

KAYE SCHOLER LLP

INTERNATIONAL TRADE UPDATE

WASHINGTON, DC

OCTOBER 2002


STEEL UPDATE

US Defends Section 201 Safeguard Measures

Responding to the World Trade Organization (WTO) challenge against the US Section 201 safeguard measures on steel, US Department of Commerce (DOC) officials have reiterated that the safeguard measures remain necessary because the US steel industry's adjustment process is incomplete and US trading partners have not eliminated unfair practices that protect their own steel industries. The DOC statement comes after extensive criticism of the safeguard measures from both US trading partners and US steel producers, consumers, and end-users. Downstream manufacturers of steel products criticize the measures for increasing steel prices to such an extent that steel-using manufacturers are exporting business opportunities and, thereby, damaging growth potential.


However, DOC also rejected a recent request by a US steel producer to not phase down in March 2003 the Section 201 safeguard measures. Specifically, Weirton Steel Corporation requested that the Bush administration extend for an additional year the 30 percent tariffs on certain imported steel products. Commerce Under Secretary for International Trade Grant D. Aldonas stated that extending the measures would be inconsistent with US WTO obligations. Overall, the safeguard measures are slated for an interim review in September 2003.

The DOC is also investigating whether the 201 measures should be amended to include carbon flat-rolled products from India and Turkey. Seven domestic flat-rolled producers sent a letter to trade officials requesting the investigation. The original March 5, 2002 presidential proclamation excluded India and Turkey from the measures on the basis of the developing country exclusion under the WTO Safeguards Agreement, *i.e.*, their individual import share did not exceed the 3 percent threshold of total imports. However, US producers claim that, since the measures were introduced, imports from Turkey and India have exceeded the 3 percent threshold. Producers are currently gathering supporting import data, and expect to meet with trade officials in the near future.


On the WTO front, on October 4, the US submitted its first brief in response to complainants. The first meeting of the panel is scheduled for October 29-31. 

WTO APPROVES PANEL REQUEST FOR US CHALLENGE TO EU STEEL SAFEGUARD MEASURES	2
SWISS MAY DROP WTO COMPLAINT ON US STEEL SAFEGUARD MEASURES ..	2
US TO RESTART STEEL EXCLUSIONS PROCESS.....	2
US PROPOSES INCREASED TRANSPARENCY IN WTO DISPUTE SETTLEMENT ...	3
CHALLENGES TO US TRADE LAWS REBUFFED.....	3
US OFFERS PROPOSAL FOR CHILE-US FTA.....	4
USTR ACTIVELY PURSUES FREE TRADE AGREEMENTS.....	5
BRIEFLY NOTED	5

WTO Approves Panel Request For US Challenge To EU Steel Safeguard Measures


On September 16, 2002, the WTO approved a panel request from the United States against the provisional safeguard measures imposed by the European Union (EU) on steel imports. The EU safeguard was imposed several weeks after President Bush's March 5, 2002 proclamation imposing US safeguard measures on steel. The US charges that the EU's provisional measure was not imposed in accordance with the WTO's Safeguards Agreement. The EU has countered that the provisional safeguard is needed to offset increased imports of steel diverted from the US market because of the US safeguard measures. The provisional safeguards, which are the subject of the dispute, expired on September 27, 2002. Subsequent to formation of the panel, the EU announced final safeguard measures on seven categories of steel imports. However, the European Union Council of Ministers has supported delaying retaliation until the WTO dispute has been decided. One factor influencing the decision to delay imposing safeguards appears to be the US decision to exclude from its safeguard measures as much as one-half of the European steel exports that were covered by the original US proclamation. 

Swiss May Drop WTO Complaint On US Steel Safeguard Measures

Switzerland and the US reportedly are engaged in discussions aimed at reaching an agreement that could lead the Swiss government to drop its WTO dispute complaint against the US safeguard tariffs on imported steel. The talks were prompted by the US government's announcement on August 22, 2002, that it was excluding an additional 178 steel products from the safeguard measure, a move that effectively exempts Swiss steel exports from the US safeguard measures. In a related development, the Swiss government is monitoring imports of steel in order to determine whether steel previously bound for US and European markets is being diverted to Switzerland as a result of the safeguard measures adopted by the two countries. If steel is being diverted to the Swiss market, Switzerland could impose its own safeguard restrictions on steel imports. 

