Order Code RL32014

CRS Report for Congress
Received through the CRS Web

WTO Dispute Settlement: Status of U.S. Compliance in Pending Cases

Updated March 1, 2006

Jeanne J. Grimmett
Legislative Attorney
American Law Division

WTO Dispute Settlement: Status of U.S. Compliance in Pending Cases

Summary

Although the United States has complied with adverse rulings in many past World Trade Organization (WTO) disputes, 14 cases are pending in which rulings have not yet been implemented or the United States has taken action and the dispute has not yet been settled. A WTO Member found to have violated a WTO obligation will generally be given a reasonable period of time to comply. While the Member is expected to withdraw the offending measure, compensation and temporary retaliation are available if the Member has not complied by the established deadline.

As a result of the 2004 repeal of the WTO-inconsistent Extraterritorial Income Exclusion Act (American Jobs Creation Act, P.L. 108-357), complainant European Communities (ECs) suspended the WTO-authorized tariffs it had been imposing but also secured a compliance panel, which in September 2005 faulted transition and grandfather provisions in the new law; the AB upheld the panel in February 2006. The United States has not yet complied in a case faulting a trademark statute affecting property confiscated by Cuba. S. 328, S.Amdt. 281 to S. 600, H.R. 208, H.R. 579, and H.R. 719 would repeal the provision; S. 691 would amend the law. Legislation to amend a statute involving the factual basis of dumping determinations (H.R. 2473) was introduced in May 2005 to resolve a dispute with Japan. Mid-2005 compliance deadlines in the trademark and dumping cases were not extended, but complainants have reserved their retaliation rights. Compliance deadlines have expired in the case challenging the Continued Dumping and Subsidy Offset Act, a statute authorizing distribution of antidumping and countervailing duties to U.S. firms; P.L. 109-171 repeals the statute but allows the distribution of duties on goods entered before October 1, 2007. Complainants EC, Canada, Japan, and Mexico are currently imposing added tariffs on selected U.S. products and have expressed concerns about the continued payments allowed under the new law. P.L.109-171 also repeals a WTO-inconsistent cotton program at issue in a dispute with Brazil over U.S. cotton subsidies; other U.S. agricultural programs were also faulted, and Brazil may seek further compliance measures. The United States has pledged to legislatively clarify a federal law at fault in a dispute with Antigua and Barbuda over U.S. cross-border gambling measures; the compliance period ends April 3, 2006.

In seven pending cases, compliance involves administrative action under existing authorities. The United States modified a privatization methodology used in 12 countervailing duty (CVD) proceedings involving EC steel products and issued new determinations in each. An August 2005 compliance panel report faulted two of the determinations; the report was adopted in September 2005. Three cases involve the final dumping, subsidy, and threat of injury determinations in antidumping and CVD investigations of Canadian softwood lumber. Canada has challenged the new U.S. determinations in each and is also seeking to impose sanctions. Argentina has requested consultations regarding U.S. compliance measures in a case involving the sunset (five-year) review of an antidumping order on oil country tubular goods (OCTG) from that country. Mexico and the United States have agreed on a May 28, 2006, deadline in a case involving the sunset review of an antidumping order on OCTG from Mexico. This report will be updated.

Contents

WTO Dispute Settlement: Status of U.S. Compliance in Pending Cases

This report provides a summary of the status of U.S. compliance efforts in pending World Trade Organization (WTO) disputes that have resulted in adverse rulings against the United States.[1] Although the United States has complied with adverse rulings in many past WTO disputes, a number of cases are currently pending in which the United States has not fully implemented adopted WTO panel and Appellate Body reports or has taken action but the dispute is not yet definitively resolved. In some cases, original or subsequently extended deadlines have expired, while in others, the original deadline will lapse in 2006. Compliance in these cases may implicate either legislative or administrative action by the United States.

The report begins with an overview of WTO dispute settlement procedures, focusing on the compliance phase of the process, followed by a discussion of U.S. laws relating to WTO dispute proceedings. The report continues with a listing of the pending WTO disputes in the compliance phase and a summary of the compliance history for each case.

WTO Dispute Settlement Procedures

WTO disputes are conducted under the terms of the WTO Understanding on the Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding or DSU).[2] The DSU, which entered into force with the establishment

---

[1] The case histories in this report are primarily based on WTO documents, available at [http://www.wto.org] or the WTO dispute settlement website indicated below. This report does not address the cases in which the United States has implemented adverse reports to the satisfaction of the complaining party and thereby settled the disputes, nor does it discuss the compliance history of other WTO Members. For further information on WTO disputes, *see* Office of the United States Trade Representative, "Dispute Settlement Update" at [http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/asset_upload_file343_5697.pdf] and "Snapshot of WTO Cases Involving the United States," at [http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/asset_upload_file291_5696.pdf?ht=]; the annual *Trade Policy Agenda and Annual Report of the President of the United States on the Trade Agreements Program,* at [http://www.ustr.gov] under "Reports"; and WTO, *Update of WTO Dispute Settlement Cases* (updated regularly) at [http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm].

[2] For additional information on WTO dispute settlement procedures, *see* "Dispute Settlement Gateway," at the WTO website, *supra* note 1, and CRS Report RS20088, *Dispute*

(continued...)

of the World Trade Organization on January 1, 1995, carries forward and expands upon dispute settlement practices developed under the General Agreement on Tariffs and Trade (GATT). The DSU is administered by the WTO Dispute Settlement Body (DSB), which is composed of all WTO Members. Where individual WTO agreements contain special or additional dispute settlement rules that differ from those in the DSU, the former will prevail. A list of these agreements and rules (e.g. special timelines for subsidy disputes in the Agreement on Subsidies and Countervailing Measures) is contained in Appendix 2 of the DSU.

WTO dispute settlement may be characterized as a three-stage process: (1) consultations; (2) panel and, if requested, Appellate Body (AB) proceedings; and (3) implementation. Within this process, the DSB establishes panels; adopts panel and appellate reports; authorizes countermeasures when requested; and monitors the implementation of dispute settlement results. The establishment of panels, adoption of panel and AB reports, and authorization of countermeasures are actions that are subject to a "reverse consensus" rule under which the DSB will take the proposed action unless all DSB Members vote not to do so. In effect, these particular decisions are virtually automatic.

After the DSB adopts an adverse panel and any Appellate Body report, the defending Member must inform the DSB of its compliance plans. If it is impracticable for the Member to comply immediately, the Member will be allowed a "reasonable period of time" to do so. Where a timeframe proposed by the Member is not approved by the DSB, the disputing parties may negotiate a compliance period; if this fails, the period will be arbitrated. A WTO Member found to have violated WTO obligations is expected to comply by withdrawing the offending measure, with compensation and temporary retaliation available to the prevailing party as alternative remedies. Full compliance is the preferred outcome, however, so as to ensure that negotiated rights and obligations are preserved and maintained.

Article 22 of the DSU provides that if the prevailing Member in a dispute believes that the other Member has not implemented the WTO rulings and recommendations by the end of the compliance period, it may request the other Member to negotiate a compensation agreement or may ask the DSB for authorization to suspend WTO concessions (usually to impose higher tariffs on items from the other country). The Member may choose the latter option without first seeking compensation.

Under the DSU, the DSB is to authorize the retaliation request, subject to the reverse consensus rule, within 30 days after the compliance period expires. If the defending Member objects to the request, however, the proposed retaliation will be arbitrated and the 30-day deadline for approving the retaliation request effectively extended. The objection may relate to the level of nullification or impairment of benefits involved or whether DSU rules as to the choice of retaliatory measures have been followed. Under the DSU, the arbitration is to be carried out by the original panel, if members are available, or by an arbitrator appointed by the WTO Director

---

[2] (...continued)
Settlement in the World Trade Organization: An Overview, by Jeanne Grimmett.

General. The arbitration is ordinarily to be completed within 60 days after the compliance period expires. The DSB then meets to authorize the retaliation request to the extent the proposed retaliation is consistent with the arbitrator's decision.

In addition, Article 21.5 of the DSU provides for further dispute settlement proceedings in the event the disputing parties disagree as to whether the defending Member has implemented the WTO rulings and recommendations in a particular case. Once a compliance panel is convened, it has 90 days to issue a report; the report may then be appealed. Since the DSU fails to incorporate Article 21.5 proceedings into the 30-day period for approving countermeasures and the timeframe for any subsequent arbitration, a procedural problem, referred to as "sequencing," has resulted. Members have often filled the gap, however, by entering into *ad hoc* bilateral agreements. Such agreements may provide, for example, that the prevailing party will request authorization to impose countermeasures, the defending party will request arbitration of the proposal, and the arbitration will be suspended until the compliance panel procedure is completed.[3]

If a prevailing Member is ultimately authorized to impose countermeasures, the Member is not required to implement them and, as shown in the cases below, Members may manage disputes in a variety of ways at the compliance phase short of imposing sanctions.

Uruguay Round Agreements Act (URAA): Statutory Requirements for Implementing WTO Decisions

The legal effect of Uruguay Round agreements and WTO dispute settlement results in the United States is comprehensively dealt with in the Uruguay Round Agreements Act (URAA), P.L. 103-465, which addresses the relationship of WTO agreements to federal and state law and prohibits private remedies based on alleged violations of WTO agreements.[4] The statute also requires the United States Trade Representative (USTR) to keep Congress informed of disputes challenging U.S. laws once a dispute panel is established, any U.S. appeal is filed, and a panel or Appellate Body report is circulated to WTO Members.[5] In addition, the URAA places requirements on regulatory action taken to implement WTO decisions and contains provisions specific to the implementation of panel and appellate reports that fault U.S. actions in trade remedy proceedings.

---

[3] *See* Sylvia A. Rhodes, *The Article 21.5/22 Problem: Clarification Through Bilateral Agreements?* 3 J. Int'l Econ. L. 553 (2000).

[4] For background discussions regarding the effect of treaties and international agreements in domestic law, *see* CRS Report RL32528, *International Law and Agreements: Their Effect Upon U.S. Law*, by Michael Garcia and Arthur Traldi; Ronald A. Brand, *Direct Effect of International Economic Law in the United States and the European Union*, 17 Nw. J. Int'l L. & Bus. 556 (1996-97); and John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 Am. J. Int'l L. 310 (1992).

[5] Uruguay Round Agreements Act (URAA), § 123(d)-(f), 19 U.S.C. § 3533(d)-(f).

Section 102 of the URAA: Domestic Legal Effect of WTO Decisions

Section 102 of the URAA and its legislative history establish that domestic law supersedes any inconsistent provisions of the Uruguay Round agreements and that congressional or administrative action, as the case may be, is required to implement adverse decisions in WTO dispute settlement proceedings.

Federal Law. Section 102(a)(1), 19 U.S.C. § 3512(a)(1), provides that "[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." The URAA further provides, at § 102(a)(2), 19 U.S.C. § 3512(a)(2), that nothing in the statute "shall be construed ... to amend or modify any law of the United States ... or ... to limit any authority conferred under any law of the United States ... unless specifically provided for in this act."

As explained in Statement of Administrative Action (SAA) that accompanied the Uruguay Round agreements when they were submitted to Congress in 1994, "[i]f there is a conflict between U.S. law and any of the Uruguay Round agreements, section 102(a) of the implementing bill makes clear that U.S. law will take precedence."[6] Moreover, section 102 is further intended to clarify that all changes to U.S. law "known to be necessary or appropriate" to implement the WTO agreements are incorporated in the URAA and that any unforeseen conflicts between U.S. law and the WTO agreements "can be enacted in subsequent legislation"[7] Congress has traditionally treated potential conflicts with prior GATT agreements and free trade agreements in this way, treatment that it also deems to be "consistent with the Congressional view that necessary changes in Federal statutes should be specifically enacted, not preempted by international agreements."[8]

This approach carries over into the implementation of WTO dispute settlement results, a situation explained as follows in URAA legislative history:

> Since the Uruguay Round agreements as approved by the Congress, or any subsequent amendments to those agreements, are non-self-executing, any dispute settlement findings that a U.S. statute is inconsistent with an agreement also cannot be implemented except by legislation approved by the Congress unless consistent implementation is permissible under the terms of the statute.[9]

---

[6] Uruguay Round Agreements, Statement of Administrative Action, H.Doc. 103-316(I) at 659 (1994)[hereinafter cited as Uruguay Round SAA]. The SAA, which was expressly approved in the URAA, is "regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and ... [the URAA] in any judicial proceeding in which a question arises concerning such interpretation or application." URAA, § 102(d), 19 U.S.C. § 3512(d).

[7] H.Rept. 103-826(I), at 25; *see also* S.Rept. 103-412, at 13.

[8] H.Rept. 103-826(I), at 25; *see also* S.Rept. 103-412, at 13.

[9] H.Rept. 103-826(I), at 25; *see also* S.Rept. 103-412, at 13, and the Uruguay Round SAA, *supra* note 6, at 1032-33. The latter states as follows:

(continued...)

State Law. Where State law is at issue in a WTO dispute, the URAA provides for federal-state cooperation in the proceeding and limits any domestic legal challenges to such law to the United States.[10] The act's general preclusion of private remedies (discussed below) further centralizes the response to adverse WTO decisions involving State law in the federal government.[11]

Section 102(b) provides as follows:

> No State law, or the application of a such a State law, may be declared invalid as to any person or circumstance on the ground that the provision or its application is inconsistent with any of the Uruguay Round Agreements, except in an action brought by the United States for the purposes of declaring such law or application invalid.[12]

According to legislative history, the provision "makes clear that the Uruguay Round agreements do not automatically preempt State laws that do not conform to their provisions, even if a WTO dispute settlement panel or the Appellate Body were to determine that a particular State measure was inconsistent with one or more of the

---

[9] (...continued)

> Reports issued by panels or the Appellate Body under the DSU have no binding effect under the law of the United States and do not represent an expression of U.S. foreign or trade policy. They are no different in this respect than those issued by GATT panels since 1947. If a report recommends that the United States change federal law to bring it into conformity with a Uruguay Round agreement, it is for the Congress to decide whether any such change will be made.

[10] Two recent WTO cases have involved the WTO-consistency of U.S. state laws. In the challenge by Antigua and Barbuda to federal and state laws affecting the cross-border supply of gambling and betting services, the United States prevailed on the issue of whether the state measures infringed market access obligations under the General Agreement on Trade in Services (GATS). The WTO Appellate Body found that the panel had erred in considering whether the eight laws at issue violated the Agreement because the complainant had not presented sufficient evidence and legal arguments to establish a prima facie case. *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285. *See infra* text accompanying notes 155-176 for further discussion of this case.

A challenge by Brazil to Florida's equalizing excise tax on processed orange and grapefruit products (WT/DS250) was resolved in 2004 without panelists having been appointed after Florida amended its statute. Notification of Mutually Agreed Solution, *United States — Equalizing Excise Tax Imposed by Florida on Processed Orange and Grapefruit Products*, WT/DS250/3 (June 2, 2004); *U.S. Brazil Settle Long-standing Dispute Over Florida Tax to Promote Citrus Products*, 21 Int'l Trade Rep. (BNA) 945 (2004).

[11] For further discussion, *see* Uruguay Round SAA, *supra* note 6, at 676.

[12] URAA, § 102(b)(2)(A), 19 U.S.C. § 3512(b)(2)(A). The term "State law" is defined to include "any law of a political subdivision of a State, as well as any State law that regulates or taxes the business of insurance." URAA, § 102(b)(3), 19 U.S.C. § 3512(b)(3). The term is intended to encompass "any provision of a state constitution, regulation, practice or other state measure." Uruguay Round SAA, *supra* note 6, at 674.

Uruguay Round agreements."[13] The statute also contains certain restrictions in any such legal action brought by the United States, including that the report of the WTO dispute settlement panel or the Appellate Body may not be considered binding or otherwise accorded deference.[14] Any such suit by the United States is expected to be a rarity.[15]

Preclusion of Private Remedies. Private remedies are prohibited under § 102(c)(1) of the URAA, 19 U.S.C. § 3512(c)(1), which provides that "[n]o person other than the United States ... shall have a cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreements" or "may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State, on the ground that such action or inaction is inconsistent with such agreement."

Congress has additionally stated in § 102(c)(2) of the URAA, 19 U.S.C. § 3512(c)(2), that it intends, through the prohibition on private remedies:

> to occupy the field with respect to any cause of action or defense under or in connection with any of the Uruguay Round Agreements, including by precluding any person other than the United States from bringing any action against any State or political subdivision thereof or raising any defense to the application of State law under or in connection with any of the Uruguay Round Agreements —
>
> (A) on the basis of a judgment obtained by the United States in an action brought under any such agreement; or
>
> (B) on any other basis.

---

[13] S.Rept. 103-412, at 15; *see also* H.Rept. 103-826(I), at 25, and Uruguay Round SAA, *supra* note 6, at 670.

[14] URAA, § 102(b)(2)(B), 19 U.S.C. § 3512(b)(2)(B). In addition, the United States will have the burden of proving that the State law or its application is inconsistent with the WTO agreement in question; any State whose interests may be impaired or impeded by the suit will have the unconditional right to intervene as a party, and the United States will be entitled to amend its complaint to include a claim or cross-claim concerning the law of a State that does intervene; and any State law that is declared invalid will not be considered to have been invalid in its application during any period before the court's judgment becomes final and all timely appeals are exhausted. The statute also requires the United States Trade Representative to notify Congress before bringing any such suit. URAA, § 102(b)(2)(C), 19 U.S.C. § 3512(b)(2)(C).

[15] Uruguay Round SAA, *supra* note 6, at 674; H.Rept. 103-826(I), at 26; S.Rept. 103-412, at 15. The SAA states, inter alia, that the Attorney General "will be particularly careful in considering recourse to this authority where the state measure involved is aimed at the protection of human, animal, or plant health or of the environment or the state measure is a state tax of a type that has been held to be consistent with the requirements of the U.S. Constitution. In such a case, the Attorney General would entertain use of this statutory authority only if consultations between the President and the Governor of the State concerned failed to yield an appropriate alternative." Uruguay Round SAA, *supra* note 6, at 674.

The House Ways and Means Committee report on the URAA discusses the rationale and implications of § 102(c) as follows:

> For example, a private party cannot bring an action to require, preclude, or modify government exercise of discretionary or general "public interest" authorities under other provisions of law. These prohibitions are based on the premise that it is the responsibility of the Federal Government, and not private citizens, to ensure that Federal or State laws are consistent with U.S. obligations under international agreements such as the Uruguay Round agreements.[16]

The SAA notes, however, that § 102(c) "does not preclude any agency of government from considering, or entertaining argument on, whether its action or proposed action is consistent with the Uruguay Round agreements, although any change in agency action would have to be authorized by domestic law."[17] In addition, federal courts have not viewed the provision as precluding them from considering U.S. WTO obligations in challenges to agency actions implicating WTO agreements.[18]

Implementation of WTO Decisions Involving Administrative Action

In addition to the URAA provisions that limit the direct effect of WTO rules and decisions in U.S. law, the URAA also places requirements on agencies in their

---

[16] H.Rept. 103-826(I), at 26.

[17] Uruguay Round SAA, *supra* note 6, at 676.

[18] E.g., SNR Roulements v. United States, 341 F.Supp.2d 1334, 1341 (Ct. Int'l Trade 2004); Timken v. United States, 240 F.Supp. 2d 1228, 1238 (Ct. Int'l Trade 2002); Gov't of Uzbekistan v United States, 2001 WL 1012780, at *3 (Ct. Int'l Trade Aug. 30, 2001). As stated in *Timken*, which reviewed a challenge to a final Department of Commerce dumping determination: "[Foreign producer] Koyo ... is not bringing this action under any WTO agreement; rather, Koyo is arguing that the Department's application and interpretation of U.S. law violates its international obligations pursuant to a WTO agreement. Koyo is certainly 'free to argue that Congress would never have intended to violate an agreement it generally intended to implement, without expressly saying so.'" 240 F.Supp. at 1238, *quoting* Gov't of Uzbekistan, *supra*, at *3.

For discussions of the relationship of WTO decisions and U.S. administrative and judicial actions, *see, e.g.*, Gregory Husisian, *When a New Sheriff Comes to Town: The Impending Showdown Between the U.S. Trade Courts and the World Trade Organization*, 17 St. John's J. Legal Comment. 457 (2003); Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 Va. J. Int'l L. 675, 731-46 (2003); Julie Dunne, Delverde *and the WTO's British Steel Decision Foreshadow More Conflict Where the WTO Subsidies Agreement, Privatization, and United States Countervailing Duty Law Intersect*, 17 Am. U. Int'l L. 79 (2001); Michael F. Williams, Charming Betsy, Chevron, a*nd the World Trade Organization: Thoughts on the Interpretive Effect of International Trade Law*, 32 Law & Pol'y Int'l Bus. 677 (2001); Jane A. Restani & Ira Bloom, *Interpreting International Trade Statutes: Is the* Charming Betsy *Sinking?* 24 Fordham Int'l L. J. 1533 (2001), *Sixteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 193 F.R.D. 263, 403-416 (1999); *Thirteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 166 F.R.D. 515, 609-638 (1995).

implementation of WTO panel and Appellate Body reports. These provisions apply to (1) regulatory action in general and (2) new agency determinations in response to WTO decisions involving trade remedy proceedings and the implementation of such determinations.

Section 123 of the URAA: WTO Cases Involving Regulatory Action. Section 123(g) of the URAA, 19 U.S.C. § 3533(g), provides that in any WTO case in which a departmental or agency regulation or practice has been found to be inconsistent with a WTO agreement, the regulation or practice may not be rescinded or modified in implementation of the decision "unless and until" the USTR and relevant agencies meet certain consultation requirements and the final rule or other modification has been published in the *Federal Register*.[19]

Section 129 of the URAA: WTO Cases Involving Trade Remedy Proceedings. Section 129 of the URAA, 19 U.S.C. § 3538, sets forth authorities and procedures for administrative action by the U.S. International Trade Commission (ITC) and the Department of Commerce (DOC) to implement adverse WTO reports involving U.S. safeguards, antidumping, and countervailing duty statutes. U.S. actions in these types of trade remedy proceedings are subject to obligations under the GATT 1994 and, as the case may be, the WTO Agreement on Safeguards, the WTO Antidumping Agreement, and the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement).

