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The WTO Doha Ministerial: Results and Agenda for a New Round of Negotiations

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Summary

Trade ministers from the 142 member countries of the World Trade Organization (WTO) met in Doha, Qatar from November 9-14, 2001. At the end of their meeting, they issued a ministerial declaration, along with two statements on developing country concerns, that establish an agenda for a new round trade negotiations.

This agenda has significant implications for Congress. Most of the agreements reached during the round will require congressional approval before they can be implemented by the United States. More immediately, however, the Doha results provide a framework for the congressional debate on trade policy that is taking place in the context of congressional consideration of legislation authorizing presidential trade promotion, or fast-track, authority.

For the United States, the greatest success was the adoption of language on agricultural trade. The Ministerial Declaration stated that the members committed to "comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting support." The Declaration includes other market access issues supported by the United States, such as continuing negotiations on trade in services. It also calls for the reduction or elimination of tariffs, as well as non-tariff barriers, for industrial products. It directs the General Council to report to the fifth ministerial (to be held in 2003) on the progress of the work program on electronic commerce and calls on members to continue the practice of duty-free treatment for electronic transmissions until the fifth ministerial.

However, negotiations on the market access issues of transparency in government procurement and of trade facilitation, which the United States wanted on the agenda, were postponed until at least the fifth ministerial, as were the other two so-called "Singapore issues" of investment and competition policy. Major work on the topic of the environment also was postponed. The United States was unsuccessful in keeping out language on antidumping. The Ministerial Declaration states that members "agree to negotiations aimed at clarifying and improving disciplines" under the antidumping and subsidies agreements. One controversial issue that is absent from the work program for the next round is labor rights and trade, although the issue is mentioned in the preamble of the Doha Declaration.

The results of the Doha Ministerial have already touched off heated debate within the 107th Congress that will likely continue as the Congress considers legislation to provide for presidential trade promotion, or fast-track, negotiating authority. The Doha agenda could play a role in shaping that legislation. Members of Congress will be weighing that agenda against a variety of national, regional, and local economic interests and concerns.

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From November 9-14, 2001, trade ministers from 142 member countries of the World Trade Organization met in Doha, Qatar for the fourth WTO ministerial. The ministers succeeded in their main goal of agreeing to launch a new round of multilateral negotiations. The declaration and two other documents that the ministers issued at the end of ministerial established a broad negotiating agenda covering virtually all aspects of trade.

This agenda has significant implications for Congress. Most of the agreements reached during the round will require congressional approval before they can be implemented by the United States. More immediately, however, the Doha results provide a framework for the debate on trade policy that is taking place in the context of congressional consideration of legislation authorizing presidential trade promotion, or fast-track, negotiating authority. In this report, CRS analysts provide summaries and analyses of the major results of the Doha ministerial conference in the context of U.S. objectives.

Overview of the Doha Ministerial and Results*

Background

Trade ministers from member countries of the WTO must meet at least every two years, according to the agreement that established the WTO. These meetings, called Ministerial Conferences, are the highest level of decision-making in the WTO. Since the WTO was established (1995), there have been four Ministerial Conferences.

The most important decision facing the trade ministers in Doha was whether they could reach agreement on launching a new round of multilateral trade negotiations. Negotiations had already been underway on trade in agriculture and trade in services, as required under the last comprehensive round of multilateral trade negotiations (the Uruguay Round, 1986-1994). Some countries, including the United States, wanted to expand the agriculture and services talks to allow discussions on other areas and thus achieve greater trade liberalization through potential trade-offs.

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*Prepared by (name redacted), Specialist in International Trade and Finance, Foreign Affairs, Defense, and Trade Division.

Trade ministers ended the 1999 Ministerial Conference in Seattle without agreeing to launch a new round.. Among the reasons were the inability of the United States and the European Union (EU) to agree on agricultural rules, discontent by developing countries with the proposed agenda, a working document that, many believed, had not been sufficiently prepared, and an apparent lack of commitment by members to make the difficult decisions necessary for an agreement. Following the Seattle Ministerial, it was agreed that WTO officials would consult with member countries and discuss ways to bridge remaining differences.

Many countries did not want to repeat the problems of the Seattle ministerial. WTO members considered ways that developing countries' concerns might be addressed. U.S. and EU trade officials developed a closer relationship. WTO General Council Chairman, Stuart Harbinson, prepared a well-received draft of a ministerial declaration with a proposed future work program. In a second document on "implementation issues," he addressed complaints by developing countries that they lacked the capacity to implement the Uruguay Round trade agreements and had not yet realized the expected benefits from those agreements.

The Doha ministerial came at a time when economic activity worldwide was slowing and business and consumer confidence was declining. These developments no doubt were exacerbated by the September 11 terrorist attacks on the United States and continuing terrorist threats to the United States and other countries.

U.S. Goals

For the United States, the core of the negotiations was market access, especially in agricultural trade.[1] Goals were elimination of agricultural export subsidies, easing of tariffs and quotas, and reductions in other forms of trade-distorting domestic support. The United States also wanted expanded services negotiations and the reduction of industrial tariffs. U.S. negotiators sought more transparency, or openness, in government procurement practices. They also wanted to improve customs procedures to reduce problems when goods enter another country (trade facilitation).

In order to gain the concessions that they wanted, however, U.S. trade officials knew that they would have to address other countries' concerns. For example, the EU wanted a round to include certain new issues, such as investment and competition (antitrust) policy. These issues were not major U.S. goals, but the United States recognized their importance to the EU. U.S. trade officials also recognized that implementation issues would be important to developing countries.

The U.S. position on three other issues should also be mentioned. A major topic at the ministerial regarded the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The issue was the balance between the interests of pharmaceutical companies in developed countries and public health needs in

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[1]This section uses background information provided by "senior U.S. trade officials" and found at the U.S. Department of State, International Information Programs web site at [http://usinfo.state.gov/products/washfile/econ.shtml].

developing countries. The United States claimed that the current language in TRIPS was flexible enough to address health emergencies, but other countries insisted on new language. Second, the United States wanted to address certain environmental issues (e.g., fisheries subsidies), but strongly opposed some environmental issues that the EU supported (e.g., the precautionary principle). Third, in the face of almost universal opposition, the United States said it would not negotiate on trade remedies, especially rules on antidumping.

Results of the Ministerial

Trade ministers adopted three documents at the end of the Ministerial Conference. The *Ministerial Declaration* includes a preamble and a work program for a new round and for other future action. The *Declaration on the TRIPS Agreement and Public Health* presents a political interpretation of the TRIPS agreement. A document on *Implementation-Related Issues and Concerns* includes numerous provisions of interest to developing countries.[2]

For the United States, the greatest success was the adoption of language on agricultural trade. The Ministerial Declaration states that the members committed to "comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting support." The EU successfully pushed to have the phrase "without prejudging the outcome of the negotiations" inserted before the preceding phrase, insisting that a complete elimination of export subsidies, therefore, was not necessarily the required outcome.

The Declaration includes other market access issues supported by the United States. It reaffirms continuing negotiations on trade in services. It also calls for the reduction or elimination of tariffs, as well as non-tariff barriers, for industrial products. It directs the General Council to report to the fifth ministerial (to be held year-end 2003) on the progress of the work program on electronic commerce and calls on members to continue duty-free treatment for electronic transmissions until the fifth ministerial.

However, negotiations on the market access issues of transparency in government procurement and of trade facilitation, which the United States wanted on the agenda, were postponed until at least the fifth ministerial, as were the other two so-called "Singapore issues" of investment and competition policy, which the EU wanted. India strongly opposed negotiations on the Singapore issues. As a compromise, the Ministerial Declaration states that further clarification will be undertaken on all four Singapore issues, and negotiations will take place after the fifth ministerial on the basis of a decision to be taken by consensus.

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[2]The Ministerial Declaration (WT/MIN(01)/DEC/1), the Declaration on the TRIPS Agreement and Public Health ((WT/MIN(01)/DEC/2), and the Implementation-Related Issues and Concerns (WT/MIN(01)/DEC/17) are available through the WTO home page at [http://www.wto.org/].

Major work on the topic of the environment also was postponed. The EU had wanted this issue included, and it did achieve some of its goals. For example, trade ministers agreed to negotiations on the relationship between WTO rules and trade obligations in multilateral environmental agreements (MEAs) and regular information exchange between MEA Secretariats and relevant WTO committees. The United States realized some success by having fisheries subsidies included in future negotiations. The precautionary principle, which was supported by the EU and opposed by the United States, was not included in the Ministerial Declaration. Under this principle, governments could impose trade restrictions and take other measures for public health reasons, even though scientific evidence was still incomplete.

A major success for developing countries was the Declaration on the TRIPS Agreement and Public Health. In this Declaration, trade ministers "affirm that the [TRIPS] Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all." U.S. officials expressed satisfaction that the TRIPS Agreement was not re-negotiated, but the Declaration clearly suggests a liberal interpretation of actions that developing countries may take. This Declaration was reached early in the Doha ministerial, and most reports say that this early concession to developing countries helped move along the other negotiations. The U.S. Trade Representative (USTR) was given considerable credit for the strategy.

The United States was unsuccessful in keeping out language on antidumping. The Ministerial Declaration states that members "agree to negotiations aimed at clarifying and improving disciplines" under the antidumping and subsidies agreements. U.S. officials point out that the Ministerial Declaration also states that the "basic concepts, principles and effectiveness of these Agreements and their instruments and objectives" would be preserved. This wording, they contend, would retain U.S. trade remedy laws. Some congressional leaders, however, are highly critical of this concession by U.S. trade negotiators.

In addition to the TRIPS Declaration, developing countries realized numerous benefits in the other two documents. The Ministerial Declaration includes, for example, sections on special and differential treatment, technology transfer, and capacity building. The implementation document includes almost 50 actions to assist developing country members. Because of the attention to developing countries, the actions begun at the ministerial are called the Doha Development Agenda.

One issue that is absent from the future work program is labor rights. The preamble of the Doha Ministerial Declaration states only: "We reaffirm our declaration made at the Singapore Ministerial Conference regarding internationally recognized core labour standards. We take note of work under way in the International Labour Organization (ILO) on the social dimension of globalization." The Singapore Ministerial Declaration included, among other provisions, that the ILO was the "competent body" to set labor standards. Developing countries were adamantly opposed to including labor standards in a new round. At the Seattle Ministerial Conference two year earlier, President Clinton raised the issue of linking labor standards and trade sanctions, causing some developing countries to threaten to walk out of the meeting. Labor organizations, however, continue to press for labor standards to be addressed.

Although the start of a new round of negotiations is seen as the major accomplishment of the Doha meeting, another major accomplishment was the approval of China and Taiwan as WTO members. Because of the size of its economy and its economic growth, China is expected to have considerable influence within the WTO in the future.

On organization and management of the work program, the Ministerial Declaration directs that negotiations be concluded not later than January 1, 2005. It states that the fifth ministerial, which must be held within two years, will "take stock of progress, provide any necessary political guidance, and take decisions as necessary." It directs that a Trade Negotiations Committee (TNC) be established to supervise the negotiations under the authority of the WTO General Council. The TNC must hold its first meeting not later than January 31, 2002. With the exception of actions on the Dispute Settlement Understanding, which have a deadline of May 2003, the outcome of the negotiations will be a single undertaking, which means there is likely to be a single, comprehensive agreement at the end of the negotiations.

