE's Schott - FTA's: The Good, the Bad, and the Ugly

Mr. Jeffrey Schott, Senior Fellow at the Institute for International Economics, disagreed with Prof. Bhagwati's unequivocal condemnation of FTAs. Comparing different FTAs is like comparing "apples and oranges": while some FTAs covered a very broad range of areas (like NAFTA), some were very narrow, and their impact was different.

Mr. Schott opined that free trade agreements have both good and bad effects, and that depending on the particulars of a given FTA, the balance between the two shifted. As ***positive*** effects of FTAs Mr. Schott listed: growth of countries' GDP, reduction of value of regional preferences, creating precedents in liberalization (enabling future extension of bilateral commitments to everyone as part of multilateral round), learning value of negotiating FTAs (very important for poorer developing countries lacking the expertise), as well as the approximation of negotiating positions of FTA partners on the multilateral stage (parties to FTAs often took similar positions in WTO negotiations).

Addressing the ***negative*** aspects of FTAs, Mr. Schott said that FTAs often divert exports due to no liberalization in more appropriate export markets. These diverted exports might replace in the importing market otherwise competitive exports from non-FTA countries, which would have remained, had they been offered similar market access. Also, FTAs between a rich developed countries and a poor developing countries, due to the unequal negotiating power, have been criticized as allowing "unusual" provisions, citing the U.S. – Chile and U.S. – Singapore FTAs (capital control provisions), and the U.S. – Australia (exclusion of sugar) FTA.

C. IADB's Granados - Jury Is Still Out on FTAs

Mr. Jaime Granados from the Inter-American Development Bank, said that the "jury is still out" on the ***net economic effects*** of FTAs. More studies need to be done before the WTO rules on free trade agreements could be rewritten to address the problems posed by their proliferation.

He also pointed out that FTAs played two very important roles for the developing countries. On one hand, bilateral agreements enable government officials to provide ***quick results*** (very important in many developing countries' political context), not available under the WTO's long and unpredictable negotiating rounds. On the other hand, FTAs play a ***complimentary role*** to the WTO: the developing countries pursue their immediate interests in bilateral/regional free trade agreements, while they pursue other issues on multilateral stage.

D. USBBC's Smith – Brazil Must Get Its Act Together

Mr. Mark Smith from the U.S. – Brazil Business Council called on Brazil to "get its act together", meaningfully participate in international trade negotiations (both the WTO as well as FTAA), and face the necessity of further trade liberalization.

In his opinion, the FTAs negotiated (NAFTA, U.S. – Chile, and CAFTA) or under negotiation (U.S. – Andean Pact) by the US in the Western Hemisphere provide substantial benefits to the countries involved. He hoped that a network of FTAs between Western Hemisphere countries would facilitate "patching them together" to create the Free Trade Area of the America (FTAA).

He urged Brazil not to "drag its feet", and to participate in the negotiations with will to compromise. Otherwise, Mr. Smith said, "Brazil will miss the boat". Mr. Smith noted trade facilitation as an example of a simple issue which Brazil was reluctant to cooperate in. He questioned why merchandise shipped to Brazil was cleared through customs in 30 days, the same time as in Bangladesh.

As for the role of FTAs, Mr. Smith agreed with other speakers that FTAs dealt with issues not fully covered by the WTO. He also pointed out that a network of FTAs facilitated subsequent WTO negotiations by allowing WTO members to make concessions to a limited number of countries in the FTAs first, and later to extend them to other countries in WTO negotiations.

E. Brazil's Felsberg – South American Integration Failed; Future of the FTAA Lies in U.S. – Brazil Relations

Mr. Thomas Felsberg, an attorney with Felsberg, Pedretti, Mannrich e Aidar, a Brazilian law firm, narrowed the future of the FTAA down to relations between the U.S. and Brazil. Mr. Felsberg pointed out that Brazil's objective has always been to integrate the markets of South America, but those plans largely failed.

According to Mr. Felsberg, the following endangered MERCOSUR's existence as an entity: Uruguay's independent positions in international negotiations, Paraguay's passiveness coupled with small economy, and Argentina's protectionism, triggered by a long period of economic woes. In Mr. Felsberg's opinion, Brazil should seriously consider scaling back MERCOSUR to a free trade area, which would better correspond to reality. ***Chile***, according to Mr. Felsberg, mistakenly focused its trade policy on free trade agreements with the "entire world", the most significant of which are FTAs with the US and the EU, "forgetting that it still finds itself in South America".

Mr. Felsberg believes that Brazil is the most meaningful ***FTAA*** partner the US has to negotiate with and he fails to see why the US focuses its resources on FTAs with smaller and

economically less significant countries, such as in Central America or the Andean Pact. He believes the future of the FTAA lies in direct negotiations between Brazil and the US, and identified agriculture as the main obstacle.

OUTLOOK

Many U.S. businesses have opted to focus their resources on bilateral and regional agreements instead of larger agreements such as the FTAA and the WTO. Many U.S. businesses see the bilateral and regional FTAs as vehicles to:

i) Target specific markets of interest;

ii) Gain advantages sooner, since it is easier to negotiate with fewer countries; and

iii) Establish model provisions for larger agreements.

Notwithstanding, many private sector representatives acknowledge that companies generally would benefit more from broader liberalization initiatives negotiated at the WTO level, instead of bilateral and regional agreements.

FTAA

Brazil and the US Make Little Progress in Recent Talks on the FTAA; Possible Movement By Spring with Upcoming Bilateral and TNC Meetings

SUMMARY

In late February, the leading trade negotiators from Brazil and the US met in Washington, D.C. in an effort to overcome current difficulties in the FTAA negotiations. FTAA negotiations have been stalled since early 2004.

Although no significant details of what was discussed in the February meeting were disclosed, it appears that Brazil and the US still face difficulties in trying to reach consensus on issues such as agricultural liberalization and protection of intellectual property rights in the FTAA.

The US and Brazil negotiators are expected to meet again in late March in another effort to move negotiations forward. In addition, the FTAA Trade Negotiations Committee (TNC) – which has not met since February 2004 – is expected to reconvene by April-May 2005.

ANALYSIS

I. Brazilian and U.S. Officials Attempt to Move the FTAA Agenda Forward

On February 22-23, 2005, acting USTR Peter Allgeier and his Brazilian counterpart Adhemar Bahadian held a meeting in Washington, D.C. in an effort to put the FTAA agenda back on track.

It appears that fundamental difficulties between the two major FTAA parties remain, given the fact that the meeting has not resulted in any concrete results. Brazil and the US have significant disagreements in areas such as agricultural products' liberalization and intellectual property rights, among others.

On the other hand, officials from both sides have declared that the meeting served to "narrow the differences" between the two countries in the Hemispheric negotiations.

According to press articles, Brazil's Adhemar Bahadian mentioned some of the main points of dispute between Brazil and the US in the FTAA negotiations, as follows:

- Brazil rejected a U.S. proposal from 2004 for a new category of agricultural products that would not have a set date for the elimination of duties. The two countries are negotiating a consensual formula to overcome their differences.

- Brazil opposes a U.S. proposal that would allow for cross-retaliation against legitimate businesses for IPR violations. Reportedly, the U.S. proposal for the FTAA contains more substantive commitments than the WTO TRIPs Agreement, especially concerning enforcement issues.

OUTLOOK

Although U.S. and Brazilian officials did not achieve concrete results, they described the February 22-23 FTAA co-chairs meeting as "constructive" and "positive." The next meeting is expected take place on March 29-30.

In other limited signs of movement, the FTAA TNC (Trade Negotiations Committee) is expected to reconvene by late April or early May 2005. The TNC has not held a meeting since February 2004 in view of the difficulties in the negotiating process.

NAFTA

NAFTA Leaders Announce Security and Prosperity Partnership of North America; Tri-national Think-Tank Urges Creation of New North American Community

SUMMARY

On March 23, President Bush, Canadian Prime Minister Paul Martin and Mexican President Vicente Fox met to discuss emerging challenges and urgent issues affecting NAFTA partners. The agenda focused on trilateral issues rather than the various bilateral disputes. Leaders agreed that security and prosperity of their nations are mutually dependent and complementary. In a joint statement North America leaders announced the establishment of the "Security and Prosperity Partnership of North America".

In anticipation of the trilateral summit, the Independent Task Force on the Future of North America released a report intended to stimulate discussion on improving cooperation on security and economic issues.

ANALYSIS

A trilateral meeting among President George Bush, Canadian Prime Minister Paul Martin and Mexican President Vicente Fox took place on March 23 at Baylor University, in Waco, Texas. The purpose of the meeting was to discuss emerging challenges and urgent issues affecting NAFTA partners. Leaders discussed border security and competitiveness in North America.

The trilateral meeting took place amidst a backdrop of bilateral tensions affecting U.S.-Canada and U.S.-Mexico relations, including the following.

- ***U.S.-Canada Relations:*** Canada announced that the country would not participate in the U.S. missile defense program, and trade disputes over softwood lumber and beef continue to irritate U.S.-Canada relations.

- ***U.S.-Mexico Relations:*** The Fox Administration has been strongly criticized on human right law enforcement and border enforcement (drug trafficking and corruption). In addition, Mexico is irritated by local anti-immigrant initiatives, such as the Minute Man Initiative.[23]

The agenda for the March meeting focused on trilateral issues, rather than the bilateral disputes. Leaders agreed that security and prosperity of their nations are mutually dependent and complementary.