US To Restart Steel Exclusions Process

The US Department of Commerce and the US Trade Representative (USTR) on August 30 completed the process of reviewing and granting steel exclusions under the Section 201 safeguard measures on steel. (See "More Steel 201 Exclusions Granted," *International Trade Update*, August 2002.) USTR approved an additional 37 products on August 12 and a final batch of 178 products on August 22. In keeping with a self-extended deadline of August 31, USTR issued a Federal Register notice on August 30 implementing all additional exclusions granted since July 9 and providing technical corrections to previously granted exclusions.

USTR and DOC are preparing for the next product exclusion process for the 2003/2004 period. USTR issued a notice on September 3 requesting comments on proposed exclusion questionnaires. The questionnaires are based on those used in the previous exclusion process and have been revised to respond to concerns that arose during that process. Beginning September 23, parties wishing to pursue exclusions have been able to apply for exclusion request numbers. 


MULTILATERAL TRADE

US Proposes Increased Transparency In WTO Dispute Settlement

The Bush administration is leading a campaign to increase transparency in WTO dispute settlement proceedings. Fayar Shirzad, assistant secretary of commerce for import administration, said that the proposal is currently being reviewed within the Bush administration for final approval to introduce at the meeting of the WTO Negotiating Group on Rules, scheduled for October 16-18, 2002. The US proposal calls for: (i) public access to meetings of the Dispute Settlement Body (DSB) and the non-confidential portions of panel, Appellate Body and arbitrator meetings; (ii) more timely access to reports issued by the WTO; and (iii) allowing *amicus curiae* submissions. On August 9, the United States submitted its negotiating proposal to the WTO on reforming certain procedures of the DSB under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The US presented a similar proposal last month to the Organization for Economic Cooperation and Development (OECD). The US has argued that implementing these changes would increase the credibility of the WTO dispute settlement process.

The European Union (EU) and Norway have offered tentative support for the US proposal. However, the proposal has met with strong criticism, primarily from developing countries. India, for example, has highlighted several instances of what it considers to be failures by the US to encourage transparency in dispute settlements. Specifically, India alleges that the US did not notify the EU of a textiles rules-of-origin dispute ruling until a year after it had been decided.

India also has proposed that developing countries' legal costs in dispute settlement proceedings be partially borne by developed countries. Kenya has made a similar point on litigation costs and is expected to introduce a new proposal on behalf of African countries. Other opponents of the US proposal assert that the controversy produced by the proposal and resulting negotiations likely cannot be resolved in time to produce an agreement by the stated deadline of May 2003, in which case the mandate of the Doha Round would have to be expanded to include the DSU agreement.

In addition, some developing countries argue that the US proposal for greater transparency avoids addressing more substantive issues that relate to implementation and compliance with WTO rulings. These countries argue that the United States needs to put forward proposals on reforming retaliatory practices, such as the US practice to "carousel" or rotate retaliatory measures. In addition, the EC, supported by some developing countries, argues that the United States must address the controversial issue of "sequencing." At issue is whether a Member may retaliate against another Member for its failure to comply with a WTO ruling before the WTO issues a ruling on whether compliance has taken place or not. The controversy surrounding these issues may mean that the DSU does not meet its initial deadline of May 2003 for the conclusion of talks. 

Challenges To US Trade Laws Rebuffed

The chairman of the Senate Finance Committee, Sen. Max Baucus (D-Montana), has criticized recent WTO dispute settlement findings against the US. According to Baucus, the WTO lacks

the authority to rule on the legality of US trade laws and called for a major overhaul of the WTO dispute system to ensure that panelists adhere to the Uruguay Round's "standard of review" mandate. As Baucus discussed the shortcomings of the WTO, however, USTR Robert Zoellick committed the US to coming to agreement on two major outstanding trade controversies at the WTO before the end of the year: (i) a final resolution of issues under the Trade-Related Intellectual Property Rights (TRIPS) agreement regarding the need for affordable medicines in developing countries; and (ii) an outline on how to approach issues that were not resolved during the Uruguay Round of trade negotiations. ☞

US Offers Proposal For Chile-US FTA

The US has tabled a proposal on investor-state disputes in the Chilean-US FTA negotiations that seeks to clarify key investment concepts, such as expropriation; however, controversy remains over the issue of dispute settlement proceedings. The latest round of negotiations was held in Atlanta from September 26 to October 2, 2002. Chilean and US officials report that they made progress on a broad range of issues in the week long meetings. With the passage of trade promotion authority (TPA) legislation, the US negotiators were able to introduce new proposals in areas previously subject to intense congressional scrutiny and debate. As a result, the US has tabled specific proposals concerning labor, environment and investment. However, issues involving market access, agriculture and dispute settlement are still outstanding.