Agriculture*

As at the 1999 Seattle Ministerial Conference, agreeing on a negotiating mandate for agriculture at Doha proved difficult and was among the last issues to be resolved. Unlike Seattle, however, WTO members, especially the United States and the European Union, seemed determined that disagreement on the scope of agriculture negotiations not preclude the launch of a new comprehensive round of multilateral negotiations. The resulting mandate folds agriculture negotiations into a comprehensive trade round and permits the United States to pursue further agricultural trade liberalization begun in the Uruguay Round Agreement on Agriculture.

The Negotiating Mandate for Agriculture

The Doha Ministerial Declaration of November 14, 2001, includes a broad mandate for multilateral negotiations on agriculture. Although sectoral negotiations, called for by the 1994 WTO Uruguay Round Agreement on Agriculture (URAA), have been underway for some time, the Doha Ministerial Declaration incorporates the sectoral negotiations into a comprehensive round of multilateral trade negotiations (MTNs) and constitutes an agreed negotiating mandate for agriculture. The mandate reflects the objectives advanced by the United States in the sectoral agriculture negotiations with respect to market access for agricultural products, export subsidies, and trade-distorting domestic support.

For agriculture, the Doha Ministerial Declaration states that *"building on the work carried out to date* (in the sectoral negotiations)" and *"without prejudging the outcome of the negotiations we commit ourselves to comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to*

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*Prepared by (name redacted), Senior Specialist in Agricultural Policy, Resources, Science, and Industry Division.

phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support." The Declaration also provides that *"special and differential treatment for developing countries shall be an integral part of all elements of the negotiations."* The Declaration takes note of *"non-trade concerns reflected in negotiating proposals of Members"* and confirms that *"non-trade concerns will be taken into account"* in the negotiations.

The launch of the new round likely will give impetus to the sectoral negotiations which had not progressed beyond identifying and discussing negotiating issues and had no deadline. Even with agreement on a mandate for agriculture, however, there remain the difficult tasks of deciding on "modalities," e.g., formulas and timetables, for achieving the desired reductions and of developing individual country schedules, or lists, of reduction commitments. The agriculture negotiations will be complicated by strong differences among major WTO participants–the United States, the European Union, Japan, Korea, the Cairns Group of agricultural exporting countries,[3] and the developing countries–about what the outcomes of the negotiations should be.

The deadline for concluding the negotiations in the new round, including those on agriculture, is January 1, 2005. The deadline for agreeing on "modalities" for commitments in agriculture is March 31, 2003. Schedules of concessions are to be submitted by WTO members no later than the fifth WTO Ministerial Conference in late 2003.

URAA Agriculture Sectoral Negotiations

Sectoral negotiations on agriculture began in March 2000. Part of the so-called "built-in agenda" of the WTO, these negotiations are aimed at continuing the process of "substantial progressive reductions in support and protection" of agriculture begun under the 1994 WTO URAA which established new and strengthened multilateral rules for agricultural trade. The first phase of the sectoral negotiations entailed the submission and examination of proposals from WTO member countries. The second phase, begun in March 2001 has focused on in-depth consideration of key issues raised in the proposals: tariff quota administration, tariffs, trade-distorting domestic support (amber box or prohibited support), export subsidies, export credits, state trading enterprises, export restrictions, food security, food safety, and rural development. With the launch of the new round and the establishment of deadlines for completing the negotiations, attention will now turn to examining the "modalities" for making reduction commitments for tariffs, export subsidies, and domestic support. Because developing countries were critical to the launch of the new round, particular attention seems likely to be paid to modalities for according developing countries special and differential treatment for their tariffs and domestic subsidies, an objective shared by the United States.

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[3]The 18 members of the Cairns group are: Argentina, Australia, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Fiji, Guatemala, Indonesia, Malaysia, New Zealand, Paraguay, Philippines, South Africa, Thailand and Uruguay.

U.S.-EU Negotiating Issues

The Ministerial Declaration gives ample scope for WTO member countries, during the new round, to pursue proposals made in the sectoral agriculture negotiations. During the Ministerial Conference, the United States maintained its support for the elimination of agricultural export subsidies; substantial reductions in tariffs and increases in tariff-rate quotas on agricultural imports; disciplines on state trading enterprises; and substantial reductions in trade distorting domestic support. The U.S. position was reinforced and strengthened by that of the Cairns Group and many developing countries who called for deep cuts in domestic support and the elimination of export subsidies. The EU opposed the elimination of export subsidies and conditioned its support for further export subsidy reduction on including export credits and food aid on the negotiating agenda. The EU agreed to accept the objective of phasing out agricultural export subsidies when the expression, "without prejudging the outcome of the negotiations," was included in the mandate for negotiating reductions in tariffs, export subsidies, and domestic support. The addition of that expression to the mandate, according to the EU, will prevent "pre-negotiation" of the outcomes of the agricultural negotiations.

The EU can also claim that since the negotiating mandate encompasses "all forms of export subsidies," it can introduce proposals for reducing both government-sponsored export credit programs and food aid used to circumvent export subsidy reduction commitments in the negotiations. The broad negotiating objective with respect to export subsidies also will enable both the United States and the EU to introduce proposals to discipline the operations of export state trading enterprises (STEs). STEs are often thought to use their lack of transparency to price exports differently in different markets. In addition, the EU reportedly felt its success in putting investment, competition policy, and environment on the larger Doha negotiating agenda was sufficient to enable it to support the negotiating mandate for agriculture. Some, however, consider the fact that the start of the negotiations on these issues has been delayed until 2003 a failure for the EU.

Other Agricultural Issues

The EU, Japan, and Korea also have placed greater emphasis on the use of agricultural policies to address so-called non-trade concerns like protecting the environment and rural development. Developing countries have called for rapid dismantling of trade barriers of developed countries coupled with exemptions for their domestic subsidies deemed essential for economic development. A group of small island nations and former European colonies have argued for continued preferential treatment of their exports. In response to these issues, the Ministerial Declaration provides that non-trade concerns will be taken into account in the negotiations. Also modalities for providing special and differential treatment to developing countries will be established by the March 31, 2001 deadline. Separately from the Ministerial Declaration, the Conference approved waivers that will enable developing countries that are former European colonies in Africa, the Caribbean and the Pacific to continue receiving preferential treatment for their exports.

U.S. Agricultural Interest Groups

Most U.S. agricultural interest groups rank further agricultural trade liberalization as a high priority and are pleased to see sectoral negotiations folded into a comprehensive multilateral trade round. These groups believe that trade-offs possible in a comprehensive negotiation can result in improved market prospects for U.S. agricultural exports. The American Farm Bureau, the largest general U.S. farm organization, cited the launch of the new round as a critical step in improving the global economic outlook for U.S. agriculture (November 14, 2001). Others, such as winter vegetable producers or wheat farmers in states that border Canada who feel disadvantaged by previous trade agreements (e.g., NAFTA) are not enthusiastic about U.S. participation in a new round.

The Doha Negotiations and Farm Bill Programs

The agriculture negotiations could result in tariff reductions that would benefit many U.S. agricultural commodity exports but also could result in U.S. tariff changes that create greater competition for some U.S. agricultural products. The negotiations could also impact on U.S. domestic support and export subsidies as well. Both the House-passed farm bill, H.R. 2646, and the Senate Agriculture Committee version of the farm bill, S. 1731, contain provisions that put the United States at some risk of exceeding its domestic support reduction commitments under the URAA. Provisions in both bills, however, authorize the Secretary of Agriculture to reduce commodity support if necessary to stay within URAA limits.

Negotiations dealing with "all forms of export subsidies" could lead to changes in U.S. agricultural export credit or food aid programs, both authorized in farm bills. Some trading partners argue that U.S. export credits operate to subsidize exports and that some U.S. food aid circumvents U.S. export subsidy reduction commitments under the URAA. The United States maintains that export credit programs should be negotiated not in the WTO but in the Organization for Economic Cooperation and Development (OECD), where the issue has been dealt with traditionally. Its food aid programs, the United States maintains, are in conformity with WTO requirements and developing countries' needs.

Both domestic support and export and food aid programs enjoy strong support among U.S. farmers and in Congress. U.S. negotiators would presumably not agree to changes in support and export programs without substantial reductions in other WTO countries' (especially the European Union's) domestic and export subsidies. Committees and Members of the 107th Congress will monitor the progress of the negotiations and consult with trade negotiators on U.S. proposals. Ultimately Congress would take up legislation to implement the provisions of any trade agreements that would require changes in U.S. farm laws.

Antidumping and Other WTO Trade Rules*

The United States and most of the major trading countries employ measures to remedy the adverse impact of unfair foreign trade practices on domestic producers. These trade remedies are sanctioned by the WTO as long as member countries adhere to WTO rules. Measures against imports that are dumped (antidumping) and, to a lesser extent, against subsidized imports (countervailing duty) have become widely used. A number of U.S. trading partners, including Japan, Korea, Chile, and Brazil, concerned about a recent increase in U.S. use of antidumping measures, have demanded that a review of WTO rules on antidumping (AD) and countervailing duty (CVD) remedies be placed on the agenda for a new round. Some U.S. industries and Members of Congress strongly argued against AD and CVD being placed on the agenda. However, the Doha Ministerial Declaration states that these issues will be part of a new round. The reactions from some Members of Congress and others suggest that it remains a divisive issue and will likely be raised during the upcoming debate on trade promotion authority (fast-track) legislation.

Background

The authority in U.S. law for AD relief is found in sections 731-739 of the Tariff Act of 1930, as amended. The authority for CVD relief is found in sections 701-709 of the Tariff Act of 1930, as amended AD and CVD actions are designed to "level the playing field," for adversely affected industries by eliminating the price advantages that foreign competitors obtained by selling products at an unfairly low prices or by benefitting from government subsidies. In addition, many trade specialists have argued that AD, CVD, and other trade remedies are a means by which the United States has been able to respond to the concerns of the adversely affected sectors of the economy and achieve a domestic political consensus on trade liberalization. Without these remedies, they argue, the Congress would not have approved major agreements, such as the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO), that became the foundation for the post-war international trading system. Others have argued that AD and CVD measures reduce the efficiency of trade by increasing the costs of imports and that these measures are used to protect inefficient producers.

U.S. industries petitioning for AD or CVD relief must go through a multi-stage investigation conducted by the Department of Commerce (DOC) and the U.S. International Trade Commission (ITC). The process begins when an industry–a firm, a union, or other representative group of the industry– files relevant petitions with the Office of Import Administration of the DOC and with the ITC. The DOC may also initiate an investigation. Successful completion of the process is contingent on four affirmative decisions. The ITC makes a preliminary determination whether there is a "reasonable indication" that imports in question are causing or threaten to cause "material" injury to the industry. An affirmative decision allows the investigation to continue. A negative decision terminates the investigation.

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* Prepared by (name redacted), Specialist in International Trade and Finance, Foreign Affairs, Defense, and Trade Division.

Both the DOC and the ITC must take into account a number of criteria in making their respective determinations. In CVD cases, the DOC must consider evidence of direct subsidies or upstream subsidies (subsidies provided to inputs the benefits of which are passed on to the final producer) and, if found, what would be the net countervailable subsidy. In AD cases, the DOC must first determine the "normal value" of the import (based on the price in the exporting country's home market, on the price of the export of the product to a third country market, or on a "constructed" price, depending on the availability of data). The DOC must compare the "normal value" with the actual price of the import in question to determine whether dumping is taking place and, if so, what the dumping margin is.

