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The United States and the European Union have recently engaged in highly public trade battles concerning global taxes, genetically modified foods,

Uncle Sam v. the European Union: Averting Trade Wars between the Two Titans

beef hormones, steel imports, and corporate mergers. Will the future bring further rifts or greater cooperation?

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Adjusting the backbone of international trade: Should the WTO reform its dispute settlement rules?

The member nations of the World Trade Organization (WTO) are currently debating whether to reform that organization's rules and procedures for settling trade disputes which scholars say serve as the backbone of the international trading system. While many WTO members are taking the position that "if it ain't broke, don't fix it," others are pushing for adjustments which, they believe, will make the dispute settlement process more effective and responsive to the needs of the organization's member nations and also to blunt criticism that the WTO operates in a shroud of secrecy.

Are there major problems in the procedures for settling trade disputes in the WTO? What are some of the proposals for reform and the likelihood of their actual implementation? And is it even possible to make significant changes in an organization where decisions are made by consensus among all members big and small?

The backbone of the multilateral trading system

The WTO, based in Geneva, Switzerland, is the premier international organization that sets the rules for international trade and the settlement of trade disputes. It administers three main agreements regulating trade in goods (the General Agreement on Tariffs and Trade or the "GATT"); services; and intellectual property. The trade activities of its 144 member nations encompass over 90 percent of world trade. Contrary to popular belief, the WTO member nations themselves through consensus (and not the administrative staff of the WTO) decide on the organization's rules, agenda, and substantive work.

Before the creation of the WTO, nations around the world could only rely on the GATT (which was both an agreement regulating trade in goods only and an actual organization created in 1947) to resolve trade disputes. Legal experts considered the GATT's dispute settlement process in need of reform because its procedures did not provide fixed timetables for settling disputes and because, once a dispute was settled, a consensus was needed among all GATT member nations (including the losing party to a dispute) to adopt a certain ruling. The losing party sometimes blocked the adoption of an adverse report and prevented it from coming into force. The GATT also did not provide an appeals process for its rulings.

When the WTO first came into operation in 1995 and superseded the GATT, its member nations praised the new system for settling disputes. Policymakers describe the organization's Dispute Settlement Understanding (DSU) – the legal text setting forth the WTO's rules and procedures for settling trade disputes – as the "backbone of the multilateral trading system." Unlike other international organizations where adherence to agreements and rules is often voluntary on the part of member nations, adherence to the WTO's rules in regulating international trade and settling disputes is legally binding on its members.

Trade analysts point out that unlike GATT dispute settlement procedures, the DSU provides more rigid timetables for settling disputes. In the event of an actual dispute, the WTO creates an ad hoc dispute settlement panel (composed of three policy and legal experts chosen from a list maintained by the WTO) to adjudicate disputes during closed-door deliberations. There are no standing (i.e. permanent) dispute settlement panels because the WTO always creates new panels to address disputes as they arise. And unlike the GATT system, WTO panel rulings are adopted automatically unless there is a consensus to reject the ruling (i.e. every WTO member, including the winning party to a dispute, must vote to reject the report, which is unlikely to occur).

The DSU also provides a standing Appellate Body to uphold, reverse, or modify a panel report. Appellate Body reports are also adopted automatically unless there is consensus by every WTO member, including the winning party, to reject adoption. Many political observers say that the WTO member nations deliberately created this consensus-based system so that it would be extremely difficult, if not impossible, to make major changes to its agreements, rules, and procedures.

To review or not to review

Even before the WTO began its operations in 1995, its member nations had agreed to complete a mandatory review of the DSU by the end of 1998. Under a review, member nations would determine if the rules under the DSU were functioning well and whether they should consider any reforms to improve their effectiveness. The initial call for submitting suggestions as part of the review drew a poor response – only five of the WTO's then-132 member nations had submitted proposals. Although many member nations

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Founded in 1996, the Center for International Law supports teaching and research in all areas of international law, including international trade and finance. The Center organizes events whereby students, faculty, and guests of New York Law School may interact with experts who link theory and practice.

Does the WTO need to clarify and adjust its system for resolving trade disputes which many call the backbone of the global trading system today? While some countries are taking the position "if it ain't broke, don't fix it," others are pushing for substantial changes.

later submitted many more proposals, the WTO had to extend the deadline for completing its review of the DSU several times over the course of the next four years because the member nations could not reach a consensus on what (if any) changes were needed.

While industrialized WTO members such as the European Union (EU) and the United States advocated clarifications to certain procedures, many developing nations led by India, Egypt, and Malaysia argued that the DSU should remain unchanged. Political observers say that developing countries view the DSU as leveling the playing field between industrialized and developing nations during trade disputes, and that any changes would only help the richer nations. After further delays, the WTO member nations agreed to make some improvements and clarifications to the DSU by March 2003.

Fine-tuning the DSU

WTO officials say that the organization has, in general, operated well in resolving trade disputes among its member nations. They point to statistics showing that as of August 2002, members have brought 262 disputes to the WTO for resolution in its short seven-year history, and that about a third of the disputes have been resolved. (In contrast, the GATT handled about 300 cases in its 47-year history.) Still, critics say that the WTO member nations should focus their attention on the following issues as part of the DSU review:

Punish first, ask questions later; or vice versa? Many member nations acknowledge that the DSU doesn't make clear as to when a winning party to a dispute can ask the WTO for permission to retaliate against a losing party that has not agreed or refuses to comply with a WTO ruling. While some, such as the countries of the EU, argue that the winning party must first wait for the WTO to certify noncompliance by the losing party, the US says that the winning party itself can determine compliance and then, if necessary, retaliate.

This problem first arose when the US tried to seek permission to retaliate against the EU for its supposed failure to comply with a WTO ruling against its banana import regulations in 1997. The US argued that waiting for the WTO to certify compliance by the EU would lead to an endless spiral of litigation as the EU would simply make cosmetic changes to its regulations without ever abiding by the original ruling.

The EU and the US later reached an informal compromise whereby the WTO simultaneously determined whether the EU had complied with its ruling while setting the level of retaliation the US could impose on the EU in the event of noncompliance. The WTO also declined to issue a definitive ruling concerning the sequencing (or chronological order) of when a winning party to a dispute can seek permission to retaliate against a non-complying party, arguing that this was exactly the kind of issue that member nations needed to discuss among themselves in their review of the DSU.

Dispute proceedings: Open to the public? Under DSU rules, only member governments can participate in closed-door dispute settlement proceedings and review submissions made by parties to a dispute. Supporters of this policy, drawn mostly from the developing world and some industrialized countries, say that dispute settlement proceedings often involve the airing of confidential business information and that opening up the process to public view would discourage candid discussions between the disputing parties.

On the other hand, the US, the EU, and most non-governmental organizations (NGOs) respond that a closed-door policy where very little information is released for outside scrutiny undermines public confidence in the WTO. Many NGOs also argue that because the WTO adjudicates disputes which could have serious implications for public policy, outside organizations should be allowed to attend its proceedings to ensure accountability. NGOs add that the WTO should, at a minimum, allow the public to attend non-confidential proceedings and also to review non-confidential materials submitted by the parties to dispel the notion that the WTO operates in secrecy.

A brief word on briefs. In recent years, NGOs and other groups have tried to submit *amicus curiae* or "friend-of-the-court" briefs (i.e. unsolicited legal submissions by non-parties to a dispute arguing in support of a certain position) during WTO dispute settlement proceedings. While the DSU does not make any reference to the submission of amicus briefs, several WTO dispute settlement panels and the Appellate Body have accepted amicus briefs over the past few years.

In justifying its acceptance of several briefs, the Appellate Body argued that it "has the legal authority under the DSU to accept and consider amicus curiae briefs in an appeal" which it finds pertinent and useful. But it also added that it "has no legal duty to accept or consider unsolicited amicus curiae briefs . . ."

While some member nations such as the US have welcomed the submission of these briefs in an effort to increase transparency at WTO proceedings, most other

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UNCLE SAM V. THE EUROPEAN UNION: AVERTING TRADE WARS BETWEEN THE TWO TITANS

In recent years, the European Union (EU) and the United States have had several high-profile trade disputes. Some of these disputes have involved the use of genetically-modified agricultural products and imports of hormone-treated beef; the protection of online privacy for consumers; the legality of American corporate tax rules under international trade laws; and the blocking of multi-billion dollar corporate mergers between American companies by the EU.