The US provided Chile with a list of sensitive horticultural products for which it wants tariffs eliminated over a 10-15 year period, but emphasized that substantive market access for the US must include the removal of Chilean sanitary and phytosanitary barriers to US meats, poultry and other agricultural products. Also, the US presented Chile with a proposal specifying four possible "baskets" of products that would be subject to tariff elimination over four to eight years. The US also seeks a bilateral safeguard mechanism during the phase-out of tariffs for agricultural products. While both sides favor a safeguard applicable to agricultural goods, they disagree about the specifics of such a system. On labor and environment, the US has encouraged an agenda that calls on each country to comply with its own labor and environmental standards and not to derogate from those laws in order to gain an unfair trade advantage. On the issue of investor dispute resolution, TPA contains provisions designed to ensure that US investors are not accorded lesser rights than foreign investors in the United States. These provisions are principally geared towards limiting the authority granted under Chapter 11 of the North American Free Trade Agreement (NAFTA) which allows private investors to seek arbitration against NAFTA parties for alleged breaches of the agreement. Some US state legislators claim that the final dispute settlement standards are weaker than those originally envisioned and could threaten US state regulations in expropriation claims brought by investors.

Finally, it remains to be seen how a recent WTO ruling against Chile's price band system will affect negotiations. Indeed, there is an ongoing debate among both the Chilean public and the private sector over whether the system should be maintained, replaced by supports for farmers or operate at a higher fixed-duty rate. The US has stated that the price band system hinders the US goal of full market access liberalization and could affect tabled proposals regarding agriculture. The next negotiations are planned for early November. ☞

USTR Actively Pursues Free Trade Agreements

US Trade Representative Robert B. Zoellick on October 1, 2002, provided Congress with official notification of plans to launch free trade agreement talks with five Central American countries. These countries, Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua, are all slated to be part of a Central American Free Trade Agreement (CAFTA). Due to the Caribbean Basin Initiative trade preferences and the 7 percent average tariffs provisions already in place in the region, issues such as access and rules of origin are not contentious. However, issues such as labor and environment, investment, property rights, agriculture, intellectual property rights and sanitary and phytosanitary rules still require extensive discussions. To assist in formulating negotiating objectives, USTR has requested comments from industry officials and other interested parties concerning the probable economic effect of a US-Central America FTA. Officials hope to conclude negotiations in mid-2004.

Pakistan is also likely to sign a free trade agreement with the US. Pakistan President Pervez Musharraf has discussed the possibility of FTA negotiations with President Bush and has said that Pakistan prefers increased market access over unilateral economic assistance. Earlier in the month, Pakistan, along with Turkey and Yugoslavia, were granted greater market access in a miscellaneous trade and technical corrections bill (HR 5385). The US continues to provide Pakistan with economic assistance in response to Pakistan's cooperation against the US war on terrorism.

In addition, on October 2, 2002, the US and Tunisia signed an agreement aimed at promoting bilateral trade and investment. The Trade and Investment Framework Agreement is designed to address impediments to trade and investment-related customs procedures, tax policy, government regulations and intellectual property protection. Meanwhile, the USTR is pursuing a free trade agreement with Morocco and has initiated an investigation at the International Trade Commission requesting input from trade associations and interested parties on the probable economic effect of a US-Morocco FTA. Egypt also has expressed interest in pursuing a free trade agreement with the US, but no formal discussions have been scheduled. 📖