Under both AD and CVD procedures, the ITC must make two determinations: (1) Is the domestic industry being materially injured or facing a threat of material injury? (2) Are the imports in question a cause of the material injury? U.S. law establishes time-frames within which the respective agencies must make their determinations. The United States and other WTO members must adhere to the Uruguay Round Antidumping Agreement and the Subsidies and Countervailing Measures Agreement, which establish procedures for implementing national antidumping and countervailing duty programs.

Initiations of U.S. AD investigations have increased over the last few years largely as a result of the U.S. steel industry seeking relief from a surge in steel imports since 1998. In 1998, 36 AD investigations were initiated, an increase from 15 in 1997. In 1999 46 investigations were initiated and 45 were initiated in 2000. However, some other countries, India for example, have increased their use of antidumping measures. CVD relief has not been sought nearly as much.

Congressional Concerns

The Bush Administration faced considerable pressure from a number of Members of Congress to hold the line and protect U.S. trade remedy laws from changes. On November 7, 2001, the House passed (410-4) a concurring resolution (H.Con.Res. 262) stating that it is the sense of the Congress that at the negotiations at Doha, the United States should preserve its ability to enforce its trade laws, including antidumping and countervailing duty laws, and should avoid agreements that would weaken the effectiveness of WTO disciplines and national laws on antidumping and countervailing duties. In addition, the resolution stated that U.S. negotiators should ensure that U.S. exporters are not subject to "abusive use of trade laws, including antidumping and countervailing duty laws." In mid-May 2001, Senate Finance Committee Chairman Max Baucus (MT) and 61 other Senators sent President Bush a letter cautioning him against allowing U.S. trade remedy laws to be weakened during a new round of WTO negotiations.[4]

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[4] Language regarding negotiations over AD and CVD laws is also contained in pending legislation on trade promotion authority, or fast-track. H.R. 3005, the Bipartisan Trade Promotion Authority Act of 2001, reported out of the Ways and Means Committee on October 16, 2001, states in Section 2 (c): "In order to address and maintain United States competitiveness in the global economy, the President shall– (9) preserve the ability of the (continued...)

Not all Members of Congress held this position. Six Republican Senators, including Phil Gramm (TX), argued in a November 9 letter to USTR Zoellick for flexibility on negotiating on AD and CVD.

Doha and Domestic Reaction

After much discussion, the United States and the other WTO members agreed to the following language in the Doha Declaration:

> In the light of experience and of the increasing application of these instruments by Members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 [the WTO Antidumping Agreement] and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants. In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase.

Antidumping issues are addressed not only in the main declaration but also in the separate decision issued at Doha to address concerns of developing countries over implementation of agreements reached during the Uruguay Round. That document states that when considering an AD case, national investigation authorities will dismiss an AD case, if, during the past year, an AD case regarding the same product resulted in a negative determination.

The Bush Administration has received criticism from some Members of Congress and some areas of the private sector for allowing AD and CVD to be placed on the agenda of a new round. For example, Sen. Baucus stated that he was "...extremely troubled by the decision to re-open the agreements reached just a few years ago on antidumping and anti-subsidy measures. Both Houses of Congress have made it clear that they oppose negotiations to further weaken U.S. trade laws."[5] Similarly, Rep. Richard Gephardt (MO) indicated that the inclusion of trade remedy laws on the Doha agenda will make it more difficult for the Administration to obtain trade promotion authority, or fast-track.[6]

Bush Administration trade officials have argued that the Doha Ministerial Declaration's treatment of AD and CVD is beneficial to the United States. They have emphasized that the negotiations will be a two-phase process with the first phase devoted to shaping the agenda and the second devoted to negotiations. Thus, USTR

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[4](...continued)
United States to enforce rigorously its trade laws, including the antidumping and countervailing duty laws, and avoid agreements which lessen the effectiveness of domestic and international disciplines on unfair trade, especially dumping and subsidies..." H.R.3019, The Comprehensive Trade Negotiating Authority Act of 2001, introduced on October 4, 2001, contains similar language.

[5] *Congressional Record.* November 15, 2001. p. S11899.

[6] *Inside U.S. Trade.* November 23, 2001.

Zoellick stated that negotiations on these measures will allow the United States not only to maintain its trade laws but also to focus on the AD and CVD practices of other countries, especially the transparency and due process requirements that are part of WTO rules. In so doing, Administration officials have argued, U.S. negotiators fulfilled the wishes expressed in H.Con.Res. 262.

The private sector is also divided on this issue. The U.S. business community has widely supported the agreement to begin a new round of negotiations. On the other hand, major labor groups have opposed it. For example, AFL-CIO President John Sweeney stated that the decision to include AD and CVD on the agenda will weaken U.S. trade laws, "leaving American workers vulnerable to unfair trade practices."[7]

Environment and Trade*

Environmental issues and how they should be treated in the rules of the World Trade Organization (WTO) have long been and remain controversial, as evidenced by the wide variety of positions taken by WTO members at the fourth ministerial meeting of the WTO, held November 9-14, 2001, in Doha, Qatar. At the conclusion of the fourth ministerial meeting, the declaration reflected a compromise in which negotiations were agreed upon for one key environmental issue, and further study in the WTO's Committee on Trade and Environment was outlined for three other priority issues.

The determination not to let this issue, or others, prevent agreement on initiating a new round of negotiations overcame the wide gulf in positions on environmental concerns among WTO members. Some WTO members, notably the Europeans, stated their belief that the WTO should take a proactive stance, with rules that endorse and promote environmental protection, others–particularly developing countries–wished to minimize the inclusion of environmental concerns, arguing that environmental negotiations outside the WTO are the appropriate forum for these issues; a prevalent concern among developing countries has been that environmental issues could and would provide a pretext for protectionism. The European Union (EU) position at the Doha meeting was that a firm commitment to negotiations on environmental issues should be made at the conference, and they characterized this issue as a potential "deal breaker" if such a commitment were not made.

Environment in the Doha Ministerial Declaration

In the October 27, 2001, draft declaration text prepared by the General Council (known as the "Harbinson draft") in preparation for the Fourth Session of the Ministerial Conference in November, environment was among the key issues, and was treated in several places in the text. The final Doha declaration augmented the language of the Harbinson draft in both the opening statement and in the work

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[7] *International Trade Reporter*. November 22, 2001.

* Prepared by Susan Fletcher, Specialist in Environment Policy Resources, Science, and Industry Division.

program outlined in it. The work program, in particular, reflects the compromise reached between the EU insistence on a commitment to negotiations, and the developing countries' reluctance to go beyond delegating environmental issues to the WTO's Committee on Trade and Environment (CTE) for more discussion.

The over-all declaration states:

> We strongly reaffirm our commitment to the objective of sustainable development....We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive. We take note of the efforts by Members to conduct national environmental assessments of trade policies on a voluntary basis. We recognize that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements. We welcome the WTO's continued cooperation with UNEP [United Nations Environment Program] and other inter-governmental environmental organizations. We encourage efforts to promote cooperation between the WTO and relevant international environmental and developmental organizations, especially in the lead-up to the World Summit on Sustainable Development to be held in Johannesburg, South Africa, in September 2002.

The Doha declaration includes a "work programme" covering a number of issue areas. The section on "Trade and Environment" states that negotiations will be undertaken on specified aspects of issues concerning the relationship of multilateral environmental agreements and trade rules, and that other environmental issues will be dealt with in the Committee on Trade and Environment. Regarding the commitment to negotiations, the declaration states: "With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on: (i) the relationship between existing WTO rules and specific trade obligations set out in the multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question." Negotiations are also to include procedures for information exchange between MEA and WTO entities, the criteria for granting observer status, and the reduction or possible elimination of tariff and non-tariff barriers to environmental goods and services. This section also "notes" that fisheries subsidies will be part of the negotiations on subsides.

The work program instructs the CTE, "in pursuing work on all items on its agenda within its current terms of reference, to give particular attention to: (i) the effect of environmental measures on market access, especially in reference to developing countries, in particular the least-developed among them, and those situations in which the elimination or reduction of trade restrictions and distortions would benefit trade, the environment and development; (ii) the relevant provisions of

the Agreement on Trade-Related Aspects of Intellectual Property Rights; and (iii) labelling requirements for environmental purposes." The declaration concludes, "Work on these issues should include identification of any need to clarify relevant WTO rules. The Committee shall report to the Fifth Session of the Ministerial Conference and make recommendations, where appropriate, with respect to future action, including the desirability of negotiations."

The work program adds a further paragraph recognizing the importance to developing countries of technical assistance and capacity building in the field of trade and environment, and encouraging sharing of experience among WTO members wishing to perform environmental reviews at the national level. A report on these activities is to be prepared for the fifth ministerial session.

It thus appears that this declaration and work plan, as approved by WTO ministers, establishes a commitment to negotiations on one key issue–the relationship between trade rules and MEAs–while limiting the scope of negotiations to exclude one of the most difficult aspects of this issue, which is how non-parties to the MEA in question would relate to these relationships. On other environmental issues, the work program would repeat earlier ministerial instructions to the CTE, relegating work on most environmental issues to that committee, and instructing it this time to focus particularly on the three listed priority issues. This text attempts to walk a fine line between insistence by Europeans on a commitment to negotiations and resistance by most developing countries to wide-ranging environmental negotiations in the WTO.

The issues highlighted by the agreement regarding trade and environment have already proven to be extremely difficult to resolve in the context of the CTE. Finding ways to reconcile major international environmental treaties with WTO rules has always appeared to be one of the most straightforward issues that should be resolved, but has also proven to be difficult when specifics are discussed.

Environmental groups and free trade advocates have long agreed that eliminating market distorting subsidies would mutually support the goals of both, but it proves difficult on an on-going basis to deal with specific subsidies and affected sectors. "Labelling" refers in this context primarily to eco-labeling, in which relevant information about the contents of a product or the processes used in its manufacture would be revealed on product labels. This has been a goal of environmental groups who argue that consumers should be allowed to make informed decisions about products they might consider preferable in terms of environmental impacts, but it has been opposed by many in business who argue that achieving internationally consistent standards for such labeling would be difficult and that protectionism or trade barriers that could be engendered by labeling.

Positions of WTO Members

The European Union (EU) and its member states took the strongest positions on environment during the run-up to the November ministerial meeting: they reportedly indicated that failure to get a commitment at the Fourth Ministerial to negotiations–not further discussion by the CTE as outlined in the draft text–would be a "deal-breaker." The EU identified three key issues to be negotiated in order to

clarify WTO rules that relate to them: (1) eco-labeling that would include life-cycle analysis of traded products; (2) use of the precautionary principle that would allow measures to be taken to protect the environment or health, even if scientific evidence is incomplete; and (3) clarifying the relationship of multilateral environmental agreements/treaties to WTO rules. The EU and its member states made the point that domestic political pressure to assure environmental progress in the WTO is a major factor in their position on these issues.