While critics of open trade say that these trans-Atlantic trade fights have created more headaches than benefits and have also strained relations between the two trading partners, supporters argue that the overall EU-US trading relationship (which they describe as vibrant and essential to the financial health of the world economy) overshadows any individual trade spat. But business leaders and political observers still worry that future disputes could again hurt relations and prevent cooperation in other areas of mutual concern.

Over the past decade, the EU and the US have signed several agreements which were supposed to have minimized the chances that a single trade fight would adversely affect EU-US relations as a whole. Have these agreements proved effective in managing trade fights across the Atlantic? Or are these disputes simply unavoidable? Does the future promise more cooperation between the US and the EU?

Like the US, the European Union (EU) is a world power in its own right:

- Its economy is almost as large as the American economy, and 95 million more people live in the EU than in the US.
- EU exports represent over 17 percent of world trade (compared to 16 percent for the US).
- In 2000, private investors in the EU invested over $800 billion in the US (while the US invested $573 billion in the EU).

As the importance of trade has grown for both economies, so has the frequency of major trade disputes.

The EU and the US – partners in trade but . . .

The EU and the US are the biggest trading blocs in the world today. The US Department of Commerce reported that the EU and US traded nearly $2 trillion in goods and services in 1999. In fact, the EU is America's second-largest trading partner in the world. Only Canada trades more with the US. In 2000, the EU (whose population of over 375 million people exceeds the 280 million of the US) had a combined gross domestic product of almost $8 trillion (compared to $10 trillion for the US). Officials say that the EU will probably admit over 10 new member nations by 2004.

The EU is, of course, not a single nation. It was established through a series of international treaties among its sovereign member nations beginning in the 1950s. The EU is a union of 15 member nations which have delegated sovereignty to common institutions in order to manage certain political and economic areas of mutual concern such as trade and finance, environmental and consumer protection, and agriculture. These institutions include the Council of the European Union, the European Commission, the European Parliament, and the European Court of Justice. While the member nations of the EU cooperate in many areas of governance, many members still retain their sovereignty in areas such as security and defense. Twelve of the EU members that are also members of the Economic and Monetary Union (EMU) have a common currency – the euro – and a common central bank which sets monetary policy such as the adjustment of interest rates for the euro area.

During international trade negotiations or in the event of a trade dispute with countries outside of the EU, the European Commission represents the member nations as a whole.

. . . mortal enemies during trade disputes?

Despite the important trading relationship between the US and EU, several trade disputes in recent years have strained relations between the two sides and also revealed how differently they have approached the same issues.

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Keep your hormone-treated beef

In 1989, the EU imposed a ban on American beef treated with growth hormones, citing alleged long-term carcinogenic risks. (In the US, 63 percent of all cattle are fitted with hormone implants to hasten growth.) Polls showed that European public sentiment was overwhelmingly distrustful of hormone-treated beef. The US, however, argued that scientific studies didn't support the EU's claims, and that its ban simply shielded the European beef market from foreign competition.

The US later asked the World Trade Organization (WTO) – the world's premier trade dispute resolution body – to determine the legality of the EU's ban. In June 1997, a WTO dispute settlement panel ruled (and an appellate body later affirmed) that the EU's ban on hormone-treated beef violated the WTO's Agreement on the Application of Sanitary and Phytosanitary Measures, which allows member nations to restrict imports to protect animal, plant, and human health, but only if the restrictions are based on sufficient scientific evidence (which, the panel said, the EU failed to provide).

After the EU refused to lift its beef ban, the WTO gave permission to the US to impose $116 million in sanctions (which is the annual amount of damage suffered by US exporters because of the ban) against certain EU luxury goods every year until the EU complied with the WTO's rulings. US sanctions against these goods still remain in place today, and bitter feelings continue on both sides of the Atlantic over this issue.

The EU currently bans the sale of both American beef treated with growth hormones and genetically-modified agricultural products. EU officials claim that the consumption of these products is dangerous to human health. The US argues that the EU is using public health concerns as an artifice to keep out American products. These issues remain unresolved.

Playing it safe on spliced foods

Also citing fears about the potential health and environmental hazards of using and consuming genetically modified organisms (GMOs) such as modified seeds, plants, and foods, the EU announced in 1999 that it would no longer approve the sale of GMOs until the European Parliament approved a revision of its regulations for importing and selling these products in the European market. (Polls also showed that Europeans were very distrustful of GMOs.) As the world's largest exporter of GMOs, the US said that this action had effectively created an import ban on GMOs, costing American farmers $200 million in lost exports every year.

The EU justified its ban through its newly-declared "precautionary principle" approach, which says that it is more important to err on the side of protecting public safety instead of waiting to see if a danger exists in the use of GMOs. Many US trade officials accuse the EU and other countries of using the precautionary principle simply as an excuse to keep out American products. After years of unsuccessful negotiations to resolve this dispute, the US recently warned the EU that it would file a formal complaint with the WTO, arguing that the ban lacked any scientific justification.

In 1998, the EU threatened to shut down e-commerce between Europe and the US unless American companies complied with new regulations protecting online privacy. Both sides reached an agreement whereby US companies would agree to adhere to stronger privacy protection for European consumers only.

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Protecting online privacy

Trade disputes between the US and the EU have even extended to the realm of e-commerce where European consumers represent the largest online market outside of the US (having purchased almost $10 billion in goods and services in 1999 over the Internet, according to industry analysts). Because of concerns that consumer privacy could be compromised during Internet transactions, the EU adopted comprehensive online privacy legislation in 1995 known as the "Directive on Data Protection."

The EU warned that it would halt online commerce and data flow across the Atlantic if US companies did not meet a 1998 deadline for complying with its privacy directive which, among other things, would require companies to obtain permission from consumers when collecting their personal information. A Commerce Department official warned that the effects of prohibiting data flow across the Atlantic could be "so severe as to affect . . . even internal economies." The EU replied that if American companies wanted to do business in Europe, they would have to abide by its rules.

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Whoa, hold that merger! EU officials have used competition laws (which are analogous to American antitrust laws) to block those mergers and acquisitions in the US which could negatively affect commerce and competition in Europe. An EU official said: "What matters is where the companies do business, not where they are located. If they do business in Europe, they have to abide by European rules."

The US later began negotiations with the EU for creating a self-regulatory system that would give US companies a "safe harbor" (i.e. protection) from legal action arising from the privacy directive so long as the companies adhered to strict privacy principles. The US and the EU later successfully crafted a safe harbor agreement for American companies, although the EU had to delay the implementation of its privacy directive for over two years so that the two sides could reach an agreement.

Blocking American mergers all the way from Europe?

Some of the biggest grumblings over trans-Atlantic trade occurred when EU regulators blocked mergers of American companies. Under EU competition laws (which are analogous to antitrust laws in the US), the European Commission can block or demand modifications of mergers and acquisitions that could significantly impede competition in the European marketplace, even if they originate outside the EU. (The same has long been the case in the US, which enforces its antitrust laws against foreign companies whose activities substantially affect US commerce.)

Although the European Commission ultimately cannot stop a merger from occurring outside its borders (say, for example, if the two companies are located in the US), it has the authority to exclude merging companies from doing business in Europe or, if they already have operations in Europe, to impose heavy fines, until they comply with EU regulations. Because many foreign (including US) companies have large operations and derive a substantial portion of their profits in Europe, they have little choice but to comply with EU demands if they want to continue business in this area of the world. For example, in 1997, the European Commission allowed Boeing (the world's largest aerospace company) to acquire McDonnell-Douglas, a major airplane manufacturer, but only after both companies agreed to modify certain practices in order to allay EU concerns that the merger could adversely affect competition in the aerospace market.

And last year, the EU blocked and never granted approval of General Electric's $45 billion acquisition of aerospace manufacturer Honeywell. For the first time, the EU had blocked an acquisition which had already been approved by US regulators. Although General Electric (which, last year, earned $25 billion in revenue and employed over 85,000 people in Europe) had proposed several modifications to the merger to address anti-competitive concerns, the EU continued to assert that the end result would severely reduce competition in the EU's aviation products market. After both companies ended plans for the acquisition, political leaders on both sides of the Atlantic accused the other of refusing to compromise in order to reach a mutually acceptable solution.

In 1998, when former telecommunications giant WorldCom (now under bankruptcy protection) acquired MCI Communications in a $37 billion deal, the European Commission granted approval to the takeover only after MCI agreed to sell its entire $2 billion Internet business. The EU cited the potential of the merged companies to control over 70 percent of the EU's Internet services market.

The end of corporate tax breaks through Foreign Sales Corporations?

