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The World Trade Organization: The Hong Kong Ministerial

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The World Trade Organization: The Hong Kong Ministerial

Summary

The 148 members of the World Trade Organization (WTO) are preparing for the 6th Ministerial summit to be held in Hong Kong on December 13-18, 2005. WTO Ministerials are held every two years to bring together trade ministers from member states, often to make political decisions for the body. The Hong Kong Ministerial will be used to “take stock” of the ongoing Doha Development Agenda (DDA) round of trade negotiations. The members will not be asked to agree to a package of modalities (methods by which the round is negotiated) because substantial disagreements are still evident among the members. The outcome of these negotiations could provide a substantial boost to the world economy, but if the round itself is not completed, there may be repercussions for the WTO as an institution and for the architecture of the world trading system.

Agriculture is perhaps the most significant challenge the members with which the members will grapple at the Ministerial. Members are attempting to seek modalities in the areas of tariffs and domestic support and are seeking to agree on a time-line for the elimination of export subsidies. In other negotiating areas, trade ministers may be asked to finalize modalities or to set new deadlines to finalize those modalities. Ministers may approve the draft ministerial calling for a Swiss tariff reduction formula in the non-agricultural market access talks, while new modalities designed to provide impetus to the services negotiations may be considered. With regard to the Trade Related Aspects of Intellectual Property Agreement (TRIPS), the WTO members acted before the Ministerial to approve the final amendment of the TRIPS agreement to incorporate the 2003 Decision on access to medicines. In the area of special and differential treatment for developing countries, the Ministerial may approve 5 initiatives benefiting the least developing countries (LDC), the most controversial of which is the extension of duty-free and quota-free access to all LDC products.

The outcome of the Ministerial potentially has significant implications for Congress. Any agreement resulting from the round must be approved by Congress, and there is pressure to come to an agreement well before the expiration of U.S. trade promotion authority on July 1, 2007. In addition, any agreement on agriculture may affect the drafting or necessitate the revision of the next farm bill that may be considered by Congress in 2007. Congress has also expressed an interest in shielding U.S. trade remedy laws from negotiations. This report will be updated to reflect the outcome of the Ministerial.

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Introduction

The 148 members of the World Trade Organization (WTO) are preparing for the 6th Ministerial summit to be held in Hong Kong on December 13-18, 2005. WTO Ministerials are held every two years to bring together trade ministers from member states, often to make political decisions for the body. In the ongoing Doha Development Agenda (DDA) round of WTO trade negotiations, it was hoped that at the Hong Kong Ministerial trade ministers would be able to agree on a package of modalities (methodologies or formulas that are used to negotiate trade concessions) by which the round is negotiated. As it became clear in the fall of 2005 that such modalities would not be finalized in Hong Kong, the ministerial has become an opportunity to take stock of the round, and perhaps a venue for trade ministers to come to a “meeting of the minds” in order to move the round forward.

The outcome of the Ministerial potentially has significant implications for Congress. Any agreement resulting from the round must be approved by Congress, and there is pressure to come to an agreement well before the expiration of U.S. trade promotion authority on July 1, 2007, which permits Congressional consideration of trade agreements on an up or down basis with no amendments, provided that negotiating mandates and timelines are adhered to by the Administration.¹ In addition, any agreement on agriculture may affect the drafting or necessitate the revision of the next farm bill that may be considered by Congress in 2007.

This report describes the ‘state-of-play’ of the Doha Development Agenda (DDA) negotiations at the eve of the Hong Kong Ministerial. Separate sections on Agriculture, Non-Agricultural Market Access, Services, Rules, Trade Facilitation, Special and Differential Treatment, Intellectual Property Issues, Dispute Settlement, and Trade and Environment provide background on the negotiations and details of the proposal. This report will be updated to reflect the outcome of the Ministerial.

Background

The current round of WTO trade negotiations were launched at the 4th WTO Ministerial meeting at Doha, Qatar in November 2001. The work program devised at Doha folded in continuing talks (the built-in agenda) on agriculture and services and launched negotiations in several areas including non-agricultural (industrial)

¹ Due to various reporting requirements in TPA, some observers maintain that a Doha Round agreement would need to be completed by the end of 2006 or early 2007 to be able to be concluded by Congress.

tariffs, disciplines for existing WTO agreements on antidumping and subsidies, and topics relating to special and differential (S&D) treatment for developing countries. The Members agreed to a January 1, 2005 deadline for the completion of the talks.

Negotiations have proceeded at a slow pace, due in part to the number of countries participating (148) and their diverse interest. (See country group box, p.3) More than four years into the negotiations and after several deadlines have passed, agreement on negotiating modalities — methodologies such as tariff reduction formulas by which negotiations are conducted — still elude the agriculture, industrial market access, services, and other negotiating groups. The 5th Ministerial — which took place September 10-14, 2003 in Cancún, Mexico — ended without agreement on agricultural modalities or on whether negotiations would commence on the so-called Singapore issues (trade facilitation, government procurement, investment, and competition policy).

A negotiating Framework Agreement was reached in July 2004. This agreement provided broad guidelines, though not specific modalities, for completing the Doha round negotiations in agriculture, services, industrial tariffs, and trade facilitation. The Agreement abandoned the January 1, 2005 deadline for the completion of the negotiations. While the July Agreement did not set a new deadline, many consider the new de facto deadline to be set by the parameters of the expiration of trade promotion authority in the United States.

The Agreement also set December 2005 as the date for the 6th Ministerial to be held in Hong Kong. It was hoped that negotiators would have final modalities prepared for approval at this Ministerial. However, despite a flurry of activity in the agriculture negotiations in October and November 2005, the WTO's Director-General Pascal Lamy announced on November 8 that achieving specific formulas and goals for the Doha Round would not be possible by Hong Kong.

At the Ministerial, trade ministers from the member states will receive progress reports on the state of the various sectoral negotiations in the form of a draft Ministerial declaration prepared by the Director General of the WTO. While the abandonment of Hong Kong as a critical decision-making event has been seen by some as a setback, it also prevents the Ministerial from becoming a high-profile failure as some considered the 5th Ministerial in Cancun. Without the pressure of negotiating an agreement in a tense atmosphere, trade ministers may be able to make progress at the political level on some hitherto intractable problems.

COUNTRY GROUPS IN WTO TRADE NEGOTIATIONS

African, Caribbean and Pacific (ACP countries also Lome Convention countries) — developing country group of former colonies of Europe which maintain strong ties to EU:

Cairns Group — grain exporters: Argentina, Australia, Brazil, Canada, Chile, Colombia, Fiji, Hungary, Indonesia, Malaysia, New Zealand, Philippines, Thailand, Uruguay.

Quad Group (also “Old Quad”) — developed country trade leaders: EU, U.S., Japan, Canada.

New Quad Group (also Group of 4 or G4) — critical developed and developing market leaders: U.S., EU, Brazil, India.

Five Interested Parties (FIPS also Non Group of 5 or NG5) — helped negotiate the 2004 Framework Agreement on agriculture that now serves as the basis for the Doha round. Quad plus one: U.S., EU, Brazil, India and Australia.

Friends of Antidumping — seeks reforms of rules that would affect U.S. and European Union antidumping investigations. Members include Japan, South Korea, Chile, Colombia, Costa Rica, Hong Kong, Norway, Switzerland, Taiwan and Thailand.

Friends of Mode 4 — Mode 4 is the movement of natural persons in order to supply a service in another country. 12 member countries include India, Mexico, Indonesia and Thailand

Group of 10 (G-10) — net food importers and subsidizers, includes Switzerland, Japan, Norway.

Group of 20 (G-20) — primary developing nations united on agricultural negotiations: Argentina, Bolivia, Brazil, Chile, China, Egypt, Guatemala, India, Indonesia, Mexico, Nigeria, Pakistan, Paraguay, Philippines, South Africa, Tanzania, Thailand, Uruguay, Venezuela and Zimbabwe.

Group of 33 (G-33) — Developing countries concerned with protecting developing country agricultural markets from low-priced import competition from industrialized countries and other large agro-exporters.

Group of 90 (G-90) — poorest or least developed nations.

Prepared by J. Michael Donnelly, Information Research Specialist, Congressional Research Service.

Possible Outcomes for the Ministerial

The draft ministerial text that was released by Secretary General Pascal Lamy follows his recognition that the members were too far from convergence on major issues to use the Hong Kong Ministerial as a venue to agree on specific modalities for the negotiations. After M. Lamy released his “no-surprises” draft on November 26, 2005, WTO members have met in order to modify the draft in some form. Some members reportedly are seeking to place ranges of figures for tariff or subsidy cuts in the draft and some are seeking to place areas of agreement in the draft text. A new draft incorporating some of these convergences was released on December 1, 2005, and was considered at the December 1-2 WTO General Council meeting in Geneva. For the most part, these items reflect convergences reported by the sectoral negotiating chairs in their reports to the General Council. Generally, these convergences reflect a step beyond the July Framework Agreement, but fall short of full negotiating modalities. The following bullets reflect some possible outcomes of the Ministerial for each negotiating sector.

- **Agriculture.** The Ministerial may seek to adopt some aspects of the draft ministerial text including the use of three bands for reducing developed country domestic support, the commitment to a parallel elimination of export subsidies, and the use of a 4-band approach to limit agriculture tariffs. The Ministerial may also set a modalities and a timeline for an “early harvest” decision on cotton.
- **Services.** The final ministerial declaration may reemphasize the importance of services negotiations, commit WTO members to raising the quantity and quality of commitment offerings, establish deadlines, and, perhaps, provide modalities that will be used to accelerate the pace of the negotiations.
- **Non-Agricultural Market Access.** The Ministerial may provide direction to the negotiations with agreement on the use of a Swiss tariff reduction formula, may decide to extend duty and quota-free access for LDCs, and may set a new date for the establishment of full modalities.
- **Trade Remedies.** While the draft ministerial text and the rules annex did not report consensus on any negotiating issue, it called for the establishment of a deadline to produce a text-based negotiating instrument. The ministerial may establish such a date and could provide guidance on what topics should be reflected in the negotiations.
- **Intellectual Property Rights.** On December 6, 2005, the WTO General Council approved the final amendment of the TRIPS agreement to incorporate the 2003 Decision on access to medicines. No action is expected on the negotiations concerning traditional knowledge and folklore and the relationship between TRIPS and the Convention on Biological Diversity.

- **Trade Facilitation.** The draft ministerial text reflects a high degree on convergence on trade facilitation. The upcoming ministerial may result in a more specific agreement on when to begin text-based negotiations for trade facilitation and that agreement may include more specific commitments on technical assistance or special and differential treatment.
- **Special and Differential Treatment.** The Ministerial may consider the five agreement-specific proposals concerning the LDCs, the most controversial of which concerns the extension of duty and quota-free access for all LDC products. The Ministerial may also set a deadline for the General Council to take action on implementation issues.
- **Dispute Settlement.** The draft ministerial takes note of the work of dispute settlement negotiations, but does not recommend any specific course of action.
- **Trade and Environment.** The Ministerial may adopt language from the draft text to identify environmental goods in which tariffs and non-tariff barriers may be reduced or eliminated.

Stakes of the Doha Round

The economic value of prospective WTO liberalization under the Doha round to the United States and the world economy could be significant. One model indicates that world net welfare resulting from certain Doha scenarios could increase by \$574 billion and by \$144 billion in the United States.² Other studies present a more modest outcome with world net welfare gains ranging from \$84 billion to \$287 billion by the year 2015.³ Nonetheless, because trade liberalization involves the shifting of economic resources into more productive uses, it inevitably involves dislocations, including job losses and plant closures, to some groups and regions.