[23] Initiative of the southwestern state of Arizona involving volunteers trying to spot illegal immigrants and report them to the Border Patrol.

I. NAFTA Leaders Announce Security and Prosperity Partnership of North America

In a joint statement North America Leaders announced the establishment of the "Security and Prosperity Partnership of North America".

As part of the initiative, North America leaders agreed to create a set of 12 ministerial-level working groups to discuss measurable and achievable goals and to identify concrete steps to achieve these goals. The ministerial-level working groups will report their findings in a 90-day period. The North American leaders will review the results of the working groups after 45 days, and the working groups will report again after six months of evaluation.

We highlight below some of the goals of the Security and Prosperity Partnership of North America:

a) Advance a common prosperity framework to promote growth, competitiveness and quality of life

b) Ensure compatibility of regulations and standards and eliminate redundant testing and certification requirements to minimize barriers

c) Enhance North America competitiveness by promoting cooperation in sectors such as autos, steel and other sectors identified through consultations

d) Strengthen North America's energy markets to increase reliable energy supplies for the region's needs and developments

e) Improve North America's markets access systems and work toward the freer flow of capital, goods and people

f) Develop North America's human capital by expanding partnerships in higher education, science and technology

g) Liberalize the requirements for obtaining duty-free treatment under NAFTA, including the liberalization of rules of origin, to lower the transaction costs of trade.

h) Enhance North American people's quality of life by working together to improve the environment, food safety and health.

The trilateral declaration is the first step North American leaders have taken to advance border security and economic prosperity in a new era of terrorism and global competition.

II. Tri-national Think-Thank Urges Creation of New North American Community

On March 14, the Independent Task Force on the Future of North America released a report that proposes the creation by 2010 of a community that enhance security, prosperity

and opportunities for NAFTA partners. The Task Force is a tri-national think-tank sponsored by the Council on Foreign Relations in association with the Mexican Council of Foreign Relations and the Canadian Council of Chief Executives.

Former Canadian Deputy Prime Minister John Manley, former Mexican Finance Minister Pedro Aspe and former Governor of Massachusetts and Assistant US Attorney General William Weld, lead the Task Force.

The report highlights three common challenges NAFTA partners are facing that could impact the commercial relationship:

a) Shared security threats;

b) Shared challenges to enhance North America competitiveness; and

c) Shared interest in broad-based development.

The report recommends the following:

1. Implementation of a **North American Advisory Council** to convey energy and ideas for a North America annual leaders summit.

2. **A Tri-national Border Action Plan for Border Management** that involves:

a) Harmonization of policies that apply to nationals of non-NAFTA countries and the creation of a North American border pass to allow smoother travel for legitimate travelers

b) Establishment of pre-clearance procedures at all major entry points

c) Expansion of border infrastructure and agreement on a joint border infrastructure management

d) Creation of a trilateral environment of trust that enhances law enforcement cooperation and expands defense cooperation.

3. Adoption of **a common external tariff** on a sector-by-sector basis and establishment of **a permanent dispute settlement structure** that enhances the North America region's ability to compete.

4. Stimulation of economic growth in Mexico by establishment of a **North American Investment Fund** for infrastructure and human capital investment that improves the region's future competitiveness.

5. Development of a **North American energy and natural resource security strategy.**

6. Creation of a **North America educational-exchange network.**

The Task Force could stimulate debate and encourage the emergence of a constituency that would drive a new North America agenda.

OUTLOOK

The United States is pushing for the need to strength cooperation against terrorism, drug-trafficking and illegal immigration. Additionally, there is a perception that after 11 years, NAFTA needs to be reenergized. NAFTA partners recognize that, despite bilateral tensions, there are many areas of trilateral cooperation to pursue.

NAFTA partners will establish a set of ministerial working groups to identify sectors in which they can collaborate to deepen integration and obtain full advantage of trilateral cooperation. NAFTA partners agreed on cooperative measures to address challenges and urgent issues, and leaders will evaluate recommendations made by the Independent Task Force on the Future of North America.

MULTILATERAL

Appellate Body Rules US Cotton Subsidies Inconsistent With WTO

SUMMARY

The WTO Appellate Body has ruled that U.S. cotton subsidies violate the obligations of the United States under the Agreement on Agriculture and the Agreement on Subsidies and Countervailing Measures (SCM Agreement). The Appellate Body found that the U.S. subsidies caused "serious prejudice" to Brazil. The U.S. measures also violated the WTO prohibitions against export subsidies and import substitution subsidies. Indeed, the Appellate Body ruled against the United States on virtually every major interpretive issue.

I. U.S. Subsidies Fail to Qualify as Exempt "Green Box" Measures under "Peace Clause"

Both the Appellate Body and Panel determined that the conditions set out in the so-called “Peace Clause” in Article 13 of the WTO Agreement on Agriculture had not been met, and thus the U.S. measures were not exempt from Brazil's challenges under the SCM Agreement.

The Peace Clause provided that during the nine-year "implementation period" that began in 1995, certain domestic support measures and export subsidies for agricultural products were exempt from challenge, as long as certain preconditions were met. During this period, if all of the conditions of the Peace Clause were fulfilled, the agricultural subsidies were exempt from being challenged in WTO dispute settlement. Brazil argued that the United States had not complied with the conditions in the Peace Clause, and that therefore the exemption did not apply. Both the Panel and the Appellate Body agreed with Brazil on this critical threshold issue.

Article 13(a) of the Agreement on Agriculture protected so-called "green box" measures. It provided, among other things, that domestic support measures that met all of the conditions for "green box" support were exempt, during the implementation period, from being challenged as "actionable subsidies" under the SCM Agreement. The Appellate Body agreed that certain U.S. subsidies (production flexibility contract payments and direct payments) failed to meet the conditions provided for in Article 13, and therefore could not be considered as valid "green box" measures.

In order to qualify for the "green box" exemption, the measures had to be limited to "decoupled income support", i.e., the amount of the payments could not be related to "the type or volume of production...undertaken by the producer...." The Appellate Body found that the U.S. payments were not "decoupled", and therefore were not entitled to be exempted as "green box" measures. Therefore, the "Peace Clause" did not protect these U.S. measures from challenge under the SCM Agreement.

In addition, Brazil argued that the U.S. domestic support measures did not comply with a key condition of the Peace Clause, that "such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year." The United States argued that "support to a specific commodity" meant "product-specific support", i.e.

support targeted to a specific commodity rather than made available through a more general subsidy program.

The Appellate Body rejected this argument, saying that "support to a specific commodity" is broader than "product-specific support." In the view of the Appellate Body, there would be "support to a specific commodity" as long as there was a "discernable link" between the measure and the specific commodity concerned. Applying this test to the impugned U.S. measures, the Appellate Body concluded that the U.S. payments granted support to a specific commodity, cotton. Moreover, the U.S. domestic support measures granted support to cotton in excess of that decided during the 1992 marketing year.

II. Actionable Subsidy Claim May Arise Where there is "Serious Prejudice"

The Appellate Body then turned to Brazil's SCM claims. Part III of the SCM Agreement sets out the disciplines applicable to actionable subsidies. Article 5 provides that "[n]o Member should cause, through the use of any subsidy...adverse effects to the interests of other Members...." Article 5(c) lists, as one such adverse effect, "serious prejudice to the interests of another Member." Article 6.3(c), in turn, states that "serious prejudice" may arise where "the effect of the subsidy" is "significant price suppression...in the same market."

A. "Same Market" Can Include World Market

Before examining whether the effect of U.S. subsidies was "significant price suppression...in the same market," the Appellate Body first had to determine the meaning of the term "same market." The United States argued that this phrase required the identification of a particular domestic market of a Member. By contrast, Brazil argued that the term could encompass an individual country, region, or a world market.

The Appellate Body agreed with the Panel that the drafters of the SCM Agreement did not intend to confine the market to be examined to any particular area. It said that the ordinary meaning of the word market "neither requires nor excludes the possibility of a national or a world market." Consequently, the Appellate Body concluded that two products may be "in the same market" even if they were not necessarily sold at the same time and in the same place or country. The Appellate Body said that it was for the complaining party to identify the market where it alleged significant price suppression, and to establish that this market existed. Depending on the facts of the case, the "same market" could be the "world market."

B. Significant Price Suppression: "No Legal Error in Panel's Causation Analysis"

The Panel had cited "four main, cumulative grounds" why it believed that a causal link existed between the U.S. subsidies and the significant price suppression:

- The United States exerts a substantial proportionate influence in the world upland cotton market, flowing from the magnitude of U.S. production and export of cotton;

- Several U.S. subsidies are directly linked to world prices for cotton, thereby insulating U.S. producers from low prices;

- There was a "discernable temporal coincidence" of suppressed world market prices and the price-contingent U.S. subsidies; and

- There was credible evidence on the record concerning the divergence between the U.S. total costs of production and revenue from sales of cotton. In the view of the Panel, this supported the proposition that U.S. cotton producers would not have been economically capable of remaining in production had it not been for the subsidies, and the effect of the subsidies was to allow U.S. producers to sell cotton at a price lower than would otherwise have been necessary to cover their total costs.

