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International Trade Highlights in 1995

I. Introduction

Since World War II, the United States has articulated and pursued a policy of free and fair trade. The highlights of trade policy in any particular year focus on the extent to which the United States focuses on free trade or fair trade, and the means employed to promote its policy.

Immediately following World War II, the United States took the lead, with Great Britain, in establishing the General Agreement on Tariffs and Trade (GATT) as a complement to the World Bank and International Monetary Fund. With the GATT's institution and dramatic success in reducing tariffs through successive rounds of negotiations, U.S. trade policy was predominantly multilateral. "Plurilateral" was a word that was not applied to trade until recently, and relatively few major trade initiatives before the 1980s were bilateral. The antidumping and countervailing duty laws—providing for the unilateral imposition of offsetting duties, but authorized generally by the GATT—existed and applied, but did not generally have a major impact on trade before the 1980s.

The tools used by the United States to pursue its free and fair trade policy began to change significantly in 1982. In that year, U.S. Trade Representative

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The views of each author expressed in this article do not necessarily reflect the views of other authors, or any author's law firm, clients, or otherwise affiliated agency or institution.

Bill Brock tried but failed to persuade trading partners, starting with the European Community (EC), to launch another round of multilateral trade negotiations to follow the Tokyo Round negotiations concluded and implemented in 1979. EC trade policy at the time was largely self-absorbed with its single market initiative, enlargement, relations with the European Free Trade Association countries, and, later, the reunification of Germany and relations with the republics of the former Soviet Union.

Frustrated in the desire to promote further trade liberalization through the traditional multilateral means, Ambassador Brock pursued other means. During his tenure as U.S. Trade Representative, the United States concluded its first free trade agreement with Israel, newly emphasizing bilateral trade avenues. Also during this time, trade tensions between the United States and Japan began to increase, resulting in nearly continuous bilateral negotiations between the two governments ever since, often with a high profile.

Ambassador Brock's successor, Ambassador Clayton Yeutter, then led U.S. negotiations with Canada of a second free trade agreement. The Bush Administration Trade Representative, Ambassador Carla A. Hills, then led negotiations essentially broadening the bilateral U.S.-Canada agreement into the plurilateral North American Free Trade Agreement (NAFTA). Moreover, President Bush promoted an Enterprise for the Americas Initiative, under which the NAFTA could be expanded to include democratic, free market economies through negotiations.

Following his inauguration, President Clinton persuaded the Congress to enact legislation implementing the NAFTA and, as President Bush, proposed NAFTA's expansion southward through initial negotiations with the Republic of Chile. Thus, from the inception of the NAFTA negotiations, the United States has newly emphasized plurilateral trade options, which are also reflected in the Asia Pacific Economic Cooperation (APEC) initiative and the more recent TransAtlantic Dialogue.

Also beginning in the 1980s, the United States increased its resort to and use of its pre-1934 primary avenue for making trade policy, unilateral action. In his second term, in response to alarming U.S. trade and current account deficits and the political pressure they generated, President Reagan initiated investigations of foreign governments' unfair trade practices, imposed sanctions in many cases, and impliedly threatened to take such measures in many more cases. This more aggressive, unilateral approach to resolving trade problems was emulated subsequently by both Presidents Bush and Clinton.

The last fifteen years, therefore, have witnessed a shift in the tools used by the United States in pursuing free and fair trade objectives. Whereas U.S. trade policy from 1947 to 1982 was overwhelmingly multilaterally based, non-multilateral means have received more emphasis since then. However, this perspective is tempered by the multilateral backdrop of the U.S. plurilateral, bilateral, and unilateral actions in the launch of the GATT Uruguay Round negotiations in 1986, their conclusion in December 1993, their legislative implementation in the United States in 1994, and the entry into force of the GATT successor World Trade Organization (WTO) in 1995. Indeed, most U.S. trade negotiators during this period heavily credit the combination of U.S. plurilateral, bilateral, and unilateral trade activities as spurring both the launch and the successful conclusion of the Agreement Establishing the WTO.

Since the United States continues to use all these means—multilateral, plurilateral, bilateral, and unilateral (or national)—as tools with which to implement its trade policy, this article reviews the highlights in each of these arenas in 1995.

II. Key Multilateral Developments

by Judith Hippler Bello

The year 1995 reasonably should have been the year of the WTO. After nearly fifty years, the GATT began its eclipse on January 1, 1995, the date the Agreement Establishing the WTO entered into force. While the GATT formally continued to exist through December 31, 1995, the WTO was the forum for multilateral trade liberalization.

A. Selection of the WTO Director-General

The WTO began in the long-running Uruguay Round to facilitate the more comprehensive work and agenda of the Geneva-based multilateral trade organization. The Agreement provides for a Ministerial Conference of all WTO Members that convenes at least every other year. In the interim, the day-to-day work of the organization is accomplished through a General Council, which oversees subsidiary councils for trade in goods, trade in services, and intellectual property protection, as well as a Dispute Settlement Body, Trade Policy Review Body, and various committees (such as the Committee on Balance-of-Payments Restrictions).

In addition to a more formal structure and broader scope, the WTO also has a necessarily larger staff, or Secretariat. The chief executive officer of this staff is the Director-General, who oversees the administrative and professional functions of the Secretariat, serves as the chief spokesman of the organization, and seeks to lead Members in a harmonious direction. While the power resides with Members, the Director-General is a key position that enables an effective leader to wield significant influence, as did Director-General Peter Sutherland in facilitating closure in the Uruguay Round. Sutherland earned widespread respect for his exercise of these responsibilities, but he gave the GATT Contracting Parties notice that he would not stay on to serve as the Director-General of the new WTO.

The United States, European Union (EU), Canada, Japan, and other trading partners thus embarked in 1994 on the selection of a successor to the able Sutherland. However, rather than working quietly and discreetly toward consensus, major nations each advocated a regional champion for the number one WTO job. The United States backed Mexican President Carlos Salinas, the visionary and then political hero who proposed and negotiated the NAFTA. The EU settled on former Italian Trade Minister Renato Ruggiero, and many Asian nations supported former Korean Trade Minister Chulsu Kim. Instead of focusing consensually on a candidate to unite Members, the three major trading blocks seemed to duel over whose candidate would emerge the winner of regional combat.

The United States wisely proposed President Salinas for the top WTO job in 1994. However, political and economic conditions in Mexico changed markedly later in the year, by which time President Zedillo succeeded President Salinas. By December 1994, Mexican currency reserves declined so precipitously that the Zedillo administration devalued the peso. The devaluation triggered a crisis of confidence, stemmed only by controversial U.S. assistance to Mexico through the Economic Stabilization Fund, some additional assistance from other major trading partners, and the International Monetary Fund. In the meantime, however, the Mexican crisis risked a tequila effect in other Latin American financial centers, particularly those with weak banking regulatory systems.

Mexico's financial woes, combined with political assassinations and scandal, cast an impenetrable cloud over former President Salinas's candidacy. The United States loyally persisted in supporting him, but his prospects first dimmed, then died.

The EU continued to advocate former Minister Ruggiero, and many Asian nations favored former Minister Kim. Both candidates prompted widespread concern, reflecting in part the criticism of the rate and extent of trade liberalization in Italy and Korea. Ultimately, however, the United States had to decide whether to seek to reopen the selection process, field a new North American candidate, or accept one of the remaining two candidates. After conflicting statements in early 1995, the United States finally agreed to support Mr. Ruggiero.[1] The Asian supporters of Mr. Kim also agreed to accept Mr. Ruggiero, provided Mr. Kim would be made a new (fifth) Deputy Director-General.

Finally in late March 1995, nearly three months after the WTO Agreement went into effect, Mr. Ruggiero became Director-General. While he may well perform with distinction in this position, the manner of the Director-General's selection, and in particular the parties' inability to reach consensus on time, did not reflect well on the new organization.

1. *E.g.*, "U.S. Rejects Remaining Candidates for WTO, Calls for 'New Process,' " *Inside U.S. Trade* 1 (March 3, 1995); "Kantor Says U.S. Not Opposed to Any Candidate for WTO Post," *Inside U.S. Trade* 3 (March 10, 1995).

B. FINANCIAL SERVICES NEGOTIATIONS

Of the many issues facing the new WTO and its even newer Director-General, none was more pressing than the deadline for concluding negotiations on financial services. As the Uruguay Round neared its conclusion in December 1993, the United States Government and private sector remained dissatisfied with the offers other GATT Contracting Parties made on financial services. The U.S. negotiating team, led by the Department of the Treasury, was unwilling to conclude an agreement under which the already relatively open U.S. market would be locked open, but foreign markets would remain relatively closed. However unlikely the possibility that the United States would close its financial services market to services providers from closed markets, nonetheless the United States insisted on retaining the right to take such action as leverage in its continuing market-opening negotiations.

As the logjam broke in other negotiating groups in Geneva in late 1993, the United States judged the financial services package still deficient. On the one hand, the United States did not wish to push financial services off the table (as was the case for civil aviation, which, with minor exceptions, is not covered under the General Agreement on Trade in Services[2]). On the other hand, the United States did not wish to embrace a lopsided agreement.

