WTO SYMPOSIUM PANEL SUMMARIES

I. THE DDA: TAKING STOCK – A 20,000-FOOT ASSESSMENT

In this segment, *The DDA: Taking Stock – A 20,000-Foot Assessment*, of the ABA Symposium, a panel of experts assessed the current status of the Doha Development Agenda (DDA) negotiations and highlighted issues that need to be addressed in the coming months to ensure a successful outcome of the negotiations.

Panelist: Gerard DePayre, Former Deputy Head of the Delegation of the European Commission to the United States

Gerard DePayre, former Deputy Head of the Delegation of the European Commission to the United States, offered his personal views on what has happened in the negotiations since July 2004, and what issues he believes will shape the negotiations during the next few months. Mr. DePayre expressed concern that the negotiations may get lost in the details and negotiators may fail to focus on the big picture of how much is at stake for the world. He said much progress has been made since July 2004, in large part due to a change in attitude of the key participants; however, unless there is more progress in agriculture, there will be no progress in other areas.

Concerning agriculture, Mr. DePayre briefly outlined what proposals the United States and European Union (EU) have put forth thus far, noting that the EU has signaled that it may be prepared to offer proposals to further liberalize the market if the United States is willing to match those proposals with equally ambitious proposals in areas of concern to the EU. Specifically, he urged the United States to propose further reform of domestic supports. He acknowledged this would be difficult given that Congress will soon consider a new farm bill, and that U.S. agribusinesses will only accept a cut in domestic support if they are given an increase in market access. But, he warned it would be a mistake to believe that agriculture talks could move forward without the United States moving more on domestic supports.

Mr. DePayre also offered a few comments on other areas of the negotiations. He noted the services negotiations have thus far been very disappointing. He expressed hope that countries would be willing to participate more in negotiations on industrial tariffs, India in particular, and antidumping. He noted that time is running out as WTO Members make preparations for the Hong Kong Ministerial. Without some forward movement on key issues in the coming months, he expects there will be little progress on the big issues in Hong Kong.

Panelist: William Reinsch, President, National Foreign Trade Council

William Reinsch, President of the National Foreign Trade Council, remarked on progress in the DDA negotiations from the perspective of the U.S. business community. From the outset, Mr. Reinsch was very critical of the EU approach to the negotiations and the quality of the proposals put forth by the European Commission on agriculture. He disagreed with Mr. DePayre's assessment that the Commission has done all that it needs to in this negotiating area.

Mr. Reinsch reacted to criticism that the U.S. business community has not been very active in supporting the DDA negotiations by explaining that businesses are skeptical that the ambitious outcome stakeholders want in the negotiations will be realized. He said it is difficult for businesses to be confident about the negotiations at this early stage because WTO Member countries have not yet demonstrated a willingness to make significant concessions in sensitive areas. Thus, there is still a large amount of uncertainty about the likely outcome of the negotiations—concerning both the fact that they will conclude at all and that any possible outcome would be meaningful for the business community. And, external events continue to impact the ability of countries to become more aggressive in the negotiations. For example, Mr. Reinsch noted that the German election would affect the ability of the EU to make more concessions in the area of agriculture.

As the Hong Kong Ministerial fast approaches, Mr. Reinsch noted that it is hard for businesses to be hopeful about forward movement in the talks when political uncertainty is compounded by negative press reports on the Ministerial and a growing sense of skepticism by the public about the benefits of free trade. Nevertheless, he insisted the business community would be very engaged in the lead up to Hong Kong and at the Ministerial itself, and noted that his organization will hold a series of pre-Ministerial meetings.

Mr. Reinsch recommended two steps that negotiators could take to ensure there is forward movement in the negotiations in Hong Kong. First, he said they should ensure that no issues are taken off the table. In this regard, he pointed to demands by U.S. lawmakers to remove some issues from inclusion in the final agreement, such as the so-called Code 4 of the services negotiations (temporary movement of persons for the purpose of providing a service) and changes to the laws encompassed in the Rules negotiations. Second, he said all countries should be willing to make concessions. In addition to the EU and United States, developing countries should be willing to make concessions on non-agricultural market access and services. Mr. Reinsch expressed particular concern that little progress has been made in the area of services, especially related to information technology, telecommunications, and financial services.

Panelist: Warren Maruyama, Partner, Hogan & Hartson

Warren Maruyama, partner at Hogan & Hartson and former U.S. trade official, offered his personal perspective on the DDA negotiations. He said it is in the economic self-interest of all stakeholders to achieve a successful outcome from the DDA negotiations. He emphasized the need for forward movement in the agriculture talks to ensure a successful outcome of the overall negotiations. He said progress in agriculture would likely require a further reduction in domestic supports from the United States and expanded market access from the EU, Brazil, and major Asian economies. He opined that a multilateral deal to discipline domestic supports would be in the long-term U.S. interest, particularly if it were accompanied by expanded access for U.S. farm products to key Asian export markets. Mr. Maruyama also questioned whether the EU could expand subsidies under the Common Agriculture Policy (CAP) because of the fiscal burden imposed by the new members of the EU.

Regarding the Hong Kong Ministerial meeting, Mr. Maruyama warned against setting expectations too high. On agriculture, he said both the United States and the EU must be willing to make more concessions, but he recognized this would be difficult given the EU's constraints associated with the CAP and the United States' impending overhaul of the farm programs. Mr. Maruyama agreed with Mr. DePayre's assessment that the developing countries must make concessions on services, agriculture market access, and industrial goods. He closed by noting that trade negotiations by nature should be rational, but this does not always happen. He said the challenges for Hong Kong are twofold: avoiding another debacle like that in Seattle, and keeping momentum in the talks going forward. In response to a question on why the U.S. business community has not been engaged in the talks, Mr. Maruyama said past trends in trade negotiations show that businesses offer support when they know they have something to gain, and to date, there has been little for the U.S. business community to get excited about.

Moderator: Ambassador Michael Smith, Former Deputy U.S. Trade Representative

Ambassador Mike Smith closed the panel discussion by commenting on the remarks of the three preceding speakers. First, he said the lack of progress with the DDA negotiations is frustrating and that some of this is due to a lack of private-sector enthusiasm for the talks. He argued that some forward movement could be made in the talks if businesses are more proactive and push Congress. In response to a question on why the business community has not been active in supporting the DDA negotiations, Ambassador Smith commented that one reason is that much of the debate in the Round has focused on so-called development issues, which have not been of interest to the business community and are in some

cases contrary to their interests. To launch a major congressional lobbying campaign would be a significant effort, and businesses may question the results.

Separately, Ambassador Smith expressed concerns about the use of deadlines in the negotiations. While recognizing the need for deadlines as action-forcing moments, he argued that the deadlines set for completing certain tasks within the framework of the negotiations are too artificial and may have the reverse effect, giving bureaucrats an opportunity to make the case that the talks have failed because of missed deadlines. He said he would be surprised if the talks concluded by the end of 2006.

The question and answer session focused in large part on the stalled agriculture talks, as success in this area of negotiations is seen as the key to success in other areas. When asked whether negotiators should seek to make progress in agriculture by excluding the EU, all of the speakers said this is not possible on economic grounds. Audience members were concerned that if no progress is made in agriculture in 2006, then it would be impossible to conclude the negotiations by the summer of 2007, when trade promotion authority (TPA) expires in the United States. Most of the speakers agreed that the most important deadline in the DDA negotiations is the expiration of TPA at the end of June 2007.

II. WTO DISPUTE SETTLEMENT, PART I

This segment addressed the question: "The Appellate Body and Charges of Judicial Activism: Sounding the Alarm or Tempest in a Teapot?" Panelists discussed the key Appellate Body decisions focusing on reliance on the Vienna Convention, public international law, gap-filling, and U.S. and EU proposals.

Moderator: John Veroneau, Former General Counsel, Office of the U.S. Trade Representative

John Veroneau opened the panel discussion by stressing the importance of preserving the legitimacy of the WTO dispute settlement process. Mr. Veroneau pointed out the fact that the Member countries' waiver of sovereign immunity is fragile, and thus it is critical that the Appellate Body exercise its role in preserving the legitimacy of the overall dispute settlement process.

Panelist: Claude Barfield, American Enterprise Institute

Claude Barfield noted that, from the beginning, there have been differences of views between political scientists and legal scholars. For example, in 2001, certain prominent political scientists criticized the new dispute settlement system as going a step too far. They suggested this because the WTO dispute settlement system, unlike the GATT dispute settlement system before it, does not have escape mechanisms. As a result, the current system exacerbates the problem because it creates expectations that cannot be fulfilled, supplanting diplomacy with crafty lawyering.

In contrast, Mr. Barfield suggested that well-known scholars, such as John Jackson and Raj Bhala, have instead argued that the system is just beginning and needs to be strengthened. A strengthened system would have elements such as retroactive application and maybe even punitive sanctions for non-compliance. Mr. Barfield noted that the WTO may be moving in that direction. One argument in favor of such a system is that it may be more beneficial to developing countries (or those with relatively less leverage in the system).

Mr. Barfield suggested that between the two choices—tightening the system and narrowing the scope for action by national governments, or loosening the system to permit national governments greater flexibility—he would advocate loosening. Mr. Barfield stated that the system needs to accommodate domestic rules that are deeply rooted in the respective countries. There should be exceptions, safeguards, and waivers that may be invoked where rules are deeply rooted in a particular nation state. He suggested that this bifurcation of positions will be a continuing debate hanging over future cases.

Panelist: Professor Petros Mavroidis, Columbia University, New York

Professor Mavroidis discussed three topics: (1) the role of the Appellate Body, (2) the record of the Appellate Body decisions during the past ten years, and (3) his recommendations for moving forward.

1. The Role of the Appellate Body

Professor Mavroidis noted that the Appellate Body has a difficult task. It is dealing with two incomplete documents: the WTO Agreement and the Vienna Convention. The Appellate Body must interpret these documents in context, which is not an exact science. Therefore, the Appellate Body is in a difficult position when interpreting complicated concepts. *However*, the Appellate Body is an *agent* of the principal; it is not the negotiator. The Appellate Body cannot undo the balance of rights and obligations that were defined by the Member States in the WTO Agreement. And it must keep in mind that every decision has an impact on future agreements.

2. The Record over the Past Ten Years

The Appellate Body has had a mixed record over the past ten years. In certain cases, such as in the *Hormones* and *Softwood Lumber* cases, it overstepped its authority by going beyond the language of the agreements. This overreaching occurs where the Appellate Body shifts the burden (for example, to the complaining party) despite language in the agreement to the contrary, or where the Appellate Body decides it is acceptable to use a methodology that is counter to (or outside) of the language in the agreement, as was the case in *Softwood Lumber*.

Another example regarding bad methodology is that, after sixty years of disputes and ten years of WTO precedent, we still do not know how to define the like product in cases of non-discrimination claims. The cases still have not resolved whether it is proper to look at econometric indicators; whether to look at market surveys; and whether to look at intent or effects, or both.

The cases have been widely different on these questions. There are also some good cases. One good example was the *Shrimp-Turtle* decision, which stated the basic principle that trade is not a value—it is a means to become wealthier. This overturned the nonsensical decision in the *Tuna-Dolphin* dispute, which interfered with the United States' right to unilaterally define its policies—a right that must be afforded to every Member.

3. Three Recommendations for the Appellate Body

First, decisions should be minimalist. Adjudicate only the particular case at hand and do not attempt to address future circumstances. The externalities will be there at any rate.