On the basis of these four factors, taken together, the Panel found that there was a causal link between the U.S. price-contingent subsidies at issue and the significant price suppression. However, the Panel found that no such causal link had been established for the non-price contingent subsidies.

The Appellate Body noted that causation requirements are not expressly provided for in an examination of serious prejudice under Articles 5(c) and 6.3 of the SCM Agreement, and therefore a panel had "a certain degree of discretion" in selecting an appropriate methodology for determining whether the effect of a subsidy is significant price suppression. At the same time, the Appellate Body said that it was necessary to ensure that the effects of other factors on prices were not improperly attributed to the challenged subsidies.

The Appellate Body reviewed the four factors relied upon by the Panel, and upheld the Panel's causation determination. The Appellate Body's finding on this issue derived in large part from its reluctance to second-guess the Panel on factual issues. The Appellate Body stressed that "unlike in certain other instances under the WTO agreements, a panel conducting an analysis under Article 6.3(c) is the first trier of facts, rather than a reviewer of factual determinations made by a domestic investigating authority." For this reason, the Appellate Body underlined "the responsibility of panels in gathering and analyzing relevant factual data and information in assessing claims under Article 6.3(c) in order to arrive at reasoned conclusions." The Appellate Body chided the Panel for not providing a more detailed explanation of its analysis of the complex facts and economic arguments. Nonetheless, in light of the Panel's extensive review of the voluminous evidentiary record, it said that it found "no legal error in the Panel's causation analysis."

C. Determining Effect Of The Subsidy: A "Precise, Definitive Quantification" is Not Required

The Appellate Body stated that the text of Article 6.3(c) did not state explicitly that a panel needed to quantify the amount of the challenged subsidy. However, in examining whether "the effect of the subsidy" is significant price suppression, ultimately constituting serious prejudice, the Appellate Body said that a panel would need to consider the effect of the subsidy on prices. It added that the "magnitude of the subsidy" was an important factor in this analysis, as a "large subsidy that is closely linked to prices of the relevant products is likely to have a greater impact on prices than a small subsidy that is less closely linked to prices." Similarly, "the smaller the subsidy for a given product, the smaller the degree to which it will affect the costs or revenue of the recipient, and the smaller its likely impact on the prices charged by the recipient for the product." However, the size of the subsidy was

only one factor that could be relevant in determining the effects of the subsidy, and a panel needed to take into account "all relevant factors."

The Appellate Body rejected the U.S. argument that the methodologies in the countervailing duty section of the SCM Agreement provided "relevant context" for the interpretation of Articles 5(c) and Article 6.3(c). The Appellate Body reasoned that under the countervailing duty provisions of the Agreement, the amount of the subsidy must be calculated, because countervailing duties cannot be levied in excess of that amount. By contrast, under the serious prejudice provisions of the Agreement, the remedy envisaged is withdrawal of the subsidy, or removal of the adverse effects. The Appellate Body said that such a remedy "is not specific to individual companies" but "targets the effects of the subsidy more generally." Therefore, there was no need for a "precise quantification of the subsidies at issue."

The Appellate Body concluded that in a claim under Article 6.3(c), a panel "should have regard to the magnitude of the challenged subsidy and its relationship to prices of the product in the relevant market when analyzing whether the effect of the subsidy is significant prices suppression." It acknowledged that in many cases, it may be difficult to decide this in the absence of such an assessment. However, it stressed that a "precise, definitive quantification of the subsidy is not required."

III. "World Market Share": Appellate Body Declines to Rule

Article 6.3(d) states that "serious prejudice" may also arise where the effect of the subsidy is "an increase in the world market share" of the subsidizing Member in a particular subsidized primary product.

The Panel rejected Brazil's argument that the phrase "world market share" referred to the world export market, and accepted the U.S. view that it encompassed all consumption of upland cotton, including consumption by a country of its own cotton production. The Panel stressed that the actionable subsidies disciplines of the SCM Agreement were not limited to export subsidies, but rather related generally to subsidies that affect production. The Panel said that this included subsidies that may incidentally facilitate or promote exportation, as well as subsidies that promote production itself, whether or not exportation of such production necessarily resulted.

Therefore, the Panel read the phrase "world market share" in a manner that took into account both production and export. Accordingly, the Panel found that the phrase "world market share" referred to "the share of the world market *supplied* by the subsidizing Member of the product concerned." As Brazil's arguments focused on what the Panel called a "different and erroneous" legal interpretation of the phrase, the Panel said that Brazil had not established a violation.

The Appellate Body declined to rule on Brazil's cross-appeal on this issue, saying that a ruling under Article 6.3(d) would not impose any additional obligations on the United States regarding implementation, and there was thus no "compelling reason" for the Appellate Body to decide this issue.

A. Serious Prejudice to Sub-Saharan Africa: Appellate Body "Not in a Position to Accede to Benin and Chad's Request"

The Appellate Body similarly declined to make a finding that two third party sub-Saharan African cotton exporters, Benin and Chad, also sustained serious prejudice as a result of the U.S. increase in world market share. These two African countries argued that if the Appellate Body were to find that the United States increased its world market share of exports under Article 6.3(d), then a logical corollary of that must be that the U.S. increased its market share at the expense of other Members. There were undisputed facts on the record that Francophone Africa (including Benin and Chad) had suffered a 20% drop in exports over the same period in which the U.S. world export share for cotton had increased sharply. Benin and Chad argued that this provided a sufficient factual basis for the Appellate Body to conclude that, at a minimum, Benin and Chad had indeed lost market share to the United States, and had therefore suffered serious prejudice within the meaning of Article 6.3(d).

The Appellate Body did not accede to this request, reasoning that "[a]s we do not find it necessary to rule on Brazil's appeal regarding the interpretation of the phrase 'world market share' in Article 6.3(d), we therefore are not in a position to accede to Benin and Chad's request to complete the analysis and to find that, in addition to Brazil, Benin and Chad also have suffered serious prejudice to their interests in the sense of Articles 6.3(d) and 5(c) of the SCM Agreement."

IV. U.S. Violation of Rules on Import Substitution Subsidies

Article 3.1(b) of the SCM Agreement prohibits import substitution subsidies, i.e., "subsidies contingent...upon the use of domestic over imported goods." The Panel had found that the U.S. "user marketing" or so-called "Step 2" payments made the use of U.S. domestically-produced cotton a condition for obtaining the subsidy, in violation of Article 3.1(b). The United States argued on appeal that Article 3.1(b) of the SCM Agreement did not apply to payments that were consistent with the domestic support reduction commitments under the Agreement on Agriculture. The Appellate Body rejected this interpretation, saying that although Members may provide domestic support that is consistent with their reduction commitments under the Agreement on Agriculture, they must comply with their other WTO obligations, including the prohibition against import substitution subsidies.

V. U.S. Violation of Rules on Export-Contingent Subsidies

Article 9.1 of the Agreement on Agriculture provides that export subsidies subject to reduction commitments include subsidies "contingent on export performance." The United States asserted that its "Step 2" subsidies should not be considered as export-contingent, because they also provided payments to domestic users. The Appellate Body rejected this argument, stressing that "the fact that the subsidy is also available to domestic users of upland cotton does not 'dissolve' the export-contingent nature of the Step 2 payments to exporters." Thus, the Step 2 payments were found to violate the prohibited export subsidy disciplines of both the Agreement on Agriculture and the SCM Agreement.

VI. Export Credit Guarantees: Appellate Body Divided over Disciplines

The United States argued that Article 10.2 of the Agreement on Agriculture exempted export credit guarantee programs from export subsidy disciplines. Article 10.2 provides that:

> Members undertake to work toward the development of internationally agreed disciplines to govern the provision of export credits, export credit guarantees or insurance programmes and, after agreement on such disciplines, to provide export credits, export credit guarantees or insurance programs only in conformity therewith.

The (two-person) majority view in the Appellate Body was that this provision did not currently exclude export credit guarantees from the export subsidy disciplines of the Agreement on Agriculture. They said that Article 10.2 did not include express language indicating that it was intended as an exception, nor did it expressly state that the application of export subsidy disciplines to export credits or export credit guarantees was "deferred."

One unnamed Appellate Body member dissented, arguing that a "specific provision that calls on Members to 'work toward the development' of disciplines strongly suggests to me that disciplines do not yet exist." The dissenting opinion expressed the view that export credit guarantees, export credits and insurance programs are not currently subject to export subsidy disciplines.

VII. Brazil's "Threat" Claim Not Accepted

Article 10.1 of the Agreement on Agriculture is the so-called "anti-circumvention" provision. It provides in part that:

> Export subsidies not listed in paragraph 1 of Article 9 shall not be applied in a manner which results in, or which *threatens to lead to*, circumvention of export subsidy commitments.... [emphasis added]

Brazil had argued that a number of the U.S. measures posed a "threat of serious prejudice" under the SCM Agreement and the GATT. In Brazil's view, the U.S. subsidies threatened to cause serious prejudice to Brazil's interests during the 2003 through 2007 marketing years, including the threat of significantly suppressed cotton prices, the threat of an increasing U.S. share of the world market for cotton, and the threat that the United States would continue to have more than an equitable share of world export trade.