Instead, negotiators found a third way: the United States obtained a Ministerial Decision on Financial Services that essentially prolonged the financial services negotiations and kept options opened. Specifically, Members agreed that the financial services commitments they scheduled would enter into force on a most-favored-nation (MFN) basis at the same time that the Agreement Establishing the WTO entered into force. However, they further agreed that for six months following such entry into force, Members would be free to improve, modify, or withdraw all or part of such financial commitments without offering compensation. In other words, Members could change their minds and their commitments.

The entry into force of the WTO Agreement on January 1, 1995, started the clock ticking toward the June 30 deadline for conclusion of the financial services renegotiations. By mid-March, the negotiations did not pick up significant momentum. Only eight countries met the March 15 deadline for submitting initial conditional offers. Of the major developing country markets of interest to the United States, only Hong Kong and Korea tabled offers. Such underparticipation provoked strong concerns, both in the United States Government and in the private sector, since the U.S. objective in the talks was to seek secure commitments on

2. General Agreement on Trade in Services, Annex on Air Transport Services, para. 2, Uruguay Round Trade Agreements, Texts of Agreements, Implementing Bill, Statement of Administrative Action, and Required Supporting Statements, 103d Cong., 2d Sess. 1610 (1994).

trade liberalization in this sector "from a wide range of commercially important developed and developing countries."[3]

Six weeks later, the situation and outlook were not appreciably different. Only eight more countries tabled either conditional offers or written statements of intent to improve their Uruguay Round offers. An internal assessment by the WTO Committee on Trade in Financial Services in late April expressed alarm that failure in the negotiations would be an unfortunate beginning for the WTO and a "significant setback to creating a common set of rules for services. . . ."[4] The United States again warned that it would not accept an MFN commitment unless key developing countries made satisfactory offers. The administration reported to the Congress, "It's up to them [key developing countries] whether we will have a successful negotiation in financial services or not."[5]

In late May, Director-General Ruggiero warned that failure in the financial services talks would "be a setback both to the development of services trade and to the multilateral system."[6] The United States finally tabled its offer, including a proposal to provide MFN treatment. However, the United States would take an MFN exemption if existing offers were not improved adequately and more offers were not tabled satisfactorily.

By early June, U.S. financial services providers were sufficiently pessimistic about the outcome of negotiations to urge the administration to develop a contingency plan in case the talks failed.[7] The Coalition of Services Industries Financial Services Group judged the current offers in the talks as simply inadequate, and concluded that the United States would be worse off with any such agreement.[8]

Director-General Ruggiero pressed the United States not to withdraw its offer, and some developing countries did improve their offers in June. For example, all the ASEAN countries except Brunei made new offers.

The final negotiations were in Geneva the week-end of June 24-25. Treasury and U.S. Trade Representative (USTR) officials, Senate trade staff, and many financial services industry representatives evaluated the latest new offers and engaged in extensive bilateral negotiations. However, the yield was too little from too few. As one headline captured the outcome, "U.S. Pulls Plug on WTO Financial Services Talks, Takes MFN Exemption."[9]

3. Uruguay Round Agreements Act, § 135(a), 19 U.S.C. § 3555(a).

4. Reported in "WTO Credibility at Stake in Financial Services Talks," *Inside U.S. Trade* 19 (May 5, 1995).

5. *Id.*, quoting from a report on the WTO submitted pursuant to the Uruguay Round Agreements Act, § 124, 19 U.S.C. § 3534.

6. "EU to Step up Pressure for Improvement in Financial Services Offers," *Inside U.S. Trade* 8 (May 26, 1995).

7. Financial Services Firms Urge Contingency Plan for Failure of WTO Talks," *Inside U.S. Trade* 1 (June 9, 1995).

8. *Id.*

9. *Inside U.S. Trade* 1 (June 30, 1995).

The U.S. MFN exemption does not apply to existing financial service investments in the United States, and the United States agreed to continue nondiscriminatory treatment in this regard. However, the MFN exemption applies to all new investment or expansion of existing investments in the United States in the financial services sectors, including banking, securities, insurance, and asset management.

The U.S. decision was widely denounced by trading partners as warmly as it was praised by the U.S. financial service industry. In view of the U.S. decision, most knowledgeable observers expected the talks simply to collapse, a setback for the new WTO. However, the EU assumed leadership of an endeavor to save the negotiations by salvaging the offers made by other Members, even without U.S. participation. European Trade Commissioner Sir Leon Brittan assumed the role normally played by the U.S. Trade Representative and urged Members to maintain their offers and conclude an interim agreement. Through considerable urging, Sir Leon succeeded in achieving an interim financial services agreement to which the United States has taken an MFN exemption regarding all new or expanded investment in the U.S. financial service sectors.

This outcome may be viewed more or less favorably, depending on the perspective. In light of the U.S. invocation of an MFN exemption, the exercise of GATT leadership by the EU reflects that agreements can be achieved even without the support of both the United States and the EU, previously considered a necessary (albeit not sufficient) condition for GATT success. Moreover, the parties reached an agreement, if only on an interim basis, that is modestly trade liberalizing. On the other hand, the U.S. MFN exemption may be perceived as a harmful precedent for post-Uruguay Round efforts at further trade liberalization. The exemption also was a signal that the United States is committed to achieving reciprocal trade agreements that afford a balance of symmetrical rights and obligations.

In any event, the outcome of the first major WTO negotiation was less than ideal.

C. Selection of the Appellate Body

One of the most dramatic achievements of the Uruguay Round is the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes. The Understanding incorporates procedural improvements to which the parties tentatively agreed in April 1989 and also makes sweeping substantive improvements as well by:

- establishing panels to examine disputes, as by providing standard terms of reference;
- providing for virtually automatic adoption of panel reports, thereby eliminating the losing party's ability to block adoption of a report adverse to its interests;
- providing for binding arbitration if parties disagree about the reasonable period for the losing party's compliance with a panel's recommendations

or the amount of compensation required (or retaliation authorized) in the event of continued noncompliance;
- ensuring vigilant scrutiny by the Dispute Settlement Body of compliance with panel reports; and
- providing a right of appeal for legal issues and establishing a new Appellate Body for this purpose.

Although not generally as important as the virtually automatic adoption of panel reports, the Appellate Body was a significant safeguard for sound panel reports. In the event that a rogue or aberrational report were issued, Members reasoned, the Appellate Body would serve as a check to restore a sensible interpretation of the WTO Agreement.

The Appellate Body is comprised of seven persons appointed by the Dispute Settlement Body for four-year terms. They are to be "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally." Moreover, they must be "broadly representative of membership in the WTO."[10] The Understanding does not provide any more specific details about the selection of the appellate body.

Most trade experts believe that a relatively short list of persons best qualified to serve on the Appellate Body could have been approved in Geneva by trade experts in a matter of days, if not hours. Members then could have been called upon to narrow such a short list of eminent persons to the requisite seven.

Instead, the selection process began quite differently, with many countries championing candidates who, despite admirable résumés, would not have been on a short list of "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally." In short, the Appellate Body selections mirrored too closely and more broadly the Director-General selection process, with the competition often between politically chosen candidates. The key variable for selection among them was not their qualifications, but essentially a quota system based on nationality.

The United States and the EU both insisted on two representatives on the Appellate Body; the rest of the world argued that two of more than a hundred members would hold four of only seven seats. The United States finally agreed to the selection of only one of its two candidates, provided the EU agreed likewise to one European candidate. The EU less graciously prolonged its insistence on two European seats, but finally acquiesced, reluctantly. Even so, the EU specifically reserved the right to urge a new manner of selection, yielding greater European representation, in the future.

As a result of this selection process, many of the world's leading GATT/WTO authorities—luminaries such as Professors John Jackson of the University of Michigan, Robert Hudec of the University of Minnesota, and Kenneth W. Dam

10. Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 17:1-3.

of the University of Chicago—are not members of the Appellate Body. Perhaps they were simply not interested in serving. However, the stature of the Appellate Body would have been enhanced if the Appellate Body included more persons of their widely recognized expertise.

Of course, the Appellate Body includes some world-renowned trade experts, and may do an excellent job and increase its overall credibility through its performance. WTO supporters worldwide certainly hope so. However, a less political, less geographic, and more meritorious selection process would have launched this new, important institution with perhaps more confidence.

D. Negotiations for the Accession of New Members

Finally, another major WTO activity throughout 1995 that continues in 1996 is the negotiations for the accession of several new members, including notably the People's Republic of China, Taiwan, Russia, and other republics of the former Soviet Union. While the negotiation regarding China attracted far and away the most attention, all are important. The collective result of these negotiations could bring much of the earth's population within the WTO, thus enormously expanding its reach, influence, and ability to promote trade with revenue- and job-creating effects.

E. Conclusion

Perhaps the climax of the Uruguay Round achievement would necessarily and inevitably be followed by a more hesitant, unsure period. In any event, 1995 was a year of modest accomplishment in the WTO, followed by preparations for the first WTO Ministerial Conference in Singapore in December 1996.

III. Key Plurilateral Developments

by Claire E. Reade

NAFTA is clearly the most prominent plurilateral trade arrangement in which the United States participates. In 1995, however, the United States also participated in several other trade initiatives, including APEC, a new Transatlantic Agenda (Agenda) with the EU, and the effort to negotiate the Free Trade Agreement of the Americas. 1995 was a year in which these initiatives made modest progress and NAFTA institutions gained considerable strength. At the same time, NAFTA was under new strain in 1995 from politically sensitive, issue-specific disagreements.

