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The World Trade Organization: The Hong Kong Ministerial

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Ian F. Fergusson, Coordinator
William H. Cooper, Vivian C. Jones, and Danielle J. Langton
Foreign Affairs, Defense, and Trade Division

Charles E. Hanrahan and Susan R. Fletcher
Resources, Science, and Industry Division

Jeanne J. Grimmett
American Law Division

The World Trade Organization: The Hong Kong Ministerial

Summary

The World Trade Organization (WTO) held its 6th Ministerial summit in Hong Kong from December 13-18, 2005. WTO Ministerials are held every two years to bring together trade ministers from member states, often to make political decisions for the body. Although an original goal of the Ministerial was to agree on a package of modalities (methods by which the round is negotiated) for the ongoing Doha Development Agenda (DDA) round of trade negotiations, this aim was dropped in order to avoid a high-profile failure similar to previous Ministerials at Cancun and Seattle. Rather, members agreed to some modest advancements in agriculture, industrial tariffs, and duty and quota-free access for least developed countries. The final outcome of these negotiations could provide a substantial boost to the world economy, but if the round itself is not completed, there may be repercussions for the WTO as an institution and for the architecture of the world trading system.

Agriculture has become the most significant challenge for the members in the negotiations. At the Ministerial, members agreed to an elimination of export subsidies by 2013. Members also agreed to a three band approach to cutting domestic support and committed to achieving specific modalities areas of tariffs and domestic support by April 30, 2006. Trade ministers agreed to use a Swiss tariff reduction formula in the non-agricultural market access talks with specific modalities to be agreed by April 30, 2006. Members also reaffirmed a commitment to completing the services negotiations. With regard to the Trade Related Aspects of Intellectual Property Agreement (TRIPS), the WTO members acted before the Ministerial to approve the final amendment of the TRIPS agreement to incorporate the 2003 Decision on access to medicines. Members also made a commitment to extend duty-free and quota-free access to all LDC products.

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

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The World Trade Organization: The Hong Kong Ministerial

Introduction

The 6th Ministerial of the World Trade Organization (WTO) was held from December 13-18, 2005, in Hong Kong. WTO Ministerials are held every two years to bring together trade ministers from member states, often to make political decisions for the body. In the ongoing Doha Development Agenda (DDA) round of WTO trade negotiations, it was hoped that at the Hong Kong Ministerial trade ministers would be able to agree on a package of modalities (methodologies or formulas that are used to negotiate trade concessions) by which the round is negotiated. As it became clear in the fall of 2005 that such modalities would not be finalized in Hong Kong, the ministerial became an opportunity to take stock of the round, and to achieve some modest, incremental steps on which to build a full agreement.

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

This report describes the outcome of the Doha Development Agenda (DDA) negotiations. Separate sections on Agriculture, Non-Agricultural Market Access, Services, Rules, Trade Facilitation, Special and Differential Treatment, Intellectual Property Issues, Dispute Settlement, and Trade and Environment provide background on the negotiations and details of the proposal.

Background

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

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

topics relating to special and differential (S&D) treatment for developing countries. The Members agreed to a January 1, 2005 deadline for the completion of the talks.

Negotiations have proceeded at a slow pace, due in part to the number of countries participating (149) and their diverse interests. (See country group box, p.3) More than four years into the negotiations and after several deadlines have passed, agreement on negotiating modalities — methodologies such as tariff reduction formulas by which negotiations are conducted — still elude the agriculture, industrial market access, services, and other negotiating groups. The 5th Ministerial — which took place September 10-14, 2003 in Cancún, Mexico — ended without agreement on agricultural modalities or on whether negotiations would commence on the so-called Singapore issues (trade facilitation, government procurement, investment, and competition policy).

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

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

Outcome of the Ministerial

The WTO Secretary General Pascal Lamy released a draft ministerial text on November 26, 2005.² This “no-surprises” draft followed his recognition that the members were too far from convergence on major issues to use the Hong Kong Ministerial as a venue to agree on specific modalities for the negotiations. A new draft incorporating some additional areas of convergences was released on December 1, 2005, and was considered at the December 1-2 WTO General Council meeting in Geneva. For the most part, these items reflect areas of agreement reported by the sectoral negotiating chairs in their reports to the General Council. Generally, these convergences reflect a step beyond the July Framework Agreement, but fall short of full negotiating modalities. A summary of sector-by-sector results of the Ministerial follow in bullets below:

² The final Ministerial Declaration (WT/MIN(05)/DEC), December 18, 2005 is available at [http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.pdf].

COUNTRY GROUPS IN WTO TRADE NEGOTIATIONS

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

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

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

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

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

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

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

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

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

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

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

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

- **Agriculture.** Members agreed to eliminate export subsidies, and “export measures with equivalent effect” by 2013, a date favored by the European Union (EU). Members agreed to cut domestic support programs with a three band methodology. As the largest user of domestic agricultural subsidies, the EU was placed in the highest band. The United States and Japan were placed in the second band and lesser subsidizing countries were placed in the third band. However, the actual percentage cuts that these bands represent remain subject to negotiation. Members also renewed a commitment to achieve a tariff cutting formula by April 30, 2006.
- **Cotton.** Members agreed to eliminate export subsidies for cotton and to provide duty-free and quota-free access for LDC cotton producers by year-end 2006. Members also agreed to reduce domestic support for cotton in a more ambitious manner than for other agricultural commodities as an “objective” in the ongoing agricultural negotiations.
- **Least-Developed Countries (LDC).** Members agreed to provide duty-free and quota-free access for LDC exports by 2008. However, this agreement provides the caveat that 3% of tariff lines can be exempted as sensitive products such as textiles, apparel, and footwear.
- **Non-Agricultural Market Access (NAMA).** In the NAMA talks, members agreed to adopt a Swiss formula approach, one in which higher tariffs are decreased more than lower tariffs. However, the exact formula is yet to be determined, although members agreed to a April 30, 2006 deadline to achieve a formula. The exact nature and scope of special and differential treatment for developing countries in tariff reduction also remains to be resolved.
- **Services.** No substantive breakthrough was achieved in the services negotiations. Draft ministerial language that would have clarified specific sectors and modes of supply as subject to negotiations were watered-down at the insistence of some developing countries. Language that allowed for plurilateral negotiations was also restricted by tying members’ obligations under the process to their development status.
- **Intellectual Property Rights.** Members agreed to a permanent amendment of the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS). The amendment would enable developing and least developed countries without domestic manufacturing capability to issue a compulsory license to a third-country producer to manufacture generic drugs to access medicines to fight public health epidemics such as HIV/AIDS, tuberculosis, malaria, and other infectious diseases. This agreement will become effective when it is ratified by two-thirds of the membership.