Second, respect the agreements. The judges are not the negotiators and must respect the will of the original drafters/Member countries.

Third, do not simply disregard panel decisions when you disagree with them. The Appellate Body's role is to guide the panels to better decisions. Thus, all decisions should reflect that objective.

QUESTIONS AND ANSWERS

1. What do you think about the proposal of making the Appellate Body reports available in draft form before they are final?

Professor Mavroidis responded that he would not agree with this approach. We should not be negotiating the decisions. The focus must be on selecting the right judges, not questioning the reports.

2. Why has the Appellate Body never been granted remand authority, especially given the idea that it should have such authority in order to complete its analysis?

Professor Mavroidis said that this is a good idea and would be one of the first things he would introduce in the Dispute Settlement Understanding (DSU). Mr. Barfield noted that this might have been a trade-off if they were not so worried about the timing. Instead, the Members chose a schedule that favored finality and shorter timing over granting remand authority.

Professor John Jackson added from the audience that he would also favor remand authority, but there were a few factors that led to having the system without remand authority. Most notably, there were time constraints. When the agreements were negotiated, the United States wanted to ensure that dispute settlement cases were completed within the time frame for decisions under section 301 of the Trade Act of 1974. It made a commitment to Congress that it would not modify the law and schedule on section 301. Additionally, a complication arises in determining who to remand to. Normally, the panel is discharged after the decision is issued. This could be changed, of course, but it presents a complication because panelists typically do not want to make that kind of commitment.

Going back to the tensions that the panelists flagged, the Vienna Convention needs rethinking as it applies to large, multilateral treaties. Professor Jackson noted that he would not agree with the notion that we should be too fixed upon the text. Textualism has its problems. For example, it does not help with weighing. There also needs to be more thought devoted to documentation of the intent of the parties.

Professor Jackson stated that there is also a power disparity between the dispute settlement process, which has greater power, versus the non-dispute settlement process, which needs further attention.

Mr. Barfield responded that the dispute settlement process is the only way to deal with problems that arise under the WTO agreements because there is no continuous legislative process. Further, this imbalance will be difficult to address even in future negotiations because the winning parties will always have something at stake.

III. WTO DISPUTE SETTLEMENT, PART II

This segment addressed the question: "Trade Remedies: Sore Losers or Bias in the System?" The panelists discussed the key panel and Appellate Body decisions relating to safeguards, countervailing duties, and antidumping duties, as well as the role these decisions play in the negotiations over trade remedies in the Doha Round.

Moderator: Professor Raj Bhala, University of Kansas

Professor Raj Bhala introduced the speakers, providing their backgrounds and noting that they are three of the world's leading antidumping experts.

Panelist: Gary Horlick, WilmerHale

Gary Horlick picked up on the prior panel discussion regarding the lack of a legislative branch in the WTO system. Because there is no legislative system for resolving issues, there is no fix other than dispute resolution. Mr. Horlick noted that this does not mean solutions cannot be achieved through negotiation. There have always been disagreements in the past, and issues were legislated under the GATT. We sometimes come close in negotiations under the WTO system, but have seen less advancement in this regard than was normally accomplished under GATT. Therefore, the burden falls on the Appellate Body to resolve differences among Members.

Mr. Horlick also noted that it is probable that no Appellate Body member has ever seen the details of an antidumping case. However, we must accept the word of the Appellate Body that they have. The *Shrimp-Turtle* decision was the worst decision. The second-worst decision was the *Softwood Lumber* decision, which was contrary to the negotiated agreements. Mr. Horlick noted that in those cases, the United States won. Some say there is a bias, but a Government Accountability Office report recently found there was no evidence of bias in favor of the United States.

Further, every case is different. Mr. Horlick said that with respect to antidumping, we essentially have a set of rules that was drafted by amateurs, with layers of rules that have been added over the years. This should be contrasted with the subsidies agreements, where the negotiators started with a clean slate.

In summary, we have: (1) an Appellate Body that does not know antidumping details; (2) an agreement that is a mess; and (3) a system where no one is ever satisfied because the losers will always complain. And it is probably not going to get any better. Instead, we will continue to have more micro-drafting, and the agreement will simply become thicker, not better.

Panelist: Jorge Miranda, King & Spalding, Formerly with WTO Rules Division and SECOFI

Mr. Miranda focused on whether one can argue that there is a tendency to rule against the United States. In fact, this is a temporary phenomenon. Prior to the new WTO rules, the outcome of a dispute settlement was contingent upon acceptance by the losing party. Now, compliance is mandatory.

There are situations where the parties agree that they are not complying with WTO rules (for example, the non-attribution in the injury portion of U.S. antidumping determent actions challenged in the WTO cases). This situation has been changing dramatically. The United States has won most claims raised in many cases. Already there are many cases against Mexico, China, and India.

Regarding the differences in approach between the United States and developing countries: arguably, if the U.S. wrongs are compared with the wrongs of other countries such as Mexico, China, and India, you could say that the United States is engaging in white collar crime, while these countries are involved in something more akin to the Texas Chainsaw Massacre. For example, there are cases in Mexico where there is no consistency in methodologies; rather, the variables change depending upon the issue, with an intent to bias the final finding. Often, these other countries use different periods of investigation, depending on the results. Recently, in China, the government found injury where imports fell from 13% to 3%. Yet, this fact is nowhere mentioned in the decision. So, there are decisions that are much more egregious than that of the U.S. International Trade Commission or U.S. Commerce Department. In reality, the U.S. process is respectable. In the future, the attention will shift to the much worse practices of developing countries.

Panelist: Terence Stewart, Stewart and Stewart

Terry Stewart distributed a paper detailing his views on these issues. Mr. Stewart first noted that, with respect to the dispute settlement system, by and large, most Members have been quite happy with the system, despite all of the disputes and discussions. In addition, there is a broader mix of countries engaged in dispute settlement, which is a good indicator.

At the same time, there are concerns over whether the Appellate Body is living within the parameters under which it was set up. The Appellate Body is not supposed to write the rights and obligations of the parties. Mr. Stewart questions whether there are obligations being imposed on the United States that were not anticipated. There are questions regarding whether the dispute settlement system is being misused or overused, and whether the Members will continue negotiating or turn to the Appellate Body to resolve their issues more frequently.

So what are the warning signals? First, there is a clear bias for the complaining party. The record shows that if a party brings a case, 90% of the

time, that party will win. Second, even where countries do not think they have a strong case, they may bring a case to engage in a show of force. It is not clear whether this is the best role of the Appellate Body. Third, there is a gross imbalance between the number of disputes that involve trade remedies. Even though the volume of trade that is affected is only somewhere between 0.5% to 1.5% of total trade, nearly one-half of all disputes involve trade remedies. Further, the United States is subject to 60% of the cases brought. There must be something wrong. Another problem exists because it is a government-to-government process. Governments may not be protecting the interests reflected in the agreements that were actually negotiated because domestic parties do not have the opportunity to have their views considered. There is also an unwillingness to implement trade remedies by Members. And finally, the decisions are arbitrary; a review of the decisions shows this. The United States worked in the Uruguay Round to have a different standard of review for antidumping cases. The Appellate Body is supposed to implement the concept that if there is more than one permissible interpretation, the Appellate Body should accept any permissible interpretation of the Member, but they have yet to find more than one meaning in any case. So there are issues of restraint on parties, on the agencies, and most importantly, on the Appellate Body's decisions to fill gaps. In that regard, the Appellate Body is overstepping its authority.

FOLLOW-UP RESPONSES BY THE PANELISTS

Panelist: Gary Horlick

Mr. Horlick responded that the main reason for the disparity in U.S. cases is that the United States will not bring cases on behalf of exporters. Industries cannot get the U.S. government to do it. Also, the 1% statistic regarding the amount of trade is not an appropriate statistic because it does not take into account the major impact of these products on entire industries.

Panelist: Jorge Miranda

Mr. Miranda disagreed that the Appellate Body has never found multiple permissible interpretations. For example, the Appellate Body did this in the *DRAMs* dumping case and in the *Hot-Rolled Steel* case; it just did not state it explicitly.

Panelist: Terence Stewart

Mr. Stewart noted that, with regard to the imbalance in disputes, there are many areas of key importance (such as SPS, etc.), but there are only a few disputes in those cases. This is the result of decisions by the governments not to pursue those areas as part of governmental restraint.

QUESTIONS AND COMMENTS

1. One member of the audience commented that it makes sense that the United States is the most-sued country because it has the largest economy. The commenter also inquired whether the high number of losses for national systems is because, according to the commenter, many national systems' laws are inconsistent with the WTO agreements.

In response, the panelists noted that the 0% success rate for national systems is not entirely accurate because there are multiple rulings in most cases; the actual success rate for cases brought against national systems is much lower. Mr. Horlick pointed out that the United States has also admitted that it will not comply in certain circumstances; this is a calculated decision.

2. Another commenter raised the issue of retroactive remedies, noting that there should be the opportunity to impose refunds as part of the withdrawal of measures in a case, especially in antidumping cases. In particular, there has been some precedent for retroactive measures in the *Australian Leather* case.

The speakers responded to the comment, noting that most governments have attempted to limit or minimize the *Australian Leather* case. This is a particular issue in cases involving prohibited subsidies. Mr. Stewart suggested that although there have been some proposals for retroactive remedies, this is unlikely because the potential application could be broad and countries will not agree to it. Mr. Horlick stated that while there are legal arguments for refunds, he agrees with Mr. Stewart that every WTO Member takes advantage of the system. As a result, the system is no longer useful because the process is too long with no real remedy in the end. Mr. Miranda pointed out that, in addition, reimbursement is not enough in many cases because the initial duties are prohibitive for certain industries. Further, if there is no compliance, the countermeasures are not useful to the industry that actually brought the claim. There may not be a better alternative because it is an imperfect system.

IV. WTO DISPUTE SETTLEMENT, PART III

In this segment, panelists were asked to answer the following questions: How have WTO panels and the Appellate Body handled alleged market access barriers with regard to national treatment violations and sanitary/phytosanitary measures? In addition, how has the implementation process fared, and what proposals, if any, make sense in this area?

Moderator: Jane Bradley, Georgetown University Law Center, Washington, D.C.

Jane Bradley noted that this panel would discuss WTO cases that do not involve dumping or subsidies. Many of these other cases involve original GATT obligations. In addition, this panel would address issues regarding implementation. Statistics show that there have been seventy-nine disputes in which a panel found a violation where implementation was necessary. In at least eighteen of those disputes, the complaining country argued that the implementation that occurred was not sufficient. In those cases, the disputes were referred back to panels for further consideration, in many cases more than once. As a result, some commentators have called for fundamental changes in the remedies available under the WTO dispute settlement process.

Panelist: Andrew Shoyer, Sidley & Austin

Andrew Shoyer made three general points: (1) The WTO has been an excellent tool for addressing discrimination. The WTO process has made prior GATT rules much more viable for private stakeholders because enforcement is an option. (2) There has been a judicialization of the dispute settlement process from the GATT to the WTO, which means that the outcome of a case now comes down to what the parties can prove, both with regard to what the treaty means and the facts of a particular case. Because the task of pulling together evidence is tough, there is some bias in the system. (3) Some cases do not work well within a dispute settlement system (e.g., market access cases). Mr. Shoyer noted that there have been significant changes during the past ten years. For example, dispute settlement under the WTO provides protection against unfair practices, companies are aware of this, and it has mattered on the ground. When CEOs believe foreign practices are unfair (e.g., discriminatory practices in China), they think of the WTO as a way of addressing this. This is a positive development.