The ITC is charged under U.S. safeguards law, set forth in Title II of the Trade Act of 1974, with conducting investigations to determine whether or not increased imports are a substantial cause of serious injury to a domestic industry. If the ITC makes an affirmative injury determination, it recommends remedial measures to the President, who ultimately determines whether or not to take action. In addition, in antidumping and countervailing duty investigations carried out under Title VII of the Tariff Act of 1930, the ITC determines whether dumped or subsidized imports, as the case may be, cause material injury to domestic industries. The Department of Commerce (DOC) makes determinations as to the existence and level of dumping or subsidization in these investigations.

Implemented § 129 determinations in antidumping and countervailing duty cases are reviewable in the U.S. Court of International Trade and by binational panels established under Chapter 19 of the North American Free Trade Agreement (NAFTA).[20] Chapter 19 panels are available to review final agency determinations

---

[19] An example of the use of the § 123 process may be found in the Commerce Department's issuance in 2003 of a modified privatization methodology for use in making subsidy determinations in countervailing duty proceedings. The modification was issued in response to adverse panel and appellate reports in DS212, discussed later in this report, a challenge by the European Communities to 12 U.S. countervailing duty orders based on what the EC alleged were WTO-inconsistent methodologies. *See infra* pp. 42-47.

[20] URAA, § 129(e), *adding* Tariff Act of 1930, § 516A(a)(2)(B)(vii), 19 U.S.C. § 1516a(a)(2)(B)(vii)), *and amending* Tariff Act of 1930, § 516A(g)(8)(A)(i), 19 U.S.C. § 1516a(g)(8)(A)(i).

(continued...)

in antidumping and countervailing duty investigations involving NAFTA countries in lieu of judicial review in the country in which the determination is made.

U.S. International Trade Commission. If an interim WTO panel report or a WTO Appellate Body report concludes that an action by the ITC in connection with a trade remedy proceeding is inconsistent with U.S. obligations under the WTO Antidumping Agreement, SCM Agreement, or the Agreement on Safeguards, the USTR may request the ITC to issue an advisory report on whether U.S. antidumping, countervailing duty, or safeguards law, as appropriate, allows the ITC to take steps with respect to the proceeding at issue that would render its action "not inconsistent with" the panel or AB findings.[21]

The ITC is to report to the USTR within 30 calendar days of the USTR's request where an interim report is involved, and within 21 calendar days in case of an AB report.[22] These deadlines are aimed at ensuring that the USTR will receive the requested advice in time to decide whether to appeal a panel's interim report or to implement an adverse report, and to estimate how long of a period for implementing the WTO decision may be needed.[23]

If a majority of the Commissioners have found that action may be taken under existing law, the USTR must consult with the House Ways and Means Committee and the Senate Finance Committee and may request the ITC in writing to issue a new determination in the underlying proceeding that would render the ITC action "not inconsistent with" the WTO findings.[24] The new determination must be issued within 120 days of the USTR's request.[25] The time limitation is intended to allow

---

[20] (...continued)

The Uruguay Round SAA states the following regarding the legal implications of possible parallel judicial proceedings regarding the same agency determinations :

> Since implemented determinations under section 129 may be appealed, it is possible that Commerce or the ITC maybe in the position of simultaneously defending determinations in which the agency reached different conclusions. In such situations, the Administration expects that courts and binational panels will be sensitive to the fact that under the applicable standard of review, as set forth in statute and case law, multiple permissible interpretations of the law and the facts may be legally permissible in any particular case, and the issuance of a different determination under section 129 does not signify that the initial determination was unlawful.

Uruguay Round SAA, *supra* note 6, at 1027.

[21] URAA, § 129(a)(1), 19 U.S.C. § 3538(a)(1).

[22] URAA, § 129(a)(2), 19 U.S.C. § 3538(a)(2).

[23] Uruguay Round SAA, *supra* note 6, at 1023.

[24] URAA, § 129(a)(3),(4), 19 U.S.C. § 3538(a)(3),(4).

[25] ITC authority to issue a new determination is granted "notwithstanding any provision of Tariff Act of 1930 ... or title II of the Trade Act of 1974." The SAA explains that "[m]any of the ITC's proceedings are time-limited by statute, and the ITC cannot revisit its actions (continued...)

the USTR to propose a reasonable period of time for implementation to the WTO once a panel and any appellate report is adopted.[26]

Further Action in Antidumping and Countervailing Duty Proceedings. If an antidumping or countervailing duty order must be revoked in whole or in part because it is no longer supported by an affirmative ITC determination, the USTR may direct DOC to revoke the order to the extent needed.[27] The USTR must consult with the House Ways and Means and Senate Finance Committees before the ITC's new determination is implemented.[28] Determinations that are implemented under this authority apply to unliquidated entries of the subject merchandise that are entered, or withdrawn from warehouse for consumption, on or after the date on which the USTR directs the Commerce Department to revoke the order in question.[29] Notices

---

[25] (...continued)
in those proceedings in the absence of the authority provided by subsection (a)(4) or a remand." Uruguay Round SAA, *supra* note 6, at 1024.

[26] *Id.*

[27] URAA, § 129(a)(6), 19 U.S.C. § 3538(a)(6).

[28] URAA, § 129(a)(3),(5), 19 U.S.C. § 3538(a)(3),(5).

[29] URAA, § 129(c)(1), 19 U.S.C. § 3538(c)(1). Unliquidated entries are those for which the Customs Service has not ascertained a final rate and amount of duty. U.S. Customs and Border Protection, *Importing into the United States; A Guide for Commercial Importers* 105-106 (2002 ed.), at [http://www.customs.gov/xp/cgov/toolbox/publications/trade].

The SAA explains this provision as follows:

> Consistent with the principle that GATT panel recommendations apply only prospectively, subsection 129(c)(1) provides that where determinations by the ITC or Commerce are implemented under subsections (a) or (b), such determinations have prospective effect only. That is, they apply to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which the Trade Representative directs implementation. Thus, relief available under subsection 129(c)(1) is distinguishable from relief available in an action brought before a court or a NAFTA binational panel, where, depending on the circumstances of the case, retroactive relief may be available. Under 129(c)(1), if implementation of a WTO report should result in the revocation of an antidumping or countervailing duty order, entries made prior to the date of Trade Representative's direction would remain subject to potential duty liability.

Uruguay Round SAA, *supra* note 6, at 1026. *See also* H.Rept. 103-826(I), at 39; S.Rept. 103-412, at 27.

Canada unsuccessfully challenged § 129(c)(1) in a WTO dispute settlement proceeding in January 2001, arguing that the provision precludes the United States from complying fully with WTO rulings since, in Canada's view, it requires U.S. agencies to ignore a WTO ruling with respect to unliquidated imports that enter before the date that USTR directs implementation even though the final determination assessing those duties will be made after the U.S. compliance deadline in the case. Canada alleged violations of the DSU, Article VI of the GATT 1994, and the WTO Antidumping Agreement and the Agreement
(continued...)

of the implementation of § 129 determinations must be published in the *Federal Register*.[30]

Further Action in Safeguards Proceedings. Where a safeguard proceeding is at issue, the President is authorized, after receiving a new ITC determination, to reduce, modify, or terminate the safeguard notwithstanding other statutory requirements regarding changes in existing safeguard measures.[31] The President is required to consult with the House Ways and Means Committee and Senate Finance Committee before acting under this authority.[32] The USTR must publish a notice of the implementation of any ITC determination in the *Federal Register*.[33]

Department of Commerce. A procedure for USTR and agency interaction, including congressional consultation requirements, is also set forth with respect to DOC determinations in antidumping and countervailing duty proceedings, though without the requirement for an initial agency advisory report regarding the extent of its statutory discretion. Instead, promptly after the issuance of a WTO panel or appellate report finding that a DOC action in an antidumping or countervailing duty proceeds is inconsistent with U.S. obligations under the WTO Antidumping Agreement or the SCM Agreement, the USTR is to consult with DOC and the House Ways and Means and Senate Finance Committees, and may request DOC in writing to issue a determination in connection with the underlying proceeding that would render its action "not inconsistent with" the panel or appellate findings.[34] DOC must

---

[29] (...continued)
on Subsidies and Countervailing Measures (SCM Agreement). *See* WTO Dispute Settlement Proceeding Regarding Section 129(c)(1) of the Uruguay Round Agreements Act, 66 Fed. Reg. 41649 (Aug. 8, 2001). The panel in the case concluded that Canada had failed to establish that the provision violated the cited WTO obligations and thus made no recommendations to the WTO Dispute Settlement Body. Panel Report, *United States — Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221 (July 15, 2002). Canada did not appeal and the report was adopted August 30, 2002. *See generally WTO Panel Rejects Canadian Challenge to U.S. Rules to Correct Antidumping Fees*, 19 Int'l Trade Rep. (BNA) 1275 (2002).

[30] URAA, § 129(c)(2), 19 U.S.C. § 3538(c)(2).

[31] URAA, § 129(a)(7), 19 U.S.C. § 2254(b)(3).

[32] *Id.*

[33] URAA, § 129(c)(2)(B), 19 U.S.C. § 3538(c)(2)(B).

[34] URAA, § 129(b)(1),(2), 19 U.S.C. § 3538(b)(1),(2). Senate legislative history indicates that USTR is expected to "consult closely with Commerce in order to ensure that it benefits from Commerce's expertise with respect to both the panel or Appellate Body reports and the appropriate implementing action (if any), including the implications of any such action on the administration of the antidumping or countervailing duty law." S.Rept. 103-412, at 27. The Senate Finance Committee has further stated that it "expects to be consulted closely by the Administration throughout this process, and to be informed and provided an explanation should USTR decide to implement an adverse panel or Appellate Body decision notwithstanding a contrary recommendation by Commerce." *Id.* If USTR directs Commerce to implement the new determination, "Commerce may do so even if litigation is pending with respect to the initial agency determination." H.Rept. 103-826(I), at 39.

issue a determination within 180 days of the request.[35] After consulting with DOC and the above-named congressional committees, USTR may direct DOC to implement its determination in whole or in part.[36]

Implementation of WTO Rulings in Pending Cases

Seven WTO dispute proceedings that involve federal statutes are now at the compliance stage — that is, panel and appellate reports adverse to the United States have been adopted by the DSB and compliance issues have not yet been fully resolved.[37] At issue are challenges to

- the Foreign Sales Corporation (FSC) statute and its replacement statute, the Extraterritorial Income (ETI) Exclusion Act;
- § 110 of the Copyright Act, a statute affecting music licensing;
- § 211 of the Omnibus Appropriations Act of 1998, a statute affecting trademarks affecting property confiscated by Cuba;
- a provision of antidumping law involving the calculation of dumping rates for producers and exporters that are not individually investigated by the Commerce Department;
- the Continued Dumping and Subsidy Offset Act (CDSOA), which requires the distribution of collected antidumping and countervailing duties to petitioners and interested parties in the underlying trade proceedings;
- statutes providing cotton subsidies to U.S. producers and exporters; and
- federal laws governing the remote supply of gambling services.

While the WTO proceeding involving U.S. cotton subsidies, *United States — Subsidies on Upland Cotton* (WT/DS267), also implicates regulatory action by the United States, this report focuses on statutory aspects of U.S. compliance.

Seven pending cases involve regulatory action in trade remedy proceedings under existing statutory authorities. At issue are the following:

- whether the Department of Commerce (DOC) properly determined if subsidies were provided to privatized EC steel companies;

---

[35] URAA, § 129(b)(2), 19 U.S.C. § 3538(b)(2).

[36] URAA, § 129(b)(3),(4), 19 U.S.C. § 3538(b)(3),(4).

[37] Further information on these disputes is available at the USTR and WTO sources listed at *supra* note 1.

- a question as whether a subsidy bestowed on lumber produced by one Canadian enterprise was "passed through" to unrelated downstream entities;

- the administrative practice of "zeroing" used by the Department of Commerce in determining dumping margins for Canadian softwood lumber;

- the basis of a threat of injury determination by the U.S. International Trade Commission (ITC) in combined antidumping and countervailing duty investigations of Canadian lumber imports;

- the implications of waiving participation in sunset (five-year) reviews of antidumping orders; and

- DOC findings in a sunset review that dumping was likely to continue or recur; and

- whether, in a countervailing duty proceeding, the ITC attributed to imports injury caused by other factors.

In the fifth bulleted case, *United States — Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* (WT/DS268), the panel found both a U.S. statute and its related regulations to be inconsistent with WTO obligations. In implementing the ruling, however, the United States took only regulatory action to comply.

Pending Cases Involving Legislative Action

Foreign Sales Corporation (FSC) Statute (Tax Exemption for "Foreign Trade Income") (DS108). This case concerns U.S. tax statutes governing the treatment of export income, which were found to constitute prohibited export subsidies under the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) and to violate other WTO obligations.[38] Although the United States sought to comply with the original adverse ruling involving the FSC statute by repealing the provisions and establishing new rules for the treatment of extraterritorial income (FSC Repeal and Extraterritorial Income Exclusion Act of 2000, P.L. 106-519), complainant European Communities (EC) requested authorization to retaliate, arguing that the new law did not satisfy WTO requirements.

Following a U.S. request for an arbitral panel on the level of retaliation, the parties agreed to suspend the arbitration until the completion of compliance proceedings. A compliance panel report, generally upheld by the Appellate Body,

[38] For additional information on the history of this dispute and the statutes involved, *see* the following: CRS Report RL31660, *A History of the Extraterritorial Income (ETI) and Foreign Sales Corporation (FSC) Export Tax-Benefit Controversy*, by David L. Brumbaugh; and CRS Report RS20746, *Export Tax Benefits and the WTO: The Extraterritorial Income Exclusion and Foreign Sales Corporations*, by David L. Brumbaugh.

found that the new law also provided an export subsidy in violation of WTO rules; the reports were adopted in January 2002. The arbitration resumed, with the EC asking for some $4 billion in countermeasures and the United States arguing that $956 million was proper. The arbitral panel ruled August 30, 2002, that $4 billion was appropriate in this case. The EC received authorization from the DSB to impose the retaliatory measures May 7, 2003, but stated that it would review U.S. actions in the following months before deciding whether to take further action.[39] The United States pledged to comply with the WTO rulings.[40]

The EC subsequently announced that it would impose an additional 5% ad valorem duty on a list of U.S. products as of March 1, 2004, if the statute were not repealed as of that date. The duty would increase automatically by 1% each month, and would reach a maximum 17% on March 1, 2005, if the United States did not comply in the interim. The duty was imposed as announced.[41]

The ETI statute was repealed in October 2004 in § 101 of the American Jobs Creation Act (Jobs Act), P.L. 108-357; the repeal provisions entered into force January 1, 2005.[42] The statute also provides a two-year transition period for phase-out of the ETI benefit, continues the benefit for transactions in the ordinary course of business pursuant to a binding contract between the taxpayer and an unrelated person in effect on September 17, 2003, and contains numerous other corporate tax provisions. Upon enactment of the new law, then EU Trade Commissioner Lamy announced that he intended to ask the EU Council to suspend the sanctions as of the effective date of the statute, but that the European Commission would seek review of the legislation under the WTO dispute settlement system, focusing on the exemption for transactions under the contracts described above.[43]

---

[39] "Foreign Sales Corporations: Following WTO authorisation to apply countermeasures of up to $4 billion, EU expects to ensure compliance with WTO rules before the beginning of next year," EC Press Release, IP/03/642, May 7, 2003, at [http://europa.eu.int].

[40] H.R. 5095 (Thomas), a 107th Congress proposal to repeal the statute and revise various international tax provisions in U.S. law, was not acted upon. Multilateral negotiations on the issue were also proposed. The Administration, in its FY2004 budget proposal, called for repeal of the law and stated an intent to work with Congress for statutory reform of international tax rules.

[41] *See* Council Regulation (EC) No 2193/2003 of 8 December 2003, at [http://europa.eu.int/eur-lex], and "Foreign Sales Corporations (FSC): Commission prepares for the imposition of countermeasures on U.S. products," EC Press Release, IP/03/1505, November 5, 2003, at [http://europa.eu.int]. For detailed discussion and analysis of the EC retaliation, *see* CRS Report RS21742, *European Trade Retaliation: The FSC-ETI Case*, by Raymond J. Ahearn.

[42] For a discussion of the enacted legislation, *see* CRS Report RL32652, *The 2004 Corporate Tax and FSC/ETI Bill: The American Jobs Creation Act of 2004,* by David L. Brumbaugh.

[43] EU News Release No. 147-04, Oct. 25, 2004, at [http://www.eurunion.org][hereinafter cited EU News Release]; *EU to End Sanctions in Wake of Export Bill But Plans Appeal of Grandfather Provisions*, 21 Int'l Trade Rep. (BNA) 1744 (2004). With regard to the transition period in the statute, the EC press release states that "during discussions with the US Congress the EU had signaled its willingness to accept a two-year transition period
(continued...)

Recent developments. On January 14, 2005, the EC requested that a compliance panel review the Jobs Act, claiming that the statute contained provisions "which will allow US exporters to continue benefiting from the tax exemptions already found to be WTO incompatible (a) in the years 2005 and 2006 with respect to all transactions and (b) for an indefinite period with respect to certain contracts" and that thus "the United States has failed to implement the DSB's recommendations and rulings by failing to withdraw without delay schemes found to be prohibited subsidies under the SCM Agreement and to bring its legislation into conformity with its obligations under the SCM Agreement, the Agreement on Agriculture and the GATT 1994."[44] Later that month, the EU Council directed that sanctions be suspended, retroactive to January 1, 2005, with the proviso that they be reimposed at 14% ad valorem as of January 1, 2006, or 60 days after the DSB adopts any WTO ruling that the United States is noncompliant in the case, whichever is later.[45]

The WTO panel report, issued September 30, 2005, ruled in favor of the EC, stating that "[i]t is clear that continuing to grant subsidies found to be prohibited is not consistent with the obligation to 'withdraw' prohibited export subsidies, in the sense of 'removing' or 'taking away.'"[46] It found that "to the extent that the United

---

[43] (...continued)
provided all other aspects of the bill were satisfactorily addressed." EU News Release, *supra*. *See also Lamy Decision on FSC-ETI May Signal Link to Boeing, Beef Hormone Fights*, Inside U.S. Trade, Oct. 29, 2004, at 1.

The Senate Finance Committee report on S. 1637, which contained an exemption for transactions under pre-September 18, 2003, contracts, states the contracts covered by the provision primarily involve long-term leasing arrangements, which "typically entail a U.S. lessor purchasing the manufactured goods from the manufacturer and subsequently entering into a long-term lease with a foreign lessee." S.Rept. 108-192, at 9. "Under these circumstances," the report states, "the FSC/ETI tax benefit accrues to the lessor rather than the manufacturer of the leased good." *Id.* The report further states that "[l]easing is a service and is recognized as such within the WTO." It maintains that providing "non-discriminatory subsidies to service suppliers is not prohibited under the WTO General Agreement on Trade in Services ("GATS")" and therefore "an extension of FSC/ETI benefits for existing long-term leasing contracts does not appear to be inconsistent with the WTO obligations of the United States under the GATS." *Id.* The report further adds, that the extension of the tax benefits for such contracts "will have no effect on future exports." *Id.*. The House bill, H.R. 4520, also contained an exemption for such transactions, but also contained a sentence, included in the enacted legislation, stating that for purposes of the provision, "a binding contract shall include a purchase option, renewal option, or replacement option which is included in such contract and which is enforceable against the seller or lessor." P.L. 108-357, § 101(f).

[44] Request for the Establishment of a Panel, Second Recourse to Article 21.5 of the DSU by the European Communities, *United States — Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/29 (Jan. 14, 2005).

[45] Council Regulation (EC) No 171/2005 of 31 January 2005 amending and suspending the application of Regulation (EC) No. 2193/2003 establishing additional customs duties on imports of certain products originating in the United States of America, at [http://europa.eu.int/eur-lex].

[46] Panel Report, Second recourse to Article 21.5 of the DSU by the European Communities,
(continued...)

States, by enacting Section 101 of the Jobs Act, maintains prohibited FSC and ETI subsidies, through these transitional and grandfathering measures, it continues to fail to implement fully the operative DSB recommendations and rulings to withdraw the prohibited subsidies and to bring its measures into conformity with its obligations under the relevant covered agreements."[47] The panel further stated that because the WTO rulings and recommendations made in 2000 "remained operative through the results of the compliance proceedings in 2002, we make no new recommendation."[48]

The United States appealed the ruling on November 14, 2005.[49] The EC appealed on November 28, 2005, requesting, in part, that were the Appellate Body to reverse any of the panel's findings, the AB consider other listed EC claims.[50] On February 13, 2006, the AB issued a ruling upholding the challenged panel findings.[51] Under WTO rules, the report is to be adopted by the DSB within 30 days after its issuance. While the United States has called on the EC not to reimpose sanctions, EC Trade Commissioner Mandelson has stated that the tariff surcharges will be reimposed 60 days after adoption of the panel and AB reports unless a mutually agreed solution is reached before that time.[52]

Section 110(5)(B) of the Copyright Act (Music Copyrights) (DS160). This dispute involves legislation enacted in 1998 (17 U.S.C. § 110(5)(b), as added by P.L. 105-298, § 202(a)), which provides that it is not a copyright infringement for bars and restaurants and other retail outlets to play radio and television music without authorization from the copyright holder or the payment of fees so long as the

---

[46] (...continued)
United States — Tax Treatment for "Foreign Sales Corporations," ¶ 7.62, WT/DS108/RW2 (Sept. 30, 2005). Referring to a statement in the prior compliance panel ruling in the case "that the obligation to withdraw prohibited subsidies is unaffected by contractual obligations that the Member itself may have assumed under its applicable domestic legislation or regulation," the panel stated that "[s]imilarly, this obligation cannot be affected by contractual arrangements which *private parties* may have made in reliance on laws conferring prohibited export subsidies." *Id.* ¶ 7.63 (emphasis added).

[47] *Id.* ¶ 8.1.

[48] *Id.* ¶ 8.2

[49] Notification of an Appeal by the United States, Second Recourse to Article 21.5 of the DSU by the European Communities, *United States — Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/32 (Nov. 16, 2005).

[50] Notification of an Other Appeal by the European Communities, Second Recourse to Article 21.5 of the DSU by the European Communities, *United States — Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/33 (Nov. 30, 2005).

[51] Appellate Body Report, Second Recourse to Article 21.5 of the DSU by the European Communities, *United States — Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/AB/RW2 (Feb. 13, 2006).