The future of the multilateral trading system may also hinge on the successful conclusion of the Doha Round. If the round does not conclude, or concludes with a superficial agreement, the world trading system could be affected in numerous ways.

² Drusilla Brown, Alan Deardorff, and Robert Stern, "Computational Analysis of Multilateral Trade Liberalization in the Uruguay Round and Doha Development Round," University of Michigan Discussion Paper 490, December 12, 2002, (www.spp.umich.edu/rsie/workingpapers/wp.html).

³ Thomas W. Hertel and Roman Keeney, "What is at Stake: The Relative Importance of Import Barriers, Export Subsidies and Domestic Support," in Anderson and Martin, eds., *Agricultural Trade Reform in the Doha Agenda* (Washington: World Bank, 2005); and Kym Anderson, Will Martin, and Dominique van der Mensbrugge, "Doha Merchandise Trade Reform: What's At Stake for Developing Countries," July 2005, available at (www.worldbank.org/trade/wto). The different outcomes in these studies are due substantially to the assumptions concerning the liberalization resulting from the Doha Round as well as from differences in the econometric models themselves. For example, the World Bank studies do not attempt to quantify services liberalization.

First, it may result in the loss of confidence in the institutions of the WTO. One of the achievements of the Uruguay Round was the establishment of a binding dispute settlement system, in which countries have recourse to challenge the trading practices of other members. However, a failure of the WTO to further trade liberalization in areas which are significant to its members may bode ill for the legitimacy of its other institutions, including dispute settlement.

Second, an unsatisfactory outcome of the Doha Round may accelerate the trend toward regional and bilateral free trade agreements. While some of these agreements are quite comprehensive and do result in substantially free trade between the partners, others are more political documents that include what is convenient and leave out whole economic sectors. In addition, regional and bilateral agreements are often negotiated between countries of different economic power, and the resulting agreement reflects the interests of the dominant negotiating partner. However, the drawback of these agreements to the world economy is one that the multilateral trading system was designed to avoid, namely trade diversion⁴ and increased complexity from a “spaghetti bowl” of rules, multiple tariff rates, and arbitrary rules of origin. If the Doha round is not seen as moving forward, these regional and bilateral deals increasingly may form the basis for the world trading system.

The Doha Round presents challenges to both developed and developing countries. Developed countries are challenged to negotiate an agriculture agreement that provides meaningful reductions to tariff and subsidies that impede the market access of producers with comparative advantage, often developing countries. Developing countries are also looking to see meaningful market access commitments in labor intensive industrial products. The challenge for developing countries is to provide meaningful market access in industrial products and services, partly to reduce their own inefficient barriers, but also to allow political cover in developed countries to proceed with liberalization beneficial to developing countries. Developing countries are also challenged to fully participate in the round, and not to invoke the mantra of special and differential treatment to avoid liberalization that is ultimately in their own interest.

Agriculture⁵

Agriculture has been among the most difficult areas to negotiate in the Doha Round, yet progress in agriculture seems to be outpacing progress in other areas. The Doha Round mandate and the July Framework for the agriculture negotiations call for 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. These three aims have come to be termed the three pillars of the agriculture negotiations. Although negotiators have focused on the three pillars, two

⁴ Trade diversion occurs when the lower tariffs under a trade agreement cause trade to be diverted away from a more efficient producer outside the trading bloc to a producer inside the bloc.

⁵ This section was written by Charles E. Hanrahan, Senior Specialist in Agricultural Policy, Resources, Science, and Industry Division.

other issues are also being negotiated: a sectoral initiative for cotton calling for the accelerated elimination of trade-distorting subsidies for cotton and a proposal for additional protection for geographical indications (GIs).⁶

In preparation for the Hong Kong meeting, the United States, the EU, the G-20 developing countries (such countries as Brazil, India, and China) and the G-10 group of net importers of agricultural products (which includes Switzerland, Norway, and South Korea) have each made proposals for specific modalities to address the three pillars.⁷ There are major differences among the proposals that are not likely to be bridged before the Hong Kong meeting, casting doubt on the likelihood that full modalities in agriculture would be agreed. The United States, for example, has made its offer to substantially reduce domestic subsidies conditional on gaining substantial market access for agricultural products from the EU and, especially, the developing countries. The EU, however, has indicated it will not move further on agricultural market access unless developing countries agree to open markets for services and industrial products, and the United States makes concessions on the treatment of geographical indications for food and agricultural products. The G-20, for its part, indicates it will not make substantially improved offers on industrial products and services, until there is progress on domestic farm subsidies and market access. The G-10 argues strongly for maintaining high tariffs for agricultural products, although some members like Japan have taken a more conciliatory stance.

A draft of a declaration for the Hong Kong Ministerial Conference, now being discussed by trade ministers, notes that “much remains to be done in order to establish modalities (for agriculture) and to conclude the negotiations.” As proposed, the draft declaration would commit WTO member countries to complete negotiations on modalities and to submit comprehensive schedules of concessions by dates in 2006 to be determined. A report of the Chairman of the agriculture negotiating committee is appended to the draft declaration. The Chairman’s report illustrates the range of proposals on the three pillars, but make no recommendations for reconciling differences.⁸

Market Access

In the July Framework, all WTO members agreed to make substantial improvements in market access for all products. The framework provided no tariff reduction formula, but directed that tariffs would be reduced on a tiered and progressive basis, with higher tariffs receiving the deepest cuts. Tariff reductions

⁶ Although effectively treated by the EU as an agricultural market access issue, the negotiations over additional protection for GIs is taking place in the WTO’s Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS).

⁷ For details on the U.S., EU, G-20, and G-10 agriculture negotiating proposals, see CRS Report RL33144, *WTO Doha Round: Agricultural Negotiating Proposals*, by Charles Hanrahan and Randy Schnepf. A detailed discussion of the July Framework agreement is in CRS Report RS21905, *Agriculture in the WTO Doha Round: The Framework Agreement and Next Steps*, by Charles E. Hanrahan.

⁸ “Draft Ministerial Text,” [Job(05)/298], [http://www.wto.org/english/thewto_e/minist_e/min05_e/draft_min05_text_e.doc].

would be from “bound” or permitted (and higher) levels, not from lower applied rates. An “appropriate” number of import sensitive products could be shielded from deep tariff reductions, but market access would have to be provided for such products by expanding tariff-rate quotas (TRQs).⁹ Special and differential treatment would be available for developing countries.

The U.S. and EU market access proposals are far apart. The United States proposes to cut the highest agricultural tariffs by 90%, with the maximum tariff capped at 75% for developed countries. The maximum developing country cap would be 100%. The number of sensitive products would be limited to 1% of the total number of tariff lines, which for the United States, would be about 20 products. The EU, in contrast, would reduce the highest agricultural tariffs by 60% and allow a maximum tariff of 100% for developed countries. Up to 8% of tariff lines (in the EU case 176 products) could be classified as sensitive and there would be no tariff cap for such products. The EU proposes keeping the special safeguard (SSG) mechanism in the current WTO agriculture agreement to allow reimposition of tariffs for sensitive products when imports meet certain trigger levels. The G-20 proposes that developed countries cut their highest agricultural tariffs by 75%, and cap the maximum tariff allowed at 100%. The highest developing country tariffs would be cut by 40%; the tariff cap would be 150%. Like, the United States, the G-20 proposes limiting the number of sensitive products to 1% of tariff lines. (The World Bank has concluded that if more than 2% of farm products were exempted from tariff cuts or given minimal cuts, the poverty impact of a Doha Round agriculture agreement would be negligible.¹⁰) The G-20 would keep the SSG for developing countries only. The G-10 proposal on market access, which has been characterized as “defensive” calls for a maximum tariff cut of 50% with flexibility (i.e., the maximum cut could vary in either direction by 10%. With plus-10% flexibility, the G-10 would limit the number of sensitive products to 10% of tariff lines, while with minus-10% flexibility, the number of sensitive products would be 15%). The G-10 applies the same tariff reduction formula to both developed and developing countries and does not call for any maximum tariff cap.

Export Competition

In the July Framework, WTO members agreed to the elimination of export subsidies and the elimination of export credits with repayment periods beyond 180 days. Also eliminated would be terms and conditions for export credit programs that allow them to operate as subsidies (e.g., interest payments, minimum interest rates,

⁹ In a TRQ, a so-called market access quota is combined with a specified tariff level to provide the desired degree of import protection. Imports entering during a specific time period under the quota portion of a TRQ are subject to a lower, or sometimes a zero, tariff rate. Imports above the quota’s quantitative threshold face a much higher (usually prohibitive) tariff. Currently, TRQs apply to U.S. imports of certain dairy products, beef, cotton, green olives, peanuts, peanut butter, sugar, certain sugar-containing products, and tobacco.

¹⁰ World Bank, *Agricultural Trade Reform and the Doha Development Agenda*, Washington, DC., 2005, Chapter 2, “What is at Stake: The Relative Importance of Import Barriers, Export Subsidies, and Domestic Support.”

reduced premia, etc.). Trade distorting practices of state trading enterprises (STEs) would be eliminated as would food aid that displaces commercial sales.

The U.S. proposal calls for eliminating agricultural export subsidies by 2010 and bringing export credit guarantees in line with commercial terms to prevent subsidization. The monopoly status, export privileges, and special financial privileges of STEs would be eliminated. WTO members would have broad discretion to meet emergency food aid needs and needs of low income countries; all other food aid transactions would be subject to tighter disciplines. The EU proposes eliminating export subsidies by 2012, putting export credit programs on a commercial footing, and applying disciplines on STEs similar to those proposed by the United States. However, the EU proposes tighter disciplines on food aid than does the United States, including moving gradually to untied and cash only food aid, something the United States opposes. The G-20 calls for eliminating all forms of export subsidies over five years, and emphasizes that food aid rules should not compromise emergency humanitarian food aid. The G-10 has made no proposals for the export competition pillar. It is generally agreed that differences in the export competition negotiations (excepting food aid) are much narrower than in the market access or domestic support pillars and that something close to full modalities for this pillar might be agreed at Hong Kong.

Domestic Support

As with market access, the July Framework calls for a harmonizing approach to reducing trade-distorting domestic subsidies: countries that subsidize more should cut more. The framework agreement requires a cut in the overall level of trade-distorting support as well as cuts in its individual components. Although support currently categorized as non-trade distorting would be reviewed, the framework does not call for reductions of such support.

The U.S. proposal on domestic support would impose an overall cut of 75% in trade-distorting support for the EU and Japan, the two largest subsidizers of their farmers; for the United States the overall cut would be 53%. For the most trade-distorting domestic subsidies (those directly linked to production and trade), the United States would impose an 80% cut on the EU and Japan, and on itself, a 60% cut. The United States argues that cuts of these magnitudes would result in real reductions in U.S. trade distorting subsidies and should meet concerns of G-20 developing countries like Brazil who allege unfair competition from such subsidies. The EU, however, proposes reducing overall trade-distorting domestic support by 70% for itself and Japan, and 60% for the United States. The EU would also cut its most trade-distorting component of support by 70% and the United States' by 60%. The G-20 proposal would apply an overall cut of 80% for the EU and Japan, and 75% for the United States. The most-trade distorting component of support would also be cut by those same percentages. The G-10 proposal calls for an overall cut of 80% for the EU and a 75% cut for the United States and Japan. The most trade-distorting component of domestic support would be cut by 80% for the EU and 75% by the United States and Japan.

