SIDLEY AUSTIN BROWN & WOOD LLP
AND AFFILIATED PARTNERSHIPS

UPDATED ANALYSIS OF THE DOHA ROUND OF TRADE NEGOTIATIONS:

NEW OPPORTUNITIES & CHALLENGES FOR GLOBAL BUSINESS

AUTUMN 2002

PREFACE

The International Trade and Dispute Resolution Practice of Sidley Austin Brown & Wood LLP advises a wide range of government and private sector clients on the Doha Round of trade negotiations. Early in 2002, we published a report reviewing the outcome of the Doha Ministerial Conference, including the framework for the negotiations and the issues likely to arise in the new Round.

Since our initial report, there have been significant developments on many major issues. This updated analysis of the Doha Round reviews and analyzes these developments. While not a comprehensive analysis of all of the hundreds of submissions to the various negotiating groups, it should provide a useful guide to the present status of the negotiations. Should you require more detailed information regarding a particular topic, please contact the attorney listed at the end of the relevant chapter of the report. We will provide further updates as the Doha Round progresses.

DANIEL M. PRICE
CHAIR,
THE INTERNATIONAL TRADE AND DISPUTE RESOLUTION PRACTICE

TABLE OF CONTENTS

OVERVIEW

Ministers of 142 countries meeting in Doha, Qatar agreed on 14 November 2001 to launch a new round of global trade talks across a wide range of issues. In some cases, ministers addressed issues that have not been the subject of prior negotiations in the WTO, such as foreign direct investment and competition. In other cases, such as agriculture and services, ministers called for efforts to deepen market access commitments agreed in previous trade rounds. As stakeholders in the outcome of the new round, global businesses have a key role to play in negotiations.

At the conclusion of the Ministerial session, WTO Members adopted a Ministerial Declaration launching a new round of trade negotiations.[1] The Declaration specifies the scope of the negotiating mandate for a range of issues. Although there will be issue-specific negotiating groups, negotiations in all areas will eventually be drawn together and result in a "single undertaking."[2] This means that all negotiations will be completed as a single package at some time in the future. In this respect, negotiators in this new trade round will follow the same motto adopted by negotiators in earlier rounds: "Nothing is decided until everything is decided."

Along with issues directly addressed in the Declaration, the new round will also address issues previously raised in the context of the "implementation review," which was aimed at resolving interpretive questions left open by the current text of the WTO Agreements. Some of these issues, on which there was particular consensus among WTO Members, are included in a decision adopted by the Members at the close of the Doha Ministerial session.[3] Others, on which there is no consensus, are included in a list compiled by the Secretariat in October 2001.[4]

Although the Declaration calls for the conclusion of the negotiations by 1 January 2005, this is widely viewed as optimistic. The previous round, for example, took more than seven years to complete.

The viability of the negotiations was in some doubt prior to the passage by the U.S. Congress in early August 2002 of Trade Promotion Authority (TPA) legislation. The legislation requires the Congress to accept or reject the entire package of Doha Round agreements negotiated by the U.S. President by a single up or down vote without amendments to individual provisions. This procedure, formerly known as "fast track," is considered essential to U.S. participation in the Round because other countries may have

---

[1] *Ministerial Declaration*, WT/MIN(01)/DEC/1 (20 November 2001).

[2] The only exceptions are the negotiations on modifications to the dispute settlement rules, which under the Declaration can be concluded earlier, and the negotiations on a multilateral register for wines and spirits, which must be concluded by the Fifth Ministerial Conference.

[3] *Implementation Decision*.

[4] *Compilation of Outstanding Implementation Issues Raised by Members*, JOB(01)/152/Rev.1 (27 October 2001).

been unwilling to enter into agreements with U.S. negotiators if the agreements could later be amended by the Congress.

In the ten months since Doha, WTO Members have put the negotiating framework in place and commenced substantive negotiations. We provide below an analysis of the process and upcoming schedule for each of the major sets of negotiations. In addition, we set out the main issues that are being addressed, the positions of the major players, and a summary of key developments in each negotiating group in the ten months since Doha. We caution that the analysis and summaries contained herein are not intended to provide a detailed description of the hundreds of submitted written proposals and statements made in numerous meetings. Rather, it is intended to be a late-September snapshot of fast-moving negotiations. We plan to provide further updates in the first quarter of 2003.

KEY DEVELOPMENTS IN THE NEGOTIATING GROUPS SINCE DOHA

The first meeting of the Trade Negotiation Committee (TNC) on 1 February 2002 established the organizational framework for the negotiations. There are seven negotiating bodies including services, agriculture, non-agricultural market access, rules, environment, geographic indications for TRIPS, and DSU reform. Discussions regarding trade and competition, trade and investment, and transparency in government procurement take place within existing working groups and await a formal launch of negotiations in the Fifth Ministerial Conference, which is to take place in Cancun, Mexico in September 2003. The Rules negotiation group covers antidumping, subsidies and regional trade agreements. The TNC supervises the entire negotiation process and is currently chaired by the new WTO Director General, Dr. Supachai Panitchpakdi.

Many of the negotiating groups have been fairly active, and Members have presented and discussed many new proposals in negotiation sessions. These are summarized below. The first exchange of requests for new concessions in the negotiations took place in Services negotiations at the end of June 2002. Despite the large number of proposals, few delegations have been willing to reveal their bottom-line negotiating positions at this early stage of the process. Thus, the public positions of Members continue to highlight the deep divisions among Members in many of the negotiations.

Dr. Supachai recently expressed concern about the slow pace of the negotiations and pledged to push the process in the months prior to the Cancun Ministerial. The October 2002 - March 2003 period, particularly in the Agriculture and Services negotiations, will be crucial if Members are to make significant progress prior to Cancun.

In the **Services** negotiations, some delegations have exchanged request lists for services liberalization. Developing countries continue to resist any obligation to make more services commitments in sessions of the Council on Trade in Services, but bilateral bargaining will get off to a (slow) start this fall. The deadline for offers on services has been set for 31 March 2003 – making it likely that progress on services will be held hostage for progress on agriculture.

Negotiations in the **Market Access for Non-Agricultural Products** were delayed until August 2002 following resolution of a dispute involving the timing of completing

modalities for tariff cuts. The August 2002 meeting revealed disagreements among members whether to use a "formula," "offer-and-request" or "as-applied" methodology for tariff cuts, with significant new papers by Japan and Singapore illustrating the differences among Members. The United States focused on the need for developing countries to make significant tariff cuts. Developing country Members identified tariff escalation and peaks as targets for reduction or elimination.

In **Trade Facilitation** negotiations, Japan, the EC, Canada and the United States submitted new proposals that would require clarification of customs procedures, including fees, penalties, appeal of decisions, and introduction of an advance ruling system.

Negotiations on **Subsidies** have revolved around a number of submissions, many by developing countries, to address issues such as enhancing flexibility to apply export-financing support, amending the illustrative list of export subsidies, and clarifying prohibited subsidies provisions.

Antidumping negotiations were held in March and July 2002, with Members identifying procedural and substantive antidumping issues to be negotiated in the working group. Members that seek to restrict the use of antidumping measures presented comprehensive proposals, while those Members that actively use antidumping mechanisms have not submitted substantive proposals.

TRIPS negotiations have focused on geographic indications and on remedies to authorize compulsory licenses for patented pharmaceuticals in countries without manufacturing capacity. Discussions concerning extension of protection for geographic indications beyond wines and spirits have revealed a wide divergence of views with no possibility of agreement in sight. More intense discussions have taken place concerning the compulsory license issue with some narrowing of differences, making an agreement by the December 2002 deadline possible.

The **Trade and Competition** negotiations have revealed continued sharp divisions among Members. The EC and Japan continue to push for broad multilateral rules regarding competition, while Members such as the United States, India, Thailand, and Singapore remain reluctant to embrace comprehensive rules. Developing countries have emphasized the need for technical assistance to accommodate comprehensive competition rules.

In the **Trade and Investment** discussions, there have been differences regarding the scope of the investments that would be covered by rules, with the United States pushing for a broad definition of investment that would include portfolio investment, while Canada and EC seek narrower coverage but more comprehensive rules. Many developing countries continue to raise objections to multilateral rules covering investment. Similar differences exist on the issue of transparency, with Japan and the United States emphasizing its importance in attracting and maintaining investments, while developing countries are concerned about their lack of technical capability and resources to meet transparency demands.

In the **Agriculture** negotiations, Brazil, Australia, New Zealand, Argentina, and Malaysia have taken the lead in pushing for elimination or drastic reduction of domestic and

export subsidies. The EC, Norway, Japan, and Korea have resisted this effort. Developing countries such as India, Sri Lanka, Cuba, and Pakistan have refused to agree to cuts in domestic support or their tariffs until they receive assurances of significant cuts in support by developed countries. The United States presented a significant new proposal that would both eliminate export subsides and reduce tariffs and amber-box payments, but would retain full flexibility for green-box domestic support. Canada and other Members insist on green-box reductions. Upcoming events include a 18 December 2002 status report by Chairman Harbinson and a 31 March 2003 deadline to set modalities and numeric targets for reduction of subsidies and tariffs.

In the **Dispute Settlement Understanding** negotiations, there is general agreement on the need to resolve the long-standing DSU Article 21.5/22 conflict and to enhance third party rights. Still, significant differences remain regarding U.S. insistence on greater transparency in dispute settlement proceedings, the U.S. "carousel" provision, and the EC proposal for a permanent standing panel body. There is considerable doubt whether the 31 May 2003 negotiating deadline will be met.

IMPORTANT UPCOMING DATES

In the months ahead of the Cancun Ministerial, there are many key deadlines, of which global businesses should be aware:

3-4 October 2002

- TNC Meeting: Reports from subsidiary bodies should be submitted and progress review made.

15-16 October 2002

- Reports from the Agriculture Committee on two implementation issues – NFIDC Decision and export credits.

4-6 December 2002

- TNC meeting: Progress reports from subsidiary bodies and reports on outstanding implementation issues from the relevant WTO bodies.

10-11 December 2002

- General Council Meeting to review implementation issue reports from the Antidumping Committee, the Market Access Committee, and the Customs Valuation Committee.

- TRIPS Council report to the General Council on the compulsory license issue.

- Interim report from the Director General to the General Council on sufficiency and implementation of technical cooperation and capacity-building commitments and on all issues affecting LDCs.

18 December 2002

- Chairman Harbinson to provide analysis of progress in Agriculture negotiations.

February 2003

- TNC meeting to review progress reports from negotiating groups.
- Report by Chairman of the Sub-Committee on LDCs with concrete recommendations on implementation of the commitment by Ministers.

31 March 2003

- Services negotiations: Submission of initial offers.
- Agriculture negotiations: Establishment of the modalities for further commitments, including provisions for special and differential treatment.

31 May 2003

- Deadline for completion of dispute settlement understanding negotiations.

10-14 September 2003—Cancun Ministerial Conference

- Guidance and decisions from Ministers regarding negotiations as necessary.
- Decisions by explicit consensus on modalities of negotiations and on the "implementation" issues.
- Submission of draft schedules on the agriculture negotiations.
- Conclusion of TRIPS negotiations on the establishment of a multilateral system of notification and registration of geographical indication for wines and spirits.
- Review reports to be submitted from:
    - Committee on Trade and Environment on issues in paragraph 32;
    - General Council on progress in trade and technology transfer, and debt and finance examination, e-commerce work program, and those elements of the work program that do not involve negotiations;
    - Director General on all issues affecting LDCs, implementation and adequacy of technical cooperation, and capacity-building commitments; and
    - TRIPS Council on recommendations following its examination of the scope and modalities for non-violation complaints under Article XXIII of GATT 94.

CHAPTER 1 – SERVICES

One of the WTO's major successes is the General Agreement on Trade in Services (GATS), which provides a framework of basic rules governing trade in services and includes country-specific, legally binding commitments by WTO Members to open particular service sectors to foreign service providers. The Uruguay Round put in place the legal framework of the GATS, but left some issues to be completed by subsequent negotiation. The commitments agreed to in the Uruguay Round were also uneven in quality, and for the most part guaranteed only existing market access. As a result, the GATS provided for a new round of negotiations on services trade liberalization to begin in 2000. Those negotiations have now been folded into the Doha Round.

Services trade will be a key area for business in the new round of negotiations. The negotiating agenda is driven by the market realities and the opportunities they create for negotiators and for business stakeholders. As the WTO Secretariat noted in its 2001 study, *Market Access: Unfinished Business*, services play an increasingly central role in the world economy, representing well over 60 percent of world GDP. New information and communication technologies have created new service businesses. Manufacturing and services industries also are increasingly dependent on basic infrastructural services, including communications and finance. Growth in services trade has been particularly strong in developing countries. Hong Kong, China presents one of the most striking examples: Hong Kong now depends on service industries for 85 percent of its GDP and 79 percent of its employment. In the United States, service-sector jobs account for 80 percent of private-sector employment, or about 83 million jobs. Between 1989 and 1999, services created 20.6 million new U.S. jobs.

The Doha round offers opportunities for achieving more access to markets around the world for service businesses such as banking, insurance, securities, accounting and other professional services, basic and value-added telecommunications, courier services and express delivery, retail and wholesale distribution, environmental and energy services, tourism, and transportation. Manufacturing businesses also can benefit from liberalization and open competition in financing and distribution services in key markets.

The service negotiations combine individualized bargaining between WTO Member governments about access to specific national services markets with multilateral debates on the ground rules for bargaining, on special treatment for developing countries and on the unfinished rules agenda left over from the Uruguay Round. The rules agenda calls for resolution of how to discipline government subsidies and procurement in the services area, and whether and how to allow a "safeguards" mechanism that would permit Members to suspend their services commitments in response to unexpected import surges. Services safeguards could threaten past gains, forcing service investors abroad to divest or withdraw their licenses to do business. For these reasons, business stakeholders will need to monitor closely the work of all services negotiating groups.

1. Procedure for the negotiations

The services negotiations officially began in early 2000, and have moved forward in special sessions of the Council for Trade in Services (CTS). After a number of negotiating meetings in 2000-01, on 27 March 2001, the CTS adopted its final negotiating guidelines and procedures, a work program, and revised guidelines for scheduling commitments. As a result, almost no issues were left to be resolved at Doha. The Doha Declaration simply acknowledged the work done and proposals submitted to date, reaffirmed the March 2001 negotiating guidelines, and set deadlines for submitting offers and requests.

Negotiations after Doha continued to move forward in special sessions of the CTS, held on 19-22 March,[1] 5-6 June,[2] and 23 July 2002.[3] Additional special sessions have been scheduled for October and December 2002. The sessions combine plenary special sessions of the CTS to discuss negotiating proposals and horizontal issues with work on special issues in the subgroups of the CTS such as the Working Party on GATS Rules and bilateral negotiations on rules and market access. The horizontal issues addressed in plenary sessions have included modalities for giving negotiating credit for autonomous liberalization; assessment of service trade; liberalizing delivery of services through movement of natural persons; transparency and other aspects of domestic regulation; small and medium-sized enterprises; classification of services; MFN exemptions; participation of developing countries; and recognition of regulatory status.

The Doha Declaration required participants to have submitted their initial services request lists by 30 June 2002 and their initial offers of services market access by 31 March 2003. At that point, the intensive stage of bargaining will begin. As of September 2002, many Members – optically developing Members—had not yet submitted their initial requests. However, the 30 June 2002 deadline was flexible and many developing countries with a keen interest in seeking additional market access are expected to submit their initial requests over the next three to four months. The developed countries are expected to have submitted all their requests by the special session in October 2002. The U.S. services industries are not unhappy with this pace of negotiation, because it allows time for them to educate governments. Most likely the deadline for the initial offers of services market access is set a bit too early, especially for the developing countries.

Services negotiations will continue until the end of the new round on 1 January 2005, and will be part of the single undertaking, enabling global tradeoffs including market access for services and goods and WTO rules. As currently planned the Cancun Ministerial Meeting in September 2003 will not deal with anything specific related to the services negotiations.

---

[1] Session results described in *Statement of the Chairman of the Special Session of the Council for Trade in Services to the Trade Negotiations Committee*, TN/S/1 (11 April 2002).

[2] Session results described in *Statement of the Chairman of the Special Session of the Council for Trade in Services to the Trade Negotiations Committee*, TN/S/2 (11 June 2002).

[3] Session results described in *Statement of the Chairman of the Special Session of the Council for Trade in Services to the Trade Negotiations Committee*, TN/S/3 (9 August 2002).

Negotiating guidelines

The negotiating guidelines and procedures adopted by the Services Council in March 2001 set out the objectives, modalities, and scope for the negotiations. Proposals on how to fulfill this mandate continue to be an active point of discussion in the CTS.

Objectives for the negotiations

- The negotiations are to take place within the existing GATS structure. WTO Member governments will continue to have the right to specify (or exclude) sectors in which they will undertake commitments and to tailor commitments to their particular needs and situation.

- Commitments will continue to be structured around the four modes of services supply specified in the GATS (cross-border supply, supply abroad, commercial presence, presence of natural persons).

- The guidelines recognize the right to regulate services.

- Individual developing countries, and particularly the least developed, will have flexibility to open fewer sectors and to attach conditions to strengthen their own service suppliers.

- Services liberalization shall have "due respect" for national policy objectives; the level of development and the size of economies of individual Members, both overall and in individual sectors; and "due consideration" to needs of small and medium-sized service suppliers.

Scope of the negotiations

- *All service sectors.* The guidelines rule out *a priori* exclusion of any service sector or mode of supply (as happened in the Uruguay Round, *e.g.*, for air transport services and movement of natural persons). Special attention is to be given to sectors and modes of supply that are of export interest to developing countries.

- *MFN exemptions* taken by Members in the Uruguay Round or upon accession.

- The *uncompleted rules agenda* of the Uruguay Round, including negotiations on "safeguards," subsidies, government procurement of services, and regulatory barriers to trade in services. These negotiations are to be concluded before the market access talks conclude.

Modalities for the negotiations

- The negotiations will continue in special sessions of the CTS and its existing subsidiary committees. Negotiations will be open to all WTO Members and countries negotiating accession.

- The current schedules will be the starting point for negotiations. Negotiations will be based on the request-offer approach. This puts the burden on negotiators to agree on exactly what market access to provide for and how to schedule it. Uniform formulas (like the Reference Paper in telecommunications) to standardize commitments in particular sectors could well emerge by the end of the talks.

- The guidelines call for credit to be given for "autonomous liberalization" (regulatory reform) undertaken since January 1995 and for criteria for such credit to be developed before the start of market access talks.

- Developing countries will be provided with technical assistance in evaluating their services trade interests. CTS stocktaking meetings must include an evaluation of how negotiations are increasing developing country participation in trade. The CTS is to continue evaluating services trade in relation to, *e.g.*, development objectives, and is to "adjust negotiations" in light of the results. The CTS has discussed at length how to assess services trade, and who benefits from it.

2. Issues to be addressed in the negotiations

Main issues

Multilateral negotiations on services trade liberalization began in response to the great expansion of the services sector in advanced industrial economies in the 1980s. The major achievement in the Uruguay Round was to persuade major developing countries to cooperate, to reach agreement on most of the details of the GATS, and to reach commitments on market access that largely froze the status quo. There was a substantial agenda remaining for the new round of WTO talks.

The manner in which Members specify their GATS commitments for national treatment and market access needs to be addressed. Intensive work resulted in new guidelines agreed in March 2001 for scheduling (recording) commitments. These provide an improved basis for bilateral market access talks. The technical agenda is moving forward in the CTS Committee on Specific Commitments.

The GATS also provided a built-in agenda on rules for safeguards, subsidies, government procurement and disciplines on domestic regulation as a barrier to trade in services. The GATS negotiators agreed that such rules were necessary but could not agree on what they should be, and, thus, called for them to be negotiated later. The rules agenda is moving forward in the Working Party on GATS Rules and the discussions on domestic regulation take place in the Working Party on Domestic Regulation.

The remaining agenda in the talks consists of the "horizontal issues." India and other developing countries with large pools of skilled labor continue to push for improved treatment of the movement of natural persons across borders. Discussions also continue on

how to improve the evaluation of benefits from services trade and liberalization, and how to give credit for autonomous liberalization.

Finally, the WTO General Council adopted a work program on e-commerce in September 1998, and since then e-commerce issues have been under examination by the Goods, Services and TRIPS Councils and the Committee on Trade and Development. The Doha Declaration agrees to continue this work and recognizes the "importance of creating and maintaining an environment which is favorable to the future development of electronic commerce." It directs the General Council to consider how this work should be handled, and to submit a progress report in 2003. The Declaration also continues the moratorium on imposing customs duties on electronic transmissions until the Fifth Ministerial Conference in September 2003.

Key issues addressed since Doha

Since Doha, substantive discussions at the special sessions in the CTS have focused on assessment of trade in services and on treatment of autonomous liberalization. Both of these topics are being used by developing countries to argue that they should be entitled to benefit from market opening in developed countries, and should not be expected to undertake any further services liberalization themselves. These discussions are required by GATS Article XIX:3, which provides that for the purposes of establishing negotiating guidelines in each negotiating round, the CTS is to carry out an "assessment of trade in services in overall terms and on a sectoral basis with reference to the objectives of this Agreement" including strengthening of developing countries; and these guidelines are to establish "modalities for the treatment of liberalization undertaken autonomously by Members since previous negotiations."

Assessment of trade in services: Under this topic, developing countries continue to argue that they are less able to export services and to negotiate access commitments, that developed countries have refused to liberalize service sectors where developing countries have a comparative advantage, and that any deal will be one-sided in favor of the developed countries. The WTO Secretariat held a symposium on assessment of trade in services on 14-15 March 2002.[4]

Autonomous liberalization: In many instances, Members themselves have decided to open competition in services sectors (for instance, eliminating telecommunications monopolies) as a matter of domestic policy or regulatory reform. GATS Article XIX:3 calls for governments to be granted credit, but there is no agreement yet on when or how. The Chair of the CTS has tabled draft texts on modalities for giving credit for autonomous liberalization.

Developing countries have argued that credit for autonomous market opening should be given only to developing countries, not to developed countries or ex-socialist countries in transition. Members such as China that provided extensive commitments on

[4] For program *see* http://www.wto.org/english/tratop_e/serv_e/symp_assessment_serv_march02_e.htm.

service sector market access to gain accession to the WTO have also argued that they should not be expected to make any further commitments in the ongoing round of services negotiations; this initiative has met with opposition even from developing countries. Developed countries and their business stakeholders, which remain very much interested in more market access in China and elsewhere, have taken a dim view of attempts to stave off requests for liberalization, noting that their own markets are already open in most sectors.

Financial services

Over 100 WTO Members made GATS commitments in the area of financial services during the Uruguay Round of trade negotiations, and afterward in financial services talks ending in December 1997. Commitments in the financial services sector are roughly divided into two sub-sectors: insurance and banking. Commitments in the insurance sub-sector may include life and non-life insurance, reinsurance, insurance intermediation (brokerage and agency services), and related consultancy and actuarial services. In addition to traditional banking services (lending, deposits, payments), commitments in the banking sub-sector may include trading, securities underwriting, asset management, clearance and settlement services, provision of financial information, and related advisory services.

Commitments vary broadly from Member to Member, and the variations on the terms and conditions imposed are numerous. Generally speaking, those terms and conditions relate to limits on the number of service suppliers allowed, the value of transactions or assets permitted, the type of legal entity that a foreign firm can use to do business, and the amount of foreign equity participation authorized.