Developing countries continued to resist such negotiations, arguing these issues could encourage or allow disguised, "green," protectionism. Some observers feel that the language of the draft text that calls for further study by the CTE and possible recommendations from the committee for future negotiations is at the very edge of acceptability on the part of developing countries. The United States took a low-profile approach to environmental issues at the ministerial meeting, and its position was not often quoted in press reports, nor was it elucidated in USTR materials; however, the Bush Administration has generally been lukewarm at best to including environmental issues in trade talks. The compromise language of the final Doha Declaration reflects the positions of both the EU and developing countries, and does reflect the fact environmental issues are likely to be an on-going agenda item in trade discussions.

Implementation and Other Developing Country Issues*

The Doha Ministerial Conference attached unprecedented importance to developing country issues at the WTO. These issues, often referred to as implementation issues, refer to the technical, administrative, and financial challenges faced by developing countries in complying with their WTO obligations and whether these difficulties should result in the review or amendment of certain WTO obligations. However, implementation has also come to encompass overall dissatisfaction with aspects of the Uruguay Round agreements and with the perceived need of making the agreements more attuned to the needs of the developing world. The implementation agenda has been raised by newly industrializing countries, developing, and least developed countries (LDCs) active in the WTO. These countries include the informal "like-minded group" of countries comprising Egypt, India, Pakistan, Malaysia, Cuba, Dominican Republic, Indonesia, Sri Lanka, Honduras, and Jamaica.

The Uruguay Round agreements expanded the scope of the multilateral trade agreements beyond the traditional binding of tariff rates to include agreements on trading rules, domestic regulations, and trade in services. Many newly industrializing countries and LDCs indicate that they lack the necessary infrastructure or resources to comply with these agreements. This situation has given rise to attempts by these countries to seek relief from some of these requirements. Furthermore, the sense of

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developing country members that they were isolated and excluded from the decision-making at the Seattle Ministerial contributed to a new resolve among them to demand action on their concerns as the price of a new trade round. Many observers credit the success of the Doha Ministerial to the activity and pragmatism of developing countries, often active in the WTO for the first time, although developing countries did not achieve all their negotiating objectives.[8]

The Doha Ministerial's decision on implementation[9] outlines a package of 46 actions for WTO members to assist developing countries to comply with existing agreements. These measures generally allow flexibility in developing country implementation of existing agreements, phased in compliance times, and assistance for these countries in developing the technical capability to carry out WTO obligations. Implementation measures will be undertaken in conjunction with the WTO agreements on agriculture, anti-dumping, customs valuation, intellectual property, investment, rules of origin, sanitary and phytosanitary measures, subsidies and countervailing duties, technical barriers to trade, and textiles and clothing.

The Ministerial Declaration also reaffirmed the WTO's commitment to special and differential (S&D) treatment for developing countries. These provisions allow for exemptions or phased in implementation in compliance with WTO rules. Developing countries would like to see these provisions, now considered exhortatory or recommended, become binding, thus permitting the use of dispute settlement mechanisms to enforce them. The Ministerial Decision on Implementation only commits the Committee on Trade and Development to study and to make recommendations concerning the implications of making S&D provisions mandatory.

Developing countries secured a separate ministerial declaration clarifying the relationship between the Trade Related Aspects of Intellectual Property (TRIPS) and public health.[10] While reaffirming the commitment to the TRIPS agreement, the document calls for TRIPS to be interpreted and implemented as to recognize a Member's right to protect public health. This issue was pressed by developing countries seeking to cope with HIV/AIDS and other public health crises. U.S. negotiators opposed attempts to weaken pharmaceutical patent protection, but expressed satisfaction with the resulting declaration.[11] Although pharmaceutical groups were leery of the declaration, they subsequently maintained that the declaration is a political document, which does not change existing obligations under the TRIPS agreement.[12] The declaration also adopted a U. S. proposal to extend until

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[8] "Credit Goes to LDC's for Successful Doha Ministerial," *Washington Trade Daily*, November 29, 2001.

[9]"Implementation-Related Issues and Concerns," WT/MIN(01)/W/10, November 14, 2001.

[10]"Declaration on the TRIPS Agreement and Public Health," WT/MIN(01)/DEC/W/2, November 14, 2001. Also, see separate section on this issue in this report.

[11]"Ministers Offer Political Statement on TRIPS, but Flag New Problem," *Inside U.S. Trade, November 15, 2001*.

[12]"TRIPS declaration does not undermine IP Rights, Pharmaceutical Groups Say," *International Trade Reporter*, November 22, 2001.

2016 the time in which LDC can achieve compliance with pharmaceutical related patent obligations.

Under the Uruguay Round agreement, textile trade is covered by the Agreement on Textiles and Clothing (ATC) which is designed to eliminate import quota restrictions on textiles and apparel by 2005. Under the ATC, quotas on textiles and apparel are to be eliminated in 4 phases, with two phases totaling a reduction of 33% already implemented, a third phase of 18% scheduled to occur on January 1, 2002, and the remaining 49% to occur by January 1, 2005. Developing countries have been disappointed in the progress of opening developed country markets to their textiles, and sought at Doha to have the phase-out of quotas accelerated. Developing countries claim that they have not received the benefits of liberalization because the quotas reductions thus far achieved have been made on low value-added products. At the Conference, however, the United States and the European Union fought off attempts to alter the ATC to accommodate developing country demands on textiles. However, the ministers agree to begin negotiations to reduce high tariffs and tariff peaks that are characteristic of textiles. The Members also agree to "exercise particular consideration" before commencing anti-dumping investigations on textiles from developing countries for two years after quotas on those items have been removed. The Group of 77 (G-77) had called for a moratorium on antidumping actions by developed countries on textiles previous to the Ministerial.[13] The implementation declaration did direct the Council for the Trade in Goods to examine proposals (1) for countries maintaining quota restrictions to use the most favorably methodology available (that of the EU) in implementing the quota phase-out on the least developed countries, and (2) to advance the retroactive implementation of the last phase of quotas from January 2002 to January 2000.

Developing nations achieved mixed success on anti-dumping and subsidies measures. The implementation declaration adopted draft declaration language which calls for national authorities to refrain from seeking new dumping investigations on products in which a negative dumping determination had been reached in the past year. It also seeks clarification on alternative "constructive remedies" to antidumping sanctions on developing countries, in accordance with Article 15 of the 1994 Antidumping Implementation Agreement. However, attempts to substantially revise the antidumping agreement were rebuffed by the United States. Developing countries were united in their opposition to European Union attempts to include discussions on labor and environment in the Doha round.

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[13] "Declaration of the Group of 77 and China on the Fourth WTO Ministerial Conference at Doha, Qatar," WTO Document WT/L/424, October 24, 2001.

Patents and Access to HIV/AIDS Drugs*

Background and U.S. Objectives

One of the major objectives of the Doha Ministerial was the issuance of the Declaration on the TRIPS (Trade-Related Aspects of Intellectual Property Rights) Agreement and Public Health. There were several meetings earlier this year hosted by the World Trade Organization (WTO), the World Health Organization and the United Nations to address the problem of increasing access to essential drugs while maintaining adequate intellectual property protection. These were motivated most immediately by the AIDS epidemic and the need for greater access to and dissemination of HIV/AIDS drugs, particularly in Third World countries which have been severely impacted by the epidemic and do not have the highly developed domestic pharmaceutical industries necessary to develop such drugs. The dependence on drugs developed and patented by pharmaceutical companies in developed countries had led to tension between the patent protection deemed necessary as a financial incentive and reward for developing innovative drugs and the arguably restrictive access to such drugs engendered by the patent monopoly over such drugs and the attendant increased cost. The TRIPS Agreement, which had established minimum patent protection standards and implementation deadlines for developing and least developed countries, was viewed by many developing countries as an obstacle to dealing effectively with the AIDS epidemic and other pandemics or similar public health crises. Consequently, these countries sought the amendment of the TRIPS Agreement during the next round of negotiations to be launched by the final declarations and decisions at Doha. The U.S. objective at Doha was to defend the TRIPS Agreement from such encroachments by demonstrating to concerned countries that the Agreement already had sufficient flexibility to accommodate public health initiatives to combat AIDS, malaria, tuberculosis and other pandemics and was part of the solution, not part of the problem, in dealing with public health crises by providing the framework and protection necessary to encourage pharmaceutical innovations in the treatment of pandemic diseases.

The flexibility of the TRIPS Agreement is reflected in provisions affecting parallel importation (also referred to under the terms "exhaustion of rights," or "gray market importation") and compulsory licensing. Parallel importation into one country of drugs which are sold at a cheaper price in another country, without the authorization of the patent holder, and compulsory licensing have been perceived as possible methods of resolving the problem of greater access to HIV/AIDS drugs. However, some developed countries had been concerned that these would undermine the patent rights of their pharmaceutical industries and thus undermine pharmaceutical developments and innovations. Although parallel importation is arguably a violation of the exclusive importation right of the patent owner since it occurs without the consent of the owner, Article 6 of the TRIPS bars such an issue from being the subject of a dispute settlement proceeding. Articles 7, 8 and 31 of the TRIPS Agreement are relevant to compulsory licensing. Article 7 states that the objective of intellectual property protections should be to contribute to the promotion of

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*Prepared by (name redacted), Legislative Attorney, American Law Division.

technological innovation and the dissemination of technology, "to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations." Article 8 permits members to adopt measures necessary to protect public health and nutrition and to adopt measures to prevent the abuse of intellectual property rights by the rights holders. Article 31 permits compulsory licensing under certain conditions. Article 30 provides for limited exceptions to the exclusive rights conferred by a patent and Article 31 sets out the requirements for still "other use of the subject matter of a patent without the authorization of the right holder," *i.e.*, compulsory licensing. Normally, compulsory licensing will be permitted only if the proposed licensee has made efforts to obtain authorization from the patent holder on reasonable commercial terms and conditions, but such efforts have not been successful within a reasonable period of time. However, this requirement may be waived "in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use." While developing countries suffering from an AIDS epidemic view it as the type of emergency necessitating a waiver, pharmaceutical industry groups in developed countries had been concerned that developing countries may try to invoke these exceptions to justify issuing a compulsory license without first making a good-faith effort to negotiate with a pharmaceutical patent holder.

The United States further proposed a 10-year extension of the TRIPS Agreement implementation deadline for least-developed countries, with regard to pharmaceutical products only, and also a 5-year moratorium on WTO challenges to actions taken by sub-Saharan African developing countries in response to public health crises.

Declaration on the TRIPS Agreement and Public Health

The Declaration had been the subject of considerable disagreement in the days leading up to the Doha Ministerial and was anticipated to be a major obstacle; one of the surprises of Doha was the early consensus achieved on it. The United States and Switzerland, leading other developed countries, had objected to a Declaration which would explicitly endorse the use of parallel importation and compulsory licensing by creating a public health exemption from TRIPS standards; they believed the TRIPS Agreement was already sufficiently flexible to accommodate access to drugs. They also objected to a Declaration purporting to address public health generally rather than emphasizing access to drugs. Developing countries saw the need for a greater emphasis on the importance of public health needs. The Draft Declaration, JOB(01)/155, dated October 27, 2001, reflecting this divergence in views, proposed two alternative titles and versions of ¶ 4 covering the two competing views of the Declaration, one emphasizing public health, the other access to medicines.