- **Trade Remedies.** While the Ministerial text and the rules annex did not report consensus on any negotiating issue, it called for the preparation of a text-based negotiating instrument.
- **Trade Facilitation.** No major breakthroughs in trade facilitation were announced in Hong Kong and the Ministerial declaration did not agree on a date for beginning text-based negotiations. The ministerial served as a review of progress and a discussion of plans for future work.
- **Dispute Settlement.** The Ministerial takes note of the work of dispute settlement negotiations, but does not recommend any specific course of action.
- **Trade and Environment.** The Ministerial reaffirmed its commitment to Doha language “aimed at enhancing the mutual supportiveness of trade and environment.” It also noted the cooperation between negotiating groups to identify environmental goods in which tariffs and non-tariff barriers may be reduced or eliminated and to reduce or to eliminate fisheries subsidies.

Stakes of the Doha Round

The economic value of prospective WTO liberalization under the Doha round to the United States and the world economy could be significant. One model indicates that world net welfare resulting from certain Doha scenarios could increase by \$574 billion and by \$144 billion in the United States.³ Other studies present a more modest outcome with world net welfare gains ranging from \$84 billion to \$287 billion by the year 2015.⁴ Nonetheless, because trade liberalization involves the shifting of economic resources into more productive uses, it inevitably involves dislocations, including job losses and plant closures, to some groups and regions.

The future of the multilateral trading system may also hinge on the successful conclusion of the Doha Round. If the round does not conclude, or concludes with a

³ Drusilla Brown, Alan Deardorff, and Robert Stern, “Computational Analysis of Multilateral Trade Liberalization in the Uruguay Round and Doha Development Round,” University of Michigan Discussion Paper 490, December 12, 2002, (www.spp.umich.edu/rsie/workingpapers/wp.html).

⁴ Thomas W. Hertel and Roman Keeney, “What is at Stake: The Relative Importance of Import Barriers, Export Subsidies and Domestic Support,” in Anderson and Martin, eds., *Agricultural Trade Reform in the Doha Agenda* (Washington: World Bank, 2005); and Kym Anderson, Will Martin, and Dominique van der Mensbrugge, “Doha Merchandise Trade Reform: What’s At Stake for Developing Countries,” July 2005, available at (www.worldbank.org/trade/wto). The different outcomes in these studies are due substantially to the assumptions concerning the liberalization resulting from the Doha Round as well as from differences in the econometric models themselves. For example, the World Bank studies do not attempt to quantify services liberalization.

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

Second, an unsatisfactory outcome of the Doha Round may accelerate the trend toward regional and bilateral free trade agreements. While some of these agreements are quite comprehensive and do result in substantially free trade between the partners, others are more political documents that include what is convenient and leave out whole economic sectors. In addition, regional and bilateral agreements are often negotiated between countries of different economic power, and the resulting agreement reflects the interests of the dominant negotiating partner. The drawback of these agreements to the world economy is one that the multilateral trading system was designed to avoid, namely trade diversion⁵ and increased complexity from a “spaghetti bowl” of rules, multiple tariff rates, and arbitrary rules of origin. If the Doha round is not seen as moving forward, these regional and bilateral deals increasingly may form the basis for the world trading system.

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

Agriculture⁶

Agriculture has been among the most difficult areas to negotiate in the Doha Round, yet progress in agriculture seems to be outpacing progress in other areas. The Doha Round mandate and the July Framework for the agriculture negotiations called for substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support. These three aims have come to be termed the three pillars of the

⁵ Trade diversion occurs when the lower tariffs under a trade agreement cause trade to be diverted away from a more efficient producer outside the trading bloc to a producer inside the bloc.

⁶ This section was written by Charles E. Hanrahan, Senior Specialist in Agricultural Policy, Resources, Science, and Industry Division.

agriculture negotiations. Although negotiators have focused on the three pillars, two other issues related to agriculture are also being negotiated: 1) a sectoral initiative for cotton calling for the accelerated elimination of trade-distorting subsidies for cotton; and 2) proposals to establish a multilateral system of notification and registration for wines and spirits and the provision of additional protection for GIs of agricultural products.⁷

Agricultural Negotiating Proposals. In preparation for the Hong Kong meeting, the United States, the EU, the G-20 developing countries (such countries as Brazil, India, and China) and the G-10 group of net importers of agricultural products (which includes Switzerland, Norway, and South Korea) each made proposals for specific modalities to address the three pillars.⁸ Major differences among the proposals cast doubt on the likelihood that full modalities in agriculture would be agreed in Hong Kong. The United States, for example, made its offer to substantially reduce domestic subsidies conditional on gaining substantial market access for agricultural products from the EU and, especially, the developing countries. The EU, however, indicated it would not move further on agricultural market access unless developing countries agreed to open markets for services and industrial products, and the United States made concessions on the treatment of geographical indications for food and agricultural products. The G-20, for its part, indicated it would not make substantially improved offers on industrial products and services, until there was progress on domestic farm subsidies and market access. The G-10 argued strongly for maintaining high tariffs for agricultural products, although some members like Japan have taken a more conciliatory stance.

A draft of the declaration for the Hong Kong Ministerial noted that “much remains to be done in order to establish modalities (for agriculture) and to conclude the negotiations.” As proposed, the draft declaration would commit WTO member countries to complete negotiations on modalities and to submit comprehensive schedules of concessions by dates in 2006 to be determined. A report of the Chairman of the agriculture negotiating committee appended to the draft declaration illustrated the range of proposals on the three pillars, but made no recommendations for reconciling differences.⁹

Agriculture in the Hong Kong Ministerial

In Hong Kong, WTO member countries made only limited progress in reaching agreement on precise numerical formulas or targets (modalities) for liberalizing

⁷ Although effectively treated by the EU as an agricultural market access issue, the negotiations over additional protection for GIs is taking place in the WTO’s Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS).

⁸ For details on the U.S., EU, G-20, and G-10 agriculture negotiating proposals, see CRS Report RL33144, *WTO Doha Round: The Agricultural Negotiations*, by Charles E. Hanrahan and Randy Schnepf. A detailed discussion of the July Framework agreement is in CRS Report RS21905, *Agriculture in the WTO Doha Round: The Framework Agreement and Next Steps*, by Charles E. Hanrahan.

⁹ “Draft Ministerial Text,” [Job(05)/298], [http://www.wto.org/english/thewto_e/minist_e/min05_e/draft_min05_text_e.doc].

agricultural trade, the original aim of the Hong Kong Ministerial, but the Hong Kong agreement does set new deadlines for completing the Round in 2006.¹⁰ According to the declaration, modalities for cutting tariffs on agricultural products, eliminating export subsidies, and cutting trade-distorting domestic support would be agreed to by April 30, 2006. Based on these modalities, member countries would then submit comprehensive draft schedules by July 31, 2006. The Doha Round would be concluded in 2006. Completing negotiations by year-end would allow enough time to submit an agreement to Congress before the expiration of the President's TPA authority in mid-2007 and before the expiration of the U.S. farm bill in September 2007.

The Hong Kong declaration deals with all three pillars of the agricultural negotiations — export competition, domestic support, and market access — and also with the controversial issue of the nature and pace of reform of trade-distorting cotton subsidies in the United States and other developed countries. Most progress was made in negotiations on the export competition pillar with an agreement on a specific end date for the elimination of export subsidies, but difficult negotiations remain on establishing new disciplines for other forms of export competition. Detailed negotiations are yet to be carried out for domestic support and market access.