Cotton

Four least-developed African countries — Benin, Burkina Faso, Chad, and Mali — have proposed a sectoral initiative for cotton that would entail the complete elimination of export subsidies and trade-distorting domestic support.¹¹ Although not specifically mentioned in the Doha round negotiating mandate, cotton was identified as a key to a successful conclusion of the Doha Round following the Cancun Ministerial and was identified as a priority issue in the July Framework.¹²

The July Framework recognized the importance of cotton for certain developing countries and stated that cotton will be “addressed ambitiously, expeditiously, and specifically” within the agriculture negotiations. The Framework noted that there were trade-related aspects of the cotton issue dealing with all three pillars of the agriculture negotiations. In addition, the Framework said that the development assistance aspects of the initiative also would be addressed. A cotton subcommittee of the agriculture negotiating committee was established to deal with the initiative. The draft declaration for the Hong Kong Ministerial calls for reaffirming the July Framework’s priority accorded to the cotton issue.

Currently, there are two main proposals for dealing with the trade-related aspects of the sectoral initiative on cotton.¹³ One is a revised proposal from the African group and the second is an EU proposal, both of which call for decisions to be made at the Hong Kong Ministerial. The African proposal calls for export subsidies on cotton to be eliminated by the end of 2005. Trade-distorting domestic support would be completely eliminated by January 1, 2009, with 80% eliminated by the end of 2006 and 10% each in 2007 and 2008. The market access aspects of the initiative would be addressed by duty-free and quota-free access for cotton and cotton products from least-developed countries. An emergency fund would be established to deal with depressed international prices. Additionally, this proposal calls for technical and financial assistance for the cotton sector in African countries.

The EU proposal calls for the Hong Kong Ministerial to endorse more ambitious and faster commitments on cotton than for agriculture as a whole. The EU provides details of its proposal for cotton, but without assigning numerical targets, which is

¹¹ The original proposal, *WTO Negotiations on Agriculture, Poverty Reduction: Sectoral Initiative in Favour of Cotton: Joint proposal by Benin, Burkina Faso, Chad, and Mali*, Committee on Agriculture, Special Session, (TN/AG/GEN/4), May 16, 2003, was revised in WTO, General Council, *Poverty Reduction: Sectoral Initiative on Cotton: Wording of Paragraph 27 of the Revised Draft Cancun Ministerial Text: Communication from Benin*, (WT/GC/W/516), October 7, 2003. These documents can be retrieved from [<http://www.wto.org>]. For a detailed discussion of the initiative, see CRS Report RS21712, *The African Cotton Initiative and WTO Agriculture Negotiations*, by Charles E. Hanrahan.

¹² *Statement by the Chairman of the General Council*. Doha Development Agenda: Informal Heads of Delegation Meeting, December 9, 2003. [http://www.wto.org/english/news_e/news03_e/stat_gc_chair_9dec03_e.htm]. Paragraph 1(b) of the July Framework agreement addresses the cotton issue.

¹³ These new proposals are discussed in [http://www.wto.org/english/news_e/news05_e/cotton_18nov05_e.htm]

consistent with its position that Hong Kong should not be about deciding numbers (i.e., actual modalities). For export subsidies, the EU proposes an earlier end date for elimination. As to market access, the EU indicates that it is willing to eliminate all duties, quotas and other quantitative restrictions on imports from all countries. For domestic support, the EU would eliminate all trade-distorting subsidies for cotton. The EU indicated that all its cotton commitments “will already be in place, as far as the EU is concerned, from 2006.”

The U.S. position on the cotton initiative has been that cotton should be dealt with as an integral part of the agriculture negotiations. Thus cotton subsidy reductions or market access commitments would be made as part of an overall agreement on agriculture. A more ambitious result for cotton, then, would depend on the underlying agriculture agreement. According to the WTO summary of the cotton subcommittee meeting in which the initiative was discussed most recently, the U.S. Deputy Trade Representative indicated that the United States agrees that the outcome for cotton should be “more than the average” (i.e., the general outcome for agriculture.)¹⁴

Geographical Indications (GIs)

GIs are place names (or words associated with a place) used to identify products (for example, “Champagne”, “Tequila” or “Roquefort”) which have a particular quality, reputation or other characteristic because they come from that place.¹⁵ The EU maintains a register of more than 700 protected GIs. France has the largest number of protected GI’s on the register — 141 — of any other EU member country. For the EU, guaranteeing protection to GIs is a critical component of a strategy of developing EU agriculture as a source of high-value products that include both foods as well as wines and spirits.¹⁶ The EU considers that GIs, because they affect trade in agricultural products, should be considered an issue in the agricultural market access pillar. Its position is that the protection accorded GIs for food products should be at the high level accorded GIs for wine and spirits under the WTO Trade Related Aspects of Intellectual Property (TRIPS) Agreement. The U.S. view has been that GIs should be negotiated as an intellectual property, not an agricultural, issue and that the existing protection for GIs for food and agricultural products provided in WTO agreements is adequate. Complicating the U.S. position is the EU’s insistence on linking expanding protection for GIs to reaching agreement on the three pillars: market access, export competition, and domestic support.

The Doha Declaration called for completing work started in the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS) on the establishment

¹⁴ The African and EU proposals for a sectoral initiative on cotton as well as the U.S. reaction are also discussed in “U.S. Links Cotton-Specific Moves on Overall Agriculture Deal,” *Inside U.S. Trade*, November 18, 2005.

¹⁵ For a detailed discussion of GI’s, see CRS Report RS21569, *Geographical Indications and WTO Negotiations*, by Charles E. Hanrahan.

¹⁶ John Baize, “EU’s New Farm Policy Signals the Way on Quality,” *World Perspectives*, pp. 4-5, July 2, 2003.

of a multilateral system of notification and registration of GIs for wines and spirits and for addressing the issues related to extending the protection of GIs to products other than wines and spirits.¹⁷ The July Framework agreement noted that issues related to the extension of the protection of geographical indications provided for in Article 23 of the TRIPS Agreement to products other than wines and spirits remained unresolved. Although under negotiation in the TRIPS council, the EU has made GIs an agricultural trade issue by conditioning its market access offer on progress with GIs.

In its agricultural modalities proposal, the EU proposed extending Article 23 protection to all products; establishing a multilateral register of protected GIs, with legal effect in all WTO member countries; and prohibiting use of well-known GIs on a short list. The EU notes that all of these proposals would need to take into account existing trademark rights. The U.S. agriculture modalities proposal does not address the issue of GIs, but the U.S. position has been that existing trademark laws provide adequate legal protection for GIs.

Outlook for Hong Kong. The Ministerial may seek to adopt some aspects of the draft ministerial text including the use of three bands for reducing developed country domestic support, the commitment to a parallel elimination of export subsidies, and the use of a 4-band approach to limit agriculture tariffs. The Ministerial may also set a modalities and a timeline for an “early harvest” decision on cotton.

Services¹⁸

“Services” covers a wide-range of economic activities. Services also account for more than 80% of U.S. private-sector non-agricultural employment and close to 60% of U.S. GDP (as of 2004). Advancements in information technology are making more types of services, such as accounting consulting services, tradeable across national borders. Yet, multilateral rules on trade in services, in the form of the General Agreement on Trade in Services (GATS) under the WTO, are in their infancy, having been in force only since 1995, with the implementation of the Uruguay Round Agreements. The current negotiations are designed to refine and expand on the rules in the GATS.¹⁹

Evolution of the Negotiations

WTO members acknowledged that the GATS was rudimentary and that for it to develop into an effective system of rules they would have to do more work.

¹⁷ Paragraph 18 of the Doha Declaration addresses the issue of geographical indications [http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#trips].

¹⁸ This section was written by William Cooper, Specialist in International Trade and Finance, Foreign Affairs, Defense, and Trade Division.

¹⁹ For more information on the services negotiations, see CRS Report RL33085, *Trade in Services: The Doha Development Agenda Negotiations and Goals*, by William H. Cooper.

Therefore, they mandated, in Article XIX of the General Agreement on Trade in Services (GATS), that new negotiations on services commence no later than five years after the Uruguay Round agreements entered into force, that is by the year of 2000. Thus, the services negotiations became, along with the agricultural negotiations, part of the so-called built-in agenda. The negotiations did begin in 2000, but the early start has not ensured early progress.

By March 2001, the negotiators had established the guidelines for the negotiations but not much else: negotiations would proceed using the “request-offer” format in establishing commitments for market access; all services sectors and subsectors would be subject to negotiation; and negotiators would seek progressive trade liberalization in services, while recognizing the sovereign right of member states to regulate their national services sectors. The Doha Ministerial Declaration of November 2001, folded the services negotiations into the agenda of the DDA round. The Ministerial Declaration reaffirmed the guidelines but mandated deadlines to spur the negotiators: WTO members were to submit their initial requests for market access and national treatment commitments from each member by June 30, 2002 and their initial offers of commitments they would be willing to make by March 31, 2003.

Any momentum (which was modest at best) that had been attained in the services negotiations was halted, along with the other aspects of the DDA negotiations, with the failure of the September 2003 Cancun Ministerial. By that time, only a few WTO members, including the European Union (EU) and the United States, had submitted their requests and made initial offerings per the deadlines set down in the Doha Ministerial Declaration.

The July 2004 Framework, in an effort to recharge the negotiations, reaffirmed the mandates contained in the Doha Ministerial Declaration. The July Framework specifically charged the negotiators to complete and submit their initial offers as soon as possible, to submit revised offers by May 2005 and to ensure that the offers are of “high quality.” The presence of the services negotiations in the Framework is considered important to the U.S. business community. It had been concerned that the WTO negotiators’ commitment to services might be lost in the midst of concerns about agriculture. The Framework places services on par with the negotiations on agriculture and on market access for non-agricultural goods.²⁰

Major Issues and Status of Negotiations

The negotiations on trade in services, by consensus, are proceeding very slowly, lagging behind even the troubled negotiations on agriculture and NAMA. WTO officials and others, including representatives of the U.S. business community, have cited lapsed deadlines and the low quality and quantity of offers made by participants to date as indicators of problems with the negotiations. All members (except the 55 members classified as the least -developed countries (LDCs)) were to have submitted

²⁰ One business representative stated that the services industry had to fight to have services given this level of importance. Meeting with John Goyer, Vice-President for International Trade Negotiations and Investment, U.S. Coalition of Services Industry. August 9, 2005.

their initial offers by March 31, 2003. The July 2004 framework stipulated that all 127 non-LDC members were to have submitted revised offers by March 31, 2005, but as of November 2005 only 28 had done so. The United States and the European Union (which represents 25 members) met the deadlines. In his July 11, 2005 report to the WTO on the status of the negotiations, Alexandro Jara, Chilean Ambassador to the WTO and the then-chair of the Council for Trade in Services, noted that the average member-country offer covered only 51-57 service subsectors out of a total of more than 160.²¹

The complexity of the negotiations may go a long way in explaining the retarded pace. However, negotiators and other observers have suggested several other underlying causes rooted in process and substance.

Negotiating Format. Some negotiators and other observers have suggested that the “request-offer” negotiating format might be stalling the process, because it is time-consuming and tedious. At the suggestion of WTO officials, some members have suggested ways to alter the format to accelerate the process. The United States and the EU, among other WTO members, separately have proposed formats that would include numerical targets, for example, that WTO members agree to liberalize trade in a certain percentage of core sectors. Some have proposed plurilateral negotiations whereby subgroups of countries jointly present offers to other subgroups. Some developing countries, such as Brazil that are highly protective of their services industries, have criticized these proposals as deviating from the “request-offer” format that is mandated by the Doha Ministerial Declaration and subsequent decisions. They are wary of losing the flexibility implicit in the “request-offer” format.