The final Declaration, WT/MIN(01)/DEC/2, November 20, 2001, constituted a political statement emphasizing that the TRIPS Agreement does not and should not prevent member countries from taking measures to protect public health, but also affirming the flexible interpretation and implementation of the existing TRIPS Agreement in accommodating public health measures and access to medicines. It noted the need for the TRIPS Agreement to be part of broader national and international actions in addressing pandemics and the importance of patents as incentives in the development of new medicines, and also acknowledged pricing concerns. In further clarifications, it affirmed the right of WTO members to fully use

the provisions permitting flexibility. These make explicit the right to grant compulsory licenses and the freedom to determine the grounds for such licenses, including the right to determine what constitutes a national emergency or other circumstances of extreme urgency, with the understanding that public health crises such as a pandemic can constitute such emergencies. Each WTO member is free to establish its own parallel importation regime, without challenge, subject to most-favored-nation and national treatment principles. Furthermore, the Declaration recognized that certain members have inadequate or non-existent pharmaceutical manufacturing capacities which impede them from utilizing compulsory licensing effectively. It urged the TRIPS Council to find an expeditious solution to this problem and to report recommendations to the WTO General Council by the end of 2002. Least-developed countries would not be obligated to implement or enforce provisions in the TRIPS Agreement concerning patent and trade secret protections with regard to pharmaceutical products until January 1, 2016, and could seek further implementation extensions in accordance with existing TRIPS Agreement provisions. The only major provision of the Draft deleted in the final Declaration was the U.S. proposal for a 5-year moratorium on dispute settlement challenges with regard to any non-discriminatory law, regulation or measure of a Sub-Saharan African developing country that improves access to patent drugs for HIV/AIDS or other pandemics. This apparently was deemed unnecessary since any actions consistent with the existing, flexible TRIPS regime should not be subject to a challenge. The only major new language in the final Declaration was an affirmation of the existing TRIPS Agreement obligation of developed countries to promote technology transfer to least-developed countries.

The United States achieved its primary objective of convincing developing countries and least-developed countries that no major amendment of or exception to the TRIPS Agreement was necessary, given its existing flexibility and importance to the development of new drugs and the fact that patent protection was only one component of a comprehensive public health effort to combat public health crises.

Services Issues in the WTO*

Services issues are part of the World Trade Organization's "built-in" agenda. The services negotiations are mandated by the General Agreement on Trade in Services (GATS), which required that further negotiations on services begin in 2000 and that the negotiations promote the economic growth of all trading partners and the development of developing countries. According to Article XIX of the GATS, the new round of negotiations, initiated for the purpose of providing effective market access, must aim at reducing or eliminating the adverse effects on services trade of restrictive measures. This objective was reaffirmed in the Doha Ministerial Declaration, which supports continuing negotiations aimed at further liberalizing trade in services. Nations now face a series of deadlines. They must submit their initial requests for issues they would like to see included by June 30, 2002, and present their

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initial list of liberalization policies they would be willing to pursue by March 31, 2003.

Service industries account for over 80 percent of U.S. employment and nearly 70 percent of U.S. gross domestic product (GDP). U.S. exports of commercial services (i.e., excluding military and government) were $293 billion in 2000. Cross-border trade in services accounts for more than 25 percent of world trade, or about $1.4 trillion annually. U.S. services exports have doubled over the last 10 years, increasing from $147 billion in 1990 to $293 billion last year. Major markets for U.S. services include the European Union ($93 billion in private sector 2000 exports), Japan ($35 billion), and Canada ($23 billion). At $14 billion, Mexico is presently the largest emerging market for exports of services.

The GATS[14] was created as part of the Uruguay Round of trade negotiations and entered into effect in January 1995. The Agreement consists of 29 articles, eight annexes, eight Ministerial decisions, and an Understanding. Article XIX is considered by many to be one of the most important because it commits the WTO members to "successive rounds of negotiations with a view to achieving a progressively higher level of liberalization." Such a commitment was felt necessary because the Agreement does not rely on a set of rules similar to those applied for goods, but relies instead on a list of specific commitments supplied by each member country and details what that country is willing to undertake.

Under the GATS, member countries agreed to abide by a set of general obligations, which were applied directly and automatically to all members and services sectors, and a number of specific commitments concerning market access and national treatment in certain designated sectors. The scope of these sectoral commitments is laid down in individual country schedules and, therefore, varies widely between members. Under the Agreement, the general obligations are comprised of two specific issues: most favored nation treatment, and transparency, or openness regarding laws and regulations. Specific commitments relate to market access, national treatment, and the movement of natural persons. Other annexes concern four areas in which the Members agreed to continue negotiations: air transport, financial services, telecommunications, and maritime transport services. The Agreement also distinguishes between four different types of services: (1) cross-border trade in services, which represents the most common type of services trade; (2) consumption abroad, primarily activities associated with tourism; (3) commercial presence in which a firm from one country establishes a presence in another country in order to provide a service; and (4) the presence of natural persons, such as medical doctors, accountants, or teachers from one country entering another country in order to supply a service.

In principle, the Agreement applies to all services with two exceptions: services supplied to governments, and air traffic rights and services. The Agreement also provides that in certain circumstances, member countries can introduce or maintain domestic measures that are contrary to their obligations under the Agreement. These circumstances include measures that a nation feels are necessary to: protect public

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[14] [http://www.wto.org/english/tratop_e/serv_e/gatsintr_e.htm]

morals or maintain public order; protect human, animal, or plant life or health; or secure compliance with laws or regulations that are not consistent with the Agreement, such as laws to prevent deceptive or fraudulent practices. Exemptions are also allowed in the area of financial services that allow member countries to take measures to protect investors, depositors, policy holders, or to ensure the integrity and stability of the financial system. Finally, member countries are allowed to temporarily restrict trade on a non-discriminatory basis in the event of a serious balance of payments problem.

The U.S. Position[15]

The United States has a clear economic advantage in a large number of services areas and has offered twelve proposals for areas of study for further liberalization:

Accounting services. This proposal is designed to make it easier for accountants and accounting firms to serve clients in other countries by addressing citizenship and prior residency requirements for licensing, and would strengthen the Accountancy Disciplines, adopted by the WTO in 1998.

Audiovisual and related services. This proposal is intended to provide a framework for future negotiations in the WTO that would ensure an open and predictable environment that recognizes public concern for the preservation and promotion of cultural values and identity.

Distribution services. This proposal addresses barriers faced by wholesalers, retailers, and other distribution companies in operating supply chains internationally (e.g., restrictions on real estate purchases, store location, etc.).

Education and training services. This proposal addresses barriers to market access and national treatment for suppliers of education and training services of higher education, adult education, and training.

Energy services. Liberalization of energy services and nondiscriminatory access to foreign energy services providers is a priority issue for U.S. negotiators. These services include exploration of energy resources to generation, transmission and distribution, to marketing and trading of energy, to services promoting the clean and efficient use of energy necessary to obtain, convert, and deliver an energy resource to consumers.

Environmental services. This proposal aims to reduce barriers to the provision of environmental services as a means of preventing, reducing, or correcting environmental degradation.

Express delivery services. This proposal addresses barriers faced by express delivery companies in providing integrated services and seeks the adoption of a separate classification for express delivery services and requests countries to undertake commitments on market access and national treatment.

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[15]The U.S. submission on services can be found at:[http://usinfo.state.gov/wto/se1214b.htm]

Financial services. This proposal would establish benchmarks for further financial services liberalization to include commitments constituting fundamental liberalization, and commitments on transparency and other principles for regulation in the areas of insurance, banking, securities, asset management, pension funds, financial information, financial advisory, and other financial services.

Legal services. This proposal is intended to have Members examine liberalization opportunities with regard to market access and such national treatment barriers as commercial presence, citizenship and residency requirements for licensing, scope of practice, and association of foreign-qualified lawyers with local lawyers and association of foreign-partner law firms with local law firms.

Movement of natural persons. This proposal would address the regulatory hurdles corporations face in moving personnel to foreign locations on a temporary basis. It would not apply to permanent entry or stay of individuals as service suppliers.

Telecommunications, value-added network, and complementary services. This proposal seeks to develop a negotiating framework that could obtain commitments from member countries in both basic and value-added telecommunications services, as well as complementary services. Initial objectives include ensuring market access and national treatment for providers of both network infrastructure and key service sectors, promoting competition in basic telecommunications, and avoiding unnecessary restrictions on services offered by competitive suppliers.

Tourism services. This proposal requests the removal of limits on market access or national treatment or limits on foreign investment, the purchase of real estate, and the discriminatory treatment of parties in a joint venture. It also proposes that all Members undertake additional commitments relating to travelers and international conferences to promote expansion of international tourism.

Other Positions

Other developed nations are also supporting efforts to liberalize trade in services. In addition to the 12 proposals offered by the United States, other members have offered proposals in such services areas as: advertising, architectural services, business services, computer, construction and engineering services, logistics, postal and courier, professional, sporting, and transport services. Over the course of the negotiations, some of these areas likely will be dropped. In nearly all of these areas, developed countries have a clear competitive economic advantage over developing countries. Although developing countries will obtain benefit from liberalized trade in services, it is unclear at this stage of the negotiations which areas they will support for liberalization.

Intellectual Property Issues at the Doha Ministerial*

The topics concerning the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which were addressed in the Ministerial Declaration (Declaration) and the Decision on Implementation-Related Issues and Concerns (Decision), include the negotiations on a registration system for geographical indications for wines and spirits; the extension to other products of the protections afforded the geographical indications for wines and spirits; implementation and review of Article 27.3(b), including the clarification of the relationship between the TRIPS and the Convention on Biological Diversity (CBD); the moratorium on non-violation complaints under Article 64; and technology transfers to developing countries. Provisions addressing the TRIPS in the context of the AIDS epidemic and public health issues were addressed separately in the Declaration on the TRIPS Agreement and Public Health and are discussed in a separate section of this report.

Geographical Indications

The TRIPS provides for the protection of geographical indications concerning the origins of a product where a certain quality and reputation are associated with a particular geographic origin (e.g. "champagne," "tequila," or "Roquefort"). It establishes a two-tier system – (1) a general level of protection available to all types of goods and (2) a higher level of protection for the geographical indications for wines and spirits. TRIPS mandates negotiations to establish a *voluntary* multilateral system for notification and registration of geographical indications for wines and spirits. A multilateral registration system has not yet been established and there are different proposals for such a system. Two major proposals, one cosponsored by the United States, the other sponsored by the European Union, exemplify two approaches. The salient feature of the U.S.-backed proposal is that it would impose no new obligations on WTO members; a registered term would not be automatically granted protection by all members. Each member would decide whether a term was entitled to protection under its own laws. In contrast, under the European Union proposal, terms accepted for registration would be protected in all countries, other than those which successfully opposed registration on certain grounds. Both proposals enjoy support. Under the Declaration, WTO members agreed to negotiate the establishment of a multilateral registration system by the next Ministerial Conference.

TRIPS also authorizes negotiations to increase further the protections of individual geographical indications covered by the heightened, second-tier protections. Under these latter negotiations, some countries have proposed to extend the higher-level protection of geographical indications to products other than wines and spirits, such as indigenous and folkloric crafts, certain agricultural products, cheeses, etc., but the United States and other countries believe that such negotiations are only authorized to further increase protections for wines and spirits, not to extend the scope of the products covered. The Declaration notes that this issue will be addressed in the Council for TRIPS as part of the implementation-related issues and concerns to be negotiated under the Work Program established by the Declaration.

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*Prepared by (name redacted), Legislative Attorney, American Law Division.