As throughout the Doha agricultural negotiations, market access, and especially how to deal with access for import-sensitive products, remains the thorniest issue, not least because of EU intransigence on this pillar. Some agreement was reached on how to deal with export subsidies and market access for cotton, but this issue still pits the United States, which argues for handling the reduction of trade-distorting support for cotton within the domestic support pillar, against the cotton-producing African countries who insist on an early harvest of reductions in cotton support.

Export Competition. The most concrete outcome of the Hong Kong Ministerial was an agreement to eliminate agricultural export subsidies by the end of 2013. The European Union (EU), the largest user of export subsidies, had opposed setting an end date, maintaining that WTO members needed to determine first how other forms of subsidized export competition — export credit programs, insurance, export activities of State Trading Enterprises (STEs), and food aid — would be disciplined. The United States and Brazil, among others, had been demanding an end to such export subsidies by 2010 to be followed by negotiations on other forms of export completion. As a compromise, the declaration calls for the parallel elimination of all forms of export subsidies and disciplines on measures with equivalent effect by the end of 2013. The end date will be confirmed, however, only after the completion of modalities for the elimination of all forms of export subsidies.

With respect to other forms of export competition, the declaration included the following:

¹⁰ Paragraphs 3-12 of the declaration deal with agriculture and cotton; the text of the declaration, available at [http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.pdf].

- Export credit programs should be “self-financing, reflecting market consistency, and of a sufficiently short duration so as not to effectively circumvent real commercially-oriented discipline”;
- On exporting STEs, disciplines will be such that their “monopoly powers cannot be exercised in anyway that would circumvent the direct disciplines on STEs on export subsidies, government financing, and the underwriting of losses”; and
- On food aid, a “safe box” will be established for “bona fide” food aid “to ensure there will be no impediment to dealing with emergency situations.” However, disciplines will be established on in-kind food aid, monetization, and re-exports to prevent loopholes for continuing export subsidization leading to elimination or displacement of commercial sales by food aid.

Domestic Support. On trade-distorting domestic support, WTO members agreed to three bands for reductions, with the percentages for reducing support in each band to be decided during the modalities negotiations. The EU would be in the highest band and be subject to the largest reduction commitments, while Japan and the United States would be in the middle band. (The U.S. proposal would have subjected Japan to a higher percentage cut of its domestic support.) All other WTO members, including developing countries, would be in the bottom band. The declaration states further that “the overall reduction in trade-distorting domestic support will still need to be made even if the sum of the reductions in the components of trade-distorting support would otherwise be less than the overall reduction requirement. (This appears aimed at ensuring that the United States does not engage in box shifting to maintain its current spending levels.)

Market Access. The declaration calls for four bands for structuring tariff cuts, with the relevant band thresholds and within-band reduction percentages to be worked out during modalities negotiations. The treatment of sensitive products (those to be exempted from formula tariff reductions) was also left to modalities negotiations. A preliminary draft of the declaration would have required WTO member countries to ensure that, for sensitive products, the greater the deviation from agreed tariff reduction formulas, the greater would be the increase in tariff rate quotas. The extent to which tariff rate quotas for sensitive products are expanded remains a key determinant of the market access gains that would result from the Round.

The declaration also ensured that developing countries would have two privileges not otherwise available to developed countries: (1) the right to self-designate a number of tariff lines to be treated as special products (with lower cuts in tariffs) based on certain criteria — food security, livelihood security, and rural development; and (2) the ability to impose a special safeguard mechanism (SSG) on imports based on both import quantity and price triggers.¹¹

¹¹ SSGs are presently available to all WTO members (not just developing countries) that have them listed in their country schedules. See CRS Report RL32916 *Agriculture in the WTO: Policy Commitments Made Under the Agreement on Agriculture*.

Cotton. On cotton, the declaration reaffirms the commitment (made in the July 2005 Framework Agreement) to ensure an explicit decision on cotton “within the agriculture negotiations and through the Sub-Committee on Cotton expeditiously and specifically.” The declaration calls for developed countries to eliminate all forms of export subsidies on cotton in 2006. This coincides with the United States’ elimination of its Step 2 program for cotton by August 1, 2006, as contained in the pending 2006 budget reconciliation act (S. 1932, Deficit Reduction Act of 2005). Step 2, which compensates U.S. millers and exporters for using high-priced American cotton, was declared in violation of WTO rules in the Brazil-U.S. cotton case.¹²

On cotton market access, the declaration calls on developed countries to give duty and quota free access to cotton exports from least-developed countries (LDCs) from the beginning of the implementation of a Doha Round agreement. Not agreed to, but certain to be revisited during the modalities negotiations in 2006, was a provision that “trade-distorting domestic subsidies for cotton should be reduced more ambitiously than under whatever general formula is agreed and that it should be implemented over a shorter period of time” than for other commodities.

Agriculture, NAMA, and LDCs. Two other provisions in the declaration touch on agriculture. One is a provision in the declaration calling (for the first time in Doha Round negotiations) for balance between agricultural and non-agricultural market access (NAMA) modalities. The declaration recognizes that it is important to advance the development objectives of the Round through enhanced market access for developing countries in both agriculture and NAMA. As a result, the declaration calls for a “complementary high level of ambition” in market access for both these components of the round. Second, in a departure from special and differential treatment, the declaration calls for all developed countries, and developing countries in a position to do so, to provide duty-free and quota-free market access for products originating from LDCs, with some exceptions, by 2008 or no later than the beginning of the implementation period. These aspects of the Hong Kong declaration are discussed more fully elsewhere in this report.

Doha and the 2007 Farm Bill

Current Doha reform proposals suggest that substantial changes could be needed for several components of U.S. agricultural policy, the authorizing statute for which, the 2002 farm bill, expires in 2007. The agreement in the declaration to eliminate export subsidies would most likely affect exports of milk and milk products, the principal beneficiaries of U.S. agricultural export subsidies. Direct export subsidies for other eligible agricultural commodities have been little used since 1995. The emerging Doha agreement on export competition also suggests that the effectiveness of traditional export credit guarantees in supporting U.S. commodity exports into price-competitive markets would be reduced. However, ongoing U.S. changes in its export credit guarantee program, made in response to a WTO dispute settlement

¹² See CRS Report RS22187, *U.S. Agricultural Policy Response to the WTO Cotton Decision*.

ruling against certain features of the U.S. cotton program,¹³ are likely to bring them into compliance with Doha reform proposals, thereby necessitating little if any further change. Since most of U.S. food aid is in the form of commodity donations rather than cash, U.S. food aid donations would likely be reduced to the extent that reforms to food aid limit or restrict the donation of actual commodities.¹⁴

The various components of U.S. domestic support for farmers also could require some redesign in order to meet lower overall and individual component spending ceilings. Although there are many ways that such changes could be achieved, a likely approach would include shifting away from market-distorting programs such as loan deficiency payments (LDP) or marketing loan gains (MLG) and towards greater use of non-trade distorting (or green box) programs such as decoupled direct payments, conservation payments, or rural infrastructure development.