The Appellate Body said that "based on its ordinary meaning, the phrase 'threaten[] to lead to...circumvention' would imply that export subsidies are applied in a manner that is 'likely to' lead to circumvention of a WTO Member's export subsidy commitments. Furthermore, we observe that the ordinary meaning of term 'threaten' refers to a *likelihood* of something happening; the ordinary meaning of 'threaten' does not connote a sense of certainty [original emphasis]." For this reason, the Appellate Body overruled the Panel's interpretation of the phrase "threatens to lead to...circumvention" as requiring "an unconditional legal entitlement" to receive the export subsidies as a condition for a finding of threat of circumvention.

However, the Appellate Body said that it was not persuaded by the arguments put forward by Brazil that the U.S. export credit guarantee programs were applied in a manner that threatened to lead to circumvention of U.S. export subsidy commitments. It said that "the fact alone that exports of certain products are eligible for export credit guarantees is not sufficient to establish a threat of circumvention." Therefore (with modified reasoning), it upheld the Panel's finding that Brazil had not established that the export credit guarantee programs were generally applied to scheduled agricultural products (other than one product,

rice) and other unscheduled products in a manner that threatened to lead to circumvention of U.S. export subsidy commitments.

VIII. Procedural Issues

Expired measures can be challenged: The United States argued that expired measures could not be included in a request for consultations or a request for a panel. The Appellate Body disagreed, saying it would not advance the purpose of consultations to exclude automatically "measures whose legislative basis may have expired, but whose effects are alleged to be [currently] impairing the benefits accruing to the requesting Member under a covered agreement." If the effect of the expired measure remained in dispute following consultations, the complaining party could request a panel to examine it. This was particularly important in subsidies cases, because "[i]f expired measures underlying past payments could not be challenged in WTO dispute settlement proceedings, it would be difficult to seek a remedy for such adverse effects."

Panels should not consider what happens in consultations: The United States argued Brazil's Panel Request had expanded the product scope of its challenge to include other products, in addition to cotton. The Appellate Body found that the request for consultations did in fact include other agricultural commodities. However, it expressed its disapproval of the fact that the Panel "looked first at what actually happened in the consultations." The Appellate Body recalled that consultation are confidential, and are without prejudice to the rights of Members in further proceedings. Moreover, there is no public record of the consultations, and the Appellate Body noted that "parties will often disagree about what, precisely, was discussed." At the same time, it reaffirmed its earlier rulings that there need not be a "precise and exact identity" between the measures that were the subject of consultations, and the measures identified in the panel request.

The decision of the Appellate Body in *United States - Subsidies on Upland Cotton* was released on March 3, 2005. The appeal was heard by Merit Janow (United States), Luiz Baptista (Brazil) and A.V. Ganesan (India).

OUTLOOK

The Appellate Body decision in this high-profile and contentious dispute is extremely important for both commercial and legal reasons. Moreover, it will probably have implications for current negotiations in the Doha Round on agricultural reform.

As a commercial matter, the Appellate Body has ruled against a multi-billion dollar U.S. subsidy program that has consistently distorted world cotton prices. Although this complaint was brought by Brazil, the ruling against U.S. subsidies will benefit all cotton-exporting WTO Members, including the fragile economies of sub-Saharan Africa. Indeed, according to uncontradicted evidence before the Panel, the subsidies paid by the United States to its relatively prosperous 25,000 cotton farmers exceed the entire gross national income of virtually every cotton-exporting country in West and Central Africa. All such countries would gain substantially from the removal or the diminution of the massive U.S. subsidies.

As a legal matter, the Appellate Body's decision has clarified a number of the key disciplines under the SCM Agreement, particularly for actionable subsidies. The *Cotton*

decision can be used as a precedent to challenge the subsidies - and not just agricultural subsidies - of the United States, the EU and other WTO Members.

Probably the most important aspect of the Appellate Body's decision was its ruling that serious prejudice claims do not require a "precise quantification" of the amount of the challenged subsidies. The Appellate Body said that a panel should have regard to the "magnitude" of the subsidy, and its relationship to prices in the market, but that a "precise, definitive quantification of the subsidy is not required." This means that successful serious prejudice claims will be significantly easier than if the challenger had to identify the exact amount of the subsidy.

At the same time, the standard set out by the Appellate Body - that a Panel should have regard to all relevant facts, including the "magnitude" of the subsidy - is somewhat nebulous. In future cases, it may be difficult to predict with certainty which subsidy programs, or unquantified payments, would be of a sufficient "magnitude" to be considered as WTO-inconsistent.

In the *Cotton* case, the Panel had an ample evidentiary basis on which it could, in fact, have calculated the amount of the impugned subsidies. Although the Appellate Body has made clear that quantification is not required, future Panels may nevertheless choose to quantify the subsidy, where it is possible to do so, as evidence that the magnitude of the subsidy rendered it WTO-inconsistent.

This decision included a dissenting opinion, the first such dissent in the history of the Appellate Body. The dissent related to one specific issue, whether export credit guarantees programs were currently subject to export subsidy disciplines. The Appellate Body has traditionally sought to avoid dissenting opinions, out of concern that a dissent could detract from the overall authority of the decision. In the present case, the short dissent on this discrete issue does not, in fact, diminish the clear and convincing ruling of the Appellate Body on the WTO-inconsistency of the U.S. subsidies.

The emergence of a dissenting opinion is another sign of the increasing judicialization of the WTO in general, and the Appellate Body in particular. Dissenting opinions are of course common occurrences in many national-level appeal courts. Moreover, dissenting opinions can later form the basis for a court to overrule one of its earlier decisions. The Appellate Body has never expressly overturned one of its decisions, although this could be the next step in the evolution of this tribunal.

That said, the Appellate Body will continue to work towards unanimous opinions in the future, as it has done in the past. While an informal rule against dissenting opinions has now been broken, dissenting views in the Appellate Body will very likely remain very much the exception.

As for the Doha Round, the decision could have significant implications for ongoing negotiations on reform of agricultural subsidies, and the work of the Subcomittee on Cotton. The decision is likely to pressure the United States to expedite reforms in the sector, and possibly for other Members like the EU that subsidize commodities including cotton. Coincidentally, the decision was released during the “mini-Ministerial” meeting of about 30 trade ministers and senior officials in Mombasa, Kenya. At the meeting, Brazil and African

countries urged the United States – as a sign of commitment to the Round – to eliminate all subsidies to cotton by the Hong Kong Ministerial this December.

Returning to specifics of the *Cotton* case, the United States must withdraw its prohibited subsidies by July 1, 2005. Implementation dates for the other violations (under the actionable subsidies provisions of the SCM Agreement, and the Agreement on Agriculture) remain to be determined. However, implementation of this decision could well become as contentious as the litigation itself.

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WTO Panel Issues Mixed Decision on EC Regulations Governing Geographical Indications

SUMMARY

On March 15, 2005, a WTO Panel released a mixed decision in the challenge by the United States and Australia to EC rules governing so-called "geographical indications" (GIs). GIs identify a product with a particular region, such as Florida oranges, Parma ham, or Darjeeling tea.

The Panel ruled that the EC Regulation on GIs violated the national treatment obligations of the EC under the WTO *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS), largely because it accorded national treatment only on a reciprocal basis. However, the Panel rejected the portion of the complaint based on the trademarks provisions of TRIPS. Although the Regulation was found to violate WTO trademarks disciplines, it was nevertheless saved as a "limited exception" to trademark rights.

ANALYSIS

I. WTO Panel Releases Mixed Decision on EC Rules Governing Geographical Indications

On March 15, 2005, a WTO Panel released a decision on *European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuff*s, following a challenge by the United States and Australia.[24]

The Panel's report was divided into two main parts: national treatment and trademarks. Under the national treatment disciplines of TRIPS, each WTO Member is required to accord to the nationals of other Members "treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property." Under the challenged EC Regulation, the availability of protection within the EC for GIs located in third countries was contingent on the third country giving "guarantees identical or equivalent" to the EC. The Panel rejected the notion that national treatment obligations can be conditioned on reciprocity, and had little difficultly in finding these provisions of the EC measure to be WTO-inconsistent.

The Panel also agreed that the EC Regulation violated the exclusive trademark rights provided for in TRIPS with respect to the "coexistence of GIs with prior trademarks." However, the Panel ruled that the EC measure could be justified as a "limited exception" to the rights conferred by trademark. Therefore, this portion of the EC Regulation was ultimately upheld.

[24] WT/DS174/R

II. Panel Rules That EC Rules Violate National Treatment Obligations under WTO

A. Availability of Intellectual Property Protection: "Equivalence and Reciprocity" Conditions Violate National Treatment Obligations

The impugned EC Regulation contained two sets of procedures for the registration of GIs for agricultural products and foodstuffs, depending on whether the names of the geographical areas were located inside or outside the EC. The Panel agreed with the complainants that the availability of protection within the EC for GIs located in third countries was contingent on the third country giving "guarantees identical or equivalent" to the EC, and the willingness of the third country to provide protection "equivalent" to that available in the EC. Indeed, the Panel quoted a statement by the EC to the TRIPS Council that "the EC register on GIs for foodstuffs does not allow the registration of a foreign GI unless it is determined that a third country has an equivalent or reciprocal system of GI protection." The Regulation also provided that the European Commission could determine whether a third country "satisfies the equivalence conditions."

