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

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Summary

Although the United States has complied with adverse rulings in many past World Trade Organization (WTO) disputes, 10 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 resolved. 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.

The United States has not yet settled disputes with the European Communities (EC) involving a music copyright statute and a trademark provision affecting property confiscated by Cuba. H.R. 217 (Serrano) and H.R. 624 (Rangel) would repeal the trademark statute, as well as remove the current trade embargo on Cuba. Also unresolved is a dispute with Japan regarding a provision of U.S. antidumping law involving the calculation of dumping rates for producers and exporters who are not individually investigated. The WTO-inconsistent Continued Dumping and Subsidy Offset Act was repealed in P.L. 109-171, but antidumping and countervailing duties imposed on goods entered before October 1, 2007, may still be distributed to U.S. firms. Complainants EC, Canada, Japan, and Mexico, who had retaliated against selected U.S. products, have expressed concerns about the continued payments allowed under the new law; the EC and Japan are continuing to impose sanctions. P.L. 109-171 also repealed a WTO-inconsistent cotton program at issue in a dispute with Brazil over U.S. cotton subsidies; other U.S. programs were also faulted, and Brazil has since secured a compliance panel, whose report is expected in July 2007. The United States reported to the WTO in April 2006 that it had complied in Antigua and Barbuda's challenge of U.S. cross-border gambling measures by announcing an administrative clarification of U.S. law; a compliance panel subsequently requested by the complainant expects to issue a report in March 2007.

Four pending cases, each involving the imposition of antidumping or countervailing duties (CVDs), require administrative action under existing authorities. The cases involve CVDs on EC, antidumping duties on oil country tubular goods from Argentina and Mexico, and the Commerce Department's practice of "zeroing," under which it disregards non-dumped sales when calculating dumping margins. While the United States took administrative action in the first three cases, compliance panel proceedings were undertaken in each. With a compliance deadline of April 9, 2007, in the zeroing case, the Department of Commerce has announced that it will discontinue the practice in original investigations when applying its most commonly used price comparison methodology. The modification will apply to redeterminations in the specific antidumping proceedings at issue in the WTO case, as well as to all current and future antidumping investigations. Responding to congressional concerns, the Department announced on January 22, 2007, that it will delay the effective date of the modification until February 22, 2007. This report will be updated.

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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 the United States has taken action but the dispute is not, or does not appear to have been, definitively resolved. In some cases, original or subsequently extended compliance deadlines have expired; in others, the original deadline will lapse in 2007. 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 then lists pending WTO disputes in the compliance phase, with a brief discussion of major issues and the U.S. compliance history in each.

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

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[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 framework, 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 decisions that are subject to a "reverse consensus" rule under which the DSB agrees to the proposed action unless all DSB Members object. In effect, these 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

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[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]

The DSU provides that any suspension of concessions or other obligations is temporary and may only be applied by the prevailing Member until the WTO-inconsistent measure is removed, the defending Member provides a solution to any trade injury at issue, or a mutually satisfactory resolution of the dispute is reached.[4] Moreover, 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

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

[4] The DSU does not expressly set out a procedure for obtaining the removal of countermeasures, though Members may obtain a ruling on whether continued imposition is warranted either through a compliance panel or a new dispute settlement proceeding. The EC has complained against the United States and Canada for continuing to apply the increased tariffs on EC products that they had originally imposed in 1999 in response to the EC's failure to comply with a WTO decision faulting European Union (EU) import restrictions on beef produced with growth hormones, arguing that the EU had taken adequate compliance measures by adopting a new Directive on the matter in 2003. The panel has not yet issued its report. For a procedural history of the dispute, *see* Request for the Establishment of a Panel by the European Communities, *United States — Continued Suspension of Obligations in the EC-Hormones Dispute*, WT/DS320/6 (Jan. 14, 2005).

violations of WTO agreements.[5] 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.[6] 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.

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) accompanying 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."[7] 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"[8] Congress has traditionally treated potential conflicts with prior GATT agreements

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[5] 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).

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

[7] 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).

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

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."[9]

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.[10]

State Law. Where a 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 the law to the United States.[11] 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.[12]

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

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

[10] H.Rept. 103-826(I), at 25; *see also* S.Rept. 103-412, at 13, and the Uruguay Round SAA, *supra* note 7, at 1032-33. The latter states as follows:

> 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.

[11] In the current challenge by Antigua and Barbuda to both 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 157-181 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).