A. Europe: The Transatlantic Agenda and the Transatlantic Business Dialogue

Experts on both sides of the Atlantic have expressed concern about weakening U.S.-European trade and diplomatic cooperation. In an effort to combat this perception, in early December 1995, the United States and the EU announced a comprehensive Transatlantic Agenda of issues on which they would intensify their cooperative efforts.

The Agenda is impressively broad, covering a range of political and security issues, from fostering Eastern European democracy to combatting international drug trafficking. Trade and economic issues, such as support for the WTO, work on a multilateral investment treaty, and cooperation in a joint trade study, also are featured prominently. Finally, the Agenda also includes pledges of regulatory harmonization, enhanced information flow, and technology cooperation.

The Agenda is in no sense a legally binding agreement, however. Many parts of the Agenda speak in terms of political aims rather than actual commitments. Thus, the parties typically commit themselves to work toward particular objectives, without any firm time frame for accomplishing specific goals. Concrete commitments are limited to technical efforts such as conclusion of a customs cooperation agreement, development of an intellectual property seminar, and agreement on certain product standards.

The engine to drive the United States and the EU aggressively toward enhancing transatlantic trade and investment may well prove to be the U.S.-EU business community. Transatlantic business groups responded enthusiastically to the U.S. Commerce Secretary's invitation in mid-1995 to offer ideas on how to promote U.S.-EU trade and investment. The groups put pressure on their governments to take concrete action by issuing a report at a joint industry/government meeting in Seville, Spain, in November 1995 expressing their strong views on which issues were urgent and these issues needed to be resolved.

This Transatlantic Business Dialogue report covered four areas: standards and regulatory issues, trade liberalization, investment problems, and third countries. Excessive and inconsistent regulations were a prominent focus of criticism. The report also recommended detailed modifications to international investment rules. Most importantly, the business community asked for government responses to their recommendations within six months.

While the governments stated that their December Agenda incorporated many of the business community's recommendations, the Agenda's written commitment to action was fairly weak. If the business community continues to press for more aggressive government action, however, this pressure may motivate the EU and the United States to act with more alacrity on at least some issues. If this scenario plays out, a number of lingering nontariff barriers hampering trade and investment between the United States and Europe could be eliminated within a period as short as the next year or two.

B. Asia: APEC

In November 1994, members of the APEC forum met in Bogor, Indonesia, and agreed to a goal of free trade and investment for APEC-developed countries by 2010 and for APEC-developing countries by 2020.[11] A year later, in Osaka, Japan, APEC members were supposed to move from the mere expression of a broad policy vision toward actual implementation of this goal. The 1995 Action Agenda that eventually emerged from Osaka represents some political progress, but did not contain the rigorous commitments the United States wanted to see.

The U.S. business community was quite concerned about the lax nature of the APEC policy commitments in Bogor. For example, APEC statements on liberalizing investment lacked the rigor and comprehensiveness of U.S. bilateral investment treaties, making some members of the U.S. business community question the utility of pursuing any negotiations in the APEC forum.

The Osaka meeting was intended to demonstrate that the APEC countries were genuinely committed in principle, at least to liberalization of trade and investment. Countries came to Osaka with symbolic unilateral downpayments of tariff cuts and other liberalizing measures. Each country also adopted the Osaka Action Agenda, "the embodiment of our political will to carry through our commitment at Bogor."[12]

The Action Agenda required that each country develop and implement a specific individual plan for liberalizing trade and investment. The plans are to be in place before the next APEC summit, which will be held in the Philippines in November 1996. Action plans will cover fifteen separate areas: tariffs, nontariff barriers, services (with special emphasis on telecommunications, transportation, energy, and tourism), investment, standards and conformance, customs procedures, intellectual property, competition law, government procurement, deregulation, rules of origin, dispute mediation, mobility of business people, implementation of the Uruguay Round agreements, and information gathering and analysis.

Just how aggressive and comprehensive these action plans will prove to be remains unsure, since they are driven strictly by the political will of each country and not by any binding commitments to the APEC group as a whole.

Indeed, an important conflict among APEC members at Osaka demonstrated the highly political character of the APEC initiative and the lowest common denominator approach to these negotiations. Some countries, notably Japan, South Korea, China, and Taiwan, pressed for the right to make exceptions to their liberalization commitments, particularly in the agricultural sector. The United States and others strongly opposed this approach. Notwithstanding the ostensibly clear commitment to free trade in Bogor a year earlier, the pronouncements from Osaka finessed the issue.

Looking toward the future, it remains unclear exactly how far and how fast

11. APEC members include the United States, Australia, Brunei, Canada, Chile, China, Taiwan, Hong Kong, Indonesia, Japan, South Korea, Malaysia, New Zealand, the Philippines, Singapore, Thailand, Mexico, and Papua New Guinea. (Countries interested in becoming members include Russia and India.)

12. Int'l Trade Rep. (BNA), November 22, 1995.

APEC liberalization will move. The United States did not succeed in shifting the APEC initiative toward speedy development of a legally binding agreement, so progress on tough issues is unlikely. However, important practical improvements in certain technical areas, such as customs and visa procedures and product standards, may still be possible in the near term; and these changes may modestly decrease trade barriers in the APEC region over the next several years.

C. NAFTA

The second year of operation for NAFTA was 1995. The most prominent news story concerning NAFTA during 1995 focused on the controversy over whether the U.S. Executive Branch would be able to convince Congress to renew so-called fast-track legislation to facilitate Chile's accession to NAFTA.[13] New fast-track legislation never materialized; and, as a result, Chile's talks with the United States on NAFTA accession remained at a technical level with no commitments being made on either side. In the absence of fast track, Chile also has held more intensive free trade talks with Canada as an interim step toward future NAFTA accession.

While NAFTA developments unrelated to Chile received far less publicity, several NAFTA institutions passed some fairly significant milestones in 1995. The NAFTA parties faced several new challenges to NAFTA disciplines as well.

Important actions by NAFTA institutions included the following:

- Mexico accepted the adverse findings of the first NAFTA dispute settlement panel it faced under Chapter 19, the NAFTA chapter that deals with antidumping and countervailing duty measures.
- For the first time, the NAFTA Commission for Environmental Cooperation (CEC) used Article 13 of the North American Agreement on Environmental Cooperation to study an environmental issue that could affect all three NAFTA partners. The CEC investigated the mysterious death of thousands of migratory birds in Mexico in 1994. The CEC publicly reported its conclusions and recommendations to the NAFTA parties' environment chiefs in October 1995, generating a commitment by Mexico to review the issue and take necessary action.
- The CEC also clarified the meaning of the NAFTA environmental side agreement by responding to a claim by U.S. environmental groups that the United States was not enforcing the Endangered Species Act. The CEC decided that a failure to enforce U.S. environmental laws could not be used as a basis for striking down new legislation. Under the side agreement, each NAFTA party has the right to modify its environmental laws and establish

13. "Fast track" authority enables the U.S. Executive Branch to present a trade agreement to Congress for expedited approval on an up or down vote, without amendments being permitted. The element is critical to Executive Branch negotiating authority.

its environmental protection, the CEC noted. United State environmentalists were very disappointed, but the CEC action may mute conservative U.S. politicians' claims that the CEC will try to interfere with U.S. sovereignty by imposing its standards on the United States.

- In September 1995, the Border Environmental Cooperation Commission, established under the NAFTA environment side agreement to clean up the border between the United States and Mexico, approved a first set of infrastructure projects.
- The U.S. National Administrative Office (NAO), established under the NAFTA labor side agreement, issued its first report, finding that Mexico was likely not enforcing its labor laws. The report found that Mexico permitted managers at a Sony plant to fire certain workers for legally organizing a union. This report, together with earlier U.S. National Administrative Office investigations, led to a series of public meetings to discuss union registration.
- The Mexican National Administrative Office concluded that U.S. labor laws likely were not being enforced in California, where a Sprint subsidiary closed down just a week before a scheduled union election. The United States and Mexico agreed to a series of actions in response to these findings, including a public meeting in the United States.
- The NAFTA's Commission on Labor Cooperation officially opened its doors and began two studies. The first study concerns labor laws and enforcement mechanisms in the three countries. The second study will compare various statistics on the NAFTA countries' labor forces. The Commission will also develop a labor dispute avoidance procedure that will use independent panels of experts to examine issues of common concern to the NAFTA parties.

The year 1995 was not simply a year of NAFTA institutional development, however. Several difficult disputes arose throughout the year, and leaders resolved none of these issues by year end.

One important dispute arose when Canada converted a number of agricultural quotas to tariff rate quotas (TRQs) to meet its WTO obligations, and then claimed it did not have to eliminate them despite its NAFTA obligation to the United States to eliminate all tariff measures. Canada has long been worried that a flood of U.S. imports would destroy certain agricultural industries (particularly in the politically sensitive province of Quebec), and argued that its TRQs were an exception to normal NAFTA rules.

The United States disagreed and instituted dispute resolution proceedings under NAFTA Chapter 20. The political sensitivities surrounding this issue could put some strain on NAFTA Chapter 20 dispute settlement if the United States prevails, since political pressures within Canada may make compliance difficult.