Mode-4.²² Mode-4 delivery, temporary entry of supply personnel, has become one of the most controversial issues at this stage of the negotiations in services. It has divided many developed countries and developing countries, although differing positions have emerged among members of each category. Much of developing country criticism of the United States has been regarding mode-4. It has also created some tension between the U.S. business community and the U.S. government. All of this criticism is despite the fact that mode-4 accounts for less than 1% of world trade in services.²³

The controversy arises in part because the issue of mode-4 delivery is closely related to immigration policy in the United States and some other countries, and comes at a time when the United States has tightened restrictions in response to the

²¹ World Trade Organization. Council for Trade in Services. Report by the Chairman to the Trade Negotiations Committee. 11 July 2005. TN/S/20 available at [<http://www.wto.org>].

²² The GATS defines four modes of supply of services: across borders (mode 1); temporary movement of service buyer to country of supplier (mode 2); long-term commercial presence of supplier in country of buyer (mode 3); and temporary movement of supplier to country of buyer (mode 4).

²³ World Trade Organization. Trade Directorate. Trade Committee. Working Party of the Trade Committee. *Service Providers on the Move: Economic Impact of Mode 4*. TD/TC/WP(2002)12/Final. Available at [<http://www.wto.org>]. p. 12.

attacks of September 11, 2001. In addition, some Members of Congress have warned that changes in U.S. immigration laws that might be implied under mode 4 must be handled via the normal legislative process and not within trade agreements.

Negotiations on Rules. Not much has been accomplished regarding establishing rules on subsidies and emergency safeguard measures for services. Developing countries, especially East Asian developing countries, consider these issues a high priority. However, the negotiators have not been able to resolve basic questions, such as, what would constitute a countervailable subsidy, how would it be measured and how to measure import surges to which a WTO member could apply safeguard measures. Negotiations on government procurement have also proceeded slowly.²⁴

Delays in Other DDA Negotiations. Some observers have suggested that the time and attention devoted to the agriculture negotiations has diverted interest from the services negotiations. Furthermore, a number of developing countries, for example India and Brazil, have directly linked progress in the services negotiations with progress in the agricultural negotiations. Specifically, they have demanded that the EU and the United States be more aggressive in reducing or eliminating subsidies and tariffs on agriculture before they will either make initial offers or improve on their initial offers.

Outlook for Hong Kong

WTO negotiators will probably attempt to resolve differences over process and substance in the services negotiations. Judging from statements from WTO officials, the aim of the WTO trade ministers will likely be to emerge from the Hong Kong Ministerial with a statement that reemphasizes the importance of services negotiations, commits WTO members to raising the quantity and quality of commitment offerings, establishes deadlines, and perhaps provides modalities that will be used to accelerate the pace of the negotiations.

Non-Agricultural Market Access²⁵

Talks on Non-Agricultural Market Access (NAMA) refer to the cutting of tariff and non-tariff barriers (NTB) on industrial and primary products, basically all trade in goods which are not foodstuffs. While other areas of WTO negotiations have received greater scrutiny in the Doha round, trade of industrial and primary products, the subject of the NAMA negotiations, continue to make up the bulk of world trade. Nearly \$8.9 trillion in manufactures and primary products were traded worldwide in

²⁴ World Trade Organization. Council for Trade in Services. Report by the Chairman to the Trade Negotiations Committee. July 11, 2005. TN/S/20 available at [<http://www.wto.org>.] Also information was obtained in a meeting with John Goyer, Vice-President for International Trade Negotiations and Investment, U.S. Coalition of Services Industries.

²⁵ This section was written by Ian F. Fergusson, Analyst in International Trade and Finance, Foreign Affairs, Defense, and Trade Division.

2004, accounting for 81% of world trade activity.²⁶ In the United States, industrial and primary products accounted for 70% of exports and 83% of imports in 2004.²⁷ Hence, the outcome of these negotiations could have a substantial impact on the U.S. trade pictures and on the overall U.S. economy.

Previous to the Doha Round, industrial tariff negotiations were the mainstay of GATT negotiations. These rounds led to the reduction of developed country average tariffs from 40% at the end of World War II to 6% today. However, average tariff figures mask higher tariffs for many labor intensive or value-added goods that are especially of interest to the developing world. Seen from the developed world perspective, gains from the NAMA talks in this round are to be had from the reduction of high tariffs in the developing world, particularly from such countries as Brazil, India, and China. In previous rounds, developing countries were not big players in the market access talks, which has helped to perpetrate the heavy tariff structure in those countries. Developing countries are leery of opening up their markets to competition, often making the argument that protectionist policies have been employed in the development of many successful economies, from the European and North American economies in the 19th century, to the rise of the East Asian tigers in the 20th. However, as negotiating positions have made clear, developed economies will demand more access for their industrial products as a price for opening up their agricultural sectors, where many developing countries have a comparative advantage.

As in other sectors, negotiations on NAMA have been conducted on the basis of the July 2004 Framework Agreement, which provided the basis on which to conduct negotiations on modalities. While many useful discussions have taken place, no agreement on modalities have been reached, and the Draft Ministerial Declaration of November 25 on the NAMA talks “note that much remains to be done in order to establish modalities and conclude the negotiations.”²⁸ Dates for finalization of modalities also remain unresolved.

Major Negotiating Issues

Tariff Reduction. The Framework Agreement endorsed the use of a non-linear formula applied on a line-by-line basis as a modality to conduct tariff reduction negotiations. A non-linear formula works to even out or harmonize tariff levels between participants. This type of formula would result in a greater percentage reduction of higher tariffs than lower ones, resulting in a greater equalization of tariffs at a lower level than before. A common non-linear formula is the Swiss formula, which has come to dominate discussions of the tariff reduction formula in Geneva. The formula is,

²⁶ World Trade Organization, *International Trade Statistics 2005*, p. 3.

²⁷ Bureau of Economic Analysis, “International Trade in Goods and Services, 2004 Annual Revision,” June 10, 2005.

²⁸ Draft Ministerial Text, [Job(05)/298], available at [http://www.wto.org/english/thewto_e/minist_e/min05_e/draft_min05_text_e.doc].

$$T = at/(a+t)$$

where T , the resulting tariff rate, is obtained by dividing the product of the coefficient (a) and the initial tariff rate (t) by the sum of the coefficient (a) and the initial tariff (t). Selection of the coefficient is key, where a lower coefficient results in a lower resulting tariff (T).

An harmonization formula would also work to reduce tariff peaks and tariff escalation, another stated goal of the declaration. Tariff peaks are considered to be tariff rates above 15% that often protect sensitive products from competition. Tariff escalation is the practice of increasing tariffs as value is added to a commodity. As an example of tariff escalation, cotton would come in with a low tariff, fabric would face a higher tariff, and a finished shirt would face the highest tariff. Tariff escalation is often employed to protect import-competing, value-adding industry. The emphasis on tariff peaks and escalation results from findings that the use of peak tariffs and escalations are particularly levied against the products of developing countries, as well as becoming increasingly costly to the consumer in developed countries. The Framework does not specify an implementation period for tariff cuts, but developing countries are to be afforded longer implementation periods.

Currently two main tariff formulas are on offer, both based on the Swiss formula. The first option proposed by developed countries is the simple Swiss formula with the coefficient taking one value for developed and another, higher, value for developing countries. For example, Pakistan proposed that the developed countries have a coefficient of 6 and developing countries a coefficient of 30.²⁹ The EU in its cross-cutting proposal of October 2005 proposed a coefficient of 10 for developed countries and advanced developing countries and 15 for LDCs. This proposal has been criticized in the developing world for differentiating between developing countries, which runs counter to current WTO practice.

Distinct from the simple Swiss formula proposal with multiple coefficients is the proposal put forth by Argentina, Brazil, and India, known as the ABI proposal.³⁰ ABI also uses the Swiss formula, but it proposes the coefficient to be the tariff average of each country, thus each country would have its own coefficient. ABI would not result in tariff harmonization between countries because there would not be a common coefficient, however, it would result in a certain harmonization within each country's tariff schedule.³¹

Tariff Binding. The framework encourages the continued binding of tariffs and uses bound tariffs as the baseline for the reduction formula. Tariffs are bound when a country commits to not to raise them beyond a certain level. Therefore, binding has been seen as the first step in tariff reduction. Bound tariffs are often

²⁹ "The Way Forward, Communication from Pakistan, (TN/MA/W/60), July 21, 2005.

³⁰ "Market Access for Non Agricultural Products," (TN/MA/W/54), April 15, 2005.

³¹ Sam Laird, "Economic Implications of WTO Negotiations on Non-Agricultural Market Access.," [http://www.nathaninc.com/nathan/files/ccLibraryFiles/Filename/000000000044/Economic%20Implications_Laird.pdf].

significantly higher than applied tariff levels, which has led to questions as to the usefulness of reductions from bound rather than applied rates. For its part, the EU still seeks cuts from applied rates. Reductions from applied rates would result in greater cuts to actually applied tariffs. However, the use of the applied rate may serve as a disincentive for countries to undertake unilateral liberalization. Under this reasoning, countries would hesitate to undertake unilateral tariff reductions if they knew that multilateral liberalization efforts would use the applied rate that the country had already unilaterally lowered as a starting point. It may also increase the incentive to raise applied rates prior to negotiation.³²

Under the Framework, tariff reductions would be calculated from the bound, rather than the applied, level. Under the Framework, reductions in unbound tariff lines would be calculated from twice the currently applied rate, however this suggestion was not repeated in the Chairman's statement. Now discussions are centered around a 'non-linear mark-up approach,' one that would add a certain number of percentage points to the applied rate of the unbound tariff line in order to establish the base rate on which the tariff reduction formula would be applied. Discussions have ranged from 5-30 percentage points as an addition, which would generally result in lesser bound rates than under the Framework. The Framework also provided flexibility for developing countries who have bound less than 35% of their tariff lines. They would be exempt from tariff reduction commitments in the Round provided that they bound the remainder of their non-agricultural tariff lines at the average tariff for all developing countries..

Special and Differential Treatment for Developing Countries. The Framework provides several flexibilities (known as Paragraph 8 flexibilities) to developing country members. It permits developing countries longer periods to implement tariff reductions. Developing countries may also choose one of the following flexibilities: (1) apply less than formula cuts for up to 10% of tariff lines provided that the cuts applied are no less than half the formula cuts and that the tariff lines do not exceed 10% of the value of all imports, or (2) keep tariff lines unbound or not applying formula cuts for 5% of tariff lines provided they do not exceed 5% of the value of a member's imports. Least developed countries (LDCs) would not be required to apply formula cuts, nor participate in the sectoral cuts, but would undertake to "substantially" increase the level of bound tariffs. Developed-country participants and others are encouraged to grant LDCs duty free and quota free access to their markets by a date to be negotiated.

In the negotiations since the July Framework, the relationship between the Paragraph 8 flexibilities and the formula negotiations have proved controversial. Certain developed country proposals have linked the flexibilities to the value of the coefficient of the tariff reduction formula. Thus, according to these proposal, if developing countries want a differentiated coefficient, they would have to give up certain of the Paragraph 8 flexibilities.

³² Joseph Francois and Will Martin, "Formula Approaches for Market Access Negotiations," *The World Economy*, January 2003, p. 17.

Non-Tariff Barriers. The industrial market access talks also encompass negotiations on the reduction of non-tariff barriers. Non-tariff barriers include such activities as import licensing, quotas and other quantitative import restrictions, conformity assessment procedures, and technical barriers to trade. The framework instructed members to submit notification of NTBs so negotiators could identify, examine, categorize, and, ultimately, conduct negotiations on them. The framework “takes note” of several modalities by which negotiations on NTBs could proceed. The draft ministerial text noted that members were holding bilateral discussions on NTBs, and groups of members were discussing NTBs by product sectors, and by specific NTBs. No agreements have been reached on the reduction of NTBs or on the procedures to negotiate such reductions.