[12] For further discussion, see Uruguay Round SAA, *supra* note 7, at 676.

> 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.[13]

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 Uruguay Round agreements."[14] 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.[15] Any such suit by the United States is expected to be a rarity.[16]

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."

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[13] 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 7, at 674.

[14] S.Rept. 103-412, at 15; *see also* H.Rept. 103-826(I), at 25, and Uruguay Round SAA, *supra* note 7, at 670.

[15] 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).

[16] Uruguay Round SAA, *supra* note 7, 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 7, at 674.

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.

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.[17]

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."[18] 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.[19]

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

[18] Uruguay Round SAA, *supra* note 7, at 676.

[19] 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 Uzbekista*n, *supra*, at *3.

For discussions of the relationship of WTO decisions and U.S. administrative and judicial actions, see Dan Nichols, *Use of WTO Panel Decisions in Judicial Review of Administrative Action under U.S. Antidumping Law*, 1 Int'l L. & Mgmt. Rev. 237 (2005); 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*

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

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 congressional consultation and private sector advice requirements, the proposal has been published in the *Federal Register* with a request for public comment, and the final rule or other modification has been published in the *Federal Register*.[20] Section 123(g) does not apply to any regulation or practice of the U.S. International Trade Commission.

Regarding congressional consultation, the USTR is required to consult with "the appropriate congressional committees" regarding the proposed contents of the final rule or other modification. Along with the general condition stated above, § 123(g) provides that the final rule or other modification may not take effect until 60 days after the USTR has begun committee consultations, unless the President determines that an earlier effective date is in the national interest. The House Ways and Means Committee and the Senate Finance Committee may vote to indicate the disagreement

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[19] (...continued)
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, *and 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).

[20] The provision first came into play in 1996 when the United States took regulatory action to comply with the adverse WTO decision in *United States — Standards for Reformulated and Conventional Gasoline*, WT/DS2, WT/DS4. See World Trade Organization (WTO) Decision on Gasoline Rule (Reformulated and Conventional Gasoline), 61 Fed. Reg. 33703 (1996). The U.S. Court of Appeals for the District of Columbia Circuit upheld the final issued by EPA to resolve the dispute, finding, inter alia, that the agency was not statutorily precluded from considering factors other than air quality in issuing rules under the antidumping provision of the Clean Air Act and could thus consider the effect of the proposed rule on U.S. treaty obligations. George E. Warren Corp. v. U.S. Environmental Protection Agency, 159 F.3d 616 (D.C.Cir. 1998).

of the committee with the proposed action during the 60-day period. Any such vote is not binding on the agency or department involved.

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 under which the U.S. International Trade Commission (ITC) and the Department of Commerce (DOC) may issue new determinations in implementation of adverse WTO decisions involving U.S. safeguards, antidumping, and countervailing duty proceedings. Section 129 does not authorize the ITC and DOC to issue new determinations on their own motion, but instead grants the United States Trade Representative (USTR) the discretion to direct the agency to do so in a given case.

In antidumping and countervailing duty investigations, which are carried out under authorities in Title VII of the Tariff Act of 1930, the Department of Commerce (DOC) determines the existence and level of dumping or subsidization, as the case may be, and the ITC determines whether the dumped or subsidized imports cause material injury, or a threat of material injury, to domestic industries. Under U.S. safeguards law, set forth in Title II of the Trade Act of 1974, the ITC conducts investigations to determine whether or not increased imports, whether or not they are fairly traded, 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.

Implemented Section129 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).[21] Chapter 19 panels are available to review final agency determinations in antidumping and countervailing duty investigations involving NAFTA countries in lieu of judicial review in the country in which the determination is made.

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[21] 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).

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 7, at 1027.

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, the Agreement on Subsidies and Countervailing Measures, 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.[22]

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.[23] 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.[24]

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.[25] The new determination must be issued within 120 days of the USTR's request.[26] The time limitation is intended to allow the USTR to propose a reasonable period of time for implementation to the WTO once a panel and any appellate report is adopted.[27]

Further Action in Antidumping and Countervailing Duty Proceedings. If the ITC issues a new negative injury or threat of injury determination and the antidumping or countervailing duty order must thus be revoked in whole or in part because it is no longer supported by an affirmative ITC determination, the USTR is authorized to direct DOC to revoke the order to the extent needed.[28] The USTR must consult with the House Ways and Means and Senate Finance Committees before the ITC's new determination is implemented.[29]

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

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

[24] Uruguay Round SAA, *supra* note 7, at 1023.