Panelist: Hal Shapiro, Miller & Chevalier

Hal Shapiro explained that he sees WTO dispute settlement through a political lens. Mr. Shapiro noted that there is a useful analogy to viewing implementation from a doctor's perspective, under a three-step analysis.

1. This will only hurt a little bit.

The importance of dispute settlement is greatly exaggerated. The WTO agreements are primarily self-executing. The institutions of the WTO work most days with almost no enforcement. Each day, trade between the United States and Canada, and between the United States and Europe, is more than $1 billion. The largest trade disputes are enormous for the particular industry affected, but typically are dwarfed by the total amount of trade between the countries involved. For example, the $4 billion involved in the *Softwood Lumber* dispute is the equivalent of four days of U.S. trade with Canada or the EU. So, why is the dispute settlement system important? The dispute settlement system gives parties the ability to have their day in court and allows grievances to be addressed. The trading system would not work as well as it does if there were no mechanism to deal with disputes when they arise. The existing system is generally sensible and necessary.

2. The patient is fine, but just needs rest.

The diagnosis is that there are some cases where there is non-compliance, but the problems are exaggerated. It is true that a number of WTO Members, including the United States, are not implementing adverse decisions. Again, however, the claims that the WTO is threatened by such non-compliance also are exaggerated. The WTO is not like a U.S. court; Members do not have to comply with its decisions. If a Member does not comply with a WTO decision, other Members have to be satisfied with the retaliation options available to them as a last resort. Another problem the WTO dispute settlement system faces is that the system has been flooded with large and small disputes, and countries are sending cases to dispute settlement that can really only be resolved through negotiation.

3. Finally, take two aspirins and call me in the morning.

Prescriptions for progress: (1) Better mediation in the process. The WTO process is more litigious, and while it is good to have a judicial body in the WTO, we need more options for resolving disputes through settlement. (2) More ministerial fixes. We need a more nimble process for revisiting complex questions that are not answered in the agreements.

QUESTIONS AND ANSWERS

1. One member of the audience asked whether the panelists believe there is a tension between making the WTO dispute settlement system more transparent and facilitating resolution of disputes through settlement.

Mr. Shapiro noted that transparency cannot hurt the system. He stated that the biggest mistake was closing the proceedings because it made them seem much more interesting than they really are. Opening proceedings demystifies the process, which is a step in the right direction.

2. Another member of the audience inquired about misapplication of the Vienna Convention, and how the issue will affect current and future negotiations. For example, could it minimize ambition in the services negotiations?

Mr. Shoyer stated that this should not impede negotiations but might motivate certain negotiators to create more legislative history as part of the negotiations, including, for example, definitions of terms.

3. A member of the audience pointed out that there is no statute of limitations in the WTO agreements, which raises problems regarding evidentiary support and refunds of duties.

Mr. Shoyer stated that, first, at least in the trade remedies area, there is an administrative record, which provides information for evidentiary support. Second, the need for evidentiary proof acts as a natural statute of limitations. Mr. Shapiro raised the *Foreign Sales Corporation* case as an example of a very old case, noting that old cases also present the issues of a lack of need for standing and injury.

4. Finally, a member of the audience noted that most WTO panelists are diplomats rather than lawyers, and asked whether this creates excess work for the Appellate Body in dealing with people who are not jurists.

Mr. Shoyer noted that although the United States pushed in the negotiations to require attorneys as panelists, most of the other countries preferred the flexibility to have diplomats serve as panelists. Mr. Shoyer added that the diplomats do a great job of stepping into the shoes of lawyers; they take a close look at the details and handle the cases thoroughly.

V. WTO DISPUTE SETTLEMENT, PART IV

In this segment, panelists assessed several key questions: (1) Have WTO panels overstepped their mandate in the WTO Dispute Settlement Understanding? (2) Has the launch of a new WTO Round relieved any of the pressures on the dispute settlement system? (3) What, if anything, could or should be done to clarify the scope of dispute settlement as part of interim institutional reforms of the WTO or in a new multilateral round? (4) Would greater transparency strengthen WTO legitimacy?

Moderator: Honorable Susan G. Esserman, Steptoe & Johnson, Former Deputy U.S. Trade Representative

The focus of this session is whether the WTO dispute settlement system is working to preserve the rules-based nature of the international trading system, and if so, whether that is a good thing.

Panelist: John Greenwald, WilmerHale

John Greenwald suggested that some propositions should be tested. First, it may be that the WTO is working as intended, but is this really a good thing? Are the WTO Members getting what they bargained for with respect to the way the panels and Appellate Body are reviewing the cases? For most countries, the answer is probably yes. WTO panels are probably pro-plaintiff, but so is the Department of Commerce.

Mr. Greenwald stated that, as Andrew Shoyer previously noted, the WTO system has resulted in the judicialization of disputes, where proof is required. Mr. Greenwald questioned whether this is really what we want. For lawyers, judicialization of the process is great. But if the objective is to restore balance and long-term viability to the flow of trade, what is needed is the resolution of larger issues. Because proof is required, we have transformed a system that previously depended on politics and diplomacy as mechanisms to work through complex issues into a system where the burden is on lawyers to make their cases. Mr. Greenwald stated that we should question whether this is counterproductive.

Finally, one of the arts of negotiation is ambiguity. This is a key method for reaching agreements. However, having a system of review in the WTO makes it almost impossible for the negotiators to agree to ambiguous language. This system invites the law to intrude on the politics of negotiation.

Panelist: Professor William Davey, University of Illinois College of Law, Former WTO Director of Legal Affairs Division

Is the WTO dispute settlement system a good thing? Yes, clearly. It is necessary and useful to have a rules-based system for resolving disputes.

It is important to focus on how the WTO dispute settlement has worked to date. Although today's panels have focused on the disputes, most cases have been resolved before ever getting through the panel and Appellate Body process. In fact, the formalized, judicialized process motivates Members to resolve their disputes. In some cases, just a threat of litigation leads to settlement. Therefore, the effect of WTO dispute settlement is more than just the reported cases.

For the most part, cases have been implemented successfully. The United States is the primary problem with respect to implementation, but that is probably temporary and may change as U.S. antidumping laws are brought further into compliance with the WTO agreements.

The WTO dispute settlement system is not a cure-all; the rules do not address all problems (such as Chinese currency issues).

The dispute settlement system also may impede resolution of some issues because countries cannot take unilateral actions. But on balance, this is not a big impact. It is more important, and in the best interest of the United States, to have a rules-based system in the long run.

Professor Davey agreed with Mr. Greenwald that the inability to have ambiguity in agreements may make reaching an agreement more difficult for negotiators because those agreements form the basis of cases in the dispute settlement system. But, there is some indication that the Appellate Body is willing to rely on dictionary definitions, making this less of a problem than it may otherwise appear.

Regarding the question of whether the Appellate Body has been misinterpreting the WTO agreements, Professor Davey stated that in most areas, the answer is probably no. The only questionable area is with regard to safeguards. However, in the long run, Professor Davey believes concerns in this area will be worked out. Finally, he noted that he agrees that transparency would demystify the WTO dispute settlement process, though it probably would not be a cure-all because there will always be those who oppose the WTO.

QUESTIONS AND ANSWERS

1. A member of the audience asked John Greenwald whether the fact that the WTO dispute settlement process is binding is really an impediment to resolving complex disputes.

Mr. Greenwald responded that binding dispute settlement as an idea is not a big deal as long as the losing party accepts retaliation as its primary option. The problem with binding dispute settlement is that the dispute settlement process

removes the ability to take unilateral action where such action is the best method for resolving the dispute.

2. In response to Mr. Greenwald's comment, another member of the audience asked if the WTO actually interferes with countries' leverage, given that Members can choose to ignore WTO requirements, go through the dispute settlement process, and then fail to comply with the panel or Appellate Body's decision. In other words, countries have leverage because they can simply fail to follow the rules if they need to do so to negotiate change.

Mr. Greenwald responded that countries can simply ignore WTO rules and play the system. However, the real problem involves systemic issues where the answer is not in dispute settlement. Instead, the answer lies in how the overall system works; Members must be able to make serious threats regarding the larger issues. WTO panels remove the negotiating power of the Members. For example, broader issues such as currency, cannot be addressed on a piecemeal basis; Members must be able to press these larger issues without worrying about a country simply saying, "Take me to the WTO."

Ms. Esserman responded that the real problem may not be dispute settlement, but instead that there is no group of members acting in concert on issues. Mr. Greenwald responded that this is partly a function of the fact that the system has moved from the GATT system to the WTO system, which is based more centrally on dispute settlement.

3. A member of the audience posed the following question to Professor Davey: As a strong supporter of the system, do you believe that WTO panelists and Appellate Body judges are exceeding their mandates, and where this has occurred, can this be changed? Or is this the mission of the WTO panels and the Appellate Body?

In response, Professor Davey noted that while the panels and Appellate Body do get some answers wrong, that is the nature of the judicial system, and it is rare that the panelists actually exceed their authority or mandate. There are problems with the system (for example, there is no legislative method for dealing with issues). But, this relates more to improving the political decision-making in the process.

Mr. Greenwald also responded by stating that there is, by definition, a bias in the system, because the mandate of the WTO is to favor free trade. To say that there is no bias is comparable to saying that the Department of Commerce officials lack bias in their mission to carry out the U.S. trade remedy laws, which is obviously not the case. Both entities have a mission and that is reflected in their decisions. Mr. Greenwald noted that, for example, the mission of the Agriculture and Subsidies and Countervailing Measures (SCM) Agreements is to tighten subsidies; this type of mandate leads to judicial activism. Mr. Greenwald stated that he believes this is true with regard to both the panels and the Appellate Body.

The role of the institution is to promote free trade, and this leads to activism in decisions, rather than neutral interpretation.

Professor Davey noted that the people who are involved in trade remedies panels are those who regularly administer the trade remedies laws, and therefore, it is hard to believe there is such a clear bias.

4. Finally, a member of the audience asked if the WTO dispute settlement system would be improved if panelists did not have to issue unanimous decisions, and whether that would lend better credibility to the system.

Mr. Greenwald responded that it would be a very good thing if there were dissenting opinions. To assume that all panelists agree precisely in all cases is not realistic, and as a result, decisions are watered down. It is important that panels express the fact that there can be more than one permissible interpretation, and concurring opinions are a result of that. Professor Davey pointed out that there have actually been a few dissenting and concurring opinions recently, so this is not a significant problem. Ms. Esserman noted that unanimity in decisions was useful in the developing stages of the WTO, but now, after ten years of existence, it is useful to have more thorough, broader views from the panelists.

VI. AGRICULTURE: PROVERBIAL LYNCHPIN, PROVERBIAL STUMBLING BLOCK

In this segment, panelists addressed all three dimensions of the negotiations—domestic supports, market access, and export subsidies—and the following key questions: (1) What's needed for success in Hong Kong? For completion of the DDA? (2) What are the perspectives and priorities of the key players—e.g., the United States, EU, G-20?