[52] *EC Seeks Negotiated Solution on FSC But Warns of Retaliation*, Inside U.S. Trade, Feb. 24, 2006, at 1; *U.S. Urges EU Not to Reimpose Sanctions After Losing WTO FSC Appeal*, Inside U.S. Trade, Feb. 17, 2006, at 1; *WTO Appeals Body Finds U.S. Not Complying in FSC/ETI Ruling; EU to Reimpose Sanctions*, 23 Int'l Trade Rep. (BNA) 226 (2006).

establishments meet certain size limitations or equipment requirements.[53] Challenged by the EC in 1999, this so-called "small business" exemption was found to be an improper rights limitation in violation of Article 13 of the Agreement on Trade-Related Intellectual Property Rights (TRIPS).

In the absence of U.S. legislative action by the end of the initial compliance period (July 27, 2001), complainant EC agreed to extend the period to the end of 2001, and to consider U.S. compensation for the EC music industry based on an amount of trade injury determined by arbitration under Article 25 of the DSU, a free-standing arbitration provision. A November 9, 2001 arbitral award determined that some $1.1 million in EC trade benefits are affected annually.

Notwithstanding the arbitration, the EC on January 7, 2002, requested authorization to impose countermeasures on the ground that the United States had not fully complied by the extended deadline, proposing to suspend concessions under the TRIPS Agreement by "levying a special fee from US nationals in connection with border measures concerning copyright goods." While the United States asked for arbitration of the proposal, the United States and the EC on February 26, 2002, asked that the arbitration be suspended, with the understanding that it could be reactivated by either party after March 1, 2002.

In April 2003, Congress appropriated $3.3 million for a "one-time only, lump-sum payment" to the EC to cover a three-year period of nullification and impairment of benefits in the dispute (P.L. 108-11).[54] The parties notified the WTO in late June 2003 that the payment, which will be made into a fund for EC performers, constitutes a temporary settlement of the dispute.[55] They also agreed that the EC may request that the suspended arbitration be resumed any time after December 20, 2004, or if the United States fails to pay within 45 days after being notified that the fund has been established.

Recent developments. Shortly before the three-year U.S.-EC agreement expired, the EC complained to the DSB that the United States had taken only minimal steps to secure the passage of legislation that would bring the United States

---

[53] For further discussion of this provision, *see* CRS Report RS21107, *Copyright Law's "Small Business Exception": Public Performance Exemptions for Certain Establishments*, by Todd B. Tatelman.

[54] *See* H.Rept. 108-76 at 33, 92. As does the House report on the enacted appropriation, the House report on the House-passed FY2004 appropriation for the USTR (H.R. 2799) points out that approval of the payment was intended as a "one-time only" funding measure and further states that "[t]here is a long-established practice of using suspension of tariff concessions to resolve trade disputes and the Committee does not intend to appropriate funds to settle these matters." H.Rept. 108-221 at 65. In addition, the Committee "cautions U.S. negotiators that there should be no commitments made within trade agreements to use funds from the U.S. Treasury that have neither been requested nor appropriated to resolve trade disputes." *Id.*

[55] Notification of a Mutually Satisfactory Temporary Arrangement, *United States — Section 110(5) of the US Copyright Act*, WT/DS160/23 (June 26, 2003).

into full compliance in the case.[56] The continued existence of the provision was also mentioned in the European Union's December 2004 report on US. trade barriers, which stated "the US is under an obligation to amend its legislation in the light of the WTO ruling" and that "the US has still not taken any definitive action in order to comply with the DSB recommendation to bring the Copyright Act into conformity with WTO rules."[57] Earlier in 2005, the EC was reportedly seeking continued compensation in the case, an action that would require an appropriation by Congress.[58] The EC regularly raises the issue of U.S. noncompliance at DSB meetings held in 2005, noting that it has reserved its right to reactivate the arbitration on its retaliation request at any time,[59] while the United States continues to report to the DSB that it is working with Congress on the matter.[60]

Section 211 of the Omnibus Appropriations Act of 1998 (Trademark Exclusion Involving Property Confiscated by Cuba) (DS176). This case involves a statute (P.L. 105-277, 112 Stat. 2681-88), which prohibits the registration or enforcement in the United States, without the consent of the original owner or successors, of a trademark that is the same or substantially the same as one used in connection with a business or assets confiscated by the Cuban government. Challenged by the EC in 1999, the law was ultimately found to violate national treatment and most-favored-nation obligations in the TRIPS Agreement in that it limited the prohibition on registration and enforcement of rights to rights asserted by Cuba and Cuban nationals or their successors-in-interest. Panel and Appellate Body reports in the case were adopted January 2, 2002.[61]

Recent developments. The original compliance period, as agreed upon by the United States and the EC, expired December 31, 2002; it was extended four

[56] Dispute Settlement Body, *Minutes of Meeting*, Nov. 24 and 26, 2004, at 7, WT/DSB/M/178 (Jan. 17, 2005).

[57] European Commission, *Report on United States Barriers to Trade and Investment 2004* at 67, 88 (Dec. 2004), at [http://europa.eu.int/comm/trade/issues/bilateral/countries/usa/pr231204_en.htm]. *See also* European Commission, Directorate-General for Trade, *General Overview of Active WTO Dispute Settlement Cases Involving the EC as Complainant or Defendant, 15 April 2005,* at 16, at [http://trade-info.cec.eu.int/doclib/docs/2005/April/tradoc_118122.pdf].

[58] *EU Seeks Continued Copyright Payment from U.S. in Irish Music Case*, Inside U.S. Trade, Feb. 25, 2005, at 6.

[59] E.g., WTO News, Dispute Settlement Body, Nov. 28, 2005, at [http://www.wto.org/english/news_e/news05_e/dsb_28nov05_e.htm]; Dispute Settlement Body, *Minutes of Meeting*, Aug. 31, 2005, at 7, WT/DSB/M/196 (Sept. 30, 2005) [hereinafter *DSB Minutes* (Aug. 31, 2005)].

[60] E.g., Status Report by the United States, Addendum, *United States — Section 110(5) of the US Copyright Act*, WT/DS160/24/Add.13 (Jan. 10, 2006).

[61] For more detailed information on the legal issues involved in this case, *see* CRS Report RS21764, *Restricting Trademark Rights of Cubans: WTO Decision and Congressional Response*, by Margaret Mikyung Lee.

times, also by agreement, most recently to June 30, 2005.[62] The United States did not comply by this date. Instead of agreeing to an extension of the deadline or, alternatively, requesting authorization to retaliate, the EC has entered into an agreement with the United States regarding rights and procedures involving any future EC retaliation request.[63] The EC has agreed not to request authorization to suspend concessions for the time being, but if it chooses to do so later, it has pledged to notify and consult with the United States before making such a request to the DSB. For its part, the United States has agreed not to block any retaliation request by the EC on the ground that the request is outside the 30-day window provided for in Article 22.6 of the DSU; the United States also retains the right to object to a proposed retaliation request and to refer the matter to arbitration.

Two 109th Congress bills would amend § 211 to make it applicable to all persons claiming rights in trademarks confiscated by Cuba, whatever their nationality (S. 691 [Domenici]; H.R. 1689 [Feeney]).[64] Two other 109th Congress bills would repeal the provision (H.R. 3372 [Flake] and S. 1604 [Craig]). S. 328 (Craig) and H.R. 719 (Moran) would repeal § 211 along with enacting various Cuba-related trade facilitation provisions. A pending amendment to S. 600, foreign relations authorization legislation for FY2006 and FY2007, would do the same (S.Amdt. 281 [Baucus]). Other 109th Congress legislation would repeal § 211 along with removing the current trade embargo on Cuba (H.R. 208 [Serrano]; H.R. 579 [Paul]). To date, no action has been taken on any of the legislation.

As the EC and Cuba continue to raise the issue of U.S. noncompliance at recent DSB meetings,[65] the United States has been regularly reporting to the DSB that legislative proposals related to § 211 have been introduced in the House and Senate

---

[62] Modification of the Agreement under Article 21.3(b) of the DSU, *United States — Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/15 (Dec. 21, 2004).

[63] Understanding between the European Communities and the United States, *United States — Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/16 (July 1, 2005).

[64] *See* 151 Cong. Rec. S3153 (daily ed. April 4, 2005)(remarks of Mr Domenici). Two 108th Congress bills, H.R. 4225 (Smith) and S. 2373 (Domenici), would also have amended the statute to extend its prohibition on judicial recognition of trademark rights to rights asserted by nationals of all countries. Neither was acted upon.

A number of bills that would have repealed § 211 were introduced in the 108th Congress, but no action was taken on any of these proposals. Three bills would have repealed § 211 in connection with the removal of the U.S. trade embargo with Cuba: H.R. 188 (Serrano); S. 403 (Baucus); and H.R. 1698 (Paul). A fourth bill, H.R. 2494 (Rangel), the United States-Trademark Protection Act of 2003, introduced June 13, 2003, would have repealed § 211 and made other changes in U.S. law relating to trademarks involving Cuba. An identical Senate bill, S. 2002 (Baucus/Craig), was introduced December 9, 2003.

The Senate Judiciary Committee held a hearing on Section 211 issues on July 13, 2004. *See* "An Examination of Section 211 of the Omnibus Appropriations Act of 1998," at [http://judiciary.senate.gov], for witness lists, testimony and Members statements.

[65] E.g., WTO News, Dispute Settlement Body, Nov. 28, 2005, at [http://www.wto.org/english/news_e/news05_e/dsb_28nov05_e.htm]. *Note also DSB Minutes* (Aug. 31, 2005), *supra* note 59, at 2-4. Cuba has also criticized the U.S.-EC Understanding, alleging, among other things, a lack of transparency. *Id.* at 3-4.

and that it is working with the Congress "with respect to appropriate statutory measures that would resolve this matter."[66]

Antidumping Measures on Hot-Rolled Steel Products from Japan (DS184). This case involves a challenge to preliminary and final agency determinations issued in 1998 and 1999 in an antidumping investigation of hot-rolled steel products from Japan. The panel, as upheld by the Appellate Body, found that the United States was in violation of the WTO Antidumping Agreement because (1) U.S. law, specifically § 735(c)(5)(A) of the Tariff Act of 1930, requires the Commerce Department to include dumping margins based in part on "facts available," including those contained in petitions, in calculating the antidumping duty rate for companies not investigated individually in a case (all-others rate); (2) the Commerce Department improperly applied facts available in calculating dumping margins for specific producers; and (3) the Department had improperly excluded from the calculation of the normal value of the products under investigation certain home market sales to parties affiliated with the exporter involved.[67] The Appellate Body also ruled against the United States with respect to the ITC's injury determination, reversing panel findings that the ITC had properly applied a captive production provision and that the agency had found a causal link between the dumped imports and material injury to the industry involved. With regard to Japan's causation claim, however, the AB found that there was an insufficient factual record to allow completion of the required analysis.[68]

The arbitrated compliance period in the case expired November 23, 2002. While Japan had threatened trade retaliation earlier in November because it found it unlikely that the United States would comply with each element of the ruling by this deadline, the deadline was extended until December 31, 2003, or the end of the 108th Congress, 1st Session (whichever was earlier), to comply fully with the panel and appellate reports in the case.[69]

---

[66] E.g., Status Report by the United Status, Addendum, *United States — Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/11/Add.38 (Jan. 10, 2006).

[67] Panel Report, *United States — Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R (Feb. 28, 2001)[hereinafter Hot-Rolled Steel Panel Report]; Appellate Body Report, *United States — Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (July 24, 2001)[hereinafter Hot-Rolled Steel Appellate Body Report].

[68] Hot-Rolled Steel Appellate Body Report, *supra* note 67, at ¶ 235-236.

[69] After consultations with Japan, the United States requested that deadline be extended to the dates noted; the DSB approved the extension on December 5, 2002. *See* Status Report by the United States, Addendum, *United States — Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/15/Add.3 (Dec. 9, 2002).

The United States and Japan had reportedly been in disagreement regarding implementation of the ruling as it relates to the ITC's application of the statutory captive production provision. *See Japan Threatens Retaliation Against U.S. For Hot-Rolled Steel Antidumping Duties*, 19 Int'l Trade Rep. (BNA) 1965 (2002); *U.S. Response Leaves WTO Ruling on Hot-Rolled Injury Claims Untouched*, Inside U.S. Trade, Nov. 15, 2002, at 3; *U.S. Gets Extra Year to Comply with WTO Hot-rolled Steel Decision*, Inside U.S. Trade, Dec. 6,

(continued...)

Administrative compliance. In partial implementation of the WTO rulings, the Commerce Department modified the test that it uses to determine which transactions are made by an exporter or producer to an affiliate at arm's length and are therefore "in the ordinary course of trade" [70] The panel, as upheld by the Appellate Body, found that the test that the United States had applied in the dumping investigation at issue violated Article 2.1 of the Antidumping Agreement, which provides that a product "is to be considered dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."[71] Sales that are outside the "ordinary course of trade" are thus to be excluded by national authorities when calculating normal value.

Under past practice, the Department considered sales of a product to an affiliate to be at arm's length if the prices charged were on average at least 99.5 percent of the prices charged to unaffiliated comparison market customers. The Department's new test provides that for affiliate sales to be considered, the sales prices "must fall, on average, within a defined range, or band, around sales prices of the same or comparable merchandise sold by that exporter or producer to all unaffiliated customer's. The band applied for this purpose will provide that the overall ratio calculated for an affiliate be between 98 percent and 102 percent, inclusive, of prices to unaffiliated customers ...."[72]

According to the Department, the regulatory revision "is consistent with the view, expressed by the WTO Appellate Body, that rules aimed at preventing the distortion of normal value through sales between affiliates should reflect, 'even-handedly,' that 'both high and low-price sales between affiliates might not be 'in the ordinary course of trade.'"[73] The Department stated that the new methodology would be used to implement the WTO findings regarding the Japan hot-rolled steel AD proceeding, and applied in all investigations and reviews initiated on or after November 23, 2002.[74]

---

[69] (...continued)
2002, at 13. No action has been taken by the ITC in response to the WTO decision.

[70] Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade, 67 Fed. Reg. 69186 (Nov. 15, 2002)[hereinafter Modification of Antidumping Methodology]. *See also* Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade, 67 Fed. Reg. 53339 (Aug. 15, 2002)(request for public comment).

[71] Hot-Rolled Steel Panel Report, *supra* note 67, at ¶¶ 7.91-7.120, Hot-Rolled Steel Appellate Body Report, *supra* note 67, ¶¶ 131-173.

[72] Modification of Antidumping Methodology, *supra* note 70, 67 Fed. Reg. at 69186. The Department noted that its modification was the same as that proposed in August 2002, "with the exception of comparing prices of 'similar' products where an identical comparison product was not sold to unaffiliated parties ...." *Id.* at 69187.

[73] *Id.*

[74] *Id.*

On December 3, 2002, the Department announced a new dumping determination in the AD proceeding at issue, stating that in implementation of the WTO rulings and recommendations, it had recalculated dumping margins for three affected Japanese producers using the new methodology; addressed issues related to the use of adverse facts available; and recalculated the all-others rate based on the new rates for the respondent companies.[75] The recalculations resulted in reduced dumping margins for the three companies as well for all other exporters.

Legislative compliance. As noted earlier, the dispute panel, as upheld by the Appellate Body, concluded that the United States was in violation of its WTO obligations because of its use of dumping margins based in part on facts available in determining the all-others rate in antidumping proceedings. Article 9.4 of the WTO Antidumping Agreement provides, in pertinent part, that the all-others rate may not exceed the weighted average margin established with respect to individually investigated producers or exporters, excluding any zero and de minimis margin and "margins established under the circumstances referred to in" Article 6.8 of the Agreement, that is, "made on the basis of facts available."[76] Section 735(c)(5)(A) of the Tariff Act of 1930, 19 U.S.C. § 1673d(c)(5)(A) states that, for purposes of preliminary and final dumping determinations, the estimated dumping rate for producers not investigated individually "shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined *entirely* under section 776."[77] Section 776 of the Tariff Act governs the use of facts available by the DOC and ITC in making dumping, subsidy, and injury determinations.[78] The WTO panel, as affirmed on appeal,

---

[75] Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan, 67 Fed. Reg. 71936 (Dec. 3, 2002).

[76] Article 6.8 provides, in full text, as follows:

> In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of facts available. The provisions of Annex II shall be observed in the application of this paragraph.

Annex II, titled "Best Information Available in Terms of Paragraph 8 or Article 6," provides guidelines for the collection and use of information by investigating authorities in antidumping proceedings.

[77] (Emphasis added).

[78] The Tariff Act generally directs the Commerce Department and the International Trade Commission to use "the facts otherwise available" in reaching their subsidy, dumping, and injury determinations if: (1) necessary information is not available on the record or (2) an interested party or any other person withholds requested information, fails to provide such information by the deadline or in the form and manner requested, significantly impedes an antidumping or countervailing duty proceeding, or provides information that cannot be verified. Tariff Act of 1930, § 776(a), 19 U.S.C. § 1677e(a). Before using "facts available," however, the agencies must enable a person submitting information in response to an agency

(continued...)

concluded that § 735(c)(5)(A) is inconsistent with Article 9.4 because it requires DOC to consider dumping margins based *in part* on facts available in determining the all-others rate, while the cited WTO article was found to require the exclusion of dumping margins based either *in whole or in part* on such facts.[79]

Recent developments. Absent legislative compliance by the United States, the December 2003 deadline referred to earlier was extended twice, most recently to July 31, 2005.[80] The deadline lapsed without U.S. action; in an understanding between the disputing parties reached earlier in the month, Japan stated that it would not request authorization to retaliate at the time but might choose to do so in the future.[81]

H.R. 2473 (Shaw), which would amend § 735(c)(5) of the Tariff Act of 1930 to remove the word "entirely" each time it is used, was introduced May 19, 2005. The bill has since been listed for possible inclusion in 109th Congress miscellaneous tariff legislation proposed in the House.[82] Action has not been taken on the former, and the latter has not yet been introduced.

While having pledged to comply with the WTO decision, the United States has also submitted a proposal to the Doha Round Negotiating Group on Rules that the WTO Antidumping Agreement be clarified to allow the practice that was invalidated in the case.[83]

---

[78] (...continued)
request to remedy or explain any deficiencies in the original response. Tariff Act of 1930, § 782(d), 19 U.S.C. § 1677m(d). The agencies are allowed to use adverse inferences in selecting from fact available where an interested party "has failed to cooperate by not acting to the best of its ability" to comply with an agency information request." Tariff Act of 1930, § 776(b), 19 U.S.C. § 1677e(b). As noted by the U.S. Court of International Trade, the ability of an agency to use "facts available" in an investigation acts as "an inducement for respondents to provide complete and accurate information in a timely manner." Maui Pineapple Company v. United States, 264 F.Supp. 2d 1244, 1257 (Ct. Int'l Trade 2003).

[79] (Emphasis added). *See* Hot-Rolled Steel Panel Report, *supra* note 67, at ¶¶ 7.83-7.90, 8.1(b); Hot-Rolled Steel Appellate Body Report, *supra* note 67, ¶¶ 111-130.

[80] *See* Dispute Settlement Body, *Minutes of Meeting*, Aug. 31, 2004, at 6-7, WT/DSB/M/175 (Sept 24, 2004).

[81] Understanding between Japan and the United States, *United States — Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/19 (July 28, 2005). The United States has agreed not to block any retaliation request on the ground that the 30-day period for requesting authorization to suspend concessions in Article 22.6 has expired, but has reserved the right to have any retaliation request referred to arbitration.

[82] Comments submitted to the Trade Subcommittee of the House Ways and Means Committee on the possible inclusion of this legislation in a future bill are available at [http://waysandmeans.house.gov/hearings.asp?formmode=comment&hearing=440&comm=5].

[83] *U.S. Seeks to Reverse WTO Ruling on 'Facts Available' Dumping Rates*, 21 Int'l Trade Rep. (BNA) 1540 (2004); Negotiating Group on Rules, *All-Others Rate (Article 9.4 ADA); Communication from the United States*, TN/RL/GEN/16 (Sept. 15, 2004), as corrected
(continued...)

Continued Dumping and Subsidy Offset Act (DS 217/DS234). The Continued Dumping and Subsidy Offset Act (CDSOA), 19 U.S.C. § 1675c, also known as the Byrd Amendment, requires the annual disbursement of antidumping and countervailing duties to petitioners and interested parties in the underlying trade remedy proceedings.[84] The EC and ten other WTO members challenged the October 2000 statute shortly after enactment as violative of the WTO Antidumping Agreement, the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement), and other WTO obligations. The complainants based their argument in part on the prohibitions in Article 18.1 of the Antidumping Agreement and Article 32.1 of the SCM Agreement against Members' taking any "specific action against" dumping and subsidization, respectively, except for action taken in accordance with the GATT 1994 as interpreted by the respective Agreement.[85]

The WTO panel found that the CDSOA did create an impermissible "specific action against" dumping and subsidization and that it provided a financial incentive for domestic producers to file or support antidumping and countervailing duty petitions, thereby undermining the industry support requirements in the Antidumping and SCM Agreements. At the same time, the panel rejected complainants' argument that the act would make it more difficult for the United States to enter into subsidy and price undertakings with foreign governments allowing the suspension of investigations ("suspension agreements"), along with Mexico's claim that the act

---

[83] (...continued)
[hereinafter *U.S. Communication*]. *See also* Negotiating Group on Rules, *Identification of Certain Major Issues Under the Anti-Dumping and Subsidies Agreements; Submission by the United States*, TN/RL/W/72, at 2-3 (March 19, 2003).

In presenting its proposal to WTO negotiating partners, the United States has explained that it interpreted Article 9.4 of the Antidumping Agreement as providing that only margins based entirely on facts available are to be excluded from calculating the all-others rate ceiling because "the United States believed that this was a reasonable interpretation of the statute and because, in the United States' experience, some level of facts available is often necessary to determine a company's dumping margin." *U.S. Communication*, *supra*, at 1. In the U.S. view, whether the "facts available" data used with respect to a firm are small or substantial, "the resulting margin represents the best estimate of the level of dumping by that particular company" and it is thus "appropriate to use such a margin when establishing a duty rate for unexamined firms based on the dumping found to exist for firms actually examined." *Id.* It continued: "We therefore interpreted the Agreement as distinguishing those situations from situations in which a firm's data are so flawed or unreliable that it is necessary to base its antidumping duty entirely on facts available." *Id.*

[84] For more detailed examination of the statute and additional discussion of the WTO proceeding, *see* CRS Report RL33045, T*he Continued Dumping and Subsidy Offset Act ("Byrd Amendment")*, by Jeanne J. Grimmett and Vivian C. Jones. *See also* U.S. Government Accountability Office, *International Trade: Issues and Effects of Implementing the Continued Dumping and Subsidy Offset Act* (Sept. 2005)(GAO-05-979).