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

[26] 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 Uruguay Round SAA explains that "[m]any of the ITC's proceedings are time-limited by statute, and the ITC cannot revisit its actions in those proceedings in the absence of the authority provided by subsection (a)(4) or a remand." Uruguay Round SAA, *supra* note 7, at 1024.

[27] *Id.*

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

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

Section 129(c)(1) provides that determinations that are implemented under this authority apply prospectively, that is, 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.[30] Notices of the implementation of Section 129 determinations must be published in the *Federal Register*.[31]

The Uruguay Round SAA explains the operation of § 129(c)(1), which sets an implementation date both for ITC and DOC determinations, 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.[32]

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.[33] The President is required to consult with the House Ways and Means Committee and Senate Finance Committee before acting under this authority.[34] The USTR must publish a notice of the implementation of any ITC determination in the *Federal Register*.[35]

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

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[30] 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].

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

[32] Uruguay Round SAA, *supra* note 7, at 1026. See also H.Rept. 103-826(I), at 39; S.Rept. 103-412, at 27.

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

[34] Id.

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

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.[36] DOC must issue a determination within 180 days of the request.[37]

After consulting with DOC and the above-named congressional committees, USTR may direct DOC to implement its determination in whole or in part.[38] As is the case with implemented ITC determinations, DOC determinations under § 129 also apply prospectively, that is, 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 implement the determination.[39]

Legal Challenges to § 129 of the URAA. Canada unsuccessfully challenged § 129(c)(1) in a WTO dispute settlement proceeding, where it argued that the provision violated the WTO Dispute Settlement Understanding and various WTO antidumping and countervailing duty obligations in effectively prohibiting the United States from refunding estimated duties deposited with Customs and Border Protection — that is, duties on entries that were unliquidated at the time the Section 129 determination was implemented or the antidumping or countervailing duty order revoked — in the event a determination in the underlying investigation had been found to be inconsistent with WTO obligations.

In response, the United States maintained that § 129(c)(1) addresses only the treatment of imports entered after the implementation date and does not govern the treatment of prior entries for which final duties have not yet been calculated, referred to in the dispute as "prior unliquidated entries." The United States further argued that, as such, the statute does not mandate any particular treatment of prior unliquidated entries and that the United States has other legal options for dealing with these entries, including establishing a new dumping or subsidy margin by using a WTO-consistent methodology in an administrative review of the entries or, in the event the duty order or orders were revoked as a result of the WTO proceeding,

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[36] 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.

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

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

[39] URAA, § 129(c)(1), 19 U.S.C. § 3538(c)(1).

revising the duty rate in response to a domestic court decision involving the earlier entries.[40]

In a report issued in July 2002, the WTO panel concluded that Canada failed to establish that the statute either required WTO-inconsistent action on the part of the United States or precluded the United States from taking action in accordance with its WTO obligations.[41] Canada did not appeal, and the panel report was adopted by the DSB in late August 2002.

Canada and Canadian lumber producers subsequently challenged the Administration's use of an affirmative threat of injury determination rendered by the ITC under § 129 to maintain antidumping and countervailing duty orders on softwood lumber imports from Canada, notwithstanding the existence of an earlier "no threat" determination issued by the ITC at the direction of the NAFTA binational panel. In January 2005, plaintiffs filed suit in the U.S. Court of International Trade (USCIT) arguing that the USTR's order to DOC to implement the new ITC Section 129 determination was *ultra vires* (i.e., beyond the scope of USTR's authority under the statute). Plaintiffs argued that § 129 authorizes the USTR to order only the *revocation* of an AD or CVD order in response to a new negative ITC determination, and thus, where a new determination does not legally undermine an existing order, no further administrative action is authorized.

On July 21, 2006, the USCIT ruled in *Tembec, Inc.* v. *United States* that the USTR was not authorized to issue the order to DOC to implement the ITC's affirmative Section 129 determination and that, as a result, the May 2002 antidumping and countervailing duty orders on softwood lumber were not supported by an affirmative finding of injury or threat thereof, a requirement for imposing and collecting such duties.[42] In a subsequent decision on remedies, the court ruled that all unliquidated softwood entries were to be liquidated in accordance with the final negative decision of the NAFTA injury panel and thus without the imposition of the duties.[43]

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[40] Second Written Submission of the United States, *United States — Section 129(c)(1) of the Uruguay Round Agreements Act*, ¶¶ 17-20, WT/DS221 (Mar. 8, 2002), available at [http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file327_6455.pdf].