A Doha Round agreement to reduce tariff levels is unlikely to produce significant increases in imports for most U.S. agricultural commodities since U.S. agricultural tariffs are already very low relative to most other nations and relatively few commodities receive tariff-rate quota (TRQ) protection. However, dairy products, beef, and sugar are three of the major U.S. beneficiaries of TRQ protection. Each of these products is likely to continue to receive protection as “sensitive” products under a new DDA agreement. Expanded quota levels for each of these commodities would result in some increase in imports, but would not likely require substantial modification in TRQ administration.

Geographical Indications (GIs)

GIs are place names (or words associated with a place) used to identify products (for example, “Champagne”, “Tequila” or “Roquefort”) which have a particular quality, reputation or other characteristic because they come from that place.¹⁵ The EU maintains a register of more than 700 protected GIs. France has the largest number of protected GI’s on the register — 141 — of any other EU member country. For the EU, guaranteeing protection to GIs is a critical component of a strategy of developing EU agriculture as a source of high-value products that include both foods as well as wines and spirits.¹⁶ The EU considers that GIs, because they affect trade in agricultural products, should be considered an issue in the agricultural market access pillar. Its position is that the protection accorded GIs for food products should be at the high level accorded GIs for wine and spirits under the WTO Trade Related Aspects of Intellectual Property (TRIPS) Agreement. The U.S. view has been that

¹³ For more information, see CRS Report RL32014, *WTO Dispute Settlement: Status of U.S. Compliance in Pending Cases*; and CRS Report RS22187, *U.S. Agricultural Policy Response to WTO Cotton Decision*.

¹⁴ For more information, see CRS Issue Brief IB98006, *Agricultural Export and Food Aid Programs*.

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

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

GIs should be negotiated as an intellectual property, not an agricultural, issue and that the existing protection for GIs for food and agricultural products provided in WTO agreements is adequate. Complicating the U.S. position is the EU's insistence on linking expanding protection for GIs to reaching agreement on the three pillars: market access, export competition, and domestic support.

The Doha Declaration called for completing work started in the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS) on the establishment of a multilateral system of notification and registration of GIs for wines and spirits and for addressing the issues related to extending the protection of GIs to products other than wines and spirits.¹⁷ The July Framework agreement noted that issues related to the extension of the protection of geographical indications provided for in Article 23 of the TRIPS Agreement to products other than wines and spirits remained unresolved. Although under negotiation in the TRIPS council, the EU has made GIs an agricultural trade issue by conditioning its market access offer on progress with GIs.

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

Little progress was made in Hong Kong on either of the GI issues: establishing a multilateral system of notification and registration for wines and spirits or extending a higher level of protection to GIs other than wines and spirits. The Hong Kong declaration states only that WTO member countries agree to intensify negotiations so as to complete them within the overall time-frame for the conclusion of the negotiations foreseen in the Doha declaration.

Services¹⁸

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

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

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

Uruguay Round Agreements. The current negotiations are designed to refine and expand on the rules in the GATS.¹⁹

Evolution of the Negotiations

WTO members acknowledged that the GATS was rudimentary and that for it to develop into an effective system of rules they would have to do more work. Therefore, they mandated, in Article XIX of the General Agreement on Trade in Services (GATS), that new negotiations on services commence no later than five years after the Uruguay Round agreements entered into force, that is by the year of 2000. Thus, the services negotiations became, along with the agricultural negotiations, part of the so-called built-in agenda. The negotiations did begin in 2000, but the early start has not ensured early progress.

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

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

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

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

²⁰ One business representative stated that the services industry had to fight to have services given this level of importance. Meeting with John Goyer, Vice-President for International
(continued...)

Major Issues and Status of Negotiations

The negotiations on trade in services, by consensus, are proceeding very slowly, lagging behind even the troubled negotiations on agriculture and NAMA. WTO officials and others, including representatives of the U.S. business community, have cited lapsed deadlines and the low quality and quantity of offers made by participants to date as indicators of problems with the negotiations. All members (except the 55 members classified as the least -developed countries (LDCs)) were to have submitted their initial offers by March 31, 2003. The July 2004 framework stipulated that all 127 non-LDC members were to have submitted revised offers by March 31, 2005, but as of November 2005 only 28 had done so. The United States and the European Union (which represents 25 members) met the deadlines. In his July 11, 2005 report to the WTO on the status of the negotiations, Alexandro Jara, Chilean Ambassador to the WTO and the then-chair of the Council for Trade in Services, noted that the average member-country offer covered only 51-57 service subsectors out of a total of more than 160.²¹

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

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

Mode-4.²² Mode-4 delivery, temporary entry of supply personnel, has become one of the most controversial issues at this stage of the negotiations in services. It has divided many developed countries and developing countries, although differing positions have emerged among members of each category. Much of developing

²⁰ (...continued)

Trade Negotiations and Investment, U.S. Coalition of Services Industry. August 9, 2005.

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

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

country criticism of the United States has been regarding mode-4. It has also created some tension between the U.S. business community and the U.S. government. All of this criticism is despite the fact that mode-4 accounts for less than 1% of world trade in services.²³

The controversy arises in part because the issue of mode-4 delivery is closely related to immigration policy in the United States and some other countries, and comes at a time when the United States has tightened restrictions in response to the attacks of September 11, 2001. In addition, some Members of Congress have warned that changes in U.S. immigration laws that might be implied under mode 4 must be handled via the normal legislative process and not within trade agreements.

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

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

Results from Hong Kong

In the Hong Kong Ministerial Declaration, WTO members reaffirmed their commitment to complete the services negotiations with special consideration given to the needs of developing and the least developed countries. Annex C to the Declaration provides modalities and parameters for completing the negotiations.

Annex C requires members to pursue enhanced service liberalization across sectors and modes of supply, with special attention given to reducing restrictions on modes 3 and 4. It requires that any outstanding initial offers are to be made as soon as

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

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

possible. A second round of revised offers are to be submitted by July 31, 2006, and final schedule of commitments to be submitted by October 31, 2006. In order to expedite the negotiating process, Annex C states that plurilateral negotiations should be pursued with plurilateral requests to other members to be completed by February 28, 2006, or soon thereafter. During the negotiations, some developing countries raised objections to mandating the plurilateral format but retreated after assurances from Brazil, India, the United States, and the EU, that the plurilateral would not force them to make commitments they did not intend to make.

Non-Agricultural Market Access²⁵

Talks on Non-Agricultural Market Access (NAMA) refer to the cutting of tariff and non-tariff barriers (NTB) on industrial and primary products, basically all trade in goods which are not foodstuffs. While other areas of WTO negotiations have received greater scrutiny in the Doha round, trade of industrial and primary products, the subject of the NAMA negotiations, continue to make up the bulk of world trade. Nearly \$8.9 trillion in manufactures and primary products were traded worldwide in 2004, accounting for 81% of world trade activity.²⁶ In the United States, industrial and primary products accounted for 70% of exports and 83% of imports in 2004.²⁷ Hence, the outcome of these negotiations could have a substantial impact on the U.S. trade pictures and on the overall U.S. economy.