In 2001, some Members made general proposals regarding liberalization of trade in financial services. But it quickly became clear that key developing countries would not negotiate seriously on market access improvements for services unless issues that matter to them, such as market access for their agricultural exports, were also on the table. The launch of a new, comprehensive round of trade negotiations in Doha has now opened that possibility. Governments will now be able to trade improved market access in other areas for increased liberalization of the financial services sector.

As the services negotiations progress, financial services providers will have several opportunities to influence the negotiations and overcome the challenges to securing better access to key markets abroad. By playing an instrumental role in the negotiations, industry can help achieve its key objectives, which include:

- Ensuring full implementation of existing financial services commitments.
- Achieving protection for existing investments in foreign markets.
- Enhancing market access with improved rights to provide financial services cross-border or by operating abroad.
- Securing national treatment (non-discrimination) for foreign service providers.

- Securing a transparent, non-discriminatory and pro-competitive domestic regulatory environment.

- Obtaining improved rules for the temporary movement of key business personnel abroad.

- Fending off developing country demands for recourse to protectionist prudential measures and market-closing safeguards.

A comprehensive trade round facilitates tradeoffs and the likelihood of successful financial services discussions, but also complicates the negotiations. Industry will need to identify those tradeoffs that will help it in achieving its objectives, and those issues that stand in the way of its objectives. Central to this task is addressing the general reluctance of developing countries to take on more WTO commitments unless they get some of what *they* want: *e.g.*, increased market access in protected sectors abroad (textiles, steel, agriculture); restraints on use of antidumping laws; longer transition periods to comply with WTO rules; and economic and technical assistance so they can realize the benefits of WTO membership. Encouraging a constructive dialogue with developing country WTO Members will be crucial.

Trade groups active in financial services issues such as the Securities Industry Association, the Coalition of Services Industries, and the Financial Services Forum have already engaged with the U.S. government on negotiating objectives. It will be important for industry players to coordinate closely with the work of these groups, to maximize their individual goals.

Business and professional services

Professional services include a large number of services with different characteristics. We present a summary of the sectoral proposals below. Governments have now presented their request lists, setting the stage for bilateral bargaining on the specifics. Canada and Switzerland have proposed elimination of residency and nationality requirements, and adjustment of requirements to belong to a professional association or be restricted to a particular form of establishment.[5]

Accountancy: Accounting firms and organizations have been extremely active in the GATS context. In the CTS Working Party on Professional Services, they pushed forward guidelines on limiting the trade barrier effect of domestic regulation of accounting services; these guidelines are supposed to enter into effect at the conclusion of the Doha Round.

Computer services: There are many market access commitments for computer services, even in relatively restrictive countries, due to the perception that this is a critical component of the infrastructure for the information highway. For instance, Argentina, Brazil, Paraguay, Uruguay, and Costa Rica have suggested elimination of all restrictions in this sector.

---

[5] *GATS 2000: Professional Services*, S/CSS/W/75 (4 May 2001)

Other business services: Consultancy, engineering and architecture are also traded internationally—as can be seen in international competitions for architectural commissions. Each of these sectors is also subject to many regulatory obstacles to trade, has been the subject of concept papers tabled by delegations, and could be the subject for successful bilateral market access bargaining.

Communication services

Express delivery services: Since 1994, 43 Members have scheduled commitments opening access to courier services (pickup, transport, or delivery services rendered by courier). Many have agreed to unlimited access to courier services through cross-border supply or through commercial presence, without significant terms or conditions. Many have also committed to provide non-discriminatory access to foreign suppliers of courier services. A few Members have made commitments on "postal services" (services traditionally supplied by postal administrations), opening their postal markets to foreign suppliers. Some Members that did not include courier services in their scheduled commitments have nonetheless allowed foreign courier service suppliers to operate in their markets.

Since 2001, there have been six proposals focused on express delivery and postal and courier services, from the EC, Hong Kong, the U.S., Switzerland, New Zealand and Mercosur/Bolivia. All support creation of a new category of express delivery services, which would recognize that the dichotomy between (public monopoly) postal and (private) courier services is increasingly obsolete as postal reform advances. Negotiators could then bargain for access for express delivery in key markets.

Telecommunications: Basic and value-added telecommunications were the subject of intensive market access negotiations both during the Uruguay Round and in the late 1990s. The negotiations culminated in the Basic Telecommunications Agreement—which actually consisted of many individual scheduled market access commitments, and agreement by most countries in the negotiations to endorse a common Reference Paper of competition principles. In effect, the Reference Paper was a means of harmonizing commitment levels in this area. Telecom liberalization was impelled not only by the intense interest of stakeholder businesses in this area, but by accelerating technological changes, the recognition of the critical part played by modern telecommunications infrastructure in national economies, and the worldwide interest in introducing competition as a means to improve telecom service. These fundamentals remain largely unchanged and telecom will remain a subject of intense bargaining in the new round.

Audiovisual: Negotiations in the Uruguay Round focused mainly on film production and film distribution, but the audiovisual sector includes as well broadcasting and distribution of radio and television programs. The United States remains a major *demandeur* in this sector. Other countries with major export interests in audiovisual include Japan, Egypt, Mexico, Brazil, and India. Canada, France and other proponents of cultural policies lead the opposition to liberalization.

Construction

The construction and engineering services sector is a logical target for negotiated trade liberalization. On the one hand, it provides an essential infrastructure service, but on the other hand, it has been subject to extensive regulation and political intervention. Developing countries such as India and Korea have shown strong interest in negotiating greater access for construction crews of skilled and unskilled workers.

Distribution

Distribution services form the main link in the supply chain between producers and consumers, and their operation has a major impact on the range of goods and services available in an economy. Relatively few countries have made commitments with regard to this sector, and the commitments often have product exclusions or citizenship and residence requirements. Yet the commitments made by China on distribution in its accession services schedule illustrate the effect that liberalization in this sector can have. Before accession, no foreign business could distribute products in China; even companies manufacturing in China could only export their products. As of accession, foreign companies manufacturing in China can immediately distribute their own products, and by the end of 2005, even wholly foreign-owned enterprises will be able to engage in distribution of any product. This commitment will have major effects on the Chinese economy and on the environment for doing business in China generally.

Australia, Switzerland, Canada, the United States, Australia, and Colombia have made proposals for liberalizing distribution services generally; the Mercosur countries (Argentina, Brazil, Paraguay, and Uruguay) have argued for sector-specific liberalization in retailing and wholesaling of specific products.

Energy and environmental services

Energy services have traditionally been considered the domain of state-owned or regulated monopolies, but with the rise of energy trading in the 1990s, interest rose in negotiating GATS commitments to eliminate regulatory obstacles. Canada has proposed greater liberalization in this sector. The push for energy services commitments will be slowed significantly by the U.S. financial scandal involving Enron's energy trading operations, the problems of energy deregulation in California, and (in the United States) the arguments of NGOs for the public interest in energy regulation.

There are a number of commitments in schedules for "environmental services" such as water, sewage, refuse disposal, sanitation, and similar services involving waste management and pollution control. These services involve high levels of investment and expertise; there are a number of major firms active internationally in this area, exporting expertise in water systems, pollution remediation, and other services.

Tourism

Tourism represents about one-third of the total value of world trade in services, is growing fast, and is of great importance to developing countries. The level of commitments

in this sector is far above any other service sector.[6] Many of the services commitments of developing countries relate to tourism. Tourism includes transportation services, food and beverage services, travel agency services, accommodation services, and recreation and entertainment services, to varying degrees. The main tourism service providers, in terms of foreign exchange earnings and number of visitors, are developed countries, but tourism matters to developing countries as a creator of jobs and generator of foreign exchange earnings.[7] Canada and the United States have noted regulatory provisions that discourage or tax foreign tourism service providers.[8] The EC has suggested that full worldwide liberalization of this sector could be achieved through the GATS.

Transportation

WTO classifications divide transport services into four main sectors: maritime, air, land, and other modes such as space and pipeline transport. The four modes include around 40 subsectors. Many Members have made no commitments at all on transportation, and some have been extremely selective.[9] While an integrated approach to transportation might seem ideal, the politics of each mode of transportation differ so much that realistically they will continue to be treated separately.

Maritime:[10] Eighty percent by volume of world trade is shipped by vessel. Maritime transport is therefore a very important facilitator of world trade. The EC,[11] Australia, Hong Kong, China, Japan, Republic of Korea, Norway, and Singapore along with many other Members have argued for more liberal policies for maritime transport.[12] The United States remains unwilling to enter into any obligations in this area due to its Jones Act cabotage laws and the strength of domestic shipping lobbies. Negotiations on maritime transport services after the Uruguay Round foundered for this reason. Cargo sharing agreements are also a factor, and are provided for in the MFN exemptions of a number of developing countries.

Air: Air transport services are subject to a network of over 3000 bilateral agreements world wide, which are regulated by the International Civil Aviation Organization (ICAO) on the basis of the 1944 Convention on International Civil Aviation (Chicago Convention). During the Uruguay Round, after some initial discussions on including air transport services in the GATS, it became clear that major players were not willing to abandon the existing

---

[6] Background Note by the Secretariat, *Tourism Services*, S/C/W/51 (23 September 1998).

[7] *Tourism and Travel-Related Services*, S/CSS/W/122 (27 November 2001).

[8] *Initial Negotiating Proposal on Tourism and Travel-Related Services, Revision*, S/CSS/W/54/Rev.1 (4 May 2001) and *Tourism and Hotels*, S/CSS/W/31 (18 December 2000).

[9] *GATS 2000: Services Auxiliary to all Modes of Transport*, S/CSS/W/78 (4 May 2001).

[10] See Secretariat Background Note, *Maritime Transport Services*, S/CSS/W/106 (4 October 2001).

[11] *GATS 2000: Transport Services*, S/CSS/W/41 (22 December 2000).

[12] *Negotiations on Maritime Transport Services*, S/CSS/W/8 (6 October 2000) and *Negotiating Proposal for Maritime Transport Services*, S/CSS/W/87 (11 May 2001).

regime of bilateral reciprocity in favor of the GATS. The GATS Annex on Air Transport Services provides that the GATS will not apply to air transport services at all, except for aircraft repair and maintenance, sales and marketing, and computer reservation services (CRS). A review of the Annex in 2000 did not lead to any change. Proposals in this area have not urged a shift to the GATS from the Chicago Convention regime, but simply increased commitments in the areas such as CRS that are subject to the GATS.[13]

Movement of natural persons

Commitments to open services markets have differed greatly by mode of supply. Commitments relating to the fourth mode, supply through movement of natural persons, have been few, narrowly drawn, and hedged with limitations, due to the sensitivity of immigration and temporary stay in many countries. Developing countries have been quick to point out the resulting asymmetry of obligations in the GATS: many commitments facilitating the movement of capital, where developed countries have a comparative advantage, and few relating to movement of people, where developing countries are strong. Addressing this asymmetry has become part of the development agenda in the new round. For instance, the WTO and World Bank held a joint symposium on 11-12 April 2002 on the economic implications of further liberalization of the movement of natural persons and the challenges and opportunities it presents.[14]

The economic case for liberalizing movement of natural persons has become stronger with developments in airplane travel: temporary visits can be key in marketing certain types of sophisticated services, or providing software consulting, or other services supplied sometimes remotely and sometimes on the spot.[15] However, concerns remain with political—and now security—issues connected with temporary entry and stay of personnel. Developing countries have been vocal in the WTO talks on the subject of movement of natural persons: India submitted an extensive list of suggestions in 2000.[16] Developed countries such as the United States and Canada have been cautious in their proposals.[17] The United States and others may find it difficult to propose changes in immigration laws as part of implementing legislation for a Doha Round agreement. But the asymmetric treatment of natural persons will remain a cause for resistance by developing countries to further liberalization for inward flows of capital.

---

[13] *Aircraft Repair and Maintenance Services*, S/CSS/W/138 (19 March 2002); *Air Transport Services*, S/CSS/W/124 (27 November 2001); *GATS 2000: Transport services*, S/CSS/W/41 (22 December 2000).

[14] See program and papers at http://www.wto.org/english/tratop_e/serv_e/symp_mov_natur_perso_april02_e.htm#top

[15] *GATS 2000: Temporary Movement of Service Suppliers*, S/CSS/W/45 (14 March 2001).

[16] *Proposed Liberalization of Movement of Professionals under General Agreement on Trade in Services (GATS)*, S/CSS/W/12 (24 November 2000).

[17] *Initial Negotiating Proposal on Temporary Movement of Natural Persons Supplying Services under the GATS (Mode 4)*, S/CSS/W/48 (14 March 2001), *Movement of Natural persons*, S/CSS/W/29 (18 December 2000).

Organization of further work

The July 2002 CTS session marked a new phase in negotiations, in which delegations spent increasing time on bilateral meetings without stopping the multilateral work. Discussions focused particularly on horizontal issues such as the assessment of trade in services and the treatment of autonomous liberalization, which are particularly important at the current stage of the negotiations. The CTS has re-opened the door for new proposals, and so future special sessions will be able to hold loosely structured discussions of proposals tabled.

The upcoming meetings in October 2002 will be scheduled over a two-week period, with the CTS plenary meetings convened at the start of the second week, suspended for bilateral consultations and reconvened at the end of the week for stocktaking discussions.

3. Positions of the major players

The negotiating positions of WTO Members can generally be divided into three groups. Developed countries, led by the EC and United States, would like to have broad and comprehensive negotiations, and are viewed as the *demandeurs* for market access concessions. Developing countries in Asia (except for India and Singapore) and Brazil have expressed reluctance to provide further market access concessions. For instance, ASEAN and Brazil have been extremely reluctant to provide greater market access in financial services due to their perceived need to control capital flows in the wake of the 1997 financial crisis. Finally, other developing countries primarily concerned with agriculture are less interested, and may well make success in the negotiations on financial and other services of interest to the EC and the United States conditional upon a flexible attitude by developed country Members in the agriculture negotiations. It is no coincidence that the deadline for services market access offers on 31 March 2003 coincides with the deadline for agreement on negotiating modalities for further market access in agriculture.

For further information please contact Amelia Porges at aporges@sidley.com

CHAPTER 2 – MARKET ACCESS FOR NON-AGRICULTURAL PRODUCTS

Market access for non-agricultural products — through tariff cutting and non-tariff commitments — is a key item for the Doha Development Agenda. Even though negotiations on rulemaking tend to get the most attention in trade rounds, in the end the concrete commitments countries make to lower their tariffs are essential to the success of a round. These commitments will be made in bilateral negotiations between WTO Members. The Doha Round provides a setting for these bilateral negotiations and a legal framework for making the promises legally binding.

The Ministerial Declaration provides some parameters for these bilateral negotiations. Specifically, paragraph 16 of the Declaration states as follows:

> We agree to negotiations which shall aim, by modalities to be agreed, to reduce or as appropriate eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs, and tariff escalation, as well as non-tariff barriers, in particular on products of export interest to developing countries. Product coverage shall be comprehensive and without *a priori* exclusions. The negotiations shall take fully into account the special needs and interests of developing and least-developed country participants, including through less than full reciprocity in reduction commitments in accordance with the relevant provisions of Article XXVIII *bis* of GATT 1994 and the provisions cited in paragraph 50 below. To this end, the modalities to be agreed will include appropriate studies and capacity-building measures to assist least-developed countries to participate effectively in the negotiations.

Thus, the tariff negotiations should not put any products off-limits for tariff cuts. The "modalities" (such as tariff-cutting formulas) are yet to be agreed. In principle, developing and least-developed countries should be able to obtain tariff cuts on products they export, and should not have to offer tariff cuts of equal value in return.

1. Procedure for the negotiations

The bilateral tariff negotiations will take place through direct negotiations between the countries concerned. Before these meetings, WTO Members will exchange lists of requests and offers for tariff reductions (or other negotiated improvements in market access). Although the Ministerial Declaration does not specify the setting for these negotiations, the WTO Trade Negotiations Committee (TNC) decided on 1 February 2002 that negotiations on market access for non-agricultural products will take place within a separate Negotiating Group on Market Access.

The major task that the Negotiating Group has faced to date is to agree on modalities for the bilateral negotiations: that is, rules for whether and how each country will present its requests and offers and cut its tariffs in accordance with a formula. In April 2002, the Negotiating Group chairman proposed a deadline of 31 March 2003 for reaching agreement,

but developing countries led by India, China, Kenya, Egypt, Jamaica, and Malaysia proposed 1 July 2003 instead. Industrialized countries pushed for 31 March or 30 April 2003, to synchronize this decision with the 30 March 2002 deadline for agreement on modalities for agricultural liberalization. A compromise agreement was reached on 19 July 2002, where members agreed to reach a common understanding on the outline for negotiating modalities by 31 March 2003, with the goal of reaching an agreement on modalities by 31 May 2002. As part of this agreement, Member States agreed to submit proposals on modalities for the negotiations by 31 December 2002.

The Ministerial Declaration also includes a provision stating that the modalities to be agreed will "include appropriate studies and capacity-building measures" to assist developing and least-developed countries to participate in the negotiations.[1] In 2001, the Secretariat released a study on the agenda for market access talks,[2] while Secretariat experts provide technical assistance on an ongoing basis. The Ministerial Declaration provides no intermediate milestones for tariff and non-tariff barrier talks; the only deadline is the end of the round in 2005.

The first negotiating session on market access for industrial products was held on 2 August 2002. An EC proposal on the scope and methodology of the negotiations was discussed as well as two U.S. communications, one proposal from New Zealand, and one from South Korean. The U.S. papers discuss the definition of environmental goods and the importance of ensuring that all counties have the necessary tariff and import data to participate in the negotiations. The substantive work will continue in three more sessions on 12-13 September 2002, 4-5 November 2002, and 2-3 December 2002.

2. Issues to be addressed in the negotiations

The key issue to be decided concerning the tariff negotiating modalities is whether to use a tariff-cutting formula or a classic request-offer approach, or some combination of the two. Bilateral negotiations are unlikely to move forward until the modalities issue has been solved.

In a request-offer approach, each WTO Member would present each of its negotiating partners with a list of requests for tariff reductions, and respond to each partner's requests with an offer list; negotiations would then proceed bilaterally with a view of reaching bilateral agreements exchanging promises of tariff reductions. The request-offer approach is labor-intensive and is favored by Members that wish to avoid concessions in sensitive sectors.

Under a formula approach, Members would first agree on a formula to be applied by each Member individually to its entire non-agricultural tariff schedule. Bargaining would then focus on instances where a Member wished to cut less than the formula amount or not

---

[1] *Id.*, para. 16.

[2] *Market Access: Unfinished Business Post Uruguay Round* (Special Study No. 6) (2001).

at all, or instances where another Member sought deeper-than-formula cuts on a product. Formulas can be linear (*e.g.* like the straight 50 percent cut used in the 1960s Kennedy Round) or graduated (*e.g.*, like the formula used in the 1970s Tokyo Round, which cut higher tariffs more). The formula approach tends to produce more tariff reductions overall and puts more pressure on Members with sensitive sectors. The United States has generally low tariffs with "tariff peaks" in sensitive sectors such as textiles, and resisted any use of formula bargaining in the Uruguay Round. Also, if a formula approach is used, the negotiating group will need to decide whether and how developing countries will be expected to submit formula tariff offers.

A third approach, used extensively in the Uruguay Round, consisted of sectoral "zero-for-zero" tariff elimination by agreement between major markets for a product. For instance, the Uruguay Round produced sectoral "zeroes" on paper, brown spirits, pharmaceuticals, and other products. "Zeroes" of this type have been attractive to business stakeholders. In some cases, the tariffs eliminated in the Uruguay Round were so low that they only have nuisance value; in some cases, the tariff elimination provided substantial market opening and effectively a tax cut for importers. A major example of tariff elimination is the 1997 Information Technology Agreement, in which countries agreed to eliminate tariffs on approximately 180 information technology products amounting to billions of dollars in trade. In some cases, the elimination of tariffs also eliminated tariff discrimination. For instance, the EC's agreement in the Uruguay Round to reduce the tariff on paper to zero meant that North American paper exporters would finally have equal access with Finnish exporters, who had enjoyed duty-free access to the EC market under a free trade agreement.

Under either approach, at the end of every tariff round, each Member sums up all of its promises in a "schedule" of tariff reductions which, after a multilateral checking and clearance process, is attached to a "protocol" (a legal instrument that attaches new concessions to an existing treaty) to the WTO. The Member's schedule then enters into force and becomes legally binding when that Member formally accepts that protocol. Although tariff and non-tariff barrier (NTB) concessions may be negotiated bilaterally, their benefit will be extended to all WTO Members under the GATT's most-favored nation requirement.

The Doha Declaration states that the negotiations to reduce and eliminate tariffs and NTBs shall be aimed in particular at "products of export interest to developing countries." It also states that the negotiations must "take fully into account" the special needs and interests of developing and least-developed countries, including "through less than full reciprocity in reduction commitment," in accordance with Article XXVIII *bis* of GATT 1994 and the provisions in paragraph 50 of the Declaration, including the Decision of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries.[3]

[3] *Ministerial Declaration*, paras. 16 and 50.

3. Positions of the major players

Negotiations on industrial tariffs so far have shown a split between developing and developed countries on market access issues.

Developing country Members, including India, Malaysia, and African countries led by Kenya and Egypt, have resisted participating in industrial market access negotiations. Many of these countries oppose cutting their tariffs because tariff revenues are a major source of their government revenue. Also, those countries that participate actively in preferential trade agreements, such as the ACP-EC Partnership or regional trade agreements, benefit when they have low-tariff access to a high-tariff market. For this reason, they may oppose tariff-cutting by their trade agreement partners. For instance, in the Uruguay Round, the ACP "Lome Convention" countries opposed cuts in the EC's tariffs on tropical products. At the Doha Ministerial Meeting, developing countries advocated a study process, rather than negotiations, aimed at determining the impact that further reduction in tariffs and non-tariff barriers in developing countries would have on the countries' economies.

In the negotiating session on 2 August 2002 India, China, and Kenya presented their demands regarding eliminating or reducing tariff peaks and tariff escalation, the need to adopt a request-and-offer approach and the need for special and differential treatment for all developing countries without differentiation. China emphasized its difficulties in providing new market access commitments in industrial products in addition to the extensive commitments already made upon its accession.

Industrialized countries including the United States, Canada, and the EC generally seek to further improve market access commitments during the Doha Round. Yet these Members disagree on whether and how to use a formula approach. The EC has consistently pushed for a formula approach, a position shared by South Korea, Canada, and Japan. In its latest proposal, the EC said that the most important goal of this round should be to bridge the gap between applied and bound tariffs. Japan also suggested recently that it was open to both the formula approach as well as the "zero-for-zero" and "harmonization" approach, assuming there is a meaningful participation by as many Members as possible. Norway expressed interest in using a formula approach with a goal of elimination of tariffs on most non-agricultural items.