Implementation and Review of Article 27.3(b)

Article 27.3(b) permits members to exclude from patentability plants and animals other than microorganisms, and also biological processes for producing plants and animals other than microbiological and non-biological processes. However, it also requires members to provide for the protection of plant varieties by either a patent or a *sui generis* system or a combination of both. So members which opt to exclude plant varieties from patent protection must establish a *sui generis* system of protection. Several sub-issues have arisen during the required review of Article 27.3(b), including the patentability of microbiological organisms and processes; the meaning of a *sui generis* system of protection for plant varieties; the recognition of traditional knowledge and the rights of communities where genetic material originates (including benefit sharing when inventors in one country have rights to creations based on material obtained from another country); and the relationship between the TRIPS Agreement and the CBD.

Developing countries generally are concerned with the benefits which they perceive Article 27.3(b) confers on developed countries via protections granted medicines, micro-organisms, and crop seeds for plant varieties to the detriment of developing countries struggling with public health and food supply problems. Therefore, they propose variously that the distinction between biological organisms and processes and microbiological organisms and processes should be clarified; that there should be harmonization between the TRIPS Agreement and the CBD; and that the option of *sui generis* protection for plant varieties should be clarified to permit the protection of traditional knowledge and of traditional farming practices, such as saved seed, and the prevention of anti-competitive rights and practices which may threaten food sovereignty. The issues concerning the CBD and traditional knowledge have assumed a high profile in recent years. The CBD provides generally for the conservation of biological diversity, the sustainable use of such genetic resources, and the equitable sharing of the benefits resulting from such use and development. This sharing was envisioned as a two-way street, with the provision of access to resources by countries rich in biological diversity, which includes many developing countries, on one hand, and the transfer of relevant technologies by developed countries using genetic resources, on the other hand. Because the CBD in its preamble also recognizes the contribution of the traditional knowledge of indigenous peoples in the research into and development of resources, discussion of implementation often includes the development of some type of protection for traditional or indigenous knowledge and for expressions of folklore. The United States has not yet ratified the CBD. However, it does not see a conflict between the TRIPS Agreement and the CBD; therefore it perceives no need to amend either agreement to clarify the relationship between the two.

The Ministerial Conference focused on what the nature and scope of the review required for Article 27.3(b) should be. A review of developed country practices has already occurred; the United States has called for a review of developing country practices since they were obligated to implement TRIPS by the beginning of this year. However, some other WTO member countries have sought the inclusion in the review of issues which the United States considers to be outside the proper scope of the review, such as a consideration of the relationship between TRIPS and the CBD, and the protection of traditional knowledge. Although the United States has expressed

its views on the substance of these issues, it has opposed inclusion of these issues in the review and has sought to refocus the review discussions. However, the Declaration instructs the Council for TRIPS to examine these issues as part of the work program, including the Article 27.3(b) review and the implementation review under Article 71.1.

Moratorium on Non-Violation Complaints under Article 64

Article 64.2 provides for the non-application to the TRIPS, until Jan. 1, 2000, of subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994, which permit complaints concerning nullification and impairment of benefits under the GATT, despite no explicit violation of obligations under the GATT, to be brought before the dispute settlement system. Under Article 64.3, the Council for TRIPS is required to examine the "scope and modalities" for non-violation complaints and submit recommendations to the Ministerial Conference for approval by consensus. However, the Council has not yet completed this examination and has continued to discuss this issue. Accordingly, there is a difference of opinion among the WTO members as to whether the moratorium must or should remain in effect until the scope and modalities for non-violation, nullification and impairment complaints have been established. The United States has seen no need for the development of scope and modalities for non-violation nullification and impairment complaints and has opposed the continued discussion of this topic; presumably, the United States therefore has seen no need to continue the moratorium on such complaints. However, the Decision directs the Council for TRIPS to continue its examination and discussion of this issue and to make recommendations to the next session of the Ministerial Conference. In the meantime, the moratorium on such complaints will continue.

Transfer of Technology under Articles 7, 8, and 66.2

Articles 7 states that the protection of intellectual property rights should help promote, *inter alia*, technology transfer in "a manner conducive to social and economic welfare, and to a balance of rights and obligations." Article 8 permits measures to prevent the abuse of intellectual property rights and practices "which unreasonably restrain trade or adversely affect the international transfer of technology." Under Article 66.2, developed countries are required to "provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base." Many developing countries feel that the requirement of Article 66.2 has not been implemented adequately by most developed countries and cite this as a factor in their own problems with timely implementation of their obligations under the WTO agreements, including the TRIPS Agreement. The United States has provided to the WTO a fairly comprehensive list of technology transfer and assistance programs in the implementation of TRIPS; therefore, it appears to have made *bona fide*, adequate efforts to comply with the obligations of Article 66.2. The Decision affirms that these obligations are mandatory and provides that the Council for TRIPS shall establish a mechanism for ensuring the monitoring and full implementation of these obligations, including reports to be submitted by the developed-country members by the end of

2002 and updated annually concerning the functioning in practice of technology transfer incentives for their domestic industries.

Dispute Settlement*

The Uruguay Round Dispute Settlement Understanding (DSU) introduced new elements into existing General Agreement on Tariffs and Trade (GATT) dispute settlement practice intended to strengthen the system and facilitate compliance with dispute settlement results. A Uruguay Round Ministerial Declaration called for a review of the new agreement to be completed within 4 years after the WTO Agreement entered into force. While a variety of legal and procedural issues were raised both in and out of the WTO, the primary focus of the review was on implementation issues and making the system more transparent and accessible to the public. No decisions on reforms had been taken by WTO Members through 2001 and the future of the review remained unclear. The Doha Ministerial Declaration calls for further negotiations on improving and clarifying the DSU, aiming for an agreement by May 2003 and adoption of the results separate from any final act emerging from the Doha Round.

Background

The WTO Dispute Settlement Understanding, which provides the legal basis for dispute resolution under virtually all WTO agreements, is the primary means of enforcing WTO obligations. The system has been heavily used, the WTO Secretariat reporting 239 complaints filed between January 1, 1995 and October 18, 2001; roughly half involve the United States either as a complainant or defendant. Disputes proceed through three phases – consultations, panel and possible Appellate Body consideration, and implementation – each having its own rules and time frames. To strengthen existing GATT processes, the DSU made establishment of a panel, the adoption of panel and appellate reports, and the authorization of requests to retaliate subject to a reverse consensus rule – that is, these actions are taken unless all Members present agree not to do so. It also gave disputing parties the right to appeal panel reports on matters of law to a standing Appellate Body (AB). A Uruguay Round Ministerial Declaration 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 3d Ministerial Conference held in Seattle in 1999) 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, no consensus could be reached at that time.

The United States had earlier identified two main goals for the review: enhancing prompt compliance with panel and AB reports, and enhancing the transparency of the process. Among other things, it called for possible shortening of compliance periods and creating fairer and more efficient procedures through

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*Prepared by (name redacted), Legislative Attorney, American Law Division.

measures for higher quality panels, shorter deadlines overall, and elaboration of conflict of interest rules. The United States proposed that greater transparency be achieved by requiring that Members' submissions (except for confidential business information) be made public when submitted, thereby resulting in shorter and more quickly produced panel reports; requiring that panel and AB meetings be open to observers from all WTO Members and civil society (except for confidential business matters); and allowing *amicus* briefs to be submitted to the panel and AB in each dispute. In general, the United States has argued that greater openness is needed to ensure public support for the legitimacy of the dispute system.

The review period coincided with the implementation phase of the U.S.-EC banana dispute, which in turn gave rise to the problem of "sequencing," since viewed as a significant gap in the DSU. The problem revolves around lack of integration of 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 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 European Union (EU) argued that a full compliance proceeding (including consultations) was called for; the United States argued that it would lose its right to request authorization to retaliate if it waited for a compliance panel to complete its work. An additional problem arose with the proposal of so-called "carousel" legislation in Congress, under which the USTR would be required periodically to rotate lists of items subject to authorized trade retaliation unless certain exceptions applied. The EU argued that changing a list would be a unilateral action not authorized by the DSU.

As proposed in the Seattle draft, disagreements over compliance would mandate that an Article 21.5 panel be established before a retaliation request could be made and the DSB would supervise modifications to authorized retaliation. The text was supported by the EU, Canada, Japan, and various other Members, but was not formally endorsed by the United States, in part because of inadequacies as to transparency as well as problems with the carousel language. The United States did not object to the compliance panel requirement, however, arguing instead that other deadlines should be shortened so that the entire dispute time frame would remain intact. Disputing parties have since dealt with sequencing issues through *ad hoc* bilateral agreements. After the United States enacted carousel legislation in May 2000, the EU filed a complaint in the WTO; the case is still in consultations and the issue essentially remains unresolved. In October 2000, Japan, along with 10 other countries, sponsored a new compromise proposal largely based on the Seattle text, focusing mainly on sequencing and excluding provisions on carousel retaliation and increased transparency. Neither the United States nor the EU endorsed the proposal. Proponents have since called for timely multilateral action after the DSB in January 2001 adopted an appellate report effectively concluding that a panel convened to arbitrate the level of trade retaliation proposed by a prevailing party may not decide if the defending Member is in compliance, and that sequencing rules must instead be established by WTO Members as a whole.

The United States has continued to argue for increased transparency and the shortening of time frames in tandem with clarifying the sequencing issue. Increased access remains controversial, given reaction to recent AB decisions to accept *amicus*

briefs in various cases, actions strongly criticized by the Chairman of the WTO General Council and a number of WTO Members (including Japan, Canada, the EU, and developing countries), who have argued that the move gives greater rights in a dispute proceeding to non-governmental organizations than to WTO Members and that any decision to allow *amicus* briefs should be made by Members as a whole. With regard to retaliation, the EU has since proposed that countries be allowed to arbitrate the level of trade affected by a disputed measure before a request for authorization to retaliate is made, arguing that this factual matter could be settled before resorting to the more contentious action of requesting retaliation. Developing countries have argued against the shortening of time frames on the basis that current deadlines are difficult for them to meet and have generally argued that greater resources be made available to them for dispute proceedings. To this end, an Advisory Center on WTO Law for developing countries opened in Geneva in July 2001.

Dispute settlement review was a non-controversial issue at the Doha Ministerial and a consensus existed to continue talks on outstanding problems. The Ministerial Declaration states in ¶ 30 that the Ministers agree "to negotiations on improvements and clarifications of the Dispute Settlement Understanding" and that "[t]he negotiations should be based on the work done thus far as well as any additional proposals by Members, and aim to agree on improvements and clarifications not later than May 2003, at which time we will take steps to ensure that the results enter into force as soon as possible thereafter." Ministers also agreed in ¶ 47 that dispute settlement results would be adopted separately, that is, they would not be part of any single act containing other agreements negotiated during the new round.

E-Commerce and the WTO*

The major electronic commerce (e-commerce) issue facing WTO members is how to best encourage its continued global growth as a part of increased global trade. Internet use and e-commerce growth already have a substantial global presence. In August 2001, the industry research group Nielsen/NetRatings released a report that estimated that the number of people with Internet access at home rose to 459 million by mid-2001, up by 30 million from the beginning of the calendar year. While the Western industrialized nations dominate Internet development and use, some contend that by the year 2003 more than half of the material posted on the Internet will be in a language other than English. The United States and Canada represent the largest percentage of users, at 56.6%. Europe follows with 23.4%. Of approximately 200 million Internet users outside of the United States, 3.1% were in Latin America, 0.5% were in the Middle East, and 0.6% were in Africa. The Asian Pacific region has 15.8% of all Internet users; but its rate of growth is nearly twice as fast as the United States and Canada. By 2005, the U.S.-Canada share of Internet use may decline to 36%.[16]

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*Prepared by (name redacted); Specialist in Telecommunications and Technology Policy; Resources, Science, and Industry Division.