[85] Article 18.1 of the Antidumping Agreement had been successfully used by EC and Japan in their WTO challenges of the U.S. Antidumping Act of 1916, 15 U.S.C. § 72, which provided a private right of action and criminal penalties against dumping. *See* Appellate Body Report, *United States — Anti-Dumping Act of 1916*, ¶¶ 103-138, WT/DS136/AB/R, WT/DS162/AB/R (Aug. 28, 2000)(*adopted* Sept. 26, 2000). The 1916 Act statute was prospectively repealed in late 2004. P.L. 108-429, § 2006.

itself constituted a subsidy.[86] The Appellate Body upheld the panel's finding that the statute created a "specific action against" dumping and subsidization not allowed under WTO agreements, but reversed the panel on its conclusion regarding industry support requirements.[87] Further, whereas the panel had recommended that the provision be repealed, the Appellate Body recommended only that the United States "bring the CDSOA into conformity with its obligations" under WTO agreements.[88]

The Appellate Body concluded that an impermissible "specific action against" dumping and subsidization existed because the statute fulfilled two basic elements of the term. First, the CDSOA constituted "specific" action because offset payments were found to be "inextricably linked to, and strongly correlated with a determination of dumping ... or a determination of a subsidy" or, as alternatively characterized by the AB, the payments "can be made only following a determination that the constituent elements of dumping or subsidization are present."[89] Second, the AB stated that a measure would be considered to be an action "against" dumping or subsidization if it "has the effect of dissuading the practice of dumping or the practice of subsidization, or creates an incentive to terminate such practices."[90] The AB found that, given its "design and structure," the CDSOA "effects a transfer of financial resources from the producers/exporters to their domestic competitors" and as a result the requisite incentives are created.[91] Because the CDSOA did not take the form of the responses to dumping or subsidization permitted under WTO agreements, the AB concluded that the statute fell within the scope of the prohibitions in above-cited agreement articles.[92]

The reports were adopted January 27, 2003, and the compliance period was subsequently determined by arbitration to expire December 27, 2003. The arbitrator emphasized in his award, published June 13, 2003, that it is for the United States to

---

[86] Panel Report, *United States — Continued Dumping and Subsidy Offset Act*, WT/DS217/R, WT/DS234/R (Sept. 16, 2002)[hereinafter CDSOA Panel Report].

[87] Appellate Body Report, *United States — Continued Dumping and Subsidy Offset Act*, ¶¶ 224-299, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003)[hereinafter CDSOA Appellate Body Report].

[88] *Id.* ¶ 319; CDSOA Panel Report, *supra* note 86, at VIII.

[89] CDSOA Appellate Body Report, *supra* note 87, at ¶ 242.

[90] *Id.* ¶ 254.

[91] *Id.* ¶¶ 256.

[92] *Id.* ¶¶ 264-274. The AB stated that three responses to dumping were allowed under Article VI of the GATT and the Antidumping Agreement: definitive antidumping duties; provisional measures (i.e. a provisional duty or security imposed in the event of a preliminary affirmative dumping determination); and price undertakings (suspension agreements). *Id.* ¶ 264. The AB found that four responses to a countervailable subsidy were permitted under GATT Article VI and the SCM Agreement: definitive countervailing duties; provisional measures; price undertakings; and multilaterally-sanctioned countermeasures under the WTO dispute settlement system. *Id.* ¶ 269.

decide on the manner of implementation, which may be through repeal or modification of the law.[93]

Because the United States did not comply by the December 2003 deadline, eight complaining Members — Brazil, Chile, EC, India, Japan, Korea, Canada, and Mexico — asked the WTO in January 2004 for authorization to impose retaliatory measures.[94] The United States has objected to the requests, sending them to arbitration.[95] The remaining three complainants — Australia, Indonesia, and Thailand — agreed to give the United States until December 27, 2004, to comply.[96] Under WTO rules, the level of suspension of concessions authorized by the DSB must be equivalent to the level of the nullification or impairment of WTO benefits caused by the infringing measure.

Each of the eight Members seeking to retaliate proposed the imposition of additional tariffs on U.S. goods in an amount to be determined each year that is equal to: (1) the amount of offset payments attributable to antidumping and countervailing duties collected on the Member's products and (2) except for Chile, a proportionate amount of the balance of offset payments less those attributed to the products of the other Members authorized to retaliate.[97] The United States contested the requests on the ground that the proposed retaliation is not based on actual harm to the complainants' exports and has noted as particularly troublesome the use of the amount of duties imposed on goods from countries that are not party to the WTO proceeding as a basis for determining the amount of permissible retaliation.[98]

---

[93] Award of the Arbitrator, *United States — Continued Dumping and Subsidy Offset Act of 2000*; ¶ 50, WT/DS217/14, WTDS234/22 (June 13, 2003).

[94] *See* WTO documents WT/DS217/20 (Brazil); WT/DS217/21(Chile); WT/DS217/22 (EC); WT/DS217/23 (India); WT/DS217/24 (Japan); WT/DS217/25 (Korea); WT/DS234/25 (Canada); WT/DS234/26 (Mexico).

[95] *See* Dispute Settlement Body, *Minutes of Meeting*, Jan. 26, 2004, WT/DSB/M/164 (Mar. 12, 2004)[hereinafter *DSB Minutes* (Jan. 26, 2004)].

[96] *See* WTO documents WT/DS217/17 (Thailand); WT/DS217/18 (Australia); and WT/DS217/19 (Indonesia).

[97] Regarding the measures the complainants intended to take, Brazil, Chile, the EC, India, Japan, and Korea each stated that retaliation would take the form of additional import duties on a final list of U.S. products (*see* WTO documents WT/DS217/20 through WT/DS217/25). Canada stated that it intended either to place additional import duties on U.S. products or to suspend the application of specified obligations under the WTO Antidumping Agreement and the WTO SCM Agreement "to determine that the effect of dumping or subsidization of products from the United States is to cause or threaten material injury to an established domestic injury [*sic*], or is to retard materially the establishment of a domestic industry," or to do both (WT/DS234/25). Mexico requested authorization to "to suspend the application to the United States of obligations in the trade in goods sector" (WT/DS234/26).

[98] Statement of the United States Representative to the WTO Dispute Settlement Body, January 26, 2004, at [http://www.us-mission.ch/press2004/0216DSB.html]; *DSB Minutes* (Jan. 26, 2004), *supra* note 95, at 6.

In awards issued August 31, 2004, the WTO Arbitrator (a panel of three) determined that each of the eight Members could impose countermeasures on an annual basis in an amount equal to 72% of the CDSOA disbursements for the most recent year for which official U.S. data are available relating to antidumping and countervailing duties paid on imports from the Member at that time.[99] The Arbitrator stated that the disbursements "operate, in economic terms, as subsidies that may generate import substitution production"[100] and used an economic model to determine the level of nullification or impairment of benefits, or what the arbitrator characterized as "a value of trade" affected by application of the CDSOA.[101] The arbitrator also made clear that each Member would need to ensure that the total value of U.S. trade subject to the proposed duty increase does not exceed the total value of trade determined to constitute the level of nullification or impairment or else propose other forms of suspending concessions to the DSB that are less likely to have trade effects exceeding this level in terms of value of U.S. exports to the country involved.

U.S. executive and legislative response. The Administration proposed repeal of the CDSOA in its FY2004 and FY2005 budgets (allowing, however, for current disbursements), stating in the latter that payments under the act "provide a significant additional benefit to producers that already gain protection from the increased import prices provided by the [compensatory] tariffs."[102] Some consuming industries have also argued in favor of eliminating CDSOA payments to domestic firms.

At the same time, considerable congressional opposition has been expressed to repeal, evidenced in part in a letter, signed by 70 Senators and sent to the President shortly after the WTO reports were adopted, in which the Senators urged negotiations with U.S. trading partners aimed at recognizing a right to disburse antidumping and countervailing duties in the manner prescribed by the statute "prior to any attempt to change our laws."[103] Moreover, the USTR and the Department of Commerce were

---

[99] E.g., Decision by the Arbitrator, Recourse to Arbitration by the United States under Article 22.6 of the DSU; *United States — Continued Dumping and Subsidy Offset Act of 2000 (Original Complaint by the European Communities)*, at ¶¶ 5.1-5.2, WT/DS217/ARB/EEC (Aug. 31, 2004).

[100] *Id.* at ¶ 3.41.

[101] *Id.* at ¶¶ 3.72, 3.80-3.151, 4.7.

[102] Office of Management and Budget, *Budget of the United States, Fiscal Year 2005 — Appendix* at 13, 847 (2004), at [http://www.whitehouse.gov/omb/][hereinafter cited as *FY2005 Budget Appendix*]. The Administration had also urged the House to adopt its repeal proposal in the Statement of Administration Policy on H.R. 2989, as reported, the Departments of Transportation and Treasury appropriation for FY2004, arguing in the latter that repeal "could provide savings to the taxpayer of over $300 million per year" and further that the statute "provides an unwarranted subsidy to entities that already benefit from higher import prices due to the duties." The President's FY2005 Budget additionally proposes deleting language providing for negotiations regarding the distribution of antidumping and countervailing duties from the FY2005 appropriation for the USTR. *FY2005 Budget Appendix, supra*.

[103] *Two-Thirds of Senate Defends Byrd Law, Casting Doubt on Repeal*, Inside U.S. Trade, (continued...)

expressly directed to initiate such talks in the WTO in the Consolidated Appropriations Act, 2004, P.L. 108-199, signed January 23, 2004.[104] In April 2004, the USTR submitted a proposal to this effect to the Doha Development Round Negotiating Group on Rules, which is negotiating on antidumping and countervailing duty issues.[105] The Commerce Department and USTR were again directed to continue WTO negotiations regarding the CDSOA in their appropriations act for FY2005, P.L. 108-447.[106]

Recent developments. Seven of the complainants — the European Union, India, Japan, Korea, Brazil, Canada, and Mexico — received formal authorization from the DSB to impose retaliatory measures in late November 2004; Chile was authorized to retaliate in December 2004. In contrast, Thailand, Indonesia, and Australia entered into agreements with the United States in January 2004 under which they would not seek authorization to suspend concessions at that time, but retained the right to pursue retaliation in the future.[107]

The EC and Canada began to impose countermeasures in the form of higher tariffs and surcharges on selected U.S. products, respectively, as of May 1, 2005.[108] Mexico began to impose $20.9 million in retaliatory tariffs effective August 18, 2005.[109] The official Mexican Government notice states that the tariff decree will remain in effect for 12 months and that it will no longer apply when the Ministry of the Economy places a notice in the *Diario Oficial* that the United States has complied

---

[103] (...continued)
Feb. 7, 2003, at 7 (text of letter appended to article).

[104] P.L. 108-199, Division B, Title II, 118 Stat. 64-65 (USTR), 118 Stat. 65 (Department of Commerce). The Senate Appropriations Committee report on S. 1585, the bill in which the directive originated, states that the Committee is aware of the WTO Appellate Body ruling on the CDSOA and instructs the USTR and the Department of Commerce, in consultation with each other, to initiate negotiations immediately and to report regularly to the Committee on their progress. S.Rept. 108-144, at 69-70, 72. The conference agreement adopted the Senate report language by reference. H.Rept. 108-401 at 573, 575.

[105] Negotiating Group on Rules, *Three Issues Identified for Discussion by the Negotiating Group on Rules; Communication from the United States*, at 2, TN/RL/W/153 (Apr. 26, 2004).

[106] *See* H.Rep. 108-792, at 65, 67-68, 780, 782. *See also* S.Rept. 108-344 at 70, 73.

[107] *See* WTO documents: WT/DS217/17 (Thailand); WT/DS217/18 (Australia); WT/DS217/19 (Indonesia).

[108] Communication from the European Communities, *United States — Continued Dumping and Subsidy Offset Act*, WT/DS217/47 (May 4, 2005); *Canada Implements Retaliatory Surtax on U.S. Goods Due to Byrd Amendment*, 22 Int'l Trade Rep. (BNA) 796 (2005).

[109] "Decreto por el que se modifica temporalmente el artículo 1 del Decreto por el que se establece la Tasa Aplicable durante 2003, del Impuesto General de Importación, para las mercancías originarias de América del Norte, publicado el 31 de diciembre de 2002, por lo que respecta a las mercancías originarias de América del Norte, publicado el 31 de diciembre de 2002, por lo que respecta a las mercancías originarias de EE.UU.," *Diario Oficial*, 17 de agosto de 2005, *as printed in* [http://www.insidetrade.com][hereinafter Decreto]; "*Mexico Announces $20.9 Million in Byrd Retaliation Against U.S. Exports*, Inside U.S. Trade, Aug. 19, 2005, at 1.

with the WTO decision, at which time tariffs will return to their original rates.[110] In addition, Japan imposed additional tariffs of 15% on 15 categories of U.S. goods as of September 1, 2005.[111] Australia, Indonesia, and Thailand are postponing any further action against U.S. goods, though they have reserved the right to do in the future under agreements reached with the United States.[112]

A provision repealing the CDSOA, but providing for the distribution of "duties on entries of goods made and filed before October 1, 2007," is contained in P.L. 109-171, the Deficit Reduction Act of 2005, signed by the President on February 8, 2006 (P.L. 109-171).[113] While the United States has informed the WTO that it has taken

---

[110] Decreto, *supra* note 109, "Transitorios."

[111] Communication from Japan, *United States — Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/48 (Aug. 19, 2005); Japan, Ministry of Economy, Trade and Industry, "US Byrd Amendment: Japan Decides to Start Retaliation," Press Release, August 1, 2005, at [http://www.meti.go.jp/english/information/data/WTOByrd050801e.html][hereinafter METI Press Release]; *Japan OKs Countervailing Duties on 15 U.S. Products Because of Byrd Amendment*, 22 Int'l Trade Rep. (BNA) 13424 (2005). According to Japan, the level of retaliation will not exceed $52 million, which, it stated, is the amount authorized by the WTO based on the amount of CDSOA disbursements involving Japanese goods in fiscal 2004. METI Press Release, *supra.*

[112] *See* WTO documents WT/DS217/44 (Australia), WT/DS217/45 (Thailand), and WT/DS217/46 (Indonesia).

[113] The repeal, contained in § 7601(a) of the Act, is to be effective "upon the date of enactment." Section 7701 of S. 1932 provides that Title VII of the bill, which contains the repeal provision, "shall take effect as if enacted on October 1, 2005." The provision for future distributions, set forth at § 7601(b) of the legislation, states as follows:

> All duties on entries of goods made and filed before October 1, 2007, that would, but for subsection (a) of this section, be distributed under section 754 of the Tariff Act of 1930, shall be distributed as if section 754 of the Tariff Act of 1930 had not been repealed by subsection (a).

There is no discussion of § 7601 in the "Joint Explanatory Statement of the Committee of Conference," as it relates to Title VII of the bill. *See* 151 Cong Rec. H12735-H12736 (daily ed. Dec. 18, 2005).

The repeal, with no provision for future distributions, first appeared in § 8701 of H.R. 4241, the House budget reconciliation bill, as reported. In addition, repeal legislation had been introduced as free-standing legislation earlier in the 109th Congress (H.R. 1121 (Ramstad/Shaw), and the bill was later suggested for inclusion in proposed House miscellaneous tariff legislation. Comments submitted to the Trade Subcommittee of the House Ways and Means Committee on the possible inclusion of this legislation in a future bill are available at [http://waysandmeans.house.gov/hearings.asp?formmode=comment &hearing=440&comm=5]. The Administration had proposed repeal of the statute in its FY2006 budget. Office of Management and Budget, *Budget of the United States, Fiscal Year 2006*, under Department of the Treasury, at [http://www.whitehouse.gov/ omb/budget/fy2006/ treasury.html].

Two bills that would have repealed the measure were introduced in the 108th Congress, though no action was taken on either. H.R. 3933 (Ramstad/Crane), introduced March 10, 2004, would have repealed the CDSOA and transferred all amounts remaining in CDSOA special accounts on the date of enactment to the general fund of the Treasury. S. 1299

(continued...)

the actions necessary to implement the WTO rulings,[114] and complaining countries have expressed support for the repeal, the complainants have also stated their concerns that the transitional provision will allow the continued distribution of duties through 2007 and possibly afterward.[115] The Members imposing sanctions have reportedly indicated that they are likely to continue to do so as long as distributions are made.[116]

At the same time, the Commerce Department and USTR have been directed to conduct negotiations in the WTO "to recognize the right of members to distribute monies collected from antidumping and countervailing duties" in P.L. 109-108, the Science, State, Justice, Commerce and Related Agencies Appropriations Act, 2006, marking the third time the agencies have been so directed.[117] As noted earlier, the USTR submitted a proposal to this effect to the Doha Round Negotiating Group on Rules in 2004.

---

[113] (...continued)
(Snowe), introduced June 19, 2003, would have repealed the CDSOA and directed the Secretary of Commerce to provide financial and technical assistance to communities determined to be "negatively impacted by trade." The bill would have funded the readjustment assistance authorized under the measure through a Trust Fund in the U.S. Treasury consisting of (1) transfers of any funds in current CDSOA Special Accounts and (2) transfers out of the general fund of the Treasury of amounts that the Treasury Secretary determines are equivalent to the amounts received into the general fund after the effective date of the measure that are attributable to duties imposed under AD and CVD orders and AD findings.

[114] Statements by the United States at the February 17 Meeting of the WTO Dispute Settlement Body, Item 1, *in* U.S. Mission to the United Nations in Geneva, Press Release, Feb. 17, 2006, at [http://www.us-mission.ch/Press2006/0217DSB.html][hereinafter U.S. Statements (Feb. 17, 2006)].

[115] *Trading Partners Reject U.S. Claims of WTO Compliance in Byrd Act Dispute*, 23 Int'l Trade Rep. (BNA) 260 (2006); *EU, Canada Expected to Keep Sanctions in Place Despite Byrd Repeal*, Inside U.S. Trade, Feb. 17, 2006, at 3; European Union, *US Congress Repeals the Byrd Amendment; Allows for Transition Period*, News Release, No. 09/06 (Feb. 1, 2006), at [http://www.eurunion.org/News/press/2006/2006009.htm]l; WTO News, Dispute Settlement Body, Jan. 20, 2006, at [http://www.wto.org/english/news_e/news06_e/dsb_20jan06_e.htm].

[116] *Trading Partners Reject U.S. Claims of WTO Compliance in Byrd Act Dispute*, 23 Int'l Trade Rep. (BNA) 260 (2006); *EU, Canada Expected to Keep Sanctions in Place Despite Byrd Repeal*, Inside U.S. Trade, Feb. 17, 2006, at 3.

[117] The President's signing statement on the legislation appears to indicate that the Executive Branch will treat the provision (inasmuch as it affects the Commerce Department) as "advisory" on the ground that it interferes with the President's foreign affairs authority. The statement provides in pertinent part:

> The executive branch shall construe as advisory the provisions of the Act that purport to direct or burden the Executive's conduct of foreign relations, including the authority to ... negotiate international agreements on behalf of the United States .... These provisions include ... language under the headings [Department of Commerce] "International Trade Administration, Operations and Administration" ....

A First Amendment challenge to the CDSOA is currently pending in the U.S. Court of International Trade, [118] along with a suit brought by Canada and Canadian industry groups against the United States claiming that the CDSOA violates the NAFTA Implementation Act.[119]

Subsidies on Upland Cotton (DS267). In September 2002, Brazil requested consultations with the United States regarding U.S. statutes and programs that it claimed provided prohibited and actionable subsidies to U.S. producers, users, and exporters of upland cotton. Brazil alleged violations of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement), the Agreement on Agriculture, and national treatment obligations in the GATT,[120] adding in its subsequent panel request in February 2003 a claim based on subsidy obligations in GATT Article XVI.[121]

WTO Members have made commitments in the Agreement on Agriculture to reduce both agricultural export subsidies and domestic support programs in favor of agricultural producers. Article 9.1 of the Agreement lists the types of export subsidies that are subject to reduction commitments. A WTO Member's export and domestic support commitments are outlined in the Member's Schedule attached to the SCM Agreement.[122] With certain exceptions, a Member may not provide export subsidies enumerated in Article 9.1 regarding agricultural products or groups of

---

[118] The plaintiff is arguing that the statute infringes its free speech rights by conditioning eligibility for CDSOA funds on support of the relevant antidumping or countervailing duty investigation, thus placing an unconstitutional condition on the receipt of a government benefit. PS Chez Sidney, L.L.C. v. U.S. International Trade Commission, No. 02-00635 (Ct. Int'l Trade). A claim that the CDSOA turned statutory antidumping provisions into a penal law, thereby granting the plaintiff a Fifth Amendment right to a neutral judicial hearing before antidumping duties could be imposed, was rejected by the U.S. Court of Appeals for the Federal Circuit in March 2003. Huaiyin Foreign Trade Corp. v. United States, 322 F.3d 1369 (Fed. Cir 2003), *aff'g* 201 F.Supp.2d 1351 (Ct. Int'l Trade 2002).

[119] Plaintiffs are claiming that the CDSOA violates § 408 of NAFTA Implementation Act, P.L. 103-182, 19 U.S.C. § 3438, which provides that, after the NAFTA enters into force for the United States, an amendment that is made to Title VII of the Tariff Act of 1930 may apply to goods from a NAFTA country only to the extent specified in the amendment. Title VII contains U.S. antidumping and CVD laws as well as the CDSOA. *See, e.g.*, Complaint, Government of Canada v. United States, No. 05-00327 (Ct. Int'l Trade filed, April 29, 2005).

Section 408 of the statute implements Article 1902 of the NAFTA, which sets out obligations regarding amendments to domestic antidumping and CVD laws as they affect NAFTA Parties and, among other things, requires that the amendment, as applicable to the NAFTA party, not be inconsistent with the GATT, the WTO Antidumping Agreement or the WTO Agreement on Subsidies and Countervailing Measures.