Moderator: Joseph O'Mara, O'Mara and Associates, and Former U.S. Department of Agriculture Trade Negotiator

Panelist: Nikolaos Zaimis, Trade Counselor, Delegation of the European Commission to the United States

Mr. Zaimis reviewed the European Union (EU) Common Agricultural Policy (CAP), emphasizing its central role in European integration and recovery of food security after World War II, and outlined successive reforms. He pointed out that the reduction of agricultural subsidies has decreased from 62% of the EU budget and 0.67% of total gross domestic product (GDP) in 1988 to 37% of the budget and 0.43% of total GDP this year, and predicted a greater reduction once CAP reforms are completed. He outlined the new challenges faced by European agricultural policy, including increased consumer concern about food quality issues, the accession of new EU members, the financial strain on the CAP, and increased globalization and trade liberalization. The most recent reforms, in 2003-2004, delinked subsidies from production, which makes it possible to phase EU subsidies into the green box of non-trade-distorting subsidies. Mr. Zaimis discussed the EU's contribution to the development goal of the round through the Everything But Arms (EBA) Initiative, which allows all products, including sensitive agricultural products such as sugar and milk, to be imported tariff and quota free from EBA beneficiaries, and through EU proposals made possible by CAP reforms, such as putting all export subsidies on the table for negotiation. It will now be possible for the EU to change from a net exporter to a net importer of some products. On market access, Mr. Zaimis said the EU is as engaged as any Member in the search for the best formula for cutting tariffs. Mr. Zaimis emphasized the importance of geographical indications of products (such as the name "champagne") in the negotiations.

Panelist: Evandro Didonet, Minister-Counselor, Deputy Chief of Mission of Brazil to the United States

Mr. Didonet emphasized that Brazil wants to avoid a repeat of Uruguay Round outcomes, where developing countries made important concessions, yet achieved disappointing results in agriculture. He argued that there must be an indication of potential achievements in agriculture before developing countries make the contributions in non-agricultural market access and services, which will be necessary for the round to move forward. Mr. Didonet noted that although the negotiations are moving more slowly than expected, all the regions remain engaged and are negotiating in good faith. He highlighted the G-20 leadership in presenting pragmatic proposals on domestic support and market access and said that Brazil wants a high level of ambition across the board. He pointed out that some estimates show that a cut of less than 55% on some categories of subsidies would not lead to actual reductions in levels of spending, and emphasized that such reductions, or box-shifting of subsidies, should be avoided. Mr. Didonet expressed Brazil's appreciation of the U.S. intention to address the subsidy issue, and pointed out that Brazil and the United States have a common interest in increasing market access in key emerging markets. He praised the EU's decision to eliminate export subsidies, but advocated a shorter phase-out of five years. Finally, he pointed out that Brazil's commitment on agriculture is consistent with its domestic policies of an average applied tariff of 10% and a maximum applied tariff of 20%, and producer support estimated by the Organization for Economic Cooperation and Development (OECD) at 3%.

Panelist: James Grueff, Former Assistant Deputy Administrator for International Trade, U.S. Department of Agriculture Foreign Agricultural Service

Mr. Grueff recognized the EU's elimination of export subsidies, but asserted that CAP reform was necessary but not sufficient to move Doha forward. He encouraged the EU to progress on market access and lead the way for developing countries to do so. Mr. Grueff recognized the developing country argument that subsidy cuts are necessary for them to open their markets, but encouraged them to find an acceptable compromise level of real market access for U.S. products. He discussed the challenges of export credits and food aid, but emphasized that domestic support is the key to agricultural negotiations, and urged the EU and other critics of the new blue box developed by the United States to work to develop another way of politically managing the reduction of domestic support. Mr. Grueff recognized Brazil as the leader of the G-20 and of developing countries in the negotiations. He recommended that Brazil monitor the political situation in the United States to avoid overloading the political capacity to manage

agricultural reform and to provide leadership in proactively increasing developing country market access.

QUESTIONS AND ANSWERS

1. The moderator asked the panelists and audience for comments on the alternative to an agreement on agriculture modalities in Hong Kong.

James Grueff expressed the need to lower expectations for Hong Kong, but to develop a detailed work plan and real timelines for 2006, since the world perceives the expiration of the U.S. trade promotion authority as a deadline. Mr. Zaimis stressed the importance of negotiations in other sectors for progress at Hong Kong and criticized the media portrayal of the WTO negotiations as a U.S.-EU discussion, emphasizing the importance of the G-20, emerging economies like Brazil and India, and the potential of South-South trade liberalization.

2. One audience member commented on the need for more focus on the U.S. marketing loan program; he also pointed out that U.S. farmers need an agreement at Hong Kong more than European farmers, who would accept a continuation of the status quo because the reformed CAP insulates them from further disputes, which is not the case for the United States.

Mr. Grueff responded that reducing marketing loan rates and switching to decoupled support is meaningful, and cautioned against the idea that complete elimination of the marketing loan was the only meaningful reform.

3. An audience member from an organization representing spirits producers commented that the most potential benefit for these producers is in access to middle income developing country markets; he expressed his concern about the use of bound rather than applied tariff rates, and a linear rather than Swiss formula cut, pointing out that the final tariff rates may still be very high for developing countries, resulting in no meaningful market access increase in return for developed country concessions.

Mr. Didonet pointed out that the markets of Brazil and other G-20 countries that are aggressive on market access are already very open, while countries like India are more cautious because of understandable concerns about the defensive interests of large numbers of small farmers. Mr. Grueff responded that the use of bound tariffs and a linear cut were issues that the United States opposed, but it lost on these issues. He also called for more leadership from Brazil and other developing countries to increase market access.

4. A representative of Reuters asked why it would not be possible to achieve modalities by Hong Kong, and how realistic it is to finish the Doha round by 2007.

Mr. Grueff responded that next year, the political pressure will likely intensify, allowing the negotiations to solidify and produce modalities. Mr. Zaimis agreed, suggesting that after Seattle and Cancun, there was impatience for Hong Kong and fear of a failure in negotiations; he predicted that there will be some agreement at Hong Kong. Mr. Didonet pointed out that Brazil feels a great deal of responsibility to make progress rather than accept the status quo, and will continue its efforts in 2006 even if modalities are not achieved at Hong Kong.

VII. AGRICULTURE: THE HILL PERSPECTIVE

In this segment, senior Hill staff commented on the preceding discussion.

Panelist: Mark Halverson, Senate Committee on Agriculture, Nutrition & Forestry, Washington, D.C.

Mr. Halverson began by noting the importance of agriculture in the Doha Round. He noted that a trade agreement will not pass in Congress unless agriculture is relatively satisfied. This is particularly true, considering the makeup of Congress, with so many members representing agricultural states and districts. However, this does not necessarily mean that agriculture has absolute veto power. It is hard to make any real assessment as to what the situation might be a couple of years from now, because attitudes can change, and a lot of considerations come into play for the approval of any trade agreement. Another factor to keep in mind is the relative strength of the Administration to argue for a particular deal. The political climate is certainly not the same that it was at the time leading to the Uruguay Round vote or soon thereafter. The Uruguay Round was very focused on agriculture and on the benefits of opening markets; the United States had to make some concessions in terms of actual reductions in domestic programs. There is currently much more skepticism in the U.S. farm community, and the climate seems to indicate that the United States now has to make more concessions, at least in terms of market access. Several U.S. farm programs are currently being criticized. There is more sensitivity now about the balance of agriculture exports versus imports, other sensitive industries that require protection, and particular commodities that are more at risk.

Mr. Halverson believes that there are a couple ways to look at the WTO *Cotton* case that Brazil recently won against the United States. The case is a strong indication and expectation that the United States now has to come in line with the WTO ruling. Some reform is now going to be necessary. By and large, there is truth to most of this. At the same time, though, the U.S. Congress has not moved quickly, and the Administration has not been pushing very hard to meet the WTO deadlines. Mr. Halverson believes that there is a need from the agriculture community and members of Congress to maintain some reasonably adequate program.

Mr. Halverson noted that the dynamics have changed considerably from the Uruguay Round as well. During the Uruguay Round, it was more a matter of the United States and the EU deciding what would be a basis for an agreement. This time around, the developing countries are making a much stronger case, which appears to have gained some legitimacy. However, such developing countries will also have to make concessions in terms of market access.

On food aid, the argument is whether the United States should convert what is now in-kind aid to cash. Under current policy, the United States ships

commodities as food aid, either for emergency food relief purposes or development assistance. The Europeans have been critical of this approach, arguing that it should be converted into cash assistance rather than provided as in-kind assistance. The United States finds this approach problematic. Cash grants may not be the best way to maintain the integrity of the food aid program, since it greatly increases the risk of diversion of the money for other purposes, as opposed to getting the aid to where it can actually be helpful to needy people.

Mr. Halverson feels that there is room for changes in U.S. domestic policy but that there is a real political need to maintain some sort of reasonable system in the United States. There are definitely some benefits for the United States from trade agreements, and if there is sufficient progress on agriculture market access, it would lead Congress to a broader consideration of potential reforms. One of the changes that is being discussed is to put relatively more money into conservation incentives—the so-called green payments—such as world economic development, investments in research, or other infrastructures that are all permissible under the WTO framework. The EU has made some moves in that direction, as it provides a much higher level of support and payments to farmers. This will be the basis to find some common ground in the negotiations.

Panelist: William O'Connor, House Committee on Agriculture, Majority Staff Director

The situation has changed even more perhaps in the House than in the Senate. We have had rapid turnover of the Agriculture Committee throughout the years. We have changed from 15% to 25% of our Committee members every time there is an election, and after every election, the Committee becomes less and less pro-trade agreement, and more and more skeptical of the advantages of the trade agreements. The new members come with the notion that everything negative that has happened in their home states, such as factory closings or layoffs, is a consequence of trade agreements. But, whenever their state has been able to sell their export products abroad, then this is due to brilliant management, not the U.S. government. This is the type of outlook that people are bringing to the House. So there is less and less support for the idea that trade agreements are the solution to people's problems. When the Uruguay Round was completed, nearly the entire House was supportive of the Agreement, and members were enthusiastically trying to convince other members to vote for it. However, this will not be the case for the next agreement that needs implementation. Probably half of the members will oppose the agreement and some will try to stop others from voting for the implementation. Trade agreements routinely pass now by only one or two votes after months of debates and negotiations. For example, in CAFTA [Central America Free Trade Agreement], there were very few downsides—it was a very beneficial and straightforward agreement—but it was

still very difficult for the Agriculture Committee to support it. Mr. O'Connor thinks that the Administration is aware of this situation, and that they are going to try very hard to bring in an agreement that agriculture can support. But, that is going to be a difficult task.

What happened in the Brazilian *Cotton* case was a very big shock for the Committee. The Committee is going to be much more careful regarding the rules in new agreements and the potential for future litigation, than it was in the Uruguay Round.

Panelist: Kevin Studer, Office of Senator Chuck Grassley

Mr. Stuart started by saying that he would provide the perspective of Senator Grassley on agriculture. Hurricanes Katrina and Rita led to record prices on diesel and energy, and grains got backed up from the river. In sum, farmers in Iowa have been squeezed. He invited specific questions from the audience.

QUESTIONS AND ANSWERS

1. Can you comment on the reaction back home after the negotiation of the agreement?

Mr. O'Connor: Our Congress is going to want to assist the citizens of this country. Congress would not be very comfortable if some of the current proposals became the framework for the Doha agreement.

Mr. Halverson: The reaction to a trade agreement becomes particularly difficult when you are trying to put side by side the different concessions and opportunities on both sides of the table.

2. Is there going to be as much money available for farm programs in the future as in recent years to offset some of the pain?

Mr. O'Connor: To some degree, yes. We have been through a cycle after the 1996 Farm Bill, and now it has flipped around. You cannot really predict how this dynamic is going to be in the future with regard to federal spending. Congress is obviously going to be a little more hesitant. However, even in a cautious budgetary environment, agriculture can get more money if the situation is right. There are certainly cuts currently in place.