Other significant Chapter 20 disputes during 1995 involved the United States and Mexico. In April 1995, the United States requested consultations under Chapter 20 concerning alleged Mexican discrimination against U.S. package delivery services operating in Mexico. Mexico argued that its complex trucking regulations precluded quick and easy amendment to correct the apparent discrimination. However, Mexico may be protecting its trucking industry from U.S. competition.[14] United States pressure did not produce any solution to the problem by the end of 1995.

United States political concerns apparently have driven two other Chapter 20 disputes. First, in December 1995, the United States Secretary of Transportation announced that United States would not meet a NAFTA deadline for authorizing Mexican trucks to haul loads into U.S. border states. The United States cited safety concerns and drug trafficking, issues that could create a backlash against the Clinton administration's support for NAFTA during an election year. Furthermore, U.S. trucking unions pressed the U.S. administration to prevent Mexican trucks from moving further into the United States. While many Republicans decried this NAFTA violation and the Mexicans quickly asked for consultations under Chapter 20, the U.S. administration has not moved. Given the upcoming U.S. elections, this issue could prove difficult to resolve in the short term.

The second set of Chapter 20 consultations initiated by Mexico arose from measures proposed by the United States to try to stem the flow of winter tomatoes into the United States from Mexico. Winter season tomato growers failed in their attempt to use the U.S. safeguard statute, section 201 of the Trade Act of 1974, to cut back Mexican imports. USTR responded to the political pressure from Florida interests in December 1995 with a proposal to change the calculation of TRQs for Mexican tomatoes so import flows would be more restricted.

Mexico charged that this restriction would violate NAFTA and requested Chapter 20 consultations. The issue remained unresolved through February 1996, although the U.S. Secretary of Agriculture stated that he would not take any steps in violation of NAFTA.[15] Nonetheless, the political pressure on the United States to solve the Florida industry's problem in this election year appears likely to lead to import restrictions, whether accepted by the Mexican industry or imposed by the United States.

Overall, NAFTA has worked fairly well thus far to channel many disputes into manageable legal channels. However, whether NAFTA disciplines can handle the most sensitive political issues that arise between NAFTA partners remains to be seen.

D. The Free Trade Area of the Americas

In December 1994, Canada, the United States, and nations from Latin America and the Caribbean participated in the Summit of the Americas at which they

14. *See Inside U.S. Trade*, April 28, 1995, at 7.
15. *Inside U.S. Trade*, January 19, 1996, at 1.

agreed to conclude negotiations on a Free Trade Area of the Americas (FTAA) by 2005.

Although the United States initially hoped that the FTAA negotiation process would entail early trade liberalization beyond WTO commitments as well as aggressive consideration of labor and environmental issues, the Latin American and Caribbean nations quickly dampened these ambitions. Concerns about financial instability in the region, the distractions of MERCOSUR negotiations, and the limited capacity of the United States to accelerate trade liberalization in areas of interest to other countries ensured that the construction of an FTAA would not take off at lightning speed during 1995.

Instead, at a ministerial meeting in Denver in June 1995, FTAA participants agreed to proceed in a deliberate fashion. They developed a framework for high level political decision making on how to proceed with further negotiations, and they set up seven technical working groups to provide an information base for these negotiations. The groups were to deal with the following areas: smaller economies, investment issues, antidumping and subsidies matters, sanitary and phytosanitary measures, standards and technical barriers to trade, market access, and customs procedures, and rules of origin.

The Denver Declaration outlined a specific mandate for each working group to complete by the March 1996 ministerial meeting in Cartagena, Colombia. The tasks set out for the groups focused primarily on gathering of information and development of recommendations on how negotiations in a given area could proceed during 1996 and beyond. The mandate asked only a few working groups to take actual steps toward trade liberalization.

Given the variable resources available to individual countries and the many issues for group consideration, many of the groups had difficulty meeting all of their objectives. However, information on the many facets of hemispheric trade has been accumulating. Indeed, a vice ministerial group that met in December agreed to set up four additional working groups at the March 1996 ministerial meeting. These groups will deal with intellectual property rights, competition issues, services decisions, and government procurement.

Political leaders also have been sending consistent messages about the scope and level of commitment likely in an FTAA. Public statements by regional leaders indicate the FTAA will liberalize trade beyond WTO commitments and should incorporate most of the subject areas covered by NAFTA.

Nonetheless, significant open issues remain. On the issues of substance, smaller countries in the region have been pressing for special and differential treatment, an initiative strongly resisted by Canada and the United States. As for process, no one seems to have a sense of how to actually negotiate this kind of broad agreement with thirty-four diverse participants, particularly when existing regional arrangements create very different trade conditions among the parties.

Finally, the lack of U.S. fast-track authority and the MERCOSUR countries' preoccupation with other more economically beneficial trade arrangements reduce any sense of urgency in the negotiations. While certain elements necessary to any FTAA negotiation may be coming together, an actual FTAA seems a distant goal.

IV. Key Bilateral Developments

by Janet A. Nuzum

A. Introduction

The bilateral trade agenda in 1995 included both issues from previous years as well as new disputes. Last year marked the ten-year anniversary of the first free trade agreement entered into by the United States—that with Israel. The U.S. list of free trade agreement partners would not expand in 1995, however, to include Chile. In the absence of fast-track negotiating authority, U.S. discussions with Chile on possible NAFTA accession focused only on technical and preparatory matters.

Most of the developments on the bilateral trade agenda came about in connection with, if not as a direct result of, the institution of a U.S. investigation under section 301 of the Trade Act of 1974. The most notable achievements were the successful conclusion in February of an agreement with China on intellectual property and an agreement in June with Japan on autos and auto parts. No sooner did the dispute with Japan on autos and auto parts end, however, than a new dispute over the Japanese market for photographic film and paper began. The United States reached four bilateral agreements with Korea in 1995, covering telecommunications, meats, steel, and autos.

Bilateral trade disputes with our largest trading partner, Canada, focused again on agriculture and cultural industries. A dispute over discriminatory practices in the granting of cable television broadcasting licenses appeared to dissipate when the private parties reached a joint commercial agreement. A one-year agreement on U.S.-Canadian wheat trade expired, although underlying concerns about both Canadian and U.S. practices in this sector continue. Bilateral consultations on lumber trade continued throughout the year. Finally, a dispute over EU policies on banana imports carried over from 1994 and led to procedural developments on both the bilateral and multilateral fronts by year-end 1995.

B. United States–Israel Free Trade Agreement

January 1, 1995, marked the full implementation of the U.S.-Israel Free Trade Area Agreement.[16] This first free trade area agreement for the United States

16. Agreement on the Establishment of a Free Trade Area Between the Government of the United States of America and the Government of Israel, signed April 22, 1985, entered into force August 19, 1985, *reprinted in* 24 I.L.M. 653 (1985); implemented in U.S. Law by Pub. L. No. 99-47, approved June 11, 1985, 19 U.S.C. § 2112.

became effective on August 19, 1985. The scope of the agreement included tariff barrier elimination over a ten-year period as well as nontariff barrier reduction between the two countries in areas such as licenses, procurement, and subsidies. The U.S.-Israel FTA covered trade issues beyond the scope of GATT and served as a model for future free trade agreements. As a consequence of the U.S.-Israel FTA, the share of U.S. exports to Israel enjoying duty-free access increased from 18 percent in 1982 to 100 percent in 1995.

The main purpose of the U.S.-Israel FTA was to expand trade between the two countries; and indeed, trade more than doubled during the ten-year phase-in period. United States exports to Israel grew from $1.8 billion in 1985 to $5.6 billion in 1995.[17] Similarly, U.S. imports from Israel grew from $2.1 billion to $5.7 billion during this period. Israel ranked as our twenty-third largest trading partner last year.

C. United States–China Agreement on Intellectual Property Rights

Although the United States and China reached an agreement on intellectual property rights protection in 1992, that agreement focused on improving China's statutory and regulatory regime for the protection of intellectual property rights. United States concerns subsequently shifted to the lack of adequate intellectual property rights enforcement measures by the Chinese Government. Piracy of U.S. sound recordings, motion pictures, and computer software, for example, was very extensive and went largely undisciplined in China. On July 1, 1994, these concerns led USTR to name China a priority foreign country under the special 301 provisions of the Omnibus Trade and Competitiveness Act of 1988 and to initiate a section 301 investigation.[18] The U.S. sound recording, motion picture, and computer software industries actively developed the U.S. case and pressed for meaningful action by the Chinese authorities. Bilateral consultations failed to resolve U.S. concerns by year-end 1994, prompting USTR Kantor to announce that retaliatory duties of 100 percent on certain products from China would go into effect February 26, 1995, absent a satisfactory agreement.[19] Analysts valued the proposed sanctions at $1.08 billion. China threatened counterretaliation if the U.S. sanctions went into effect.

17. Trade figures used throughout this article are developed by the staff of the U.S. International Trade Commission based on official statistics of the U.S. Department of Commerce. To be consistent with the approach used by the Department of Commerce in its monthly release of trade statistics, U.S. export figures include total (domestic plus foreign) exports; U.S. import figures are general imports, customs basis; two-way trade figures are exports plus imports.

18. Identification of Priority Foreign Country and Initiation of Section 302 Investigation, 59 Fed. Reg. 35,558 (1994). USTR initiated this investigation under the so-called Special 301 provision of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1303, 19 U.S.C. § 2242.