BRIEFLY NOTED

- The WTO on September 16, 2002, officially released its **Panel Report on The Continued Dumping and Subsidy Offset Act of 2000** (Byrd Amendment), upholding claims that the Act violates WTO rules. This case dealt with a challenge by a number of WTO Members to the US "Byrd Amendment," which provides for distribution of anti-dumping/countervailing duties to affected domestic producers. The panel found that this law violates provisions of the AD Agreement, the GATT and the SCM Agreement. The United States recently announced that it would appeal this ruling. (Kaye Scholer assisted the Republic of Korea in this dispute.)
- The White House is reconstituting the **President's Advisory Committee for Trade Policy and Negotiations** (ACTPN). USTR Robert Zoellick has stated that the members currently serving on the committee would be released from their terms, and the committee would be completely reappointed. It is not unusual for committees to be reconstituted in an effort to

KAYE SCHOLER LLP

ensure they reflect the current administration's policy. ACTPN is responsible for preparing reports on current trade negotiations for the president, including a report on whether fast-track authority should be extended until 2007.

- A federal court in Ohio has revived a proceeding under the Anti-Dumping Act of 1916 against Japanese and European producers of printing presses. The revival follows Congress' **failure to repeal the Antidumping Act of 1916 (1916 Act)**. In July 2001 the WTO found the 1916 Act to be in breach of US obligations under the WTO. However, the most recent US trade legislation, the Trade Act of 2002, failed to repeal the 1916 Act. Although the European Union and Japan proposed a deadline of July 30, 2002, to comply with the ruling, the US Congress has taken little action. Officials are hopeful that the US Congress will repeal the 1916 law by the end of the year.
- On September 23, 2002, the WTO Appellate Body upheld and modified a panel ruling which found that a **"price-band" system imposed by Chile on imports of certain agricultural goods** is in violation of WTO rules. The Appellate Body rejected Chile's claim that the panel erred in concluding that the price band system violated the GATT and the Agriculture Agreement. Chilean officials have already warned that the country may be obliged to raise its applied tariff rates on the targeted imports as a result of the Appellate Body ruling.
- China is actively pursuing a **free trade agreement** with the Association of Southeast Asian Nations (ASEAN) which would reduce trade restrictions on \$1.2 trillion worth of goods and services that move between China and the ASEAN nations. On September 11, 2002, ASEAN indicated it would sign a timetable of economic integration with China in November. The agreement would create a free trade area encompassing two billion people. The US also has been pursuing a trade agreement with ASEAN, while it separately negotiates a bilateral deal with Singapore.

INTERNATIONAL TRADE UPDATE IS PREPARED BY THE INTERNATIONAL TRADE GROUP
OF KAYE SCHOLER LLP.

FOR FURTHER INFORMATION OR IF YOU WOULD LIKE TO BE REMOVED FROM OUR MAILING LIST,
PLEASE CONTACT THE INTERNATIONAL TRADE GROUP AT:
202-682-3500 (TELEPHONE) OR 202-682-3580 (FAX), OR VIA E-MAIL AT:
TRADE@KAYESCHOLER.COM

PREVIOUS ISSUES OF THE INTERNATIONAL TRADE UPDATE MAY BE FOUND ON
KAYE SCHOLER'S WEBSITE AT:
WWW.KAYESCHOLER.COM/TRADE.HTML

© 2002 KAYE SCHOLER LLP

THIS UPDATE IS INTENDED AS A GENERAL GUIDE ONLY. IT DOES NOT CONTAIN A GENERAL LEGAL ANALYSIS OR CONSTITUTE AN OPINION OF KAYE SCHOLER LLP OR ANY MEMBER OF THE FIRM ON THE LEGAL ISSUES DESCRIBED. IT IS RECOMMENDED THAT READERS NOT RELY ON THIS GENERAL GUIDE IN STRUCTURING INDIVIDUAL TRANSACTIONS BUT THAT PROFESSIONAL ADVICE BE SOUGHT IN CONNECTION WITH INDIVIDUAL TRANSACTIONS. REFERENCES HEREIN TO "KAYE SCHOLER LLP & AFFILIATES," "KAYE SCHOLER," "KAYE SCHOLER LLP," "THE FIRM" AND TERMS OF SIMILAR IMPORT REFER TO KAYE SCHOLER LLP AND ITS AFFILIATES OPERATING IN VARIOUS JURISDICTIONS.

INTERNATIONAL TRADE UPDATE