In a major case brought by the EU against the US, a WTO panel ruled (and its Appellate Body later affirmed) in 1999 that the tax breaks given under the "foreign sales corporation" (FSC) provisions of the US tax code – whereby American companies export US-manufactured goods through offshore subsidiaries set up in places like the Virgin Islands and Barbados – constituted an illegal export subsidy under WTO rules.

Tax analysts say that under these provisions, US companies were able to reduce the taxes on their export sales by 15 to 30 percent. The EU argued that the FSC provisions gave an unfair advantage to American exports, and that WTO rules prohibited this practice. Analysts point out that hundreds of American companies, such as Boeing and General Motors, have used the FSC provisions to save over $3.5 billion in taxes.

While the two sides are currently negotiating a resolution to this case, the EU has threatened to impose $4 billion in sanctions against the US (which is the amount of injury EU companies claim to have suffered because of the FSC provisions). While the WTO recently approved these sanctions (making it the most expensive case lost by any country at the WTO), the US and EU are still negotiating a settlement.

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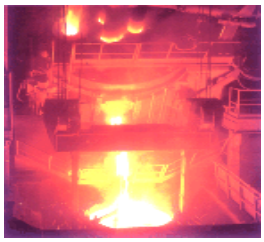
"Safeguarding" American Steel

The most recent (and on-going) trade fight began in March 2002 when President Bush announced that the US would impose temporary tariffs ranging from eight percent to 30 percent on steel imports in order to protect the floundering American steel industry from what he claimed was a sudden surge in less expensive foreign steel imports.

President Bush claimed that this "safeguard" measure would give American steel manufacturers time to adjust their operations and better handle foreign competition. But many political observers believe that the US steel lobby had simply pressured the Bush administration to enact these safeguard measures to shield an industry known for its inefficiency. The EU argued that the US had no justification for imposing these tariffs because foreign steel exports to the US had actually dropped in the last few years, and that it would retaliate against the US unless it rescinded the tariffs.



Really hot problems: President Bush is facing heavy criticism from trading partners for shielding the US steel industry from foreign competition even though he has urged other countries to resist such protectionism. And thanks to a challenge brought by the EU, the WTO recently struck down as illegal US tax breaks for American exports. The decision is the most expensive loss for any country in the WTO's history.

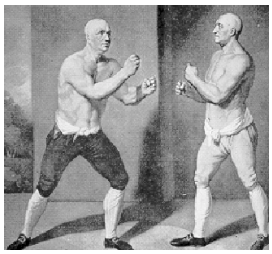
The EU and the US: Destined to fight over trade?

Most trade analysts argue that despite all the negative attention given to these trade disputes by political circles and the media, they do not accurately reflect the strong state of EU-US relations. But many people still ask themselves why the last decade has seen an increase in the frequency of high-profile trade fights.

Some legal commentators say that because the US and EU have different philosophical approaches in the development of various laws and regulations, these differences will eventually affect trade policy and cause future conflicts. For example, some argue that the EU generally relies on new regulations and newly-created government agencies to protect consumer interests, especially if the public feels very strongly about certain issues (as in the case of online privacy protection and the use and consumption of GMOs). The US generally prefers a self-regulatory approach if possible.

Many business executives also point to the EU regulatory process itself. They claim that, unlike the US regulatory process, which gives advance notice to the public to comment on pending regulations, the EU system doesn't provide the same level of participation and that newly-implemented laws then catch by surprise many multinational companies doing business in Europe. EU officials dismiss such criticism, saying they prefer a more cautious approach when requesting public comments.

While not downplaying regulatory differences between the US and the EU, other analysts say that politics play an even more prominent role in creating, resolving, or even worsening trade disputes across the Atlantic. For example, US officials have claimed that after having lost many trade battles to the US in years past (including the beef hormones case), the EU decided to challenge the FSC provisions out of spite even though it had known about the existence of these provisions for over a decade. Pollsters claim that the EU has refused to comply with the WTO's decision on the beef hormones case simply because the public strongly favors the ban.



Why do trade fights occur? While there is no simple answer, many simply point to politics. EU officials say that the Bush administration imposed recent tariffs on steel imports to shore up electoral support in steel (and swing) states such as Ohio and Pennsylvania. The US says the EU attacked its export tax breaks to seek revenge against recent US trade victories over the EU.

Leaders may also want to score political points at home (especially during an election year) by showing domestic constituencies that they are willing to stand up to foreign pressure. In the case of US tariffs on steel imports, most political analysts say that the Bush administration had probably calculated in advance that the WTO would eventually rule against its safeguard measures protecting steel manufacturers. (The WTO has, so far, never approved a safeguard measure in its short history.) Yet the political benefits of imposing such tariffs (such as stronger support among voters in steel-producing states, including Ohio and Pennsylvania) would outweigh the negative consequences from any WTO decision. The White House denies such accusations.

Breaking the cycle of trade disputes?

Over the past decade, the EU and the US have signed many guidelines to increase cooperation in trade and regulatory matters. Although not legally binding, these agreements were designed to help prevent trade disputes from taking place or, once they started, to minimize their impact on overall EU-US relations.

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NYLS Alumna Profile

Name and Year: 1996 Evening Division student. Associate, Large international law firm based in New York City (Frankfurt, Germany, office)

My work and responsibilities: My work is focused on international stock and debt offerings. This means that I work on public and private transactions involving sales of securities (i.e. shares of stock or debt) to investors domiciled inside or outside the country where the company is located. In contrast to private transactions where securities are sold to private investors, public offerings are generally more work-intensive because these transactions are more heavily regulated.

In September 2001, I helped Deutsche Bank (based in Germany) in its efforts to become listed on the New York Stock Exchange (NYSE). Deutsche Bank is the largest financial/banking group in Europe, and one of the largest in the world. This transaction did not directly involve the sale of any Deutsche Bank shares. Instead, the listing on the NYSE allows shares of Deutsche Bank to be freely bought and sold every day on the largest and most prestigious stock exchanges in the world.

My responsibilities include primarily drafting offering documents (usually in the form of prospectuses describing the company and the transaction in detail); negotiating with other lawyers; and attending meetings with clients so that I can learn more about their businesses. I also give US corporate and securities law advice to domestic and foreign companies.

Clerkship at the US Court of Appeals: After graduating from New York Law School and in preparation for what I thought would be a career as a litigator, I clerked for then-Chief Judge Jon O. Newman (now Senior Judge) on the US Court of Appeals for the Second Circuit. A law clerk on a court of appeals will generally prepare bench memos (which are summaries of the often voluminous briefs and exhibits submitted by the parties) for the judge to read. After researching the law and drafting the bench memo, the clerk will include a recommendation on the decision to be made (i.e. to confirm the trial court decision or to reverse it). And depending on the particular case, the clerk may draft the final opinions which could then be edited by the judge, or the judge may decide to draft the opinions himself (with comments from the clerk).

A clerkship is really a great experience, but it's not for everyone. There is a lot of reading involved (*really* a lot); a lot of research; and lots of writing. Depending on the judge for whom you clerk, you will have varying degrees of contact with your judge. My co-clerk and I ate lunch with Judge Newman almost every day. We ate lunch with him because we wanted to and because we would use that time to discuss our bench memos and the pending cases.

From litigator to international corporate lawyer: After the one-year clerkship, I started out at my firm's New York office in 1997 as a litigator. At that time, I had every intention of remaining a litigator. However, since my firm offers associates the opportunity to try out different areas of law without committing to a lengthy rotation period, I decided that I should take advantage of this freedom and try my hand at some corporate work. Prior to beginning work on my first securities deal, I was quite ignorant of this area of law. I hadn't even taken a securities regulation course during law school. Even so, after my first corporate deal, I was hooked. While I still enjoy most aspects of litigation, I found that corporate work offers some similar experiences in a usually (but not always) less adversarial environment.

A piece of advice for those wanting to practice corporate law – with hindsight, I would have taken a course in accounting for lawyers, and I would have considered a joint degree program (such as a JD/MBA). In order to be most effective, corporate lawyers must have a solid understanding of many financial issues involved in their transactions. A financial or accounting background would have eased my transition from litigator to corporate lawyer.

The move to Germany: I later went to my law firm's office in Frankfurt, Germany, because I wanted to spend some years abroad. I did not have to take the German equivalent of the bar exam because I do not practice German law – my practice is solely US law. At my firm, most American associates who wish to work abroad in one of the foreign offices are able to do so (usually for three years). In some offices, such as Paris, foreign language ability is more important than in others.