19. Determination of Action Concerning the People's Republic of China's Protection of Intellectual Property and Provision of Market Access to Persons Who Rely on Intellectual Property, 60 Fed. Reg. 7230 (1995).

The dispute was highly visible and each side was reluctant to be perceived as giving in to the other. During the early morning hours of February 26, however, the parties reached an agreement, averting retaliation under the section 301 proceeding. Under the agreement, China agreed to establish effective intellectual property rights enforcement and to reduce current intellectual property rights piracy, particularly of copyrighted works. China also agreed to improve access to the Chinese market for U.S. audiovisual products, computer software, and books and periodicals. The new enforcement structures included working groups at the central, provincial, and local levels; high-level government task forces; urban strike forces; and special enforcement periods of intensified crackdowns. China also pledged increased resources to stop Chinese export of pirated products and agreed to establish an effective border control system, with technical assistance from the United States.

In addition to stepped up enforcement measures, the bilateral agreement included market access commitments. For the first time, China agreed to permit U.S. companies to establish joint ventures to produce, reproduce, distribute, sell, and perform audiovisual works in China. United States motion picture companies may enter into revenue-sharing arrangements with partners in China.

As the negotiations were coming to a close, the seriousness of China's commitments was symbolically demonstrated by the raiding and closure of seven factories producing pirated music compact discs and movie laser discs. Under the terms of the agreement, China will share information on its enforcement activities on a quarterly basis, and bilateral consultations will occur every six months.

By late 1995, however, U.S. concerns were rising over the adequacy of implementation in several areas. For example, although China significantly reduced piracy of compact discs, videos, and books at the retail level, numerous factories producing pirated CDs were still operating. Large exports of infringing products suggested that Chinese customs authorities were not aggressively pursuing infringers. Regulations providing Chinese customs officials with enhanced enforcement powers contained significant loopholes that shifted much of the enforcement burden to the intellectual property rightholder. Although the 1995 intellectual property rights agreement was a significant achievement, implementation issues clearly linger.

D. United States–Japan Auto and Auto Parts Agreement

United States trade with Japan, our second-largest trading partner, exceeded $187 billion in 1995, with U.S. exports to Japan of $64 billion and imports from Japan of almost $124 billion. As usual, access to Japan's market in general, and autos in particular, dominated the bilateral trade agenda. The U.S.-Japan framework talks, initiated in July 1993, expired in July 1995, but mutual agreements extended the negotiations. During the year, many bilateral consultations reviewed and assessed progress under various framework agreements, including those on construction, insurance, paper, and deregulation. In November, the United States Government submitted its third deregulation proposal to Japan, focusing on deregulation in twelve specific industry sectors.[20] In December, the Japanese Deregulation Subcommittee of the Administrative Reform Council released a deregulation package that recommended a range of actions to improve deregulation in Japan.

In June, while attending the G-7 economic summit in Halifax, Nova Scotia, President Clinton and Japanese Prime Minister Murayama announced an extension of the framework talks and the signing of a U.S.-Japan investment agreement.[21] President Clinton also took the occasion to rule out any extension of the auto talks and reiterated his intention to take retaliatory action against imports of Japanese autos if an acceptable agreement were not concluded by June 28.

Auto trade with Japan has long been a contentious subject. The Clinton administration has pursued bilateral discussions on the automotive sector since October 1993. On October 1, 1994, USTR initiated a section 301 investigation on autos and auto parts focusing on three areas: deregulation of the replacement parts market in Japan, increased access for U.S. automakers to Japanese dealership networks, and increased purchases by Japanese automakers of U.S. auto parts.[22] As expected, negotiations with the Japanese Government were not easy; and before the parties reached an agreement, the United States Government made very clear its intention to take retaliatory action if necessary. The retaliatory action taken under section 301 would be 100 percent duties on thirteen models of Japanese luxury cars.[23]

Although negotiations went, as usual, right up to the deadline, USTR Kantor and Japanese Trade Minister Ryutaro Hashimoto announced an agreement on U.S.-Japan auto trade on June 29. The agreement included all three areas sought by the United States and objective criteria for monitoring progress in these areas. The Japanese Government pledged to take various steps to deregulate the Japanese market for replacement auto parts, including reform of the qualifications for designated or certified garages and reform and review of the critical parts designations. To facilitate Japanese dealerships' access to U.S. automobiles, the Japanese Government would reassure Japanese dealers of their right to sell foreign vehicles and to be free of pressure not to do so from Japanese auto manufacturers. The

20. Submission by the Government of the United States to the Government of Japan Regarding Deregulation, Administrative Reform and Competition Policy in Japan (Nov. 1995).

21. The agreement underwent additional textual review, and was concluded with an exchange of letters between the two governments on July 20, 1995.

22. Initiation of Section 302 Investigation and Request for Comment: Barriers to Access to the Auto Parts Replacement Market in Japan, 59 Fed. Reg. 52,034 (1994).

23. Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301; Barriers to Access to the Auto Parts Replacement Market in Japan, 60 Fed. Reg. 26,745 (1995).

Japanese Government also pledged to increase the budget and strengthen the activities of the Japanese Fair Trade Commission.

In addition, the five largest Japanese auto manufacturers announced plans to increase U.S. and foreign parts purchases in the United States and in Japan and to increase parts and vehicle production in the United States. The Big Three U.S. auto manufacturers indicated their expectation to increase exports of competitive products to Japan from 45,000 in 1994 to 160,000 in 1998. Although the actions to be taken by the Japanese private sector were critical to the successful conclusion of the negotiations, these elements of the agreement were not government commitments. They were instead voluntary plans by the companies, not strictly enforceable under section 301 of the Trade Act.

Recognizing that enforceability would be a crucial factor in the agreement's ultimate success or failure, USTR insisted that specific provisions for monitoring progress be part of the agreement itself. The agreement included seventeen objective criteria, both qualitative and quantitative, for assessing progress. For example, two of these criteria dealt with changes in the number of new foreign vehicles sold in Japan and changes in the purchases of U.S. auto parts for use in Japanese automobiles produced in the United States. The United States Government also pledged to work with the auto parts industry to develop a new data collection and verification system as part of the monitoring effort. Semiannual progress reports will be published by the administration.

No sooner did the negotiations end than arguments over differing interpretations of the commitments began. Debate over the nuances of voluntary plans, targets, goals, and the objective criteria ensued, with all sides putting their own spin on the character of the commitments. Although the agreement itself was a substantial accomplishment, bilateral disputes are likely to continue in coming years over its implementation and interpretation.

E. Japanese Market for Photographic Film and Paper

On July 3, less than a week after the resolution of the longstanding auto parts dispute, USTR announced the initiation of a section 301 investigation based on Eastman Kodak's complaint of anticompetitive practices in the Japanese market for consumer photographic film and paper. Kodak alleged that blocked distribution channels in Japan denied Kodak fair access to Japanese consumers through exclusive distribution relationships, anticompetitive practices on retail price maintenance, financial dependence of distributors on Japanese manufacturers, and nontransparent and anticompetitive rebates from manufacturers. Kodak directed the allegations at Fuji Photo Film, Ltd., Japan's film distributors, and the Japanese Government.

Fuji vehemently denied the allegations, and the government of Japan said it would not negotiate with USTR under the threat of trade sanctions. As 1995 came to an end, the Japanese Government tried to divert the dispute into a larger forum and proposed putting the subject on the agenda of the Organization for Economic Cooperation and Development Trade Committee. The United States Government declined.

In early 1996, the Japanese Fair Trade Commission announced that it would conduct a year-long survey of competition in the Japanese photographic film and paper markets. Kodak found the Japanese Fair Trade Commission's survey proposal inadequate. Although the dispute touches on the interesting intersection of competition policy and market access, little progress developed in the absence of serious bilateral discussions.

F. United States–Canada Trade Relations

Canada continued to be our largest trading partner, with two-way trade in 1995 reaching over $271 billion. Last year, Canada accounted for 22 percent of U.S. exports and almost 20 percent of U.S. imports. Although most of this trade was without incident, several disputes with Canada arose last year in the ever-sensitive areas of agriculture, lumber, and cultural industries.

The United States-Canada Memorandum of Understanding (MOU) on Grains, which provided for a one-year TRQ on U.S. imports of Canadian wheat, expired on September 11, 1995. The United States and Canada negotiated the MOU in 1994 in lieu of unilateral U.S. action against Canadian wheat under section 22.[24] Upon expiration of the Grains MOU, however, USTR Mickey Kantor and U.S. Agriculture Secretary Dan Glickman announced that the United States would continue to monitor imports of Canadian wheat using the MOU's TRQ levels as a benchmark. The United States could request consultations with Canada after six, nine, or eleven months if actual wheat imports from Canada exceeded the levels applicable under the TRQ. The parties would also monitor barley imports. United States officials vowed to use appropriate U.S. trade laws in the event of market disruption from Canadian wheat. On the Canadian side, Canadian officials welcomed the expiration of the MOU, noting that, as a result of the Uruguay Round, international legal obligations now preclude U.S. authorities from using section 22 against Canadian wheat.

The 1994 settlement of the United States-Canada wheat dispute also established a Joint Commission on Grains. The Commission included six U.S. members with growing, milling, and farming backgrounds, and six Canadian members with teaching, trading, pooling, and malting backgrounds. The Joint Commission issued a final report at the end of the year. The final report contained fourteen recommendations on issues ranging from policy coordination and cross-border trade to grading schemes and regulatory regimes.