[120] Request for Consultations by Brazil, *United States — Subsidies on Upland Cotton*, WT/DS267/1 (Oct. 3, 2002).

[121] Request for the Establishment of a Panel by Brazil, *United States — Subsidies on Upland Cotton*, WT/DS267/7 (Feb. 7, 2003).

[122] Agreement on Agriculture, Art. 3.1, at [http://www.wto.org/english/docs_e/legal_e/legal_e.htm].

products specified in the Member's Schedule ("scheduled products") in excess of the budgetary outlay and quantity commitments specified in the Schedule.[123] Moreover, a Member may not provide Article 9.1 export subsidies with respect to *any* agricultural product that is *not* specified in the Schedule ("unscheduled products").[124] In addition, Article 10.1 of the Agreement provides, in pertinent part, that export subsidies that are not listed in Article 9.1 "shall not be applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments...." Finally, subject to certain Agreement provisions, a Member may not provide support in favor of domestic producers in excess of the commitments levels specified in its Schedule.[125]

Agricultural subsidies may be challenged under the SCM Agreement, which prohibits export subsidies and subsidies contingent on the use of domestic over imported products ("import substitution" subsidies) (Art. 3) and makes any subsidy "actionable" if it is alleged to cause certain types of trade injury to the Member's interests, including what the Agreement deems "serious prejudice" (Art. 5).[126] The United States argued in the case that certain of its agricultural programs were covered by the now-expired Article 13 of the WTO Agreement on Agriculture — the so-called Peace Clause — which provides that certain domestic support measures and export subsidies that conformed fully with specified Agreement requirements were "exempt from actions" under specified subsidy-related provisions in the GATT and the SCM Agreement through the end of 2003.

In a panel report issued September 8, 2004, the panel found that the United States was maintaining prohibited export and import substitution subsidies as well as actionable subsidies that caused serious prejudice to the interests of Brazil.[123] First, the panel found that three U.S. export credit guarantee programs — as they applied to exports of upland cotton and other unscheduled agricultural commodities supported under the programs, and to exports of rice (a scheduled commodity) — are export subsidies applied in a manner that illegally circumvents U.S. export subsidy commitments in the Agriculture Agreement.[124] The three programs are the Commodity Credit Corporation (CCC) Export Credit Guarantee Program (GSM 102), providing export credit guarantees for up to 3 years; the CCC Intermediate Export Credit Guarantee Program (GSM 103), providing export credit guarantees for up to 10 years; and the Supplier Credit Guarantee Program (SCGP). As these

---

[123] Agreement on Agriculture, Art. 3.3.

[124] *Id.*

[125] Agreement on Agriculture, Art. 3.2.

[126] Agreement on Subsidies and Countervailing Measures (SCM Agreement), at [http://www.wto.org/english/docs_e/legal_e/ legal_e.htm].

[123] Panel Report, *United States — Subsidies on Upland Cotton*, WT/DS267/R (Sept. 8, 2004)[hereinafter Cotton Panel Report]. For further information on the agricultural programs at issue and the bases for the panel and Appellate Body findings, *see* CRS Report RL32571, *Background on the U.S.-Brazil WTO Cotton Subsidy Dispute*, by Randy Schnepf. *See also* Eliza Patterson, *The WTO Decision on U.S. Cotton Subsidies*, ASIL Insight (Mar. 2005), at [http://www.asil.org/insights/2005/ 03/insights050323.html].

[124] Cotton Panel Report, *supra* note 123, at ¶¶ 7.787-7.948, 8.1(d)(i).

programs did not conform fully to export subsidy obligations in the SCM Agreement, they were found not to be covered by the Peace Clause and thus subject to challenge.[125] The panel went on to find that these programs are prohibited export subsidies under Article 3.1(a) of the SCM Agreement.[126]

Second, the panel found that § 1207(a) of the Farm Security and Rural Investment Act of 2002, 7 U.S.C. § 7937(a), or the so-called Step 2 program, to the extent that it provides for payments to *exporters* for their purchase of higher priced upland cotton, constitutes an export subsidy for that product that was not scheduled by the United States, and therefore inconsistent with U.S. obligations under the Agreement on Agriculture.[127] As such, this part of the Step 2 program was also found not to be covered by the Peace Clause, to be subject to challenge, and, as further found by the panel, to constitute a prohibited export subsidy under the Article 3.1(a) of the SCM Agreement.[128] Similarly, the panel also determined that § 1207(a), insofar as it provides for payments to domestic *users* of upland cotton, constitutes an import substitution subsidy prohibited under Article 3.1(b) of the SCM Agreement.[129]

Third, the panel found that various U.S. domestic support programs, including counter-cyclical payments, market loss assistance payments, market loan program payments, and Step 2 payments for U.S. cotton producers, granted support to a "specific commodity in excess of that decided during the1992 marketing year" and thus were not covered by a provision of the Peace Clause that could be invoked only if such support was not being provided.[130] The panel then found that the four above-cited programs — characterized as mandatory price-contingent subsidies — caused serious prejudice to Brazil's interests for purposes of Article 5(c) of the SCM Agreement, in the form of significant price suppression in the world upland cotton market.[131] Among other things, the panel also found that an agricultural program could be challenged in the WTO even though it had expired so long as the program was in force during the nine-year Agreement implementation period beginning in 1995 and continued to have an adverse effect on the complaining Member,[132] a finding that allowed Brazil to challenge flexibility contract payments (FCP) and market loss assistance payments, the legislative basis of which had expired in 2002. Brazil was unable, however, to show serious prejudice from the FCP program.

The panel recommended that the prohibited subsidies be removed "without delay" and specified that this be done at the latest within six months of the date of

---

[125] *Id.* ¶¶ 7.943-7.944, 8.1(d)(i).

[126] *Id.* ¶¶ 7.946-7.948, 8.1(d)(i).

[127] *Id.* ¶¶ 7.692-7.749, 8.1(e)(i).

[128] *Id.* ¶¶ 7.751-7.761, 8.1(e)(ii)-(iii).

[129] *Id.* ¶¶ 7.1030-7.1098, 8.1(f).

[130] *Id.* ¶ ¶ 7.415-7.608, 8.1(c).

[131] *Id.* ¶¶ 7.1109-7.1416, 8.1(g)(i).

[132] *Id* . ¶¶ 7.528-7.530.

adoption of the panel report or July 1, 2005, whichever was earlier.[133] The panel cited Article 4.7 of the SCM Agreement, which requires that where an export subsidy is found, the panel recommend expeditious removal and specify a time period for such action. The panel also recommended that the adverse effects of the actionable subsidies, or alternatively, the subsidies themselves, be removed, as provided in Article 7.8 of the SCM Agreement.[134] The United States appealed, and the Appellate Body, in a March 5, 2005, report, largely upheld the panel.[135] The reports were adopted at the DSB meeting of March 21, 2005.[136]

Along with the deadline for removal of the prohibited subsidies, the finding of serious prejudice implicated a deadline for actionable subsidies provided for in Article 7.9 of the SCM Agreement. This provision accords a prevailing Member the right to request authorization to retaliate with regard to an actionable subsidy in the event the defending Member "has not taken appropriate steps to remove the adverse effects of the subsidy or withdraw the subsidy within six months" after the date the panel or Appellate Body report is adopted, or, in this case September 21, 2005, provided there is no agreement between the disputing parties on compensation.[137]

The United States told the Dispute Settlement Body on April 20, 2005, that it would implement the WTO rulings, but that it would need a reasonable period to comply and that it had begun to consider its options for doing so.[138] Brazil complained that the U.S. statement was not sufficiently detailed and made reference to the panel's recommended compliance date.[139] The EC noted that because the subsidies at issue were found to infringe both the SCM Agreement and the Agreement on Agriculture, the United States was entitled to a reasonable period to comply with the latter.[140]

---

[133] *Id.* ¶ 8.3(b)-(c). Article 4.7 of the SCM Agreement provides that, in the event a panel finds that a prohibited subsidy exists, the panel "shall recommend that the subsidizing Member withdraw its measure without delay" and "shall specify in its recommendation the time-period within which the measure must be withdrawn."

[134] *Id.* ¶ 8.3(d).

[135] Appellate Body Report, *United States — Subsidies on Upland Cotton*, WT/DS267/AB/R (March 3, 2005).

[136] Dispute Settlement Body, *Minutes of Meeting*, Mar. 21, 2005, at 7-13, WT/DSB/M/186 (Apr. 14, 2005).

[137] Article 7.9 further provides that the DSB "shall grant authorization to the complaining Member to take countermeasures, commensurate with the degree and nature of the adverse affects determined to exist," subject to the reverse consensus rule. Article 7.10 of the SCM Agreement provides that if arbitration is requested, the arbitrator is to determine "whether the countermeasures are commensurate with the degree and nature of the adverse effects determined to exist."

[138] Dispute Settlement Body, *Minutes of Meeting*, Apr. 20, 2005, at 7, WT/DSB/M/188 (May 18, 2005)[hereinafter *DSB Minutes* (Apr. 20, 2005)].

[139] *Id.* at 8.

[140] *Id.*

Recent Developments. In response to the WTO finding that fees charged by the Commodity Credit Corporation (CCC) guarantee programs be risk-based, the United States Department of Agriculture (USDA) announced that as of July 1, 2005, CCC would use a risk-based fee structure for both the GSM-102 and SCGP program, and that CCC would no longer accept applications for payment guarantees under the GSM-103 program.[141] In addition, USDA announced that to further comply with the WTO decision, it was sending proposed statutory changes to Congress to eliminate the Step 2 cotton program, to remove a 1% cap on fees that can be charged under the export credit programs, and to terminate the GSM-103 program.[142] According to USDA, repealing the Step 2 program "would remove both the export subsidies and import substitution subsidies that the WTO cited and address issues related to suppression of cotton prices in world markets."[143]

Because prohibited export subsidies had not been removed by July 1, 2005, Brazil requested that the DSB meet on July 15 to consider its request for authorization to impose countermeasures against the United States. Brazil proposed to suspend tariff concessions as well as obligations under the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPS) and the General Agreement on Trade in Services (GATS) until the United States withdrew the exports subsidies identified by the WTO, in an amount corresponding to (1) the Step 2 payments made in the most recent concluded marketing year and (2) the total of exporter applications received under the GSM-102, GSM-103 and SGCP programs, for all unscheduled commodities and for rice, for the most recent concluded fiscal year.[144] Brazil estimated the annual total for both to be $3 billion.[145]

On July 5, 2005, Brazil and the United States notified the DSB that they had entered into a procedural agreement which, along with specifying steps that could or could not be taken by the disputing parties in the implementation phase of the dispute, recognized the changes to the CCC programs announced June 30, 2005, and the legislative proposal that had been sent to Congress to repeal the Step 2 program.[146] Pursuant to the agreement, the United States requested arbitration of

---

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] Recourse to Article 4.10 of the SCM Agreement and Article 22.2 of the DSU by Brazil, *United States — Subsidies on Upland Cotton*, WT/DS267/21 (July 5, 2005).

[145] Brazil stated that this amount represented "Step 2 payments estimated for marketing year 2004-2005 and total amount of applications received for export credit guarantees under GSM 102, GSM 103, and SGCP during fiscal year 2004." *Id.* at 2, note 1.

[146] Understanding between Brazil and the United States Regarding Procedures under Articles 21 and 22 of the DSU and Article 4 of the SCM Agreement, *United States — Subsidies on Upland Cotton*, WT/DS267/22 (July 8, 2005). It was agreed, among other things, that Brazil would make its retaliation request at the July 15 DSB meeting; the United States would object to the retaliation request (thus sending it to arbitration); the two would request shortly thereafter that the arbitration be suspended; Brazil would be entitled to request an Article 21.5 compliance panel, which either party could appeal; were the United States found to be (continued...)

Brazil's retaliation proposal; the DSB referred the matter to arbitration at the July 15 meeting of the DSB;[147] and the two countries, on August 17, 2005, requested that the arbitration be suspended.[148] While the agreement also provides that Brazil may request an Article 21.5 compliance panel at any time after the July 15 meeting, Brazil to date has not done so.

Further, because the United States had not complied with its WTO obligations regarding the actionable subsidies by September 21, 2005, Brazil on October 6 proposed to suspend tariff concessions as well as obligations under the Agreement on TRIPS and the GATS in the annual amount of $1.037 billion until the United States withdrew the four domestic subsidies enumerated above or removed their adverse effects.[149] The United States objected to the proposal on October 17,[150] and the matter was referred to arbitration at the DSB meeting held the following day.[151] On November 21, 2005, the parties requested that the arbitration be suspended, "noting that the United States reaffirmed" at the November 18 DSB meeting "its commitment to implement the recommendations and rulings of the DSB in this disputes, and in light of the preference for WTO-consistent solutions mutually acceptable to the parties to a dispute set out in DSU Article 3.7."[152] The parties also agreed that if either desired to resume the arbitration, that party would inform the other 30 days before making such a request.

As part of the congressional budget reconciliation process, the Senate Agriculture Committee, on October 19, 2005, approved legislation repealing the Step

---

[146] (...continued)
out of compliance, Brazil could request that the arbitration of its retaliation request be resumed; if the United States were found to be in compliance, Brazil would withdraw its retaliation request; and a mutually agreed solution, if reached, would be notified to the DSB, whereupon Brazil would withdraws its retaliation request, an action that would terminate the arbitration.

[147] Dispute Settlement Body, *Minutes of Meeting*, July 15, 2005, WT/DSB/M/193 (July 28, 2005).

[148] *See* Communication from the Arbitrator, Recourse by the United States to Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, *United States — Subsidies on Upland Cotton*, WT/DS267/25 (Aug. 18, 2005). Regarding possible future action by Brazil, *see With U.S. Inaction on Parts of WTO Ruling Brazil May Restart Cotton Subsidy Dispute*, Daily Rep. for Executives (BNA) No. 13, at A-1 (Jan. 20, 2006); *Brazil Threatens to Renew WTO Arbitration Proceeding on Cotton*, Inside U.S. Trade, Jan. 20, 2006, at 1.

[149] Recourse to Article 7.9 of the SCM Agreement and Article 22.2 of the DSU by Brazil, *United States — Subsidies on Upland Cotton*, WT/DS267/26 (Oct. 7, 2005).

[150] Request by the United States for Arbitration under Article 22.6 of the DSU and Article 7.10 of the SCM Agreement, *United States — Subsidies on Upland Cotton*, WT/DS267/27 (Oct. 18, 2005).

[151] *See* Note by the Secretariat, Constitution of the Arbitrator, Recourse by the United States to Article 22.6 of the DSU and Article 7.10 of the SCM Agreement, *United States — Subsidies on Upland Cotton*, WT/DS267/29 (Dec. 7, 2005).

[152] *See* Communication from the Arbitrator, Recourse by the United States to Article 22.6 of the DSU and Article 7.10 of the SCM Agreement, *United States — Subsidies on Upland Cotton*, WT/DS267/29 (Dec. 7, 2005).

2 program, effective August 1, 2006; a repeal provision was also approved by the House Agriculture Committee on October 28, 2005.[153] A repeal provision with the same effective date is contained in § 1103 of P.L. 109-171, the Deficit Reduction Act of 2005, signed by the President on February 8, 2006. While Brazil has continued to question whether the United States has fully complied in the case, it has reportedly not yet decided whether to take further compliance action in the WTO.[154]

Measures Affecting Cross-Border Supply of Gambling and Betting Services (DS 285). In a March 21, 2003, complaint, Antigua and Barbuda (Antigua) requested consultations with the United States regarding federal, state, and local laws affecting the remote supply of gambling and betting services, alleging that the overall effect of these laws was to prevent the supply of gambling and betting services from the territory of one WTO Member into the United States in violation of U.S. market access commitments in Article XVI of the General Agreement on Trade in Services (GATS).[155] Article XVI(a) of the GATS prohibits a WTO Member, in sectors where it undertakes market access commitments, from maintaining or adopting, unless specified in its Schedule, "limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test." Article XVI(c) prohibits a Member, in any such sectors, from maintaining or adopting, unless specified in its Schedule, "limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test."

While the United States did not expressly identify gambling and betting services in its Schedule of Specific Commitments to the GATS, the WTO panel, in its November 2004 report, interpreted the services sub-sector titled "Other Recreational Services (except sporting)" as including gambling and betting services, and concluded that the United States, by not placing any limitations on the supply of such services from the territory of one WTO Member into the United States, had made market access commitments in the area.[156] The panel then found that three federal

---

[153] *See Senate Agriculture Narrowly Approves $3 Billion in Cuts to Agriculture Spending*, Daily Rep. for Executives (BNA) No. 202, at A-23 (Oct. 20, 2005); *House Agriculture Committee Approves $3.7 Billion in Cuts for Reconciliation Plan*, Daily Rep. for Executives (BNA) No. 209, at A-12 (Oct. 31, 2005).

[154] *Brazilians Continue to Have 'Doubts' on U.S. Compliance in WTO Cotton Case*, Daily Rep. for Executives (BNA), Feb. 27, 2006, at A-11; *Brazil Still Considering Next Actions on WTO Cotton Fight*, Feb. 17, 2006, at 8; Press Release, Brazilian Ministry of External Relations, Brasilia, Feb. 2, 2006, as distributed by Brazilian Embassy, Washington, DC.

[155] Request for Consultations by Antigua and Barbuda, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/1 (Mar. 27, 2003).

[156] Panel Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004)[hereinafter Gambling Panel Report].

Each Party to the General Agreement on Trade in Services (GATS) submits a Schedule of Specific Commitments to the Agreement, in which it inscribes the service sectors for which it is making commitments and lists any terms, limitations, and conditions on the supply of services in these sectors for each of four modes of service supply : (1) from the

(continued...)

statutes and provisions of four state laws conflicted with these obligations. The federal statutes were the Wire Act, the Travel Act, and the Illegal Gambling Business Act (IGBA);[157] the state laws were those of Louisiana, Massachusetts, South Dakota, and Utah. The panel found that by preventing one, several, or all means of delivering gambling and betting services, the statutes constituted impermissible limitations on the number of service suppliers for purposes of Article XVI:2(a) of the GATS or, alternatively, on the total number of total number or service operations or total quantity of service output for purposes of Article XVI:2(c).

The panel further found that, with regard to the federal laws, the United States could not successfully invoke exceptions in GATS Article XIV for "measures necessary to protect public morals or to maintain public order" (Article XIV(a)) or for "measures necessary to secure compliance with" GATS-consistent laws and regulations (Article XIV(c)) because the United States had not shown that the measures were "necessary" to achieve the stated end or that they were consistent with the Article XIV proviso, which requires that measures justified under the exception not be applied "in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail." Under WTO jurisprudence, discrimination may occur not only between the different exporting Members but also between an exporting Member and the importing Member and thus in this case between foreign and domestic providers of Internet gambling services.[158]

On appeal, the WTO Appellate Body, using a different mode of analysis than the panel, nonetheless determined that the United States had made sectoral commitments regarding gambling and betting services.[159] Though the AB upheld the

---

[156] (...continued)
territory of one Member into the territory of any other Member; (2) in the territory of one Member to the service consumer of any other Member; (3) by a service supplier of one Member, through commercial presence in the territory of any other Member; and (4) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member. *See* General Agreement on Trade in Services (GATS), Arts. I, XX, at [http://www.wto.org/english/docs_e/legal_e/ legal_e.htm]. The first mode of supply is at issue in this dispute. GATS obligations regarding market access (Article XVI) and national treatment (Article XVII) are applicable only with respect to scheduled commitments, subject to the terms, limitations and conditions outlined in the Member's Schedule. Other GATS obligations apply to all services-related measures maintained by a Member.

[157] The Wire Act, P.L. 87-216, § 2, as amended, 18 U.S.C. § 1084, prohibits the transmission of wagering information. The Travel Act, P.L. 87-228, § 1(a), as amended, 18 U.S.C. § 1952, prohibits interstate and foreign travel or transportation in aid of certain unlawful activities, including business enterprises involving gambling in violation of U.S. or state law. The Interstate Gambling Business Act, P.L. 91-452, § 803(a), as amended, 18 U.S.C. § 1955, prohibits illegal gambling businesses, as defined in the statute.

[158] *See* Gambling Panel Report, *supra* note 156, at ¶ 6.578.

[159] Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 158-213,373(B),WT/DS285/AB/R (Apr. 7, 2005) [hereinafter Gambling AB Report].

panel's finding of a violation of GATS market access obligations,[160] it reversed the panel on its finding that the United States could not justify the federal measures under GATS exceptions.[161] The AB also reversed the panel's finding that four state laws were inconsistent with the GATS, finding that because Antigua had not made a prima facie case that eight state measures violated the Agreement, the panel had improperly examined their GATS-consistency.[162]

With respect to the GATS exceptions, the AB found that the panel had erroneously concluded that the three federal statutes could not be considered "necessary" for purposes of Articles XIV(a) and XIV(c) because the United States had not entered into consultations with Antigua to find a less trade-restrictive alternative. The AB ultimately found that statutes were "necessary to protect public morals or to protect public order" for purposes of Article XVI(a) and that they thus fell within the scope of this exception.[163] At the same time, the AB also found that, in light of a provision in the Interstate Horseracing Act (IHA) that might facially continue to allow the remote supply of wagering on horseracing by domestic firms, the United States had not shown that the Wire Act, the Travel Act, and the IGBA were being applied consistently with the Article XVI proviso, that is, that they may possibly be used to prosecute foreign, but not domestic, providers of remote horserace gambling services.[164]

Antigua had based its argument that the United States was applying the three statutes inconsistently with the Article XIV proviso on two aspects of the IHA, a statute allowing the acceptance of interstate off-track wagers provided certain conditions are met, making violators civilly liable for damages to named entities, including the state in which the subject horserace takes place, and authorizing certain civil suits against violators.[165] First, Antigua cited § 5 of the act, which it characterized as expressly allowing an interstate off-track wager to be accepted by an off-track betting system, where consent is obtained from certain organizations.[166]

---

[160] *Id.* ¶¶ 214-265, 373(C)(i)-(ii). *Inter alia*, the AB stated that "limitations amounting to a zero quota are quantitative limitations and fall within the scope of Article XVI:2(a)" and that prohibitions on service supply "amount to a 'zero quota' on service operations or output with respect to such services ... [and a]s such fall within the scope of Article XVI:2(c)." *Id.* ¶pp 238, 251.