3. How concerned are you that the agriculture safeguard and the sanitary and phytosanitary standards (SPS) might undermine whatever deal we do get on market access?

Mr. O'Connor: As it is right now, if we were to sign an agreement tomorrow, our five major sources of exports—corn, soybeans, beef, poultry, and pork—may be facing major SPS problems. So, if there were a deal where the

United States had negotiated improvements in market access to overseas markets, but we could not export anything because of SPS barriers, then there would be a major problem.

Mr. Halverson: I agree, and that is exactly why there is so much skepticism in the agriculture community.

4. What is your sense of the percentage of the agriculture community that is comfortable with the status quo of the agreements?

Mr. O'Connor: Unless they are convinced that litigation will cost them their programs, I would guess about 85%. Their leadership is much more focused on the national and international aspects of an agreement and on the advantages of trade, but they are not as pushy as before.

5. Can you create a non-trade-distorting agricultural program?

Mr. O'Connor: I don't think so. However, a lot has to do with definitions (for example, "What is non-trade-distorting?" or "What is a green box?"), time frames, and the nature of the changes.

6. To what extent is preferential treatment in a WTO Agriculture Agreement an acceptable option, and if so, to what countries would it apply to?

Mr. O'Connor: It depends on the country. If you are talking about the poorest of the poor, you can think about providing development assistance. But when you are talking about countries that are merely trying to certify their country as "developing" in order to earn a competitive advantage and escape any WTO commitments, then it should not be allowed. Countries can also be divided by sector for these purposes, particularly for those developing countries that are very developed and competitive in certain agriculture sectors.

VIII. NON-AGRICULTURAL MARKET ACCESS (NAMA)

This segment assessed the status and key challenges to a successful completion of "non-agricultural market access" (NAMA). Particular issues considered were the status of "modalities" for reducing tariff rates and addressing non-tariff barriers.

Moderator: Mike Castellano, Counsel and Senior Policy Advisor, Office of Democratic Leader

Mr. Castellano introduced the panelists.

Panelist: Bill Lane, Washington Director, Caterpillar, Inc.

Mr. Lane noted that he has been with Caterpiller (CAT) for thirty years, with twenty years of that time focused on trade. He has worked on a variety of trade issues. However, by far, the most important event during his twenty years of experience was the GATT Uruguay Round. Mr. Lane noted that the United States was able to get tariff elimination for CAT machines in about twenty large OECD countries. This complete duty elimination in large countries was a major accomplishment. The United States also achieved establishment of better trade rules and ended up with a significant global "tax cut." Mr. Lane noted that part of the economic expansion of the 1990s was the result of a global "tax cut."

Mr. Lane stressed that working through this WTO round of negotiations is not easy, but neither was the Uruguay Round—it was tough to keep people focused. He believes that what the United States will do with Doha and getting it through Congress over the next couple of years will be one of the most important things that will be done on the issue of trade liberalization. This is a big deal that should be taken very seriously right now.

There is much discussion about agriculture—so much you would think this was an agriculture round. However, agriculture represents only 10% of total trade, while manufactured goods account for 75% of trade. Yet, strangely enough, manufactured trade is called "non-agriculture market access" in talks.

It will take an agricultural agreement to get an overall WTO Doha Round agreement. But it will take a great manufacturing agreement to *sell* the Doha results. This is important. When you cut through everything, we will be talking about market access and tariffs for manufactured goods.

Caterpillar is also pioneering an initiative regarding remanufactured goods. It is common practice around the world to ban used products or make it difficult to use and sell them. But there has been great movement from some countries who remanufacture used products. Caterpillar would like to see market access for these goods. There is less waste, in that products are not thrown away

as readily, and the remanufactured goods come with new warranties. Remanufactured goods are good for customers and business. It is the perfect issue to show that freer trade is good for the environment.

Mr. Lane highlighted two main points:

1. We need to start challenging the terms used with regard to trade (for example, "NAMA," the "Doha Round," "Swiss Formula," and "coefficients"). We need to put these in plain terms. We have also talked about the notion of a "free rider"—a country that does not take advantage of its opportunity to open its markets. But this is not the right name—"free riding" is *bad* for the countries, and we need to emphasize this. Now is the time to make the changes that will be needed to make developing countries competitive, and this cannot be done by "free riding."

2. We need to understand and talk about the importance of imports. We consistently emphasize the importance of exports, but we rarely talk about the importance of imports. Consumers always benefit from imports. For example, since the U.S.-Chile free trade agreement took effect, Caterpillar's exports to Chile have more than doubled. In fact, Chile is now Caterpillar's fifth largest export market. But this is not the only benefit. Now, we also get fresh grapes in the winter and crushed grapes year-round. This is because of trade liberalization.

Panelist: Meredith Broadbent, Assistant USTR for Industry, Market Access and Telecommunications

Ms. Broadbent provided a status update on the NAMA negotiations. She made the following points:

A key factor in the negotiations is that members of Congress focus on saved duties on U.S. exports. This is a good common goal for all Americans. Unfortunately, in the NAMA negotiations, the WTO Members are in a bit of a deadlock. The U.S. goal is to obtain further market access into developed and developing countries, which means that there is a need to cut into "applied" rates. Normally there is a big gap between "bound" and "applied" rates, and many developing countries are insisting that we negotiate only about bound rates—not applied rates. We need a formula that is aggressive enough to actually cut into the applied rates, so that we have something to write home to Congress about once we have reached an agreement.

NAMA is a big deal for the U.S. economy. Manufactured goods represent 62% of U.S. exports—eleven times the size of agricultural exports—and NAMA exports are growing five times as fast as agriculture.

Overall, we have a framework that was agreed to in July 2004. First, we agreed that Members will use a formula. The United States is advocating the Swiss Formula, which cuts high tariffs more than lower tariffs in order to

harmonize market access and address some of the very high tariffs around the developing world. Second, we are determined to engage in sector negotiations, particularly for highly traded sectors such as chemicals, capital goods, electronics, and medical equipment. Our model is the Information Technology Agreement, which was concluded in 1986 and brought duties on information technology products to zero for 95% of traders in that market. We refer to this as a critical mass, where countries agree to eliminate tariffs in a sector if they participate; they will take on the small percentage of the sector that will not participate in the liberalization.

Finally, we need to reduce non-tariff barriers to ensure tariff reductions are not eroded by other regulatory and logistical obstacles. The playing field is a bit out of sync for the United States. U.S. tariffs are already the lowest in the world. The United States imposes tariffs of about 3% on average (simple average), compared with the WTO allowed average of about 30% for foreign countries.

More than half of U.S. goods are exported to countries where the United States does not have free trade agreements. These trade negotiations provide an efficient way to secure a huge amount of economic activity and growth. Developing countries account for about 71% of all duties assessed on U.S. exports of manufactured goods. These developing countries need to participate in this round.

In addition, as the President recently emphasized in his U.N. speech, further trade liberalization will have positive and substantial impacts on alleviating global poverty. It is expected that further liberalization will lead to a reduction in world poverty by 25%. It is estimated that the liberalization resulting from this round will lift 500 million people out of poverty and inject $200 million annually into developing countries. We need to find more ways to spark economic growth internationally.

Non-tariff barriers are an important area for NAMA, and we are looking for ways to solve industry-specific problems in the negotiations. For example, the United States is working on issues regarding wood products and autos, in order to deal with problems in areas such as customs procedures, licensing, etc. As Mr. Lane mentioned, the remanufacturing initiative is new, and this is the type of private sector work that must happen in order for the negotiations to work. We will have success in areas where the private sector has taken the lead to carry on a discussion with industry and to look for solutions.

The status in Geneva is basically a deadlock. India and Brazil are engaging in a brinksman-like approach, offering no flexibility. Brazil's approach would preserve very high tariffs for the developing world, while cutting U.S. tariff levels to the bone. This is not a productive discussion and is not where we want to go in this negotiation. If the United States is going to build enough constituencies for an agriculture coalition, there must be some real benefit for the United States as well. That is necessary for the United States to make changes in its domestic

programs. Formulas that yield no market access make it very difficult for the United States to make changes.

In sum, NAMA will be the engine that will pull this negotiation through the political process, because the goal is to achieve measurable results and tariff savings. The United States will need cooperation from its counterparts, and we hope that the linkage to agriculture negotiations will not drag out so long that we will not have time to work out the details. There are 8,000 tariff lines in major markets—that is a very labor-intensive process that takes time, and it cannot be done in the last month of negotiations. This is a point of caution.

Panelist: John Magnus, TradeWinds, LLC

Mr. Magnus discussed the prospects for advancing disciplines regarding non-tariff barriers (NTBs).

However, as an initial matter, Mr. Magnus noted that there are many questions regarding market access and tariff reductions, so he began with some discussion of those issues. Mr. Magnus noted that each stage of negotiations for market access is more difficult than the last one. Using a football analogy, Mr. Magnus noted that with a 3% average tariff rate, the United States is backed against its goal line, while on offense the United States cannot seem to get anywhere near the opposing team's end zone because the other teams are much more effective. They have an average 30% bound rate—this is not anywhere near the United States' end zone.

Mr. Magnus then discussed five main points:

1. No one is questioning the commercial and policy significance of NTBs, or the need to address NTBs in that Round. Both the Doha mandate and the July 2004 framework identified the importance and the requirement to move forward on these issues in the Round.

2. The Chair of the negotiating group has regularly and dutifully included the issue of NTBs in its reports. That said, they have not been reporting very much. After Cancun, it was reported that work was at its "initial stage." Up to now, there have been two reports in which the negotiating group announced that proposals have been considered and examined. However, there is a long way to go just to plan for the negotiations, and then the actual negotiations have to take place.

3. NTBs encompass a wide variety of constraints on the movement of goods and capital. This makes it difficult to devise a negotiating approach. One congressional letter from 2003 listed examples of NTBs, including government-tolerated cartels, limited access to finance and distribution channels, investment requirements, customs procedures, currency manipulations, prohibitive taxes and

fees, and technology transfer requirements. Some items are being negotiated elsewhere in the Round; still other items will not be reopened for this Round; while other items have decidedly been left as-is (for example, competition policy).

The overview published by the WTO Secretariat more systematically identifies the categories of NTBs. The range of non-tariff barriers is extensive. NTBs are like Broadway Avenue in New York City—the avenue intersects everything. This includes agriculture. Therefore, any approach must be squared with all of the negotiating mandates. If we wanted to address all NTBs, that would require the reopening of many negotiations. For example, one could argue that excessive use of safeguards is a barrier to trade, but the Members have explicitly decided not to reopen safeguards discussions.

In other words, if NAMA tries to be everything, it will be nothing. The challenge is to find boundaries and a strategy that will make a difference but will not overwhelm the negotiations.

4. The United States does have an affirmative agenda regarding NTBs. However, from the perspective of those outside the negotiating tables, the strategy for making reforms on NTBs is becoming less clear. But that is often the case from the outside. There is a reverse notification process in which the United States has identified a number of areas to be addressed, including sector-specific or other NTBs, and procedural approaches such as rulemaking, request/offer, plurilateral NTB agreements built on positive commitments, etc. What is not as clear is where the leverage comes from. Sectoral proposals (for example, automotive and wood products) appear to be good for everyone. But it is inevitable that there will be some NTBs that we will have to pay for, and the question is, "how?" The trading stock that the United States has is in high demand. Certain sectors have leverage (for example, automotive, farm subsidies, etc.), but they are concerned they will lose it with formula cuts that have no connection to the reduction of NTBs.