Sectoral Approaches. WTO members have agreed to consider the use of sectoral tariff elimination as a supplementary modality for the NAMA negotiations. Sectoral initiatives, such as tariff elimination or harmonization, permit a critical mass of countries representing the preponderance of world trade in an item to agree to eliminate tariffs in that good. Such an arrangement requires the participation of the major players, however, because under most-favored-nation principles those tariffs would be eliminated for all countries, even those not reciprocating. The 1996 Information Technology Agreement is one such sectoral tariff elimination agreement.

Sectoral negotiations have been proposed for bicycles, chemicals, electronics/electrical equipment, fish, footwear, forest products, gems and jewelry, pharmaceuticals and medical equipment, raw materials and sporting goods.³³ Textiles, apparel, and auto parts have also been mentioned for sectoral negotiations. While some developing countries have participated in these discussions, and have proposed some sectors, other developing countries have questioned engagement in sectoral negotiations prior to settling on a formula for negotiations.

Outlook for Hong Kong

Even if the resolution of full modalities are off the table at the Hong Kong Ministerial, the Ministerial could provide direction to the negotiations with agreement on the use of a Swiss tariff reduction formula, a convergence noted in the draft ministerial declaration, and will likely set a new date for the establishment of modalities. Discussions may also provide political direction to resolve such issues as the binding of developing country tariffs, issues related to sectoral tariff elimination, and a decision on extending duty and quota free access for least developed countries. However, much also depends on the outcome of the agriculture negotiations or the willingness of the participants to trade concessions between negotiating sectors.

³³ “Draft Ministerial Text,” (Job(05)/298, Annex B) p. B-4.

Trade Remedies and Related Matters³⁴

Background

The United States and many of its trading partners use antidumping (AD) and countervailing duty (CVD) laws to remedy the adverse impact of alleged unfair trade practices on domestic producers. These statutes are permitted by the WTO as long as they conform to the Agreement on Implementation of Article VI (Antidumping Agreement, ADA) and the Agreement on Subsidies and Countervailing Measures (SCM), as adopted in the Uruguay Round of trade negotiations.

Under pressure from trading partners (including Japan, Korea, Brazil, Chile, Colombia, Costa Rica, Thailand, Switzerland, and Turkey) which had become concerned with a perceived general increase in the use of trade remedy measures, U.S. negotiators agreed to a Doha round negotiating objective which called for “clarifying and improving the disciplines” under the ADA and SCM.

This objective has been criticized by many in Congress who are concerned that future U.S. concessions on trade remedies could lead to a weakening of U.S. laws that are seen to ameliorate the adverse impact of unfair trade practices on domestic producers and workers. Other Members, who have expressed concern about the economic inefficiencies caused by AD and CVD actions, especially as they relate to higher prices to U.S. consumers and consuming industries, have expressed some openness to considering changes to the WTO agreements.

U.S. Legislation

Support for U.S. trade remedy laws is especially strong in the Senate, where, following an adverse WTO panel decision on a controversial trade remedy law, 70 senators wrote a letter to President Bush arguing strongly for retaining the law.³⁵ S. Con Res. 55 (Craig, introduced September 29, 2005) seeks to express the sense of Congress that the United States should not be a signatory to any DDA agreement that would “lessen the effectiveness of domestic and international disciplines” or “lessen in any manner the ability of the United States to enforce rigorously our trade laws.” On the other side of the debate, legislation has also been introduced that would give consuming industries standing in trade remedy cases (H.R. 4217, Knollenberg, introduced November 3, 2005), or to comply with certain WTO rulings on trade remedies.

Progress of Negotiations

According to a report by the Chairman of the Negotiating Group on Rules, work on trade remedies has taken place in three overlapping phases. First, negotiators

³⁴ This section was written by Vivian C. Jones, Specialist in International Trade and Finance, Foreign Affairs, Defense, and Trade Division.

³⁵ Letter to President George W. Bush, signed by seventy Senators, including Robert C. Byrd, Max Baucus, and Mike DeWine, February 4, 2003.

presented formal written papers indicating the general areas in which the participants would like to see changes in the agreements. A compilation of the 141 proposals was published by the Chairman in August 2003, just prior to the Cancun Ministerial.³⁶ Second, after Cancun (and ongoing), negotiators began discussing their positions in more detail, sometimes proposing legal drafts of suggested changes.³⁷ This phase helped negotiators develop a clearer idea of what proponents of specific changes are seeking, and helped proponents develop “a realistic view of what may and may not attract broader support in the group.”³⁸ The third phase consists of bilateral and plurilateral meetings for technical consultations, partly aimed at developing a possible standardized questionnaire which administering officials could use in AD investigations in order to reduce costs and increase transparency.³⁹

Many observers believe that any consensus on changing the ADA, SCM, or other trade remedy agreements is likely to involve perceived successes in other areas being discussed in the DDA, such as improved agricultural market access or services trade. Therefore, any accord involving changes in trade remedies is not likely to take place until the end of the round.

In the draft negotiating text for the Hong Kong Ministerial issued by Director General Pascal Lamy on November 28, 2005, WTO members “affirm our commitment to the negotiations on rules.”⁴⁰ Appendix D of the document states that “the achievement of substantial results on *all aspects* of the Rules mandate, in the form of amendments to the Anti-Dumping (AD) and Subsidies and Countervailing Measures (SCM) Agreements, is important to the development of the rules-based multilateral trading system and to the overall balance of results in the DDA.”⁴¹ This assertion is controversial given the substantial opposition in Congress to any concessions that may weaken U.S. trade remedy laws.

With regard to trade in fisheries, the draft also suggests that WTO members are committed to “enhancing the mutual supportiveness of trade and the environment, [WTO members] note that there is broad agreement that the Group should strengthen disciplines on subsidies in the fisheries sector” through prohibiting subsidies that lead

³⁶ WTO Negotiating Group on Rules. Note by the Chairman. “Compilation of Issues and Proposals Identified by Participants in the Negotiating Group on Rules. TN/RL/W/143, August 22, 2003, p. 1.

³⁷ See WTO Negotiating Group on Rules. Report by the Chairman to the Trade Negotiations Committee. TN/RL/13, July 19, 2005, p. 2.

³⁸ *Ibid.*, pp. 1-2.

³⁹ *Ibid.*

⁴⁰ World Trade Organization, “Doha Work Program.” Draft Ministerial Text issued by Secretary General Lamy in preparation for the Hong Kong Ministerial, November 26, 2005, WTO Document No. JOB(05)/298, [http://www.wto.org/english/thewto_e/minist_e/min05_e/draft_text_e.htm].

⁴¹ *Ibid.*, p. D-1.

to over-fishing and overcapacity.⁴² In this context, the draft directs the Negotiating Group on Rules to intensify and accelerate the negotiating process.⁴³

Stakeholders

A coalition of developed and developing countries, known as the “Friends of Antidumping,” — including Brazil, Chile, Colombia, Costa Rica, the European Union, Hong Kong, India, Israel, Japan, Korea, Mexico, Norway, Singapore, Switzerland, Taiwan, Thailand, and Turkey — were largely responsible for pressing the inclusion of trade remedy talks in the Doha Development Agenda, and have advanced discussions in several areas that seem to be generating interest. U.S. negotiators, pledging to push an “offensive agenda” in trade remedy discussions,⁴⁴ have submitted papers addressing measures to improve transparency in the investigative process, prevent circumvention of AD and CV duties, and clarify the “standard of review” provisions in dispute settlement deliberations. Canada, Australia, the European Union (on its own behalf) and New Zealand — who with the United States are considered “traditional” users of antidumping actions, have also put forward several proposals.

Major Developments and Issues

Most of the action in the WTO Negotiating Group on Rules has been focused on the Antidumping Agreement, largely because AD actions make up the largest share of trade remedy actions worldwide. Since the present texts of the trade remedy agreements are highly detailed, and were “painstakingly negotiated” over at least three multilateral trade rounds,⁴⁵ the issues that negotiators are attempting to “clarify and improve” tend to be quite specific in nature. However, much of the discussion seems to be based around a few central themes, such as refining methodology for determining injury and existence/extent of dumping or subsidies, giving more specific guidance on conduct of reviews, and providing “special and differential treatment” for developing countries. Broadly characterized, many of the “clarification and improvements” offered could tend to limit or proscribe the ability of countries to grant relief to domestic manufacturers.

Determination of Injury. Proposals that would affect injury determinations include requiring administrative authorities to clarify that there is a direct correlation between the injury to domestic producers and dumping of the targeted merchandise. Another proposal affecting injury determinations seeks to establish an “economic interest test” or “public interest test” to determine whether or not the domestic economy or domestic consuming industries might be injured to a greater extent than the domestic producer.

⁴² Ibid, p. D-2.

⁴³ id.

⁴⁴ “USTR Zoellick Says World Has Chosen Path of Hope, Openness, Development, and Growth.” Office of the U.S. Trade Representative. Press Release, November 14, 2001 [<http://www.ustr.gov>].

⁴⁵ Ibid.

Determination of Dumping. Proposed changes in methodology for calculating dumping and subsidies margins could affect both dumping/subsidies determinations and the level of duties assessed if an affirmative determination is made. First, a prohibition on “zeroing” is being pushed by the Friends of Antidumping. “Zeroing” is the process in which, when calculating dumping margins for targeted merchandise, administrative authorities factor in a zero (rather than a negative amount) if a subgroup of the merchandise is found to have a negative dumping margin. The Friends of Antidumping group alleges this practice leads to erroneous findings of dumping as well as inflated dumping margins. U.S. use of “zeroing” is being challenged in WTO dispute settlement proceedings on a number of fronts.⁴⁶

Second, the Friends of Antidumping, India, and the European Union have submitted papers advocating the establishment of a mandatory “lesser duty rule.” This proposal would require investigating authorities to impose an AD or CV duty lower than the full dumping margin if it is determined that the lesser amount is sufficient to offset the injury or threat thereof suffered by the domestic industry.

Third, the Friends of Antidumping recommend that the Antidumping Agreement require increased use of “price undertakings” or alternative measures negotiated with the exporting country in which the price of the targeted merchandise is increased to eliminate the dumping, or the product is no longer exported to the United States. Some developing countries favor mandatory use of such actions by developed countries in AD investigations involving developing countries. U.S. antidumping law already allows such negotiated agreements (called “suspension agreements” in U.S. law), but they are not used very often.⁴⁷

Reviews. The current ADA and SCM specify that each AD or CVD order must be terminated after five years *unless* authorities determine in a review that its expiration would be likely to lead to a recurrence of dumping or subsidization, and subsequent injury to the domestic producer. Some WTO Members claim that authorities base review determinations inordinately on submissions by the domestic industry, and that, therefore, AD or CVD orders are likely to remain in place as long as the domestic industry opposes their removal. On this basis, some favor a mandatory termination of AD or CVD orders within five years. Others favor a more moderate approach that would list specific circumstances or definitive factors that authorities must consider before extending the orders. Others criticize the length of time that sunset review procedures take to complete and favor a mandatory twelve-month time limit.⁴⁸

⁴⁶ These disputes are (1) DS294, *United States — Laws, Regulations, and Methodology for Calculating Dumping Margins* (brought by European Communities, panel report distributed October 31, 2005); (2) DS322, *United States — Measures Relating to Zeroing and Sunset Reviews* (brought by Japan, panel established April 15, 2005; and (3) DS325, *United States — Antidumping Determinations Regarding Stainless Steel from Mexico* (brought by Mexico, request for consultations January 10, 2005, no panel established as yet).

⁴⁷ 19 U.S.C. 1671c (countervailing), 19 U.S.C. 1673c (antidumping).