On the issue of tariff peaks, the EC states that Members should reduce tariff peaks in a way that would result in the greatest possible reductions across the board for Members. Members should also "avoid approaches that would result in the continued sheltering from liberalization of particular sectors of interest to many participants.[4] Japan, Korea, and Norway also support reductions of tariff peaks, with Japan stating they should be "rectified efficiently," Korea placing "great concern" with tariff peaks levied by way of non-ad valorem duties, while Norway stated that the current unbalanced tariffs make it difficult for developing countries to receive value for their raw materials. New Zealand has identified

[4] *Market Access for Non-Agricultural Products*, TN/MA/W/1 (24 June 2002).

some priority non-tariff barriers to be addressed during the negotiations (*e.g.* standards, food safety and health requirement, and import quotas and prohibitions).[5]

Major U.S. exporters are interested in pushing for a comprehensive elimination of industrial tariffs and allowing for "zero-for-zero" sectoral tariff elimination negotiations, and some business groups have begun to actively push for sectoral tariff reduction or elimination. The United States has been critical of a strict formula approach because it notes that it has already made significant tariff concessions and that many developed and developing countries have a long way to go to be at the same level of U.S. tariffs. U.S. import-competing industries such as textiles, glass, and mirrors will continue to resist any cuts in their tariffs (the "tariff peaks" in the U.S. schedule). U.S. business may seek leverage from the proliferation of bilateral and multilateral free trade agreements and the developing countries' interest in negotiating tariff peaks with the U.S. to push their agenda. A U.S. proposal on tariff and trade data emphasized the need to set a deadline for submitting the necessary data for a common data set of the most recent data on imports and bound as well as applied tariffs.[6] Another U.S. proposal requests better coordination between the Committee on Trade an Environment and the Negotiation Group on Industrial Products to achieve increased market access for environmental products.[7]

For further information please contact Jennifer Haworth McCandless at j.haworth.mccandless@sidley.com

[5] *Scope of the Negotiation on Non-Tariff Barriers*, TN/MA/W/4 (31 July 2002).

[6] *Tariff and Trade Data Needs Assessment*, TN/MA/W/2 (3 July 2002).

[7] *Negotiations on Environmental Goods*, TN/MA/W/3 (3 July 2002).

CHAPTER 3 – TRADE FACILITATION

Trade facilitation, the process of simplification and harmonization of international trade procedures that govern cross-border trade and distribution of goods, is addressed in paragraph 27 of the Ministerial Declaration:

> Recognizing the case for further expediting the movement, release and clearance of goods, including goods in transit, and the need for enhanced technical assistance and capacity building in this area, *we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations*. In the period until the Fifth Ministerial, the Council for Trade in Goods shall review and as appropriate, clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 and identify the trade facilitation needs and priorities of Members, in particular developing and least-developed countries. We commit ourselves to ensuring adequate technical assistance and support for capacity building in this area.[1]

Trade facilitation has been on the WTO agenda since the 1996 Singapore Ministerial Declaration, which provided a mandate to the Council on Trade in Goods (CTG) to explore and analyze ways to simplify the movement of goods across international borders.[2] The Doha Ministerial Declaration moves the international trading community one step closer to the creation of binding and enforceable rules governing trade facilitation.

1. Procedure for the negotiations

The Doha Declaration provides that the modalities of negotiations on trade facilitation will be agreed upon "by explicit consensus" at the Fifth Ministerial Conference, taking place in Cancun, Mexico, on 10-14 September 2003. India, Pakistan, and other Members had argued for the inclusion of the "explicit consensus" language in paragraph 27, as well as in paragraphs covering three other issues left over from the Singapore Ministerial Session, and have insisted that this language implies that negotiations may not occur at all if there is no explicit consensus on the modalities for negotiations. Most WTO Members, however, understand this language merely to specify how the parties will agree upon the modalities – the very mention of modalities presupposes the existence of negotiations. Still, there is a possibility that India and other WTO Members might withhold agreement on the modalities so as effectively to preclude meaningful negotiations. As with other negotiating topics identified at the Doha Ministerial, negotiations on trade facilitation are scheduled to be completed by 1 January 2005.

---

[1] Emphasis added.

[2] *Singapore Ministerial Declaration*, WT/MIN(96)/DEC (18 December 1996), para. 21.

The Doha Declaration directs the CTG to review, clarify and improve current provisions of the GATT 1994 that relate to trade facilitation (*e.g.*, GATT 1994 Articles VIII, X) and to continue to identify trade facilitation needs of WTO Members, particularly those needs of developing countries. Members have agreed on a work program for 2002. The first meetings took place 23-24 May 2002 and 22 July 2002. The schedule for the remaining part of the year is to hold meetings in October and December.

2. Issues to be addressed in the negotiations

Background

The international trading community has been remarkably successful in lowering tariff levels. As tariff levels have decreased, attention increasingly has been focused on non-tariff barriers that hinder the free flow of goods across borders. These non-tariff barriers include excessive documentation requirements, lack of modernization in required trade procedures, lack of transparency in import and export requirements, and other bureaucratic provisions that unnecessarily increase the cost and hamper the efficiency of international trade. Trade facilitation aims to eliminate this unnecessary interference with international trade.

Most WTO Members agree in principle that simplification and harmonization of international trade procedures would promote trade and lower the costs of doing business, and trade facilitation efforts are among the least controversial topics for the upcoming trade negotiations. As with other negotiations, however, the devil is in the details. Perhaps more importantly, the heightened sense of security following the attacks last fall in the United States has cast doubt on whether the time is right for trade facilitation negotiations.

Prior work by the CTG and in the World Customs Organization (WCO) – an international organization based in Brussels that focuses on harmonization and simplification of international trade procedures of its member countries – has largely identified the issues that effect trade facilitation. The extent to which the norms of trade facilitation already established in the CTG and the WCO will become binding and enforceable rules under the auspices of the WTO remains to be negotiated.

On 25 June 1999, the WCO adopted the International Convention on the Simplification and Harmonization of Customs Procedures (the Revised Kyoto Convention). Although the Revised Kyoto Convention is a modern and far-reaching treaty, it remains fundamentally flawed because its provisions are neither binding nor enforceable. Because the WCO lacks the legal infrastructure to penalize treaty signatories that act inconsistently with the terms of the Revised Kyoto Convention, the provisions of the treaty remain merely legal norms.

Members have agreed to deal with the following topics as principle agenda items:

- GATT Articles X, VIII and V which deal with transparency, public information, formalities associated with importing and exporting and goods in transit.

- Trade Facilitation needs and priorities of Members.

- Technical assistance and capacity building.

The Singapore Ministerial Declaration

Beginning with the Singapore Ministerial Declaration in December 1996, the WTO started to address the extent to which rules governing trade facilitation should be brought under the WTO legal infrastructure. The Singapore Ministerial Declaration directed the CTG to:

> undertake exploratory and analytical work, drawing on the work of other relevant international organizations, on the simplification of trade procedures in order to assess the scope for WTO rules in this area.[3]

Work in the Council on Trade in Goods

Since 1998, the CTG has embarked on a comprehensive study of trade facilitation. Following a series of three informal meetings during 2000 to discuss measures to promote trade facilitation, the CTG submitted to the General Council a Progress Report on Trade Facilitation.[4] The report highlights numerous proposed measures to be discussed in negotiations on the development of a rules-based approach to improving clarity and predictability in trade procedures, including the following:

- Publication of all rules, regulations and administrative guidelines relating to official trade procedures and requirements.
- Advance rulings on tariff classification and other forms of customs treatment.
- Prior publication of new and amended procedures.
- Establishment of inquiry points where all information on trade procedures is available.

The report also refers to several proposed measures to simplify trade procedures, including the following:

- Reduction of import, export and customs procedures to the absolute minimum, providing a balance between facilitation and enforcement.
- Introduction of modern and flexible customs control systems based on risk-assessment techniques and allowance of post-clearance customs control.
- Concentration of official controls in the hands of a single agency.
- A "single window" for the submission of required information.

---

[3] *Id.*

[4] *Council for Trade in Goods: Chairman's Progress Report on Trade Facilitation*, G/L/425 (5 December 2000).

3. Positions of the major players

Developed country WTO Members, including Canada, the European Communities, Japan, Switzerland and the United States, have long advocated comprehensive rules governing trade facilitation. For example, the EC has argued that "a rules based approach will guarantee transparency and predictability for traders, ensure political commitment to reform, and ensure that appropriate measures are introduced." Submissions from Members since the Doha Ministerial Conference discuss improving and clarifying GATT Article X.[5] The most frequently proposed measures are: (i) the establishment of effective appeal procedures; (ii) the introduction of an advance ruling system; and (iii) the installation of inquiry points. The EC has also presented a proposal to expand GATT Article VIII to deal with customs procedures on a more operational basis.[6] A U.S. submission presents questions for Members to bear in mind when considering the negotiations on trade facilitation.[7] It focuses on the need to clarify Article VIII provisions on requirements and formalities, the need for specification on fees, and on clarifying rules on the application of penalties for customs regulation infractions. All communications have emphasized the significance for trade facilitation for a country's development and the reduction of trade transaction costs.

On the other hand, some developing country WTO Members resist the creation of binding and enforceable rules governing international trade procedures, fearing that they do not have the financial resources to adopt and administer new laws and procedures. Although these developing countries agree that trade facilitation is beneficial, they do not want to be penalized in WTO dispute settlement proceedings for any inability to adhere strictly to trade facilitation rules. Many developing countries have expressed their concern that trade facilitation measures would violate their national sovereignty. Some of the developing countries expressed their preference for trade facilitation work on the regional, bilateral or national level.

Several provisions in the Doha Declaration facilitate a potential compromise, allowing for the negotiation of trade facilitation rules while allaying the financial concerns of some developing country Members. First, WTO Members have stated in paragraph 27 of the Declaration that they "commit . . . to ensuring adequate technical assistance and support for capacity building in this area."[8] The Declaration also expressly adopts the reference in the Decision on Implementation-Related Issues and Concerns to the needs of developing countries for financial and technical assistance to improve their capacity to keep up with

---

[5] Communications from Japan: *Trade Facilitation: Improvement of GATT Article X*, G/C/W/376, (22 May 2002), the European Community: *Trade Facilitation: Article X of GATT on the Publication and Administration of Trade Regulations*, G/C/W/363, (12 April 2002) and Canada:, *Trade Facilitation: Article X of GATT on the Publication and Administration of Trade Regulations*, G/C/W/379, (30 May 2002).

[6] *WTO Trade Facilitation – Improvements to GATT Article VIII on Fees and Formalities Connected with Importation and Exportation, G/C/W/394* (12 July 2002).

[7] *Trade Facilitation: Article VIII of GATT 1994 on Fees and Formalities Connected with Importation and Exportation, G/C/W/400* (19 July 2002).

[8] *Ministerial Declaration*, para. 27.

new requirements as they arise in future negotiations.[9] If trade facilitation negotiations are to be productive, developed and developing countries will have to find middle ground between the desire that rules be binding and enforceable on one hand, and the need for assistance to provide the means for compliance with such rules on the other.

For further information please contact Richard M. Belanger at rbelanger@sidley.com or Leigh Fraiser at lfraiser@sidley.com

[9] *Id.*, para. 12.

CHAPTER 4 – TRANSPARENCY IN GOVERNMENT PROCUREMENT

Discriminatory and non-transparent government procurement practices can be a significant market barrier for international businesses and traders, because the government in many countries functions as the principal purchaser of goods and services. There are two main issues in government procurement – market access for the providers of goods and services, and transparent procedural rules that create an open and fair process for goods and services providers to create the environment for fair competition.

Paragraph 26 of the Ministerial Declaration addressed the second of these issues in the following terms:

> Recognizing the case for a multilateral agreement on transparency in government procurement and the need for enhanced technical assistance and capacity building in this area, we agree that *negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.* These negotiations will build on the progress made in the Working Group on Transparency in Government Procurement by that time and take into account participants' development priorities, especially those of least-developed country participants. Negotiations shall be limited to the transparency aspects and therefore will not restrict the scope for countries to give preferences to domestic supplies and suppliers. We commit ourselves to ensuring adequate technical assistance and support for capacity building both during the negotiations and after their conclusion.[1]

The current, plurilateral WTO Agreement on Government Procurement (GPA) that entered into force in 1995 does not apply to all WTO Members. While WTO Members realized that many developing countries were not ready to join the GPA, there was fairly widespread agreement among many Members that there should be multilateral rules for transparency in government procurement. Discussion on this subject began in 1996, when Ministers established a working group at the First Ministerial Conference to "conduct a study on transparency in government procurement practices, taking into account national policies, and, based on this study, to develop elements for inclusion in an appropriate agreement."

Since its first meeting on 23 May 1997, the Working Group on Transparency in Government Procurement has undertaken exploratory work in accordance with its mandate. Its work, however, has been conducted in the shadow of a long-standing debate between those Members that want to start negotiations on a multilateral agreement on transparency in government procurement (*e.g.*, United States, EC, Canada, Chile, Japan, Korea) and those that

[1] *Ministerial Declaration*, emphasis added.

believe that negotiations in this area are premature (*e.g.*, India, Indonesia, Malaysia, Philippines).

1. Procedure for the negotiations

The Ministerial Declaration calls for negotiations on transparency in government procurement to be held after the Fifth Ministerial Conference in Cancun, Mexico, on 10-14 September 2003. Prior to Cancun, no deadlines or special procedures have yet been established for the Working Group on Transparency in Government Procurement to report to the General Council. The Working Group will instead simply continue to observe its annual reporting obligation to the General Council.

2. Issues to be addressed in the negotiations

The negotiations will likely draw upon a series of issues included in the latest revision of the "List of the Issues Raised and Points Made," prepared by the Chairman of the Working Group and circulated in November 1999.[2] This list of issues includes: definition and scope of government procurement (who is doing the procuring, what is being procured, what types of transactions are covered); procurement methods; publication of information on national legislation and procedures; information on procurement opportunities; tendering and qualification procedures (publication, contents of information, evaluation criteria, clarification and modifications, etc.); time-periods; transparency of decisions on qualification; transparency of decisions on contract awards; domestic review procedures; maintenance of record of proceedings; information technology; bribery and corruption; information to be provided to other governments; WTO dispute settlement procedures; technical cooperation; and, special and differential treatment for developing countries.

The negotiations will not deal with market access issues. Chile and the EC sought to make market access and national treatment commitments part of the negotiations. However, the Declaration contains explicit language to the contrary. The Declaration explicitly stipulates that "[n]egotiations shall be limited to the transparency aspects and therefore will not restrict the scope for countries to give preferences to domestic supplies and suppliers."[3]

3. Positions of the major players

Members can be divided into three groups, according to their position regarding negotiations on transparency in government procurement.

The **first** group is composed of WTO Members that are *demandeurs*, or actively seeking negotiations in the area, and includes the United States, EC, Canada, Chile, Japan, Korea, Hungary, Switzerland, Romania, New Zealand, Czech Republic, Norway, and Australia.

---

[2] Job(99)/6782.

[3] *Ministerial Declaration*, para. 26.

These Members believe that the Working Group process has been useful but is now completed. They consider that the WTO should now move into the negotiations phase, building on the exploratory work carried out by the Working Group over the past four years. They are willing to consider and address developing countries' needs for technical assistance. One of the arguments put forth by some of these Members is that transparency in government procurement would enable their governments to benefit from the increased competition and the consequent price reduction in the tenders.

Members of this group have also been active in tabling proposals to the Working Group since the Doha Ministerial Conference.[4] Australia has submitted a discussion paper on methods of procurement where they encourage a flexible non-prescriptive approach to the selection of procurement method. It wants government procurement agencies to be able to design and manage their procurement functions so that a quick and efficient delivery of their procurement objectives would be guaranteed.[5]

Chile and the EC want to go beyond the transparency aim by including market access issues in the negotiations. Chile, in particular, argues that the market access component is necessary for developing countries to be able to effectively participate in government procurement in developed countries, and that it would eliminate some of the market barriers developing countries face in developed countries.

The **second** group is composed of Members that support or acquiesce to negotiations as long as they are limited to transparency issues. This group includes Brazil, Mexico, Costa Rica, Argentina, Bolivia, Venezuela, Singapore, Hong Kong (China), and Morocco.

This group is willing to negotiate a multilateral agreement on government procurement, provided that: i) the negotiations form part of a wider and balanced trade round; ii) the negotiations are based on short and simple modalities; iii) there is an express *exclusion* of market access from the negotiations; and, iv) the final agreement will not include a "built-in agenda" that would extend the negotiations to cover market access at a future date or in subsequent negotiations.

The **third** and final group is composed of Members opposed to negotiations, including India, Indonesia, Malaysia, Philippines (ASEAN, except for Singapore), Pakistan, Egypt, Cuba, Peru, Asian Caribbean and Pacific (ACP) countries and African countries such as Senegal, Ghana, Uganda, Nigeria, and Zimbabwe.

Within this group, some Members are adamantly opposed to negotiations (India, Malaysia, Indonesia, Egypt, Cuba, Pakistan, Sri Lanka), while others only oppose negotiations at present. The latter would be willing to consider negotiations in the near

---

[4] Three communications have been submitted from the United States with responses to questions asked to them by Canada, the EC (in GPA/W/163) and Japan (in GPA/W/162) about the modifications to Appendix 1 that the United States previously suggested in submission number GPA/W/153. The Secretariat of the United Nations Conference on Trade and Development (UNCTAD) has requested observer status; GPA/W/188. In submission GPA/W/194, United States asked Georgia questions regarding the accession of Georgia to the Agreement on Government Procurement.

[5] *Methods of Procurement,* WT/WGTGP/W/31 (15 May 2002).

future, after the Working Group conducts further study (mostly the African countries listed above). In opposing negotiations certain Members argue that: i) the Working Group must carry out further exploratory work, since there are key concepts that are still not well defined or fully understood; ii) the Members supporting the negotiations would attempt to extend them to market access issues; and, that iii) commitments in the area of government procurement would inevitably lead to increased tendering by foreign companies in procurement contests, thus negatively impacting domestic companies that would have otherwise obtained the award had they not been forced to compete with larger, more efficient firms.

For further information please contact Patricio Grane at pgrane@sidley.com

CHAPTER 5 – SUBSIDIES

WTO Members agreed to comprehensive negotiations "aimed at clarifying and improving disciplines" under the *Agreement on Subsidies and Countervailing Measures*.[1] The negotiating mandate approved by the Ministerial Conference is essentially open-ended, and will proceed with very few limits.

1. Procedure for the negotiations

At the first meeting of the Trade Negotiations Committee it was decided to create a separate negotiating group for all WTO rules issues. The Negotiating Group on Rules will handle three issues: subsidies, antidumping and regional trade agreements.

For practical reasons, while fisheries subsidies will be treated as a distinct subject, these talks will also be handled by the Negotiating Group on Rules under the subsidies heading. Generally, those Members opposing regulation of fisheries subsidies (*e.g.*, the EC, Japan and Korea) also opposed separation of fisheries negotiations from the rest of the subsidies negotiations. Iceland (supported by the United States, Australia, Brazil, Peru, New Zealand and Malaysia) wanted fisheries subsidies to be treated on a par with the subsidies, antidumping and regional trade agreements, since each is specifically cited in the Doha Ministerial Declaration.

In addition to the general mandate that all negotiations launched at Doha shall be concluded by 1 January 2005,[2] there will be a stock taking by the Fifth Ministerial Conference, which is scheduled to take place in Cancun, Mexico, in September 2003. On 31 July 2002, the Subsidies Committee reported to the General Council on progress regarding particular proposals that are related to countervailing duty investigations and were previously raised in the context of the so-called "implementation review."[3] In the future, however, the expectation is that these issues will be taken up in the Negotiating Group on Rules. Launched well before Doha, the implementation review was aimed at resolving interpretive questions left open by the text of the current Subsidies Agreement.

The tentative 2002 meeting schedule for the Negotiating Group on Rules is 16-18 October and 25-27 November.

2. Issues to be addressed in the negotiations

There are virtually no limits on the issues that can be raised in the subsidies negotiations. The rules disciplining prohibited, actionable and formerly "non-actionable"

---

[1] *Ministerial Declaration*, para. 28.

[2] *Id.*, para. 45.

[3] *Implementation Decision*, para. 10.3.

subsidies are on the table, as are the provisions of the Subsidies Agreement addressing countervailing duty proceedings.

Despite the broad scope for the negotiations, the Declaration makes it clear that the disciplines on countervailing duty laws, while subject to refinement, will not be weakened by the negotiations. The United States' acquiescence to the inclusion of countervailing duty (as well as antidumping) issues in the negotiations depended on the inclusion of a statement that, along with "clarifying and improving" the disciplines included in the Agreement, the aim of the negotiations will be to "preserv[e] the basic concepts, principles and effectiveness of [the Agreement] and [its] instruments and objectives."[4] Among the Agreement's "instruments" are, of course, domestic countervailing duty laws.

The Members are now identifying the particular provisions of the Subsidies Agreement, or the particular means included in the Agreement to discipline subsidies, that they consider to be in need of clarification or improvement.[5] Much of the groundwork for this exercise was conducted in the process of the "implementation review," introduced above.

During the implementation review, the General Council directed the Subsidies Committee to debate and consider a broad range of subsidies issues raised by Members. A few of those issues were the subject of a binding decision at the Ministerial Conference.[6] Principally, they address the ability of developing countries to qualify for exemption from the Agreement's disciplines on export subsidies, under the terms of Article 27 and Annex VII to the Agreement. Even though this exemption is set to expire in the near future, in the binding Implementation Decision Ministers also adopted procedures for certain developing country Members to apply for extensions.[7] Along with granting extensions for the exemption, these procedures also provide concrete guidance and certainty for qualifying developing country Members wishing to provide export subsidies. The exemption is particularly important to developing country Members that maintain free trade zones, and was vigorously supported by, in particular, Caribbean Members and some Central and South American Members.

A long list of other issues, about which there is no consensus among Members, also resulted from the implementation review and will be the subject of negotiations.[8] This is not to say, however, that the negotiations are limited to the issues raised during the

---

[4] *Ministerial Declaration*, para. 28.

[5] The Negotiating Group on Rules is basing its work principally on written submissions from participants. A complete list of submissions received is annexed to the *Report by the Chairman of the Negotiating Group on Rules to the TNC*, TN/RL/2 (12 July 2002).

[6] *Implementation Decision*, para. 10.

[7] *Id.*, para. 10.6. The procedures are included in document G/SCM/W/471/Rev.1, which has been issued in its final form as G/SCM/39 (20 November 2001).

[8] *Compilation of Outstanding Implementation Issues Raised by Members*, JOB(01)/152/Rev.1 (27 October 2001), para. 8.

implementation review and included on this list. Members are free to bring any and all issues to the negotiating table. Thus, the list reflects a starting point for the negotiations.[9]

Many of the issues on this list seek greater flexibility in the application of the Agreement's export subsidies disciplines to developing countries, and were sought by particular developing countries (*e.g.*, Brazil, India) with capital-intensive industries that compete with their developed country counterparts. In particular, these developing countries seek changes to the rules regarding the provision of export financing support.[10] Those rules, while facially non-discriminatory, in fact place greater constraints on the export financing options available to developing countries than on the options available to developed countries. In particular, developing countries seek adjustments to the Illustrative List of Export Subsidies, included as Annex 1 to the Subsidies Agreement, that will boost their industries' export competitiveness. For its part, Canada has also requested a clarification of the prohibited subsidies provisions.[11]

The list also includes issues related to technical aspects of countervailing duty investigations. These issues were also raised by developing countries (mainly Brazil and India). Nonetheless, while there will be refinements at the margins, we do not expect that countervailing duty issues will be a major focus of the subsidies negotiations. Although the United States is the primary user of countervailing duty proceedings, making its practices and the countervail rules a target in the negotiations, most of the opposition to U.S. trade remedy practices is centered on U.S. use of the antidumping rules.