[41] Panel Report, *Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R (July 15, 2002).

[42] Tembec, Inc. v. United States, 441 F.Supp.2d 1302 (Ct. Int'l Trade 2006), *available at* [http://www.cit.uscourts.gov/slip_op/Slip_op06/06-109.pdf].

[43] Tembec, Inc. v. United States, Consol. Ct. No. 05-00028, slip. op 06-152 (Ct. Int'l Trade Oct. 13, 2006), at [http://www.cit.uscourts.gov/slip_op/Slip_op06/06-152.pdf]. The United States retroactively revoked the antidumping and countervailing duty orders on October 12, 2006, the effective date of the 2006 U.S-Canada Softwood Lumber Agreement (2006 SLA) and the day before the court's decision. Also on October 12, Canada had stipulated to the dismissal of its complaint in the USCIT proceeding and the United States filed a motion to dismiss on the ground that retroactive revocation and liquidation in accordance with the revocation rendered the action moot. The United States subsequently asked the court to (continued...)

Implementation of WTO Rulings in Pending Cases

Six WTO dispute proceedings that involve federal statutes are in the compliance phase — 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.[44] At issue are challenges to

- § 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 who are not individually investigated by the Commerce Department;
- the now repealed Continued Dumping and Subsidy Offset Act (CDSOA), which required the distribution of collected antidumping and countervailing duties to petitioners and interested parties in the underlying trade proceedings, and whose repeal legislation mandates the distribution of duties on goods entered through September 30, 2007;
- 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.

Four 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 European Union steel companies;

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[43] (...continued)
vacate its October 13 decision; Canada and Canadian producers have opposed the granting of this later motion. *U.S., Canada Lumber Groups Oppose Dismissal of NAFTA Case*, Inside U.S. Trade, Dec. 1, 2006, at 8, 9. The case is still in litigation. For further discussion this case and the previously discusssed WTO proceeding involving § 129, see CRS Report RL33752, *Softwood Lumber Imports from Canada: Issues and Events*, by Ross W. Gorte and Jeanne J. Grimmett.

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

- the implications of waiving participation in sunset (five-year) reviews of antidumping orders;
- DOC findings in a sunset review that dumping was likely to continue or recur if the antidumping order were revoked; and
- use of the practice of "zeroing" (i.e., the exclusion of non-dumped sales) by DOC in determining dumping margins in antidumping investigations and reviews of existing antidumping orders.

In the second 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 has only taken regulatory action to comply.

One longstanding dispute, *United States — Tax Treatment for "Foreign Trade Income"* (DS108), was settled in 2006 with the enactment of a legislation in May 2006 and the subsequent termination of sanctions that had been imposed by the EC on U.S. products but that were suspended at the time.[45] The new statute, P.L.109-222, § 513(b), repealed a "grandfather" provision in the American Jobs Creation Act, (AJCA), P.L. 108-357. Section 101 of the AJCA had repealed a tax benefit for export income that had been ruled to be WTO-inconsistent, but did so with an overall two-year transition period for the phaseout of the benefit, as well as a "grandfather" provision that continued 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. The EC formally discontinued the sanctions, even though the two-year transition period remained in force, noting that full compliance would be achieved with the expiration of the transition provision at the end of 2006.[46]

In addition, three pending proceedings brought by Canada challenging U.S. agency actions in antidumping and countervailing duty investigations involving Canadian softwood lumber were settled by the United States and Canada in October 2006 as part of the U.S.-Canada Softwood Lumber Agreement.[47] The United States

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[45] See Dispute Settlement Body, *Minutes of Meeting*, May 17, 2006, at 18, WT/DSB/M/212 (June 20, 2006).

[46] Id. 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; CRS Report RL32652, *The 2004 Corporation Tax and FSC/ETI Bill: the American Jobs Creation Act of 2004*, 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.