Bilateral discussions on softwood lumber trade also continued in 1995, although in a less confrontational manner than in previous years. In December 1994, the

24. *See* 7 U.S.C. § 5624; Proclamation No. 6740, 59 Fed. Reg. 52,399 (1994).

United States and Canada established a consultative mechanism to consider a broad range of issues affecting trade in lumber, including subsidy practices, forestry resource management policies, and other challenges facing the industry. This bilateral mechanism's purpose was to shift the forum for dispute resolution away from the more litigious arena of U.S. trade remedy laws to a more cooperative, mutually beneficial process. Both sides exchanged views and considered proposals on a number of issues during 1995 but did not reach any mutual agreements by year's end.

Agriculture and lumber were not the only issues addressed by the United States-Canada agenda. On February 6, 1995, USTR initiated a section 302 investigation of the Canadian Government's transfer of a broadcasting license from a U.S.-owned company to a Canadian-owned company.[25] The 302 petition, filed by Country Music Television (CMT) and its owner, Westinghouse Broadcasting Company, argued that the Canadian action was an unreasonable barrier to U.S. market access in Canada as well as a violation of Canadian obligations under NAFTA's investment and services provisions. The petition sought restoration of CMT's license, compensation for the company's losses, and adoption of new policies to ensure that similar actions by Canada would not occur in the future.

The Canadian Government defended the Canadian Radio-Television and Telecommunications Commission (CRTC), arguing that services in cultural industries are exempt from coverage under NAFTA and that the CRTC decision was in accordance with Canadian law as upheld by a Canadian court. The USTR asked the U.S. Federal Communications Commission to identify pending license applications from Canadian-owned entities and international facilities connected with Canadian-owned entities. The USTR wanted the information to identify potential targets for retaliation, and this request signaled USTR's interest in taking retaliatory action in the same sector.

In June, however, the USTR suspended the 302 investigation because the owners of CMT and of Canada's New Country Music reached a tentative agreement. The two sides agreed to form a single, twenty-four-hour country music television network in which CMT would hold a 20 percent equity interest. USTR nevertheless made clear its continuing concern over Canada's policy of displacing foreign broadcasters in favor of Canadian broadcasters. As of year-end, the private agreement was not final.

Another cultural dispute with Canada last year focused on a Canadian legislative proposal to impose an 80 percent excise tax on advertising revenues of Canadian split-run editions of foreign magazines. "Split-run" foreign magazines are magazines that are written abroad but published in Canada with Canadian-directed advertising. Advocates of the excise tax argued that the tax was necessary to protect Canadian culture. The United States objected to the Canadian legislation,

25. Initiation of Section 302 Investigation Concerning Certain Discriminatory Canadian Communications Practices, 60 Fed. Reg. 8101 (1995).

which the Parliament nevertheless passed in late 1995-early 1996. USTR Kantor claimed the tax violated Canada's international obligations and that he was considering further action.

G. EU Banana Policies

The dispute over EU policies to regulate banana imports continued in 1995 without resolution. In September 1994, Chiquita and the Hawaii Banana Industry Association filed a section 301 petition challenging both the EU regime setting TRQs on banana imports and a 1994 banana framework agreement between the EU and four Latin American nations (Colombia, Costa Rica, Nicaragua, and Venezuela). Chiquita claimed these schemes disadvantaged U.S. companies that market and distribute bananas. In October 1994, USTR initiated a section 301 investigation of the EU import regime, but deferred any action on the framework agreement until the agreement's implementation.[26]

On January 9, 1995, following implementation of the framework agreement by Colombia and Costa Rica, USTR initiated two investigations under section 301 of the policies and practices of Colombia and Costa Rica regarding exportation of bananas to the EU.[27] One year later, on January 10, 1996, USTR Kantor determined the banana export policies, including export licensing requirements, to be unfair, but indicated that no sanctions would be invoked at that time in light of two MOUs reached with Costa Rica (on January 6) and Colombia (on January 9).[28] The MOUs established consultative mechanisms with Costa Rica and Colombia designed to increase international cooperation on banana trade. In particular, the two countries pledged to eliminate discrimination in the export certificate system and to join the United States in pressing the EU for reform of the EU import regime.

In October 1995, USTR terminated the earlier 301 investigation against the EU banana import regime, and then initiated a second investigation to take the dispute to the WTO.[29] Mexico, Guatemala, Honduras, and Ecuador joined the United States in the WTO complaint.

26. Initiation of Section 302 Investigation Concerning the European Community Banana Import Regime and Request for Public Comment, 59 Fed. Reg. 53,495 (1994).

27. Initiation of Section 302 Investigation Regarding Policies and Practices of the Government of Colombia Concerning the Exportation of Bananas to the European Union; Request for Public Comment, 60 Fed. Reg. 3283 (1995); Initiation of Section 302 Investigation Regarding Policies and Practices of the Government of Costa Rica Concerning the Exportation of Bananas to the European Union; Request for Public Comment, 60 Fed. Reg. 3284 (1995).

28. The two MOUs were part of USTR's section 304 determinations on Colombia and Costa Rica's policies and practices concerning the exportation of bananas to the European Union. *See* 61 Fed. Reg. 1788, 1789 (1996).

29. Termination of Investigation; Initiation of New Investigation and Request for Public Comment: European Union Banana Regime, 60 Fed. Reg. 52,026 (1995).

H. United States-Korea Agreements on Telecommunications, Food, Steel, and Autos

Two-way trade with Korea, our seventh largest trading partner, reached almost $50 billion in 1995. Disputes in four areas—telecommunications procurement, food shelf-life standards, steel pipe and tube, and automobiles—led to bilateral agreements with Korea last year.

The United States and Korea reached a telecommunications agreement with Korea on March 27, 1995, in response to U.S. complaints that Korea was failing to live up to its commitments under a 1992 bilateral agreement. United States firms, including AT&T, charged that Korea was delaying certification of U.S. products, including a new version of switching equipment, through lengthy and unnecessary equipment tests. Korea agreed to provide nondiscriminatory procurement and to exempt telecommunications equipment from type approval if the equipment does not harm the Korean public network. The agreement established an experts group to consider mutual recognition of equipment approval and to develop criteria for determining when type approval is unnecessary. USTR estimated the increased market access for U.S. firms to be valued at $100 million.

A U.S.-Korea dispute over trade in meat and other food products also led to a bilateral agreement in 1995. In November 1994, USTR initiated a section 301 investigation in response to a petition filed by the National Pork Producers Council, the American Meat Institute, and the National Cattlemen's Association.[30] The petition challenged Korea's requirements for sausage distribution; limitations on beef shelf-life; delays in inspection periods; and exclusion of U.S. bidders from a contract tender process. In May 1995, the United States invoked WTO dispute settlement; and on July 20, the two countries reached a bilateral agreement resolving the dispute.

Under the terms of the agreement, Korea will phase out its system of shelf-life requirements and allow manufacturers to set their own use-by dates. The new rules would apply to chilled, vacuum-packed pork and beef and all frozen food as of July 1, 1996, and to dried, packaged, canned, or bottled products as of October 1, 1996. Interim steps based on internationally accepted shelf-life standards would allow trade to resume during the transition period. Korea further agreed to provide adequate time for U.S. pork producers to respond to tender offers. The United States and Korea registered the agreement with the WTO to strengthen its enforceability.

Only one week prior to the agreement on food shelf-life standards, the United States reached a bilateral agreement with Korea on steel trade. A 301 petition filed by the Committee on Pipe and Tube Imports complained of unfair advantages to Korean pipe and tube producers as a result of price controls in the steel sector.

30. Initiation of Section 302 Investigation and Request for Public Comment: Korean Agricultural Market Access Restrictions, 59 Fed. Reg. 61,006 (1994).

On July 14, the United States and Korea announced an agreement establishing a consultative mechanism to share data on steel sheet and pipe and tube products and to review economic trends in the sector. Korea also agreed to notify the United States in advance of any government action to control steel production, pricing, or exports.

The bilateral agreements on food and steel trade may have resolved pending trade disputes in time for the state visit of Korean President Kim Young Sam on July 26-27, but did not resolve all trade disputes for the year. United States concerns over market access to the Korean auto market led to the signing of an MOU between the two countries on September 28, 1995.[31] The MOU included reductions in Korean auto taxes, changes to Korea's auto inspection standards, and changes in Korea's exclusionary advertising rules. As a result of the MOU, U.S. auto manufacturers will have substantially greater opportunities for self-certification under revised safety standards and will face reduced documentation burdens. The deal did not satisfy all of the U.S. auto industry's concerns, but did save Korea from being named a priority country on the Super 301 list.[32]

I. Conclusion

Notwithstanding foreign criticism of section 301 as U.S. unilateralism, the record in 1995 showed section 301 of the 1974 Trade Act to be an effective tool for bilateral resolution of several trade disputes. Important agreements resolved disputes with China, Japan, and Korea in areas involving large volumes of trade during 1995. Implementation and enforcement of these and other bilateral agreements are certain to be areas of attention in 1996.