[161] *Id.* ¶¶ 300-327, 335-336, 373(D)(iii)(b),(iv)(a).

[162] *Id.* ¶¶ 133-155, 373(A)(iii),(C)(iii).

[163] Because it had found that the U.S. statutes were "necessary" for purposes of XVI(a), the AB did not address whether the statutes fulfilled the "necessity" test of Article XIV(c). *Id.* ¶¶ 337, 373(D)(iv)(b).

[164] *Id.* ¶¶ 338-372, 373(v),(vi).

[165] Interstate Horseracing Act of 1978 (IHA), P.L. 95-515, 15 U.S.C §§ 3001-3006. *See* Gambling AB Report, s*upra* note 159, at ¶ 361.

[166] Section 4 of the IHA, 15 U.S.C. § 3003, prohibits a person from accepting an "interstate off-track wager" except as provided in the act. Section 5(a) of the IHA , 15 U.S.C. § 3004(a), states that "[a]n interstate off-track wager may be accepted by an off-track betting system only if consent is obtained from — (1) the host racing association ...; (2) the host

(continued...)

Second, it cited the statutory definition of "interstate off-state wager," which, in pertinent part, includes pari-mutuel wagers "placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State," provided the wagers are lawful in the States involved.[167] In the words of the AB, Antigua thus argued that:

> the IHA, on its face, authorizes *domestic* service suppliers, but not *foreign* service suppliers, to offer remote betting services in relation to certain horse races. To this extent, in Antigua's view, the IGHA "exempts" domestic service suppliers from the prohibitions of the Wire Act, the Travel Act, and the IGBA.[168]

As further described by the AB, "[t]he Panel found that the evidence provided by the United States was not sufficiently persuasive to conclude that, as regards wagering on horseracing, the remote supply of such services by *domestic* firms continues to be prohibited notwithstanding the plain language of the IHA."[169] The AB concluded that the panel did not err in making this finding.

The appellate report and the panel report, as modified by the AB, were adopted April 20, 2005.[170] The United States reported at the May 19, 2005, meeting of the DSB that it intended to implement the rulings and had begun to consider options for doing so, but that it would need a reasonable period to comply.[171]

Recent developments. After the disputing parties had failed to agree on a reasonable period of time for compliance, Antigua requested that the compliance period be arbitrated.[172] In an award made public August 19, 2005, the Arbitrator determined that the compliance period would last 11 months and 2 weeks from the date of adoption of the panel and AB reports, thus expiring April 3, 2006.[173]

In its submission to the Arbitrator, the United States stated that compliance would be achieved "by further clarifying the relationship between the IHA and preexisting federal criminal laws" and that clarification would be sought "through

---

[166] (...continued)
racing commission; (3) the off-track racing commission."

[167] IHA, § 3(3), 15 U.S.C § 3002(3).

[168] Gambling AB Report, *supra* note 159, ¶ 361 (footnotes omitted)(emphasis in original).

[169] *Id.* ¶ 364(emphasis in original).

[170] *DSB Minutes* (Apr. 20, 2005), *supra* note 138, at 15.

[171] Dispute Settlement Body, *Minutes of Meeting*, May 19, 2005, at 9, WT/DSB/M/189 (June 17, 2005)[hereinafter *DSB Minutes* (May 19, 2005)].

[172] Request from Antigua and Barbuda for Arbitration under Article 21.3(c) of the DSU, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/11(June 9, 2005).

[173] Award of the Arbitrator, Arbitration under Article 21.3 of the Understanding on Rules and Procedures Governing the Settlement of Dispute, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/13 (Aug. 19, 2005)

legislation."[174] In seeking a 15-month compliance period, the United States stressed that such legislative action would be "technically complex":

> ... It requires consideration of the relationship between the IHA and three different federal criminal statutes — the Wire Act, the Travel Act, and the Illegal Gambling Business statute The Appellate Body has made no finding as to whether the activity that is prohibited by these statutes is permitted under the IHA. Instead the Appellate Body has emphasized the need to "demonstrate[] that — in the light of the existence of the Interstate Horseracing Act — the Wire Act, the Travel Act, and the Illegal Gambling Business Act are applied consistently with the requirements of the [Article XIV] chapeau." Accordingly a reasonable legislative option would have the effect of clarifying that relevant U.S. federal laws entail no discrimination between foreign and domestic service suppliers in the application of measures prohibiting remote supply of gambling and betting services.
>
> ... There will be ample room for reasonable and principled disagreements among legislators as to precisely how to achieve such a clarification in the context of Internet gambling. ...
>
> ... A legislative clarification will be further complicated by the fact that , starting in the 105th Congress (1997-98), and continuing in each subsequent Congress through the 108th Congress (2003-04), U.S. federal lawmakers have considered a wide range of proposals to address Internet gambling. Members of Congress are actively considering introduction of Internet gambling bills in the current 109th Congress (2005-06), and will undoubtedly find it necessary to consider the need for compliance with the DSB's recommendations and rulings in the context of this continuing debate, and the variety of broader proposals already supported by different groups of legislators. The issue of how to achieve compliance with the DSB's recommendations and rulings is thus further complicated by its potential to affect, and be affected by, elements of an already complex legislative debate that has gone unresolved over the past four Congresses.[175]

Antigua has written to the USTR, claiming that two bills introduced in the current Congress — H.R. 4777 (Goodlatte), which would, inter alia, amend the Wire Act to prohibit internet gambling and the use of credit and other forms of payment for unlawful wire gambling, and H.R. 4411 (Leach), which would prohibit the use of certain types of payment instruments for unlawful internet gambling — are "in key respects contrary to" the WTO decision. Antigua is reportedly considering the imposition of countermeasures against the United States if it does not comply by the April 3 deadline.[176]

---

[174] Submission of the United States, Arbitration under Article 21.3 of the DSU, United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285, July 12, 2005, at 5, at [http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file504_5581.pdf].

[175] *Id.* at 5-7.

[176] *Antigua Preparing to Impose WTO Sanctions Against U.S. in Internet Gambling Dispute*, 23 Int'l Trade Rep. (BNA) 281 (2006); Letter of Feb. 16, 2006, from Dr. John W. Ashe, Ambassador/Permanent Representative to the WTO to Mr. Rob Portman, USTR, *available*

(continued...)

Pending Cases Involving Administrative Action

Countervailing Measures Concerning Certain Products from the European Communities (DS212). The European Communities (EC) in a November 2000 complaint alleged violations of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) stemming from methodologies used by the Department of Commerce in 12 countervailing duty (CVD) proceedings to determine whether a countervailable subsidy existed subsequent to the privatization of a firm. In its panel request, the EC claimed that the United States had imposed duties without first establishing that a benefit was received by the producers under investigation, all of which were privatized steel companies.[177] Under Article 1.1 of the SCM Agreement, a subsidy is "deemed to exist" if there is a "financial contribution" by a government or public entity and "a benefit is thereby conferred."

The EC argued that the Department had applied a methodology in 11 CVD cases after the methodology was successfully challenged in an earlier WTO proceeding; that it had applied a revised methodology in a twelfth case that replicates the violative aspects of the prior approach; and that § 771(5)(F) of the Tariff Act of 1930, setting forth a statutory rule for considering change in ownership, impermissibly allows the Department to impose countervailing duties without initially determining

[176] (...continued)
at [http://www.insidetrade.com]; *Goodlatte Bill Would Outlaw Credit Card Use for Internet Gambling, Target Illegal Activity*, Daily Rep. for Executives (BNA), Feb. 17. 2006, at A-35.

[177] Request for the Establishment of a Panel by the European Communities, *United States — Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/4 (Aug.10, 2001).

the existence of a countervailable subsidy.[178] Section 771(5)(F), codified at 19 U.S.C. § 1677(5)(F), states as follows:

> A change in ownership of all or part of a foreign enterprise or the productive assets of a foreign enterprise does not by itself require a determination by the administering authority that a past countervailable subsidy received by the enterprise no longer continues to be countervailable, even if the change in ownership is accomplished through an arm's length transaction.

---

[178] The U.S. privatization methodology first faulted by the WTO was at issue in the EC's successful challenge of countervailing duties imposed on lead and carbon steel products produced and exported by a British firm. *United States — Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138. The British firm had originally been created as a joint venture between the state-owned British Steel Corporation (BSC) and a private company, and was eventually fully owned by a British Steel PLC, the privatized BSC; both parties in the WTO dispute had agreed that the privatization, which had taken place through a sale of shares, "was 'at arm's length, for fair market value and consistent with commercial considerations.'" Panel Report, *United States — Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, ¶ 2.3, WT/DS/138/R (Dec. 23, 1999)[hereinafter UK Steel Panel Report].

Under the challenged methodology, the Commerce Department treated nonrecurring subsidies provided to the seller as "potentially allocable to the production transferred to the purchaser in a privatization or other change-in-ownership transaction." First Written Submission of the United States, *United States — Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, ¶ 46, WT/DS138 (May 18, 1999), *as printed in* UK Steel Panel Report, *supra*, at 162-205. The methodology was based on the principle that the benefit of a subsidy exists at the time the subsidy is bestowed, and thus the determination that a benefit exists, once made, was not to be reconsidered; instead, the Department of Commerce would take into account a change in ownership by reallocating the subsidy benefit. *Id.* ¶¶ 9-10. The unamortized subsidies could, however, be repaid. *Id.* ¶¶ 47-48.

The WTO panel, as upheld by the AB, found that the United States had not shown that a benefit was conferred on the privatized company as required by the SCM Agreement. Panel and Appellate Body reports in the case were adopted in June 2000. When the United States presented its implementation plan to the DSB in July 2000, it announced that it was considering a change in CVD regulations governing its change-in-ownership methodology in response to both the adverse WTO reports in the case and recent U.S. legal developments. Because the challenged duty order had been revoked, however, the United States considered that it had complied with the DSB rulings and recommendations in the proceeding. Dispute Settlement Body, *Minutes of Meeting*, July 5, 2000, at 9, WT/DSB/M/85 (Sept. 25, 2000), as corrected; *see also "U.S. Tells WTO Commerce CVD Rules Under Review After British Steel Decision*, 17 Int'l Trade Rep. (BNA) 1090 (2000).

The referenced domestic legal development was the February 2000 federal court decision in *Delverde, SrL* v. United States), 202 F.3d 1360 (Fed. Cir. 2000), *reh'g denied* (2002), a case involving a CVD investigation in which the Commerce Department had analyzed a private-to-private sale of a company using its "spin-off" methodology for corporate restructurings. The U.S. Court of Appeals for the Federal Circuit held that "the Tariff Act as amended does not allow Commerce to presume conclusively that the subsidies granted to the former owner of Delverde's corporate assets automatically 'passed through' to Delverde following the sale," but instead "requires that Commerce make such a determination by examining the particular facts and circumstances of the sale and determining whether the new owner received a financial contribution and benefit from the government." *Id.* at 1364.

The panel report, circulated to the WTO Members July 31, 2002, concluded that the United States had violated the SCM Agreement in imposing and maintaining countervailing duties in the 12 challenged proceedings without determining whether a benefit continues to exist.[179] The panel not only found that the U.S. privatization methodologies were inconsistent with the SCM Agreement, but also concluded that the Agreement required a *per se* rule under which a sale concluded at fair market value or an arm's-length transaction always extinguishes earlier subsidies.[180] The panel further found that while the plain wording of § 771(5)(F) did not mandate a violation of the Agreement, the statute, in light of its legislative history, object and purposes, and judicial interpretation, prohibited the Commerce Department from adopting a general rule applicable in all cases and was thus inconsistent with the Agreement.[181]

Following a U.S. appeal, the Appellate Body (AB), in a report released December 9, 2002, upheld the panel's determination that the CVD orders were improperly based, but reversed the finding that the SCM Agreement required the privatization rule articulated by the panel and the panel's conclusion that § 771(5)(F) was inconsistent with the Agreement.[182] The AB stated that it agreed with both the United States and the EC that § 771(5)(F) does not dictate any particular

---

[179] Panel Report, *United States — Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/R (July 31, 2002)(hereinafter Countervailing Measures on Certain EC Products Panel Report). The methodologies were used by the Department of Commerce in original subsidy determinations, administrative reviews, and sunset (i.e. five-year) reviews, depending on the CVD order in question. The panel, as upheld by the Appellate Body, concluded that the requirement that a benefit be found applies at each of these stages of a CVD investigation. Countervailing Duties on Certain EC Products Panel Report, *supra*, ¶¶ 7.98, 7.113-7.114.

[180] *Id* . ¶¶ 7.60-7.89.

[181] *Id.* ¶¶ 7.129-7.158

[182] Appellate Body Report, *United States — Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R (December 9, 2002). The AB found, however, that WTO Members must maintain a presumption against the existence of a continued benefit where an arm's length, fair market value privatization has occurred, characterizing the obligation under the SCM Agreement as follows:

> ... privatization at arm's length and for fair market value ... *presumptively* extinguishes any benefit received from the non-recurring financial contribution bestowed upon a state-owned firm. The effect of such a privatization is to shift to the investigating authority the burden of identifying evidence which establishes that the benefit from the previous financial contribution does indeed continue beyond privatization. In the absence of such proof, the fact of the arm's-length, fair market value privatization is sufficient to compel a conclusion that the 'benefit' no longer exists for the privatized firm, and, therefore, that countervailing duties should not be levied.

Id. ¶ 126 (emphasis in original).

methodology and thus "as such, does not prevent the USDOC from determining whether a 'benefit' continues to exist, as required by the SCM Agreement."[183]

The appellate and modified panel reports in the WTO proceeding were adopted by the DSB January 8, 2003. The United States informed the DSB at its January 27, 2003, meeting that it would implement the rulings but that it needed a reasonable period of time to do so. The disputing parties later agreed on a compliance deadline of November 8, 2003. In implementation of the WTO rulings, the Commerce Department issued a *Federal Register* notice March 21, 2003, announcing a proposed revision of its privatization methodology and seeking comments on the revisions.[184] As described by the Department, the new methodology is "structured as a series of rebuttable presumptions," which starts with the "'baseline presumption' ... that non-recurring subsidies can benefit the recipient over a period of time (i.e., allocation period) normally corresponding to the average useful life of the recipient's assets."[185] The Commerce Department issued a final notification of its methodology June 23, 2003, stating that the revised analytical approach would be used in reviewing the 12 cases at issue, as well as in all CVD investigations and reviews initiated on or after June 30, 2003.[186]

On October 23, 2003, the Commerce Department issued 12 determinations under § 129 of the Uruguay Round Agreements Act (Section 129 determinations) in response to the WTO rulings.[187] Once implemented, the determinations resulted in revised cash deposit rates for certain companies in five CVD orders, full revocation of two CVD orders on imports from France, and revocation of a CVD order on imports from Italy with respect to the subject privatized company. The remaining four Section 129 determinations concerned sunset (i.e., five-year) reviews of CVD orders on goods from France, Germany, Spain, and the United Kingdom.[188] The USTR did not direct the Commerce Department to implement these determinations because, as the United States later explained to the DSB, the Department had determined that "application of its new WTO-consistent analysis would not change

---

[183] *Id.* at ¶ 159.

[184] Notice of Proposed Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act and Request for Public Comment, 68 Fed. Reg. 13897 (Mar. 21, 2003).

[185] *Id.* at 13899.

[186] Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act, 68 Fed. Reg. 37125 (June 23, 2003).

[187] *See* Notice of Implementation Under Section 129 of the Uruguay Round Agreements Act; Countervailing Measures Concerning Certain Steel Products from the European Communities," 68 Fed. Reg. 64858-59 (Nov. 17, 2003)[hereinafter EC Steel Products Implementation Notice]. Regarding Section 129 determinations, *see supra* pp. 8-12.

[188] For a description of sunset reviews, *see infra* pp. 54-55.

its original conclusions that continued subsidization was likely."[189] As a result of these actions, the United States considered that it had fully complied in the case.[190]

Recent developments. On March 17, 2004, the EC requested that the United States enter into consultations with respect to the Commerce Department's new "change-in-ownership" methodology, and its application in the four Section 129 determinations involving sunset reviews.[191] Consultations having failed to resolve the matter, an Article 21.5 compliance panel was established at the EC's request on September 27, 2004. As requested by the EC, the panel focused on reviews involving imports from France, Spain, and the United Kingdom.[192] In a report publicly circulated August 17, 2005, the compliance panel upheld the Section 129 determination involving French imports, but found fault with the two others.[193] The panel found that the Commerce Department had failed to determine in each whether the privatization involved was at arm's length and for fair market value and whether the privatized producer received any benefit from the previous nonrecurring

---

[189] Dispute Settlement Body, *Minutes of Meeting*, Nov. 7, 2003, at 6, WT/DSB/M/157 (Dec. 18, 2003)[hereinafter *DSB Minutes* (Nov. 7, 2003)]. *See* EC Steel Products Implementation Notice, *supra* note 187, 68 Fed. Reg. at 64859.

[190] *DSB Minutes* (Nov. 7, 2003), *supra* note 189, at 6.

[191] Request for Consultations, Recourse to Article 21.5 of the DSU by the European Communities, *United States — Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/14 (March 19, 2004). In its request, the EU stated that the new Commerce Department privatization methodology continued to be inconsistent with the SCM Agreement because it "provides that the unamortized amount of any pre-sale subsidy continues to be countervailable if a privatization is found not to be at arm's length and for fair market value." *Id.* at 2. The EC disputed "that this is necessarily the case and that the amount of any subsidy that may exist corresponds to the 'unamortized amount' of the original subsidy." *Id.* (citation omitted).

[192] Dispute Settlement Body, *Minutes of Meeting*, Sept. 27, 2004, at 11-13, WT/DSB/M/176 (Oct. 19, 2004). *See also* Request for the Establishment of a Panel, Recourse to Article 21.5 of the DSU by the European Communities, *United States — Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/15 (September 19, 2004). The EC claimed that in the sunset review involving French imports the Commerce Department had "failed to properly examine the existence, continuation or likelihood of recurrence of subsidization," basing this assertion on the Department's alleged improper analysis of whether, in the privatization involved, the price for employees' and retirees' shares constituted a subsidy or that it led to any continuation of a countervailiable subsidy." *Id.* at 2. The EC further claimed that in the reviews involving the United Kingdom and Spain the Department had "failed to properly determine whether ... there was continuation or recurrence of subsidization and injury, because it did not examine the nature of the privatizations in question and their impact on the continuation of the alleged subsidization " *Id.* The EC also stated in its panel request that it "continues to reserve its rights in respect of all other aspects of the United States' purported compliance with its obligations in this case," and that "[i]n particular, the European Communities reserves it right to challenge the revised methodology in the light of the eventual outcome of a number of court challenges seeking to overturn it." *Id.*

[193] Panel Report, Recourse to Article 21.5 of the DSU by the European Communities, *United States — Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/RW (Aug. 17, 2005).

subsidization of the state-owned firm. The panel thus concluded that, by not properly determining the likelihood or recurrence of subsidization before deciding to maintain the CVD orders, the United States violated obligations under both the SCM Agreement and the GATT. The panel also found that the United States had acted inconsistently with the SCM Agreement in refusing to consider new evidence submitted during the Section 129 proceeding involving imports from the United Kingdom.

The United States did not appeal, and the panel report was adopted on September 27, 2005. According to a February 2006 statement by the United States before the DSB, the USTR on November 29, 2005, requested the Commerce Department to issue revised determinations with respect to the sunset reviews involving Spain and the United Kingdom in an expeditious manner, and the Department initiated such proceedings shortly thereafter.[194]

Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada (DS257). This case involves Canada's challenge to the final affirmative subsidy determination issued by the Department of Commerce on March 25, 2002, regarding certain softwood lumber imports from Canada.[195] As a result of the CVD investigation, a CVD order was issued in May 2002, prescribing duties reflecting a country-wide net subsidy rate of 18.79% ad valorem.[196]

While the United States generally prevailed in this WTO proceeding, it was found to violate the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) and the GATT 1994 with respect to one aspect of its analysis underlying the countervailing duty order — namely, its failure to analyze whether the arm's-length sale of logs by harvesters who owned sawmills to unrelated lumber producers resulted in a "pass through" of subsidies, or, in other words, whether a benefit was conferred on those producers for purposes of the SCM Agreement's

---

[194] U.S. Statements (Feb. 17, 2006), *supra* note 114, at Item 3.

[195] This determination was also challenged by Canada before a binational review panel established under the North American Free Trade Agreement (NAFTA), a option available under Chapter 19 of the NAFTA in lieu of judicial review in the country in which the determination is issued. Binational panels, which may review final agency determinations in antidumping and countervailing duty proceedings, are charged with determining whether determinations are in accordance with domestic law. As a result of ongoing binational panel review of the Commerce Department's subsidy determination in the lumber case, the Department in November 2005 calculated a subsidy margin of 0.80%, a *de mininis* rate that does not permit the imposition of countervailing duties. The panel is currently reviewing this determination. For further information on the NAFTA proceeding, *see* CRS Issue Brief IB10081, *Lumber Imports from Canada: Issues and Events*, by Ross W. Gorte and Jeanne J. Grimmett, and CRS Congressional Distribution Memorandum, *Status of NAFTA and WTO Challenges to Final Agency Determinations in Antidumping and Countervailing Duty Investigations Involving Softwood Lumber from Canada*, by Jeanne J. Grimmett (available from the American Law Division, CRS).

[196] Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order: Certain Softwood Lumber Products from Canada, 67 Fed. Reg. 36070, 36076 (May 22, 2002).

definition of a "subsidy." As noted earlier, a subsidy will be found to exist when there is a financial contribution by a government and "a benefit is thereby conferred."

The panel report in the case, publicly circulated August 29, 2003, upheld the Commerce Department finding that provincial stumpage programs were financial contributions by the government and that the subsidies were specific to an industry, a WTO requirement for finding a countervailable domestic subsidy.[197] The panel faulted the Department, however, on its use of cross-border comparisons and its determination that the subsidy from the stumpage program passed through to downstream users. The report was appealed by both the United States and Canada.

In a January 19, 2004, decision, the WTO Appellate Body upheld the panel's stumpage determination, but reversed the panel on its finding that cross-border comparisons could not be used in determining a benefit and on its consequential finding that the U.S. determination of the existence and amount of the benefit violated WTO rules.[198] Because of insufficient information, however, the Appellate Body could not complete the analysis as to whether the benchmark that the United States did use was proper and consequently whether the U.S. benefit finding and ultimately its imposition of countervailing duties based on that determination comported with WTO rules.