[47] The cases were *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* (DS257); *United States — Final Dumping Determination on Softwood Lumber from Canada* (DS264); *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada* (DS277). For (continued...)

also reported to the DSB in March 14, 2006, that it had complied in Korea's challenge to the U.S. countervailing duty order on dynamic random access memory semiconductors from that country (DS296) with the issuance of a new determination by the International Trade Commission in February 2006 in which the Commission, elaborating on its earlier analysis regarding the effects of a decline in the rate of growth in demand and addressing the panel's concerns regarding nonattribution to subject imports of any effects that may have been caused by the decline, continued to find material injury.[48] Although Korea stated at the March 2006 DSB meeting that the United States had not fully implemented the WTO ruling,[49] it has not raised the issue in subsequent meetings.[50]

Pending Cases Involving Legislative Action

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 establishments meet certain size limitations or equipment requirements.[51] 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.

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[47] (...continued)
further discussion, see CRS Report RL33752, *Softwood Lumber from Canada: Issues and Events*, by Ross. W. Gorte and Jeanne J. Grimmett.

[48] Dispute Settlement Body, *Minutes of Meeting*, Mar. 14, 2006, at 7, WT/DSB/M/206 (Apr. 4, 2006)[hereinafter *DSB Minutes* (Mar. 14, 2006)]; see U.S. Int'l Trade Comm'n, *DRAMs and DRAM Modules from Korea; Investigation No. 701-TA-431 (Section 129 Consistency Determination)*(Feb. 2006)(Pub. 3839).

[49] *DSB Minutes* (Mar. 14, 2006), *supra* note 48, at 8

[50] The ITC material injury determination was also challenged by the Korean producer Hynix in the U.S. Court of International Trade. In December 2006, the court sustained an ITC determination submitted on remand in which the Commission, again directed to address the issue of decline in demand, continued to find material injury to the U.S. industry from subsidized Korean imports. Hynix Semiconductor, Inc. v. United States, No. 03-00652, 2006 WL3924180 (Ct. Int'l Trade Dec. 7, 2006); see also Hynix Semiconductor, Inc. v. United States, 431 F.Supp.2d 1302 (Ct. Int'l Trade 2006).

[51] 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.

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).[52] 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.[53] 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 into full compliance in the case.[54] The EC regularly raises the issue of U.S. noncompliance at DSB meetings, noting that it has reserved its right to reactivate the

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[52] 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.*

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

[54] Dispute Settlement Body, *Minutes of Meeting*, Nov. 24 and 26, 2004, at 7, WT/DSB/M/178 (Jan. 17, 2005). The continued existence of the provision is also routinely cited in the European Union's annual report on US. trade barriers. E.g., European Commission, *Report on United States Barriers to Trade and Investment 2005* at 69, 90 (Mar. 2006), at [http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc_127632.pdf]. See also European Commission, Directorate-General for Trade, *General Overview of Active WTO Dispute Settlement Cases Involving the EC as Complainant or Defendant, 01 December 2006*, at 18, at [http://trade.ec.europa.eu/doclib/docs/2006/november/tradoc_129465.pdf].

arbitration on its retaliation request at any time,[55] while the United States continues to report to the DSB that it is working with Congress on the matter.[56]

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.[57]

Recent developments. The original compliance period, as agreed upon by the United States and the EC, expired December 31, 2002; it was extended four times, also by agreement, most recently to June 30, 2005.[58] 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 entered into an agreement with the United States regarding rights and procedures involving any future EC retaliation request.[59] The EC agreed not to request authorization from the DSB to suspend concessions for the time being, but has pledged to notify and consult with the United States before making any such request in the future. 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.

As the EC and Cuba continue to raise the issue of U.S. noncompliance at recent DSB meetings,[60] the United States has regularly reporting to the DSB that legislative proposals related to § 211 have been introduced in the House and Senate and that it is working with the Congress "with respect to appropriate statutory measures that

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[55] E.g., Dispute Settlement Body, *Minutes of Meeting*, Sept. 28, 2006, at 5-6, WT/DSB/M/220 (Nov. 2, 2006)[hereinafter *DSB Minutes* (Sept. 28, 2006)].

[56] E.g., id. at 4; see also Status Report by the United States, Addendum, *United States — Section 110(5) of the US Copyright Act*, WT/DS160/24/Add.25 (Jan. 12. 2007).

[57] 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.

[58] 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).

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

[60] E.g., *DSB Minutes* (Sept. 28, 2006), *supra* note 55, at 2-3. Cuba and other WTO Members have also made note of U.S. non-compliance. Id. at 3-4.

would resolve this matter."[61] A number of bills either repealing or amending the provision were introduced in the 109th Congress.[62] H.R. 217 (Serrano), introduced January 2, 2007, and H.R. 624 (Rangel), introduced January 22, 2007, would repeal § 211, as well as remove the current trade embargo on Cuba.