Fisheries

As noted above, fisheries subsidies have been singled out in the Declaration as a particular topic for negotiation.[12] While these subsidies are already subject to the disciplines included in the Subsidies Agreement, many Members see particular reasons for negotiating a special set of rules for this sector. Regulation of fisheries subsidies represents one of the rare occasions on which developing and developed countries are on the same side of an environmental issue. In fact, developing countries see the regulation of fisheries subsidies as a competitiveness, rather than an environmental, issue. These countries consider that their fishing fleets are unable to compete with developed country fleets that, for example, receive subsidies that enable them to procure refrigeration vessels that support long stretches of time at sea and thus yield significantly larger catches.[13] Regulating these types of subsidies,

---

[9] In an annex to the report by the chairman of the Negotiating Group on Rules to the TNC, all the submissions by participants to the Negotiating Group are listed, TN/RL/2 (12 July 2002).

[10] *Export credits in the WTO*, TN/RL/W/5 (26 April 2002).

[11] *Improved Disciplines under the Agreement on Subsidies and Countervailing Measures and the Anti-dumping Agreement,* TN/RL/W/1 (15 April 2002).

[12] *Ministerial Declaration*, para. 28.

[13] The various types of fisheries subsidies – environmentally positive and negative – were most recently addressed in a note by the Secretariat to the WTO Committee on Trade and Environment. *Environmental Benefits of Removing Trade Restrictions and Distortions: the Fisheries Sector*, WT/CTE/W/167/Add.1 (19 June 2001).

which have the negative environmental effect of encouraging overfishing, will also boost developing countries' competitiveness. Because of the confluence of interests supporting the introduction of disciplines on fisheries subsidies, there are considerable chances of agreement. Member submissions thus far primarily lay out facts regarding the fisheries industry, and outline the debate on fisheries subsidies.[14]

On 15 March 2002, United Nations Environment Programme organized, in consultation with the WTO, FAO and OECD Secretariats, a workshop to address the impact of trade-related policies on fisheries and measures required for their sustainable management.[15] One of the many issues addressed was a working definition of the term "subsidy" in the fishery sector.

3. Positions of the major players

Developing countries are the principal *demandeurs* of negotiations on the subsidies and countervailing duty rules. However, developed countries, while traditionally defending the strong disciplines on trade-distorting subsidies contained in the Subsidies Agreement, also bring certain issues to the table. Dispute settlement challenges brought under the rules included in the Subsidies Agreement have toppled several important export facilitation programs and financing hereunder maintained by the U.S. and Canada, including the U.S.' Foreign Sales Corporation (FSC) program, and Canada's Export Development Corporation. For this reason, developed countries are expected to seek further refinement of the export subsidy rules. Developed countries with small domestic markets walk a particularly fine line; while defending subsidies disciplines, they have particular interests in rules that are finely tuned to give them flexibility to support their exporters. Moreover, Canada is leading a push to re-establish a category of subsidies that are "green lighted" or "non-actionable," meaning that they cannot be attacked under the Subsidies Agreement.[16] Article 8 of the Agreement, which previously established a list of such subsidies (including, for example, certain regional support subsidies and research and development subsidies), expired on 1 January 2000.[17] The United States, which was against establishing any such category of subsidies during the Uruguay Round negotiations, is expected to take the same stance in the new round.

Members opposing special (and in fact any) regulation of fisheries subsidies include the EC, Japan, and Korea. Canada also opposes special regulation on the issue, and is concerned about the idea of dividing subsidy disciplines into different sectors. Iceland, which wants a separate WTO Agreement restricting fisheries subsidies, favors distinct

---

[14] A submission from Australia, Chile, Ecuador, Iceland, New Zealand, Peru, Philippines and the United States provides some useful background to the negotiations. TN/RL/W/3 (24 April 2002).

[15] WT/CTE/W/205.

[16] *Improved Disciplines under the Agreement on Subsidies and Countervailing Measures and the Anti-dumping Agreement,* TN/RL/W/1 (15 April 2002).

[17] *Subsidies Agreement*, Article 31.

treatment of fisheries issues. Iceland's view is supported by the United States, Australia, New Zealand, Malaysia, Brazil, and Peru.

The EC is proposing fundamental domestic fisheries reforms to govern its own fishing fleet.[18] The proposed reforms include a new conservation policy, action plans targeting illegal fishing, and environmental measures such as the reduction of the catch of dolphins in fishing nets. The EC has undertaken to table a proposal later this year regarding fishing activities in international waters. With the intensified talks on fisheries in the Doha negotiations, the EC's domestic reform effort may mark the beginning of a new trend of national reviews on fisheries policies.

For further information please contact Todd Friedbacher at tfriedbacher@sidley.com

[18] One example is the EC Commission's outline of its Fisheries Sector Reform. DN: IP/02/764 (28 May 2002).

CHAPTER 6 – ANTIDUMPING

1. Procedure for the negotiations

The Ministerial Declaration, the Implementation Decision, and a separate compilation of implementation issues[1] have established the scope of upcoming antidumping negotiations. As discussed below, under the Decision on Implementation-Related Issues and Concerns, definitive agreement was reached at the Doha Ministerial session on one antidumping issue, and three other issues were specifically identified to be addressed in future negotiations of the Agreement on the Implementation of Article VI of GATT 1994 (AD Agreement).

The Ministerial Declaration set a broad, and somewhat vague, agenda for negotiations "aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 . . . while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants."[2] The language used in the Declaration evolved from a compromise arranged by the EC between, on one hand, the Japanese, Koreans, and developing countries that wanted full negotiations on antidumping, and on the other hand the United States, which is adamantly opposed to any weakening, whether real or perceived, of U.S. antidumping laws. At the Doha Ministerial, Ambassador Zoellick, the United States Trade Representative (USTR), attempted to walk a fine line between scuttling any hope of a new round of negotiations, and appeasing a U.S. Congress that strongly opposes the weakening of U.S. antidumping laws.

With these domestic pressures in mind, the USTR has sought to limit the antidumping agenda. First, the agenda limits negotiations to clarifying the implementation of the existing AD Agreement, while leaving the underlying framework of the AD Agreement unchanged. Second, negotiations are restricted to "preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants." The United States, which requested use of the term "instruments" in the Declaration, defines "instruments" as domestic laws implementing the AD Agreement. Thus, the United States wants to limit the agenda to proposals for strengthening domestic antidumping laws. Developing countries, however, are seeking a broader agenda.

The TNC has established a Negotiating Group on Rules, which is responsible for negotiations on three topics—Antidumping, Subsidies, and Regional Trade Agreements. The first formal meetings of the Negotiating Group were held on 11 March 2002 and 8-10 July 2002. The Committee on Antidumping Practices (Committee) must address

---

[1] *Compilation of Outstanding Implementation Issues Raised by Members*, JOB(01)/152/Rev.1, para. 6 (27 October 2001).

[2] *Ministerial Declaration*, para. 28

negotiations as a matter of priority and report to the TNC on its progress by the end of 2002. Negotiations are to be concluded by 1 January 2005. At the Fifth Ministerial Conference there will be a review of the progress in the negotiations to provide the necessary political guidance and to take any decisions that are required. There will be two more formal meetings in 2002, on 16-18 October and 25-27 November.

The Ministerial Declaration states that during the initial phase of the negotiations, "participants will indicate the provisions . . . that they seek to clarify and improve in the subsequent phase." The likely starting point for identifying the specific provisions that require clarification will be the issues raised by Members in response to the so-called "Harbinson text" drafted by WTO General Council Chairman Stuart Harbinson, from which the Ministerial Declaration evolved. Another starting point for these negotiations could be a long list of issues, compiled during the so-called "implementation review," although there is as yet no consensus among Members about this list.[3] The Members have been making progress at this initial stage of the Doha round in identifying the range of issues to be negotiated in the Working Group.[4] However, the so-called "Friends" group of WTO Members have expressed their concern about the negotiations being too slow and have been looking forward to a speedier process in the autumn.

On 6 August 2002, the U.S. President signed Trade Promotion Authority (TPA) legislation (formerly known as "fast track"), which gives the president authority to negotiate trade agreements that must be accepted or rejected in their entirety by a single vote of the U.S. Congress. TPA authority is considered essential for conducting trade negotiations because other countries would be unwilling to enter into agreements with U.S. negotiators if the agreements could be amended by the Congress.

The draft TPA legislation contained a controversial provision, referred to as the Dayton-Craig amendment after the senators who introduced it, which would have allowed the Congress to amend or reject individual agreements separately while voting on the rest of the Doha Round agreements as a package without amendments. The Bush Administration threatened to veto the entire bill unless the amendment was dropped. U.S. producers and their congressional supporters feared that the administration would enter into agreements that "weaken" the antidumping, countervailing duty, and safeguards laws. After much debate, the Congress dropped the Dayton-Craig amendment and substituted provisions that emphasize congressional opposition to changes in these laws. The TPA legislation as signed states that the preservation of these laws must be a principal negotiating objective. It requires the president to notify the Senate Finance and House Ways and Means Committees six months before entering into an agreement that has any provision affecting the trade remedy law, and it provides that the Congress may adopt a non-binding resolution disapproving any such agreement.

---

[3] *Id*.

[4] The Working Group on Rules is basing its work principally on written submissions from participants. A complete list of submissions received is annexed to the *Report by the Chairman of the Negotiating Group on Rules to the TNC*, TN/RL (12 July 2002).

2. Issues to be addressed in the negotiations

During the Doha Ministerial, Members reached agreement on one antidumping issue: that an antidumping investigation should not proceed if an investigation of the same product during the past year resulted in a negative determination, and if the pre-investigation examination does not indicate any substantial change in circumstances subsequent to the original negative determination.

Members also identified three other issues for negotiation. First, Members agreed to review Article 15 of the AD Agreement, which provides that if an antidumping investigation involves a developing country, the investigating authority should seek "constructive remedies" other than an antidumping duty. The term "constructive remedies" is undefined, but has been interpreted to mean settlement of antidumping cases through price revisions or export restraints. However, the application of this provision has proved limited and unfocused, and developing countries want to establish more specific requirements for resolution of antidumping cases that involve their exports.[5]

Second, Members agreed to review Article 5.8 of the AD Agreement, which requires termination of an antidumping investigation if the volume of dumped imports from a particular country accounts for less than three percent of total imports, and imports from all countries under investigation that individually account for less than three percent collectively do not exceed seven percent of total imports. The WTO Members will negotiate a specific period of time to be used to determine whether subject imports are within these limits.

Third, many WTO Members have expressed dissatisfaction with the biannual antidumping review process implemented by the Committee to review individual countries' use of antidumping laws. The Members agreed to give the Committee 12 months to draw up guidelines to improve the review process and to report its recommendations to the General Council.

In addition, the Ministerial Declaration set a broad agenda to clarify and improve disciplines under the Agreement. One starting point could be a long list of implementation issues on which, unlike those included in the Implementation Decision, Members have not yet formed any consensus.[6] Among the issues that *may* be brought to the negotiating table are those that were raised by WTO Members, particularly developing countries, in response to the Harbinson text.

---

[5] For both these issues the Committee on Antidumping Practices, through its Working Group on Implementation, has 12 months to draw up appropriate recommendations.

[6] JOB(01)/152/Rev.1, para. 6.

In the 10 months since Doha, the Friends Group submitted two proposals to the Negotiating Group on Rules.[7] Some of the main issues raised in these proposals concerns are listed below.

- Members wish to develop clearer, more comprehensive and representative criteria for the calculation of "constructed value" under Article 2.2.2 of the AD Agreement.

- Members wish to ensure that antidumping rules reflect commercial market realities. Investigating authorities do not always respect the requirement of a "fair" comparison between prices in Article 2.4 of the AD Agreement, in that mechanical rules are often applied unreasonably at the expense of fairness.

- The EU applies the lesser-duty rule, whereby dumping duties are based on the lesser of (1) the calculated dumping margin; or (2) the margin necessary to prevent injury to domestic producers. Some Members have proposed that the lesser-duty rule should be mandatory, rather than voluntary as under the current wording of Article 9.1 of the AD Agreement.

- Antidumping duties cannot be imposed unless either the dumping margin or volume of dumped imports exceeds specified *de minimis* levels. Proposals include increasing the current two percent *de minimis* standard to 5 percent for investigations involving developing countries; applying the same standard to refund and review cases as well as original investigations; and increasing the threshold volume of dumped imports considered negligible from three percent to five percent (seven percent for least developed countries).

- Members propose clarifying Article 2.4.2 of the AD Agreement to expressly prohibit the practice of "zeroing" found to be illegal in the *EC – Bed Linens* case.

- Members would like to develop better methodologies for establishing a causal relationship between dumping and injury. The current language of Article 3.5 does not provide sufficient clarity, especially in light of the series of Appellate Body decisions on causation under the Safeguards and AD Agreements.

- Members would like to clarify the list of factors to be taken into consideration in deciding whether an injury was "foreseen and imminent" under Article 3.7 of the AD Agreement.

---

[7] Two collective communications by Brazil, Chile, Colombia, Costa Rica, Hong Kong, China, Israel, Japan Korea, Mexico, Norway, Singapore, Switzerland, Thailand, Taiwan and Turkey illustrate some major issues to be negotiated, *Anti-Dumping: Illustrative Major Issues,* TN/RL/W/6 (26 April 2002) and *Second Contribution to Discussion of the Negotiating Group on Rules on Anti-Dumping Measures,* TN/RL/W/10 (28 June 2002). Mexico and Turkey signed on to the first submission but not to the second, while Taiwan did not join in on the first submission. Also, communications from Canada and India establish some preliminary markers on issues where they expect negotiations, *Improved Disciplines Under the Agreement on Subsidies and Countervailing Measures and the Anti-Dumping Agreement,* TN/RL/W/1 (15 April 2002) and *Proposals on Implementation Related Issues and Concerns*, TN/RL/W/4 (25 April 2002). In an annex to the *Report by the chairman of the Negotiating Group on Rules to the TNC,* TN/RL/2 (12 July 2002), all the submissions by participants to the Negotiating Group are listed.

- Members would like to review the manner in which investigating authorities have used so-called "sunset reviews" to undermine the general rule of the AD Agreement that antidumping orders should be terminated after five years.

- Members would like to strengthen the AD Agreement to ensure that investigating authorities take into account relevant information of public interest.

- Some Members would like clarification of the definition of "material retardation of the establishment" of a domestic industry under footnote 9 to Article 3 of the AD Agreement.

- Developing country Members want to establish a presumption of dumping when products from developed countries are imported into developing countries under certain conditions.

- The United States and other Members want to restrict the ability of WTO panels to review factual determinations made by investigating authorities in antidumping investigations.

- Members have also sought more stringent rules to control the use of "facts available" under Article 6.8 and Annex II of the AD Agreement.

- Members may wish to regain the refund of all duties collected in any antidumping investigation found by a WTO Panel or Appellate Body to be inconsistent with the antidumping Agreement.

3. Positions of the major players

Many of these proposals, which have been advanced by both developed and developing country Members, are likely to be resisted by U.S. negotiators and the U.S. Congress, which has strongly opposed any weakening of U.S. antidumping laws. Nevertheless, the negotiations may eventually lead to significant changes to the AD Agreement notwithstanding U.S. opposition.

Meanwhile, some Members that had supported broad antidumping negotiations may be having second thoughts following China's accession to the WTO. WTO Members now face the prospect of increased imports of Chinese goods, and hence may want greater leeway to use trade defense measures to protect their own industries. Many developing country Members are no longer just targets of U.S. or EC antidumping investigation, but are themselves increasingly resorting to antidumping measures to restrict access to their own markets. India, for example, has increasingly used antidumping measures in response to cheap imports from China and Russia, but has indicated that its negotiating position will be to restrict the use of antidumping measures against its export industries. Japan, which recently restricted imports of scallions, shiitake mushrooms and tatami floor mats from China, has also indicated that it may revisit its views regarding the limited application of antidumping measures. But for now, Japan is playing a leading role in seeking to limit the use of antidumping measures.

Several countries (*e.g.,* Switzerland, Costa Rica, Hong Kong, Israel, Japan, Mexico, Singapore, China, Thailand, Norway, Korea, Turkey, Brazil, Chile, and Colombia) encourage the clarification and improvement of the AD Agreement so that misuse of antidumping measures and trade restrictive effects can be stopped.

For further information please contact Niall P. Meagher at nmeagher@sidley.com

CHAPTER 7 – INTERACTION BETWEEN TRADE AND COMPETITION POLICY

The negotiating mandate in the Doha Ministerial regarding the interaction between trade and competition policy is limited to the text of the Ministerial Declaration. There are no "implementation" issues relevant to this area.

Three paragraphs in the Ministerial Declaration address the negotiating mandate concerning the interaction between trade and competition policy:

> 23. Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.
>
> 24. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organizations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.
>
> 25. In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them.[1]

[1] The WTO Secretariat has prepared three out of four background notes on the four substantive elements in paragraph 25 of the Doha Ministerial Declaration, C*apacity Building for Developing Countries*, WT/WGTCP/W/182 (17 April 2002), P*rovisions on Hardcore Cartels*, WT/WGTCP/W/191 (20 June 2002) and *Modalities for Voluntary Cooperation*, WT/WGTCP/W/192 (28 June 2002).

1. Procedure for the negotiations

Negotiations on trade and competition will not begin until after the Fifth Ministerial Conference in September 2003. All work prior to the Fifth Ministerial will take place in the Working Group on the Interaction between Trade and Competition. With respect to any negotiations to take place after the Fifth Ministerial, the Ministerial Declaration does not identify a specific, separate negotiating group responsible for the negotiations on trade and competition. Therefore, negotiations will take place under the supervision of the Trade Negotiations Committee, or some sub-committee appointed by the TNC.

The Ministerial Declaration states that in the near term, until negotiations on trade and competition policy begins after the Fifth Ministerial, the Working Group will focus on clarifying certain core principles, modalities for voluntary cooperation, and support for progressive reinforcement of competition institutions in developing countries through "capacity building." Work in these areas began immediately after the Doha Ministerial Conference through communications submitted from the different Members to the Working Group on the Interaction between Trade and Competition Policy.

At the Fifth Ministerial, a decision will be taken on the modalities to be used for negotiations on the interaction between trade and competition.[2] This decision must be made by "explicit consensus."[3] The Chair of the Doha Ministerial understood this requirement to mean that each Member has the right to take a position on modalities "that would prevent the negotiations from proceeding after the Fifth Ministerial Conference until that Member is prepared to join in an explicit consensus."[4] As already noted, any actual negotiations on trade and competition policy will only occur after the Fifth Ministerial, assuming that an "explicit consensus" is obtained at that Ministerial.

The Ministerial Declaration includes no separate and distinct timeline for reporting the results of any negotiations on trade and competition to the General Council or the TNC. Therefore, if it is agreed by consensus that negotiations are to take place, it would appear that they are to be concluded by the general deadline for concluding negotiations under the Declaration – on or before 1 January 2005.[5]

2. Main issues to be addressed in the negotiations

The issues to be negotiated under the Ministerial Declaration are based on work done by the WTO Working Group on the Interaction between Trade and Competition Policy, established at the Singapore Ministerial Conference in December 1996.

---

[2] *Ministerial Declaration*, para. 23.

[3] *Id.*

[4] Extract from the Chair's final statement at the Fourth Ministerial Conference clarifying language in the Ministerial Declaration on the "Singapore Issues," including on trade and competition policy.

[5] *Ministerial Declaration*, para. 45.

Since its establishment, the Working Group has examined a wide range of issues, including the relevance of the fundamental WTO principles (*e.g.*, national treatment, transparency, and most-favored-nation treatment) to competition policy; approaches to promoting cooperation and communication among Members; and the contribution of competition policy to achieving the objectives of the WTO. In the year preceding the Doha Ministerial, the Working Group focused on issues concerning the general impact of implementing competition policy on the economies of developing countries; the implications, modalities and potential benefits of enhanced international cooperation, including within the context of the WTO, with regard to the subject of trade and competition policy; and capacity building for developing countries in the area of competition law and policy.

Parallel efforts addressing the interaction between trade and competition policy were initiated, but then stopped without success, in the Organization for Economic Cooperation and Development,[6] as well as through the "International Competition Network" (formerly known as the "Global Competition Initiative"), an informal forum through which the competition authorities of the U.S., the EC, Canada, Australia, and other interested jurisdictions explore areas of potential "harmonization" of national competition rules.

If Members decide at the Fifth Ministerial Conference to pursue negotiations on trade and competition policy, the negotiations are likely to address two basic areas: the scope of a potential multilateral framework for competition rules, and capacity-building for developing countries. We address those two areas in turn.

There is an active ongoing debate, as shown by the proceedings of the Working Group,[7] regarding the appropriate scope of any multilateral competition policy framework established by the WTO. This debate has focused on whether the WTO framework should be limited to core principles such as, for instance, transparency and non-discrimination, or whether it should be more comprehensive, including substantive principles such as the definition and treatment of "hardcore cartels," or, even more ambitiously, international resolution of antitrust disputes. In light of the skepticism expressed by the United States (discussed below) concerning the likelihood and value of meaningful agreement on substantive issues, the mandate for the Working Group put forth in the Ministerial Declaration, quoted above, is fairly modest. The only truly substantive issue included in the Declaration is a relatively non-controversial reference to hardcore cartels, while the other topics focus on the procedural aspects of antitrust enforcement, such as transparency, non-discrimination, and procedural fairness.

With respect to capacity building, many developing countries have recently enacted, or are actively considering enacting, competition laws, but their governments have little enforcement experience or institutional capacity in this complex area. An important aspect

---

[6] *See OECD, Trade and Competition Policies: Options for a Greater Coherence (2001).*

[7] *See, e.g., Report (2000) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council*, WT/WGTCP/4 (30 November 2000).

of the WTO's work regarding trade and competition policy will be to determine the extent to which the WTO can provide resource and technical assistance to developing and least-developed countries to respond to their needs for the "reinforcement of competition institutions."[8]

3. Positions of the major players

Members have generally agreed that there is a need for enhanced cooperation among members in addressing private anti-competitive practices. Views differ dramatically, however, as to the need for, and appropriateness of, action at the WTO level. For example, some developed countries, such as the EC and Canada, have strongly pressed the view that WTO rules on trade and competition policy should be relatively broad and should address issues such as cooperation among competition authorities, transparency, most-favored-nation treatment, and technical assistance.[9] The EC has stressed the importance of a WTO competition agreement based on their view that anti-competitive practices are very seldom limited to only one jurisdiction.[10] Instead, while such practices may be implemented in one jurisdiction, they may have negative effects in multiple jurisdictions.

Japan has examined more closely the relationship between competition laws and policies and national development policies.[11] In its communication, Japan has stressed the positive effects of competition policy on economic development but has recommended balancing competition policy with the specific developmental policies of each Member. Japan has also stressed the importance of flexibility and progressivity in the development of a multilateral framework of cooperation in competition policy.[12]

On the other hand, other developed countries, primarily the United States, are concerned that the negotiation topics identified by the EC may function as the first step toward an attempt to develop comprehensive competition rules within the WTO framework, a concept about which the United States remains skeptical. The United States favors minimizing the scope of a multilateral framework, including limiting the role of the WTO in developing substantive competition rules, and even more strongly, any involvement by the WTO in the area of antitrust dispute resolution.[13] For example, the

---

[8] *Ministerial Declaration*, para. 25.

[9] *See, e.g.*, Trade Officials Seek Doha Breakthrough, But Few Changes Emerge in WTO Stances, *BNA International Trade Reporter*, 14 June 2001 and two recent communications from Canada: *Provisions on Hard Core Cartels – A Starting* Point, WT/WGTCP/W/201 (12 August 2002) and *Towards a Flexible Framework for Cooperation*, WT/WGTCP/W/202 (12 August 2002).