V. Key Unilateral Developments

by G. Hamilton Loeb

When it comes to unilateral trade developments from the Clinton administration's perspective, 1995 probably best can be described as the morning after. From the Republican point of view, their first year in control of Congress brought to mind, with respect to trade, the famous phrase by William Shakespeare, "[F]ull of sound and fury, Signifying nothing."[33] After two years in which the NAFTA and WTO debates engulfed the Congress and the U.S. trade community, and faced with a legislature controlled by the opposition and increasingly focused on domestic issues, President Clinton's trade aides decided in 1995 to take a breather. The few areas in which the Administration manifested a desire to reach agreement—such as renewal of fast-track—proved unachievable. The Republican

31. U.S.-Korea Memorandum of Understanding: Market Access for Foreign Automobiles, signed Sept. 28, 1995.

32. *See* Exec. Order No. 12,901, 59 Fed. Reg. 10,727 (1994).

33. William Shakespeare, Macbeth, act V. sc. v, verse 17.

leadership, preoccupied with the budget stalemate and fearful of internal dissension, also accomplished little on the trade front. As a result, most of the year's activity took place in the bilateral or multilateral arenas. Unilaterally, the notable developments occurred through executive order, regulatory action, or court decision.

A. Legislative Developments

One of the key planks of the House Republicans' Contract with America during the 1994 campaign was a promise to reduce the size of the federal government. Soon after arriving in Washington in January 1995, congressional leaders in both chambers settled on abolishing the Commerce Department (Commerce) as a first, dramatic step toward fulfillment of that pledge.

Republicans offered a number of different proposals. Some would have merged the bulk of Commerce's functions with the USTR in a new, independent Department of Trade or U.S. Trade Agency. Others would have transferred pieces of Commerce's responsibility to other agencies—export control to State or Defense, dumping and countervailing duty cases to USTR—and would have abolished others. Some Republicans sought to insert Commerce-dismantling provisions into the continuing resolutions during the budget debate or into debt relief legislation, but no bill passed with such provisions. In the face of determined opposition by the Clinton administration and congressional Democrats, and with many key Republicans in the Senate concerned about how Commerce's trade promotion and regulation activities would be carried out in other agencies, attempts to kill the Department faltered late in the year.

Other key trade initiatives met with no kinder a fate in 1995. Attempts to renew the Generalized System of Preferences, achieve parity of the Caribbean Basin Initiative nations with NAFTA, pass the Fair Trade in Financial Services legislation (which would increase the federal government's ability to retaliate against foreign financial services providers for unfair trade practices), ease restrictions on foreign ownership of telecommunications in the United States, and overhaul the Export Administration Act all fell victim to a combination of partisan wrangling, preoccupation with the budget dispute, or opposition from the growing congressional bloc of trade liberalization skeptics.

Despite efforts by both the Clinton administration and Republican congressional leaders, agreement on renewal of fast-track authority for trade negotiations also proved elusive in 1995. The administration's insistence on sufficient flexibility to negotiate labor and environmental provisions as part of trade agreements was anathema to those Republicans otherwise supportive of fast track. The lack of fast-track authority hampered the administration's ability to conduct meaningful trade negotiations, particularly the much-anticipated talks with Chile concerning its possible accession to the NAFTA.

B. Monitoring of Trade Agreements

The inability to negotiate new trade agreements likely caused administration policymakers little worry, as the focus of trade policy shifted in any event. Rather than concluding more bilateral or multilateral trade agreements, U.S. officials began stressing the importance of monitoring the agreements already in place.

To further that goal, both the USTR and the Commerce Department announced the formation of new units to monitor and enforce compliance with those agreements by U.S. trading partners. After an initial jurisdictional spat between the two agencies over the respective roles of the new units, a proposed modus operandi seemed to develop. The USTR's monitoring and enforcement unit, staffed by six USTR attorneys led by Assistant U.S. Trade Representative for Monitoring and Enforcement Jane Bradley, will focus on preparation of the annual National Trade Estimate Report, pursuit of multilateral and bilateral dispute settlement efforts, and involvement in section 301 investigations. Commerce's Trade Compliance Center, located within the International Trade Administration, will function predominantly as a repository of information and will offer technical and analytical expertise that USTR does not maintain in-house. Both agencies pledged to cooperate closely, and President Clinton's nominee to head the International Trade Administration, Stuart Eizenstat, offered several public gestures of reassurance in that respect.

Whether this new enforcement focus presages a longer-term shift in the U.S. approach toward trade relations, or merely a pause in the rapid development of international trade law through new trade agreements, will become clear only in the years ahead.

C. Export Controls

At the beginning of 1995, the Republican trade leadership on the Hill called revision of the 15-year-old Export Administration Act a top priority. Despite that commitment, completion of a bill reforming the law eluded the Congress, and the administration continued to exercise export control powers only by virtue of extension of the presidentially declared emergency under the International Emergency Economic Powers Act.[34]

The administration's long-awaited overhaul of the Export Administration Regulations, by contrast, drew closer to completion in 1995, with the release of proposed rules in May.[35] The rules ease the burdens imposed on exporters and align the classification system for items on the Commerce Control List with the

34. 50 U.S.C. § 1701 *et seq.*

35. 60 Fed. Reg. 25,268 (to be codified at 15 C.F.R. Part 730 and several sections thereafter) (Notice of Proposed Rulemaking); 60 Fed. Reg. 25,480 (to be codified at 15 C.F.R. Part 799) (Advance Notice of Proposed Rulemaking).

categories used in the EU. The most striking proposed change in the regulations reflects a fundamental shift in approach: the proposed regulations reverse the traditional presumption that prohibits all exports unless the exporter has obtained a general or validated license for the transaction. Instead, no export license will be necessary unless the new regulations affirmatively require it.

Toward the end of 1995, President Clinton took another step designed to facilitate exports by signing an executive order establishing firm timetables for interagency review of export license applications.[36] The order allows the Departments of State, Defense, and Energy, along with the Arms Control and Disarmament Agency, to review any license application received by the Department of Commerce, but establishes specified procedures and deadlines for reaching agreement among the agencies on a disputed application. The agencies must resolve their disagreements within ninety days of the application's submission or forward the application to the president for determination.

The most prominent export control issue of 1995 was encryption capabilities. In response to enormous pressure from the software industry, the Clinton administration re-examined its controls on the export of encryption software. Industry lobbyists vehemently argue that the current restrictions impede their ability to compete in the world marketplace. The initial administration proposal, to permit exports of certain dual-key systems if a certified third party retains control of a duplicate key in escrow, met with industry derision.[37] Stung by the criticism, the administration dropped the escrow requirement but retained firm ceilings on key lengths. Industry spokespersons indicate that they will present a counterproposal sometime in the early part of this year.

The administration also eased controls on the sale of high-powered computers abroad, raising the limits on the types of computers that manufacturers may export while retaining restrictions on sales to certain designated countries.[38]

D. Trade Sanctions and Prohibitions

The year 1995 also witnessed significant changes in the regulatory status of several foreign nations:

- The United States lifted restrictions imposed under Foreign Assets Control Regulations that blocked assets of Vietnam and designated nationals in the United States.[39] The move followed the 1994 agreement between the two countries that lifted the U.S. trade embargo.
- The United States also partially suspended sanctions against Yugoslavia

36. Exec. Order No. 12,981, 3 C.F.R. or 60 Fed. Reg. (1995).

37. *See, e.g.*, "Clinton Administration, Industry Wrangle Over Encryption De-Control," *Export Practitioner*, Sept. 30, 1995.

38. 60 Fed. Reg. 65,526 (1995) (to be codified at 15 C.F.R. Parts 771, 779, 799).

39. 60 Fed. Reg. 12,885 (1995) (to be codified at 31 C.F.R. § 500.578).

(Serbia and Montenegro) as a reward for Serbia's support of the Dayton accords on Bosnia-Herzegovina.[40]

- By contrast, President Clinton tightened the U.S. embargo against Iran, prohibiting all trade and investment with that nation in retaliation for the Islamic Government's alleged support of international terrorism.[41]
- In a high-profile judicial decision dealing with export controls, the Court of International Trade upheld the authority of the president through the Bureau of Alcohol, Tobacco and Firearms (ATF) to prohibit importation from China of certain defense articles under the Arms Export Control Act.[42] Plaintiffs contended that the Arms Export Control Act does not authorize import embargoes and challenged certain other aspects of ATF's decision. The agency interpreted the Arms Export Control Act's grant of authority to the president to control imports to include the ability to prohibit those imports altogether, and the court deferred to that construction.[43] The court also affirmed ATF's "authority to revoke current import permits in order to achieve the stated purpose of the embargo," despite the importers' claims that such action was unconstitutional and outside the scope of the statutory authority.[44]

E. Export Promotion

The U.S. Export-Import Bank (ExIm) for the first time last year adopted environmental guidelines to govern its activities. The impact of ExIm's new environmental sensitivity was almost immediate when ExIm decided not to support U.S. companies bidding to participate in China's enormous Three Gorges dam project. Environmentalists criticized the project, claiming it would create widespread environmental degradation and destruction. Business groups and many Republicans in Congress lambasted ExIm's decision. These groups generally have opposed the guidelines, although the new rules may not have played a formal role in ExIm's decision on the China project.

ExIm is considering renewal of the guidelines during the first part of 1996. As of this writing, ExIm has made no final decision on whether to retain the guidelines.