[16] See also: CRS Report RS20426, *Electronic Commerce: An Introduction*, by Glenn J. (continued...)

The U.S. government has advocated a wide range of policy prescriptions to encourage e-commerce growth. These have included calling on the WTO to declare the Internet to be a tax-free environment for delivering both goods and services; recommending that no new tax policies be imposed on Internet commerce; stating that nations develop a "uniform commercial code" for electronic commerce; requesting that intellectual property protection—patents, trademarks, and copyrights—be consistent and enforceable; suggesting that nations adhere to international agreements to protect the security and privacy of Internet commercial transactions; maintaining that governments and businesses cooperate to more fully develop and expand the Internet infrastructure; and calling for businesses to self-regulate e-commerce content. In November 2001, the 107th Congress passed the Internet Tax Freedom Act, which extends the domestic Internet tax moratorium to November 1, 2003. This bill awaits President Bush's signature.

The EU approach to e-commerce has resulted in some areas where there is agreement with U.S. policies, and in some areas where there are still tensions. While the EU as an entity represents a sizable portion of global Internet connection, users are concentrated in countries like the United Kingdom and Germany. In France, Italy, and Spain, the rate of Internet connection is reportedly less than five percent of the total population. Thus, while EU policies can provide a broad regional context for e-commerce, within national boundaries, Internet use and the potential for e-commerce development can vary widely. For example, the United Kingdom, Ireland, and France have advocated a common set of standards for e-commerce that, they contend, would provide a baseline of government regulation for e-commerce use. Germany, Austria, and the Netherlands have advocated extending domestic commercial legislation to e-commerce. Critics contend that the German-Austrian-Netherlands approach would ensnare e-commerce in a knot of differing national laws and regulations; others state that e-commerce policy should not be set by EU officials.

The WTO also has addressed e-commerce. In the October 27 draft Ministerial Declaration for the fourth conference in Doha, Qatar, the Chairman of the General Council states that "electronic commerce creates new challenges and opportunities for trade for Members of all stages of development . . . [W]e instruct the General Council to consider the most appropriate institutional changes for handling the Work Programme, and to report on further progress to the Fifth Ministerial Conference" and that "Members will maintain their current practice of not imposing custom duties on electronic transmissions until the Fifth Session." This language was adopted as article 34 under the Ministerial Declaration of November 14, 2001. Upcoming WTO conferences may address any additional e-commerce issues raised by WTO working groups on goods, services, intellectual property and economic development; or address related e-commerce issues raised at previous ministerial conferences in areas such as privacy, security, taxation, and infrastructure.

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Foreign Investment Issues in the WTO*

Ministers at the World Trade Organization's (WTO) Ministerial meeting in Doha avoided discussing foreign investment issues directly, but focused instead on clarifying the scope of future negotiations that will occur following the 2003 ministerial. In the interim, the WTO Working Group on Investment will attempt to clarify the nature and extent of the future round of negotiations. One stated purpose of the negotiations is to develop a multilateral framework of rules on investment to secure "transparent, stable, and predictable" conditions for foreign investment. U.S. negotiators indicated that they would drop their opposition to including investment issues as a part of the overall negotiations as long as the talks meet certain conditions.

Developed and developing countries view foreign investment as an important stimulant to economic growth and as an important force for globalization. Nevertheless, foreign investment issues continue to defy consensus in international forums. Foreign investment often produces sharp differences between the developed and developing countries, because it acts as a channel through which different countries' legal systems and social and economic values collide. In addition, public debates on foreign investment often focus on such perceived negative effects as environmental degradation, the transfer of technology, the protection of culture, the potential loss of employment, and the ability of national governments to regulate or to tax economic activity.

These and other concerns often stymie attempts to reach agreements on a broad range of foreign investment issues in a multilateral forum. For instance, similar concerns sparked intense public opposition to foreign investment in 1997 and 1998 during debates within the Organization for Economic Cooperation and Development (OECD) over a proposed agreement on investment, known as the Multilateral Agreement on Investment, or MAI. As a result, the Doha Declaration calls for work prior to the next Ministerial to focus on a group of core elements: the scope and definition of foreign investment; transparency, or openness of laws and government regulations; non-discrimination; possibilities for developing a GATS(General Agreement on Trade in Services)-type list of pre-establishment investor commitments; development provisions; exceptions and balance of payments safeguards; consultation and the settlement of disputes between Members; and the process of negotiations, including the way in which nations may choose to participate. The Declaration also stipulates that the "special development, trade, and financial needs" of developing and least-developed countries be an integral part of any framework for discussion.

Investment in the WTO

The WTO has not directly tackled the broad issue of foreign investment rules. Instead, it has dealt with a narrow set of very specific issues, which has left nations to formulate their own policies, either through bilateral investment treaties, or through such entities as the OECD. The WTO's work on foreign investment issues focuses on three main areas: a Working Group was established in 1996 to conduct analytical

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* Prepared by (name redacted), Specialist in International Trade and Finance, Foreign Affairs, Defense, and Trade Division.

work on the relationship between trade and investment; the Agreement on Trade-Related Investment Measures (TRIMs) prohibits trade-related investment measures; and the GATS, which addresses foreign investment in services. Both of the agreements were negotiated during the Uruguay Round of multilateral trade talks.

The TRIMs Agreement, however, does not attempt to regulate the entry and treatment of foreign investment, but applies only to those measures that impose discriminatory treatment on imported and exported goods. This agreement recognizes that certain national practices, such as local content requirements, can restrict and distort trade and supports the concept of "national treatment." As a result, the TRIMs outlaws investment measures that restrict quantities, and it discourages measures which limit a company's imports or set targets for the company to export. Among the measures not covered by the agreement are export performance requirements and technology transfer requirements.

The WTO's perspective on foreign investment broadened at the 1996 WTO Ministerial in Singapore when WTO Ministers set up two working groups to investigate the relationship between trade and investment and the issue of competition policies. The working groups were tasked initially only with analyzing the issues and were not authorized to negotiate new rules or commitments, or to make judgements concerning the possibility of any future negotiations on foreign investment. Nevertheless, the 1996 statement on foreign investment required that the TRIMs Agreement would be reviewed in 2001 in order to determine if the agreement should be supplemented with additional provisions on investment policy and competition policy.

The U.S. Position

Until mid-2001, the United States had opposed including foreign investment issues as a formal part of any new round of trade talks. U.S. negotiators argued that the WTO's working group on trade and investment was the best place to hammer out the multitude of differences that separate the developed and developing countries, as well as those issues that divide the developed countries. These negotiators apparently believed that opening up a new round of trade talks to include foreign investment rules would divert attention from what they believe should be the main goal of the talks: increased market access through reductions of tariffs and non-tariff barriers in agriculture, services, and industrial goods. U.S. negotiators apparently have agreed to accept broader discussions of investment issues as long as the talks are well-defined, with a specific negotiating agenda.

Other Positions

As a whole, developed countries, represented by the OECD, favor eliminating most of the national rules governing inward and outward direct investment. Exceptions to this policy include their desire to retain exemptions for industries or sectors that individual countries deem to be important to their national security or of special national importance. Developing countries, however, are at odds with the majority of the objectives set out by the developed countries. These countries are unlikely to negotiate over the issue of reducing investment subsidies without a

willingness on the part of the developed countries to consider imposing additional regulations on their use of rules that govern the use of locational incentives, especially at the sub-national level, and tax holidays for investors. Furthermore, the developing countries want the developed countries to agree to negotiations governing the use of anti-dumping regulations and countervailing duties, which most of the developed countries oppose. The lack of progress in formulating multilateral rules on foreign investment spurred most nations, including the developing countries, to formulate bilateral investment treaties. As a result of this experience, developing countries, as a broad group, now question whether multilateral rules on investment are preferable to bilateral investment treaties. The latter apparently offer the developing countries a level of flexibility to pursue their own foreign investment and development policies that they doubt would prevail under any multilateral agreement.

Conclusions

As the largest foreign investor and the largest recipient of foreign investment in the world, the United States potentially has the most to gain and to lose from any multilateral negotiations on foreign investment rules. The Bush Administration apparently supports the concept of holding a new multilateral round of talks on investment issues, as long as those talks are well defined with clear objectives determined in advance. U.S. multinational firms likely will also press for a broader consideration of foreign investment issues.

Interaction Between Trade and Competition Policy*

Ministerial Declaration

Agreement was reached to continue studying this issue for an additional two years (until the Fifth Ministerial to be held in late 2003) in the Working Group on the Interaction between Trade and Competition Policy.[17] Members agreed "that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiation." During the next two years, the study program will focus on the clarification of core principles such as transparency, non-discrimination and procedural fairness, and provisions of hard-core cartels. While the expectation of many countries is that negotiations will be added to the Doha round talks after the Fifth Ministerial, language included at the insistence of India makes clear that any WTO member has the right to take a position on the modalities of the negotiations that would prevent negotiations from proceeding.

The European Union was the leading proponent of including competition policy in the negotiations that will start next year. Japan also supported this effort.

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[17] Similar agreement was reached to defer immediate negotiations on three other issues: foreign direct investment, trade facilitation, and transparency in government procurement.

Developing countries, led by India, provided the strongest opposition. Many developing countries argued that they are still in the process of enacting national competition laws or have little experience in implementing such laws, and therefore would be at a great disadvantage in engaging in negotiations at this time. The United States adopted the middle ground, supporting more study as well as capacity building efforts to help countries develop modern competition policies.

Background

As government-erected trade barriers at the border have been substantially eliminated or reduced over the past few decades, countries have increasingly clashed over private business practices that allegedly serve as barriers to market access. U.S.-Japan trade disputes in the 1980s and 1990s over semiconductors, auto parts, and photographic paper were rooted in concerns that Japan's toleration of private business practices allowed producers to maintain exclusive and restrictive ties with retailers and distributors that denied U.S. firms fair opportunities to increase market share. More recently, Europe and the United States clashed over the decision by the European Commission to block the proposed merger of General Electric and Honeywell. Many other disputes among WTO members have revolved around the commercial activities of state-owned and recently privatized companies that act as cartels or monopolies.

What is known as competition policy in Europe (antitrust policy in the United States) provides a legal framework for the regulation of many private business practices. It is estimated that about half the countries in the world have some form of competition laws or are contemplating creating them. While a few trade disputes involving competition policy matters have been taken to the World Trade Organization (WTO), there is considerable controversy whether the WTO is the appropriate venue for arbitrating these disputes. Some elements of competition policy such as monopolistic practices and exclusive supply agreements are already covered under WTO rules through agreements such as the General Agreement on Trade in Services.

The WTO in 1996 established a Working Group on Trade and Competition Policy to examine this issue. The formal charge of the working group was "to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework." In October 1999, the working party issued a report summing up its activities, but declined to suggest whether to commence with new WTO negotiations on competition policy, continue with its ongoing educational work program, or cease its activities. (The mandate of the working was formally extended by WTO members on March 27, 2000). The European Union had pushed for the inclusion of competition policy on the agenda of the new round of multilateral trade negotiations that was expected to be launched at Seattle in November-December 1999, but was opposed by the United States and most other WTO members. The agreement at Doha means that the mandate of the Working Group will extended at least through late 2003.