Regarding downstream users, the issue before the Appellate Body concerned situations where harvesting and processing were not carried out by vertically integrated, thus requiring an examination of "whether the subsidy conferred on products of certain enterprises in the production chain was 'passed through,' in arm's length transactions, to other enterprises producing the countervailed product."[199] The Appellate Body upheld the panel's finding that United States had violated WTO obligations when the Department of Commerce failed to conduct a pass-through analysis regarding arm's-length sales of *logs* by tenured harvesters/sawmills to unrelated sawmills, but reversed the panel on its finding that Department of Commerce acted inconsistently with WTO obligations when it failed to conduct a pass-through analysis regarding arm's-length sales of *primary lumber* by such sellers to unrelated remanufacturers.

---

[197] Panel Report, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/R (Aug. 29, 2003). The panel found that because the Canadian provincial stumpage programs give tenure holders a right to cut standing timber that is in the nature of a proprietary right, the governments are in essence providing standing timber to timber harvesters and thus providing a good for WTO purposes. *Id.* at ¶¶ 7.09-7.30; *see also* Appellate Body Report, *infra* note 198, ¶¶ 46-76.

[198] Appellate Body Report, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R (Jan. 19, 2004).

[199] *Id.* ¶ 124. Canada argued in the appeal that by not conducting a pass-through analysis, the United States "acted inconsistently with: (i) Article 10 of the *SCM Agreement*, by failing to 'take all necessary steps' to determine subsidization in accordance with the provisions of the *SCM Agreement* and Article VI:3 of the GATT 1994; (ii) Article 32.1 of the Agreement, by taking action against a subsidy not in accordance with the provisions of the GATT 1994, as interpreted by the *SCM Agreement*, and (iii) Article VI:3 of the GATT 1994, by imposing duties without establishing the existence of indirect subsidization and failing to ensure that countervailing duty measures are not in excess of the subsidy found to exist." *Id.* ¶ 133.

The appellate and modified panel reports were adopted by the DSB on February 17, 2004, and the United States and Canada later agreed on a compliance deadline ending December 17, 2004.[200] The Department of Commerce issued a revised CVD determination pursuant to § 129 of the Uruguay Round Agreements Act on December 10, 2004, and instructed Customs to collect estimated countervailing duties of 18.62% on goods entered for consumption or withdrawn from warehouse after that date, a reduction of 0.17% from the original net subsidy rate.[201]

Recent developments. Although the United States stated at the December 17, 2004, meeting of the DSB that it had complied in the case, Canada requested a compliance panel as well as authorization to retaliate in the amount of approximately $200 million (Can.).[202] Citing various deficiencies in the Commerce Department's use of pass-though analysis, Canada challenged not only the Section 129 determination, but also U.S. action in the first administrative review of the CVD order. The administrative review, which covered imports from the period May 22, 2002, though March 31, 2003, and established the official duty rate for imports entered during this period, resulted in a reduction of the net subsidy rate to 16.37% ad valorem.[203]

A compliance panel was established January 14, 2005. In addition, the United States objected to Canada's retaliation request, an action that automatically sent the request to arbitration. In an agreement between the two countries, the arbitral proceeding has been suspended until the resulting from the compliance process are adopted, at which time either party may request that the arbitration be resumed.[204]

In a report circulated August 1, 2005, the compliance panel found that the Department of Commerce had not carried out the necessary pass-though analysis regarding non-arm's-length sales of logs by tenured timber harvesters to unrelated

---

[200] Agreement under Article 21.3(b) of the DSU, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/13 (Apr. 30, 2004).

[201] Notice of Implementation Under Section 129 of the Uruguay Round Agreements Act; Countervailing Measures Concerning Certain Softwood Lumber Products from Canada, 69 Fed. Reg. 75305 (Dec. 16, 2004); Section 129 Determination available at [http://ia.ita.doc.gov/frn/0412frn/E4-3683.txt].

[202] Request for the Establishment of a Panel, Recourse to Article 21.5 of the DSU by Canada, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/15 (Jan. 4, 2005); Recourse to Article 22.2 of the DSU by Canada, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/16 (Jan. 4, 2005).

[203] Notice of Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company-Specific Reviews: Certain Softwood Lumber Products from Canada, 69 Fed Reg. 75917, 75919 (Dec. 20, 2004), *amended by* Notice of Amended Final Results of Countervailing Duty Administrative Review: Certain Softwood Lumber Products from Canada, 70 Fed. Reg. 9046, 9048 (Feb. 24, 2005).

[204] Communication from the Arbitrator, Recourse to Article 22.6 of the DSU by the United States, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/21 (Mar. 1, 2005).

lumber producers and concluded that, in both its Section 129 determination and the first administrative review, the Department had made its calculations using transactions for which it had not demonstrated that the benefits of subsidized log inputs had passed through to the processed product.[205] The United States appealed the decision September 6, 2005, arguing that the first administrative review was outside the scope of the panel's jurisdiction. In a report issued December 5, 2005, the AB upheld the conclusion of the panel that examination of the first administrative review fell within its mandate to the extent the pass-though analysis was involved.[206] The United States had not requested that the AB review the panel's substantive findings regarding the use of pass-through analysis in the administrative review and the AB went on to find that the panel had acted within the scope of its authority in making its legal conclusions regarding U.S. actions in the review.

The panel and AB reports were adopted by the DSB on December 20, 2005.[207]

Final Dumping Determination on Softwood Lumber from Canada (DS264). This case involves Canada's claim that the United States violated provisions of the GATT and the WTO Antidumping Agreement in its investigation of dumping of Canadian softwood lumber. Canada argued that the Commerce Department had improperly initiated the case; improperly applied a number of methodologies, resulting in artificial or inflated dumping margins; not established a correct product scope for its investigation; and failed to adhere to various WTO requirements involving procedural matters in the investigation.[208]

The panel circulated its final report April 13, 2004, generally rejecting Canada's claims, though (with one dissent) faulting the United States for calculating dumping margins with the use of "zeroing."[209] Briefly, this practice involves assigning a "zero" value to transactions in which the export price or constructed export price exceeds normal value (i.e., where there is no dumping), and as a result not using the higher prices in these transactions to offset the lower prices in other sales. The United States appealed the panel report on this issue.

On August 11, 2004, the Appellate Body upheld the panel's conclusions on "zeroing," and, regarding an issue appealed by Canada, reversed the panel's finding

---

[205] Panel Report, Recourse by Canada to Article 21.5, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/RW (Aug. 1, 2005).

[206] Appellate Body Report, Recourse by Canada to Article 21.5, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/RW (Dec. 5, 2005).

[207] Action by the Dispute Settlement Body, Appellate Body Report and Panel Report pursuant to Article 21.5 of the DSU, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/25 (Dec. 22, 2005).

[208] Request for the Establishment of a Panel by Canada, *United States — Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/2 (Dec. 9, 2002).

[209] Panel Report, *United States — Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R (Apr. 13, 2004).

that the United States had not infringed various Antidumping Agreement provisions in calculating financial expenses for softwood lumber for one company under investigation (Abitibi).[210] Since the reversal focused only on the panel's interpretation of the legal standard that the panel used to evaluate the Commerce Department's approach, the Appellate Body did not make any findings as to whether the United States in fact acted consistently or inconsistently with the provisions involved. The reports were adopted by the DSB August 31, 2004.[211]

The practice of "zeroing" had earlier been ruled to violate the Antidumping Agreement in a case brought by India against the EC.[212] In the EC's challenge of the U.S. practice as used in over 30 antidumping investigations, the WTO panel, in an October 31, 2005, report, found that "zeroing" is not permitted in an initial investigation, but is allowed in an administrative review.[213] The EC has appealed the ruling.[214] A broad challenge to the U.S. practice brought by Japan is currently before a panel,[215] and the issue has been raised in a number of other WTO challenges to U.S. antidumping investigations and orders.[216] Federal courts have consistently held "zeroing" to be valid under U.S. antidumping law, finding the statute to be silent on the issue and deferring to the Commerce Department's statutory interpretation.[217]

---

[210] Appellate Body Report, *United States — Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (Aug. 11, 2004).

[211] Dispute Settlement Body, *Minutes of Meeting*, Aug. 31, 2005, at 10, WT/DSB/M/189 (June 17, 2005).

[212] European Communities — *Anti-Dumping Duties on Imports of Cotton-Type Bed-Linen from India* (WT/DS141).

[213] Panel Report, *United States — Laws, Regulations, and Methodology for Calculating Dumping Margins* ("Zeroing"), WT/DS294/R (Oct. 31, 2005).

[214] Notification of an Appeal by the European Communities, *United States — Laws, Regulations, and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/12 (Jan. 17, 2006).

[215] The panel hopes to complete its work in March 2006. *See* Communication from the Chairman, *United States — Measures Related to Zeroing and Sunset Reviews*, WT/DS322 (Nov. 17, 2005).

[216] *United States — Anti-Dumping Measures on Shrimp from Ecuador*, WT/DS335 (in consultations); *United States — Anti-Dumping Determinations regarding Stainless Steel from Mexico*, WT/DS325 (in consultations); *United States — Provisional Anti-Dumping Measures on Shrimp from Thailand*, WT/DS324 (in consultations); *United States — Anti-Dumping Measures on Cement from Mexico*, WT/DS281 (panel proceedings suspended in January 2006 at request of the United States and Mexico); *United States — Anti-Dumping Duties on Silicon Metal from Brazil*, WT/DS239 (in consultations).

[217] The statutory provisions generally cited with respect to "zeroing" are § 703 of the Tariff Act of 1930, 19 U.S.C. § 1673, the basic authority for the imposition of antidumping duties, and § 771 of the same Act, 19 U.S.C. § 1677, which contains definitions for the terms "dumped," "dumping," and "dumping margin."

In January 2004, the Court of Appeals for the Federal Circuit held that the antidumping statute does not directly address the issue of negative-value dumping margins and, applying *Chevron* deference, held that the Department of Commerce based its practice on a reasonable interpretation of the statute. *The Timken Co.* v. *United States*, 354 F.3d 1334

(continued...)

To comply with the decision, the Department of Commerce in January 2005 issued a preliminary Section 129 determination in which it continued to find dumping.[218] The Department applied a mode of comparing foreign and U.S. prices that was not used in the original dumping determination, maintaining that the WTO rulings applied only to the use of "zeroing" in the methodology involved in the case and did not apply to other methodologies, an approach that resulted in higher dumping margins that those in the original determination. With a May 2, 2005, compliance deadline in place,[219] the Department published a final Section 129 determination in the May 2 *Federal Register* in which it used the same methodology that it had used in the preliminary determination and again posted higher dumping margins.[220]

---

[217] (...continued)
(2004), *aff'g* 240 F.Supp. 2d 1228 (Ct. Int'l Trade 2002). Similarly, the Court of International Trade (CIT), applying *Chevron*, held in August 2004 that the plain language of the statute is ambiguous, neither clearly requiring nor prohibiting zeroing, and that the Commerce Department's practice is based on a permissible construction of the statute. SNR Roulements *et al.* v. United States, 2004 WL 1790178 (CIT), at *8-*10. The Department of Commerce has argued that the antidumping statute unambiguously requires that sales with negative dumping margins be given a zero value. *Id.* at *9.

In a 1996 decision, the CIT had stated that it was "aware of the statistical bias inherent in Commerce's methodology" but that it was:

> not prepared ... to invalidate that methodology because the practice combats masked dumping, an apparently legitimate goal consistent with the antidumping statute. Unless and until it becomes clear that such practice is impermissible or unreasonable (because, *e.g.*, Commerce erroneously placed too much significance on the phenomenon of masked dumping), the Court must defer to Commerce's methodology."

Böwe Passat Reinigungs-Und Wäschereitechnik GMBH *et al.* v. United States, 926 F.Supp. 1138, 1150 (Ct. Int'l Trade 1996).

As described in a still earlier CIT opinion, the practice "ensures that sales made at less than fair value on a portion of a company's product line to the United States market are not negated by more profitable sales." Serampore Industries Pvt. Ltd. v. United States Dep't of Commerce, 675 F.Supp. 1354, 1360 (Ct. Int'l Trade 1987). The court continued: "Commerce has interpreted the statute in such a way as to prevent a foreign producer from masking its dumping with more profitable sales. Commerce' interpretation is reasonable and is in accordance with law." *Id.* at 1361.

[218] Preliminary Determination under Section 129 available at [http://ia.ita.doc.gov/download/section129/Canada-Lumber-129-Prelim-013105.pdf].

[219] Modification of the Agreement under Article 21.3(b) of the DSU, *United States — Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/15 (Feb. 17, 2005).

[220] Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products from Canada, 70 Fed. Reg. 22636 (May 2, 2005).

Canada also challenged the dumping determination before a NAFTA binational panel, which in July 2003 unanimously affirmed the determination in part and remanded it in part. After two remands, the Commerce Department lowered the average dumping margin to (continued...)

Recent developments. The United States announced at the May 19, 2005, meeting of the DSB that in implementing the new dumping determination it had complied with its WTO obligations in the proceeding.[221] Canada subsequently challenged the U.S. measure, requesting a compliance panel as well as authorization to suspend concessions in the amount of $400 million (Canadian) for the year 2005 and, for each subsequent year, in an amount that equals "the portion of the total anti-dumping duties illegally collected and not refunded for that year as a result of the United States non-compliance."[222] The United States objected to the retaliation request, sending it to arbitration. Under a procedural agreement between United States and Canada, arbitration of the retaliation request has been suspended pending the completion of the compliance panel proceeding.[223] An interim panel ruling has reportedly upheld the new U.S. determination; the decision is expected to be circulated publicly in March 2006.[224]

Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina (DS268). Argentina requested consultations with the United States in October 2002 regarding affirmative determinations by the Commerce Department and the ITC in a sunset review of an antidumping duty order on oil country tubular goods (OCTG) from that country.[225] The determinations resulted in the continued imposition of antidumping duties in the amount of 1.36%.[226]

---

[220] (...continued)
7.92%. Dep't of Commerce, Second Remand Redetermination, signed April 21, 2004, available at [http://ia.ita.doc.gov/remands/index.html]. The panel remanded a third time in June 2005, citing the WTO decision discussed here and directing the Commerce Department to recalculate the dumping margins without the use of zeroing. The panel also directed the department to issue a *de minimis* margin for one producer. As it did in the WTO proceeding the Department recalculated all margins using zeroing but applied a different mode of price comparison and arrived at higher dumping margins. The Department also asked the panel to reconsider certain procedural and analytical issues in the panel's June 2005 decision, including that the decision, as it involved the Department's price comparison methodology, was in conflict with federal appeals court rulings. The panel has not yet issued a decision in the proceeding. For further information on binational panels, *see supra* note 195.

[221] *DSB Minutes* (May 19, 2005), *supra* note 171, at 23.

[222] Recourse to Article 21.5 of the DSU by Canada, *United States — Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/17 (May 20, 2005); Recourse to Article 22.2 of the DSU by Canada, *United States — Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/17 (May 20, 2005).

[223] Communication from the Arbitrator, Recourse by the United States for Arbitration under Article 22.6 of the DSU, *United States — Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/22 (June 16, 2005).

[224] *U.S. Industry Welcomes WTO Interim Ruling on U.S. Compliance with Lumber AD Ruling*, 23 Int'l Trade Rep. (BNA) 287 (2006).

[225] Request for Consultations by Argentina, *United States — Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/1 (Oct 10, 2002).

[226] *See* Final Results of Expedited Sunset Reviews: Oil Country Tubular Goods from Argentina, Italy, Japan, and Korea, 65 Fed. Reg. 66701, 66703 (Nov. 7, 2000).

The rate applied to one individually investigated company (Siderca SAIC) as well as to all other exporters (all others rate).

A "sunset review" is a five-year agency review of an antidumping or countervailing duty order conducted to determine if the duty order should be continued. Both the WTO Antidumping Agreement, at Article 11.3, and the Agreement on Subsidies and Countervailing Measures, at Article 21.3, require that duties be terminated after five years unless domestic authorities determine in a review initiated before that date on their own motion, or "upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date," that termination of the duty "would be likely to lead to continuation or recurrence" of dumping or subsidization and injury.

Sunset reviews are provided for in U.S. law in § 751(c)-(e) of the Tariff Act of 1930, 19 U.S.C. § 1675(c)-(e). In a sunset review, the ITC determines whether revocation of an antidumping or CVD order "would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time,"[227] while DOC determines, as the case may be, whether revocation of a countervailing duty order "would be likely to lead to continuation or recurrence of a countervailable subsidy,"[228] or whether revocation of an antidumping duty order "would be likely to lead to continuation or recurrence of sales of the subject merchandise at less than fair value."[229] Special rules to be followed by the agencies in making these determinations are set forth in § 752 of the act, 19 U.S.C. § 1675a. Regulations are set forth at 19 C.F.R. § 351.218(d) and elsewhere in 19 C.F.R. Part 351. In addition, DOC has issued a document known as the Sunset Policy Bulletin (SPB), which contains a set of departmental policies regarding the conduct of sunset reviews pursuant to §§ 751 and 752 and related regulations.[230] As described by the Department, the policies set out in the SPB are "intended to complement the applicable statutory and regulatory provisionby providing guidance on methodological or analytical issues not explicitly addressed by the statute and regulations."[231]

Section 751(c)(4) of the act, 19 U.S.C § 1675(c)(4), provides for the waiver of participation in reviews by certain interested parties. Under § 751(c)(4)(A), parties that produce, export or import the subject merchandise (respondent parties) may elect not to participate in the DOC portion of a sunset review and to participate only in the portion conducted by the ITC.[232] Section 751(c)(4)(B) provides that in a review in

[227] Tariff Act of 1930, § 752(a)(1), 19 U.S.C. § 1675a(a)(1)(2000).

[228] Tariff Act of 1930, § 752(b)(1), 19 U.S.C. § 1675a(b)(1(2000).

[229] Tariff Act of 1930, § 752(c)(1), 19 U.S.C. § 1675a(c)(1)(2000).

[230] Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders: Policy Bulletin, 63 Fed. Reg. 18871-77 (Apr. 16, 1998).

[231] *Id.* at 18871.

[232] Tariff Act of 1930, § 751(c)(4)(A), 19 U.S.C. § 1675(c)(4)(A)(2000). The parties who may waive participation in the sunset review are: (1) a foreign manufacturer, producer or exporter of the subject merchandise; (2) the U.S. importer of the subject merchandise; (3) a trade or business association a majority of whose members are producers, exporters or (continued...)

which any such party waives its participation, DOC "shall conclude that revocation of the order ... would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) with respect to that party."

Under the so-called "deemed" waiver regulation, 19 C.F.R. § 351.218(d)(2)(iii),[233] the Commerce Department treated "the failure by a respondent interested party to file a complete substantive response to a notice of initiation [of a sunset review] ... as a waiver of participation in a sunset review before the Department." Under 19 C.F.R. § 351.218(e)(1)(ii), the Department generally makes its determination of the adequacy of responses by a respondent party on a case-by-case basis, but the Department will normally conclude that an adequate response is provided where it receives complete substantive responses under the DOC regulation prescribing the information to be filed.[234] Where interested parties provide "inadequate responses" to a notice of initiation of a sunset review, the statute provides for so-called "expedited" sunset reviews. In such cases, DOC, within 120 days after the review is initiated, or ITC, within 150 days after initiation, "may issue, without further investigation, a final determination based on facts available," as provided for in § 776 of the Tariff Act, 19 U.S.C. § 1766e."[235]

In its panel request, Argentina maintained that § 751(c)(4) of the Tariff Act and related regulations "operate in certain instances to preclude the Department from conducting a sunset review and making a determination as to whether termination of an anti-dumping duty measure would be likely to lead to continuation or recurrence of dumping," in violation of various articles of the WTO Antidumping Agreement.[236] Argentina claimed that when a respondent party is deemed to have waived participation, U.S. law requires the Department to find that termination of the order would be likely to have this effect "without requiring the Department to conduct a substantive review or to make a determination based on the substantive review."[237]

Argentina argued that the application of expedited review procedures in the sunset review at issue was inconsistent with the Agreement because one individually investigated company (Siderca) was deemed to have waived its right to participate in the review "despite its full cooperation" with the Commerce Department; that the Department did not conduct a "review" as contemplated in Article 11.3 of the

---

[232] (...continued)
importers of such merchandise; and (4) the government of a country in which such merchandise is produced or manufactured or from which such merchandise is exported. See Tariff Act of 1930, § 771(9)(A), (B), 19 U.S.C. § 1677(9)(A), (B)(2000).

[233] *See* Procedures for Conducting Five-year ("Sunset") Reviews of Antidumping and Countervaiilng Duty Orders, 54 Fed. Reg. 13516, 13521 (Mar. 20, 1998).

[234] *See* 19 C.F.R. §§ 351.218(d)(3).

[235] Tariff Act of 1930, § 751(c)(3)(B), 19 U.S.C, § 1675(c)(3)(B). Regarding statutory authorities governing the use of "facts available, *see supra* note 78.

[236] Request for the Establishment of a Panel by Argentina, *United States — Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, at 2, WT/DS268/20 (Apr. 4, 2003).