5. Finally, part of what has to occur is a further clarification of the negotiating mandate. The mandate itself is still confused in certain ways. Sparring over modalities is, in part, a dispute over the negotiating mandate, which is one reason this has been so difficult to conclude. We need to keep the NAMA issues front-and-center and provide a method for maintaining leverage that can be used in the negotiations.

IX. SERVICES

This segment addressed what is needed in the services negotiations in order to declare success in Hong Kong, and posed the following questions: (1) What can be done to raise the priority of services negotiations in the WTO? (2) To what extent can or should visas for business personnel and other immigration issues be addressed in the negotiations? (3) Can the Doha Round produce meaningful commitments on services without addressing the visa/immigration issue?

Moderator: Everett Eisenstatt, Senate Finance Committee

Mr. Eisenstatt opened the panel presentation with an impressive statistic: If trade in services were liberalized, the world economy could expect a $1.4 trillion income gain. With so much to gain as of September 2005, however, the Doha Round services negotiations are reportedly in "crisis."

Panelist: Demetrios Marantis, Senate Finance Committee

Mr. Marantis stated that in 2004, the United States had a $48 billion trade surplus in services and noted that services account for 87 million U.S. jobs. The service sector accounts for approximately 75% of the U.S. economy. Despite the importance of the services sector to the U.S. economy, the services negotiations, which started in 2000, are further behind than other Doha Round negotiations (e.g., NAMA and agriculture). Mr. Marantis also noted that if the WTO Members would merely bind themselves to their current services trading practices, such an agreement would represent significant progress over the Uruguay Round.

The services trade negotiations revolve around modes of services trade, namely, the following four modes: Mode 1 – cross-border trade (e.g., via phone or internet transactions); Mode 2 – consumption abroad (e.g., tourism, students, hospitals); Mode 3 – commercial presence (e.g., establishing a branch or subsidiary to provide services); and Mode 4 – temporary transfer of personnel. The temporary transfer of personnel (Mode 4) is the most controversial for the United States and, according to Mr. Marantis, has become an excuse for the United States to stall progress in the talks. Mr. Marantis suggested that the U.S. business community needs to get more involved and explain why Mode 4 is important to them in order to move the negotiation forward.

Panelist: Dr. V.S. Sheshadri, Embassy of India

Dr. Sheshadri noted that for India, services represent approximately 52% of the economy. He agreed that Mode 4 represents the largest challenge in the services negotiations. He also noted that productive dialogue is difficult without a clear statement of the issues. India is one of the few WTO Members to clearly articulate their issues with respect to Mode 4 and explain why the United States' offer on Mode 4 is insufficient. India's proposal does not view Mode 4 as an immigration issue; rather, it is the temporary movement of contract service suppliers and professionals, who cross borders to perform a specific task for a defined, short period of time.

Panelist: Lionel Johnson, Citigroup

Mr. Johnson noted that there is a lack of political will regarding services. He added that while the Hong Kong Ministerial may be a critical turning point, it is not a "crisis." He agreed with Mr. Marantis that the private sector needs to engage more in order to move the services negotiations along, and it needs to make the political case for doing so. Mr. Johnson also added that discussions regarding investment services are virtually non-existent.

QUESTIONS AND ANSWERS

1. In response to the question of whether Mode 4 is the deal-breaker for the services negotiation, Mr. Marantis answered that the U.S. proposal on Mode 4 is good for most areas except contractual services. Mr. Eisenstatt added that in the wake of the Chile and Singapore free trade agreements, the Judiciary Committee has made it clear that U.S. negotiators are not to put immigration on the table in trade agreements. He reiterated the need for the U.S. business community to become more proactive. Mr. Johnson added that because Citigroup has 300,000 employees worldwide, approximately half of whom are non-U.S. citizens, a better system for allowing non-U.S. citizen employees to travel to the United States for work purposes is necessary.

2. As to which Modes the United States has the greatest interest in negotiating, Mr. Marantis responded that Mode 1 (cross-border trade) and Mode 3 (commercial presence) hold the most interest.

3. Regarding the comment that non-governmental organizations view the negotiations as a threat to public services, Dr. Sheshedri agreed that this issue should be taken seriously. Mr. Eisenstatt added that the United States has tried to make it clear in its offer that public services are not on the table.

4. When asked how negotiators might be able to get the services negotiations back on track, Mr. Marantis reiterated that simply memorializing current practice in a binding agreement would be better than the commitments made during the Uruguay Round, and added that political will is necessary to get the U.S. Trade Representative to focus more on services and less on NAMA and agriculture. Mr. Johnson responded that it falls on the private sector to lobby in the United States as well as internationally to educate employees and national governments regarding the importance of liberalizing services.

X. ROUNDTABLE DIALOGUE OF FORMER SENIOR TRADE OFFICIALS

This segment brought together former senior officials for a focused discussion of the most important WTO issues to be resolved before the end of 2006.

Moderator: Professor John H. Jackson, Georgetown University Law Center, Washington, D.C.

Panelist: Honorable Mickey Kantor, Former U.S. Trade Representative

Mr. Kantor commented that the Doha Round has experienced a perceptible slowdown due to disagreements in agriculture, which is always a difficult issue, as well as services and non-agricultural market access (NAMA); there are divisions both between developed and developing countries, and between the United States and the European Union on these issues. WTO Members face a choice between a far-reaching Doha Round on the scale of the Uruguay Round, or a less ambitious round with lowered expectations; he cautioned strongly against abandoning the round altogether, because of potential negative effects on the world economy. Mr. Kantor warned that raised expectations for the ministerial itself would be a mistake, because such a large meeting of trade ministers is unlikely to make momentous accomplishments. Mr. Kantor argued that key leaders from the United States, Europe, Japan, Brazil, and other developing countries such as India and South Africa had to take a leadership role, or else even finishing the Doha Round could be challenging; he pointed out that the involvement of heads of government was necessary to complete the Uruguay Round. In response to a question from the moderator, Mr. Kantor expressed optimism about the new leaders of negotiating teams and the WTO, because this could enable greater flexibility and progress beyond previous points of contention in the negotiations.

Panelist: Honorable Hugo Paeman, Former Ambassador of the European Union to the United States

Mr. Paeman pointed out that the overall political context for a successful Doha Round is not strong because of: (1) the general attitude towards trade in the U.S. Congress, (2) challenges for the U.S. Administration, (3) the weak position of European governments and the defeat of the European Constitution, (4) the high expectations of developing countries in the negotiations, and (5) the lack of a strong push by the business community for the Round. He agreed with Mr. Kantor on the point that some success in the Doha Round was the only acceptable

option, not only because commitments had already been made at high levels, but also because of the need for multilateral rules in trade, and because of the problems with alternatives to multilateral liberalization such as regional free trade agreements. Mr. Paeman called for a renewed focus on the development agenda of the Round, both because of the existing commitment to a development round, and because the consensus support of developing countries is necessary to ensure conclusion of negotiations before trade promotion authority expiration. He emphasized that agriculture will have to be the core of the negotiations, with particular attention paid to the crops of cotton, sugar, and rice, and to the areas of rules and market access. Mr. Paeman agreed that dramatizing Hong Kong, and expecting the Ministerial meeting to be an instrument for major negotiation, was problematic, and suggested that some issues could be scheduled for the next Ministerial meeting in two years. He also observed that several new developments, including the selection of the new director-general, were encouraging. He suggested that improvement of the relationship between the United States and Europe, as well as agreement between the two on the direction of concessions for development, was necessary to make progress in multilateral negotiations.

Panelist: Honorable Clayton Yeutter, Former U.S. Trade Representative

Mr. Yeutter stressed that the outcome of Doha should be evaluated once it is completed, not in the middle of the Round, and encouraged business groups to engage with the negotiations, rather than writing them off. He agreed that the Ministerial itself is not the forum in which large advances can be made, and suggested that expecting too much out of the Seattle and Cancun Ministerials was what caused them to collapse. For this reason, Mr. Yuetter said that measurable advances should be prepared ahead of the Ministerial to ensure that trade ministers can hit singles in Hong Kong on all three pillars of agriculture, NAMA, and, if possible, services, and lay the foundation for continued negotiations to conclude the Round in 2006 before trade promotion authority expires. Mr. Yeutter also pointed out the importance of the role of director-general of the WTO at this stage, and suggested that Director-General Lamy must manage the process of negotiations skillfully in Geneva, visit capitals of key players, and talk with chiefs of state as well as ministers to ensure success. He suggested that the negotiations on NAMA and services have not moved as quickly as necessary, but pointed out that NAMA negotiations, because they are formula driven, are likely to make progress, while services negotiations are not likely to succeed without more attention. In agriculture, Mr. Yeutter praised the EU reform on export subsidies, and said that both developed and developing countries have to drive progress on both increased market access and domestic subsidy reduction. He encouraged developing countries not to use the development aspect of the Round as a reason to be passive on market access, and pointed out that improving market access

could improve the offers from developed countries as well as increase South-South trade.

QUESTIONS AND ANSWERS

1. The moderator asked Mr. Paeman what the effect of the referendum on the European Constitution could be on the Doha Round.

Mr. Paeman responded that the relationship is not very clear, but attributed the defeat in France to an overall fear and frustration with globalization rather than specific problems with the EU or with the WTO and Doha. He predicted that the defeat of the referendum would not cause Doha to fail.

2. An audience member asked Mr. Yeutter what he meant by the singles that should be expected from Hong Kong.

Mr. Yeutter responded that NAMA modalities with a general formula for reduction of industrial tariffs could be expected; that services proposals should be on the table with a higher level of liberalization than discussed so far; and that in agriculture, progress should be made towards ultimately moving all financial support of the rural sector into programs that are minimally trade distorting. He also pointed out that although none of the negotiators will be able to show all their cards officially, if enough trust could be built up between the trade ministers, it would be possible to make progress in their discussions that would not have to be made official until next year.

3. One audience member asked what could be the content of a focus on development, given that other panelists have expressed that a free round for developing countries would not be acceptable.

Mr. Paeman responded that heads of state and government have committed to a round that would benefit developing countries. So, developed countries should respond to developing-country requests, such as the G-20 paper on agriculture, to benefit developing countries in the areas they prioritize. Mr. Kantor suggested a zero-for-zero agreement with a core group of developing countries in order to build confidence among developing countries and make progress on agriculture. Mr. Yeutter stressed that the development round had to mean success for both developed and developing countries in order to be politically feasible. He pointed out that the creation of the G-20 was a positive development in that it increases developing countries' clout and helps to maintain pressure on the United States and the EU to make progress.

4. One audience member asked the panel to assess the existing political will for progress in the negotiations, and what conditions have to exist in order to move forward at Hong Kong.

Mr. Kantor responded that there is not enough political will, demonstrated by the lack of attention paid to Hong Kong. He suggested that the pressure of a deadline will help move negotiations forward. He also pointed out that the general public view of trade, in many countries, is negative, showing a lack of advocacy for trade within countries. Mr. Paeman pointed out that trade has become an issue of broader concern among the public and legislatures because of the effects of globalization. This creates a more diversified constituency on trade that is harder to unite, in part because of concerns about the short-term negative effects of trade on some groups. Mr. Paeman advocated that governments work towards an improvement of the WTO's transparency and communication in order to increase its effectiveness and improve its ability to deal with trade-related issues such as food safety and the environment. Mr. Yeutter reiterated his suggestion that negotiators achieve modest success at Hong Kong and then work throughout the next year to ensure that the rest of the agreement is worked out. He stressed that this is an achievable goal and would produce satisfactory results for both developed and developing countries. He said there is a need for political leadership at the highest levels to move beyond the concerns of special interests and achieve greater gains from trade liberalization.