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.[63] 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.[64]

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[61] See, e.g., the most recent status report submitted by the United States to the DSB regarding the dispute, Status Report by the United Status, Addendum, *United States — Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/11/Add.50 (Jan. 12, 2007).

[62] Two 109th Congress bills would have amended § 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]). See 151 Cong. Rec. S3153 (daily ed. Apr. 4, 2005)(remarks of Mr Domenici). Two other 109th Congress bills would have repealed the provision (H.R. 3372 [Flake] and S. 1604 [Craig]). S. 328 (Craig) and H.R. 719 (Moran) would have repealed § 211 along with enacting various Cuba-related trade facilitation provisions. An amendment to S. 600, foreign relations authorization legislation for FY2006 and FY2007, would have done the same (S.Amdt. 281 [Baucus]). Other 109th Congress legislation would have repealed § 211 along with removing the current trade embargo on Cuba (H.R. 208 [Serrano]; H.R. 579 [Paul]). No action was taken on any of the legislation. 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/hearing.cfm?id=1261] for witness lists, testimony and Members statements.

[63] 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 AB Report].

[64] Hot-Rolled Steel AB Report, *supra* note 63, at ¶ 235-236.

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.[65]

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" [66] 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."[67] 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 ...."[68]

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[65] 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, 2002, at 13. No action has been taken by the ITC in response to the WTO decision.

[66] 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).

[67] Hot-Rolled Steel Panel Report, *supra* note 77, at ¶¶ 7.91-7.120, Hot-Rolled Steel AB Report, *supra* note 63, ¶¶ 131-173.

[68] Modification of Antidumping Methodology, *supra* note 70, 67 Fed. Reg. at 69186. The (continued...)

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.'"[69] 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.[70]

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.[71] 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."[72] 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

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[68] (...continued)
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.

[69] *Id.*

[70] *Id.*

[71] 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).

[72] 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.

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."[73] Section 776 of the Tariff Act governs the use of facts available by the DOC and ITC in making dumping, subsidy, and injury determinations.[74] The WTO panel, as affirmed on appeal, 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.[75]

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.[76] 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.[77]

H.R. 2473 (Shaw), introduced in the 109th Congress, would have amended § 735(c)(5) of the Tariff Act of 1930 to remove the word "entirely" each time it appears in the provision. Although the text of H.R. 2473 was listed for possible

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[73] (Emphasis added).

[74] 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 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).

[75] Emphasis added. See Hot-Rolled Steel Panel Report, *supra* note 63, at ¶¶ 7.83-7.90, 8.1(b); Hot-Rolled Steel AB Report, *supra* note 63, ¶¶ 111-130.

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

[77] 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.

inclusion in 109th Congress miscellaneous tariff legislation,[78] the bill was neither made part of the latter nor acted upon as stand-alone legislation.

Japan continues to seek legislative action on the issue,[79] as the United States continues to state its support for legislative amendments that would achieve full compliance in the case.[80] At the same time, the United States has submitted a proposal to the Doha Round Negotiating Group on Rules that the WTO Antidumping Agreement be clarified to allow the invalidated practice.[81]

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, required the annual disbursement of antidumping and countervailing duties to petitioners and interested parties in the underlying trade remedy proceedings.[82] 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

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[78] 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].

[79] E.g., *DSB Minutes* (Sept. 28, 2006), *supra* note 55, at 5.

[80] Id.; Status Report by the United States, Addendum, *United States — Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/15/Add.50 (Jan. 12, 2007).

[81] *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 [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.*

[82] For more detailed examination of the statute and additional discussion of the WTO proceeding, see CRS Report RL33045, *The 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).

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.[83]

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 constituted a subsidy in and of itself.[84] 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.[85] The reports were adopted January 27, 2003, and the compliance period was subsequently determined by arbitration to expire December 27, 2003.[86]

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.[87] The United States objected to the requests, sending them to arbitration.[88] The remaining three complainants — Australia, Indonesia, and Thailand — agreed to give the United States until December 27, 2004, to comply.[89]

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[83] 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.