[10] *A WTO Competition Agreement's Contribution to International Cooperation and Technical Assistance for Capacity-Building*, WT/WGTCP/W/184 (22 April 2002) and *International Hardcore Cartels and Cooperation under a WTO Framework Agreement on Competition*, WT/WGTCP/W/193 (1 July 2002).

[11] *Introduction of Competition Laws and Policies and the Relationship of these to National Development Policies*, WT/WGTCP/W/176 (13 December 2001).

[12] *Competition Policy and Exemption Systems*, WT/WGTCP/W/177 (13 December 2001) and *Modalities for Voluntary Cooperation*, WT/WGTCP/W/195 (12 August 2002).

[13] *Modalities for Voluntary Cooperation*, WT/WGTCP/W/204 (15 August 2002) and *Provisions on Hard Core Cartels*, WT/WGTCP/W/203 (15 August 2002).

United States stated prior to the Doha Ministerial that it "rule[d] out" the possibility of the WTO assuming any adjudicative responsibility in individual antitrust cases.[14]

Several developing countries, including India, Thailand and Singapore, have expressed a similar reluctance to embrace wide-sweeping WTO rules on competition policy, although for reasons that differ from those of the United States.[15] Generally, these countries urge continued analytical work by the Working Group, and for them, a more urgent concern than negotiating convergence of substantive competition rules is obtaining enhanced support from the WTO for technical assistance and capacity-building in competition policy.

Emphasizing the importance of providing technical assistance to developing countries, several Members, including Thailand, Egypt, and Romania, have identified capacity building and technical assistance needs of developing countries and, in some instances, have suggested means to address those needs.[16] For example, in its communication, Thailand has suggested that future technical assistance and capacity building programs should involve long-term commitments, be specifically tailored to the local needs and environment in the local language, be sufficiently flexible to allow recipients to develop their own programs, and focus on building institutional knowledge. Conversely, certain developed country Members, such as the United States, Canada, and Australia, who

---

[14] "EU's Monti Says U.S., EU 'Converging' In Talks on Role of Antitrust Policy in WTO," *BNA International Trade Reporter*, 27 September 2001.

[15] *See, e.g.*, Statement by H.E. Mrs. Rini M.S. Soewandi, Minister of Industry and Trade in Singapore, WT/MIN(01)/ST/39 (11 November 2001); Statement by H.E. Dr. Adisai Bodharamik, Minister of Commerce in Thailand, WT/MIN(01)/ST/37 (10 November 2001); Communication from India, WT/GC/W/459 (6 November 2001).

[16] *Technical Assistance on Competition Policy: Past Experiences*, Communication from Thailand, WT/WGTCP/W/188 (29 May 2002); Communication from Egypt, WT/WGTCP/W/187 (29 May 2002); *Capacity Building and Technical Assistance – Challenges Facing Competition Authorities*, Communication from Romania, WT/WGTCP/W/181 (17 April 2002) and WT/WGTCP/W/181 Rev.1 (22 April 2002).

have had experience in providing technical assistance, have submitted communications describing their experiences and identified what they have found to be important for the assistance to be successful.[17]

For further information please contact Neil Ellis at nellis@sidley.com or Jennifer Haworth McCandless at j.haworth.mccandless@sidley.com

[17] *National Experience in Antitrust Law Technical Assistance: A Ten Year Perspective*, Communication from the United States, WT/WGTCP/W/185 (22 April 2002); *Two Principles for Technical Assistance with regard to Competition Policy*, Communication from Canada, WT/WGTCP/W/183 (19 April 2002); *International Activities and Technical Assistance on Competition Law and Policy: Australia's Experience*, Communication from Australia, WT/WGTCP/W/190 (29 May 2002).

CHAPTER 8 – RELATIONSHIP BETWEEN TRADE AND INVESTMENT

Since 1996, the WTO has engaged in extensive discussions on possible multilateral rules for investment. Although investment flows are significantly greater than the value of annual trade flows, there are at present no multilateral rules on investment. Instead, hundreds of bilateral investment treaties between almost all WTO Members are in place, creating a patchwork of different obligations. The basic aim of those Members seeking multilateral disciplines on trade and investment in the WTO is to replace this patchwork with a secure, stable, transparent and predictable climate that will facilitate and promote the flow of investment while preserving the ability of the host countries to regulate the activities of investors present on their territories.

The Ministerial Declaration established a negotiating mandate for the relationship between trade and investment. This is an important step in the development of multilateral rules for investment, and was a major priority for the EC and Japan. Due to the opposition by some developing countries (most notably India), however, the resulting "mandate" is qualified:

> 20. Recognizing the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 21, *we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations*.
>
> 21. In the period until the Fifth Session, further work in the Working Group on the Relationship Between Trade and Investment will focus on the clarification of: scope and definition; transparency; non-discrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance-of-payments safeguards; consultation and the settlement of disputes between Members. Any framework should reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their right to regulate in the public interest. The special development, trade and financial needs of developing and least-developed countries should be taken into account as an integral part of any framework, which should enable Members to undertake obligations and commitments commensurate with their individual needs and circumstances. Due regard should be paid to other relevant WTO provisions. Account should

be taken, as appropriate, of existing bilateral and regional arrangements on investment.[1]

As with other areas such as Agriculture, Trade and Competition and Government Procurement, considerable preparatory work on the issue of trade and investment took place in the years prior to Doha. The Working Group on Trade and Investment established at the 1996 Singapore Ministerial Conference has examined a variety of issues, such as investment incentives, technology transfer, national treatment, and most-favored nation treatment, based on an agreed checklist of issues.[2]

Developed countries such as the EC, Japan, Canada and the United States, and many developing countries, generally took the position in the 1996-2000 discussions that investment is one of the key factors in economic growth. These Members have argued that investment flows create opportunities for investors and help developing countries to achieve sustainable development. Many developing countries participating in these discussions have also acknowledged that investment is necessary for development, does not create debt obligations, and represents a source of long-term commitment and lasting assets. However, some of the developing countries, such as India, Malaysia and Pakistan, have argued that multilateral investment rules are not necessary, and would interfere with their sovereign right to limit investment in key sectors or to require the coupling of investment with technology transfer. The United States has been less than enthusiastic about multilateral investment rules, as it is concerned that the resulting rules would embody standards far below those currently found in its bilateral investment treaties.

1. Procedure for the negotiations

The Declaration anticipates that until the Fifth Ministerial Conference[3] work will proceed in the Working Group on the Relationship between Trade and Investment (WGTI), with a focus on the "clarification" of the issues listed in the Declaration. The work will also address modalities for negotiations after 2003, to be agreed on by consensus at the Fifth Ministerial.

Technically, therefore, no "negotiations" will take place during the next two years. This is, however, largely a fiction, since any "negotiation" requires the detailed identification of issues to set up choices and options for negotiators. The Declaration *assumes* that there will be consensus to negotiate, because Ministers stated "we agree that negotiations will take place after the Fifth Ministerial Conference." However, over the next two years, the working group will report to the General Council, rather than the Trade Negotiation Committee. Any reporting to the General Council (annual or otherwise) will pertain to the *modalities* rather than the substance of future negotiations.

---

[1] *Ministerial Declaration*, paras. 20-22.

[2] *Report to the General Council*, WT/WGTI/1 (25 November 1997), Annex.

[3] The conference will take place in Cancun, Mexico, on 10-14 September 2003.

The Declaration contains language on which some Members could rely in an attempt to stall or limit the scope of the negotiations, even after the Fifth Ministerial. In particular, India insisted that the decision on the modalities of the negotiations be taken "*by explicit consensus*." India and other developing countries that are concerned about the impact of multilateral rules on investment interpret this language as giving them the right to dictate the terms and retain control of the post-2003 negotiations.

Since the Doha Ministerial Conference there have been two meetings in the Working Group on Trade and Investment. Further meetings in 2002 were schedule for 16-18 September and 14-15 November.

2. Issues to be addressed in the negotiations

Main Issues

The Declaration sets out the following specific issues requiring "focus" during the next two years:

- Scope and definition of investment.
- Transparency.
- Non-discrimination.
- Modalities for pre-establishment based on a GATS-type, positive list approach.
- Development provisions.
- Exceptions and balance-of-payments safeguards.
- Consultation and the settlement of disputes between Members.

This list is not exhaustive as Members may raise additional issues. However, the Working Group has discussed all of these issues extensively over the past four years.

One of the potentially most controversial issues is the explicit reference to a GATS-type positive list approach for modalities for "pre-establishment," *i.e.*, rules or procedures governing whether and how *new* investments may be made (as opposed to rules governing investments already made). The GATS-type positive list approach means that Members would not commit to extend even basic protection (such as national treatment or most-favored nation treatment) unless specifically identified in their schedules. Under this approach, if a concession is not listed in a schedule, then no obligations or rights are created.

An important aspect of the preparatory work will be to clarify the types of investment that would be covered by any rules that are eventually negotiated. The Declaration makes explicit reference to "foreign direct investment," but also more generally to "long-term cross-border investment," which would include portfolio investment. This will be an issue that the United States, in particular, seeks to confirm in the negotiations, as it traditionally favors a broad definition of investment. Developing countries have expressed

reluctance to establish protection for short-term investments, pointing to the role such short-term capital allegedly played in the 1997-98 financial crises. The two approaches of defining investment – an asset-based investment and an enterprise-based definition – were analyzed in detail by the WTO secretariat in a March 2002 paper.[4]

Protection for existing investment will take place under the heading "non-discrimination" providing for rules on national treatment (the treatment of investors and investments of other Members no less favorably than investors or investments of nationals of the home country Member). This would mirror a basic WTO concept, but many developing countries are reluctant to provide such treatment for investments because they may wish to provide particular benefits to domestic investors competing with larger and better-financed foreign investors. However, non-discrimination is widely regarded among Members as a basic and necessary policy-making principle of international trade and investment agreements.[5]

There is broader support for incorporating transparency rules, *i.e.*, the obligation to publish rules and procedures governing investment and open-decision making by authorities in the host country. Some experts in the WTO Secretariat believe that given the differences among Members on other aspects of the investment agenda, transparency may be the only "deliverable" of the negotiations. The United States has mentioned transparency as an initial "building block" that is a necessary prerequisite to future, more substantive disciplines. Without transparency it is difficult to decide what the rules are and to determine whether they are being applied adequately.[6]

Another key issue is whether to include additional prohibitions on performance requirements, such as technology transfer, use of local labor, minimum capital requirements, and restrictions on profit, capital, and currency transfer in or out of the host country. Two types of performance requirements – local content and trade balancing – are prohibited by the WTO Agreement on Trade-Related Investment Measures. The working group has examined and will continue to address the need, if any, for additional prohibitions on performance requirements.

The European Communities, the United States, Japan, Korea, Costa Rica and Canada consider that technology transfer requirements should be prohibited and thus included within investment rules. In general, these Members believe that technology transfer requirements are often counter-productive, and that efficient and market-oriented policies are required to enhance the contribution of investment to technological development of host countries. Those policies also need to be aimed at enhancing the spread of technology

---

[4] *Scope and Definitions: "Investment" and "Investor"*, WT/WGTI/W/108 (21 March 2002).

[5] The WTO Secretariat has submitted an Executive Summary to the WGTI, *Non-discrimination Most-Favored-Nation Treatment and National Treatment* , WT/WGTI/W/118 (4 June 2002). The summary contains information on how the principle has been applied in the GATT and the GATS and also in international investment agreements. The WGTI has discussed this topic extensively and their discussions are presented in the summary together with references to the reports on the deliberations.

[6] A submission by the WTO Secretariat takes a close look at the issue of transparency in the context of Paragraph 22 of the Doha Ministerial Declaration, WT/WGTI/W/109 (27 March 2002).

through mechanisms such as the movement of skilled labor, contractual arrangements between foreign-owned firms and local firms, and in-house research and development. On the other hand, some developing countries, led by India, have expressed the need to maintain the ability to impose such requirements to meet their development needs.

While not explicitly listed in the Declaration, the provision of investment incentives by host Members seeking investment will also be discussed in greater detail. This issue has been addressed extensively in the working group, with many developing country Members defending the need to use incentives to attract investment. Other Members argue that limitations or prohibitions on investment incentives need to be in place to avoid a "race to the bottom," with Members (including the United States and the EC) outbidding each other through, *e.g.* tax-free zones to attract investment.

A further key issue will be dispute settlement provisions in the event of a conflict between the host country and the investor. Investor-state dispute settlement mechanisms providing for monetary compensation are common in many bilateral investment treaties, and in regional agreements such as NAFTA. These mechanisms provide an important tool for businesses to protect their interests when faced with arbitrary, unreasonable, discriminatory or expropriatory government action.

There have been extensive discussions in the working group regarding whether an investor-state dispute settlement provision should be included in the investment negotiations. This position has been strongly opposed by many developing countries, which stress the government-to-government nature of the WTO dispute settlement provisions. The United States, however, has argued for inclusion of investor-state provisions as a means of protecting the United States investors in countries currently not covered by bilateral investment treaties with the United States. It should be noted that this aspect of the investment negotiations is likely to attract significant attention from non-governmental organizations in the United States and Europe, which generally oppose the right of private entities to sue governments.

Post-Doha discussions

Definition of investment

The WGTI held its first two meetings after the Doha Ministerial Conference, on 18-19 April 2002 and 3-5 July 2002. They focused on the issues of "scope and definition,"[7] "transparency"[8] and a possible Investment Agreement. There remain significant differences among Members on the scope of "investment" to be covered by any new multilateral rules.

The United States presented a paper advocating a broad, open-ended definition including all types of investment, including portfolio investment. The United States noted that such a definition is consistent with "long-standing U.S. practice" and also pointed out

[7] The Secretariat's note on the issue, *Scope and definitions: "Investment" and" Investor"*, WT/WGTI/W/108 (21 March 2002).

[8] The Secretariat's note on the issue, *Transparency*, WT/WGTI/W/109 (27 March 2002).

that European bilateral investment treaties also cover all types of investment.[9] Similarly, the EC presented a paper suggesting that the definition should be fairly broad and include: (i) Direct Investment Enterprises; (ii) Direct Investment Capital Transactions and (iii) Foreign Direct Investors.[10]

Korea proposes to define investment to cover all "long-term, cross-border investment, particularly FDI."[11] Canada favors a definition of investment not limited to one based on FDI, but instead on "any equity participation, debt security or other kinds of interests that entitles the investor to have access to the profits of the enterprises."[12] Canada also seeks investment protection for a wide range of assets while giving host countries discretion to limit protection for sensitive categories of assets.

Some developing country Members suggested a broader definition that would include portfolio investment and FDI but exclude "transactions of a speculative nature." Other Members favor a transaction-based definition, which focuses on investment as the cross-border flow of capital and related assets.

In contrast, other developing country Members favor a more narrow definition of investment, arguing that on the principle that "production-based forms of investment contributes most directly and substantially to economic and technological development, employment and growth in host countries." They argue that any negotiation would be quicker and easier with a narrow definition of investment.[13]

Transparency

Discussions on the issue of transparency in 2002 involved three topics: the relevance of WTO transparency provisions to the area of investment; the purpose of transparency; and finally, the resource requirements for meeting different levels of transparency. Although the Members generally agreed that transparency is a significant factor when creating a predictable, stable and secure climate for foreign investment, there was no agreement among Members that multilateral rules would achieve this. Many developing country Members were concerned about their technical and resource capacity to meet new transparency requirements for investment, and that the costs of transparency would outweigh its benefits.

---

[9] *Communication from the United States - Covering FDI and Portfolio Investment in a WTO Investment Agreement*, WT/WGTI/W/142

[10] *Concept Paper on the Definition of Investment,* WT/WGTI/W/11 (16 April 2002).

[11] *Scope and Definitions of "Investment"*, WG/WGTI/W/114 (15 April 2002).

[12] *Scope and Definition*, WT/WGTI/W/113 (12 April 2002).

[13] Arguments presented by the Members, for and against a broad and a narrow definition of the term investment have been laid out by the WTO Secretariat, WT/WGTI/W/108 (21 March 2002). The note also examines the NAFTA definition of investment and GATS definition of "trade in services" through commercial presence in Articles I and XXVIII.

Japan argued that transparency is necessary for the encouragement of investors' investment decisions and also attracts long-term, stable investment.[14] It presented a survey showing that lack of transparency was the primary factor discouraging Japanese companies from investing abroad. In particular, lack of information provided by governments on investment laws and regulations creates uncertainty. Japan wants disciplines on transparency to be binding and subject to dispute settlement rules.

The United States proposed that government inquiry points for investors providing information about investment rules would increase transparency.

Dispute Settlement

The EC and Japan presented papers regarding appropriate dispute settlement procedures for disputes involving investments, including expropriation. Japan took the position that the normal WTO dispute settlement procedures should be used and that it did not believe that procedures allowing private investors to obtain damages against national governments could or should take place within the WTO dispute settlement framework.[15] Instead, Japan advocated the resolution of such damage claims through domestic judicial procedures. The EC noted the existence of investor-state dispute settlement mechanisms in bilateral investment treaties, but did not propose a similar mechanism for a WTO investment agreement. The EC instead implied that the existing WTO dispute settlement mechanism of state to state dispute resolution was sufficient to address disputes arising out of an investment agreement.[16]

Future WTO investment agreement

In discussions regarding a future WTO Investment Agreement, developing countries expressed resistance to making extensive commitments to open up their economies to new foreign investment. Recognizing this reluctance, the EC[17], Japan[18] and Korea said they could agree to a flexible approach that would permit Members to delay opening some sectors of their economies to foreign companies. They suggested a "positive" list approach to pre-establishment commitments. Korea acknowledged that the level of commitments could be low in the beginning, reflecting individual domestic situations, with an increased level protection achieved through successive rounds of negotiations. The EC proposed an investment framework to incorporate "specific [national treatment] obligations for the establishment of foreign investments in those sectors listed in each country's schedule of commitments."

---

[14] *Transparency*, WT/WGTI/W/112 (12 April 2002)

[15] *Consultation and the Settlement of Disputes Between Members*, WT/WGTI/W/139

[16] *Concept Paper on Consultation and the Settlement of Disputes Between Members*, WT/WTGI/W/141.

[17] *Paper on Modalities of Pre-Establishment*, WT/WGTI/W/121 (27 June 2002) and a related paper submitted by the EC, *Concept Paper on Non-Discrimination*, WT/WGTI/W/122 (27 June 2002).

[18] *Modalities for Pre-Establishment Commitments*, WT/WGTI/W/125 (28 June 2002).

By contrast, Canada[19] and the United States strongly supported a "positive" list approach. They advanced an approach used in the North American Free Trade Agreement where Members schedule specific legal restrictions on foreign investment rather than benefiting from blanket exceptions for entire sectors.

3. Positions of the major players

Members generally can be divided into the following three categories of positions on investment:

EC, Japan, Canada, Chile, Costa Rica, Australia, and Korea

These Members advocate the need for a broader multilateral trade and investment agreement to replace the patchwork of bilateral investment treaties. Concerned about the United States' ability to successfully negotiate a series of bilateral investment treaties, these Members strongly support the launch of negotiations in 2003 to set up a coherent basic framework of multilateral investment rules. They argue that it is in the interest of all countries, developed and developing, to create a more stable and transparent climate for investment worldwide. They are of the view that non-discrimination, transparency and predictability of domestic laws applicable to investment should be the guiding principles for the framework of negotiations. To achieve this end, the EC and other Members have indicated that they can accept a GATS-like positive list approach. These Members are generally willing to accept WTO investment rules that offer fewer protections than many bilateral investment treaties.

The United States

The United States would favor a WTO agreement on investment that would result in multilateral rules at least as strong as the provisions in the numerous bilateral investment treaties to which it is already a party. The United States noted in an intervention at the first formal meeting that it has already negotiated 40 bilateral investment treaties containing a broad definition of investment. The United States has been less than enthusiastic about the WTO trade and investment process because of the negative reaction of many developing (and even developed) countries to the United States position on liberal pre-establishment requirements, the elimination of all performance requirements, stronger investor protection provisions (*e.g.*, on expropriation) and investor-state dispute settlement provisions. The United States' opposition to a positive-list approach for pre-establishment may play a major role in limiting the negotiations. The United States ultimately may be satisfied with WTO investment transparency provision only. This will allow the United States to retain its ability to enter into bilateral investment treaties that offer comprehensive protection for its investors.

---

[19] *Non-Discrimination and Modalities for Pre-establishment Commitments Based on a GATS-type, Positive List Approach*, WT/WGTI/W/130 (2 July 2002).

India, Pakistan, Malaysia, Egypt, and the Dominican Republic

These Members strongly opposed negotiations on investment before Doha. They are using this study phase to address several issues: (i) limits to any pre-establishment concessions; (ii) permission for developing countries to use incentives (and parallel prohibition for developed countries to use such incentives); (iii) the establishment and maintenance of technology transfers as a precondition of investment; (iv) permission to prohibit or limit the amount of foreign investment in certain types of investments; and (v) the absence of any investor-state dispute settlement provisions. India, Malaysia and Brazil have strongly emphasized the importance of a positive list approach in the talks succeeding the Doha Ministerial Conference.

Two more meetings were scheduled to take place in the Working Group on the Relationship between Trade and Investment in year 2002, on 16-18 September and 14-15 November.

For further information please contact Scott Andersen at sandersen@sidley.com

CHAPTER 9 – TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

The final documents of the Doha Ministerial Meeting address the TRIPS Agreement in the Ministerial Declaration,[1] the Decision on Implementation-Related Issues and Concerns (Implementation Decision),[2] and the Declaration on the TRIPS Agreement and Public Health.[3] In addition, the Decision on Implementation-Related Issues and Concerns refers to "other outstanding implementation issues [that] shall be addressed as a matter of priority by the relevant WTO bodies."[4] The phrase "other outstanding implementation issues" refers to issues identified in *Compilation of Outstanding Implementation Issues Raised by Members*, including a number of proposals relating to the TRIPS Agreement.[5]

There are five areas in the intellectual property sector in which work programs have been established or negotiations mandated: (i) "non-violation" complaints under the TRIPS Agreement; (ii) incentives for the transfer of technology to least developed country Members; (iii) issues related to the inability of countries without pharmaceutical manufacturing capacity to use the flexibility in the TRIPS Agreement; (iv) geographical indications; and (v) traditional knowledge and the relationship of TRIPS to the Convention on Biological Diversity, along with other relevant new developments arising from reviews of the TRIPS Agreement under Article 71.1.

The Trade Negotiations Committee (TNC) decided at its first meeting that the TRIPS Council will negotiate on the topic of a multilateral register for geographical indications on wines and spirits in Special Sessions. The other issues relating to TRIPS stated in paragraphs 18 and 19[6] of the Doha Ministerial Declaration will be addressed in the Council's regular meetings on a priority bases. The TRIPS Council held regular meetings on 5-7 March 2002 and on 25-27 June 2002 where the topics discussed included specific aspects of TRIPS and public health, geographical indications, protection of plant and animal inventions, biodiversity, traditional knowledge, the general review of the TRIPS Agreement and technology transfer. On 8 March 2002[7] and 28 June 2002[8], in special sessions, the Council

---

[1] *Ministerial Declaration*, paras. 17-19, 32.

[2] *Implementation Decision*, para. 11.