XI. WTO AND DEVELOPING COUNTRIES: WHERE'S THE DEVELOPMENT IN THE DOHA DEVELOPMENT AGENDA?

This segment addressed the following questions: (1) What's the long-term significance of the enhanced role played by the developing countries in the DDA? (2) To what extent are developing-country complaints about inadequate "implementation" of the Uruguay Round Agreements legitimate? (3) Do these complaints reflect the views of all developing countries or is it driven primarily by one or two countries? (4) To what extent do developing countries benefit from more open trade? (5) Does the anti-globalization movement accurately reflect the concerns of developing countries and the world's poor? (6) What role do aid and technical assistance programs play in ensuring that developing countries have the capacity to implement WTO obligations fully and take full advantage of WTO rights?

Moderator: Professor Marjorie Florestal, University of the Pacific/McGeorge School of Law, Sacramento, California

Panelist: Barbara Masekela, Ambassador, Embassy of South Africa

Ambassador Masekela discussed the issue of trade in the context of broader international efforts to shape globalization so that it promotes development and remains sustainable and legitimate. Ambassador Masekela emphasized South Africa's goals of meeting its own development needs, resisting the ongoing marginalization of developing countries, particularly African countries, and supporting multilateralism as a response to globalization and economic interdependence. In order to do so, she advocated reform of multilateral institutions, particularly the WTO, to allow developing countries to play a greater role in defining priorities and shaping the rules for global economic governance and the global trading system. She pointed out the bias towards the interests of powerful industrialized countries in the existing rules, and cited the use of agricultural subsidies by industrialized countries as an example of how globalization and the international trading system have not served the interests of developing and African countries fairly. Ambassador Masekela explained that South Africa supports the Doha Round as an alternative to the status quo because the negotiations open the possibility to ensure that development is addressed through trade. She admitted that while progress on achieving modalities in Hong Kong will be difficult, South Africa and other developing countries feel that their interests will be best served if the development objectives of the Doha Round are translated into reality as soon as possible. Ambassador Masekela expressed hope that with intense negotiations and early decisions by the major players on trade distorting practices, it will be possible for the negotiations to move forward. Ambassador Masekela described the priorities of developing countries as:

capacity building, economic diversification, enhancing industrial and technical abilities, conformity with international standards, infrastructural development, African development initiatives such as NEPAD, flexibility, and above all, access to developed-country markets.

Panelist: Sandra Polaski, Carnegie Endowment for International Peace

Ms. Polaski pointed out that an average of 68% of the population in developing countries earns a living through agriculture, while only a very small percentage of developed-country citizens depend on agriculture. For that reason, Ms. Polaski stated that the political economy issues of liberalization in developing countries must be considered just as seriously as in developed countries. Ms. Polaski stressed that the Doha Round should compensate for the disappointing results of the Uruguay Round for developing countries. While there are important issues in NAMA, services, and movement of persons, agriculture is the most important area; developing countries will not move forward in other areas unless they receive worthwhile concessions in agriculture. Ms. Polaski pointed out the efforts made by the G-20 and others on offensive agricultural interests (where some developing countries can be competitive in international markets), but said that attention must also be paid to developing countries' defensive agricultural interests. Ms. Polaski pointed out that a country's principal interest is in protecting the livelihood of its own small-scale farmers and farm workers. She stressed that allowing the income of such a large group to fall significantly is not good policy, is not good for development, and will create political challenges difficult to imagine in a developed-country context. She also stressed the importance of creating demand in developing countries for unskilled labor, which makes up most of the workforce beyond agricultural labor. Ms. Polaski noted that the process by which prior rounds were concluded is not likely to work this time. She stated that the old process entailed reaching agreement among a critical mass of countries, then bringing other countries along by evoking their fear of being left behind, or by giving them side payments. Ms. Polaski does not believe that type of process is feasible today, and argued that a mutually acceptable deal is the only way to make progress. Ms. Polaski said that neither the United States nor the EU is politically prepared to make sufficient reductions in agriculture. For that reason, she predicted that until the services and manufacturing sectors become more engaged, it is unlikely that global trade talks will progress.

Panelist: Ray Offenheiser, Oxfam America

Mr. Offenheiser emphasized that a development round is desperately needed because the poorest countries, including those in Sub-Saharan Africa, have lost trade share and are hit hardest by tariffs in rich countries. He pointed out that

the greatest burden of protectionism falls on the products sold by the poorest people in the poorest countries, particularly in agriculture. Mr. Offenheiser said that the Doha Round offers the possibility of economic growth and poverty reduction, but that for success, development cannot be left to the side and solved only through special and differential treatment. Mr. Offenheiser stated that improving the agriculture agreement is the core way to deliver on the possibility of poverty reduction and meet the needs of developing countries, which he pointed out are the majority of WTO Members. He argued that rich countries must both cut agricultural subsidies and open their markets to developing countries' products, while developing countries must implement pro-poor and pro-development policies. Mr. Offenheiser observed that the current negotiations have degenerated into mercantilist demands, and that Members are ignoring deadlines because they expect there is no chance of meeting them. He expressed Oxfam's cautious optimism about the possibility of a pro-poor outcome, because negotiations are an opportunity to improve from a status quo that serves neither development nor the poor.

QUESTIONS AND ANSWERS

1. The moderator asked the panelists whether, within the context of trade liberalization, developing countries will be forced to ask for limited liberalization in order to prevent preference erosion, or would rather be paid off for the losses of some developing countries.

Ms. Polaski stressed the importance of allowing developing countries themselves to guide policy. She noted that democratically elected governments are best suited to determine the pace and sequence of liberalization. She emphasized that the goal is for developing countries to set the pace of liberalization, rather than not liberalize at all.

Ambassador Masekela pointed out that preferential access can produce positive results, but can also reduce the access of other countries. She stressed the importance of taking into account the developmental level of each country, in order to give each country the opportunity to diversify, rather than apply the same treatment to all of them.

Mr. Offenheiser argued that some bias in favor of developing countries is necessary in order to compensate for the disappointing results of the Uruguay Round. He pointed out that developing countries' desire to liberalize at their own pace is consistent with the economic history of developed countries, which were protectionist at earlier stages in their development. He also pointed out that the terminology has changed from giving developing countries additional flexibilities to expecting fair reciprocity, implying less of the flexibility offered by the Doha development agenda.

2. Stephen Lande of Manchester Trade commented on the importance of capital, infrastructure, and export capacity building for developing countries, and suggested that the large developing countries may be the greatest beneficiaries of trade liberalization. He suggested that international support from the World Bank, G-8 countries, and others should be the response to development challenges, rather than non-governmental-organization opposition to trade liberalization.

Mr. Offenheiser responded that Oxfam is committed to constructive improvements in trade for development, a rules-based trading system for a pro-poor outcome as well as capacity building, infrastructure investments, investments into agricultural productivity, and regional integration within the developing world. Mr. Offenheiser pointed out that while Oxfam supports economic diversification, developing countries absorb all the costs in part because of developed countries' trade distorting policies. For this reason, developed countries should assist with the cost of diversification.

Ms. Polaski also agreed that structural assistance from the World Bank and other donors is necessary, but noted that this should be a prerequisite to the trade round rather than an afterthought. She stressed that a development round implies that complementary concessions are not demanded from developing countries. She noted that since developed countries have no intention of reducing trade barriers to zero, developing countries will still face challenges in encouraging export growth, and would benefit from flexibility to assist their economic transitions.

Ambassador Masekela cited examples of growth in areas in which a country may have an advantage that is then damaged by the introduction of subsidized goods from developed countries. She also stressed the importance of regional integration in Africa and trade capacity building to address sanitary standards.

3. A representative of *TradeWinds* asked whether the status quo is problematic in sectors like cotton and sugar, where negotiations have focused on market access and have not focused on the subsidy question, beyond the obligation not to cause adverse effects.

Mr. Offenheiser pointed out the political difficulties of reforming subsidies in the United States because some legislators represent districts that consider subsidies a principal issue, and are likely to vote against reform, even though the Administration favors payment limits or caps on agricultural subsidies.

4. A representative of Stanford Financial Group asked the panelists to comment on the issue of compulsory licensing for pharmaceuticals and developing countries' interests in that area.

Mr. Offenheiser responded that many developing countries recognize that major achievements have been made in this area, which has helped to keep them at the negotiating table. He noted that developing countries are pushing for an amendment to consolidate the agreements on access to medicines and TRIPs, but

noted that the push has been blocked by the pharmaceutical industry. Mr. Offenheiser said that the debate in the United States and its position in the negotiations is still unclear.

Ambassador Masekela said that litigation produced a breakthrough in anti-retroviral drugs in South Africa, now putting the country in a position to manufacture these drugs, which are necessary for the health of the population.

XII. TEXTILES AND APPAREL TRADE AFTER THE AGREEMENT ON TEXTILES AND CLOTHING (ATC)

Trade in textile and apparel products has been subject to restrictions since the 1950's, most recently the quota system provided for by the WTO Agreement on Textiles and Apparel. As of January 1, 2005, those quotas ceased to exist. This segment explored the implications of that event.

Moderator: Viji Rangaswami, Carnegie Endowment for International Peace

Ms. Rangaswami initiated the session by noting twin challenges facing textiles and apparel producers today. First, global textiles and apparel quotas have now expired, creating a hyper-competitive trading environment. Second, China has emerged as a major textiles and apparel producer, and is poised to dominate the global market. Some developed countries have responded to the second challenge by negotiating new quota agreements with China under a WTO bilateral safeguard mechanism. She asked the panel to comment on these twin challenges, and the various government responses to date.

Panelist: H.E. Shamsher M. Chowdhury, Ambassador of Bangladesh to the United States

Ambassador Chowdhury began his presentation by saying that the United States is Bangladesh's largest export market. He noted the importance of the apparel industry in Bangladesh's economy: apparel accounts for 85% of total exports, the sector employs more than two million people directly, and an additional eight to ten million people benefit indirectly. He noted that 90% of Bangladesh's apparel workers are women. He stressed that Bangladesh's economy is completely dependent on textiles, and that the sector has greatly improved standards of living in the country. He did note that the Bangladeshi industry has experienced difficulties over the last few years due to two factors: expiration of the quota regime and a lack of preferential access to the U.S. market. On the first, the old quota system provided Bangladesh with an umbrella of protection to help sustain its exports to the United States. On the second, Bangladeshi apparel exports are subject to a 17% duty. Recent U.S. trade agreements and policies, such as CAFTA [Central America Free Trade Agreement] and AGOA [African Growth and Opportunity Act], give other countries duty-free access to the U.S. apparel market. This duty-free access for other countries aggravates the pressures created with the end of the quota regime. As a result of both factors, Bangladesh fears a steep decline in its exports to the U.S. market.

The Ambassador urged the United States to implement measures to allow developing countries, such as Bangladesh, to maintain their exports levels to the United States. He noted that Bangladesh supports the Trade Act of 2005, which grants duty-free access to fourteen LDCs (less developed countries) and tsunami-hit countries not covered by other special preference programs. The Ambassador stressed the importance of the passage of the Act within a reasonable period of time. He noted that the Bangladeshi textile industry relies very heavily on U.S. cotton, so it is also beneficial to the United States to support Bangladesh.