⁴⁸ See World Trade Organization Negotiating Group on Rules. *Compilation of Issues and* (continued...)

Special and Differential Treatment. Because developing countries are regarded by some to be especially vulnerable to trade remedy action, developing countries have been negotiating for special treatment. One proposal advanced by these countries would make a lesser duty rule and/or price undertakings mandatory in AD actions involving developing countries. Other recommendations include an increase in the dumping margin that is considered *de minimis*, and consequently not actionable under the AD and SCM. Some Members also favor a type of standardized questionnaire that administrative officials could fill out when conducting trade remedy investigations. Proponents of this methodology say that it would increase predictability, cut costs, and increase the transparency of investigations.

Other Negotiations. In the Negotiating Group on Rules, other negotiations, including rules governing fisheries subsidies and regional trade agreements, are also ongoing. Topics being discussed on fisheries subsidies include which subsidies should or should not be prohibited, and how they should be implemented. Talks on regional trade negotiations are aimed largely at increasing the transparency of these arrangements.

Outlook for Hong Kong

While the draft ministerial text and the rules annex did not report consensus on any negotiating issue, it called for the establishment of a deadline to produce a text-based negotiating instrument. The ministerial may establish such a date and could provide guidance on what topics should be reflected in the negotiations.

Intellectual Property Issues⁴⁹

The Doha Ministerial Declaration called for discussions on implementation of certain aspects of the TRIPS agreement, including the relationship between TRIPS and public health (access to medicines), on the creation of a multilateral registration system for geographical indications of wines and spirits, and on the relationship of TRIPS to the Convention on Biological Diversity⁵⁰ and to traditional knowledge and folklore. The draft ministerial declaration for Hong Kong notes the progress made in these discussions, but announces no new decisions on them. However, just prior to the Ministerial, the WTO members announced an agreement on the TRIPS and public health issue. For a discussion of geographical indications, including the issue

⁴⁸ (...continued)

Proposals Identified by the Participants in the Negotiating Group on Rules. Note by the Chairman. August 22, 2003, TN/RL/W/143, pp. 58, 143 [<http://www.wto.org>].

⁴⁹ This section was written by Ian F. Fergusson, Analyst in International Trade and Finance, Foreign Affairs, Defense, and Trade Division.

⁵⁰ The U.N. Convention on Biological Diversity entered into force in 1992 and was signed by the United States in 1993. However, it has never been ratified by the U.S. Senate. Its main objectives are the conservation of the world's biodiversity, the sustainable use of such diversity, and the equitable distribution of proceeds from the exploitation of such diversity.

of extending the protection accorded to wines and spirits to other agricultural products, see the agriculture section (p.9, above).

Access to Medicines

The ability of developing and least developed countries (LDCs) to access medicines to fight public health epidemics such as HIV/AIDS, tuberculosis, malaria, and other infectious diseases within the context of the TRIPS Agreement has been an issue that has bedeviled the Doha Round since its inception. The dispute pits the needs of developing countries in obtaining access to medicines to fight public health epidemics against developed country patent holders, who maintain that patent protection provides financial incentives to innovate new drugs. The negotiations have taken on a symbolic significance as some developing countries considered these negotiations as a gauge of the commitment of developed countries to take their concerns seriously in the negotiations.

In agreeing to launch a new round of trade negotiations at Doha, trade ministers adopted a “Declaration on the TRIPS Agreement and Public Health” on November 14, 2001. This declaration recognized certain “flexibilities” in the TRIPS agreement to allow each member to grant compulsory licenses for pharmaceuticals and to allow each member to determine what constitutes a national emergency, expressly including public health emergencies. Compulsory licenses are issued by governments to domestic manufacturers to produce a product without the authorization of the rights-holder, and within certain disciplines, are consistent with the TRIPS agreement. Paragraph 6 of the Declaration directed the WTO Council on TRIPS to formulate a solution to a corollary concern, the use of compulsory licensing by countries with insufficient or inadequate manufacturing capability.

The “Paragraph 6” solution was reached on August 30, 2003. It consisted of a Decision and a Chairman’s statement as a clarification. The Decision is in the form of a waiver from current TRIPS rules with negotiations to follow on a permanent amendment to the treaty. The Chairman’s statement, which does not have the status of a binding legal document, reflects what it terms “several key shared understandings” of Members concerning the interpretation and implementation of the Decision including a pledge by 11 developing countries not to use the waiver provision except under “extreme urgency,” and that the Decision’s provision should not be used for commercial or industrial policy objectives.

The Decision permits the use of compulsory licenses by LDCs and by developing countries with insufficient manufacturing capabilities to authorize the manufacture of generic pharmaceuticals to treat “HIV/AIDS, malaria, tuberculosis and other epidemics” by third-country producers. Compulsory licenses have always been authorized by the TRIPS agreement for domestic purposes, however, the agreement did not account for countries without domestic manufacturing capacity. The Decision will allow such a country to source certain generic pharmaceuticals from a country with manufacturing capacity by issuing a compulsory license to that manufacturer, although it may be necessary to do so through the host government.

On the eve of the Hong Kong Ministerial, WTO members agreed on a method to amend the TRIPS agreement to incorporate the 2003 Decision. Soon after the

2003 Decision, negotiations bogged down over how to incorporate it into the agreement: either to amend the actual text of TRIPS, or to incorporate it as an Annex, and also how to treat the accompanying Chairman's statement. The United States had sought a footnote to the TRIPS agreement incorporating both documents, and had rejected positions that ignore or downplay the Chairman's statement. The EU tabled a proposal to include the Decision as an Annex, but without the Chairman's statement. Several developing countries such as Argentina, Brazil, India, and South Africa sought to amend TRIPS itself based on the Decision also without including the Chairman's statement. The Decision worked out by the General Council and approved on December 6, 2005, provided for the TRIPS agreement to be amended with the inclusion of an annex and an appendix to TRIPS. The Chairman's statement was reread at the time of General Council approval without debate; however, it does not constitute part of the written Decision.⁵¹

Traditional Knowledge

A second issue that is subject to Doha round negotiations is the relationship of the TRIPS agreements to the Convention on Biological Diversity and the protection of traditional knowledge and folklore. This negotiation was meant to address concerns by certain developing countries that traditional remedies or genetic materials that are the basics for pharmaceuticals are being patented by companies in developed countries without compensation. India, together with Brazil and other developing countries, proposed language for the draft ministerial declaration that would commit members to start negotiations to provide greater protection and compensation for genetic materials and traditional knowledge originating in developing countries. The language would amend TRIPS to require that patent applicants disclose the country of origin of biological materials and traditional knowledge, obtain consent from the country of origin, and share the proceeds with the country of origin.⁵² The United States and other developed countries generally have opposed commencing negotiations to amend TRIPS to address this issue and the Draft Ministerial declaration did not address this issue.

Outlook for Hong Kong

The WTO General Council approval to amend the TRIPS agreement to incorporate the 2003 Decision on access to medicines provides a resolution to a lingering irritant between developing and developed countries. However, no action is expected on the negotiations concerning traditional knowledge and folklore and the relationship between TRIPS and the Convention on Biological Diversity.

⁵¹ "Implementation of Paragraph 11 of the General Council Decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health," (IP/C/41), December 6, 2005.

⁵² "India, Brazil, Call for Changes to TRIPS Agreement at Hong Kong," *Inside U.S. Trade*, October 4, 2005.

Trade Facilitation⁵³

There is no standard definition of trade facilitation in public policy discussions, but it can be broadly defined as “the simplification, harmonization and automation of international trade procedures and information flows.”⁵⁴ Within the context of trade negotiations, trade facilitation has focused on customs procedures such as fees and documentation requirements, but it may also involve the environment in which transactions take place, including the transparency and professionalism of customs and regulatory environments. Trade facilitation aims to increase the speed and reduce the cost of trade through more efficient policies and management. Estimates of potential savings from trade facilitation vary, but studies tend to agree that trade facilitation becomes more important in reducing overall costs as trade is further liberalized. As international trade flows increase, national administrations must cope with increased traffic, straining national budgets. Trade facilitation, by increasing efficiency, could mitigate this problem. Small and medium enterprises may benefit from trade facilitation in greater proportion, because they are often priced out of international trade due to relatively high administrative costs for transporting small volumes. Developing countries have a particular interest in trade facilitation discussions because they will have to significantly reform their policies and procedures to implement an agreement. These reforms are expected to be costly, and will require financial and technical assistance from developed countries.

Trade Facilitation Negotiations

There has been ongoing multilateral work on trade facilitation for more than fifty years, including in the context of the GATT. However, trade facilitation did not enter multilateral trade discussions as a separate policy issue for negotiation until the Singapore WTO ministerial in 1996, when it was introduced as one of the so-called Singapore issues. The other Singapore issues, including government procurement, competition, and investment policy, were dropped from the agenda for the Doha Development Agenda (DDA) in the July 2004 Framework Agreement. Developing countries initially opposed including any of the Singapore issues in the Doha round, but accepted trade facilitation because of its potential benefits to development if combined with technical assistance. The modalities for trade facilitation include special and differential treatment (S&D) provisions that reach beyond those of other agreements.

The Doha Ministerial Declaration established that negotiations on trade facilitation would take place after members reached a decision to begin such negotiations, by “explicit consensus,” at the Fifth Session of the Ministerial Conference in 2003, in Cancun, Mexico. According to the Doha Ministerial Declaration, the Council on Trade in Goods was to review and clarify relevant

⁵³ This section was written by Danielle Langton, Analyst in International Trade and Finance, Foreign Affairs, Defense, and Trade Division.

⁵⁴ Carol Cosgrove-Sacks, “How to Achieve Efficient and Open Collaboration for Trade Facilitation?,” *Trade Facilitation: The Challenges for Growth and Development*, United Nations Economic Commission for Europe. (New York and Geneva: 2003).

aspects of Articles V, VIII and X of GATT 1994, and identify the trade facilitation needs and priorities of members, particularly developing country members. The July Framework Agreement includes modalities, but certain key negotiating issues are yet to be resolved. Since 2004, trade facilitation negotiations have reportedly been among the smoothest of the WTO negotiating areas. Members began to submit proposals to revise the relevant GATT articles in early 2005, and the trade facilitation negotiating group has compiled these proposals to facilitate text-based negotiations, which have yet to begin. Developed countries and multilateral institutions have continued to provide technical assistance to developing countries on an ad hoc basis.

The modalities described in the July 2004 Framework Agreement cover three core negotiating issues of trade facilitation: improving the relevant GATT articles; providing technical assistance to developing countries; and identifying and considering the needs and priorities of all countries, including special and differential treatment (S&D) for developing countries. S&D has traditionally meant longer implementation periods for developing countries, but the framework goes further to state that the extent and timing of entering into commitments shall be directly related to the capabilities of developing country members. Also, the members agreed in the framework that developing countries will not be required to undertake infrastructure investments beyond their means. The Framework encourages developed country members to provide technical assistance to developing countries, but does not provide specifics on how much to spend or specific areas of assistance. It also does not specifically state whether negotiations will result in guidelines or binding rules in trade facilitation.

Reviewing and clarifying the GATT 1994 Articles V, VIII, and X is a major focus of the negotiations. Each of these articles concern different aspects of trade facilitation, and they were initially agreed to prior to the formation of the WTO. Article V describes the rights of goods passing through a territory between countries. Article VIII requires efficient and fair fees for moving goods in and out of countries. Article X requires transparent trade regulations and the equal enforcement of these regulations, including a judicial review process. WTO members have submitted proposals for strengthening these articles, and their proposals will form the basis for text-based negotiations to take place sometime after the Hong Kong Ministerial.

