

The EU Transport Council approved the Agreement March 22, 2007. The Agreement is to be provisionally applied starting March 30, 2008, and calls for U.S.-EU negotiations on a second stage of aviation liberalization to commence within two months of that date.<sup>5</sup>

## INTERNATIONAL ECONOMIC LAW

### *U.S. Practice Regarding Acceptance of Amendments to the WTO Agreement\**

In December 2005, the World Trade Organization (WTO) General Council adopted an amendment to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),<sup>1</sup> altering WTO rules regarding the compulsory licensing of pharmaceutical products. Shortly afterward, the United States became the first WTO member to "accept" the amendment.<sup>2</sup> As of July 2007, only seven WTO members had accepted it, far short of the 101 members required for entry into force. Nevertheless, as a matter of U.S. foreign relations law and practice, the modalities of the U.S. acceptance may set a significant precedent.

Article X of the WTO Agreement establishes rules for adopting and ratifying various types of amendments.<sup>3</sup> The 2005 amendment to the TRIPS Agreement is the first time these have been utilized,<sup>4</sup> providing a possible model for future amendments. Under Article X:3, amendments to TRIPS "of a nature that would alter the rights and obligations of the Members" take effect for members accepting them "upon acceptance by two-thirds of the Members and thereafter for each other Member upon acceptance by it."<sup>5</sup>

The 2005 amendment provides a permanent fix for the compulsory patent-license-related problem encountered after TRIPS went into operation in 1995. Although TRIPS permits a WTO member government to issue compulsory licenses of products under patent, "any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use."<sup>6</sup> This approach proved to be politically unacceptable for medicines because it did not benefit many countries that lacked manufacturing capacity.<sup>7</sup> The process of

<sup>5</sup> U.S. Dep't of State Fact Sheet No. 2007/340, U.S.-EU Air Transport Agreement (Apr. 30, 2007), at <<http://www.state.gov/t/pa/prs/ps/2007/apr/83982.htm>>.

\* [Editor's Note: This item was prepared by Steve Charnovitz of the Board of Editors and Adrian Fontecilla of the George Washington University Law School, to whom the Editor extends his appreciation.]

<sup>1</sup> See Amendment of the TRIPS Agreement, WTO Doc. WT/L/641 (Dec. 8, 2005); Members OK Amendment to Make Health Flexibility Permanent, WTO Doc. PRESS/426 (Dec. 6, 2005). See generally Agreement on Trade-Related Aspects of Intellectual Property Rights [hereinafter TRIPS Agreement], Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1C, Apr. 15, 1994, in WORLD TRADE ORGANIZATION, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 3, 321 (1999), reprinted in 33 ILM 13, 81 (1994).

<sup>2</sup> See Protocol Amending the TRIPS Agreement—Status of Acceptances, WTO Doc. IP/C/W/490 (Apr. 4, 2007).

<sup>3</sup> See WTO Agreement, *supra* note 1, Art. X:3.

<sup>4</sup> See Members OK Amendment to Make Health Flexibility Permanent, *supra* note 1.

<sup>5</sup> WTO Agreement, *supra* note 1, Art. X:3. However, Article X:3 is silent on how "acceptance" is to be achieved domestically by each member.

<sup>6</sup> TRIPS Agreement, *supra* note 1, Art. 31(f).

<sup>7</sup> The concern was that WTO members having little or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under TRIPS.

changing TRIPS began in earnest in 2001, when the WTO Ministerial Conference instructed the WTO Council for TRIPS “to find an expeditious solution.”<sup>8</sup> In 2003, WTO parties approved a long-term waiver of Article 31(f)’s restrictions, as well as rules for the waiver’s implementation.<sup>9</sup> The waiver also called for preparation of the TRIPS amendment, which was made final in December 2005. The amending protocol was immediately open to acceptance by WTO members, but it did not specify what was required with regard to members’ domestic acceptance.

*U.S. Acceptance of the Protocol.* U.S. acceptance was accomplished eleven days after the Protocol was approved, by means of a short, formal letter from U.S. trade representative Rob Portman to the WTO director general.<sup>10</sup> The U.S. acceptance received little publicity in Washington.<sup>11</sup> There was no prior notice in the *Federal Register* or formal notification to Congress, which was in session.<sup>12</sup>

Presumably, prior consultations were held between the executive branch and Congress regarding U.S. support for approval of the amendment.<sup>13</sup> Under U.S. law, the executive branch must notify Congress when the WTO approves an amendment. Section 122 of the Uruguay Round Agreements Act (URAA) requires the U.S. trade representative to consult with the appropriate congressional committees “before any vote is taken by the Ministerial Conference or the General Council relating to . . . (1) the adoption of an interpretation of the WTO Agreement or another multilateral trade agreement, [or] (2) the amendment of any such agreement” when such action “would substantially affect the rights or obligations of the United States.”<sup>14</sup> The URAA also requires the trade representative to report to Congress within thirty days of the end of a year in which such action is taken, regarding any U.S. rights or obligations affected, “any Federal or State law that would be amended or repealed,” and other matters.<sup>15</sup>