I chose Frankfurt over my firm's other foreign offices because I had learned German many years ago, and thought that working there would be a good way to brush up on my language skills. Proficiency in the German language was not required, although it is desirable. (Most of the time, I speak English in the office.) And Frankfurt is a very easy place for non-Germans to live and work. Because Frankfurt is Germany's financial and banking capital, there are many foreign professionals living here. One could probably get along without speaking any German.

I also wanted to experience a smaller-office environment. Our Frankfurt office has approximately 40 lawyers (the majority of whom are German lawyers), while in New York, there are over 300. Responsibilities in overseas offices are basically the same as those in New York. But because the firm's foreign offices are all smaller than the New York office, associates generally have broader responsibilities at an earlier stage in their careers than if they remain in New York.

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Advice for law school students: Students who have already decided to pursue a particular area of law should take courses in law school that are interesting to them and which broaden their general knowledge base. For example, if you want to practice family law, don't rule out tax or securities regulation courses during law school.

My advice for evening students is the same as for day students – try to find time to get involved in extra-curricular activities. This might include working on a law journal or as a research assistant or competing in a moot court competition. Students who immerse themselves in these activities will have more fun in law school. They can also improve their chances at getting the best possible recommendations from professors.

As an evening student, you may also have to make a difficult decision between staying at your full-time job or working as a summer associate in a law firm (which will substantially increase your chances of actually working for a law firm after graduation).

When I started law school, I was working full-time as a social services caseworker for the City of New York, and was receiving a partial-tuition scholarship from the Mayor's Office. In order to keep the scholarship, I had to maintain a specified minimum GPA in law school, and remain a full-time City employee. At the end of my second year, I received a fellowship from the Association of the Bar of the City of New York. These fellowships place minority students as summer associates in top New York firms for 12 weeks. However, since I couldn't get 12 weeks vacation from my City job, I had to choose between foregoing the opportunity to be a summer associate, or quitting my job (and, thus, giving up my scholarship).

This was a difficult decision for me, but I reminded myself that my reason for going to law school was that I wanted to become a lawyer – and it didn't make sense for me to limit my law opportunities by staying in a job I was intending to leave anyway in two years. So I took the plunge and gave up my job and my scholarship. It was more important for me to break into the law firm arena. I took a chance, and I have never regretted this decision. (I later received the splendid news from New York Law School that I would receive a Dean's Scholarship, which was an unexpected but pleasant surprise for me.)

I'm not encouraging all evening students to quit their jobs – that would be silly. Rather, you should keep in mind why you are in law school. See if there are any creative ways of working in a position that interests you (such as taking an unpaid leave of absence or working for less than 12 weeks during the summer).

I worked with another summer associate who arrived at the firm; worked for about two weeks; left to give birth; and then returned for a few weeks near the end of the summer. Try to arrive at your potential employer's firm or office with suggestions for fitting an internship or clerkship into your schedule in a way that will be least disruptive for them. ❖

Contact information: Please see Michael Rhee in C-303.

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A Concise Guide to the International Monetary Fund (IMF) and the World Bank

Name of Organization and Date of Inception: International Monetary Fund (1945).

Description of Organization: Uncontrolled fluctuations in the value of different national currencies due to poor economic planning or financial crises can dramatically affect prices for goods and services in a nation which could then lead to economic hardship and social unrest. Nations experiencing shortages in their foreign currency reserves – which are used to pay back debts and obligations to other countries and also to pay for imports – run the risk of default which creates further economic instability. The IMF is the international financial organization which promotes the stability of exchange rates among different national currencies and tries to bolster the supply of foreign currency reserves in the banking system of member nations so that basic world commerce can take place in a predictable manner. The IMF is not an aid agency or a development bank (such as the World Bank) that provides funding for specific projects in a nation's economy.

Membership and Voting System: Composed of 183 member nations, the IMF operates on a weighted voting system where larger and wealthier member nations are given more votes than their smaller counterparts. (The US currently has the largest number of votes – 371,743 out of 2,166,334 votes.) Yet most decisions at the IMF are still reached through consensus whereby all members unanimously agree to a certain course of action. (Some international organizations, such as the United Nations, operate on a one-country, one-vote system. Others, such as the World Trade Organization, also run to a large degree on the basis of consensus.)

Financial Resources: The bulk of the IMF's resources come from "subscriptions" (or quotas) paid by member nations when they first join the organization. These quotas reflect the size of a member's economy in the overall world economy. Currently, the US pays the highest quota of 17.6 percent. (As of February 2002, the total of IMF quotas stood at $270 billion.) Rather than depending upon certain national currencies (such as the dollar) for its transactions, the IMF created "special drawing rights" which are credits to the accounts of all members.

The IMF in action: The IMF is best known for providing a fund (as its name suggests) to those countries having balance-of-payment problems such as shortages in their foreign currency reserves. For example, at the start of the Asian financial crisis in 1997 when, say, American investors began to withdraw tens of millions of dollars from economically-troubled countries such as Korea, Thailand, and Indonesia, the banking systems in these countries naturally saw a sharp decline in their dollar reserves which are used to pay debts and obligations to the US (for example, East Asian consumers pay for American exports in dollars).

Member nations finding themselves in this situation can request a variety of temporary loans (unflatteringly known as "bailouts") which must be paid back in full so that other countries will be able to draw from the IMF. Loans from the IMF are also conditional – a borrower must adopt certain policies to correct its economic problems in return for a loan. Assistance from the IMF then allows troubled economies to rebuild their foreign currency reserves; stabilize the value of their own currencies; and continue paying their loans and obligations to other countries. The core of the IMF lending programs is composed of "stand-by arrangements" whereby a country is given assurance that it will be able to draw up to a specified amount from the IMF in order to address a short-term balance-of-payment problem. The IMF currently has $77 billion in outstanding loans to 88 member countries.

Criticisms of the IMF: Critics accuse the IMF of acting as a "loan shark" that forces borrowing countries to undertake unrealistic economic reforms which only exacerbate an already-precarious

Continued on next page

economic situation. As examples, they say that countries such as Indonesia were forced to cut food and public transportation subsidies in order to receive IMF funding, and that these policies eventually led to public riots. Others accuse the organization of creating a "moral hazard" whereby creditors and investors undertake risky transactions knowing that the IMF will probably intervene anyway in the event of an economic crisis. IMF supporters reply that its loan programs are designed in close cooperation with national authorities, and each program "is tailored to the special needs and circumstances of the country." They point out that recipient countries are on a much stronger economic footing today and that some countries, such as Korea, have already paid back their loans in full. ❖

Name of Organization and Date of Inception: The World Bank Group (1944).

Description of Organization: The main goal of the World Bank Group ("the Bank") is to reduce poverty and increase living standards in the poorest nations around the world by providing loans and technical assistance for specific development projects. Technically, there is no single "World Bank" per se. Instead, the organization is composed of five closely-affiliated organizations that specialize in different aspects of development work – the International Bank for Reconstruction and Development (IBRD); the International Development Association (IDA); the International Finance Corporation (IFC); the Multilateral Investment Guarantee Agency (MIGA); and the International Center for the Settlement of Investment Disputes (ICSID) – hence its designation as a "group." But because the IBRD and the IDA are the main institutions which provide the actual loans and technical assistance to developing countries, many people refer to these two organizations as the "World Bank."

Membership: The Bank is owned and operated by its 184 member nations (also known as "shareholders"). By tradition, the president of the World Bank Group has come from the organization's largest shareholder which is currently the United States. In order to become a member of the Bank, a country must first join the IMF. In contrast to the macroeconomic mission of the IMF, the Bank focuses on specific development projects.

Financial Resources and the World Bank's lending program: The IBRD (which engages in more than half of all Bank lending) raises most of its funds used to fight poverty by selling a variety of its own bonds and other debt securities to or through commercial banks, pension funds, insurance companies, and brokers around the world. The Bank's debt securities have received the highest ratings by credit rating agencies (triple-A since 1959) because payment is backed by the capital commitments of the Bank's member nations. As of 2001, the Bank had $106 billion in outstanding borrowings. And for fiscal year 2002, the Bank has already issued $22 billion in debt securities. Officials say that the Bank has never written off a loan in its history and has been consistently profitable (taking in an annual income of more than $1 billion) for more than 15 years. When making loans for development projects, the Bank charges interest rates which "reflect the cost of borrowing," and most loans are repaid by borrowing countries over a 15- to 20-year period.