Goals of Competition Policy and Trade Liberalization

The economic objectives of competition policy and trade liberalization tend to be similar. Both attempt to increase competition in contested markets by reducing barriers to market entry. Tension between the two, however, arises when competition policies increases barriers to market entry or vice versa.

Competition policies seek to promote both greater efficiency and fairness in domestic markets. Efficiency is concerned with maximizing output and minimizing waste. Fairness, by contrast, has different meanings in different countries and institutional settings. In the United States, it often means equality of opportunity or easy entry into a business endeavor. In other countries, such as Japan, it often means that favored activity or loyalty should be rewarded. Conflict between efficiency and fairness, thus, occurs within countries and among them.

The goal of trade liberalization is primarily to promote efficiency through greater specialization in production and trade. By opening markets, trade liberalization also leads to greater competition in markets.

While the goals of competition policy and trade liberalization are substantially similar, the underlying laws and bureaucratic processes by which the two sets of policies are administered are substantially different and separate across countries. Whether and how these two sets of policies should be more formally linked at the multilateral level and under the aegis of the WTO are issues that may be addressed by the Working Group as well.

Market Access for Non-Agricultural Products*

The Doha ministerial committed member states to conduct negotiations on market access issues including the reduction and harmonization of industrial tariffs. Tariff reduction traditionally has been a driving force of trade negotiations, assuming a central role in negotiations under the General Agreement on Tariffs and Trade (GATT). Subsequent rounds of trade talks have reduced or eliminated many tariffs between developed nations. However, high tariff rates continue to exist in the developing world and for certain import sensitive sectors in developed countries. At the Doha ministerial, WTO members adopted a negotiating agenda that has the potential to continue this process while acknowledging differential reciprocity for developing nations.

The eight rounds of trade negotiations conducted under the auspices of the GATT since 1947 have significantly reduced the magnitude of tariffs for participating countries in a process known as "binding." Under Article II of the GATT, tariffs are "bound" at a specific levels of customs duty when an agreement is reached between nations on a most-favored nation basis to (1) agree to lower a duty to a stated level; (2) agree to maintain an existing level of duty; or (3) agree not to raise a duty above

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* Prepared by (name redacted), Analyst in International Trade and Finance, Foreign Affairs, Defense, and Trade Division.

a specified level. Tariffs can be bound as a specific duty per item or as an *ad valorem* duty, a rate based on the value of the good's export. The binding of tariffs provides for stability and predictability in the trading system by preventing the raising of tariff rates except under strict circumstances accompanied by compensatory actions.

The Uruguay Round achieved success in binding tariffs in both developing and developed countries. For all countries, the percentage of imports under bound rates increased from 68% to 87%. The percentage of imports under bound rates increased from 94% to 99% in developed countries, from 74% to 96% in transition economies, and from 13% to 61% in developing countries. Average trade-weighted tariffs were reduced by 34% worldwide, 40% in developing countries, and 30% in transitional and developing economies.

The Ministerial Declaration commits member nations to negotiate the reduction or elimination of tariffs, tariff peaks, and tariff escalation. Tariff peaks refer to a country's adoption of the maximum allowable bound rate; tariff escalation is the practice of increasing the rate of duty for items as they are processed. The scope of the negotiations are to be comprehensive, without restrictions on products or sectors covered. The United States Trade Representative Robert B. Zoellick welcomed the inclusion of market access negotiations in statements leading up to the Ministerial, emphasizing that the practical effect of successful negotiations would be to lower the tariff rates of other nations to U.S. levels. However, he also expressed reservations about the explicit mention of tariff peaks and tariff escalation in a Ministerial draft declaration.[18] Tariff peaks are levied by the United States for certain textile products, footwear, and watches, and tariff escalation is characteristic of tariff schedules of the United States and other developed countries. The language on tariff peaks and escalations, a key position of developing countries seeking greater access to U.S. markets, is in the Declaration.

The Ministerial Declaration also reaffirms special and differential (S&D) treatment for developing countries in tariff reduction. In negotiations leading to the Doha conference, draft language allowing developing countries to fulfill their tariff reduction obligations with "less than full reciprocity in reduction commitments" disappeared in a draft revision, perhaps reflecting U.S. opposition to such language. U.S. industry groups had voiced varied opposition to weakening the concept of reciprocity: some feared that it would allow developing countries to retain tariffs indefinitely; others favored allowing the language for least developed countries (LDC) but not those countries with growing industrial sectors such as Brazil or India.[19] The reappearance of the language in the Ministerial Declaration, along with the reaffirmation of GATT Article XXVIII *bis* allowing S&D treatment in tariff reductions and other references to S&D language, reflects the negotiating position of developing countries, LDC, and the European Union (EU). The EU has made the principle of differentiation for least developed countries the focal point of its

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[18]"Zoellick Outlines U.S. Objectives for New Round," *Washington Trade Daily,* October 31, 2001; "Zoellick Raises Two Objections to WTO Draft Declaration," *Inside U.S. Trade,* November 2, 2001.

[19]"Industry Targets Developing Country Treatment in WTO Draft," *Inside U.S. Trade,* October 19, 2001.

discussion of market access issues. It has called for developed countries to provide duty-free access for almost all products from LDC, and greater non-reciprocal tariff concessions to developing countries.

U.S. officials are optimistic over the prospects for initiatives that aim to eliminate tariffs in entire product sectors known as zero-zero initiatives. Some industry groups believed that maintenance of differential reciprocity in tariff concessions for developing countries would doom zero-zero efforts.[20] However, such language appears in existing WTO declarations, and zero-zero initiatives have been floated in past rounds. An Accelerated Tariff Liberalization (ATL) was proposed for eight product sectors (chemicals, energy products, environmental products, fish, forest products, jewelry, medical and scientific equipment, and toys) in preparation for the Seattle Ministerial Conference in 1999. However, the failure to launch a new trade round at Seattle prevented the implementation of that proposal. The 1996 Information Technology Agreement is an example of a completed zero-zero initiative in which 41 countries have eliminated tariffs on 180 products.[21]

Trade Facilitation*

In the context of WTO discussions and negotiations, trade facilitation refers to efforts to simplify and harmonize governments' procedures to process data and other information required for the movement of goods among their respective customs areas. The United States had pressed for trade facilitation to be included on the agenda of a new round of negotiations to strengthen rules on trade facilitation. According to the Doha Declaration, that will be the case, although the negotiations will not begin until 2003. And, while the expectation of many countries is that negotiations will be added to the Doha round talks after the Fifth Ministerial, language included at the insistence of India makes clear that any WTO member has the right to take a position on the modalities of the negotiations that would prevent negotiations from proceeding.

Exporters, importers, and investors have long complained that they face nontariff obstacles when they try to ship goods across customs borders in the course of doing international trade. Often these barriers are arduous and less visible or "transparent" than tariffs. Such barriers include how products are valued at the border for duty purposes, import licensing requirements, rules of origin requirements, and the application of safety standard regulations. Although the intent of the authorities may not be to discriminate against foreign goods, exporters and importers have argued that they effectively do so. The problems arise because the regulations and procedures may not be sufficiently publicized, or may not be implemented in a timely or consistent

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[20] "Final Ministerial Declaration Shows U.S. Retreat on Market Access," *Inside U.S. Trade*, November 15, 2001.

[21] "U.S. Industry Groups Plan Strategies for Tariff Reduction in New WTO Round," *Daily Report for Executives*, November 20, 2001.

* Prepared by William H. Cooper, Specialist in International Trade and Finance, Foreign Affairs, Defense, and Trade Division.

manner. Furthermore, exporters and importers have complained that the lack of consistency or "harmony" in customs procedures and regulations plus antiquated processing methods and technology among customs areas make foreign trade less efficient and, therefore, costlier.

The WTO and its predecessor, the General Agreement on Tariffs and trade (GATT), established rules and codes on the application of customs border requirements. The United States and some other countries have argued that the WTO needs to go further. In 1996, the declaration issued during the Singapore Ministerial called for the WTO's Council on Trade in Goods "to undertake exploratory and analytical work, drawing on the work of other relevant organizations, on the simplification of trade procedures in order to assess the scope for WTO rules in this area."

Developed countries, including the United States, the EU, and Canada, called for negotiations to establish new disciplines to harmonize, simplify, and modernize customs procedures. A number of developing countries, on the other hand, are wary of making new commitments, arguing that they may not have the infrastructure to fulfill new commitments. In the end, the ministers agreed to negotiations on trade facilitation. However, they have delayed the start of the negotiations until the next WTO Ministerial scheduled to take place in 2003, at which time a decision will be made on the "modalities" of the negotiations. The Doha Declaration, in the meantime, instructs the WTO Council for Trade in Goods to review and clarify relevant WTO rules on trade facilitation and to establish what the priorities of members, especially developing and least developed countries, will be for negotiations. The decision to delay the start of the negotiations reportedly resulted from concerns of developing countries, especially African members.[22]

Transparency in Government Procurement*

Governments are the largest single group of buyers of nondefense goods and services. They represent a market of hundreds of billions of dollars to suppliers. However, many governments restrict access by foreign firms to procurement contracts and give preference to domestic suppliers. The United States, and some other governments, had argued for negotiations on a agreement on transparency in the application of government procurement procedures to be included in the next round. According to the Doha Declaration, that will be the case but the negotiations will not begin until 2003. And,while the expectation of many countries is that negotiations will be added to the Doha round talks after the Fifth Ministerial, language included at the insistence of India makes clear that any WTO member has the right to take a position on the modalities of the negotiations that would prevent negotiations from proceeding

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[22] *Inside U.S. Trade.* November 23, 2001.

* Prepared by William H. Cooper, Specialist in International Trade and Finance, Foreign Affairs, Defense, and Trade Division.

To varying degrees, governments favor domestic suppliers over foreign suppliers when making purchases of god and services for public use. Even the United States, one of the most open economies, limits some procurement to domestic suppliers under the Buy American Act. Some WTO member-states, including the United States, have signed the WTO plurilateral code on Government Procurement which requires nondiscriminatory treatment in many areas of government procurement. But the Code only applies to the 28 members that have signed it.

At the WTO Ministerial in Singapore in 1996, WTO members, led by the United States, agreed to study the possibility of developing an agreement to ensure that member-governments' procurement regulations and procedures are implemented openly, for example, by publishing relevant laws, regulations, deadlines, and evaluation criteria. In so doing, the agreement would help provide fair treatment of foreign suppliers vis-à-vis domestic suppliers when bidding on government contracts. The WTO Working Group on Transparency in Government Procurement was formed as a result of the Ministerial to develop elements of a possible agreement. The group includes the major economic powers, including United States and the European Union, as well as representative developing countries.

According to the Doha Declaration, the members agreed to begin negotiations in 2003 building on the efforts of the WTO Working Group. The delay had been sought by developing countries. Also in deference to the developing countries, the members agreed that the negotiations would not go beyond issues related to transparency of current government procurement procedures and would not seek to impose new rules on members. Furthermore, members agreed to provide technical assistance to developing countries to allow them to improve transparency in government procurement procedures.