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

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

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

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

As in other sectors, negotiations on NAMA have been conducted on the basis of the July 2004 Framework Agreement, which provided the basis on which to conduct negotiations on modalities. Although many useful discussions have taken place, final agreement on NAMA modalities was not reached in time for the Hong Kong Ministerial. At the Ministerial, WTO members agreed on a new deadline of April 30, 2006, to achieve final negotiating modalities and to establish draft schedules based on these modalities by July 31, 2006.

Major Negotiating Issues

Tariff Reduction. The Hong Kong Ministerial declaration endorsed the use of a non-linear, “Swiss” style, tariff reduction formula. This builds on July 2004 Framework Agreement’s endorsement of a non-linear formula applied on a line-by-line basis as a modality to conduct tariff reduction negotiations. A non-linear formula works to even out or harmonize tariff levels between participants. This type of formula would result in a greater percentage reduction of higher tariffs than lower ones, resulting in a greater equalization of tariffs at a lower level than before. The Swiss formula is

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

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

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

Although, the Ministerial agreed to a Swiss formula, it did not agree on the coefficients that would finalize the negotiating modalities. Currently two Swiss formula proposals are on the table in Geneva. The first option proposed by developed countries is the simple Swiss formula with the coefficient taking one value for developed and another, higher, value for developing countries. For example, Pakistan proposed that the developed countries have a coefficient of 6 and developing

countries a coefficient of 30.²⁸ The EU in its cross-cutting proposal of October 2005 proposed a coefficient of 10 for developed countries and advanced developing countries and 15 for LDCs. This proposal has been criticized in the developing world for differentiating between developing countries, which runs counter to current WTO practice.

Distinct from the simple Swiss formula proposal with multiple coefficients is the proposal put forth by Argentina, Brazil, and India, known as the ABI proposal.²⁹ ABI also uses the Swiss formula, but it proposes the coefficient to be the tariff average of each country, thus each country would have its own coefficient. ABI would not result in tariff harmonization between countries because there would not be a common coefficient, however, it would result in a certain harmonization within each country's tariff schedule.³⁰

Tariff Binding. The framework encourages the continued binding of tariffs and uses bound tariffs as the baseline for the reduction formula. Tariffs are bound when a country commits to not to raise them beyond a certain level. Therefore, binding has been seen as the first step in tariff reduction. Bound tariffs are often significantly higher than applied tariff levels, which has led to questions as to the usefulness of reductions from bound rather than applied rates. For its part, the EU still seeks cuts from applied rates. Reductions from applied rates would result in greater cuts to actually applied tariffs. However, the use of the applied rate may serve as a disincentive for countries to undertake unilateral liberalization. Under this reasoning, countries would hesitate to undertake unilateral tariff reductions if they knew that multilateral liberalization efforts would use the applied rate that the country had already unilaterally lowered as a starting point. It may also increase the incentive to raise applied rates prior to negotiation.³¹

Under the Framework, tariff reductions would be calculated from the bound, rather than the applied, level. Under the 2004 Framework Agreement, reductions in unbound tariff lines would be calculated from twice the currently applied rate. However, the Ministerial Declaration adopts a 'non-linear mark-up approach,' but did not adopt any particular formula. Generally, such an approach would add a certain number of percentage points to the applied rate of the unbound tariff line in order to establish the base rate on which the tariff reduction formula would be applied. Discussions have ranged from 5-30 percentage points as an addition, which would generally result in lesser bound rates than under the Framework Agreement. The Framework also provided flexibility for developing countries who have bound less than 35% of their tariff lines. They would be exempt from tariff reduction

²⁸ "The Way Forward, Communication from Pakistan, (TN/MA/W/60), July 21, 2005.

²⁹ "Market Access for Non Agricultural Products," (TN/MA/W/54), April 15, 2005.

³⁰ Sam Laird, "Economic Implications of WTO Negotiations on Non-Agricultural Market Access.," [http://www.nathaninc.com/nathan/files/ccLibraryFiles/Filename/000000000044/Economic%20Implications_Laird.pdf].

³¹ Joseph Francois and Will Martin, "Formula Approaches for Market Access Negotiations," *The World Economy*, January 2003, p. 17.

commitments in the Round provided that they bound the remainder of their non-agricultural tariff lines at the average tariff for all developing countries.

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

In the negotiations since the July Framework, the relationship between the Paragraph 8 flexibilities and the formula negotiations have proved controversial. Certain developed country proposals have linked the flexibilities to the value of the coefficient of the tariff reduction formula. Thus, according to this proposal, if developing countries want a differentiated coefficient, they would have to give up certain of the Paragraph 8 flexibilities. However, the Ministerial Declaration reaffirmed the Paragraph 8 flexibilities "as an integral part of the modalities."

Non-Tariff Barriers. The industrial market access talks also encompass negotiations on the reduction of non-tariff barriers. Non-tariff barriers include such activities as import licensing, quotas and other quantitative import restrictions, conformity assessment procedures, and technical barriers to trade. In the negotiations in Geneva, members have submitted notifications of NTBs in order to "identify, examine, and categorize" them, in order to proceed with negotiations. The Ministerial Annex B noted that members were holding bilateral discussions on NTBs, and groups of members were discussing NTBs by product sectors, and by specific NTBs. However, the Ministerial reached no agreement on the reduction of NTBs or on the procedures to negotiate such reductions.

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

Sectoral negotiations have been proposed for bicycles, chemicals, electronics/electrical equipment, fish, footwear, forest products, gems and jewelry,

pharmaceuticals and medical equipment, raw materials and sporting goods.³² Textiles, apparel, and auto parts have also been mentioned for sectoral negotiations. While some developing countries have participated in these discussions, and have proposed some sectors, other developing countries have questioned engagement in sectoral negotiations prior to settling on a formula for negotiations. The Ministerial Declaration took note of these sectoral negotiation and instructed negotiators to determine which sectors “could garner sufficient support to be realized.”

Trade Remedies and Related Matters³³

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

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

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

U.S. Legislation

Support for U.S. trade remedy laws is especially strong in the Senate, where, following an adverse WTO panel decision on a controversial trade remedy law, 70 senators wrote a letter to President Bush arguing strongly for retaining the law.³⁴ S. Con Res. 55 (Craig, introduced September 29, 2005) seeks to express the sense of Congress that the United States should not be a signatory to any Doha Round agreement that would “lessen the effectiveness of domestic and international disciplines” or “lessen in any manner the ability of the United States to enforce rigorously our trade laws.”

³² “Draft Ministerial Text,” (Job(05)/298, Annex B) p. B-4.

³³ This section was written by Vivian C. Jones, Specialist in International Trade and Finance, Foreign Affairs, Defense, and Trade Division.

³⁴ Letter to President George W. Bush, signed by seventy Senators, including Robert C. Byrd, Max Baucus, and Mike DeWine, February 4, 2003.