The World Bank in action: The Bank works with government agencies, multilateral organizations, and the private sector in creating development strategies and providing loans to implement those strategies. Examples of projects include the building of dams, communication networks, schools, hospitals, and business enterprises. The Bank is currently the world's largest external funder of education, health, and AIDS reduction programs. The organization also encourages the flow of foreign direct investment into developing countries. Last year, the Bank provided over $17 billion in loans for projects in over 100 developing countries.

Criticisms of the World Bank: While the Bank has touted impressive results such as increasing life expectancy and literacy rates in developing countries, critics claim that it has consistently funded projects which have hurt poor people, harmed the environment, and encouraged corruption among local officials involved in a project. They also argue that the Bank's lending policies make it difficult for borrowing nations to pay back the original loan amount and interest payments. In response to such criticism, Bank officials have started a debt relief program for the poorest countries unable to repay their loans. Officials have also devised more procedures to prevent corruption in the implementation of development projects. ❖

For example, in 1991, the US and the European Commission signed an antitrust agreement designed to enhance cooperation between US and EU regulators. Rather than immediately having either side enforce its antitrust laws extraterritorially (and thereby creating the perception of violating another country's sovereignty), the 1991 agreement called for *positive comity* whereby "a party adversely affected by anti-competitive behavior, occurring in whole or in part in the territory of another party, may request that party to take action." In 1998, the EU and the US signed a supplementary agreement which spells out the obligations that a party must assume when handling antitrust cases.

In 1995, the EU and the US also established a diplomatic framework called the New Transatlantic Agenda, whereby the US President and senior EU officials would meet during an annual summit to measure progress in ongoing areas of cooperation and also to discuss any outstanding disputes. For example, during the recent summit, President Bush and EU leaders discussed ways of reducing trans-Atlantic tensions created by the new tariffs imposed on foreign steel imports. The EU and US reached a tacit agreement whereby the US would begin excluding hundreds of foreign steel products from its tariffs. Industry analysts say that the US wanted to extend a gesture of goodwill to the EU and begin a process of rapprochement.

And just this past spring (after four years of negotiations), the EU and the US signed off on a voluntary agreement called the "Guidelines/Principles on Cooperation and Transparency in Establishing Technical Regulations" which call for EU and US regulators to consult with one another at the early stages in the development of new regulations and to allow greater participation from the public "at an early stage about the development and availability of draft regulatory proposals." Supporters are hoping that, with enough lead-time, interested parties will have more opportunity to review and modify impending regulations which could affect international trade.

Over the past decade, the EU and the US have signed many agreements designed to prevent or better manage trade disputes. Have they worked? One commentator said: "Whatever the reason for US-EU trade discord, it hardly seems to be a shortage of transatlantic institutions and mechanisms. Creating new ones is therefore not, on its own, likely to resolve the problem."

Useless agreements or handy frameworks?

Some critics say that these various agreements haven't been or won't be effective in preventing or minimizing the chances of a trade dispute simply because they are not legally binding and that political considerations will always play a prominent role in trade disputes.

Other critics point out that the 1991 and 1998 antitrust agreements don't cover mergers and acquisitions and, therefore, could not have prevented recent trade disputes in this area of law. They also say that the new regulatory agreements reached by the EU and US this past spring merely replicate some parts of the WTO's Agreement on Technical Barriers to Trade (TBT Agreement) which came into effect in 1995. The TBT Agreement requires WTO member nations to give other members at least 60 days notice to comment on proposed regulatory standards which could affect international trade.

Supporters of these agreements reply that at least a framework is now in place to minimize the impact that future trade disputes will have on overall EU-US relations, and that it is too soon to determine the effectiveness of the agreements. Another observer argued that although the antitrust agreements don't cover mergers and acquisitions, EU regulators did take into account the comity provisions in the 1991 antitrust agreement when they did not take aggressive action against Boeing's acquisition of McDonnell-Douglas. Instead, the EU allowed American antitrust regulators to take the lead in that particular case. Supporters also cite the use of the comity principle during the WorldCom-MCI merger where the US Department of Justice let the EU Commission determine how much of its Internet business the combined company would have to sell before approving the merger.

Despite doubts about the effectiveness of these various agreement in minimizing the fallout from highly contentious trade disputes, many trade analysts say they are resigned to the fact that these disputes are and will always be a part of trading with other countries. ❖

What does the future hold for the EU-US trading relationship? Although most experts expect further trade disputes, they are hoping that these fights will be better managed to prevent a spillover in other areas of mutual concern.

countries have criticized these efforts, arguing that the actual dispute settlement process must be restricted to member governments only. Many developing nations also argue that if the WTO were to regularly accept these unsolicited briefs, then the organization would be inundated with even more submissions which could then slow down the dispute settlement process.

Is ad hoc any way to run the WTO? According to one WTO official, many member nations say that creating a new, ad hoc panel every time there is a dispute has become a source of many problems at the WTO. They cite statistical evidence that there are delays of up to three months in creating a dispute panel because, for example, one party to a dispute may believe that a panelist from a certain country will favor a party from the same region of the world.

Other member nations, such as the United Kingdom (UK), allege that the ad hoc nature of panels has lowered the quality of panel reports which, in turn, has increased the number of appeals in recent years. Citing other WTO statistical data, UK officials say that because panelists on the official WTO roster usually serve on a panel once every five years on average, they have to undergo a "steep learning curve" each time they participate on a newly-created panel. Member nations supporting the creation of a standing (or permanent) dispute settlement panel say that such a panel will be able to undertake its work more quickly without delays. Supporters such as the EU also argue that permanent panelists will be able to develop more expertise in the dispute settlement process simply by virtue of having to participate on panels more frequently.

Opponents of a permanent panel, such as India, argue that there is no guarantee that permanent panelists will write higher quality reports simply because they are permanent in nature. They also argue that members of a permanent panel will not reflect the geographical diversity of the WTO membership since there is a smaller pool of experts and panelists coming from developing countries.

Demand a remand. Many praise the WTO dispute settlement process because it provides a permanent Appellate Body to review decisions made by a dispute settlement panel. Yet critics point out that the Appellate Body, after completing a review, does not have remand authority which would allow it to send back a case to the original panel for further deliberations because the panel had, for example, made an error in legal interpretation of WTO rules.

Instead, when the Appellate Body determines that a dispute settlement panel had made errors in its legal findings, it uses a technique called "completing the analysis" where it points out the correct legal analysis that the panel should have used in the first place. The Appellate Body makes definitive legal conclusions based on this analysis, which are then binding on the disputing parties.

Supporters of giving remand authority to the Appellate Body say that it would give the WTO dispute settlement process more credibility because panels will be able to adjudicate disputes to the satisfaction of all parties. But opponents argue that sending a case back to the original panel would increase the time it takes to resolve disputes which (including the appeals process) is supposed to take 15 months to complete. Some officials say that it now takes an average of 34 months to resolve a dispute during which time a complainant will continue to suffer economic damage caused by another member's objectionable trade policy.

Is it even possible to reform the DSU?

Legal experts and political analysts believe that many of these reform proposals are so contentious that they have little chance of adoption in their current form. Concerning participation by outside groups in WTO proceedings, WTO officials have reiterated their statements made in 1996 acknowledging the importance of NGOs in addressing public policy issues but emphasized that "there is currently a broadly held view [among WTO member nations] that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings."

Although WTO member nations are still arguing over whether NGOs and other outside groups can submit amicus briefs as part of a dispute settlement proceeding, the Appellate Body itself has taken its own initiative on this issue (despite disapproval from many WTO members). In a recent case concerning asbestos imports, the Appellate Body created, for the first time, formal procedures for the submission of amicus briefs for that case only. (It later rejected all of the briefs that had been submitted.)

Many member nations also believe that creating a permanent roster of dispute settlement panelists and giving remand authority to the Appellate Body should be subject to further study because of the serious implications it could have on the dispute settlement process. But many political analysts say that developing countries will most likely block the commission of any studies looking into these issues.

There is, however, a growing consensus among many industrialized and developing countries, including the US, that the WTO itself (and not a complaining party) should verify a losing party's compliance with a panel ruling before allowing a winning party to retaliate. In a recent WTO decision concerning foreign sales corporations, the EU is currently delaying any retaliation against the US until the WTO confirms American noncompliance with its adverse ruling. Political analysts say that this practice should now be clearly reflected in rules and procedures of the DSU.