Article 3.1 of TRIPS provides in part that each WTO Member must accord to the nationals of other Members "treatment no less favourable than that it accords to its own nationals with regard to the protection of intellection property." The Panel noted that this obligation applied to "nationals" and not products. It also stated that this provision required the "effective equality of opportunities" between EC nationals and the nationals of other WTO Members with regard to the protection of intellectual property rights.

Applying this test, the Panel found that the EC Regulation modified the effective equality of opportunities to obtain intellectual property protection in two ways. First, GI protection was unavailable under the Regulation for geographical areas in third countries that the Commission had not recognized as providing equivalent protection. Second, GI protection could become available under the Regulation if the third country either entered into an international agreement with the EC, or satisfied the "equivalence conditions." In the view of the Panel, both of these conditions represented a significant "additional hurdle" in obtaining GI protection that did not apply to geographical areas located within the EC. The Panel added that the "significance of the hurdle" was reflected in the fact that no third country had either entered into such an agreement, or satisfied the equivalence conditions.

The Panel examined what it called the "fundamental thrust and effect" of the Regulation and concluded that the equivalence and reciprocity conditions "modify the effective equality of opportunities" to the detriment of those wishing to obtain intellectual property protection in respect of geographical areas in third countries. The Panel said that this was constituted less favourable treatment. The Panel also pointed to the close link between nationality, on the one hand, and residence and establishment, on the other.

Therefore, with respect to the equivalence and reciprocity conditions, the Panel concluded that the EC Regulation accorded to nationals of other Members treatment less favourable than that it accorded to EC nationals, in violation of Article 3.1 of TRIPS.

B. Violation of GATT National Treatment Obligations: EC Regulation "Formally Discriminates" Against Imports

The Panel also found that the Regulation violated the national treatment obligations of the EC under GATT Article III:4, which provides that imported products "shall be accorded treatment no less favourable than that accorded to like products of national origin."

The Panel reaffirmed that the protection of names of products from other WTO Members was contingent on satisfaction of certain conditions of equivalence and reciprocity that did not apply to the names of products from the EC. Therefore, the Panel concluded that the Regulation "formally discriminates" between imported products and EC like products, in breach of GATT Article III:4.

C. Application Procedures: "Extra Hurdles" are WTO-Inconsistent

The Panel found that the application procedures for GI protection also breached the obligations of the EC under Article 3.1 of TRIPS and Article III:4 of GATT.

Under the Regulation, any application relating to a GI within the EC may be filed directly with an EC member State. However, an application relating to a GI located in a third country cannot be filed directly, but must be filed with its own government. If that third country government considers that the requirements of the EC Regulation have been met, it forwards the application to the European Commission. The Panel noted that under EC law, each EC member State was obligated to establish application procedures for the purpose of the Regulation, to examine applications for GI registration, and, if the application were justified, to forward it to the Commission. By contrast, a third country government is of course under no obligation under EC law to examine an application or to transmit it to the EC.

The Panel said that applicants for GIs in third countries thus faced an "extra hurdle" that applicants in the EC did not face. Each such "extra hurdle", according to the Panel, "significantly reduces the opportunities available to the nationals of other WTO Members in the acquisition of rights under the Regulation below those available" to EC nationals. Therefore, the Regulation accorded to the nationals of other WTO Members treatment less favourable than that accorded to EC nationals, inconsistently with TRIPS Article 3.1.

D. EC Defence of "Necessity" Rejected

The Panel found that insofar as the Regulation required examination and transmission of applications by third country governments, it accorded less favourable treatment to imported products than to like domestic products, in violation of GATT Article III:4. The Panel rejected the EC argument that its measure was justified under GATT Article XX(d) as "necessary" to secure compliance with GATT-consistent laws. The EC had argued that the requirements of examination and transmission of applications by third country governments secured compliance with the Regulation. However, Article XX(d) only applies to measures that are necessary to secure compliance with GATT-*consistent* laws. As the Panel had already found the Regulation to be GATT-*inconsistent*, the EC could not avail itself of the defence under Article XX(d). The Panel also stated that "it is not clear to what extent examination by governments, including third country governments, contributes to securing compliance with the conditions for registration."

E. Objection and Inspection Procedures also Violate National Treatment Obligations

The Panel found that the procedures relating to the verification and transmission of objections were also WTO-inconsistent. EC nationals have a direct means to object to a registration, while non-EC nationals have to file an objection with the authorities of the third country. The Panel ruled that objectors in third countries faced another "extra hurdle" in ensuring that the authorities in their own countries forward the objection to the Commission. The Regulation therefore accorded to the nationals of other Members less favourable treatment than the EC's own nationals, inconsistently with Article 3.1 of TRIPS.

The EC Regulation also requires EC member States to ensure that inspection structures are in place. One of the conditions for the registration of GIs located outside the EC is a declaration by the third country government that inspection structures have been established. If the third country government does not establish such inspection procedures, the GI located outside the EC cannot be registered with the Commission.

The Panel said that applicants for GIs in third countries therefore did not have a right to the availability of protection and application procedures provided to applicants for GIs located within the EC. This "extra hurdle" accorded less favourable treatment to nationals of other WTO Members, in violation of the obligations of the EC under Article 3.1 of TRIPS.

The inspection procedures were also inconsistent with the GATT. The Panel recalled that non-registration of GIs would lead to a "failure of the products from those third countries to obtain the benefits of registration" set out in the Regulation. Therefore, the Regulation accorded less favourable treatment to imported products than to like domestic products, inconsistently with GATT Article III:4.

The Panel rejected the EC's argument that the Regulation's provision on inspection could be justified under GATT Article XX(d), largely for the same reasons noted above. Article XX(d) related to securing compliance with GATT-consistent laws, but the Regulation had already been found to be GATT-inconsistent. The Panel also found that the Regulation could not be considered as "necessary" under Article XX(d), because GATT-consistent measures were available to secure compliance. The Panel noted that in other areas, such as technical regulations, exporters may have inspections conducted either by notified bodies within the EC, or by bodies located outside the EC through mutual recognition agreements. By contrast, the EC Regulation on GIs required the participation of governments. The Panel stated that the EC had not explained "what aspect of GI protection distinguishes it from these other areas and makes it necessary to require government participation."

III. Panel Rules That EC Rules Do Not Violate Trademark Disciplines under WTO

A. Provisional Violation of Trademark Disciplines of TRIPS

The complainants argued that the EC Regulation violated Article 16.1 of TRIPS because it did not ensure that a trademark owner may prevent uses of GIs that would result in a likelihood of confusion with a prior trademark. Article 16.1 provides that the owner of a registered trademark has the exclusive right to prevent all third parties not having the owner's consent from using identical or similar signs for goods "which are identical or similar to

those in respect of which the trademark is registered where such use would result in a likelihood of confusion."

The Panel made a number of critical threshold determinations as to the relatively narrow scope of the impugned provision. It found that:

- The provision required GI registration to be refused where it would be "liable to mislead the consumer as to the true identity of the product." The Panel stressed that, "[t]his is limited to liability to mislead as to a single issue, and not with respect to anything else."

- The provision prohibited registration "in light of a trade mark's reputation and renown and the length of time it has been used." Thus, as the Panel noted, the scope of the provision was "limited to a subset of trademarks which, as a minimum, excludes trademarks with no reputation, renown, or use." It did not prevent the registration of a GI on the basis that its use would affect any prior trademark "outside that subset."

- The standard in the provision that registration would "mislead the consumer as to the true identity of the product" was "intended to apply to a narrower set of circumstances than the trademark owner's right to prevent use that would result in a likelihood of confusion."

Turning to Article 16.1, the Panel ruled that "Members are required to make available to trademark owners a right against certain uses, including uses as a GI" and the Regulation "limits the availability of that right."

B. EC Violation Of Trademark Upheld As "Limited Exception"

The Panel accepted the EC's argument that this portion of the Regulation could be justified as an exception under Article 17 of TRIPS. Article 17 provides that "Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties." The Panel considered this defence within the context of what it called the "regime of coexistence" between GIs and prior trademarks.

The Panel noted that the term "limited exceptions" in TRIPS Article 17 "emphasizes that the exception must be narrow and permit only a small diminution of rights." In the view of the Panel, there were a number of reasons why the EC Regulation met this test. The Panel stated that "it curtails the trademark owner's right in respect of certain goods but not all goods identical or similar to those in respect of which the trademark is registered." It curtailed the trademark owner's right against certain third parties, but not "all third parties." It similarly "curtails the trademark owner's right in respect of certain signs", although not "all signs identical or similar to the one protected as a trademark."

Thus, the Panel concluded that "not only may the trademark continue to be used, but that the trademark owner's right to prevent confusing uses is unaffected except with respect to the use of a GI as entered in the GI register in accordance with its registration." The Panel said that the scope of the EC regulation fell "far short" of that which had been claimed by the United States and Australia. Therefore, the Regulation constituted a "limited exception"

within the meaning of Article 17 of the TRIPS Agreement. The Panel also ruled that the Regulation took account of the legitimate interests of trademark owners and third parties, including consumers.