On the other side of the debate, legislation has also been introduced that would give consuming industries standing in trade remedy cases (H.R. 4217, Knollenberg, introduced November 3, 2005), or to comply with certain WTO rulings on trade remedies.

Progress of Negotiations

According to a report by the Chairman of the Negotiating Group on Rules, work on trade remedies has taken place in three overlapping phases. First, negotiators presented formal written papers indicating the general areas in which the participants would like to see changes in the agreements. A compilation of the 141 proposals was published by the Chairman in August 2003, just prior to the Cancun Ministerial.³⁵ Second, after Cancun (and ongoing), negotiators began discussing their positions in more detail, sometimes proposing legal drafts of suggested changes.³⁶ This phase helped negotiators develop a clearer idea of what proponents of specific changes are seeking, and helped proponents develop “a realistic view of what may and may not attract broader support in the group.”³⁷ The third phase consists of bilateral and plurilateral meetings for technical consultations, partly aimed at developing a possible standardized questionnaire which administering officials could use in AD investigations in order to reduce costs and increase transparency.³⁸

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

In Appendix D of the Hong Kong Ministerial Declaration issued on December 18, 2005, WTO members “acknowledged that achievement of substantial results on all aspects of the Rules mandate, in the form of amendments to the Anti-Dumping (AD) and Subsidies and Countervailing Measures (SCM) Agreements is important to the development of the rules-based multilateral trading system and to the overall balance of results in the DDA.”³⁹ The document further recognizes that negotiations, especially on antidumping, have intensified and deepened and that participants are demonstrating “a high level of constructive engagement.”⁴⁰ These assertions are

³⁵ WTO Negotiating Group on Rules. Note by the Chairman. “Compilation of Issues and Proposal Identified by Participants in the Negotiating Group on Rules. TN/RL/W/143, August 22, 2003, p. 1

³⁶ See WTO Negotiating Group on Rules. Report by the Chairman to the Trade Negotiations Committee. TN/RL/13, July 19, 2005, p. 2.

³⁷ *Ibid.*, pp. 1-2.

³⁸ *Ibid.*

³⁹ World Trade Organization, Hong Kong Ministerial Declaration, December 18, 2005, (WT/MIN(05)/DEC), Annex D, p. D-1. [<http://www.wto.org>].

⁴⁰ *Ibid.*

controversial given the substantial opposition in Congress to any concessions that may weaken U.S. trade remedy laws.

With regard to trade in fisheries, the Declaration acknowledges that WTO members recalled their commitment to “enhancing the mutual supportiveness of trade and the environment, [WTO members] note that there is broad agreement that the Group should strengthen disciplines on subsidies in the fisheries sector” through prohibiting subsidies that lead to over-fishing and overcapacity.⁴¹ In this context, the Declaration directs the Negotiating Group on Rules to intensify and accelerate the negotiating process.⁴²

Stakeholders

A coalition of developed and developing countries, known as the “Friends of Antidumping,” — including Brazil, Chile, Colombia, Costa Rica, the European Union, Hong Kong, India, Israel, Japan, Korea, Mexico, Norway, Singapore, Switzerland, Taiwan, Thailand, and Turkey — were largely responsible for pressing the inclusion of trade remedy talks in the Doha Development Agenda, and have advanced discussions in several areas that seem to be generating interest. U.S. negotiators, pledging to push an “offensive agenda” in trade remedy discussions,⁴³ have submitted papers addressing measures to improve transparency in the investigative process, prevent circumvention of AD and CV duties, and clarify the “standard of review” provisions in dispute settlement deliberations. Canada, Australia, the European Union (on its own behalf) and New Zealand — who with the United States are considered “traditional” users of antidumping actions, have also put forward several proposals.

Major Developments and Issues

Most of the action in the WTO Negotiating Group on Rules has been focused on the Antidumping Agreement, largely because AD actions make up the largest share of trade remedy actions worldwide. Since the present texts of the trade remedy agreements are highly detailed, and were “painstakingly negotiated” over at least three multilateral trade rounds,⁴⁴ the issues that negotiators are attempting to “clarify and improve” tend to be quite specific in nature. However, much of the discussion seems to be based around a few central themes, such as refining methodology for determining injury and existence/extent of dumping or subsidies, giving more specific guidance on conduct of reviews, and providing “special and differential treatment” for developing countries. Broadly characterized, many of the “clarification and improvements” offered could tend to limit or proscribe the ability of countries to grant relief to domestic manufacturers.

⁴¹ Ibid, p. D-2.

⁴² Ibid.

⁴³ “USTR Zoellick Says World Has Chosen Path of Hope, Openness, Development, and Growth.” Office of the U.S. Trade Representative. Press Release, November 14, 2001 [<http://www.ustr.gov>].

⁴⁴ Ibid.

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

Determination of Dumping. Proposed changes in methodology for calculating dumping and subsidies margins could affect both dumping/subsidies determinations and the level of duties assessed if an affirmative determination is made. First, a prohibition on “zeroing” is being pushed by the Friends of Antidumping. “Zeroing” is the process in which, when calculating dumping margins for targeted merchandise, administrative authorities factor in a zero (rather than a negative amount) if a subgroup of the merchandise is found to have a negative dumping margin. The Friends of Antidumping group alleges this practice leads to erroneous findings of dumping as well as inflated dumping margins. U.S. use of “zeroing” is being challenged in WTO dispute settlement proceedings on a number of fronts.⁴⁵

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

Third, the Friends of Antidumping recommend that the Antidumping Agreement require increased use of “price undertakings” or alternative measures negotiated with the exporting country in which the price of the targeted merchandise is increased to eliminate the dumping, or the product is no longer exported to the United States. Some developing countries favor mandatory use of such actions by developed countries in AD investigations involving developing countries. U.S. antidumping law already allows such negotiated agreements (called “suspension agreements” in U.S. law), but they are not used very often.⁴⁶

Reviews. The current ADA and SCM specify that each AD or CVD order must be terminated after five years *unless* authorities determine in a review that its expiration would be likely to lead to a recurrence of dumping or subsidization, and subsequent injury to the domestic producer. Some WTO Members claim that authorities base review determinations inordinately on submissions by the domestic industry, and that, therefore, AD or CVD orders are likely to remain in place as long

⁴⁵ These disputes are (1) DS294, *United States — Laws, Regulations, and Methodology for Calculating Dumping Margins* (brought by European Communities, panel report distributed October 31, 2005); (2) DS322, *United States — Measures Relating to Zeroing and Sunset Reviews* (brought by Japan, panel established April 15, 2005; and (3) DS325, *United States — Antidumping Determinations Regarding Stainless Steel from Mexico* (brought by Mexico, request for consultations January 10, 2005, no panel established as yet).