Negotiating Issues in Trade Facilitation. An agreement on trade facilitation may not be as straightforward as it appears from the modalities in the July 2004 Framework Agreement. Trade facilitation may include “behind the border” measures to tackle corruption and other administrative issues, and these measures are interrelated with other efficiency-enhancing measures beyond trade facilitation. In developing countries, agreeing on reforms for trade facilitation may require discussions that go beyond the traditional realm of trade negotiations. Trade facilitation measures may require passing new legislation, amending existing laws, or establishing new domestic institutions. It may be difficult for trade negotiators to agree to such measures, which will have significant costs and may not be possible without technical assistance from developed countries.

The potential cost of trade facilitation measures is daunting for many developing countries. Costs vary by country depending on the degree of change needed, and are difficult to estimate. The poorest countries may require the greatest change to

implement trade facilitation measures, and are the least able to afford the costs of such change. It is also not known how much must be spent on trade facilitation to begin to realize its benefits, and this amount is likely to vary by country. Trade facilitation may entail costs in the following areas: new regulation, institutional changes, training, equipment, and infrastructure. The question of who will pay the potentially high costs of trade facilitation has not yet been fully answered. The July 2004 Framework Agreement states that developed countries should provide support to developing countries to implement trade facilitation measures, and that developing countries will not be required to implement trade facilitation measures that they do not have the means to implement. The Agreement explicitly discusses the costs relating to infrastructure investments, but is not as explicit about other significant costs of trade facilitation measures.

Unlike in other negotiating areas, technical assistance is an integral component of the trade facilitation negotiations. Technical assistance is important to trade facilitation negotiations because of the potentially high costs and capacity requirements for implementation. One of the main sticking points in technical assistance for trade facilitation is a “chicken and egg” problem: before committing to any binding agreement, developing countries would like developed countries to provide detailed technical assistance plans. Conversely, many developed countries insist on seeing more concrete commitments from developing countries before they will provide details about plans for technical assistance. There are other issues that may arise within the discussions on technical assistance. There are concerns about coordination of technical assistance activities, and integration into general development strategies. Developing countries would prefer a more comprehensive, integrated approach, but it is easier for developed countries to provide “one-off” activities without significant coordination. There is also concern about how a country’s capacity to implement trade facilitation measures will be determined. Allowing countries to assess their own capabilities could present problems, if they argue a lack of sufficient capacity in order to avoid trade facilitation obligations. Meanwhile, many countries would likely balk at delegating that authority to a committee or other entity.

Finally, there is no consensus on whether an agreement on trade facilitation would result in rules subject to WTO dispute resolution, or whether an agreement would merely comprise guidelines for best practices. Developing countries prefer not to be subject to binding trade facilitation rules, but the United States and other developed countries believe that a rules-based agreement would be most effective to ensure that measures are implemented. However, some experts observe that outside pressure from binding obligations will have no tangible impact if developing countries lack the capacity to implement the obligations. Insofar as technical assistance provided during the negotiations may increase the capacity of developing countries to take on trade facilitation obligations, it may also have a positive effect on the willingness of developing countries to consider binding commitments. Technical assistance has already had an impact on developing country attitudes toward trade facilitation, because as developing countries implement trade facilitation measures they become more aware of the potential benefits of a trade facilitation agreement.

Outlook for Hong Kong

According to the WTO Director General Pascal Lamy, trade facilitation is an area where there is a high degree of convergence. This does not mean that an agreement on trade facilitation is imminent, or that any significant commitments are likely to emerge from the Hong Kong ministerial. What it does mean is that member countries are moving forward with the work outlined by the July 2004 Framework Agreement, and they have relatively few disagreements about how to proceed. The upcoming ministerial may result in a more specific agreement on when to begin text-based negotiations for trade facilitation. There may also be more specific commitments on technical assistance or special and differential treatment. The draft Report by the Negotiating Group on Trade Facilitation to the Trade Negotiating Committee summarizes the work accomplished thus far and what remains to be done, and it includes a list of the proposals that have been tabled. The Report is included as Annex E to the Draft Ministerial Text.

Special and Differential Treatment⁵⁵

Through Special and Differential Treatment (S&D), developing countries are allowed favorable treatment in the negotiations and flexibility in implementing WTO agreements. This flexibility usually takes the form of longer implementation periods, but may also include partial implementation, such as reducing tariffs to a lesser degree than developed countries. Special treatment may include preferential market access and technical assistance for negotiating and implementing agreements. S&D is negotiated within each of the specific negotiating areas, such as agriculture and services, but also within a Special Session of the Committee on Trade & Development (CTD).

S&D is based upon two main premises: first, to assist developing countries' transition into the global trading system; and second, to allow developing countries to maintain trade policies supportive of their development strategies. Some experts question whether S&D is beneficial for development at all. Economists point out that developing countries gain the most from trade negotiations in liberalizing their own markets, and S&D is often used to avoid liberalization. On the other hand, trade liberalization is known to redistribute income among different sectors in a country, and while the net effect may be positive for economic growth some segments of the population may suffer significant hardship. S&D may help reduce the hardship resulting from trade liberalization in developing countries, and thus promote development friendly outcomes.

There is no official list of developing countries that are eligible for S&D, with the exception of least developed countries (LDCs). LDC status is based upon income and determined by the United Nations, and LDCs may receive further preferential treatment in WTO agreements. Aside from LDCs, developing countries in the WTO are self-identified, and they are all eligible for the same S&D provisions. Most

⁵⁵ This section was written by Danielle Langton, Analyst in International Trade and Finance, Foreign Affairs, Defense, and Trade Division.

developed country WTO members favor differentiating developing countries into multiple tiers, because developing countries vary widely in their income and development levels. As an example, Brazil and South Africa are currently eligible for the same S&D provisions as lower income developing countries such as Nicaragua and Ghana. Developed countries argue that they could make S&D provisions deeper and more meaningful for developing countries if there were multiple tiers of S&D provisions. Developing countries, however, are reluctant to consider that option. The lower income developing countries reportedly do not want to lose the negotiating leverage gained from being grouped with the higher income countries, and the higher income countries do not want to risk losing eligibility for S&D provisions.

S&D Negotiations in the Doha Round

Prior to the Doha Ministerial, WTO member countries criticized the overly general and ineffective application of S&D provisions contained in the Uruguay round. In response, the Doha Ministerial Declaration mandated that all S&D provisions should be “reviewed with a view to strengthening them and making them more precise, effective and operational.” The CTD was tasked with fulfilling the Doha mandate on S&D. As the discussions progressed, significant divisions between developing and developed countries on S&D became clear. One important point of divergence has been whether to negotiate the cross-cutting issue of establishing multiple tiers of S&D provisions for countries at different development levels. The developing countries have held that S&D discussions should focus entirely on agreement-specific S&D proposals, while developed countries maintain that the cross-cutting issues are important. The July 2004 Framework Agreement dealt with this divide by instructing the CTD to complete the review of all outstanding agreement-specific proposals mandated by the Doha declaration, and to address all other outstanding work, including on the cross-cutting issues. It further instructed the CTD to issue a report to the General Council with recommendations for a decision by July 2005, a deadline that was not met.

In order to move beyond the deadlock on S&D, members agreed to prioritize the five agreement-specific proposals pertaining specifically to LDCs in preparation for Hong Kong. They hoped to reach consensus on the LDC proposals in time for the Hong Kong ministerial, but there is still reportedly disagreement on the language of these proposals. The most controversial proposal states that developed country members should provide duty free and quota free market access for products originating from LDCs. The disagreement over this proposal is focused on whether this access should be binding and applicable to all products and all LDCs. The United States has indicated that it is willing to accept this proposal except in the case of textiles, because of concerns about textile imports from Bangladesh. The other four proposals are: (1) to require the General Council to respond within 60 days to requests from non-LDCs for waivers to implement measures in favor of LDCs; (2) to exempt LDCs from certain obligations under the Agreement on Trade-Related Investment Measures (TRIMs); (3) to link LDC obligations with their capacity to implement the obligations; and (4) to urge bilateral and multilateral donors to ensure that conditions for assistance to LDCs are consistent with their rights and obligations under the WTO.

Implementation Issues. Developing countries have concerns about the implementation of commitments made during the Uruguay round of WTO negotiations. Some of these issues were resolved at the Doha Ministerial, but many issues remain outstanding. The concerns tend to deal with the implementation of agreements in a way that is beneficial to and does not cause undue hardship to developing countries. In many cases the agreement language does not specify the treatment of developing countries, and the actual implementation of the agreement has been contrary to developing country expectations. Implementation issues are found within a wide variety of negotiating areas and are dealt with primarily by the committee responsible for the relevant negotiating area. Outstanding implementation issues are found in the area of market access, investment measures, safeguards, rules of origin, and subsidies and countervailing measures, among others. Some of the implementation issues may possibly be resolved by clarifying S&D provisions. However, since the work in clarifying S&D provisions is proceeding slowly negotiators may focus on some of the issues from an implementation standpoint.

Technical Assistance. Trade capacity building (TCB) and technical assistance (TA) are discussed within the individual negotiating areas as well as within the CTD. TCB is provided to developing countries to strengthen their institutional capacity to participate in WTO negotiations, meet WTO obligations, and integrate more fully into the global economy. TCB is provided from donors on both a bilateral and a multilateral basis. The WTO provides workshops on various WTO topics, maintains a global TCB database, and manages four major funds for financing TCB activities (the Global Trust Fund; the Doha Development Agenda Trust Fund; the JITAP Common Trust Fund; and the Integrated Framework Trust Fund). Critics have commented that TCB lacks coordination in the WTO, and despite the variety of funding sources the centralized sources of TCB funds are inadequate. In 2003, total contributions to the TCB trust funds totaled \$45 million. In that same year, total bilateral TCB commitments equaled approximately \$1.46 billion. Multilateral commitments to TCB equaled approximately \$1.29 billion in the same year.⁵⁶ Another area of controversy is whether donors should commit to providing TCB as part of a WTO agreement, or whether TCB should simply be encouraged in the agreement.

Outlook for Hong Kong

The Ministerial may consider the five agreement-specific proposals concerning the LDCs, the most controversial of which concerns the extension of duty and quota-free access for all LDC products. The Ministerial may also set a deadline for the General Council to take action on implementation issues.

⁵⁶ 2004 Joint WTO/OECD Report on Trade-Related Technical Assistance and Capacity Building. December 2004.

Dispute Settlement⁵⁷

The WTO Understanding on Rules and Procedures for the Settlement of Disputes (Dispute Settlement Understanding or DSU), which entered into force January 1, 1995, with the Uruguay Round package of agreements, provides the legal basis for dispute resolution under virtually all WTO agreements and is the primary means of enforcing WTO obligations. The DSU introduced significant new elements into existing GATT dispute settlement practice intended to strengthen the system and facilitate compliance with dispute settlement results. In particular, the DSU makes the establishment of a panel, the adoption of panel and appellate reports, and the authorization of requests to retaliate virtually automatic, and adds a right to appellate review of panel reports on issues of law and legal interpretation. Its system of deadlines and timelines expedites proceedings at various stages of the process, seeks to ensure that compliance with adverse panel reports is achieved, if not immediately, within “a reasonable period of time,” and allows disputing parties to exercise their rights under the DSU by defined dates. Certain unilateral actions in trade disputes involving WTO agreements, such as suspending WTO concessions or other obligations without multilateral authorization, are prohibited. The system has been heavily used, the WTO Secretariat reporting 335 complaints filed between January 1, 1995 and November 21, 2005; roughly half involve the United States either as a complainant or defendant.