On the political front, the Ambassador believes that it is also extremely important that Bangladesh increase the success of its textile and apparel sector or at least maintain the same level of success. He noted that losses in the sector will create a serious unemployment situation, which is a risk not only to the Bangladeshi economy, but also to its viability as a democracy. The Ambassador noted the link between poverty and terrorism in Bangladesh.

Panelist: Cass Johnson, National Council of Textile Organizations

Mr. Johnson urged that the question for developed countries like the United States and developing countries like Bangladesh is what to do about China. He noted that the current restraints that countries are negotiating with, or imposing on, China expire in 2008. Mr. Johnson illustrated the threat posed by China with a number of charts indicating the dramatic increase of China's production capabilities and exports. The charts showed that in 2002, China had only 10% of the world market in certain products, but by the end of 2004, for those products, China accounted for 73% of all production. Mr. Johnson stated that no other producers or countries could compete against China's low labor costs or cheap prices.

Mr. Johnson noted that in other developed countries, where there is no quota system in place, such as Japan and Australia, China had 83% of the import market. He stated that there are 30 million jobs at stake globally, particularly in Bangladesh, Turkey, Mexico, and the United States. He noted that China's safeguards had delayed the process, but that he believed an increase will definitely be coming very soon. He also noted that even with the safeguards, China's exports have been able to affect the market through pricing pressure. He stated China's prices are typically 27% lower than the previous price for apparel products. He pointed to cotton trousers as a good example of the pricing pressure, noting that cotton trousers are one of the most popular products in the textile and apparel industry. China went from 14 million pairs of trousers sold in August 2004 to 214 million sold in August 2005, an increase of 1200%. The price of these trousers went down from $10.50 to $4.84 each. Mr. Johnson noted that in most countries, you cannot make a pair of trousers for less than $6.

Mr. Johnson stated that the Global Alliance for Fair Trade in Textiles and Clothing (GAFTT Coalition) was created in March 2003 to deal with this

situation. GAFTT, which represents ninety-six trade and apparel associations from fifty-four countries representing $150 billion worth of trade in textile and apparel, is urging that some sort of measure be put in place to replace the safeguard.

Panelist: Steve Lamar, Association of Apparel Importers

Mr. Lamar challenged the notion that China is a problem. He began by noting that during the ten years when global quotas were being phased out under the WTO Agreement on Textiles and Clothing, U.S. imports grew steadily and prices progressively dropped. He noted that during that same period, there was also a proliferation of U.S. trade agreements and trade preference programs. Mr. Lamar noted that these trends show that the United States already had a robust apparel import market prior to China's rise. He also noted that China has increased its exports to the United States at the expense of other countries, mostly by taking the markets of other Asian countries such as Korea and Taiwan. Mr. Lamar stated that India and Pakistan are becoming major global players.

Mr. Lamar also stated that Chinese competition has created opportunities for the U.S. industry. One way the U.S. industry has tried to become more competitive and efficient in order to compete with China is by partnering with producers in Central America. He noted that U.S. yarn and fabric exports to Central America have increased dramatically during the last five years. These yarns and fabrics are assembled and re-shipped to the United States as finished garments.

Mr. Lamar stated that the United States is about to complete and sign a bilateral quota agreement with China that will last until the end of 2008. He said the agreement will not be renewed after that. He noted that the agreement was made to provide predictability for importers and buy the U.S. industry more time. He stated that there was a need to export goods to China.

QUESTIONS AND ANSWERS

1. An audience member asked whether it is more important for the United States to focus on becoming more competitive rather than trying to stop Chinese imports into the U.S. market, and whether the panel thought it was good for U.S. consumers to benefit from cheaper prices.

Mr. Lamar answered that the bilateral agreement was necessary to address the uncertainty in global trade right now. He noted that he does not favor extending the quotas past 2008. He agreed that there are benefits to U.S. consumers from having access to lower prices.

Mr. Johnson answered that it is important to see the long-term implications of what China is doing. He argued that the Chinese want to dominate

the world textile and apparel market, and have implemented government policies to achieve that goal. He urged that even though it is important to have lower-priced textile and apparel products, it is more important to have a job to go back to every day.

2. An audience member asked how the trade has changed so far this year (2005) after global quotas expired.

Ambassador Chowdhury answered that Bangladesh's export situation is worsening and that they have had several factories close, which has resulted in job losses.

Mr. Lamar answered that he is seeing consolidation of the textile and apparel industry, and many countries are trying to be more competitive.

XIII. CHINA AND THE WTO

This segment examined China's first three years in the WTO and its place in the global trading system three years after its accession. The following questions were addressed: (1) What impact has China had on the WTO? (2) What impact has the WTO had on China? (3) What role is China playing in WTO negotiations?

Moderator: Kevin Dempsey, Partner, Dewey Ballantine

Mr. Dempsey summarized China's accession to the WTO. Specifically, he indicated that China acceded after a long negotiation process and that this process produced considerable debate about the ways the WTO would be changed by China, and whether Chinese accession would change China's internal political dynamic.

Panelist: Hank Levine, Deputy Assistant Secretary of Commerce

Mr. Levine spoke on China's emergence as a new power. It is historic and presents multiple opportunities and challenges. The opportunities presented include the following: China is the other main engine of global economic growth besides the United States; China is the fastest growing export market for U.S. products; competition is beneficial for the United States in the long term, as long as it is fair competition. Among the challenges is that China's transition to a market economy is not complete and there are still multiple sectors where China employs government intervention while the United States would allow market forces to prevail. In addition, China still deals with a weak rule of law and lack of enforcement (for example, with respect to protection of intellectual property rights). While China has formal rules in place, the enforcement of these rules remains weak. Mr. Levine cautioned that despite government intervention in the Chinese economy, China is emerging as a formidable low-cost producer and moving up the technology chain (for example, by graduating more engineers). Finally, Mr. Levine advised that the United States should be aggressive in ensuring that China fulfills its WTO obligations and should enforce China's domestic trade laws aggressively. The United States should also do what is necessary domestically to maintain its competitiveness.

Panelist: Angela Ellard, Staff Director, Trade Subcommittee, House Ways and Means Committee

The emergence of China creates frustration for both Democrats and Republicans. U.S. manufacturers find that they cannot compete with manufacturers in China. U.S. companies that want to establish operations in China have to contend with weak enforcement of intellectual property rights, while U.S. multinational companies that have already entered the market fear a backlash from too much U.S. pressure on China. American companies that want to import from China have a completely different set of issues. Ms. Ellard outlined four ways for the United States to develop a coherent policy toward China: (1) ensure that China is in compliance with its obligations under WTO and domestic law by encouraging the Administration to put pressure on China in the WTO reviews that were set up as part of the Chinese WTO accession process; (2) ensure that China is an active participant in the WTO negotiations; (3) undertake negotiations for other free trade agreements in the same region as China to strengthen the position of the United States in that region with other trading partners; and (4) monitor China's efforts to enter into its own free trade agreements, especially with other ASEAN countries.

The House passed the Trade Rights Enforcement Act at the end of July. It contains a number of provisions that members would like to see passed. It is not yet clear what the Senate's plan is. One provision under consideration is whether to authorize countervailing duty cases against non-market-economy countries, e.g., China. Ms. Ellard suggested that the United States increase appropriations for monitoring China's compliance with its obligations. China was supposed to ensure that government agencies would no longer be able to buy pirated material. If China is failing to meet these commitments, the United States can pursue remedies through the WTO dispute settlement mechanism. China should participate in the WTO's Government Procurement Agreement.

Panelist: Honorable Patrick Mulloy, U.S.-China Economic and Security Review Commission

The U.S.-China Economic and Security Review Commission was set up by Congress. It is bipartisan. The Commission monitors and investigates the security implications of U.S.-China economic relations, conducts hearings, travels to China and Geneva for investigations, and issues reports. China had special provisions in its WTO Accession Agreement because it is a non-market economy (NME). This led to a transitional review mechanism. The Chinese Ambassador to the WTO has stated that China considers the Transitional Review Mechanism (TRM) discriminatory because no other WTO Member has to do it and China does not cooperate well. As a result, the TRM is not as useful as people thought it would be. As part of WTO accession, China agreed that it could be treated as an

NME through 2016. The United States has a statutory test for determining NME status, looking to whether there is a convertible currency and labor agreements negotiated between labor and management. The U.S.-China Joint Commission on Commerce and Trade (JCCT) was used for TRMs. China wants to be a market economy under our laws because U.S. antidumping would be less effective. There is also a textile safeguard. China specifically agreed that the United States could use textile safeguards when there is a market disruption from imports because China is an NME. While any efforts to use the tools at our disposal are labeled as protectionist, we bargained for these provisions and China agreed to them. Key issues include intellectual property rights (IPR), automobile parts, and airplanes. We should enforce our own laws and bring China into the WTO dispute settlement process for its IPR violations. On exchange rates, the U.S. Treasury Department is required to give Congress reports on which countries are manipulating the currency. Currently, the United States has a large account deficit with China.

Panelist: Frank Vargo, Vice President for International and Economic Affairs, National Association of Manufacturers

The outstanding issue with respect to China's WTO obligations is currency manipulation. Imports from China have grown much more than exports to China in the last several years. The U.S. trade deficit with most of its trading partners is nonexistent, so most of the U.S. trade deficit is attributable to China. Mr. Mulloy warns that if these trade patterns continue for five years, the trade imbalance with China will be almost $500 billion. Currency manipulation is the primary cause.

QUESTIONS AND ANSWERS

1. One participant asked how the Chinese accession impacts the effectiveness of the WTO, how the JCCT is being coordinated with possible WTO actions, and how these processes can complement each other.

Mr. Levine responded that transparency is a problem in terms of China's participation in the WTO. The strategy has been to go after individual problems as they arise. Additionally, there have been some improvements in transparency since China's WTO accession. The JCCT is a joint undertaking between the Department of Commerce and the U.S. Trade Representative (USTR), which tries to address as many burning issues of the day as possible.

2. Another conference participant asked about ways to deal with a country deemed to be a currency manipulator.

Mr. Mulloy responded that if a country is a designated currency manipulator, the U.S. Treasury Department is supposed to start negotiations, and has the power to bring a Section 301 case against them.

3. Another question was asked regarding the effect of the revaluation of Chinese currency on the value of the U.S. dollar, i.e., will there be increased money supply?

Mr. Vargo responded that China cannot move to a free-floating currency immediately, but there is disappointment that China has not done more. The hope is that China would allow market pressures to determine the value of its currency.

Ms. Ellard concluded by noting that a debate on China is a debate of extremes. She indicated that there are several questions of fact remaining with respect to China's participation in the WTO. These questions include whether there is currency manipulation, and if so, at what level, and whether the global market can withstand certain financial reforms. In addition, U.S. policymakers are contemplating whether the downside of bringing a WTO case includes a breakdown in negotiations. On the issue of intellectual property protections, there is a question as to whether the United States could bring and win a case, and whether bringing a case to the WTO could threaten negotiations. Finally, WTO adversarial mechanisms could force China into a situation where it is unwilling to pursue incremental change. A more reasonable solution might be to work through the JCCT and the USTR, and for Congress to give the USTR the necessary appropriations to manage this issue effectively.

Finally, Mr. Mulloy commented that China is helping the United States run a deficit without paying for it in the form of higher interest rates. China helps the United States continue this irresponsible fiscal policy and the United States should work to resolve that problem first.