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

as the domestic industry opposes their removal. On this basis, some favor a mandatory termination of AD or CVD orders within five years. Others favor a more moderate approach that would list specific circumstances or definitive factors that authorities must consider before extending the orders. Others criticize the length of time that sunset review procedures take to complete and favor a mandatory twelve-month time limit.⁴⁷

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

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

Results in Hong Kong

While the Ministerial Declaration and the rules annex did not report consensus on any negotiating issue, it did mandate the Rules Committee Chairman to prepare “early enough to assure a timely outcome,” revised texts of the Antidumping and Subsidies Agreements intended to be “the basis for the final stage of the negotiations.”⁴⁸ This directive seems to indicate that sufficient progress was reached in the text-based negotiating phase during and prior to the ministerial.

Intellectual Property Issues⁴⁹

The Doha Ministerial Declaration called for discussions on implementation of certain aspects of the TRIPS agreement, including the relationship between TRIPS and public health (access to medicines), on the creation of a multilateral registration system for geographical indications of wines and spirits, and on the relationship of

⁴⁷ See World Trade Organization. Negotiating Group on Rules. *Compilation of Issues and Proposals Identified by the Participants in the Negotiating Group on Rules*. Note by the Chairman. August 22, 2003, TN/RL/W/143, pp. 58, 143 [<http://www.wto.org>].

⁴⁸ Ministerial Declaration, Annex D, D-2.

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

TRIPS to the Convention on Biological Diversity⁵⁰ and to traditional knowledge and folklore. The Ministerial Declaration for Hong Kong notes the progress made in these discussions, but announces no new decisions on them. However, just prior to the Ministerial, the WTO members announced an agreement on the TRIPS and public health issue. For a discussion of geographical indications, including the issue of extending the protection accorded to wines and spirits to other agricultural products, see the agriculture section (p.9, above).

Access to Medicines

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

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

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

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

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

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

Traditional Knowledge

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

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

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

Trade Facilitation⁵³

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

Trade Facilitation Negotiations

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

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

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

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

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

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

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

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

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

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

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

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

Outcome of Hong Kong

After the Hong Kong ministerial, trade facilitation is still considered a negotiating area that is progressing relatively smoothly, although it appears that the main work of the Negotiating Group on Trade Facilitation, reviewing proposals submitted on improving the relevant GATT articles, is moving slowly. No major breakthroughs in trade facilitation were announced in Hong Kong. The ministerial served as a review of progress and a discussion of plans for future work, including further review of proposals to improve the relevant GATT articles, provision of technical assistance, and consideration of individual country trade facilitation needs. The negotiators did not agree on a date for beginning text-based negotiations, but the trade facilitation negotiating group's report discusses the need to "move into focused drafting mode" soon after the ministerial in order to conclude the negotiations in time. The Report by the Negotiating Group on Trade Facilitation to the Trade Negotiating Committee summarizes the work accomplished thus far and what remains to be done, and it includes a list of the proposals that have been tabled. The Report is included as Annex E to the Ministerial Text.

Special and Differential Treatment⁵⁵

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

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

There is no official list of developing countries that are eligible for S&D, with the exception of least developed countries (LDCs). LDC status is based upon income and determined by the United Nations, and LDCs may receive further preferential

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

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

S&D Negotiations in the Doha Round

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

In order to move beyond the deadlock on S&D, members agreed to prioritize the five agreement-specific proposals pertaining specifically to LDCs in preparation for Hong Kong. Of these proposals, the most controversial became a key accomplishment of the Hong Kong Ministerial: developed country members agreed to provide duty free and quota free market access for products originating from LDCs. This agreement is detailed in Annex F of the Hong Kong Ministerial Declaration. Duty- and quota-free access is to be granted by all developed countries for all products originating from all LDCs beginning in 2008, or at the start of the implementation period of a completed Doha round agreement. Member developed countries with sensitivities may designate at most three percent of tariff lines to be excluded from this duty- and quota-free access initially, but they agree to take steps to expand the list of eligible products over time to 100%. Developing country members “in a position to do so” are also expected to allow duty- and quota- free access to products originating from LDCs. Some observers have commented that the language on exclusions may lead to conflict between U.S. industries over which goods would be excluded. Three percent of tariff lines is equal to about 300 tariff

lines to be excluded from the initiative, which must be allocated between all sensitive products.⁵⁶

In addition to the proposal to allow duty-free and quota-free access to products from LDCs, four other LDC proposals were agreed upon in Hong Kong. The other four proposals were: (1) to require the General Council to respond within 60 days to requests from non-LDCs for waivers to implement measures in favor of LDCs; (2) to exempt LDCs from certain obligations under the Agreement on Trade-Related Investment Measures (TRIMs); (3) to link LDC obligations generally with their capacity to implement the obligations; and (4) to urge bilateral and multilateral donors to ensure that conditions for assistance to LDCs are consistent with their rights and obligations under the WTO.

Implementation Issues. Developing countries also have concerns about the implementation of commitments made during the Uruguay round of WTO negotiations. Some of these issues were resolved at the Doha Ministerial, but many issues remain outstanding. Developing countries have sought implementation of agreements in a way that is beneficial to them and does not cause them undue hardship. In many cases, the agreement language does not specify the treatment of developing countries, and the actual implementation of the agreement has been contrary to developing country expectations. Implementation issues are found within a wide variety of negotiating areas and are dealt with primarily by the committee responsible for the relevant negotiating area. Outstanding implementation issues are found in the area of market access, investment measures, safeguards, rules of origin, and subsidies and countervailing measures, among others. The Hong Kong Ministerial Declaration reiterates previous instructions adopted in August 2004, and instructs the negotiating bodies and others to “redouble” their efforts to find solutions to implementation issues. A deadline of July 31, 2006, was given for the General Council to review progress on implementation issues, and take appropriate action.

Technical Assistance. Trade capacity building (TCB) and technical assistance (TA) are discussed within the individual negotiating areas as well as within the CTD. TCB is provided to developing countries to strengthen their institutional capacity to participate in WTO negotiations, meet WTO obligations, and integrate more fully into the global economy. TCB is provided from donors on both a bilateral and a multilateral basis. The WTO provides workshops on various WTO topics, maintains a global TCB database, and manages four major funds for financing TCB activities (the Global Trust Fund; the Doha Development Agenda Trust Fund; the JITAP Common Trust Fund; and the Integrated Framework Trust Fund). Critics have commented that TCB lacks coordination in the WTO, and despite the variety of funding sources the centralized sources of TCB funds are inadequate. In 2003, total contributions to the TCB trust funds totaled \$45 million. In that same year, total bilateral TCB commitments equaled approximately \$1.46 billion. Multilateral commitments to TCB equaled approximately \$1.29 billion in the same year.⁵⁷

⁵⁶ “U.S. Accepts Duty-Free, Quota-Free Initiative for LDCs After Changes,” Inside US Trade, December 27, 2005.

⁵⁷ 2004 Joint WTO/OECD Report on Trade-Related Technical Assistance and Capacity (continued...)

Another area of controversy is whether donors should commit to providing TCB as part of a WTO agreement, or whether TCB should simply be encouraged in the agreement.

Dispute Settlement⁵⁸

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

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

⁵⁷ (...continued)

Building. December 2004.