Thus, the Panel ruled that although the Regulation was inconsistent with Article 16.1, it was justified as an exception under Article 17. Therefore, the WTO-consistency of this portion of the Regulation was upheld.

C. Other Issues

On a number of other claims raised by the United States and Australia, the Panel either exercised judicial economy, found that a prima facie case had not been made, or rejected the claims.

OUTLOOK

The panel decision is the first time that a WTO Panel has ruled on the intellectual property rights of Geographical Indications ("GIs"), which the TRIPS Agreement defines as "indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin." The intellectual property rights that are - or should be - accorded to GIs has long been one of the most difficult and contentious issues in the WTO, particularly in the ongoing trade negotiations in the Doha Round.

The Panel's national treatment analysis is sound, and is consistent with the broad, purposeful approach that has been taken by earlier Panels. However, the Panel's ruling on trademarks is questionable. The EC Regulation confers a positive right to use a GI that, in certain circumstances, prevents a trademark owner from exercising its trademark rights against a registered GI. The Panel agreed that the Regulation violated the exclusive trademark rights provided for in TRIPS with respect to the "coexistence of GIs with prior trademarks." However, the Panel ruled that the EC measure could be justified as a "limited exception" to the rights conferred by trademark. Therefore, this portion of the EC Regulation was ultimately upheld.

In determining the scope of the "limited exceptions" permitted by TRIPS, the Panel adopted the test enunciated by the 2000 *Canada - Pharmaceuticals* Panel that the "exception must be narrow and permit only a small diminution of rights." Although the Panel correctly articulated the test, its application of the law to the EC measure raises doubts. The Panel stressed that the EC Regulation curtailed the rights of the trademark owner with respect to certain goods, third parties, and signs, but not "all goods", "all third parties" and "all signs." However, the fact that the EC Regulation does not apply in "all" situations does not necessarily lead to the conclusion that the infringement of trademark is "limited." The EC's violation of the rights enjoyed by prior trademarks was arguably not "narrow", or limited to a "small diminution of rights."

One of the difficulties faced by the complainants in this case was the manner in which the Panel characterized the scope of the EC Regulation. The Panel found that the EC measure applied in relatively narrow circumstances, and this was the basis for its subsequent ruling that the EC's violation of trademark was "limited." The Panel's determinations on the scope of the EC law will be considered as findings of fact, which will complicate any

appeal that may be made by the United States and Australia. A successful appeal may need to be premised on the argument that even if the EC law only applies in the manner determined by the Panel, the violation of trademark nevertheless goes beyond the "small diminution of rights" permitted under the Agreement.

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

Mini-Ministerial Meeting in Kenya Sets Targets for WTO Hong Kong Ministerial; Other Doha Round Negotiations Proceed Apace

SUMMARY

On March 2-4, 2005, ministers and senior trade officials from 30 WTO Members gathered at a 'mini-ministerial' conference in Mombasa, Kenya in an effort to move negotiations forward on the Doha Round. Participants indicated that the meetings were useful in setting a work plan to decide on time frames and modalities for agricultural and non-agricultural market access ("NAMA"), and to encourage progress in other negotiations.

Meanwhile, Members made some progress on the Doha agenda in recent Geneva meetings. During the February round of services negotiations, Members reviewed several new offers and encouraged the tabling of improved offers by the May deadline. Overall, Members aim to conclude a 'first approximation of modalities' for agriculture and NAMA negotiations by the end of July 2005 in order to prepare for the Hong Kong Ministerial Conference in December 2005.

ANALYSIS

I. Mombasa "Mini-Ministerial" Sets Targets for Hong Kong; Geneva Meetings Make Progress in Certain Technical Areas

Ministers and senior trade officials from about thirty WTO Members attended a "mini-Ministerial" conference in Mombasa, Kenya from March 2-4, 2005, in an effort to add political momentum to the Doha Round. Participants at the conference agreed that by the end of July 2005, they would aim to define "approximations" on negotiating modalities for agriculture, NAMA and other issues.

Meanwhile in Geneva, the various negotiating groups and working bodies met recently on agriculture, NAMA, services, trade facilitation, rules, intellectual property and other matters. We discuss their recent deliberations.

A. Agriculture: Attempt to Define Modalities; Handling the Cotton Issue

1. <u>AVEs, Sectoral Initiatives, Export Taxes, GIs and Domestic Support</u>

WTO Members aim to establish outlines on "comprehensive and balanced" modalities on agriculture by the end of July. As part of this effort, Ministers in Mombasa agreed to focus on technical aspects of converting specific tariffs into 'Ad Valorem Equivalents' (AVEs), or tariffs based on the price of a product. Ministers also agreed to postpone the decision on whether Members could retain specific tariffs after the conversion into AVEs. In addition, they also seek the submission of initial tariff-reduction calculations by the April meeting of the Negotiating Group.

During the March Negotiating Group meetings in Geneva, the Chair Ambassador Groser indicated that Members were making good progress towards "first approximation" of

modalities by July. At the formal session on March 17, Members discussed "the issues of interest but not agreed" listed in paragraph 49 of the August 1, 2004 decision: sectoral initiatives, differential export taxes and geographical indications (GIs). We discuss these recent deliberations below.

- Sectoral initiatives: Colombia proposed a sectoral initiative for cut-flowers, which was supported by Costa Rica, Canada and the United States. The US also proposed sectoral initiatives for certain products including pork, beef, oilseeds and barley. The US indicated that these initiatives aim to achieve deeper cuts in domestic support and additional market access benefits. However, India and Kenya opposed the sectoral initiatives in general.

- Differential export taxes: Chile proposed that Members bind and reduce export taxes through a harmonization formula. This is the first time a developing country has opposed export taxes. The EU insisted that export competition commitments should cover all forms of export subsidies, including differential export taxes. The US agreed that export taxes should be subject to reduction commitments. Japan acknowledged that export taxes are more transparent instruments than export restrictions and prohibitions. Finally, a group of developing countries, including Argentina, China, Cuba, India, Indonesia and Malaysia, opposed reduction of export taxes, arguing that they are legitimate trade policy instruments.

- Geographical Indications: There remains a clear divide between *demandeurs* like the EU and opponents in relation to the issue of the extension of GI protection to products other than wine and spirits. The EU proposed extending such protection to a limited number of products. Switzerland, on behalf of the G-10, also supported the extension of GI protection and proposed to subject GI-protected products to lower domestic support reductions. Contrarily, Australia, supported by Argentina, the US, Peru, Costa Rica, Chile, Bolivia, Pakistan and South Africa, strongly opposed the inclusion of this item in the agriculture agenda, arguing that it should be discussed in the context of the TRIPS Agreement.

- Domestic support: At informal technical meetings, Members continued discussions on domestic support, including how to categorize different countries' support for the purpose of "Amber Box" reductions. In addition, the G-20 group presented a proposal on Blue Box seeking to prevent "box shifting" (i.e. a situation in which Members would simply move their Amber Box support into the Blue Box and avoid deeper reductions). Finally, Barbados presented a paper on behalf of the Group of 33 developing countries calling for their complete exemption from undertaking commitments in relation to *de minimis* support.

In related developments, G-20 ministers also gathered in New Delhi, India from March 18-19, in order to develop a joint position on agriculture and possibly other issues. Other groups including the Cairns Group will meet at the Ministerial-level at the end of March in Cartagena, Colombia.

2. Cotton: Appellate Body Finding Renews Pressure on the Issue

Ministers in Mombasa debated the controversial issue of cotton subsidies, which became even more prominent due to the timely release of the WTO Appellate Body decision on March 3. The Appellate Body upheld the Panel's ruling against U.S. cotton subsidies. Brazil, along with West African cotton producing countries Benin, Burkina Faso, Chad and Mali, urged the US to implement the WTO ruling in time for the Hong Kong Ministerial. Ministers agreed that the issue, including trade and development aspects, should continue to be coordinated within the Subcommittee on Cotton. We discuss below the outcome of the Subcommittee meeting in Geneva on March 22.

- Work Program: Members agreed on a work program that reflects the August 1, 2004 decision as it relates to cotton and agriculture. This will allow Members to focus on more substantive aspects of the ongoing Doha talks.

- Agriculture Negotiations: The chairperson, Ambassador Tim Groser of New Zealand, reported on the status of the agriculture negotiations, particularly as relevant to cotton. He noted that the recent G-20 Ministerial Declaration also referred to cotton. Benin, Rwanda (on behalf of the African Group) and Zambia (on behalf of the least-developed countries) said that they look forward on substantive progress in the ongoing negotiations. The African Group announced that it would submit its own proposals shortly.

- Development Aspects: The International Monetary Fund (IMF) and the United Nations Conference on Trade and Development (UNCTAD) presented their cotton-related activities. The EU said it would be unable to contribute to a proposed new cotton fund. This statement raised concerns from Benin, Burkina Faso, Kenya and Senegal.

In general, African ministers and others also insisted that in parallel to other negotiations, a decision or statement on cotton should be included as part of any agreement in July.