[3] WT/MIN(01)/DEC/2 (20 November 2001) (hereinafter "*Public Health Declaration*").

[4] *Ministerial Declaration*, para. 12(b).

[5] JOB(01)/152/Rev.1 (27 October 2001), para. 10.

[6] Including the issues "related to the extension of the protection of geographical indications provided for in Article 23 to products other than wines and spirits…."

[7] Report by the Chairman, Ambassador Eui-yong Chung, to the TNC, TN/IP/1 (12 April 2002). The meeting was held on the basis of the agenda set out in WTO/AIR/1721.

[8] Report by the Chairman, Ambassador Eui-yong Chung, to the TNC, TN/IP/2 (9 July 2002).

initiated and proceeded with a two-phase program for completing negotiations on a multilateral register for geographical indications for wines and spirits.

The tentatively schedule for the TRIPS Council's meetings in the rest of 2002 is: 17-19 September, followed by a special session on 20 September. The last regular meeting will be held on 25-27 November, followed by a special session on 28 November.

1. "Non-Violation" complaints under the TRIPS agreement

The Implementation Decision calls for an examination of non-violation complaints in the context of the TRIPS Agreement:

> [The] TRIPS Council is directed to continue its examination of the scope and modalities for complaints of the types provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 and make recommendations to the Fifth Session of the Ministerial Conference. It is agreed that, in the meantime, Members will not initiate such complaints under the TRIPS Agreement.[9]

This issue will be discussed in regular TRIPS Council session, rather than in special meeting. The deadline for coming up with recommendations will be the Fifth Ministerial Conference, in Cancun, Mexico, on 10-14 September 2003.

Article 64.2 of the TRIPS Agreement, which provides that the provisions of GATT 1994 related to non-violation complaints,[10] would not apply to the settlement of TRIPS disputes for a period of five years from the date of entry into force of the WTO Agreement, provides the

background of this exercise. While the phase-in period for non-violation claims expired on 1 January 2000, Article 64.3 provided that the TRIPS Council should "examine the scope and modalities for complaints of the type provided for under Article XXIII(1)(b) and (c) of GATT 1994 and submit recommendations to the Ministerial Conference for approval." So far, no recommendations have been issued.

---

[9] *Implementation Decision*, para. 11.1.

[10] Paragraph 1 of Article XXIII (Nullification and Impairment) of GATT 1994 reads as follows:

> If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of
>
> (a) the failure of another contracting party to carry out its obligations under this Agreement, or
>
> (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
>
> (c) the existence of any other situation,
>
> the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

The effect of the Doha Ministerial Declaration is to extend the moratorium of Article 64.2 of the TRIPS Agreement until the Cancun Ministerial Conference. Until then, the TRIPS Council is to fulfill the mandate of provided for in the Doha Declaration mirroring Article 64.3 of the TRIPS Agreement.

The issue was on the agenda for the first time following the Doha Ministerial Conference at the TRIPS Council's regular meeting on 5-7 March 2002. The Members decided that the Secretariat would compile and update information from past discussions for a discussion at the next meeting. Over the past several years, the WTO Secretariat has prepared a background paper on non-violation complaints and the negotiating history of Article 64.2.[11] In addition, the major players (identified below) have all produced papers on Article 64.2 concerning the applicability of non-violation complaints to the TRIPS Agreement and the scope and modalities for such complaints.

Issues to be addressed in the examination

The main issue in the examination will be whether the traditional principles governing non-violation complaints in disputes concerning trade in goods apply differently in disputes brought under the TRIPS Agreement, and, if so, whether the distinction argues for different rules for the treatment of these complaints under the TRIPS Agreement.

Positions of the major players

The major players in the negotiations are the United States on one side and the European Communities and Canada on the other. The United States believes that no purpose would be served by continuing the discussion in the TRIPS Council of scope and modalities for non-violation complaints. In particular, the United States considers that period specified in Article 64.2 is expired, and that after the Cancun Ministerial Meeting non-violation complaints should now be possible under the TRIPS Agreement.[12] The EC and Canada, on the other hand, believe that further study of the applicability of non-violation complaints to the obligations included in the TRIPS Agreement should be undertaken.[13]

2. Technology transfer

The TRIPS Council is mandated to put in place a mechanism related to the implementation of Article 66.2 of the TRIPS Agreement, which reads as follows:

> Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.

[11] IP/C/W/124.

[12] IP/C/W/194.

[13] IP/C/W/249.

The Implementation Decision addresses Article 66.2, and its relevance for the new round, in the following terms:

> Reaffirming that the provisions of Article 66.2 of the TRIPS Agreement are mandatory, it is agreed that the TRIPS Council shall put in place a mechanism for ensuring the monitoring and full implementation of the obligations in question. To this end, developed-country Members shall submit prior to the end of 2002 detailed reports on the functioning in practice of the incentives provided to their enterprises for the transfer of technology in pursuance of their commitments under Article 66.2. These submissions shall be subject to a review in the TRIPS Council and information shall be updated by Members annually.[14]

The Declaration on the TRIPS Agreement and Public Health also refers to Article 66.2, in the first sentence of paragraph 7, which states that Ministers "reaffirm the commitment of developed-country Members to provide incentives to their enterprises and institutions to promote and encourage technology transfer to least-developed country Members pursuant to Article 66.2."

Issues to be addressed in the work program

This issue has been under discussion in the TRIPS Council since December 1998. Developed country WTO Members have regularly notified to the TRIPS Council the assistance they provide to developing countries to facilitate the implementation of the TRIPS Agreement, pursuant to Article 67.[15] These notifications have also included information about incentives to enterprises, as required under Article 66.2. In order to stimulate discussion, the WTO Secretariat has prepared a note that sets out the types of incentives that have been offered.[16]

The discussions will be based on developed country Members' submissions on the practical functioning of the incentives provided to their enterprises for the transfer of technology to least-developed country Members. Developed country Members committed themselves to provide this information by the end of 2002 and to annually updates. The TRIPS Council shall review these submissions.

The main issue in the negotiations will be whether the type of information provided by developed country WTO Members to date is sufficient or instead needs to be improved, and whether the types of incentives provided by developed country Members are appropriate and sufficient.

---

[14] *Implementation Decision*, para. 11.2.

[15] Article 67 reads in part: "In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favor of developing and least-developed country Members. . . .".

[16] IP/C/W/128.

Post-Doha developments

The topic of technical cooperation has been discussed in the regular meetings of the TRIPS Council. The EU, Brazil, and Peru stress the use of flexibilities in the TRIPS Agreement and the need to address policy issues such as public health in workshops, meetings, seminars, *etc*. They further emphasize that necessity to provide information on and technical assistance for the implementation of TRIPS.

Positions of the major players

Developing country Members – led by the Africa Group of least developed country (LDC) Members – believe that more needs to be done by developed country Members to implement obligations under Article 66.2. They contend that the incentives identified by developed countries to date are not "meaningful." Developed country Members believe that they have provided the types of incentives required by Article 66.2, and have accurately so reported to the TRIPS Council.

3. Use of flexibility in the TRIPS Agreement

As noted above, Ministers issued a separate Declaration on the TRIPS Agreement and Public Health that resolved many of the issues that developing country Members and non-governmental organizations raised prior to the Doha Ministerial session. This separate Declaration calls for a work program and a direction to the TRIPS Council to take actions:

> We recognize that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.
>
> We reaffirm the commitment of developed-country Members to provide incentives to their enterprises and institutions to promote and encourage technology transfer to least-developed country Members pursuant to Article 66.2. We also agree that the least-developed country Members will not be obliged, with respect to pharmaceutical products, to implement or apply Sections 5 and 7 of Part II of the TRIPS Agreement or to enforce rights provided for under these Sections until 1 January 2016, without prejudice to the right of least-developed country Members to seek other extensions of the transition periods as provided for in Article 66.1 of the TRIPS Agreement. We instruct the Council for TRIPS to take the necessary action to give effect to this pursuant to Article 66.1 of the TRIPS Agreement.[17]

The TRIPS Council undertakes both the work program and the direction concerning extension of the transitional period for least-developed countries. With respect to

[17] *Public Health Declaration*, paras. 6-7.

compulsory licenses the work program obliges the TRIPS Council to report to the General Council by the end of 2002.

Issues to be addressed in the work program

The TRIPS Council discussed in detail the issue of TRIPS Article 31(f) on compulsory licenses and public health during its session on 20 June 2001,[18] which was followed by a number of informal meetings on 24-25 July and 16-17 September 2001.

The key issues in the Article 31(f) negotiations are the following

- Identification of developing country Members with manufacturing capacity to produce pharmaceuticals.
- Identification of developing country Members who could supply drugs if requested by other developing and least-developed Members with no manufacturing capacity.
- The drugs and diseases that would be covered by any solution.
- The safeguards that could apply to guard against diversion of patented products from the supplying or importing Member and to ensure pre-negotiation with patent holders prior to issuance of a compulsory license.
- Analysis of different modalities for the "solutions" such as a waiver, interpretation of Article 31(f) of the TRIPS Agreement, use of Article 30 of the TRIPS Agreement, or an amendment to the TRIPS Agreement.

Post-Doha negotiations

There has been intensive discussion of this highly contentious issue. While there is a deadline by December 10-11, 2002 for a solution to the problem, there remains considerably doubt as to whether agreement can be obtained by that deadline. There have been a number of proposals from the EC, United States, African group, Brazil and Canada.[19]

Suggestions have included amending or delete Article 31 (f) of the TRIPS Agreement,[20] which would ease or remove the requirement that production under compulsory licenses has to be predominantly for the domestic market. The EC proposes to amend the provision while developing countries prefer its deletion. Another suggestion,

---

[18] IP/C/M/32.

[19] Submission by the European Union: *Concept Paper Relating to Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, IP/C/W/339 (4 March 2002). The African Group, Brazil, Cuba, Dominican Republic, Ecuador, Indonesia, Malaysia, Thailand, Ecuador and Sri Lanka held oral presentations.

[20] Article 31 TRIPS Agreement reads in pertinent part as follows: "Where the law of a Member allows for other use of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected… (f) any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use".

supported by many developing countries, was to interpret the exceptions of Article 30 of the TRIPS Agreement[21] so that products being produced under compulsory licensing would be allowed to be exported to countries having public health problems but lacking domestic production capacity. The United States favors a solution providing for a waiver of the obligations of Article 31(f) or a moratorium on disputes on such cases. African Members emphasize the need for technology transfer to give countries the ability to build up domestic production capacity.[22]

On another issue relating to pharmaceutical patents, the TRIPS Council approved on 27 June 2002 the extension of the deadline for LDCs to apply provisions on pharmaceutical patents until 1 January 2016. The Council also approved a waiver that would exempt LDCs from having to provide exclusive marketing rights for any new drugs in the period when they do not provide patent protection.

This waiver leaves intact the obligation under Article 65.5, which provides that a Member availing itself of a transitional period "shall ensure that any changes in its laws, regulations and practice made during that period do not result in a lesser degree of consistency with" the TRIPS Agreement. The relevance of the provision lies in the fact that only view LDC Members exclude pharmaceutical products from patentability for the time being. Furthermore, Members using this extra transitional period still have to except patent applications (Article 70.8 of the TRIPS Agreement) and to provide for a five year exclusive marketing right in case they approve a new drug for sale.

LDC Members are not obliged to take advantage of the extension of the transition period. It is optional and any action to take advantage of it will have to be taken at the national level.

Positions of the major players

The United States, joined by Switzerland, Japan, and Canada, have been willing to show some flexibility on the Article 31(f) issue but generally seek to limit the importing and exporting countries, and the drugs and diseases that would be covered by any solution. These Members, along with the EC, also demand significant safeguards preventing diversion of patented products. Developing countries with generic industries with multinational capabilities or aspirations – led by India and Brazil – are in favor of such expansion. Other developing countries and many African countries favor a broader scope of the diseases and drugs, as well as the ability of all Members to be both importing and exporting Members. They also favor an amendment to Article 31 or use of the Article 30

[21] Article 30 of the TRIPS Agreement reads in pertinent part as follows: "Members may provide limited exception to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties."

[22] *The Doha Implementation Decision* ,WT/MIN/(01)/17, says "the TRIPS Council shall set up a mechanism for ensuring the monitoring and full implementation of the obligations under Article 66.2 in the TRIPS Agreement".

exceptions. As it did before Doha, the EC generally has sought to position itself between the U.S. group and the developing country group led by Brazil. [23]

4. Geographical indications

The Ministerial Declaration mandates negotiations involving the notification and registration of geographical indications:

> With a view to completing the work started in the Council for Trade-Related Aspects of Intellectual Property Rights (Council for TRIPS) on the implementation of Article 23.4, we agree to negotiate the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits by the Fifth Session of the Ministerial Conference.[24]

The Declaration also notes that "issues related to the extension of the protection of geographical indications provided for in Article 23 to products other than wines and spirits will be addressed in the Council for TRIPS pursuant to paragraph 12 of the Ministerial Declaration."[25] Paragraph 12 of the Ministerial Declaration states that "other outstanding implementation issues" shall be addressed as a matter of priority by the relevant WTO bodies – in this case the TRIPS Council – which shall report to the Trade Negotiations Committee by the end of 2002 for appropriate action.

Issues to be addressed in the negotiations

The scope of the negotiations on the notification and registration system is derived from Article 23.4 of the TRIPS Agreement itself. Article 23.4 calls for the establishment of "a multilateral system of notification and registration of geographical indications for wines"[26] eligible for protection in those Members participating in the system.

Regarding the Article 23 extension issue, the terms of reference for the discussions were very carefully drawn. Paragraph 18 of the Ministerial Declaration states that "issues related to the extension of the protection of geographical indications provided for in Article 23 to products other than wines and spirits" will be "addressed" by the TRIPS Council. Some delegations, notably the EC and Switzerland, have read this as a *mandate* to negotiate extension of Article 23 protection beyond wines and spirits. Members such as the United States and Argentina oppose this interpretation.

Both issues – establishment of a multilateral system of notification and registration and the Article 23 extension issue – have been extensively studied in the TRIPS Council and briefed by those WTO Members with an interest in the outcome.

---

[23] *Concept Paper Relating to Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, IP/C/W/339 (4 March 2002).

[24] *Ministerial Declaration*, para. 18.

[25] *Id.*

[26] This was extended to also include "spirits" through the Singapore Ministerial Declaration.

The main issue regarding the notification and registration system will be whether to establish a system that will solely cover notification (without direct substantive effect at the national level), or instead a full registration system (where registration leads to rights at the national level). The main question concerning the product scope of Article 23 is whether it should be extended beyond wines and spirits. Subsidiary issues include the scope of protection available now under Article 22 for products other than wines and spirits, the problems that arise in protecting that subject matter under Article 22 alone (versus Article 23), and the costs of extending Article 23-type protection to subject matter other than wines and spirits.

Procedure and substance of the post-Doha negotiations

The treatment of geographical indication-related matters appears to be bifurcated. The TNC decided at its first meeting that negotiations on the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits under the TRIPS shall take place in Special Sessions of the TRIPS Council. While the issue of extended protection for other products than wines and spirits is negotiated in regular meetings of the TRIPS Council.

Extension of protection

The post-Doha task of preparing a report to the TNC on the subject of extension of higher level protection (required by Article 23) to products other than wine and spirits was initiated at the TRIPS Council regular meeting held on 5-7 March 2002 and continued at its second meeting on 25-27 June 2002.

The groups of Members favoring and opposing extension each consist of both developed and developing countries. Among the countries in favor of extension are Sri Lanka, Slovenia, Switzerland, India, EC, Slovak Republic, Czech Republic, Pakistan, Morocco, Bulgaria, Thailand, and Turkey. The EC and its 15 Member States along with 20 other, mainly developing, countries put forward a proposal on 26 June 2002 to amend Article 23 to include protection for other products than wines and spirits, such as oriental carpets, ham, yogurts, rice, cheeses, beers and tea.[27] Members opposing extension include the United States, Argentina, Guatemala, Brazil, China, the Philippines, New Zealand, Canada, Australia, Colombia, Uruguay, and Paraguay. The United States is in the process of submitting a paper, co-sponsored by Brazil, China, the Philippines, and others, which states that "an extension will not cure existing problems but will create new difficulties."

Several points have been raised, in particular:

- Whether extension would improve or hold back market access and economic development.

[27] http://europa.eu.int/comm/trade/miti/intell/intel4a.htm.

- Whether the names used at present as generics would have to be changed to protected geographical indications or the exceptions in Article 24 (which includes generic terms) would be applicable.

- Whether extension would be onerous and impose costs.

- How to stop additional geographical indications becoming generic terms.

- What role cultural, social and public policies play in the debate.

Some of the countries that propose an extension of the protection accorded to wine and spirits under Article 23 to all products have requested the TRIPS Council to agree on "negotiating modalities" that would be submitted to the TNC. The Members opposing extension have said that the TNC should simply get a report on the discussions without suggestions on modalities. The TRIPS Council shall report the results of these discussions to the TNC by the end of 2002 for appropriate action.

Multilateral registration system

At the Special Sessions of the TRIPS Council on 8 March 2002 and on 28 June 2002 the two-phase negotiating program regarding a multilateral registration system for geographical indications for wine and spirits was started. While the deadline for most other negotiations is 1 January 2005, the deadline for this topic is the next Ministerial Conference in Cancun, Mexico, on 10 –14 September 2003.

During the first phase, the debate started by the TRIPS Council in February 1997 under Article 23.4 of the TRIPS Agreement will be continued. Article 23.4 states that negotiations "to set up a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system." This system is called the "voluntary" system. The first phase would cover ideas, suggestions and discussion proposals put forward before the end of 2002, as well as new proposals and ideas. In order to have a more substantive discussion at the next special sessions the Chairman, Ambassador Eui-young Chung, has suggested submitting a brief paper at the end of the year. Furthermore, a deadline for further submissions on 20 September was suggested but not agreed upon. Members had various views on this, with some wanting "soft target dates" and others not wanting any dates at all.

In the second final negotiating phase, Members would work on a draft report, addressing both controversial issues and questions upon which agreement has been reached. The Chairman stressed that this report should be submitted to the next Ministerial Conference.

The substantive discussions at the special session on 8 March 2002 reflected the differences as to structure and purpose of the two main proposals of a multilateral registration system. At the meeting, both the EC[28] and the United States[29] presented their

[28] http://europa.eu.int/comm/trade/miti/intell/intel4a.htm.

proposals. The EU proposal presumes that registered geographical indications are protected in all WTO Members except in those countries that can challenge the terms on the grounds that they are generic in their countries. The U.S., Canadian, Chilean and Japanese proposal envisages a database that would help Members in deciding whether to protect specific terms in their territories.

At the second special session on 28 June 2002, four categories of issues identified by the Chairperson were discussed: (i) definition of the term "geographical indications" and eligibility of geographical indications for inclusion in the system; (ii) the purpose of the notification and registration system; (iii) what is meant by a "system of notification and registration"; and (iv) participation. At the next special session the discussion of the four categories of issues mentioned above was scheduled to continue at the September special session, together with issues of "mechanics," including registration and procedures related to the multilateral system of notification.

5. Biological diversity, traditional knowledge, and other relevant new developments

The final TRIPS-related issue involves a work program to address issues that to date have been raised within the review of Article 27.3(b) of the TRIPS Agreement including the relationship of the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and other issues. Paragraph 19 of the Ministerial Declaration provides as follows:

> The Council for TRIPS, in pursuing its work program including under the review of Article 27.3(b),[30] the review of the implementation of the TRIPS Agreement under Article 71.1[31] and the work foreseen pursuant to paragraph 12 of this Declaration, to examine, *inter alia*, the relationship between the TRIPS Agreement and the *Convention on Biological Diversity*, the protection of *traditional knowledge and folklore*, and *other relevant new developments* raised by Members pursuant to Article 71.1. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension.

Under the Trade and Environment section of the Declaration, paragraph 32(ii) provides as follows:

---

[29] *Communication from the United States*, TN/IP/W/1 (9 April 2002).

[30] Article 27.3(b) of the TRIPS Agreement allows WTO Members to exclude the following from patentability "plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof." Article 27.3(b) goes on to state that "[t]he provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement."

[31] Article 71.1 of the TRIPS Agreement reads as follows: "The Council for TRIPS shall review the implementation of this Agreement after the expiration of the transitional period referred to in paragraph 2 of Article 65. The Council shall, having regard to the experience gained in its implementation, review it two years after that date, and at identical intervals thereafter. The Council may also undertake reviews in the light of any relevant new developments which might warrant modification or amendment of this Agreement."

> We instruct the Committee on Trade and Environment, in pursuing work on all items on its agenda within its current terms of reference, to give particular attention to: . . . the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights.

Discussions on these issues are taking place in the TRIPS Council and the Committee on Trade and Environment. There is no deadline for reporting to the General Council; rather, the negotiations are to be accomplished within the context of the existing TRIPS Council work program or, as appropriate, within the current terms of reference of the Committee on Trade and Environment.

Issues to be addressed in the work program

The scope of the discussions will involve "other relevant new developments" that arise pursuant to Article 71.1 of the TRIPS Agreement, as well as the relationship between the TRIPS Agreement, the Convention on Biological Diversity (CBD) and the protection of traditional knowledge and folklore. The WTO Secretariat has completed several studies on the relationship between the TRIPS Agreement, the CBD and the protection of traditional knowledge and folklore. These studies have been made available to the TRIPS Council and the Committee on Trade and Environment. Additionally, WTO Members have circulated papers on these issues in both the TRIPS Council and the Committee on Trade and Environment.

The main issue concerning the relationship between the TRIPS Agreement and the CBD is whether there is a conflict between the two agreements. A subsidiary issue is a call from some WTO Members to introduce an obligation to indicate the source or origin of genetic materials (or traditional knowledge) in patent applications.

Regarding the protection of traditional knowledge, the issues fall into two categories: first, whether mechanisms must be put in place to protect against the misappropriation of traditional knowledge; and second, whether there should be a *sui generis* system for the protection of traditional knowledge. A parallel issue will be the relationship between the issues raised in the TRIPS Council and the Committee on Trade and Environment and their treatment by the World Intellectual Property Organization (in the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore).

Post-Doha negotiations

At the TRIPS Council meeting 5-7 March 2002, the Members decided on the organization of the future work regarding the reviews of TRIPS provisions. The Secretariat was asked to compile summaries of proposals and concerns raised. Inter-Governmental Organizations were encouraged to supply reports on their work. Every government has also been requested to reply to a questionnaire on their implementation of Article 27.3(b) of the TRIPS Agreement. Members agreed to supply answers to the questionnaire and to submit proposals for an amendment of Article 71.1 of the TRIPS Agreement within a short

period of time. The substantive discussion mainly repeated positions that had been held by delegations at previous meetings.

Positions of the major players

WTO Members' views on these issues are divided along developed and developing country lines. Latin American countries and India seek heightened protection for genetic resources – including the introduction into national patent systems of a requirement for inventors to identify the source or origin of genetic resources. Some Members have also advocated a position that the TRIPS Agreement and the Convention on Biological Diversity ("CBD") are in conflict. Developed countries, led principally by the United States, Japan and the EC, have argued against the proposition that the TRIPS Agreement and the CBD are in conflict, and against the propriety of and need for indications of source or origin of genetic resources in patent applications.

Positions on the call for heightened protection for traditional knowledge are similarly divisible along developed/developing country lines, with India and Latin American countries as the principal *demandeurs*. That said, there is agreement that documentation of traditional knowledge, and the provision of that documentation in a usable form to patent offices, could reduce the incidence of improvidently-granted patents.