Current dispute settlement negotiations, which are taking place in the Special Session of the WTO Dispute Settlement Body (DSB/SS), are an extension of talks begun under a Uruguay Round Ministerial Declaration that called on WTO Members to complete a full review of dispute settlement rules and procedures within four years after the WTO Agreement entered into force, and to decide at the first WTO ministerial meeting held after completion (in effect, the 3rd Ministerial Conference held in Seattle in late 1998) whether to continue, modify or terminate them. While there was much discussion of possible revisions and a draft text containing amendments to the DSU was circulated at the Seattle Ministerial, consensus could not be reached at that time. No decisions on reforms were taken by WTO Members subsequent to the Seattle meeting and the future of the review remained unclear until WTO Members agreed at the Doha Ministerial Meeting in November 2001 to continue negotiations on “improvements and clarifications” of the DSU, with the aim of reaching agreement by the end of May 2003 and bringing the results into force “as soon as possible thereafter.” Further, dispute settlement negotiations would not be conducted, concluded, or their results brought into force as part of the single undertaking planned for Doha negotiations as a whole.

In the absence of probable consensus by the May 2003 deadline, the outgoing Chairman of the SS/DSB, Peter Balás (Hungary), drafted a Chairman’s Text of proposed amendments to the DSU dated May 28, 2003, in which he incorporated numerous proposals, including those involving consultation procedures, third-party rights, procedures for terminating panels before they complete their work, remand authority for the Appellate Body, sequencing of requests for authorization to retaliate

⁵⁷ This section was written by Jeanne J. Grimmer, Legislative Attorney, American Law Division.

with requests for compliance panels, procedures for terminating retaliatory measures, awards for litigation costs, and special provisions for developing countries. No action was taken on the document and in July 2003, the WTO General Council extended the talks until May 31, 2004. With additional proposals submitted but little progress by the new date, the WTO General Council agreed in the August 2004 Doha Work Program that work in the dispute settlement negotiations would continue on the basis set out by the new DSB/SS Chairman David Spencer (Australia), in his June 2004 report to the WTO Trade Negotiations Committee. The report stated that there was “agreement among Members that the Special Session needs more time to complete its work, on the understanding that all existing proposals would remain under consideration and bearing in mind that these negotiations are outside the single undertaking.” In addition, the Chairman did not recommend a specific target date for completion, noting, however, that one might be considered later.

Among specific concerns, an early problem raised under the DSU, originally identified during the implementation phase of the U.S.-European Communities (EC) banana dispute, was that of “sequencing,” that is, a gap caused by the failure of the DSU to integrate Article 21.5, which provides that disagreements over the existence or adequacy of compliance measures are to be decided by recourse to DSU procedures, with the processes and deadlines of Article 22, which permits the prevailing party in a dispute to request authorization to retaliate within 30 days after the compliance period ends if the defending party has not complied with its obligations by that time. The EC argued that a full compliance proceeding (including consultations) was called for; the United States argued that, given the 30-day deadline for retaliation requests, it would lose its right to request authorization to retaliate if it waited for a compliance panel to complete its work. While sequencing remains an issue in the negotiations, parties to disputes have resolved existing difficulties by entering into *ad hoc* bilateral agreements in specific disputes under which, for example, the complaining party requests both the establishment of a compliance panel and authorization to retaliate, the defending party objects to the level of retaliation proposed — an action that automatically sends the request to arbitration — and the arbitration is suspended pending completion of the compliance panel process (including any appeal). Another case-based problem arose with the enactment of U.S. “carousel” legislation in May 2000, under which the USTR is required periodically to rotate lists of items subject to authorized trade retaliation unless certain exceptions apply, the legislation in large part a reaction to the EC’s failure to comply with the WTO decision faulting the EC’s prohibition on hormone-treated beef. The EC argued that changing a list would be a unilateral action not authorized under the DSU.

Along with the issues just described, the negotiations have taken up a broad range of other topics, with over 50 working documents publicly circulated by Members and other informal proposals and compilations made during the course of the talks. The United States has generally sought increased transparency and access to the process through open meetings, timely access to submissions and final reports, and guidelines for *amicus* briefs. It has also proposed shorter time frames (in tandem with clarifying the sequencing issue), and has called for steps that would give Members more control over the process, such as requiring the WTO Appellate Body to issue interim reports for comment by disputing parties; allowing the deletion from an appellate report, upon agreement by the disputing parties, of findings that they

view as not necessary or helpful to resolving the dispute; and giving parties the right to mutually suspend panel and appellate proceedings to allow them to work on a solution to the case. In October 2005, the United States also suggested draft parameters concerning both the use of public international law in WTO dispute settlement and the proper interpretive approach for use in disputes. Its proposed interpretive guidelines are aimed at ensuring that WTO adjudicative bodies neither supplement nor reduce the rights and obligations of WTO Members under WTO agreements and, among other things, describe types of “gap-filling” that should only be addressed through negotiations, including a panel’s reading a right or obligation into the text of an agreement by, for example, extrapolating from a different agreement provision.

The EC has proposed, among other things, permanent panelists, remand authority for the Appellate Body, a prohibition on carousel retaliation, enhancing the availability of compensation before resort to retaliation, and a formalized way to terminate multilateral authorization to retaliate. Japan has sought, *inter alia*, greater enforcement options and a larger Appellate Body membership. Canada has proposed procedures to protect business confidential information and the creation of a panel roster. The EC, Japan, and Canada have also proposed varying degrees of transparency in dispute proceedings. Proposals by developing country Members generally reflect Members’ lower level of capacity and a desire to have developing country interests reflected to a greater degree in panel and appellate reports and dispute proceedings as a whole. These Members have proposed, among other things, extended timelines in cases in which they are involved, including extensions for consultations, brief filing, and the implementation of adverse results; provisions to ensure that a developing country panelist is included in all panels in which a developing country is a disputant, and the possible authorization of collective WTO retaliation where a developing or less-developed country Member is a successful complainant. They have also proposed ways of dealing with financial and human resource limitations in disputes, including increased technical resources for developing countries and the awarding of litigation costs to a developing country Member that has prevailed in a case. Developing countries have been critical of some transparency proposals, such as allowing non-Members to submit *amicus* briefs to panels, on the ground that non-Member participation in disputes would undermine the intergovernmental character of the dispute settlement process and that added requirements that might be placed on Members, such as responding to *amicus* briefs within prescribed timeframes, would be particularly burdensome to developing countries. While developed country Members submitted revised proposals, generally on an informal basis, during recent dispute settlement negotiations, no revised developing country proposal was put forward during this time.

Outlook for Hong Kong

In his November 25, 2005, report to the Trade Negotiations Committee, Chairman Spencer communicated that over the past 18 months of negotiations there had not been consensus of the sort needed to establish a foundation for an agreement. Instead, he noted, “the work of the Special Session has been based primarily on initiatives by Members to work among themselves in an effort to develop areas of convergence to present to the Special Session as a whole.” The report states that during this period contributions and discussions had taken place on topics such as

“remand, sequencing, post-retaliation, third-party rights, flexibility and Member control, panel composition, time-savings and transparency.” For the future, he continued, “the onus will remain on participants in the negotiations to continue to develop areas of convergence so as to lay the basis for a final agreement to improve and clarify the DSU.” Following the Chairman Spencer’s suggestions, the revised Draft Ministerial Text issued December 1, 2005, takes note of the progress made in the dispute settlement talks so far and directs the DSB/SS “to work towards a rapid conclusion of the negotiations.” However, no agreement on dispute settlement issues is expected at Hong Kong. Because the Draft Ministerial Text reaffirms the Decisions and Declarations adopted at Doha and takes into account the General Council Decision of August 2004, dispute settlement negotiations apparently will continue on their separate track, with results to be adopted separately from any Doha single act.

Environment and Trade⁵⁸

In general, environmental issues are not expected to be a major focus at the Hong Kong ministerial meeting, given the predominance of other priority issues. However, the elements of the environmental paragraphs in the Doha Declaration will be discussed, with the likelihood that attention in the environmental area will focus on the issues of environmental goods and services, and of fisheries.

When the WTO was established in the 1994 Marrakech Agreement, environment was a prominent and often controversial issue. Issues related to environment and trade were closely linked in 1994 to the somewhat amorphous need for “sustainable development.” And in April 1994 a “Decision on Trade and Environment” accompanied the Marrakech accords, stating: “There should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other.” The issue was resolved in 1994 with the establishment of the Committee on Trade and Environment (CTE), which has been meeting ever since on a regular basis to identify the relevant issues.

The Doha Ministerial Declaration in 2001 included environmental elements in paragraphs 31 and 32. Paragraph 31 states agreement for negotiations “with a view to enhancing the mutual supportiveness of trade and environment...” and identified three issues: (i) the relationships between WTO rules and trade obligations in multilateral environmental agreements (MEAs), limiting the scope of the discussion to the relationships only among those nations that are parties to the MEAs; (ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees; and (iii) the reduction and/or elimination of tariff and non-tariff barriers to environmental goods and services. This paragraph also states, “We note that fisheries subsidies form part of the negotiations provided for in

⁵⁸ This section was written by Susan R. Fletcher, Specialist in Environmental Policy, Resources, Science and Industry Division, and Jeanne J. Grimmett, Legislative Attorney, American Law Division.

paragraph 28,” i.e., negotiations on WTO rules, a mandate covering anti-dumping, subsidies, and countervailing measures.⁵⁹

The CTE has held extensive discussions of the relationship between MEAs and WTO rules. It has been noted in these discussions that there has not yet been a dispute involving an MEA and WTO rules, and there appears to be wide agreement that when all parties are parties to an MEA, the MEA rules should apply. Complications develop when a possible dispute might arise between parties and non-parties to an MEA; discussions continue on this and other technical legal points. However, it appears unlikely that discussions at the Hong Kong ministerial will attempt to resolve outstanding issues related to this negotiating element.

Outlook for Hong Kong

The Draft Ministerial Text issued November 26, 2005, and revised on December 1, 2005, reaffirms the paragraph 31 Doha mandate “aimed at enhancing the mutual supportiveness of trade and environment” and calls upon Members to intensify negotiations on all matters listed in the paragraph. It recognizes the progress that has been made in the CTE on the relationship of WTO rules to MEA trade obligations and the work undertaken toward inter-organization information exchange. Finally, it recognizes recent work regarding environmental goods and services through numerous submissions and discussions in the CTE and proposes to instruct Members either to continue their work by developing commonality on various approaches to negotiations in the area or else to complete work by 2006 by identifying environmental goods for the reduction or elimination of existing tariff and non-tariff barriers.

In addition, the Draft Ministerial Text, as it addresses rules negotiations, notes that broad agreement exists that the Negotiating Group on Rules should strengthen disciplines on subsidies in the fisheries sector, including prohibiting certain forms of subsidies that contribute to overcapacity and over-fishing. It calls on participants “to undertake further detailed work to, *inter alia*, establish the nature and extent of those disciplines, including transparency and enforceability.” The Draft also states that “appropriate and effective” special and differential treatment of developed and less-developed country Members “should be an integral part” of these negotiations, “taking into account the importance of this sector to development priorities, poverty reduction, and livelihood and food security concerns.” Finally, the Draft Ministerial Text, in addressing negotiations on Non-Agricultural Market Access (NAMA), notes that limited discussion has been held in the NAMA Negotiating Group regarding environmental goods since July 2004, but that the CTE has undertaken substantial work on the issue during this period. It further states that close coordination between the two negotiating groups would be needed in the future and that “a stock taking” of the CTE’s work by the NAMA Negotiating Group would be required at the appropriate time.

⁵⁹ Paragraph 32 outlines instructions for discussions in the CTE — not negotiating items — and includes the effect of environmental measures on market access; relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights; and labeling requirements for environmental purposes.