B. Non-Agriculture Market Access (Industrial Goods): Disagreements Persist on Sectors, Formulas, Non-Tariff Barriers and Timeframes

1. Key Target Dates Between Now and July

In Mombasa the Chair of the meeting, Kenyan Commerce Minister Kituyi, suggested that proposals on formula reductions should be submitted by the April round of NAMA meetings. Indian Commerce and Industry Minister Nath indicated that India and other countries (presumably Brazil and others) would soon table a formula that would be based on Members' existing tariff structures, and allow for developing country flexibility. Participants also agreed to work towards establishing draft modalities by June, or July at the latest.

2. NAMA Group Reorganizes Work

In an effort to spur NAMA discussion progress, Negotiating Group Chair Ambassador Stefan Johannesson of Iceland reorganized the NAMA talks in a manner similar to the structure of agriculture negotiations. In addition to the formal sessions held from March 14-15 and 18, Members convened more detailed discussions in "Room D" meetings (the name of

a meeting room in the WTO building) – which were open to a maximum of three representatives per delegation. Room D discussions covered topics including the treatment of unbound tariffs, the tariff-reduction formula, and the products to be covered by NAMA negotiations. In addition, Members convened small group (bilateral and plurilateral) meetings to discuss highly technical issues.

Reportedly, the US and EU are also considering the establishment of an informal group similar to the non-group of five countries created last year on agriculture (which included Australia, Brazil, the EU, India and the US).

3. New Proposals Tabled on Preference Erosion and Tariff Reduction Formulas

Members at the March round of NAMA negotiations discussed several new proposals addressing issues including the erosion of trade preferences, treatment of unbound tariffs, the elimination of low tariffs, and special and differential treatment for developing countries. As in past meetings, differences between developed and developing countries remain significant – especially over formulas for reducing high tariffs.

We discuss below some of the recent proposals tabled for the NAMA negotiations:

- Preference erosion: Benin, on behalf of the African, Caribbean, and Pacific (ACP) countries, tabled a proposal demanding that the issue of preferences be addressed in the NAMA negotiations. The communication attempted to reconcile broader trade liberalization with the needs of countries that stand to lose greatly from the erosion of trade preferences. The paper proposes a formula for calculating an "index of vulnerability" to determine which products should receive special treatment while their import tariffs are being reduced. The proposal outlined criteria for assessing this index: the share of exports of a particular product to a specific preference-granting country; that product's market share in the importing country; and the world market share of the exporting country in the product. The proposal was criticized by developing countries like Brazil, China and India.

- Tariff reduction: Members made proposals on various tariff reduction formulas:

  - The US suggested a "dual coefficient'" approach, which sets out two different but simple formulas for reduction of tariffs by developing and developed countries. The US, however, insisted that Members should bind all of their tariffs and accept the Swiss formula approach that would require higher tariffs to be reduced more sharply. Nevertheless, developing countries would be allowed to reduce their tariffs to a higher ceiling than developed countries.

  - Chile, Colombia and Mexico proposed that Members should choose a balance among binding their tariffs, the depth of tariff reduction, the ability to exclude some products from the tariff reduction formula, and the implementation period for tariff cuts.

  - The EU proposed two options: (1) to keep paragraph 8 of the August 2004 framework in exchange for accepting a single Swiss formula with one coefficient for all countries; or (2) to subject developing countries to the

"Swiss formula" but using a different coefficient and to allow them to reduce their tariffs to a higher ceiling.

- Norway proposed two coefficients with a simple and transparent element of credits - and thus lower tariff cuts - for Members that contribute to a more liberal trading regime.

- Norway and Canada submitted a communication proposing that Members eliminate low tariffs because they are ineffective as a form of tariff protection, and at the same time are costly and time-consuming for the business community.

- Canada, Hong Kong-China, New Zealand, and Norway tabled a proposal suggesting a methodology to convert unbound applied tariffs into base rates – which would then be subject to an eventual tariff-reduction formula. Norway also suggested providing credits to countries that accept more ambitious reduction commitments.

The US and EU generally support the "Swiss formula" approach, which would require higher tariffs to be reduced more sharply than lower tariffs. The US also suggests allowing limited flexibility for certain products and countries. In addition, the EU supports rewarding developing countries with "credits" in the form of lesser tariff reduction obligations if they bind more of their tariff lines, or lower the level of their bound tariffs.

In related developments, India and Brazil pointed out that a balance between ambition and flexibility could not be determined in the NAMA negotiations alone. Industrial countries criticized Brazil and India for not yet tabling their own proposals. Apparently, India and Brazil are courting China, Argentina, South Africa and other G-20 members to agree on a joint NAMA proposal.

C. Services: Some New Initial Offers, Anticipation of Improved Offers in May

Despite some progress on new offers, the lack of initial service offers from about 40-50 significant WTO Members remains a concern. Moreover, there is strong concern that existing offers from about 50 Members are lacking in improved market-access to service providers. It is hoped that Members will take more seriously the upcoming deadline of May 2005 to submit improved offers.

During the month of February, Members convened a longer-than-usual three-week "cluster" of services meetings in Geneva. During this time, Members met in various bilateral groupings as well as the formal Council meetings in an effort to encourage improved offers by the May deadline. Some Members tabled initial offers in time for discussion, including Malaysia, Egypt, El Salvador, Barbados and Guyana. During this time, leading industry groups including a coalition known as the Financial Leaders Group met with services negotiators to call for improved offers by May.

Among the prominent issues raised in February, many developing countries pressured the US and developed countries to offer improved "Mode 4" commitments (on temporary entry provisions). The US in particular has taken a defensive position on Mode 4 due to

resistance by Congress, and is not expected to include such an offer in its revised commitments in May.

In order to encourage improved offers, some sectoral negotiating groups including energy and telecommunications will meet in April, prior to the next cluster meeting in June. Needless to say, services talks are in danger of lagging behind if the May deadline passes without many improved offers.

D. Trade Facilitation: New Proposals Tabled at Start of Substantive Work

The Negotiating Group on Trade Facilitation held its first substantive discussions on February 7 and 9, and met again from March 21-23. At the recent meeting, the Chair of the Negotiating Group, Ambassador Muhamad Noor Yacob of Malaysia, facilitated discussion of the first set of proposals tabled in February, as well as eleven new proposals on issues including transparency, customs fees and formalities, the timely release of goods, security measures, and related issues.

Members tabled the following proposals for the March round of discussions: (1) Australia and Malaysia on the conclusions of the APEC Workshop that took place in Kuala Lumpur on March 1 and 2, 2005; (2) the People's Republic of China on GATT Article X; (3) Taiwan on customs fees; (4) New Zealand on transparency and dues process; (5) the EC and Australia on customs fees and charges; (6) Uganda and the US on "consularization" or legalization of documents; (7) the US on release of goods; (8) Canada on border agency coordination; (9) Australia and Canada on enhanced clearance procedures and provision for collateral or monetary security; (10) Korea on measures to reduce administrative burdens; and (11) Japan and Mongolia on customs fees, import and export formalities, documentation requirements and penalties for minor breaches.

Most Members reacted positively to the recent proposals. However, some Members, including Jamaica, Egypt, India, Kenya and the Philippines, stated their preference for voluntary measures. They also expressed that their participation in the discussions was without prejudice to their positions regarding the possible format of final negotiations results (i.e. binding or non-binding provisions), and whether the agreement should be subject to the Dispute Settlement Understanding, pursuant to footnote 4 of Annex D of the August 1, 2004 General Council's Decision (Modalities for negotiation on trade facilitation).

Some Members opposed proposals on "advance binding rulings", since this issue goes beyond the scope of GATT Article X. Some developing countries also criticized certain proposals which did not provide further details on implementation costs, technical assistance and capacity building.

In related developments, the World Bank presented at this meeting a tool to assist developing countries in: (i) undertaking consultations at domestic level in relation to the WTO negotiations on trade facilitation, and (ii) self-assessing the applicability of the proposals to their domestic customs regimes. This document complements the World Customs Organization's "self-assessment checklist for GATT Articles V, VIII and X."

E. Rules: Renewed Pressure on Antidumping Reform; Regional Trade Disciplines Considered

Ministers in Mombasa agreed only to have an outline of a "first approximation" of a text on improving disciplines on antidumping and regional trade agreements by June, and a full text for the Hong Kong Ministerial in December.

The Rules Negotiating Committee continues to hold "informal" meetings on anti-dumping regularly in Geneva. The "informal" meetings are intended as a forum for intensive discussion of technical issues. The discussions have at times been contentious, and have covered a wide range of issues. The US in particular is under pressure from most WTO Members, including the EU, to take a more flexible position on antidumping reform. The U.S. position, however, is constrained due to resistance from Congress and certain domestic industries to any modification of existing antidumping disciplines. The next "informal" meeting is to take place in April.

In regards to regional trade agreements (RTAs), at the center of discussions was a paper circulated by Australia proposing a more stringent definition of "substantially all the trade" in Article XXIV:8 (b) GATT. Currently, Article XXIV disciplines on RTAs are weak and based on the loosely-defined criteria that they must include "substantially all trade." According to Australia, the objective of that definition and of the examination of RTAs must be to ensure that neither entire sectors nor "highly traded" products are excluded from RTAs. Thus, Australia proposed that all duties on a minimum of at least 95 percent of tariff lines at the six-digit level in the harmonized system of tariff classification lines, with 70 percent at the entry into force of the RTA, should be eliminated. "Highly traded" products should be defined as those that constitute at least 2 percent of trade between parties. Chile and New Zealand also supported the proposal. Other Members including Hong Kong, Norway and Switzerland suggested that the evaluation of RTAs should not be limited to tariff lines.