⁵⁸ This section was written by Jeanne J. Grimmer, Legislative Attorney, American Law Division.

conducted, concluded, or their results brought into force as part of the single undertaking planned for Doha negotiations as a whole.

In the absence of probable consensus by the May 2003 deadline, the outgoing Chairman of the SS/DSB, Peter Balás (Hungary), drafted a Chairman's Text of proposed amendments to the DSU dated May 28, 2003, in which he incorporated numerous proposals, including those involving consultation procedures, third-party rights, procedures for terminating panels before they complete their work, remand authority for the Appellate Body, sequencing of requests for authorization to retaliate with requests for compliance panels, procedures for terminating retaliatory measures, awards for litigation costs, and special provisions for developing countries. No action was taken on the document and in July 2003, the WTO General Council extended the talks until May 31, 2004. With additional proposals submitted but little progress by the new date, the WTO General Council agreed in the August 2004 Doha Work Program that work in the dispute settlement negotiations would continue on the basis set out by the new DSB/SS Chairman David Spencer (Australia), in his June 2004 report to the WTO Trade Negotiations Committee. The report stated that there was "agreement among Members that the Special Session needs more time to complete its work, on the understanding that all existing proposals would remain under consideration and bearing in mind that these negotiations are outside the single undertaking." In addition, the Chairman did not recommend a specific target date for completion, noting, however, that one might be considered later.

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

Along with the issues just described, the negotiations have taken up a broad range of other topics, with over 50 working documents publicly circulated by

Members and other informal proposals and compilations made during the course of the talks. The United States has generally sought increased transparency and access to the process through open meetings, timely access to submissions and final reports, and guidelines for *amicus* briefs. It has also proposed shorter time frames (in tandem with clarifying the sequencing issue), and has called for steps that would give Members more control over the process, such as requiring the WTO Appellate Body to issue interim reports for comment by disputing parties; allowing the deletion from an appellate report, upon agreement by the disputing parties, of findings that they view as not necessary or helpful to resolving the dispute; and giving parties the right to mutually suspend panel and appellate proceedings to allow them to work on a solution to the case. In October 2005, the United States also suggested draft parameters concerning both the use of public international law in WTO dispute settlement and the proper interpretive approach for use in disputes. Its proposed interpretive guidelines are aimed at ensuring that WTO adjudicative bodies neither supplement nor reduce the rights and obligations of WTO Members under WTO agreements and, among other things, describe types of “gap-filling” that should only be addressed through negotiations, including a panel’s reading a right or obligation into the text of an agreement by, for example, extrapolating from a different agreement provision.

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

Hong Kong and Beyond

In his November 25, 2005, report to the Trade Negotiations Committee, Chairman Spencer communicated that over the past 18 months of negotiations there had not been consensus of the sort needed to establish a foundation for an agreement. Instead, he noted, “the work of the Special Session has been based primarily on initiatives by Members to work among themselves in an effort to develop areas of convergence to present to the Special Session as a whole.” The report stated that during this period contributions and discussions had taken place on topics such as “remand, sequencing, post-retaliation, third-party rights, flexibility and Member control, panel composition, time-savings and transparency.” For the future, he continued, “the onus will remain on participants in the negotiations to continue to develop areas of convergence so as to lay the basis for a final agreement to improve and clarify the DSU.” Reflecting language originally suggested by the Special Session Chairman, the Hong Kong Ministerial Declaration “takes note of the progress made” in the dispute settlement talks so far and directs the DSB/SS “to work towards a rapid conclusion of the negotiations.” Because the Hong Kong Declaration reaffirms the Decisions and Declarations adopted at Doha and takes into account the General Council Decision of August 2004, dispute settlement negotiations will continue on their separate track, with results to be adopted separately from any Doha single act.

Environment and Trade⁵⁹

In general, environmental issues were not a major focus at the Hong Kong ministerial meeting, given the predominance of other priority issues. However, the elements of the environmental paragraphs in the Doha Declaration were discussed in the Ministerial Declaration, which recognized work undertaken in the Committee on Trade and Environment, and urged continued work on the environmental issues identified in the Doha document.

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

⁵⁹ This section was written by Susan R. Fletcher, Specialist in Environmental Policy, Resources, Science and Industry Division, and Jeanne J. Grimmett, Legislative Attorney, American Law Division.

The Doha Ministerial Declaration in 2001 included environmental elements in Paragraphs 31 and 32. Paragraph 31 states agreement for negotiations “with a view to enhancing the mutual supportiveness of trade and environment...” and identified three issues: (i) the relationships between WTO rules and trade obligations in multilateral environmental agreements (MEAs), limiting the scope of the discussion to the relationships only among those nations that are parties to the MEAs; (ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees; and (iii) the reduction and/or elimination of tariff and non-tariff barriers to environmental goods and services. This paragraph also states, “We note that fisheries subsidies form part of the negotiations provided for in Paragraph 28,” i.e., negotiations on WTO rules, a mandate covering anti-dumping, subsidies, and countervailing measures.⁶⁰

The CTE has held extensive discussions of the relationship between MEAs and WTO rules. It has been noted in these discussions that there has not yet been a dispute involving an MEA and WTO rules, and there appears to be wide agreement that when all parties are parties to an MEA, the MEA rules should apply. Complications develop when a possible dispute might arise between parties and non-parties to an MEA; discussions continue on this and other technical legal points.

The Ministerial Declaration issued after the Hong Kong meeting reaffirms the Paragraph 31 Doha mandate “aimed at enhancing the mutual supportiveness of trade and environment” and calls upon Members to intensify negotiations on all matters listed in the paragraph. It recognizes the progress that has been made in the CTE on the relationship of WTO rules to MEA trade obligations and the work undertaken toward inter-organization information exchange. It also recognizes recent work undertaken under paragraph 31(iii) through numerous submissions by Members and discussions in special sessions of the CTE and in technical discussions, and instructs Members to complete work expeditiously under that paragraph.

In addition, the Declaration in Annex D as it addresses rules negotiations, notes that broad agreement exists that the Negotiating Group on Rules should strengthen disciplines on subsidies in the fisheries sector, including prohibiting certain forms of subsidies that contribute to overcapacity and over-fishing. It calls on participants “to undertake further detailed work to, *inter alia*, establish the nature and extent of those disciplines, including transparency and enforceability.” The Declaration also states that “appropriate and effective” special and differential treatment of developed and less-developed country Members “should be an integral part” of these negotiations, “taking into account the importance of this sector to development priorities, poverty reduction, and livelihood and food security concerns.”

Finally, the Declaration, in addressing negotiations on Non-Agricultural Market Access (NAMA), notes that limited discussion has been held in the NAMA Negotiating Group regarding environmental goods since July 2004, but that the CTE

⁶⁰ Paragraph 32 outlines instructions for discussions in the CTE — not negotiating items — and includes the effect of environmental measures on market access; relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights; and labeling requirements for environmental purposes.

has undertaken substantial work on the issue during this period. It further states that close coordination between the two negotiating groups would be needed in the future and that “a stock taking” of the CTE’s work by the NAMA Negotiating Group would be required at the appropriate time.