In response to this statutory requirement, the Office of the U.S. Trade Representative, on March 30, 2006, stated in its 2005 Annual Report of the President of the United States on the Trade Agreements Program:

The amendment text and the statement by the Chair preserve all substantive aspects of the August 30, 2003 solution and do not alter the substance of the previously agreed solution. The only changes made were those technical changes necessary to change the original

<sup>8</sup> See Declaration on the TRIPS Agreement and Public Health (Nov. 14, 2001), WTO Doc. WT/MIN(01)/DEC/2 (Nov. 20, 2001).

<sup>9</sup> See Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, WTO Doc. WT/L/540 (Sept. 1, 2003).

<sup>10</sup> Letter from Rob Portman to Pascal Lamy (director-general, WTO) (n.d., received Dec. 17, 2005) (on file with authors).

<sup>11</sup> As is apparent from Westlaw, LexisNexis, and Google News searches, there was scant news coverage of the U.S. acceptance of the amendment.

<sup>12</sup> Notably, the Office of the U.S. Trade Representative (USTR) did not issue a press release like the one it released following the WTO’s adoption of the proposed amendment. See USTR Press Release, United States Welcomes Negotiations Leading to Positive Outcome on Enhancing Access to Medicines (Dec. 6, 2005), at <<http://www.ustr.gov>>.

<sup>13</sup> See Uruguay Round Agreements Act §122(a), 19 U.S.C. §3532 (2000).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

waiver decision to an amendment decision. . . . On December 16th, the United States submitted its acceptance of the amendment to the WTO.<sup>16</sup>

This appears to be the first formal notification to Congress regarding acceptance of the Protocol. The executive branch may also have consulted with congressional committees between the adoption of the Protocol in the WTO and its acceptance by the United States.

*Accepting the Protocol Using Executive Approval.* United States acceptance of the WTO amendment was effected by the U.S. trade representative. His legal authority to do so without formal congressional approval was not questioned. The State Department's Circular 175 process<sup>17</sup> was not used to consider whether congressional approval was needed.<sup>18</sup> The original U.S. approval of the WTO Agreement in 1994 was accomplished by the enactment of a federal law known as the URAA<sup>19</sup> in conjunction with presidential Proclamation 6780, which implemented provisions of the trade agreements approved in the URAA.<sup>20</sup> Both the URAA and Proclamation 6780 are silent as to whether congressional approval is needed for the United States to accept an amendment to the WTO Agreement. The Protocol amending the TRIPS Agreement does not require any legislative changes in the United States, and none have been enacted. (The only major reference to the overarching issue in U.S. law is in the Bipartisan Trade Promotion Authority Act of 2002, which lists, as a U.S. trade negotiation objective, "to respect the Declaration on the TRIPS Agreement and Public Health."<sup>21</sup>)

Thus, the initial U.S. practice for accepting a WTO amendment indicates that the executive branch may accept an amendment requiring no change in U.S. law without approval by Congress. This was the case even though the TRIPS amendment alters the rights and obligations of WTO members.

## INTERNATIONAL HUMAN RIGHTS AND CRIMINAL LAW

### *U.S. Authorities Arrest and Charge Argentine and Peruvian Former Officers Implicated in Serious Human Rights Abuses*

In April 2007, U.S. authorities arrested and detained three Argentine and Peruvian former military officers who are accused of serious human rights abuses in their homelands. The Argentine, who operated an arts and antiques store in the Washington, D.C., area, is accused

<sup>16</sup> USTR, 2005 Annual Report of the President of the United States on the Trade Agreements Program 31 (Mar. 2006), at <<http://www.ustr.gov>>.

<sup>17</sup> The U.S. Department of State's Circular 175 procedure for legal review and approval prior to the conclusion of new international agreements is described at <<http://www.state.gov/s/l/treaty/c175/>>.

<sup>18</sup> Traditionally, the USTR has taken the position that Circular 175 is a purely internal State Department matter that does not apply to the USTR. No parallel procedure exists in the USTR to determine whether an amendment to a U.S. trade agreement requires congressional approval.

<sup>19</sup> See Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994). The provision approving the WTO Agreement is 19 U.S.C. §3511.

<sup>20</sup> See Proclamation 6780—to Implement Certain Provisions of Trade Agreements Resulting from the Uruguay Round of Multilateral Trade Negotiations, and for Other Purposes, 60 Fed. Reg. 15,845 (Mar. 23, 1995).

<sup>21</sup> See Bipartisan Trade Promotion Authority Act, 19 U.S.C. §3802(b)(4)(C) (Supp. 2002) (referring to declaration, *supra* note 8).