For further information please contact Richard Wilder at rwilder@sidley.com

CHAPTER 10 – AGRICULTURE

1. Procedure for the negotiations

The negotiations on agriculture began in January 2000 under Article 20 of the Agreement on Agriculture, as part of the "built-in agenda" established in the Uruguay Round. The negotiating sessions to date have been conducted under the auspices of the WTO Committee on Agriculture. The Trade Negotiations Committee determined in its first session that the agricultural negotiations will continue within the existing Committee. The discussions on agriculture will be carried out in Special Sessions[1] of the regular Committee.

Paragraphs 13 and 14 of the Ministerial Declaration address the agriculture mandate, which will encompass (i) specific commitments and (ii) rules and disciplines on agricultural support and protection. The Declaration specifies that modalities for further commitments in each area of the agriculture negotiations shall be established over a 12-month program ending on 31 March 2003.[2] This is one of the most critical stages of the agricultural negotiations. Modalities or targets, including numerical targets, shall be set to be able to achieve the objectives set out in the Doha Ministerial Declaration. The negotiations shall be aimed at "substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support."

In the beginning of 2003, WTO members will commence intense negotiations and submit their draft schedules of concessions on the basis of those modalities. The expectation is that a comprehensive draft of their commitments can be presented no later than the Ministerial Conference in Cancun (10 –14 September 2003).

The agriculture negotiations will be treated as one part of the "single undertaking" to be concluded together with all the other subjects in the new round.[3] While the current schedule calls for conclusion of the single undertaking by 1 January 2005,[4] the negotiations are not very likely to be concluded by this deadline.

In a Special Session of the WTO Agriculture Committee on 26 March 2002, the Committee agreed on a work program on the key negotiating principles. This 12 month modalities program is as follows:

---

[1] WT/GC/M/53

[2] *Ministerial Declaration*, para. 14.

[3] *Id.*, para. 47.

[4] *Id.*, para. 45.

2002

- Export subsidies and restrictions: Informal 17-19 June and formal 20 June.
- Market Access: Informal 2-3 September and formal 4 September.
- Domestic Support: Informal 23-25 September and formal 27 September.
- Follow-up: Informal 18-20 November and formal 22 November.
- For circulation by 18 December an overview paper drafted by Chairperson Mr. Harbinson[5], based on discussions so far.

2003

- Comprehensive review based on overview paper: Informal/formal 22-24 January.
- First draft of modalities document.
- Comments on first draft: Informal/formal 24-28 February.
- Second draft of modalities document.
- Consideration of final text: Informal/formal 25-31 March.
- Deadline to set "modalities" or targets (including numerical targets): 31 March.

2. Issues to be addressed in the negotiations

Paragraphs 13 and 14 of the Ministerial Declaration adopted some of the basic language and concepts found in the Preamble and in Article 20 of the Agreement of Agriculture. For example, Ministers reaffirmed their commitment to long-term reform, encompassing strengthened rules and specific commitments aimed at correcting and preventing restrictions and distortions in world agricultural markets. More specifically, the comprehensive negotiations will address three principal areas:

- Substantial improvements in market access.
- Reductions of, with a view to phasing out, all forms of export subsidies.
- Substantial reductions in trade distorting domestic supports.

[5] Mr. Harbinson was formally selected the Chairperson at the Special Session and he will hold that position until the Fifth Ministerial Conference. He also chaired the WTO General Council during the preparations for the Doha Ministerial Conference.

Members will also address special and differential treatment for developing countries and non-trade concerns.

The Declaration reaffirmed the Ministers' commitment to work already undertaken by the Committee on Agriculture, pursuant to Article 20 of the Agreement on Agriculture. At the request of the Members, the WTO Secretariat has contributed 22 background papers based on the large number of proposals and documents submitted by Member countries. The various proposals (regarding the full range of issues discussed below) were reviewed by the Special Session of the Committee on Agriculture even before the Doha Ministerial Conference. To meet the ambitious three-year timetable agreed upon at Doha, the agricultural negotiations must proceed rapidly to discussion of the modalities for commitments in each area. The work already completed in the Committee on Agriculture, however, will substantially assist negotiators in reaching the Doha timetables. More importantly, the fairly broad scope of the negotiations launched at Doha will make it easier, particularly for the EC, to make concessions in agriculture.

3. Main issues and positions of the major players

As of September 2002, the discussions in the Special Sessions of the Agriculture Committee have – in line with the modalities program agreed upon in March 2002 – covered the issues of (a) export subsidies and (b) market access for agricultural products.

The status of these and the other issues areas and the positions of the major players in the negotiations are as follows: [6]

***Export subsidies*:** The last-minute debate at Doha on export subsidies reflected the reluctance of France and several other EU Member states – by far the largest users of export subsidies – to agree to the total elimination of export subsidies. The resulting Declaration language goes a long way toward realizing the goal of many Members, including the Cairns Group[7] countries and the United States, to eventually phase out export subsidies. Going into the negotiations, the EU Member states that rely heavily on agricultural subsidies were adamantly opposed to any language that referred, expressly or implicitly, to the eventual elimination of export subsidies. Although the Cairns Group agricultural exporters and the United States succeeded in including language that refers to the elimination of export subsidies, this fight will be a long one, since the EC is expected to continue to press for the right to use these trade-distorting subsidies as long as possible. As a result of the impending accession of a number of largely rural Central European countries, however, the EC is facing substantially-increased costs associated with its Common Agricultural Policy ("CAP"). The EC may be able to take advantage of progress in the new round of trade negotiations on

[6] For more details on the issues addressed see: Agricultural Negotiations Backgrounder: The Issues and Where We Stand Now: http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd00_contents_e.htm

[7] Members of the Cairns Group are Australia, Argentina, Bolivia, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Paraguay, the Philippines, South Africa, Thailand, and Uruguay. The group was established in Cairns, Australia, in 1986 with the purpose of promoting reform of the farm sector through the multilateral trading system.

export subsidies and domestic support to move farther in the direction of CAP reform than would otherwise be possible.

The United States submitted a new comprehensive proposal on 25 July 2002.[8] Regarding export subsidies, the U.S. approach would require WTO Members to eliminate export subsidies over a five-year period. The EC's reaction to this proposal was skeptical as the United States put forward this aggressive plan only a few weeks after approving a new farm bill increasing domestic price support subsidies to U.S. farmers by over $70 billion.

Issues related to export subsidies include eliminating the circumvention of export subsidy disciplines through the use of state trading enterprises, food aid and (subsidized) export credits. In addition, many developing countries, such as India and ASEAN call for the total elimination of export subsidies only for developed countries, while allowing developing countries the flexibility to use export subsidies for marketing and selected products. Another key issue will be the development of specific disciplines on export credits. The United States is a large provider of these credits. Its proposal would permit disciplines on such export credits subject to enumerated permissible practices. The EC and the Cairns Group (notably Brazil) seek to strengthen existing disciplines to seek with the goal of curbing the use of trade-distorting export credits.

***Market access – tariffs and tariff quotas*:** The market access discussions in the 2000-2001 Special Sessions of the Committee on Agriculture focused on two basic issues: first, the tariff rate quotas themselves, including the tariffs charged within the quotas (in-quota tariffs), their volume, and the way they have been administered; and, second, the high level of tariffs outside the quotas (out-of-quota tariffs). Members have recognized that the system for administering imports within the quota has a significant impact on trade. This impact is well illustrated by the "Bananas" wars, in which some developing countries continue to dispute the EC's administration of tariff quotas. Among the issues discussed in the negotiations are the lowering of in-quota tariffs, the identification of the most trade-restrictive and non-transparent quota administration mechanism, and the categorization of methodologies as either consistent or inconsistent with WTO rules. There is, however, some agreement between WTO Members that there is no one optimal way to administer quotas.

The main market access discussions, however, will revolve around the level of tariffs, whether within or outside the tariff rate quotas. The principal issue is whether there should be product-by-product negotiations or negotiations covering a broad range of products and whether a formula approach to tariff reductions should be applied before starting to negotiate specific reductions. Some Members, such as the United States and Canada, have argued for sectoral liberalization that would include negotiation on the complete elimination of tariffs by key WTO Members in specific sectors, such as oilseeds, barley, and malt. But other WTO Members such as Japan, with particular interest in key products such as rice, have indicated their reluctance to accept these so-called "zero-for-zero" deals.

[8] http://www.fas.usda.gov/itp/wto/proposal.htm.

The United States proposed that WTO Members agree on using the so-called "Swiss formula" as a first step to reducing tariffs. This formula would cut high tariffs more than low tariffs. Furthermore, the United States wants negotiations to start from applied rather than bound tariff levels. The United States seeks a cut in the average global import tariffs on agricultural products from about 62 percent today to 15 percent over a five-year period, with no tariff higher than 25 percent.

Australia and others Members of the Cairns Group indicated their support for the U.S. proposal to achieve large tariff reductions on agricultural tariffs in the Doha Round. However, they are opposed to employing the applied rather than the bound tariffs as the basis for negotiating tariff cuts. They claim this would break with the GATT tradition of basing negotiations on the level of bound tariffs and it would punish WTO Members that unilaterally lowered their tariffs.

The issue of tariff peaks (*i.e.*, tariffs substantially higher than the average tariff that applies to other agricultural products) is also addressed in the negotiations. Tariff peaks resulted from the tariffication process of the Uruguay Round, and were employed to perpetuate the protection of the importing country's markets for certain commodities. Some Members, such as the EC, Japan, Korea, Switzerland, and Norway, have argued for continued high tariffs to protect domestic production and maintain food security. Many developing countries argue that they need the ability to apply higher duties to protect their farmers from competition from developed country products that are supported by export and domestic support subsidies. Additionally, developing countries will push for the elimination of "tariff escalation," *i.e.*, where developed countries impose higher duties on processed agricultural products (*e.g.*, milled rice) than on raw commodities (*e.g.*, husked rice). The United States has been a strong advocate for significant tariff reductions, and has even suggested starting the negotiations with applied instead of bound rates, based on the rationale that agriculture tariffs are already very high. Some developing countries argue that they need some flexibility in their tariff application and cannot reduce their bound rates too much as tariffs are a means to protect their non-competitive farmers and to ensure food security.

As of September 2002, four out of six market access sub-issues have been discussed (tariffs, tariff-rate quotas, tariff quota administration, special safeguard measures). The Agricultural Committee will discuss importing state trading enterprises and other market access issues in a formal Special Session in September 2002.

***Domestic support*:** Negotiations on domestic support will revolve around the three categories of domestic support subsidies – the so-called "amber," "blue" and "green" boxes of subsidies. Further substantial reductions in domestic support will be a critical element in the negotiations. As discussed below, calls for reduction will be directed principally at "amber" and "blue" box subsidies.

The "amber box" includes all domestic support subsidies that distort production and trade. Members agreed in the Uruguay Round to reduce the value of amber box subsidies over time. While some Members argue for a considerable reduction and eventual elimination of amber box subsidies because of their distorting effect on trade, others have

focused on the disaggregation of amber box subsidies to provide disciplines on particular products, as opposed to the current "total aggregate measure of support." The United States argues for a limitation of amber box subsidies to five percent of the total value of agricultural production. While such a limit would be implemented progressively, the United States favors a total phase-out of trade-distorting subsidies, including amber box subsidies, in the future. Generally, proposals differ as to the extent of the reductions in amber box subsidies and whether limits should be overall or rather product-specific. Some developing countries have pushed for acceptance of *de minimis* amber box support, while others demand higher levels of amber box support for developing countries.

The "blue box" exempts production-linked subsidies from reduction where production is explicitly limited or farmers are required to set aside part of their land.[9] The EC, Norway and Japan have asserted that these subsidies distort trade less than amber box subsidies, and are important to maintain "non-trade" objectives. The EC, in particular, has asserted that the maintenance of blue box subsidies is essential if it is to agree to limits on amber box and export subsidies. By contrast, many Cairns Group WTO Members want to see the elimination of blue box subsidies, because the payments are only partially de-coupled from production. The United States has proposed the maintenance of only two categories of support – those subsidies that have no or minimal trade-distorting effects or effects on production (the current green box), and those non-exempt subsidies that would be subject to a reduction commitment. Thus, the United States would merge the amber and blue box subsidies.

The "green box" subsidies are not subject to reduction, and are permitted only if they cause "at most" minimal distortion of trade or production.[10] Canada has suggested that green box subsidies be included within the overall levels of support that would be subject to reduction. The EC and the United States, however, have argued for the continuation of green box subsidies, without limitations.

Many Members of the Cairns Group press for reductions in all forms of domestic support, arguing that even so-called "non-trade-distorting" subsidies in fact affect production patterns and therefore trade. This position places the Cairns Group at odds with the United States, particularly in light of the huge new domestic support subsidies provided by the recent U.S. farm bill. Brazil, Australia and other Members of the Cairns Group are expected to be increasingly aggressive in attacking these U.S. subsidies and EC subsidies in dispute settlement during the last quarter of 2002.

***Special and differential treatment*:** The Ministerial Declaration contains a commitment to developing country participation in the multilateral trading system, with Ministers expressly recognizing special and differential treatment as "an integral part of all elements of the negotiations," both in terms of specific commitments and in the rules and

[9] Agreement on Agriculture, Article 6.4.

[10] Agreement on Agriculture, Annex 2.

disciplines to be negotiated.[11] This language can also be seen as evidence of the increased participation of developing countries in the multilateral trading system since the conclusion of the Uruguay Round. The African Group, ASEAN and some individual developing country Members have submitted proposals calling for separate rules for developed and developing countries. These Members argue that differentiated rules are necessary to support their agricultural and rural development, to maintain large populations on the land, and to address the different agricultural methods used in producing food in developing countries. Among the allowances they seek are domestic support subsidies to ensure food security, to support small-scale farming, and to address the lack of capital for farming operations. In addition, developing countries seek elimination of tariff escalation and trade-distorting domestic and export subsidies that preclude market access for their products. However, the developing countries have no single negotiating position as some, in particular the Members of the Cairns group, support more liberalization.

***Non-trade concerns*:** The Ministerial Declaration also confirms the text of Article 20 of the Agreement on Agriculture with regard to non-trade concerns to be taken into account in the negotiations. The EC, Japan, Korea and Norway have emphasized the importance of non-trade concerns and the "multifunctional" character of agriculture, or, in other words, the diverse roles that agriculture plays in society in the maintenance of environmental spaces, preservation of soil, maintenance of a rural economy, etc. The reference to Article 20 likely thwarted attempts by these Members to include express reference in the Declaration to "multifunctionality" and its relevance to the negotiations.

The Cairns Group countries are skeptical of "multifunctionality," and consider it as a justification for maintaining protectionist and trade-distorting measures. According to these countries, non-trade objectives are best obtained through the use of green box subsidies – such as food security stocks, environmental programs, structural adjustment assistance and safety-net programs – that do not distort trade. Many developing countries are critical of addressing non-trade concerns, which give preferred treatment to developed countries at the expense of closing markets to developing country products, outside the green box of non-distorting domestic supports. This will continue to be a contentious issue throughout the negotiations.

Precautionary principle and biotechnology: The United States and the Cairns Group countries feared that the EC might undermine efforts to liberalize agricultural trade through a renegotiation of rules on sanitary and phytosanitary measures (under the SPS Agreement) and other technical barriers to trade (under the TBT Agreement) at Doha. These fears were not realized. The Declaration does not provide for negotiation on those issues, and there is no mention of the "precautionary principle." Indeed, EC Trade Commissioner Pascal Lamy provided written assurances to U.S. Trade Representative Robert Zoellick that the EC would not use the precautionary principle to avoid compliance with WTO rules and obligations. This would mean that during the course of the WTO negotiations, the EC would not invoke

[11] *Ministerial Declaration*, para. 13.

the precautionary principle in potential challenges to its regulatory measures affecting trade.

The agricultural community recognizes that although biotechnology was not explicitly part of the Doha Declaration, U.S. negotiators worked hard to ensure U.S. interests related to trade in biotech products were well protected.

***Environment*:** The agreement to undertake negotiations on issues related to trade and the environment, especially with respect to the relationship between the WTO and Multilateral Environmental Agreements, has caused some nervousness among agricultural groups, particularly since the inclusion of such language was an important EC objective. However, many now believe that the discussion of this topic will also give the United States and its allies an opportunity to address issues related to the Biosafety Protocol in a friendlier international forum.

For further information please contact Scott Andersen at sandersen@sidley.com or Patricio Grane at pgrane@sidley.com

CHAPTER 11 – DISPUTE SETTLEMENT UNDERSTANDING

The WTO dispute settlement system is one of the most fundamental components of the multilateral trading system, with the Dispute Settlement Understanding (DSU) being celebrated as one of the major achievements of the Uruguay Round. Nevertheless, certain shortcomings and deficiencies have been identified since its entry into force. The Ministerial Declaration reflects recognition by Ministers that the existing rules and procedures of the DSU need improvement and clarification. Specifically, paragraph 30 of the Declaration states that:

> We agree to negotiations on improvements and clarifications of the Dispute Settlement Understanding. The negotiations should be based on the work done thus far as well as any additional proposals by Members, and aim to agree on improvements and clarifications not later than May 2003, at which time we will take steps to ensure that the results enter into force as soon as possible thereafter.

Discussions on a revision of the DSU were initiated in 1997 and are still ongoing. The 1994 Ministerial Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes called for a review of the DSU within four years of the entry into force of the WTO Agreement (*i.e.*, 1 January 1999). As early as November 1997, the Dispute Settlement Body (DSB) started holding consultations with Members to comply with the Ministerial mandate. The Members agreed that the DSU should continue, but there was also widespread recognition that improvements had to be made. The DSB held informal meetings with a view to reaching an agreement on amendments to the DSU, on the basis of individual proposals and issues identified by Members.

When the January 1999 deadline arrived, negotiators were far from reaching agreement on a package of dispute settlement changes. A group of active delegations still continued the informal negotiations through an open-ended consultation process, which culminated with a group proposal tabled before the 1999 Seattle Ministerial Meeting, co-sponsored by 15 Members (including Canada, Costa Rica, the Czech Republic, EC, Japan, Korea, Norway, Slovenia, Switzerland, Thailand, and Venezuela). After the Seattle meeting ended in failure, and preparations began for the Doha Ministerial Meeting, these same Members, with support from others (including Australia, Hong Kong (China), Mexico, Philippines, and the United States) continued to hold informal consultations and discussions, on the basis of the 1999 proposal and other issues. The co-sponsors (minus the Czech Republic, EC, Slovenia, and Thailand, but including Bolivia, Chile, Colombia, and Uruguay) submitted a proposal before the Doha Ministerial session,[12] which did not adopt the proposal but agreed to launch negotiations in the Doha Round.

---

[12] WT/MIN(01)/W/6, 1 November 2001 (Amendments on Certain Provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes).

1. Procedure for the negotiations

The negotiations on improvements and clarifications of the DSU mandated by the Ministerial Declaration will be supervised by the Trade Negotiations Committee under the authority of the General Council.[13] At the first meeting of the TNC, it was decided that the negotiations will take place in Special Sessions of the Dispute Settlement Body.

The Ministerial Declaration established a "soft" deadline for the conclusion (but not necessarily for the implementation of the results) of the DSU negotiations (May 2003), in lieu of the general date for the conclusion of the other negotiations (1 January 2005). Even though substantial work has already been done in the years leading up to the Doha Ministerial, the amount and complexity of the work that is still needed should not be underestimated. Moreover, as explicitly stated in the Ministerial Declaration, Members may submit new proposals.

It is also noteworthy that Ministers decided not to treat the DSU negotiations as part of the single undertaking.[14] Because substantial work has already taken place, Members expect to be able to reap an early harvest and implement the results of the negotiation, without tying them to the overall success or failure of the Doha Round.

The first formal meetings of the Dispute Settlement Body to address the issue were held, in Special Sessions, on 16 April 2002,[15] 21 May 2002,[16] and 15-16 July 2002. At these meetings the work was conducted on the basis of a "two-track" approach proposed by the Chairman, including parallel discussions of the issues and objectives for the negotiation, and of specific proposals submitted by Members.

The number of proposals that have been submitted to the Special Session of the Dispute Settlement Body is substantial and more proposals are expected to be tabled. There is a wide range of issues dealt with in the proposals, from the most controversial ones, such as those targeting U.S. "carousel" retaliation, to others that seem acceptable in their present form, such as expansion of third party participation rights. The Chairman has initiated smaller informal meetings to focus in on the issues. Intensive work will be necessary if the group is to reach agreement by the deadline of May 2003 set in the Doha Declaration.

Further meetings of the Special Session are scheduled to be held this year, specifically on 10-11 September, 14 October, 13-15 November and 16-18 December.

---

[13] *Ministerial Declaration*, para. 46.

[14] *Id.*, para. 47.

[15] *Report by the Chairman to the Trade Negotiations Committee*, TN/DS/1 (23 April 2002).

[16] *Report by the Chairman to the Trade Negotiations Committee*, TN/DS/2 (9 July 2002).

2. Issues to be addressed in the negotiations

Although Members have submitted a wide range of proposals, the principal focus of the negotiations for the EU and other non-U.S. actors has been the "sequencing" conflict between DSU Article 21.5 (which requires that disputes regarding compliance with DSB rulings and recommendations must be referred back to the original panel) and Article 22.6 (which requires that any request or authorization to suspend concessions in response to a failure to implement DSB rulings and recommendations must be made by 30 days after the deadline for compliance). These two provisions do not work together because they were negotiated at different times in the Uruguay Round under highly charged circumstances that precluded any technical fix at the time. However, the conflict became apparent in mid-1998. Although workarounds have been negotiated in particular cases, the dysfunctionality of the DSU text is now generally recognized to be a problem that needs to be fixed. The group text of 1999 put forward concrete technical proposals on how to fix it, but a few problems remain.

The major obstacle to fixing the "sequencing" problem has been the impact of proposed fixes on the overall duration of dispute settlement proceedings. The United States has adamantly opposed any increase in the overall duration of dispute proceedings, because such an increase would require the Administration to ask Congress to amend Section 301 of the Trade Act of 1974, the statutory framework for U.S. WTO enforcement. If this is to be avoided, any additional time to permit the original panel to resolve disputes about compliance before the DSB considers authorizing retaliation will have to be compensated for by shortening timeframes at earlier phases of a dispute.

The United States has focused its efforts on increasing transparency of the dispute settlement process. Since 1998, U.S. negotiators have argued for rapid public release of panel reports, for opening panel and Appellate Body hearings to the public to observe, for immediate public access to submissions in WTO disputes, and for provision for submission of *amicus curiae* briefs to panels by civil society stakeholders. Some of these changes have been adopted in particular disputes; U.S., Canadian and EU WTO submissions are now posted on the Internet, and access to panel reports has been speeded up substantially. Some transparency improvements were incorporated in the 1999 group proposal discussed above. However, other aspects of the U.S. transparency agenda either failed to gain support from other delegations, or were not negotiable outside the context of a trade round where wider tradeoffs might be possible. Developing countries have generally strongly opposed open hearings.

In the Doha discussions, the United States has continued to stress greater transparency.[17] The EU has also advocated some increased transparency, such as opening of hearings if its proposal for a Standing Panel Body is adopted. EU and U.S. proposals in 2002 have suggested *amicus* briefs under conditions that would be established by agreement between WTO Members. Developing countries have vehemently opposed *amicus* briefs

[17] http://www.ustr.gov/enforcement/2002-08-09-transparency.pdf.

under any conditions, and reacted strongly against the Appellate Body when it invited *amicus* briefs in a recent case.