F. TRIPS: Implementation of Public Health Declaration Unresolved, GIs and Other Issues Discussed

The TRIPS Council met in regular and special (negotiating) sessions from March 8-11. Among the most prominent issues discussed was the implementation of the TRIPS and Public Health Declaration. WTO Members acknowledged that negotiations on an amendment to the TRIPS to improve developing countries' access to generic drugs are unlikely to be resolved by the March 31 deadline.

Developed and developing countries remain divided over the content of an amendment to the TRIPS. The main point of contention concerns the legal status of a statement by the chairman of the General Council when the Decision implementing the Declaration was agreed in August 2003.[25] Many developing countries would rather not refer to the statement in the TRIPS amendment.

[25] The chairman's statement includes pledges that developing countries will only take advantage of the modified TRIPS provisions to respond to public health crises. The statement lists 11 advanced developing countries that pledged not to invoke TRIPS provisions to import generic drugs manufactured under a compulsory license, except in the most extreme emergencies. The statement also set out guidelines on "best practices" used to differentiate generic drugs manufactured under a compulsory license for export to a

The African Group of countries, with support from Brazil and Korea, have rejected references to the chairman's statement in the amendment, as they assert this would elevate its legal status. On the other hand, the US, Japan, Switzerland and other developed countries insist there would have been no agreement on the TRIPS Decision without the chairman's statement, and the statement should be reflected in an amendment. A failure to conclude an amendment this year would exacerbate the North-South divide at the WTO, and could undermine preparations for the WTO Ministerial in Hong Kong.

The TRIPS Council also discussed the issues of biodiversity, traditional knowledge and folklore. India proposed to prioritize consultations on the relationship between the Convention on Biological Diversity (CBD) and the TRIPS Agreement concurrent with a discussion on Geographical Indications in the ongoing Doha Round. Brazil, India and others requested that patent applicants disclose (i) the country and source of origin of genetic material and/or traditional knowledge used in inventions; (ii) evidence of prior informed consent under the relevant regime, and (iii) evidence of benefit-sharing. Canada, Japan and Korea instead proposed to discuss this issue at the World Intellectual Property Organization (WIPO). The US and the EU generally oppose changes related to TRIPS and the Biodiversity Convention. The chair initiated consultations, which should bring those issues more closely within the Doha agenda.

In regards to the issue of geographic indications (GIs) for wines and spirits, the EU and Switzerland rejected a new draft decision tabled by Canada. The decision is supported by New World wine producers like the US, which loosely defines the notification and registration system as voluntary and provides for limited obligations for countries. In related developments, there was no progress in the informal consultations led by Deputy Director-General Francisco Thompson-Flores, on extending the higher level of protections to other products that are given to wines and spirits.

II. US and EU Call for Balanced Deal; G-20 and Others Coordinate Positions

A. Acting USTR Allgeier Calls for Conclusion by 2006; Ambition in All Areas

Acting USTR Peter Allgeier reaffirmed in Mombasa that the US is committed to conclusion of the Doha Round by the end of 2006, and noted that the objective is widely shared among participants in Mombassa and other WTO Members. He called for ambitious results in all areas including services, NAMA and agriculture.

Allgeier discussed the recent U.S. proposals in NAMA negotiations, including the use of a dual coefficient within a Swiss tariff formula to achieve high ambition while providing appropriate flexibility for developing countries. He indicated that some developing countries have responded favorably to the idea, and awaited proposals from others.

Allgeier also indicated that Members are making good progress in agriculture talks, including the issue of transparency on specific tariffs and ad valorem tariffs. Under pressure

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developing country with no pharmaceutical industry. Moreover, special labeling is suggested to prevent diversion of such generic drugs to third country markets.

on the cotton issue, Allgeier indicated that the US has been proactive in looking at the overall development aspect of the situation. The US sponsored a public-sector private-sector assessment of the problems facing cotton-exporting countries in Africa. He also referred to the Millennium Challenge Account and its grant program to support West African development efforts.

B. EU Commissioner Mandelson Insists on "Package" Deal

EU Trade Commissioner Peter Mandelson stated in Mombasa and at a recent briefing in Brussels reiterated that the Round is not about agriculture alone or limited to the interests of "one group of WTO countries" but rather, it is about a "package." Mandelson also indicated that the Mombassa meeting was useful to the extent it pushed the objective of rebalancing the negotiations "one notch further," but he remains concerned about the disconnect between this objective and the current stage of negotiations.

In regards to industrial goods, Mandelson indicated that a consensus has emerged that tactical positions must yield to real negotiations on NAMA. The EU is among those Members seeking the most ambitious reductions overall, but recognizes the need for developing country flexibility. As for agriculture, Mandelson highlighted the need to calculate *ad valorem* equivalents to other forms of tariffs, and to do so within an identified timeframe. He also stressed that in order for the EU to engage in this sector, there must be ambitious liberalization in other areas. Likewise, in regards to services, he emphasized that progress in the issue by May is vital.

Mandelson also outlined in Mombasa four areas to focus on the development agenda: a needed pro-development outcome on Special and Differential Treatment; effective development assistance; improved market access for developing countries' exports; and more development friendly rules of origin.

C. Developing Countries Emphasize Concerns; Coordinate Positions

Developing countries in Mombasa emphasized the need to focus on economic development, including:

- Complete outstanding work on development issues such as special and differential treatment;
- Attention to implementation concerns;
- Ensuring a "less than full reciprocity" principle in all negotiations; and
- Affirming provisions for developing countries to embrace new obligations and restate the critical role of market access as a development tool.

In related developments, the G-20 grouping of key developing countries met in New Delhi on March 19-20 in an effort to coordinate their negotiating positions. Although the G-20 Members developed an ambitious and common position on agriculture, they were divided on their position on NAMA. Some Members like India and Brazil have higher tariffs and resist deeper cuts. On the other hand, China, Mexico and Chile have lower tariffs and support more ambitious trade liberalization.

OUTLOOK

Activity surrounding the Doha Round has been on the rise with the resumption of high-level mini-Ministerial meetings in capitals, and more frequent negotiating groups meetings in Geneva. The meetings have for the most part been marked by optimism and a common sense of purpose towards reaching key decisions on modalities by late July. Agreement on 'approximation of modalities' on agriculture and NAMA, and perhaps statements other Doha agenda issues like services and cotton, are seen as critical to a successful Hong Kong Ministerial Conference in December.

The recent meeting in Mombasa was useful to focus the agenda on key targets by late July. Developing countries including the host Kenya insisted on the need to address agriculture and development concerns as top priorities. Developed countries asserted the need for a balanced package and called for ambitious liberalization in all areas including NAMA and services. The meeting also highlighted a renewed focus on the cotton issue, which was reinforced by the timely release of the Appellate Body ruling against the US, the world's largest subsidizer of cotton. A poor response to West African countries' concerns on cotton could undermine yet another Ministerial Conference, as was the case in Cancun in 2003.

Meanwhile, negotiations in Geneva on agriculture, services, NAMA, trade facilitation and rules are proceeding with useful technical work. Progress on the Round is also being made in various other bodies including development, rules, intellectual property, among others. It is encouraging that some groups including specific services sectors (e.g. energy and telecommunications) plan to meet in addition to the periodic "cluster" meetings. By doing so, they might facilitate improved offers by the May deadline on services, or more realistically, by the Hong Kong Ministerial.

Strong leadership of the WTO is also critical to progress in the Round. In this regard, the four candidates for Director-General continue to campaign actively. The two Latin candidates, Seixas de Correa of Brazil and Perez del Castillo of Uruguay, appear to be dividing important votes from groupings like the G-20 and Cairns Group. The EU's Lamy is also contesting for votes with Cuttaree of Mauritius from the ACP and other developing countries. If the selection process proceeds as scheduled, WTO Members will decide on a new leader by late May, prior to the crucial summer months. The Director General selection process, however, has been fraught with dissension and politics in the past, and risks undermining work on the Round if a decision is not reached by May.

In related developments, current Director-General Supachai has been recommended to head the Geneva-based United Nations Conference on Trade and Development (UNCTAD) and will remain engaged in the multilateral trading system after his term expires in September 2005. Likewise, the recent appointment of Representative Robert Portman (R-Ohio) as the new U.S. Trade Representative should ensure capable leadership by the US in the Doha process. Portman's credentials in Congress include work on substantive trade committees and a strong voting record in support of trade. Portman's background should help him garner support among industries, the U.S. Congress and trading partners.

In the coming months, trade ministers plan to meet again on the sidelines of the OECD Trade Ministerial in Paris on May 4, and the APEC meetings in South Korea in early

June. Later this summer, China has proposed another mini-Ministerial in Quingdao, July 7-8. These high-level meetings are critical to lending political momentum to the Doha process, as seen by past efforts the produced the July framework agreements last summer.

Similar to last summer, there is much work to be done and a lot at stake for the Doha Round. For the most part, the difficult decisions on agriculture and NAMA have not been taken, nor substantial services offers tabled. Many key targets lay ahead, and strong leadership and political will are critical for success in Hong Kong – and to conclude the Round by next year.

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