[237] *Id.*

Agreement; and that the Department failed to "determine" whether or not future dumping was likely as required under Article 11.3.[238] Among other arguments, Argentina claimed that the Department's sunset determination in the case was based on a "virtually irrefutable presumption under US law as such" (i.e. on its face, rather than as applied) that termination of the antidumping order would likely lead to more dumping, given DOC's consistent practice in such reviews, as based on U.S. law and the Department's Sunset Policy Bulletin.[239]

Regarding the ITC, Argentina alleged, among other things, that the Commission had improperly used a lower standard than the "likely" standard in assessing whether termination of the order was likely to lead to continuation or recurrence of injury; that it failed both to conduct an objective injury examination and to use "positive evidence" as the basis for its injury determination; and that the Antidumping Agreement did not provide for the ITC's use of "cumulative" injury analysis in sunset reviews.[240]

The panel, in a report issued in July 2004, concluded that provisions of § 751(c)(4)(B) related to affirmative waivers and the related DOC regulation regarding "deemed waivers" (19 U.S.C. § 351.218(d)(2)((iii) were inconsistent with Article 11.3 of the Antidumping Agreement.[241] It also found that the regulation was inconsistent with Article 6.1, which requires that parties be given notice of the information required by authorities and ample opportunity to present the evidence they consider relevant to an investigation, and with Article 6.2, which requires that all parties to a proceeding have a full opportunity to defend their interests.[242] Regarding the "irrefutable presumption" alleged by Argentina, the panel found that the Sunset Policy Bulletin (SPB) was a "measure" that could be challenged in a WTO dispute settlement proceeding,[243] and that provisions of the SPB were inconsistent with the Department's obligation under Article 11.3 to determine the likelihood of continuation or recurrence of dumping.[244] The panel also found that, in making its determinations in the sunset review at issue, DOC had acted inconsistently with Articles 11.3 and 6.2 of the Agreement, but had not violated Article 6.1 or other agreement obligations allowing the use of facts available in certain circumstances and requiring public notice of antidumping investigations and explanation of determinations.[245] In addition, the panel upheld the U.S. legal standards for finding

---

[238] *Id.* at 3.

[239] *Id.* at 3.

[240] *Id.* at 3-4.

[241] Panel Report, *United States — Sunset Review of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, ¶¶ 7.80-7.103, 8.1(a)(i)-(ii), WT/DS268/R (July 16, 2004).

[242] *Id.* ¶¶ 7.107-7.128, 8.1(a)(iii).

[243] *Id.* ¶ 7.136.

[244] *Id.* ¶¶ 7.134-7.144, 7.152-7.173, 8.1(b).

[245] *Id.* ¶¶ 7.201-7.236, 7.239-7.245, 8.1(d).

a likelihood of the continuation or recurrence of injury and ITC's affirmative likelihood of injury determination in the case.[246]

The United States appealed the panel's conclusions regarding the WTO-inconsistency of U.S. law relating to affirmative and deemed waivers as well as the panel's conclusion that the SPB violated the Antidumping Agreement, including the finding at that the SPB was a "measure" that could be challenged in a WTO dispute settlement proceeding.[247]

Ruling in November 2004, the AB largely upheld the panel's findings that § 751(c)(4)(B) and its related regulations were inconsistent with Articles 11.3, 6.1 and 6.2 of the Antidumping Agreement.[248] While the AB also agreed that the SPB could be challenged in a WTO dispute settlement proceeding, it reversed the panel on its finding that a particular portion of the SPB was inconsistent with the Antidumping Agreement on the ground that the panel had not made an "objective assessment" of the issue, as required under the DSU.[249] The reports were adopted on December 17, 2004.

Recent developments. The compliance deadline in the case, determined by arbitration, expired on December 17, 2005.[250] In a submission to the Arbitrator, the United States stated that, in order to comply, it needed to amend its regulation

---

[246] Id. ¶ ¶ 7.178-7.193, 7.258-7.260, 7.268-7.312, 8.1(e).

[247] Notification of an Appeal by the United States, *United States — Sunset Review of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/5 (Aug. 31, 2004). The United States also appealed the panel's finding that Argentina's initial panel request met the requirements of the Dispute Settlement Understanding.

[248] Appellate Body Report, *United States — Sunset Review of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R (Nov. 29, 2004). The AB described the obligation in Article 11.3 as follows:

> The plain meaning of the terms "review" and "determine" in Article 11.3 ... compel an investigating authority in a sunset review to undertake an examination, on the basis of positive evidence, of the likelihood of continuation or recurrence of dumping and injury. In drawing conclusions from that examination, the investigating authority must arrive at a reasoned determination resting on a sufficient factual basis; it may not rely on assumptions or conjecture.

Id. ¶ 180.

[249] Argentina had appealed panel findings regarding the U.S. injury standard used in sunset reviews and the ITC actions in the review. *See id.* ¶¶ 61-93. The AB upheld the panel's conclusions on these issues.

[250] Award of the Arbitrator, Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, *United States — Sunset Review of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/12 (June 7, 2005).

regarding waivers and to make a new determination of the likelihood of continuation or recurrence of dumping in the sunset review at issue.[251]

In August 2005, DOC issued preliminary regulations amending 19 C.F.R. § 351.218(d)(2), regarding waivers by responding parties;[252] final regulations were issued on October 28, 2005.[253] DOC also modified a portion of the regulations involving participation in hearings in an expedited sunset review. After the final regulations were issued, DOC issued a Section 129 determination in which it continued to find that revocation of the order would be likely to led to continuation or recurrence of dumping.[254]

According to DOC, the three modifications made to § 351.218(d)(2) "eliminate the possibility that the Department's order-wide likelihood determinations would be based on assumptions about likelihood of continuation or recurrence of dumping or a countervailable subsidy due to interested parties' waiver of participation in the sunset reviews."[255] The Department stated that it "will make its order-wide determinations on the basis of the facts and information available on the record of the sunset review."[256]

First, DOC amended paragraph (2)(i), under which a responding party may choose not to participate in a sunset review by filing a Statement of Waiver within 30 days of initiation of the sunset review. DOC now requires that the filing include a statement that the party "is likely to dump or benefit from a countervailable subsidy (as the case may be) if the order is revoked or terminated."[257] Second, DOC removed paragraph (d)(2)(ii), under which the responding party was "deemed" to have waived participation in the sunset review when it failed to file a complete substantive response to a notice of initiation.[258] As a result, the Department "will no longer make company-specific likelihood findings for companies that fail to file a statement of waiver and fail to file a substantive response to the notice of initiation."[259] Third, DOC amended subparagraphs dealing with waiver of participation by a foreign government in a CVD sunset review, to remove a cross-reference to the eliminated provision, and "to eliminate certain language that might suggest the possibility that

---

[251] *Id.* at 2.

[252] Procedures for Conducting Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders, 70 Fed. Reg. 47738 (Aug. 15, 2005)(proposed rule and request for comments).

[253] Procedures for Conducting Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders, 70 Fed. Reg. 62061 (Oct. 28, 2005)(final rule).

[254] *See* U.S. Statements to the DSB, *infra* note 263; Section 129 Determination (A-357-810), *available at* [http://www.insidetrade.com]; Antidumping and Countervailing Duty Orders in Place as of December 30, 2005, by Country, at [http://info.usitc.gov/oinv/sunset.nsf].

[255] 70 Fed. Reg. at 62062.

[256] *Id.*

[257] 19 C.F.R. § 351.218(d)(2)(ii), *as amended*, 70 Fed. Reg. at 62064.

[258] 70 Fed. Reg. at 62062.

[259] *Id.*

the Department's sunset regulations would be based on assumptions about likelihood of continuation or recurrence of a countervailable subsidy."[260]

The Department rejected the suggestion of commenters on the preliminary regulations that § 751(c)(4)(B) of the Tariff Act of 1930, having been found to be WTO-inconsistent, needed to be amended or withdrawn in order to comply with the WTO decision. The Department again stated that by modifying the waiver regulations, it had "eliminated the possibility that its Department's order-wide likelihood determinations would be based on *assumptions* about likelihood of continuation or recurrence of dumping or a countervailable subsidy due to interested parties' waiver of participation in the sunset reviews."[261] The Department continued:

> Section 751(c)(4)(B) of the Act only mandates an affirmative company-specific likelihood finding *as a consequence of* a party electing to waive its participation in the sunset review. Thus, the modified regulatory waiver requirements result in elimination of any assumption about likelihood because a party waiving participation would have already indicated to the Department that it was likely to dump or benefit from a countervailable subsidy if the order were revoked.[262]

Recent developments. While the United States announced at the December 20, 2005, meeting of the DSB that it had implemented the WTO rulings and recommendations in the case,[263] Argentina stated at the same meeting that it did not view the United States as having complied.[264] In January 2006, Argentina and the United States entered into a procedural agreement addressing Argentina's possible request for a compliance panel and any subsequent appeal.[265] It was agreed, inter alia, that Argentina would not request authorization to suspend concessions or other obligations until any panel and appellate rulings adverse to the United States were adopted by the DSB. Argentina filed a request for consultations with the United States on its compliance measures in late January 2006.[266] The procedural agreement allows Argentina to request a compliance panel once 15 days after the date the request was circulated (i.e., January 30, 2006) have elapsed. To date, Argentina has not done so.

---

[260] *Id.*

[261] *Id.* at 62062-63 (emphasis added)

[262] *Id.* at 63063 (emphasis in original).

[263] Statements by the United States at the December 20th Meeting of the WTO Dispute Settlement Body, Item 4, *in* U.S. Mission to the United Nations in Geneva, Press Release, Dec. 21, 2005, at [http://www.us-mission.ch/Press2005/1221DSBmeeting.html].

[264] *See* Argentina-United States Procedural Agreement, *infra* note 265, at 2.

[265] Understanding between Argentina and the United States Regarding Procedures under Articles 21 and 22 of the DSU, *United States — Sunset Review of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/14 (Jan. 8, 2006).

[266] Request for Consultations, Recourse to Article 21.5 of the DSU by Argentina, *United States — Sunset Review of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/15 (Jan. 30, 2006).

Investigation of the International Trade Commission in Softwood Lumber from Canada (DS277). On December 20, 2002, Canada requested consultations with the United States regarding the International Trade Commission's injury investigation in the U.S. antidumping and countervailing duty cases involving softwood lumber from Canada. In May 2002, the ITC had determined that an industry in the United States was threatened with material injury by reason of imports of softwood lumber that had been earlier found by the Commerce Department to be subsidized by the Canadian Government and sold in the United States at less than fair value. Canada claimed violations of the GATT, the Antidumping Agreement, and the Agreement on Subsidies and Countervailing Measures, alleging, among other things, that the ITC based its threat of injury determination "on allegation, conjecture and remote possibility" and that it failed to consider properly a number of relevant factors in its determinations of injury or threat.[267]

A final panel report faulting the ITC's threat determination and its causal analysis was issued to the parties February 10, 2004, and publicly circulated March 22, 2004.[268] While the panel recommended that the United States bring its measures into conformity with the WTO Antidumping and SCM Agreements, it declined to recommend any ways for the United States to do so. The United States took issue with the panel's negative findings, but chose not to appeal and the report was adopted April 26, 2004.[269] The United States told the WTO Dispute Settlement Body that it intended to comply,[270] and the United States and Canada subsequently agreed on a nine-month compliance period, beginning April 26, 2004, and ending January 26, 2005.[271]

Recent developments. On November 24, 2004, the U.S. International Trade Commission issued a Section 129 determination affirming its earlier threat of injury determination. The USTR later requested the Department of Commerce to implement the new ITC determination, which it did by amending the antidumping and countervailing duty orders to reflect its issuance and implementation.[272] The United States maintains that the Section 129 determination legally supports the

---

[267] Request for the Establishment of a Panel by Canada, *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/2 (Apr. 4, 2003).

[268] Panel Report, *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R (Mar. 22, 2004).

[269] *WTO Adopts Ruling Condemning ITC Probe on Softwood Lumber; U.S. Declines Appeal*, 21 Int'l Trade Rep. (BNA) 751 (2004).

[270] Dispute Settlement Body, *Minutes of Meeting*, May 19, 2004, at 8, WT/DSB/M/169 (June 30, 2004).

[271] Agreement under Article 21.3(b) of the DSU, *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/7 (Oct. 4, 2004).

[272] *See* Amendment to Antidumping and Countervailing Duty Orders on Certain Softwood Lumber Products from Canada, 69 Fed. Reg. 75916 (Dec. 20, 2004). The text of the Section 129 determination is available at [http://www.usitc.gov/trade_remedy/TR_opinions_reports.htm].

continued imposition of antidumping and countervailing duties on Canadian softwood lumber, notwithstanding the ITC's "no threat" determination issued in September 2004 at the direction of a NAFTA binational panel.[273] Canada and Canadian producers have challenged implementation of the Section 129 determination in the U.S. Court of International Trade.[274]

Although the United States considers itself in compliance in the WTO case,[275] Canada, in February 2005, requested the establishment of a compliance panel as well as authorization to impose $4.25 billion (Can.) in sanctions, an amount it stated represents the total amount of CVD and antidumping duty cash deposits collected and not refunded as a result of the United States' failure to revoke the May 2002 CVD and antidumping orders, which Canada views as proper implementation of the WTO rulings in the case.[276] The United States objected to the retaliation request, thus sending it to arbitration.[277] Under an agreement between the parties, the arbitration has been suspended until the rulings in the compliance procedure are adopted, with either party reserving the right to request that the arbitration be resumed if the rulings are ultimately adverse to the United States.[278]

The compliance panel upheld the ITC determination in a report issued November 15, 2005.[279] Canada appealed the panel decision on January 13, 2006.[280]

---

[273] *NAFTA Lumber Panel Orders ITC to Find No Injury Threat in 10 Days*, Inside U.S. Trade, Sept. 3, 2004, at 1; *ITC Reverses Threat Ruling in Canadian Softwood Cases*, 21 Int'l Trade Rep. (BNA) 1522 (2004). An Extraordinary Challenge Committee (ECC) requested by the United States upheld the panel decision in August 2005. For further information on binational panels, *see supra* note 195.

[274] E.g., Tembec Inc. v. United States, No. 05-00028 (Ct. Int'l Trade Jan. 19, 2005).

[275] *See* Dispute Settlement Body, *Minutes of Meeting*, Jan. 25, 2005, at 6, WT/DSB/M/182 (Feb. 17. 2005).

[276] Request for the Establishment of a Panel, Recourse to Article 21.5 of the DSU by Canada, United States — Investigation of the International Trade Commission in Softwood Lumber from Canada, WT/DS277/8 (February 15, 2005), and Recourse to Article 22.2 of the DSU by Canada, *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada* (WT/DS277/9)(Feb. 15, 2005).

[277] Request by the United States for Arbitration under Article 22.6 of the DSU, *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/10 (Feb. 24, 2005).

[278] Understanding between Canada and the United States Regarding Procedures under Articles 21 and 22 of the DSU, *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada* WT/DS277/11 (Feb. 24, 2005).

[279] Panel Report, Recourse to Article 21.5 of the DSU by Canada**,** *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/RW (Nov. 15, 2005).

[280] Notification of an Appeal by Canada, Recourse to Article 21.5 of the DSU by Canada**,** *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/16 (Jan. 16, 2005).

Antidumping Measures on Oil Country Tubular Goods (OCTG) from Mexico (DS282). In 2003, Mexico challenged DOC and ITC actions in a sunset review of an antidumping duty order on oil country tubular goods (OCTG) from that country, as well as U.S. laws, policies, and regulations involving such reviews.[281] The panel generally rejected Mexico's claims, but it held that the DOC had made its determination as to the likelihood of continued or recurred dumping entirely on the basis of decline in import volumes and did not consider other possibly relevant evidence.[282] Both Mexico and the United States appealed, with the United States focusing its appeal on the panel's finding that the Department's Sunset Policy Bulletin, which lays out procedures for the conduct of sunset reviews, was inconsistent with the WTO Antidumping Agreement.[283] The Appellate Body, on November 2, 2005, upheld the panel finding that the ITC had acted consistently with the Antidumping Agreement but reversed the panel on its adverse finding regarding the Sunset Policy Bulletin.[284] The panel and AB reports were adopted on November 28, 2005.[285]

Becuase the panel's adverse findings regarding the DOC's action were adopted by the WTO, administrative action is needed to comply with this portion of the WTO decision. In February 2006, the United States and Mexico agreed on a compliance deadline of May 28, 2006.[286]

Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea (DS296). Korea requested consultations with the United States in June 2003 regarding U.S. agency determinations in a countervailing duty investigation involving dynamic random access memory semiconductors (DRAMS) from that country.[287] Following a final affirmative subsidy determination by DOC and a final affirmative injury determination by ITC, a countervailing duty order was issued in August 2003

---

[281] Request for the Establishment of a Panel by Mexico, *United States — Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/2 (Aug. 8, 2003).

[282] Panel Report, *United States — Anti-Dumping Measures on Oil Country Tubular Ggoods (OCTG) from Mexico*, WT/DS282/R (June 20, 2005).

[283] Notification of an Other Appeal by the United States, *United States — Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/7 (Aug. 19, 2005); regarding the Sunset Policy Bulletin, *see supra* note 230.

[284] Appellate Body Report, *United States — Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R (Nov. 2, 2005).

[285] Action by the Dispute Settlement Body, *United States — Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/10 (Dec. 2, 2005).

[286] Agreement under Article 21.3(b) of the DSU, *United States — Anti-Dumping Measures on Oil Country Tubular goods (OCTG) from Mexico*, WT/DS282/11 (Feb. 17, 2006).

[287] Request for Consultations by Korea, *United States — Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/1 (July 8, 2003).

directing that Customs collect cash deposits equal to a net subsidy rate of 44.29%.[288]

In its November 2003 panel request, Korea alleged violations of the GATT and the Agreement on Subsidies and Countervailing Measures (SCM Agreement). As noted earlier, under Article 1.1 of the Agreement, a subsidy will be "deemed to exist" where there is a "financial contribution by a government" (Art. 1.1(a)) and "a benefit is thereby conferred" (Art. 1.1(b)). Article 1.1(a)(1)(iv) provides that a financial contribution by a government occurs where a government "entrusts or directs a private body to carry out" a function that would be considered a financial contribution under the Agreement, such as granting loans, where the function "would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments." In addition, for a domestic subsidy to be countervailable, it must be specific to an industry (Arts. 1.2, 2).

Korea claimed that DOC had improperly determined that certain commercial financial institutions were under the direction or entrustment of the Government of Korea and therefore their loans to Korean producers were a financial contribution by the government; that DOC had failed to use market benchmarks in determining whether a benefit was conferred on Korean producer Hynix Semiconductor, Inc. in receiving the loans in question; that DOC had erroneously established that subsidies were specific to Hynix in that it had disregarded that similar debt restructuring had been undergone by many other Korean companies; and that ITC had improperly assessed the volume and price effects of the subject imports as well as the overall condition of the domestic industry, and had failed to demonstrate the required causal link between the subject imports and material injury.[289]

The February 2005 panel report found that DOC's final subsidy determination, ITC's final injury determination, and the countervailing duty order on DRAMS from Korea based on these determinations, were inconsistent with, as the case may be, Articles 1, 2 and 15.5 of the SCM Agreement.[290] The panel found that the United States had not shown entrustment or direction with respect to two groups of creditors for purposes of Article 1.1(a)(1)(iv), but that the United States had done so with respect to one private bank. The panel also found that DOC had not shown that a benefit was conferred on those companies that had received loans for purposes of Article 1.1(b) and that DOC had not shown that the subsidy was specific to the semiconductor industry under the criteria set out in Article 2 of the Agreement.

In addition, the panel found that it was not clear from the face of the ITC's injury determination "whether, or how, the ITC separated and distinguished the injury caused by ... slowing in the growth in demand from (a) the injury caused by the decline in demand inherent in the business cycle and more importantly, (b) the injury

---

[288] Notice of Countervailing Duty Order: Dynamic Random Access Memory Semiconductors (DRAMS) from the Republic of Korea, 68 Fed. Reg. 47546 (Aug. 11, 2003).

[289] Request for the Establishment of a Panel by Korea, *United States — Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/2 (Nov. 21, 2003).

[290] Panel Report, *United States — Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea,* WT/DS296/R (Feb. 21, 2005).

caused by subject imports" and that as a result the ITC had violated Article 15.5 of the SCM Agreement, which requires that domestic authorities not attribute to subsidized imports injury caused by other factors.[291]

The panel rejected Korea's claims that the United States had violated Article 2 of the SCM Agreement in finding that subsidies provided by one group of creditors were specific to an industry, and a variety of other claims under Article 15 of the Agreement regarding ITC's injury determination.

The United States appealed the panel's conclusions that DOC had improperly found that the Government of Korea had entrusted or directed two groups of creditors for purposes of Article 1.1(a)(1)(iv), challenging, inter alia, the panel's evidentiary standard and its standard of review.[292] The United States also appealed the panel's findings that DOC's benefit determination and the agency's finding of specificity regarding these two groups of creditors were inconsistent with the Agreement, inasmuch as these panel findings were based the allegedly erroneous panel determination regarding entrustment.[293] Korea appealed the panel's finding regarding entrustment or direction of one's private bank.[294] Neither the United States nor Korea appealed panel findings regarding the ITC.

The Appellate Body reversed the panel's findings that DOC's determination of governmental entrustment of the two groups of Hynix creditors, DOC's benefit determination, and DOC's finding of specificity as it related to the two groups of creditors were inconsistent with the SCM Agreement.[295] The Appellate Body and modified panel reports were adopted August 3, 2005, at which time the United States stated that it intended to comply but needed a reasonable period of time in which to do so.[296] The United States and Korea subsequently agreed on a compliance period ending March 8, 2006.[297]

---

[291] *Id.* at ¶ 7.368.

[292] Notification of an Appeal by the United States, *United States — Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, at 1-2, WT/DS296/5 (Apr. 1, 2005).

[293] *Id.* at 2-3. The United States also appealed the panel's legal conclusion that Korea's consultation request regarding the countervailing duty order sufficiently indicated the legal basis of the complaint for purposes of DSU requirements. *Id.* at 3.

[294] Notification of an Other Appeal by Korea, *United States — Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/6 (Apr. 11, 2005).

[295] Appellate Body Report, *United States — Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R (June 27, 2005).

[296] Dispute Settlement Body, *Minutes of Meeting*, Aug. 3, 2005, at 2, WT/DSB/M/195 (Sept. 6, 2005).

[297] Agreement under Article 21.3(b) of the DSU, *United States — Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/11 (Nov. 8, 2005).

On September 22, 2005, the ITC informed the USTR of the Commission's determination that Title VII of the Tariff Act permits it to take steps in connection with its action in the CVD investigation that would render its action not inconsistent with the WTO decision.[298] Following a request from USTR on October 14, 2005, the ITC instituted a proceeding under Section 129 of the Uruguay Round Agreements for the purpose of issuing a new injury determination.[299] Given the WTO ruling, the ITC stated that the only issue being addressed in the proceeding is "whether the Commission attributed to the subject imports any injury that may have been caused by declines in demand."[300] The ITC must issue its Section 129 determination no later than 120 days after the USTR's request was made

[298] *See* DRAMs and DRAM Modules from Korea, 70 Fed. Reg. 66848 (Nov. 3, 2005).

[299] *Id.*

[300] *Id.* at 66849.