Some countries have argued that even if there is a general consensus for implementing a certain reform measure, the "actual process of drafting DSU amendments was likely to be difficult, confusing, and possibly unachievable" before the March 2003 deadline because WTO member nations may not agree to the exact wording of an amendment. Instead, some member nations have suggested that, in order to reach consensus, they should simply draft a statement of non-binding "agreed-to practices" involving ambiguous procedures in the DSU and then try to draft formal amendments at a later time. ❖

Global Trade and Financial Round-up

Bush: I've got my authority back

In August 2002, Congress approved (and President Bush signed into law) legislation restoring certain powers to the President to expand and promote international trade. Once known as "fast track" authority, the recently renamed *trade promotion authority* (TPA) allows the President to negotiate trade agreements with other countries and submit them to Congress for an up-or-down vote without any amendments.

The final legislation signed by President Bush was free of several controversial provisions, including a requirement for the President to certify that the US's trading partners adhered to minimum labor and environmental standards before concluding any trade negotiations. In addition to restoring TPA authority to the President, the new legislation (which expires in five years) requires the US to subsidize 65 percent of the cost of health insurance premiums for workers displaced by foreign trade. It also provides an increase in funding for worker training programs.

A power once flexed by the last five Presidents, TPA authority expired in 1994 after the passage of the North American Free Trade Agreement (NAFTA) and the creation of the World Trade Organization (WTO). Attempts to restore such negotiating authority to the President were bogged down in a partisan rift. With the backing of labor unions, anti-globalization protestors, and industries vulnerable to foreign competition (such as the textile and steel industries), many Democrats in Congress are opposed to an expansion of international trade which, they claim, lowers labor and environmental standards around the world and displaces American jobs overseas.

On the other hand, most Republicans and the business community say that international trade has created hundreds of thousands of jobs in the US by opening foreign markets to American exports. The Office of the US Trade Representative also says that the NAFTA and WTO agreements have saved American families an average of $1,500 every year by allowing more competitively-priced foreign goods to be sold in the US market. The Senate voted 64-34 to restore TPA authority while the House of Representatives approved the measure in a razor-thin 215-212 vote.

In making their case to restore TPA authority, officials argued that other countries would be reluctant to spend time negotiating any trade agreements with the US if Congress were able to amend the final agreement. Supporters also say that while Congress was debating TPA reauthorization during the past eight years, the US slowly fell behind the rest of the world in building more trade relationships with other countries. Supporters also say that the President will need TPA authority to strengthen his credibility during two ongoing (and huge) negotiations. The WTO is currently sponsoring trade talks among its 144 member nations to further reduce trade barriers around the world. The US is also involved in negotiations to create a Free Trade Agreement of the Americas, which will expand the NAFTA agreement to almost every country in the Western Hemisphere. ❖

Once a monk, now WTO chief

The world's premiere (and controversial) organization that sets the rules for international trade and the settlement of trade disputes has a new public face. On September 1, 2002, Dr. Supachai Panitchpakdi of Thailand succeeded Mike Moore as the new Director-General of the World Trade Organization (WTO). Many point out that he is also the first Director-General from the developing world.

While responsible for leading the bureaucratic staff of the WTO, the Director-General neither has any formal powers nor controls the financial resources of the organization. Instead, Dr. Supachai's formidable task will be to help the organization's 144 member nations reach an agreement on specific plans and timetables to expand global trade and further reduce trade barriers in the latest round of WTO-sponsored talks which are scheduled to conclude in January 2005.

Said one official: "Governments rely on him to act, variously, as goal-setter, conciliator, deal broker, and referee." The WTO member nations themselves carry out the organization's substantive work and also fill the position of Director-General through a process of consensus. A former Buddhist monk, Dr. Supachai received his Ph.D. in economics from Erasmus University in the Netherlands. Before coming to the WTO, he served as the deputy finance minister and then deputy prime minister of Thailand.

In 1999, after months of bitter disagreement on choosing a successor for the out-going Director-General, WTO member nations agreed to extend the term of the directorship to six years (from four) and to split this new term between Mr. Moore and Dr. Supachai. They also agreed to develop more formal procedures in selecting a Director-General. While most Pacific Rim nations (including Japan and Australia) and other developing nations believed that Dr. Supachai would best represent their interests, industrialized nations such as the US and a majority of the other WTO

members preferred Mr. Moore, who was the former prime minister of New Zealand. ❖

You've got copyright protection, babe!

How long is a "limited time"? Would one person's concept of limited time seem too long or maybe too short by someone else's standards? By next year, in a decision that could have multibillion-dollar implications for American trade in intellectual property, the Supreme Court will determine whether Congress overstepped its authority to grant copyrights for limited times when it recently extended the duration of copyright protection in the US.

In October 1998, Congress passed (and President Clinton signed into law) the "Sonny Bono Copyright Term Extension Act." Named after one of America's favorite entertainers turned Congressman, the act extended copyright protection by an additional 20 years for works created before 1978. For individual works created after 1978, the act now provides protection during the life of the creator plus 70 years (up from 50 years). For corporate works, copyright protection lasts for 95 years (up from the previous 75).

According to the US Constitution, only Congress has the power to grant and extend copyright protection. Article I, Section 8, states: "The Congress shall have Power . . . to promote the progress of science and useful arts, by securing for *limited times* [emphasis added] to authors and inventors the exclusive right to their respective writings and discoveries." Congress has extended copyright protection twice in the last 90 years, most recently in 1998.

Supporters of the act argue that the US had no choice but to extend the duration of copyright protection in order to protect its international commercial interests. In 1996, the European Union (EU) extended its duration of copyright protection to include the life of the creator plus 70 years (up from 50 years). In contrast, the US provided protection during the life of the creator plus 50 years. EU officials also announced that they would not protect creative works from countries (such as the US) whose copyrights had expired recently and which don't provide the same length of protection as provided in the EU.

Many in the business community argued that, under this policy, commercial and private interests in the EU would be able to use (and not provide any compensation for) American works whose copyright protection had expired. Corporate lobbyists estimated the loss of compensation in the billions of dollars. Trade analysts also pointed out that the US had a large surplus in the trade of intellectual property (which include movies, computer software, home videos, music, and books), and that the 1998 act would align US copyright protection with international standards. Supporters of term extension also argued that there is no limit in the Constitution as to how long and how many times Congress may extend copyright protection, and that, accordingly, "a limited period of time is whatever Congress says it is."

Opponents, which include publishers, library associations, Internet entrepreneurs, and First Amendment supporters, argue that Congress exceeded its authority in extending copyright protection because the recent extension defeated the very purpose of providing copyrights. One legal scholar said: "The purpose of copyright power was not just to encourage existing authors, but also to create a public domain that would provide a source of inspiration to future authors and artists." Extending copyright protection for works already created, opponents argue, will not stimulate more creativity. Instead, the act would cut off from the public domain materials whose copyrights would have expired.

Others add that business interests have always looked to increase the duration of copyright protection (and the continuing flow of royalty and licensing payments) and simply used the EU issue as an excuse to lobby for the act. They point out that the Disney Corporation collects billions of dollars in licensing revenue for its Mickey Mouse character which should have entered the public domain as early as 2003, but was given a 20-year reprieve by the new act. Other opponents such as library associations believe that public libraries will have to continue paying increasingly expensive fees to gain access to some copyrighted materials.

Soon after its passage, Mr. Eric Eldred, the owner of an Internet library that posts works in the public domain, challenged the constitutionality of the recent copyright extension. Although two lower federal courts had upheld the act, the US Supreme Court, in February 2002, announced that it would review his case (*Eldred v. Ashcroft*) this fall and then announce a decision the following spring. Many legal analysts predict that the Supreme Court will most likely uphold the decisions of the two lower courts. ❖

Next WTO meeting in vacation capital

The World Trade Organization (WTO) recently announced that it would hold its next meeting in the resort city of Cancun, Mexico. From September 10-14, 2003, WTO member nations will discuss the progress of their latest round of negotiations to bring down tariffs and other barriers to global trade. Under WTO rules, member nations must hold periodic meetings (called "ministerial conferences" because the attendees are trade ministers from member nations) at least once every two years to discuss trade matters and review any on-going negotiations.

During the last ministerial conference held in Doha, Qatar, in November 2001, WTO member nations agreed to

begin a new round of negotiations – the first in eight years – in areas such as agriculture, services, intellectual property, investment, competition policy, electronic commerce, and technology transfers. The World Bank estimates that a successful conclusion of these talks (scheduled for January 2005) could increase world prosperity by almost $3 trillion by the year 2015.

Serving as Mexico's top tourist destination and also a favorite for tens of thousands of vacationing college students, Cancun boasts over 25,000 hotel rooms. WTO officials say that because early-September is the beginning of the off-season in Cancun, less-wealthy WTO members will be able to take advantage of reduced rates for travel accommodations.