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

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

[86] Award of the Arbitrator, *United States — Continued Dumping and Subsidy Offset Act of 2000*; WT/DS217/14, WTDS234/22 (June 13, 2003). The arbitrator emphasized in his award that it is for the United States to decide on the manner of implementation, which may be through repeal or modification of the law. Id. ¶ 50.

[87] 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).

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

[89] See WTO documents WT/DS217/17 (Thailand); WT/DS217/18 (Australia); and (continued...)

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.[90] The Arbitrator stated that the disbursements "operate, in economic terms, as subsidies that may generate import substitution production"[91] 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.[92] 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.

The eight complainants received formal authorization from the DSB to impose retaliatory measures in late 2004.[93] 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.[94] Mexico began to impose $20.9 million

[89] (...continued)
WT/DS217/19 (Indonesia).

[90] 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).

[91] *Id.* at ¶ 3.41.

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

[93] Absent action to repeal or modify the statute by December 27, 2004, the compliance deadline agreed to by Australia, Indonesia, and Thailand, the three Members entered into entered into new agreements with the United States in which they reserved the right to take further action against U.S. goods in the future. See WTO documents WT/DS217/44 (Australia), WT/DS217/45 (Thailand), and WT/DS217/46 (Indonesia).

[94] 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).

in retaliatory tariffs effective August 18, 2005.[95] In addition, Japan imposed additional tariffs of 15% on 15 categories of U.S. goods as of September 1, 2005.[96]

Recent developments. A provision repealing the CDSOA, but providing for the distribution of "duties on entries of goods made and filed before October 1, 2007," was enacted in the Deficit Reduction Act of 2005, signed by the President on February 8, 2006 (P.L. 109-171).[97] While the United States informed the WTO that

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[95] "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.

The official Mexican Government notice stated that the tariff decree would remain in effect for 12 months and that it would no longer apply when the Ministry of the Economy placed a notice in the *Diario Oficial* that the United States has complied with the WTO decision, at which time tariffs would return to their original rates. Decreto, *supra*, "Transitorios."

[96] 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 would not exceed $52 million, which, it stated, was the amount authorized by the WTO based on the amount of CDSOA disbursements involving Japanese goods in fiscal 2004. METI Press Release, *supra.*

[97] The repeal, contained in § 7601(a) of the Act, is to be effective "upon the date of enactment." Section 7701 of the Act provides that Title VII, which contains the CDSOA-related provisions, "shall take effect as if enacted on October 1, 2005." The provision for future duty distributions, set forth at § 7601(b), 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).

At the same time Congress again directed the Commerce Department and USTR 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, which became law November 22, 2005, marking the third time that such a requirement has appeared in statute. 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

(continued...)

it had taken the actions necessary to implement the WTO rulings, and complaining Members expressed support for the repeal, Members also stated their concerns that the provision requiring the continued distribution of duties through 2007 and possibly afterward would prevent the United States from complying fully with its WTO obligations in the case.[98]

In April 2006, the U.S. Court of International Trade ruled that the CDSOA did not apply to imports from Canada or Mexico,[99] and on September 28, 2006, Customs and Border Protection announced that it was withholding FY2006 and subsequent years' distributions on imports from the two countries pending the outcome of any appeal.[100]

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[97] (...continued)

> 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" ....

As noted earlier, the USTR had submitted a proposal regarding the recognition of a right to distribute antidumping and countervailing duties to the Doha Round Negotiating Group on Rules in 2004. See *supra* note 95.

[98] Dispute Settlement Body, *Minutes of Meeting*, Feb. 17, 2006, at 5-10, WT/DSB/M/205 (Mar. 31, 2006) [hereinafter *DSB Minutes* (Feb. 17, 2006)].

[99] Canadian Lumber Trade Alliance v. United States, 425 F.Supp.2d 1321 (Ct. Int'l Trade 2006). Canada and Canadian industry groups had challenged CDSOA distributions based on goods from Canada, arguing that, because of a provision in the NAFTA Implementation Act stating 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, the CDSOA, in not expressly referring to Canada, did not apply to imports of Canadian products. The provision is set out at P.L. 103-182, § 408, 19 U.S.C. § 3438. While ruling that Canada did not have standing to sue in the case, the USCIT agreed with industry plaintiffs that the statutory provision applied to the CDSOA, which is contained in Title VII of the 1930 act along with authorities for U.S. antidumping and countervailing duty investigations. Since the CDSOA did not refer either to Canada or Mexico, the court ruled that imports from both countries were exempt. On July 14, 2006, the court permanently enjoined CBP from making any CDSOA payments to the extent they derive from duties imposed on softwood lumber and two other Canadian products. Canadian Lumber Trade Alliance v. United States, 2006 WL 2168520 (Ct. Int'l Trade July 14, 2006), at [http://www.cit.uscourts.gov/slip_op/Slip_op06/06-48.pdf]; see also *CIT Issues Permanent Injunction On Some Byrd Amendment Distributions*, 23 Int'l Trade Rep. (BNA) 1108 (July 20, 2006).