The amendments proposed thus far include added or improved language concerning the following issues:

Suggestions have been made on added procedures for determining whether the respondent has complied with the rulings and recommendations of the DSB (proposed new *Article 21.bis*).[18] These new procedures clarify the language of existing Article 21.5 and provide for a separate set of rules for compliance panels. Members should aim to reach a mutually agreed solution on the implementation issue and notify this to the DSB. If these efforts fail a compliance panel may be established either 10 days before the expiry of the reasonable period of time or after the Member concerned has notified the measures it is taking to comply. A Member has suggested that the Compliance Panel should also determine the level of nullification or impairment (trade damage) in order to facilitate negotiations on compensation.[19]

A proposal has been submitted to modify Article 22.2 regarding the manner and timing of the request for authorization to suspend concessions. One important suggestion is to create a consultation phase for negotiating compensation.

The 1999 group proposal included an improved arbitration method for determining the appropriate level of suspension of concessions (retaliation) for non-compliance. It would try to be more efficient by building on prior proceedings under Article 21.5, to economize on time and avoid duplication. In order to make the procedure more efficient it should be completed in a shorter timeframe than before.[20]

Thailand and Philippines have made a separate and detailed proposal regarding the arbitration provided for in existing Article 22.7.[21] The proposal addresses the U.S. "carousel retaliation" legislation enacted in 1999 to pressure the EU on the bananas and hormones WTO cases, after U.S. stakeholders perceived that U.S. retaliation against a limited list of products was not effective in persuading the EU to comply with the WTO panel decisions in these disputes. The "carousel" provision called on USTR to rotate its retaliation list every six months. Although the provision has never been invoked, the EU and many other WTO Members reacted immediately. Their advocacy of anti-carousel provisions that would require repeal of the U.S. provision has been met by opposition by U.S. negotiators, resulting in an impasse on this issue.

---

[18] WT/MIN(99)/8.

[19] *Contribution of the Republic of Korea to the Improvement of the Dispute Settlement Understanding of the WTO*, TN/DS/W/11 (11 July 2002).

[20] WT/MIN(99)/8.

[21] *Proposal to Review Article 22.7 of the Understanding on Rules and Procedures Governing the Settlement of Disputes,* TN/DS/W/3 (21 March 2002) based on WT/MIN(01)/W/3 (9 October 2001).

The negotiators of the DSU provided for expeditious adjudication of disputes about compliance, and authorization of retaliation against the trade of a Member that has lost a case and failed to comply with DSB recommendations or rulings. If the losing party reaches agreement on compliance with the other parties to the case, as happened in the *Bananas* case, the agreement will generally provide for retaliation to end. But the rules do not now provide for the situation if the losing party claims it has complied and the other parties do not agree. The 1999 group proposal included an expedited procedure to settle disputes in this situation and adjust or eliminate any DSB authorization to retaliate.[22]

The 1999 group proposal also would reduce the minimum time period for consultations from 60 to 30 days, except when a defending party is a developing country. This change would economize on time at the start of a case, to allow for more elaborate compliance proceedings at the end, as discussed above. Proponents argue that in cases where it is obvious that settlement is unlikely, it would be pointless to postpone the consultations. If the parties are conducting settlement negotiations, they can, of course, prolong consultations as long as they want.

The DSU now provides that when a complaining party has put a request for establishment of a panel on the DSB agenda, the defending party can block panel establishment one time, and the panel must be established at the second DSB meeting where the request is on the agenda. The 1999 group proposal would provide for establishment of a panel at the first DSB meeting where a request is on the agenda. The EC argues that the discussions on a settlement of the dispute should be limited to the consultations phase, which would be appropriate since settlement is the main reason for consultations.

Thailand and other Members have tabled a proposal to increase the size of the Appellate Body to address its (until recently) increasing workload. [23] Another advantage of having more Appellate Body members would be to have a broader geographical representation in that important standing body.

Since 1999 many Members have pushed for increased rights for Member governments not directly involved in a dispute to receive information on the dispute (including observing panel meetings) and submit their views to panels and the Appellate Body. These proposals have wide support and are likely to be part of any package of dispute settlement changes. Opening the dispute settlement process in this manner will also expand opportunities for stakeholders to have governments advance their views in WTO disputes.

Overall time-frames of the proceedings and individual phases have been suggested by the EC to be adapted to Members' needs. Generally the EC argues that the time-frames should be shortened but that shorter deadlines could be extended if necessary to respond to

---

[22] *Id.*

[23] *Add reference to Thai proposal – the previous reference is to the 1999 group proposal.*

the need of a particular developing country. Also, Australia has emphasized the need to adopt time-saving measures to ensure efficiency.[24]

The EC has tabled a proposal to create a "Standing Panel Body" that would replace the current model of choosing panelists on an *ad hoc* basis for each particular dispute.[25] They suggest a permanent panel roster consisting of 20 people of which panels of three will be drawn in rotation. The EC underscores the importance of improving the quality of the panel reports as well as increasing the efficiency of the process. The EC argues that if panelists were selected on a more permanent basis it would result in more consistent rulings. The process would also be expedited, since the delays attributed to the difficult process of finding qualified panelists that are not nationals of Members involved in the dispute, would be averted. The representation from all WTO countries would be ensured, unlike at present when most panelists are nationals of developed countries. Members might, however, not be ready to give up their influence in the selection of panelists. Also, the fact that a standing panel body would be more like a court could increase requests for public panel hearings and increased transparency of the proceedings in general, which the majority of developing countries resolutely oppose.

The Standing Panel Body would be a major change in the operation of WTO dispute settlement. It is not clear whether other delegations will be willing to agree to such a change as a stand-alone improvement by the deadline of May 2003.

The issue of transparency has also been raised by the EC in its proposal.[26] In this respect, it compares the International Court of Justice, the International Tribunal for the Law of the Sea and the European Court of Human Rights to the WTO dispute settlement mechanism. The WTO is not as open to the public in the same way as the other dispute settlement mechanisms. In the view of the EC, if the parties considered that making the dispute settlement proceedings open to the public would help solve the particular dispute, they should have the discretion to do so. Also, third parties should be able to decide whether their interventions should take place in open or closed sessions. The United States supports the EC on the issue of transparency and claims that the public in general and Members should have access to all substantive meetings.[27] In addition, submissions and final reports should be made available in a more timely manner.[28]

---

[24] *Negotiations on improvements and Clarifications of the Dispute Settlement Understanding*, TN/DS/W/8 (8 July 2002).

[25] *Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding,* TN/DS/W/1 (13 March 2002). India has submitted a communication where they sought some clarifications on the EC communication, *India's Questions to the European Communities and its Member States on their Proposal Relating to Improvements of the DSU,* TN/DC/W/5 (7 May 2002) The EC's reply came in on 30 May 2002, *The European Communities' Replies to India's Questions,* TN/DX/W/7.

[26] *Contribution of the European Communities and its member states to the improvement of the WTO dispute settlement understanding*, TN/DS/W/1 (13 March 2002).

[27] http://www.ustr.gov/enforcement/2002-08-09-transparency.pdf.

[28] *Id.*

With regard to submission of *amicus curiae* briefs, Member States' positions are deeply entrenched. The EC emphasize the necessity of better defining the framework and conditions for allowing such briefs in potentially all cases.[29] In a recent case the Appellate Body interpreted the DSU to allow for the submission of *amicus curiae* briefs. The EC insists that allowing panels to have recourse to the expertise of international organizations is necessary to ensure the proper functioning of the WTO dispute settlement system. The EC notes that *amicus curiae* briefs should not delay the proceedings and should not create additional burdens for the developing countries, but that enough time must be given for *amicus* briefs to be meaningful. Also, the United States proposes to allow for such submissions, but wants to introduce clear guidelines for them.[30] Developing countries are vehemently opposed to the idea of allowing *amicus curiae* briefs.

3. Positions of major players

The Member States overall believe that the dispute settlement mechanism, in general terms, operates satisfactorily. However, there is also near unanimity among the Members that the DSU should be modified to improve its operation and correct some procedural deficiencies. A few developed countries believe that differences in views on some of the issues could lead to amendments that would weaken the DSU.

The most obvious is the disagreement between the United States, on one hand, and the EC and others (including Thailand, Philippines, and the co-sponsors), on the other, over the "carousel provision" discussed above. The EC argues that the carousel provision is contrary to the WTO rules, for it mandates unilateral action that suspends or threatens to suspend concessions or obligations other than those authorized by the DSB. The disagreement over the carousel provision remains unresolved. However, now that the EC has been authorized to suspend concessions in respect of the U.S. for an amount in excess of $4 billion, as a result of the U.S. failure to implement the recommendations of the DSB in the *FSC* dispute, either the U.S. or the EC may revisit the issue and reconsider the wisdom of their position with respect to the carrousel provision.

On external transparency in dispute settlement, the United States (supported by Canada and the EU) has taken a strong pro-transparency position, as discussed above. The majority of developing countries (led by Mexico and Malaysia) strongly oppose opening hearings to the public, requiring governments to make their submissions public when submitted, or allowing *amicus* submissions by civil society stakeholders.

Some developing countries (*e.g.*, Guatemala, Panama, Dominican Republic, El Salvador) have concerns regarding any shortening of the overall duration of dispute

---

[29] *Contribution of the European Communities and its member states to the improvement of the WTO dispute settlement understanding*, TN/DS/W/1 (13 March 2002).

[30] http://www.ustr.gov/enforcement/2002-08-09-transparency.pdf.

settlement proceedings, because time pressure would increase resource demands on them and strain their ability to effectively participate in dispute settlement.

For further information please contact Amy Porges at aporges@sidley.com or Patricio Grané at pgrane@sidley.com

CHAPTER 12 – TRADE AND ENVIRONMENT

The WTO has no specific agreement that deals with the environment, although a number of the WTO agreements include provisions related to environmental concerns and the preamble to the Agreement Establishing the WTO includes objectives of sustainable development and environmental protection. Outside the WTO there are about 200 international agreements currently in force that relate to various environmental issues, referred to as multilateral environmental agreements (MEAs). About 20 of these contain trade provisions.

Issues relating to sustainable development, trade and the environment have been discussed in the GATT and WTO for many years. The Committee on Trade and Environment (CTE) was created following the adoption of the 1994 Ministerial Decision on Trade and Environment and has managed the work since 1995. The CTE is open to all members of the WTO and in addition a number of intergovernmental organizations have observer status in its meetings. The mandate of the CTE is "to identify the relationship between trade measures and environmental measures in order to promote sustainable development;" and "to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system."

1. Procedure for the negotiations

At the Doha Ministerial Conference, the Members undertook to open negotiations on certain aspects relating to the linkage between trade and environment. Although several developing countries and the United States were very reluctant to include the issue under the Ministerial Declaration, the EU, Japan, Switzerland and Norway lobbied heavily for its inclusion and ultimately won the most support among Members. As a result, paragraph 51 of the Doha Ministerial Declaration states that the Committee on Trade and Development and the Committee on Trade and Environment shall:

> Within their respective mandates, each act as a forum to identify and debate developmental and environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected.

The negotiations will be carried out principally in Special Sessions of the Committee on Trade and Environment, pursuant to a decision taken by the TNC at its first meeting on 1 February 2002. The Committee is to submit a report on the results of the negotiations to the TNC at the Ministerial Conference in Cancun in September 2003. These issues are part of the Doha Round single undertaking, with a negotiating deadline of 1 January 2005.

2. Main issues to be addressed in the negotiations

The Doha Ministerial Declaration spells out a relatively narrow set of issues for the forthcoming negotiations. Paragraph 31 provides for actual negotiations on three topics: (i) " the relationship between existing WTO rules and specific trade obligations set out in the MEAs," with the *caveat* that "the negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question," and "the negotiations shall not prejudice the WTO rights of any Member that is not party to the MEA in question"; (ii) procedures for regular information exchanges between the WTO and the secretariats of MEAs, and (iii) reducing tariff and non-tariff barriers to environmental goods and services.

Paragraph 32[31] of the Declaration establishes an agenda of topics for possible future negotiations. It instructs the CTE to pursue work on all items on the its existing work program but with a particular focus on three issues: (i) the effect of environmental measures on market access, especially for developing countries; (ii) relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"); and (iii) trade issues surrounding environmental labeling requirements.[32]

In addressing the three main areas, part of the CTE's mission is to identify WTO rules that may require clarification. The CTE is directed to report to the Fifth Ministerial with recommendations for future action on these subjects, including recommendations on the desirability of negotiations on these topics.

3. Positions of the major players

Two Special Sessions have been held in the CTE, on 22 March 2002[33] and 11-12 June 2002,[34] focus principally on clarifying the relationship between the multilateral trade and environment regimes, with related discussions of information exchanges between WTO committees and MEA secretariats.[35] In addition, there have been CTE discussions about liberalization of trade in environmental goods and services.

---

[31] In the Special Sessions the CET shall pay particular attention to:

(i) the effect of environmental measures on market access, especially in relation to developing countries, in particular the least-developed among them, and those situation in which the elimination or reduction of trade restrictions and distortions would benefit trade, the environment and development;

(ii) the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights; and

(iii) labelling requirements for environmental purposes

[32] Examples of eco-labels are the "Nordic Swan" in Denmark, Norway, Sweden, Finland and Iceland and the "Blue Angel" in Germany that indicate that certain products meet specified environmental standards.

[33] *Statement by the Chairperson of the special session of the CTE to the TNC*, TN/TE/1 (12 April 2002). For a list of working documents on MEAs circulated in the CTE, see TN/TE/INF/1.

[34] *Statement by the Chairperson of the special session of the CTE to the TNC*, TN/TE/2 (4 July 2002).

[35] See note from the WTO Secretariat, *Multilateral Environmental Agreements (MEAs) and WTO Rules; proposals made in the Committee on Trade and Environment (CTE) from 1995-2002*, TN/TE/S/1 (23 May 2002).

Several proposals and discussion papers have been tabled in the Special Sessions. They include an Australian proposal[36] for a three-phase approach to the MEA negotiations, which was widely supported by, among others, the U.S., Chile, Hong Kong, New Zealand, Pakistan, Canada and India. Australia suggested that the first phase should aim to clarify (a) "the specific trade obligations in multilateral environment agreements" and (b) "the WTO rules that are relevant to these obligations," (*i.e.*, WTO rules that a Member must take into account when acting pursuant to its MEA obligations). The second phase would involve seeking information from MEA secretariats regarding the specific trade provisions of those agreements and WTO Members' real-world experiences in implementing them. The third phase would be to base negotiations on the information collected in the first and second phases.

More analytical discussion papers have been submitted by Argentina,[37] the European Union,[38] and Switzerland.[39] All three dissect the terminology in the Declaration's mandate. Argentina, for example, notes that the Declaration terminology "specific trade obligations" of MEAs is narrower than the MEA "trade measures" that have been the subject of CTE discussions to date. The EU paper, closely echoed by that of Switzerland, suggests categories for classifying such obligations. The Argentine and EU papers indicate a divergence of opinion, however, in their discussion of the relationship between MEA provisions and WTO Members who are not parties to a given MEA: Argentina suggests that Members not party to a given MEA will be completely unaffected by the MEA or these negotiations, while the EU maintains that MEAs and any new rules emerging from the WTO negotiations will be relevant to MEA non-parties because, *inter alia*, they will be relied upon in interpreting Article XX exceptions.

The Swiss submission also included a procedural recommendation: that the Members focus on negotiating an "interpretative decision" with regard to the link between existing WTO rules and specific trade obligations in the MEAs, as opposed to incorporating an MEA clause into Article XX or relying on case-by-case resolution of the MEA-WTO question in DSU proceedings. India and the United States sounded notes of caution, stating that there is no need to hasten into any decision of this kind at this time.

Regarding Paragraph 31 (ii) on information exchanges with MEA secretariats, the United States and other Members drew attention to the already substantial information exchange mechanisms in place between WTO Secretariat, UNEP, and MEA secretariats.[40] A U.S. submission focused on possible concrete actions to improve coordination.[41] Several

---

[36] *Suggested procedure for the negotiations under paragraph 31 (i) of the Doha Declaration*, TN/TE/W/7 (7 June 2002).

[37] *Mandate under Paragraph 31(i) of the Doha Declaration on Trade and* Environment, TN/TE/W/2 (23 May 2002).

[38] *Multilateral Environmental Agreements (MEAs): Implementation of the Doha Development Agenda*, TN/TE/W/1 (21 March 2002).

[39] *Multilateral Environmental Agreements (MEAs): Implementation of the Doha Development Agenda*, TN/TE/W/4 (6 June 2002).

[40] *Existing Mechanisms for Cooperation and Information Exchange Between UNEP/MEAs and the WTO*, TN/TE/S/2 (10 June 2002).

[41] *Contribution of the United States on Paragraph 31(ii) of the Doha Ministerial Declaration*, TN/TE/W/5 (6 June 2002)

delegations argued that the most direct and effective way of ensuring coherence between trade and environmental policies was to start at the national level.

Concerning paragraph 31 (iii) on eliminating barriers for environmental goods and services, there is an agreement among the Members that negotiations on environmental goods and services should be conducted in the Council for Trade in Services Special Session and the Negotiating Group on Market Access for Non-Agricultural Products respectively. However, some participants thought it was under the mandate of the CTE Special Session to clarify the concept of environmental goods; a New Zealand submission set out definitional proposals.[42] The special session of the CTE has decided that the negotiation groups should continue to work in coordination with the CTE on these issues.[43]

Of the three negotiating topics, the linkage between MEA trade obligations and WTO rules is clearly the most controversial, and the most likely to spark continued debate. The third CTE Special Session for this year is scheduled for 10-11 October 2002. The fourth meeting will be devoted to an Information Session with MEAs. It will be of a one-day duration and conducted in an informal mode.

For further information please contact Marinn Carlson at mcarlson@sidley.com

[42] *Environmental* Goods, TN/TE/W/6 (6 June 2002).

[43] Communication from the United States, *Negotiations on Environmental Goods*, TN/TE/W/8* (9 July 2002).

CHAPTER 13 – TEXTILES AND CLOTHING

The textiles and clothing sector is not a major aspect of the new round. This is largely because special quantitative restrictions protecting the domestic industries of importing Members such as the United States and the EC are due to end when the sector becomes fully integrated into the WTO rules at the end of December 2004. Because of this built-in expiration of the Agreement on Textiles and Clothing (which cannot be extended), there are only two negotiation elements contained in the Implementation Decision taken by Ministers at Doha, despite the strong frustration of developing countries with the implementation of the ATC to date. Ministers requested the Council on Trade in Goods (not the Trade Negotiation Committee) "to examine the following proposals" and "make recommendations by 31 July 2002 for appropriate action" to the General Council:

> 4.4 that when calculating the quota level for small suppliers for the remaining years of the Agreement, Members will apply the most favorable methodology available in respect of those Members under the growth-on-growth provisions from the beginning of the implementation period; extend the same treatment to least-developed countries; and, where possible, eliminate quota restrictions on imports of such Members;
>
> 4.5 that Members will calculate the quota levels for the remaining years of the Agreement with respect to other restrained Members as if implementation of the growth-on-growth provision for stage 3 had been advanced to 1 January 2000.

1. Procedure for the review

As noted above, textiles and clothing issues are to be addressed by the Council on Trade in Goods, rather than the TNC. The review under this mandate, which does not even rise to the level of a negotiation at this point, was to begin immediately and end by mid-2002. This expedited format is consistent with the need for Members to move quickly on the two issues listed above, since all textile quotas expire on 1 January 2005, although actual discussions did not begin until June 2002, with the main importing countries firmly against any recommendations that would require any additional liberalization in this sector before 1 January 2005.

2. Issues to be addressed in the review

The key issues in the discussions revolve around whether the main importing countries such as the United States, Canada and the EC should increase the speed of increased market access in clothing and textiles. The first proposal attempts to offer all small suppliers the most favorable growth-on-growth rate applied by any importing Member (that is, the methodology applied by the EC). It also would extend the more favorable methodology to least developed countries. The first aspect of this proposal reflects a

determination to have consistent interpretations of the ATC, while the second aspect would actually constitute an expansion of benefits under the ATC.

The second proposal would accelerate the date for the increased growth rates during the third stage of the phase-out of quotas to 1 January 2000 instead of 1 January 2002, thereby augmenting the size of the remaining quotas.

3. Action to date

At Doha, the United States prevented any expediting of market access for Members such as India, Pakistan, Honduras and other major textile-exporting Members. Since then, the United States has continued to resist making any concessions on either of these two proposals, skirting the argument that there should be uniform interpretations of the provision, and focusing instead on challenging the assertions that too little liberalization has been achieved during the ten-year transition period established under the ATC.

It should be noted that at Doha, the United States argued that it would need to go back to Congress for legislative changes to implement the concessions sought by the exporting countries. There is no such requirement, however, as the United States legislation enacting the Uruguay Round did not address the issue of growth rates. In discussions in the Council on Goods in June the United States made no further reference to a need for legislative authority. Instead, the United States has pointed to the extent to which textile and apparel imports have increased, in dollar terms, since 1995, arguing that such increases demonstrate that ATC benefits have accrued to restrained suppliers. In particular, the United States has emphasized the extent to which trade from members of the International Textiles and Clothing Bureau, a group of 24 exporting countries who are the primary proponents of the two proposals, have expanded their trade to the United States since the ATC came into force. (Mexico, with whom the United States has a free trade agreement and who is currently the number one supplier of textiles and apparel to the United States market, is a member of the ITCB and, through 2001, accounts for a substantial portion of this increase.) Moreover, in a statement in the Council on Goods, the United States has outlined the extent to which the U.S. industry has undergone continuous industrial adjustment as a result of increased import competition, as evidence of a policy by the United States government to fully and faithfully implement its commitments under the ATC.

India, Pakistan, Bangladesh, Hong Kong, Costa Rica, and other major textile-exporting countries pushed for concessions on these issues up until the deadline for action on 31 July 2002. The exporting countries remain frustrated by the fact that more than seven years into the ATC's 10-year quota phase-out process, only 20 percent of the covered trade has actually been liberalized, and the existing quotas have not grown as quickly as the markets in the importing countries, resulting in quotas that still "bite." The three trade majors, the United States, Canada, and the EC, did not address growth-on-growth market access concessions in textiles before the deadline on 31 July 2002. They have repeatedly claimed they have fully met all their obligations under the Uruguay Round Agreement on Textiles and Clothing. The EC justified its reluctance to address the proposals by arguing that China would be a major beneficiary, which the EC suggested was inappropriate given that China was not part of the original negotiation of the Agreement on Textiles and

Clothing. An unstated subtext of the EC argument was that the developing countries' proposal was not in their own best interests. Developing countries, led by India, Pakistan, Hong Kong, Bangladesh, China, and Brazil, attacked the developed countries for the failure to address the proposals, pointing out the difficulties it will lead to for future trade talks within this area as well as in other areas. There was no consensus before the deadline even to justify a factual report summarizing the Group's work. It will now be up to the General Council to decide the future course of action.

These developing countries may demand more rapid access at the end of 2002, however, when the EC will be pushing for a broader agenda on the question of geographical indications. Similarly, there may be some leverage over the United States at the end of 2002 concerning the issue of TRIPS and public health related to the issuance of compulsory licenses by Members with little or no domestic production capacity.

For further information please contact Brenda Jacobs at bjacobs@sidley.com