F. Antidumping and Countervailing Duties

The regime of antidumping and countervailing duties came under attack from an unexpected source last year, as the members of the International Trade Com-

40. Pres. Determination No. 96-7, 60 Fed. Reg. 2,887 (1995). The determination left unchanged the status of that country's blocked assets in the United States, pending resolution of outstanding claims by Yugoslavia's successor states and others.
41. 60 Fed. Reg. 47,061 (1995) (to be codified at 31 C.F.R. Part 560).
42. B-West Imports v. United States, 880 F. Supp. 853 (CIT 1995); 22 U.S.C. § 2778 (1988).
43. *B-West Imports*, 880 F. Supp. at 860.
44. *Id.* at 862

mission entered into an unprecedented public debate over the value of those laws. The controversy erupted on June 30 with the release of a report by the International Trade Commission staff that concluded that the antidumping and countervailing duties scheme, while providing short-term benefits to the petitioning industries in some instances, exacted substantial costs to the economy in other instances.[45] The study estimated that the U.S. Gross Domestic Product would have been $1.59 billion greater in 1991 if not for duties imposed under the two sets of laws. Only International Trade Commission Chairman Peter Watson and Commissioner Carol Crawford fully endorsed the study, while International Trade Commissioners Don Newquist and Lynn Bragg disapproved of both its conclusions and its release.[46]

The antidumping and countervailing duties laws also encountered legislative efforts aimed at eliminating negative effects of antidumping and countervailing duties orders on users of imported goods. Rep. Philip Crane (R-Ill.), chairman of the House Ways and Means Committee's Trade Subcommittee, introduced a bill in December 1995 that would allow Commerce temporarily to suspend antidumping or countervailing duties on products that cannot be obtained from U.S. producers. This short-supply measure attracts the support of some prominent legislators, including House Ways and Means Committee Chairman William Archer (R-Texas), but faces stiff opposition from others in Congress and from the Commerce Department.

The enactment of the Uruguay Round Agreements Act in 1994, which took effect on January 1, 1955, made several changes to antidumping and countervailing duties law. Both the Commission and the International Trade Commission promulgated new procedures in 1995 to comply with the WTO requirements, and the two agencies spent much of 1995 drafting proposed regulations to complement the substantive changes required by the WTO agreements and the Uruguay Round Agreements Act.[47]

Several important new judicial decisions in 1995 in the antidumping and countervailing duties area include:

- The Court of International Trade generally affirmed the International Trade Commission's injury determinations in many steel dumping cases. The court displayed a tendency—not always present in the Court of International Trade—to defer to the International Trade Commission's experience and expertise derived from years of steel proceedings.[48]

45. ITC Report Finds Trade Remedy Laws Carry Overall Cost to U.S. Economy, BNA Management Briefing, July 5, 1995.

46. The two remaining members—Vice Chairman Janet Nuzum and Commissioner David Rohr—joined the study with reservations.

47. 60 Fed. Reg. 51,748 (to be codified at 19 C.F.R. §§ 201, 207) (Notice of Proposed Rulemaking); 60 Fed. Reg. 25,130 (to be codified at 19 C.F.R. Parts 353 and 355) (Interim Final Rule).

48. *E.g.*, Stalexport v. United States, 890 F. Supp. 1053 (CIT 1995); Empresa Nacional Siderurgica, S.A. v. United States, 880 F. Supp. 876 (CIT 1995).

- The Federal Circuit settled a technical but important point in dumping analysis in affirming the Court of International Trade's treatment of home-market transportation costs. In *Ad Hoc Comm. of AZ-NM-TX-FL Prod. of Gray Portland Cement v. United States* (*Ad Hoc II*), the Federal Circuit explained that its earlier *Ad Hoc I* decision held that Commerce does not possess " 'inherent authority' to deduct pre-sale home market transportation expenses in the calculation of FMV [foreign market value]," but interpreted *Ad Hoc I* narrowly as applying only to purchase price comparisons and as silent on "the applicability of the COS [circumstances of sale] provision" of the statute to such home-market transportation costs.[49] In *Ad Hoc II*, the court permitted "such [pre-sale] expenses to be deducted as indirect expenses under the COS provision for ESP [exporter's sales price] comparisons, subject to the ESP offset cap."[50] For purchase price comparisons, the court allowed such deductions only "if the expenses are determined to be directly related to the sales at issue."[51]
- In a related case, *Torrington Co. v. United States*,[52] the Federal Circuit declined to extend the *Ad Hoc I* holding to the ESP context and also noted that *Ad Hoc I* did not address the scope of Commerce's authority under the COS provision of the antidumping statute. The court permitted Commerce to adopt a flexible test to distinguish between direct and indirect expenses. "Rather than treating all post-sale transportation expenses as direct and all pre-sale transportation expenses as indirect, Commerce now looks to whether the expenses are directly related to particular home-market sales."[53] Under this approach, "some pre-sale transportation expenses are now regarded as direct and are deducted from foreign market value under the statutory circumstances-of-sale provision."[54]

G. Import-Export

A number of important court decisions in 1995 affected the mechanics of import and export transactions. Easily the most notable was *United States Shoe Corp.*

49. 865 F. Supp. 857 (CIT 1994), *aff'd*, 1995 WL 596834 (Oct. 10, 1995) (unpublished disposition) (*Ad Hoc II*); Ad Hoc Comm. of AZ-NM-TX-FL Prod. of Gray Portland Cement v. United States, 13 F.3d 398 (Fed. Cir.), *cert. denied*, 115 S. Ct. 67 (1994) (*Ad Hoc I*); *Ad Hoc II, supra* note 36, 865 F. Supp. at 862. At the time of the court's decision, the COS provision allowed Commerce to adjust the FMV if needed due to unspecified "other differences in circumstances of sale" of the subject products. 19 U.S.C. § 1677b(a)(4)(B) (1988). Although the AD statutes experienced drastic change with the passage of the URAA, the COS provision survived in nearly identical form. *See* 19 U.S.C. § 677b(a)(6)(C)(iii) (1994). In any event, because the *Ad Hoc II* case arose prior to the effective date of the URAA, the court decided it under the former version of the statute.

50. *Id.* at 862.

51. *Id.* at 863.

52. 68 F.3d 1347, 1355-56 (Fed. Cir. 1995).

53. *Id.* at 1356.

54. *Id.*

v. United States, in which a special three-judge panel of the Court of International Trade declared the Harbor Maintenance Fee tax unconstitutional as applied to exporters.[55] The court ruled that the tax violated the Export Clause of the United States Constitution.[56] The court based its jurisdiction to consider the validity of the tax on 28 U.S.C. § 1581(i) rather than on § 1581(a), dealing with protestable decisions, as argued by the government. As a result, exporters may obtain tax refunds even if they do not file a protest with the Customs Service. However, a two-year statute of limitations applies to all claims. The court granted a stay of enforcement of the judgment pending a possible appeal.[57]

- In *International Business Machines. v. United States*, the Federal Circuit invalidated a federal excise tax imposed on U.S. beneficiaries of casualty insurance obtained from foreign insurers for exported products.[58] Exporters sometimes obtain the insurance to cover their products during shipment. The court refused the government's invitation to disregard a 1915 Supreme Court precedent, *Thames & Mersey Marine Insurance v. United States*, which the government conceded was directly on point, despite the government's contention that the longstanding case no longer constitutes good law.[59] Under the reasoning of that 1915 decision, the court determined that the tax was "in effect a tax upon the exported products themselves and thus . . . [a violation] of the Export Clause of the Constitution."[60] The circuit court expressly disclaimed authority to reject *Thames & Mersey*, but noted that the Court may yet reconsider the 1915 decision.[61] The Supreme Court's recently announced intention to review the case may signal its willingness to accept that invitation.
- In a seemingly straightforward decision that may have far-reaching consequences for many importers, the Court of International Trade decided in *Intercargo Ins. v. United States* that language routinely employed by Customs in its notices of extension of liquidation failed to comply with the requirements of the applicable statute and, consequently, the extensions were invalid.[62] The statute and regulation at issue require that Customs articulate one of three reasons provided in the statute for an extension.[63] In its notices, Customs indicated simply that "Additional Time Is Required."[64] The government has appealed the decision in *Intercargo* to the Federal Circuit. If

55. 907 F. Supp. 408 (CIT 1995).
56. U.S. CONST. art. 1, § 9, cl. 5 (providing that "no Tax or Duty shall be laid on Articles exported from any State").
57. Ct. No. 94-11-00668, 1995 WL 736335 (CIT Dec. 4, 1995).
58. 59 F.3d 1234 (Fed. Cir.), *cert. granted*, 116 S. Ct. 594 (1995).
59. 237 U.S. 19 (1915); *IBM Corp., supra* note 47, 59 F.3d at 1235-36.
60. *Id.* at 1235.
61. *Id.* at 1239.
62. 879 F. Supp. 1338 (CIT 1995).
63. *See* 19 U.S.C. § 1504(b); 19 C.F.R. § 159.12.
64. *Intercargo, supra* note 52, 879 F. Supp. at 1340.

the lower court decision is upheld, thousands of importers may be entitled to relief.

- In another procedural decision with important consequences for importers, *Pollack Import-Export Corp. v. United States*, the Federal Circuit reversed the Court of International Trade and determined that mere failure to list certain entries on a summons does not deprive the court of its jurisdiction to grant relief with respect to those entries when the plaintiff sought relief for the entries in its complaint.[65]

65. 52 F.3d 303 (Fed. Cir. 1995).