Critics point out that because of financial constraints, many least-developed country members of the WTO were unable to attend prior WTO ministerial meetings around the world, let alone afford basic office space in WTO headquarters in Geneva, Switzerland. Anti-globalization protestors also welcomed the new venue. They complained that the WTO deliberately held its last meeting in Qatar, which prohibits political protests and free speech, in order to discourage the attendance of critics. ❖

Don't bank on China's banking system

Would you bank your money on the world's fastest growing economy? After seeing double-digit growth in the past two decades, many believe that the People's Republic of China will become the next economic superpower. But many economists say that China needs to maintain such spectacular growth rates simply to provide a minimum level of economic opportunities for its fast-growing population. Serious problems in China's banking system may undermine the country's economic stability in the years to come.

Like many of its counterparts in neighboring countries, banks in China have been making high-risk loans which are not being repaid by borrowers. Officials from China's central bank claim that 25 to 30 percent of loans in the banking sector are non-performing, meaning that the principal and/or interest payments are long-overdue or not even being repaid. But some private analysts, including a major credit rating agency, put the figure as high as 50 percent and say that these non-performing loans (NPLs) represent around 60 percent of China's annual gross national product (GNP) of one trillion dollars. Such a high figure, they say, could eventually shake confidence in the banking system and cause economic turbulence in the future. One long-time critic said: "The crisis in the Chinese banking system is perhaps the most serious in the world."

Most economists agree that without a stable and robust banking system, no country can maintain any economic growth or activity. Banks are indispensable for providing loans and credit to consumers and businesses; safekeeping people's financial assets; and operating a system to make payments for everyday business transactions. Banks make most of their profits by (and stake their survival on) lending a multiple of their capital and then collecting the interest and principal payments from these loans on a regular basis. Most people deal with commercial banks which provide basic deposit and lending services.

In China, four state-owned banks – the Bank of China, the China Construction Bank, the Industrial and Commercial Bank of China, and the Agricultural Bank of China, which are collectively known as the "Big Four" – dominate that country's commercial banking sector. According to recent statistics, the Big Four hold over 60 percent of all deposits and make 66 percent of all loans in China, which still largely operates a centrally-planned economy where political considerations, and not market forces, guide economic policy and even bank lending.

Over the years, government officials have pressured these banks to make loans and provide credit to money-losing state-owned enterprises (SOEs) and factories that not only employ a large percentage of the population, but also help to maintain social and political stability in the face of greater economic competition. China recently had to open its economy to greater foreign competition when it joined the World Trade Organization (WTO) last year. Figures show that loans to SOEs comprise about 85 percent of the Big Four's total portfolio. Without these loans, banking analysts say, more than a third of these enterprises would have already gone bankrupt.

Because a large percentage of SOEs usually fail or even refuse to repay their loans, policymakers worry that China's banks will be unable to stay in business unless Chinese consumers maintain their confidence in the banking system and continue making deposits. While the Big Four have reported profits in the hundreds of millions of dollars in 2001, many analysts are skeptical of these so-called official figures. One critic has already declared: "The major state banks are insolvent."

In recent years, analysts say that news of corruption in the banking sector has led to many bank runs where depositors rushed to withdraw their monies. But they also point out that, despite the high percentage of NPLs, government officials are still pressuring state banks to lend even more money to failing SOEs. Experts warn of more bank runs if the Big Four are unable to make consistent profits from their lending operations.

China's percentage of NPLs may seem high when compared to figures from other countries such as the US where approximately 1.5 percent of loans were categorized as non-performing in 2000. Yet when compared to the estimated percentage of NPLs in other countries in East Asia such as Indonesia (60 percent) or Thailand (40 percent), China's banking problems may not appear to be

serious. Others note that Japan's NPLs stand at around 15 percent. But economists argue that given the very size and importance of China's economy, the financial implications of large-scale bank closures in that country would spread across East Asia and beyond.

The Chinese government has instituted several measures to strengthen its banking sector. For example, in 1995, the government adopted stricter loan procedures in order to shield banks from political pressure in making loans to failing enterprises and also to encourage banks to make loans based on financial considerations. The central bank now requires banks to disclose financial information on an annual basis in order to ensure depositors that the banks are operating in a responsible manner. In 1999, the government created special agencies to buy, repackage, and sell bad loans. The Big Four are also planning equity offerings in an effort to attract more investment. When China joined the WTO, it opened its banking sector to more foreign competition. Over 65 foreign banks, such as Citibank, have already opened offices around the country to provide deposit and lending services to Chinese consumers.

Though Chinese officials say that these measures will reduce the percentage of NPLs to around 15 percent by the year 2005, many experts believe that only stronger measures – such as aggressively writing off loans instead of extending the terms of repayment – will stabilize China's banking sector. ❖

Batting .900 at WTO, but taking a really big strike

If trade cases at the World Trade Organization (WTO) were a spectator sport such as baseball, then the US would be batting a .900 (i.e. the US is currently winning 90 percent of its cases at the WTO). According to a General Accounting Office (GAO) report, the US is benefiting from its membership in the WTO which sets the rules for international trade and the also adjudicates trade disputes among its 144 member nations.

Of the over 200 dispute settlement cases brought to the WTO for resolution since 1995, the GAO examined 42 completed and resolved cases where the US was either a defendant (17 cases) or a plaintiff (25 cases). In cases it initiated as a plaintiff, the US won or resolved in its favor 23 out of 25 cases. And in 14 of the 23 cases that the US had won, the losing parties agreed to change their trade practices, laws, and regulations, which led to greater market access for US goods and services.

In the 17 completed and resolved cases where it was a defendant, the US changed one law and two regulations. The GAO said "none of the changes the US made has made in response to WTO disputes have had major policy or commercial impact to date."

One exception may be an on-going dispute where the WTO ruled against American regulations concerning "foreign sales corporations" (FSCs) under the US tax code. These provisions allow US corporations to avoid paying taxes on some exports. Two years ago, the WTO ruled that these tax rules constituted an illegal subsidy under international trade rules. The European Union (EU) – which first brought the case by claiming that the FSC provisions had hurt European competitiveness – has threatened to impose sanctions on American goods sold in Europe unless the US changed its tax laws to conform to the trade body's ruling. The WTO recently announced that the EU could impose up to $4 billion in sanctions, making the FSC fight the most expensive loss by any country in the WTO. EU officials said that they would delay the imposition of any sanctions pending the outcome of current negotiations with the US in settling the case. ❖

Steel: Embracing Protectionism to Promote Trade?

How does a country go about promoting open trade and persuading other nations to resist protectionist urges? Although many would set an example by keeping open their own markets, the US – which describes itself as the defender of global trade – recently took the opposite approach, say critics.

In March 2002, President George Bush announced that the US would impose "safeguard" (i.e. emergency) measures to protect the domestic steel industry from foreign competition over the next three years. While many economists and policymakers accused the President of undercutting his calls for open trade, political observers say that his decision could actually build support for future trade agreements which are unpopular in the US. It could also, they argue, help the President win re-election in 2004.

In justifying his decision, President Bush argued that a recent surge of low-priced steel imports was directly responsible for causing serious injury to the domestic steel industry. (The US imports around 25 percent of the steel it consumes.) To prevent further injury, the new safeguard measures imposed higher tariffs ranging from eight to 30 percent on a variety of steel imports, which will help to increase the demand for American steel and also give the steel industry time to adjust to foreign competition. For decades, American steel companies have claimed that because major steel-producing nations such as Germany, Russia, China, and Japan subsidized the production of their steel products, they were unable to compete against their foreign counterparts. To bolster these claims, steel executives point to the 29 steel mills that have gone bankrupt in the last five years alone.

But many economists and the business community say

that the US steel industry has, for the most part, refused to make their operations more efficient and, instead, has relied on government protection for several decades to protect them from foreign competition. They argue that the cost of the new tariffs will be borne by American consumers in the form of higher prices ($7 billion over three years) for products that use steel such as cars and major appliances. Other analysts estimate that for every job saved in the steel industry, 13 jobs will be lost because of higher prices in industries that use steel. Critics also say that foreign competitors have made their operations more efficient in the last decade.

After President Bush imposed the new steel tariffs, a dozen countries led by the European Union (EU) announced that they would not only challenge the legality of the safeguard measures at the World Trade Organization (WTO) but would also move quickly to retaliate against US goods sold in Europe.

Under WTO rules, member nations may undertake temporary safeguard measures (such as imposing tariffs) if a sudden surge in imports causes serious injury or threatens serious injury to a domestic industry. Affected countries cannot take any retaliatory measures during the first three years of a safeguard measure unless there is evidence showing, for example, that imports did not actually increase as claimed by a country imposing the safeguard measures. Trade experts say that because of pressure from politically-powerful domestic industries (such as the steel industry), more and more countries are now using safeguard measures as a disguise for protectionism.

In justifying its threat to retaliate against the US, the EU argued that steel imports to the US have actually declined by over 27 percent since 1998, and dropped substantially last year. Many legal experts say that the White House is actually expecting the WTO to strike down its safeguard measures as a violation of its rules. Since the WTO began its operations in 1995, no member nation has ever been able to justify its safeguard measures to the satisfaction of the WTO. So why did the President still go ahead with his decision? Commentators point to politics.

They say that with a faltering economy, the US is finding it more difficult to expand open trade which is unpopular at home but remains a long-term goal for the Bush administration. In order for the President to garner more support for a recently-launched round of global trade talks, he had to protect American workers from what he describes as "unfair" foreign competition (which many economists dispute). The White House calculated that an adverse ruling at the WTO would be worth the cost as long as the steel industry had some protection from imports.

Other political analysts also say that the President was also trying to solidify his electoral support in important swing (and steel) states such as Pennsylvania, Ohio, and West Virginia. Many policymakers believe that former Vice President Al Gore lost West Virginia during the last Presidential election because the Clinton administration refused to shield the steel industry from foreign competition in 1999.

To the dismay of the steel industry, the US and the EU later reached a tacit agreement where the EU would delay any retaliation until October 2002 while the US exempted several hundred steel products (including those from the EU) from the higher tariffs. Political experts also say that the EU could not persuade a majority of its member states to retaliate against the US – in fact, only three of the 15 EU nations have urged any kind of retaliation. ❖

'Axis of evil' – plenty of other opportunities

In a broad effort to discourage state sponsorship of global terrorist activities, the Bush administration recently blocked efforts by Iran and Syria from joining the World Trade Organization (WTO).

Although the two countries had already submitted applications to join the international trade body (with Iran submitting its application in 1996), the US had blocked efforts within the WTO to move the applications forward. American officials said that because they were still conducting a comprehensive review of US policy towards Iran, it would be inappropriate to consider its application. But most political analysts say that the US had deliberately slowed down the membership process to send a message to Iran that its alleged support of terrorist activities will have consequences on other diplomatic fronts. In addition to Iran, the US State Department lists Syria as an active sponsor of terrorist activities.

In his State of the Union address in January 2002, President George Bush issued new warnings to Iran, Iraq, and North Korea (whom he had labeled as the new "axis of evil") that any clear links of their involvement in terrorist activities would be met with the strong and swift resistance. (The term "Axis Powers" was used to describe Germany, Italy, and Japan during World War II.) Although the current "axis" has been long-suspected of supporting terrorist causes around the world and for trying to obtain weapons of mass destruction, the President argued that their activities have aroused even greater concern since the terrorist attacks on the World Trade Center in New York and the Pentagon last year.

While Iraq has not submitted any applications to join the WTO, most experts say that the country isn't in any position to join the organization because current economic sanctions (which the United Nations imposed on Iraq for its refusal to allow international inspectors into the country to search for and destroy weapons of mass destruction) have left its economy in shambles. But in August 2002, Iraq and Russia announced that they would start negotiating a 10-year, $40 billion economic investment agreement.

Iran is not only continuing its efforts to join the WTO,

but it also recently launched formal negotiations to expand trade relations with the European Union (EU) which is Iran's largest trading partner. EU officials argued that creating more trade links with Iran could persuade that country to work with the US and Europe in curbing terrorism (an idea quickly dismissed by US officials), and that the conclusion of trade talks would be conditional on Iran's efforts to help in these efforts.

Most officials say that North Korea probably has no plans on joining the WTO because its economy has become a basket case after decades of government mismanagement, and that any effort to join the organization was still several decades away. ❖

Russia: We're still a contender

Russia is trying to win membership in the World Trade Organization (WTO), which is the global body that sets the rules for international trade and the settlement of trade disputes among its 144 member nations. Analysts say that of all the major developing and industrialized countries around the world, Russia is the only country that has not yet joined (or "acceded to") the WTO.

In seeking to join the WTO, Russia is moving to open its economy to greater foreign competition in areas such as financial services, trade in goods and merchandise, and the intellectual property sector, and also to abide by the WTO's legally binding agreements regulating global trade. Other WTO member nations, in turn, would further open their own markets to Russian goods and services. Policymakers also hope that Russia's accession to the WTO would make it more attractive for foreign investment and help to stabilize its economy which, in 2000, was the 14th largest in the world.

Analysts say that Russia has made more strides in joining the WTO in the past few months alone than at any time since it first requested accession talks nine years ago when the WTO was the General Agreement on Tariffs and Trade. Accession to the WTO involves four broad stages. During the first stage, an aspiring nation submits to the WTO a description of its trade practices and economic policies for review by that organization's members. It then begins bilateral negotiations during the second stage with individual WTO member nations to open certain sectors of its economy to outside competition and also to commit itself in adhering to WTO rules. (One official described an applicant's commitments and promises as "payment for the entry ticket into the WTO.") In the third stage, the WTO prepares a draft report summarizing both an applicant's concessions and the results of its negotiations with other WTO members. In the final stage, two-thirds of all WTO members must vote in favor of approving membership for an applicant nation.

WTO officials say that Russia is close to concluding the second stage of its accession process, but that negotiations with several member nations have hit some obstacles in recent months. Many countries complain that Russia still needs to pass domestic legislation which will bring that country's own trade laws into compliance with WTO rules and regulations. Without a solid regulatory framework in place, legal experts say, Russia will be unable to implement its obligations as a WTO member.

Other analysts claim that Russia still needs to eliminate many barriers protecting its marketplace from foreign competition. For example, they argue that state control of Russia's energy prices (such as the prices for gas and electricity) creates an unfair advantage for the domestic energy industry. They point out that prices for Russian energy exports to other countries are usually five to six times higher than what is charged for domestic consumption. Other officials say that Russia wants to maintain what they describe as excessive restrictions on foreign investors in its telecommunications, insurance, and financial services industries. Although some WTO officials believe that Russia may join in time for the next WTO meeting in Cancun, Mexico, in September 2003, others see Russia's accession as many years away.

Legal experts note that Russia's desire to join the WTO also has legal ramifications under US laws. Under Title IV of the 1974 Trade Act, the US cannot have normal trade relations with countries (such as Russia) that forbid its citizens to emigrate freely unless the President waives this restriction on an annual basis. Congress can vote to grant "permanent normal trade relations" (PNTR) to Russia which will permanently and unconditionally exempt Russia from Title IV (and thus the annual review). Russia argues (and the US State Department agrees) that its restrictive emigration policy ended in 1994, but that it still had not received an exemption from the 1974 Trade Act.

The US Trade Representative says that if the US does not grant PNTR to Russia before it becomes a WTO member, the annual review of Russia's trade status would violate WTO rules, which require that one member nation treat all other members on a most-favored-nation basis (i.e. if the US requires an annual vote on Russia's trade status, it must apply this requirement to all other WTO members). Because no other WTO member will need to go through an annual review of its trade status except for Russia, experts say that US law could be held WTO-incompatible. Although many political observers predict that Congress will eventually grant a permanent exemption to Russia from the 1974 Trade Act, some say that the US may deliberately delay this action until Russia makes more concessions in its effort to join the WTO. ❖

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International Law Career Panel

How difficult is it to build a career in international law? Are there many opportunities in the public sector? What are the hot topics in private practice? Is an advanced degree necessary? How does one prepare for practice areas involving international law? Come and ask the experts.

Karen Ostad '88
Counsel, Kelley Drye, Cross-Border Insolvency and Bankruptcy Law

Arthur R. Estrella '92
Vice President and Tax Director, Commerzbank AG, International Tax Law

Jayni L. Edelstein '92
Associate, Cameron & Hornbostel, LLP; former assistant district attorney and staff member, United Nations

Kevin J. Sullivan '00
Associate, Barnes, Richardson & Colburn, International Trade and Customs Law

Sydney M. Cone, III
C.V. Starr Professor of Law and Director, Center for International Law, New York Law School; Moderator

Wednesday, October 2, 2002
12:45 pm - 1:50 pm
Wellington Conference Center (Rooms A & B)

Sandwiches and beverages will be served.