Canadians had been concerned that antidumping and countervailing duties collected on softwood lumber imports, which had at the time of the suit totaled over $4 billion and whose underlying duty orders had been heavily litigated by Canada, might eventually be distributed to U.S. lumber producers. For further information on the U.S.-Canada softwood lumber dispute, which was settled in 2006, see CRS Report RL33752, *Softwood Lumber Imports from Canada: Issues and Events*, by Ross W. Gorte and Jeanne J. Grimmett.

[100] Notice of Withholding of Certain Distributions on Continued Dumping and Subsidy Offset to Affected Producers, 71 Fed. Reg. 57000 (Sept. 28, 2006).

Canada allowed its retaliatory tariffs to terminate as of April 30, 2006,[101] and Mexico, after a month's lapse, imposed increased tariffs on U.S. dairy products from September 18 through October 31, 2006.[102] The EC and Japan are continuing to impose sanctions are U.S. products.[103] Complaining Members also regularly state at DSB meetings that in prospectively repealing the statute the United States has not adequately complied with its WTO obligations in the case.[104]

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 Agreement on Subsidies and Countervailing Measures (SCM Agreement), the Agreement on Agriculture, and national treatment obligations in the GATT,[105] adding in its subsequent panel request in February 2003 a claim based on subsidy obligations in GATT Article XVI.[106]

Members have made commitments in the WTO Agreement on Agriculture to reduce, and in some cases eliminate, domestic support programs in favor of agricultural producers and export subsidies on agricultural products. A Member's commitments are listed in a Schedule that is attached to the Agreement.[107] The Agreement as a whole applies to products listed in Annex I of the Agreement.

Article 6 of the Agriculture Agreement sets out obligations regarding Members' domestic support reduction commitments, with Annex 2 of the Agreement setting out criteria for domestic measures that are not subject to such commitments. The commitments are expressed in terms of Total Agreement Measurement of Support (AMS) and Annual and Final Bound Commitment Levels. A Member will be considered to be in compliance with its domestic support reduction commitments in any year in which its domestic support for agricultural producers expressed in terms of Current Total AMS does not exceed the corresponding annual or final bound

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[101] Canada's tariff surcharge expired April 30, 2006 and was not renewed. See Canada, Dept. of Foreign Affairs and International Trade, *Dispute Settlement: Questions and Answers - Expiration of Retaliatory Measures*, at [http://www.dfait-maeci.gc.ca/tna-nac/disp/byrdqa-en.asp].

[102] *U.S. Dairy Industry Expects Hit from Short-term Mexican Byrd Retaliation*, Inside U.S. Trade, October 6, 2006; *DSB Minutes* (Sept. 28, 2006), *supra* note 55, at 9.

[103] Communication from the European Communities, *United States — Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/49 (May 2, 2006); Communication from Japan, *United States — Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/50 (Aug. 24, 2006).

[104] E.g., Dispute Settlement Body, *Minutes of Meeting*, Oct. 26, 2006, at 10-12, WT/DSB/M/221 (Dec. 2, 2006); *DSB Minutes* (Sept. 28, 2006), *supra* note 55, at 8-11.

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

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

[107] Agreement on Agriculture, Art. 3.1.

commitment level specified in its Schedule. Members agree in Article 3.2 of the Agreement not to provide support in favor of domestic producers in excess of the these specified commitment levels.

Article 9.1 expressly lists export subsidies that are subject to reduction commitments under the Agreement. Members agree in Article 3.3 not to provide Article 9.1 subsidies regarding agricultural products or groups of products specified in the Member's Schedule ("scheduled products") in excess of the budgetary outlay and quantity commitments specified in the Schedule.[108] 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").[109] 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...."

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).[110] 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

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[108] Agreement on Agriculture, Art. 3.3.

[109] *Id.*

[110] 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).

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 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.

[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.

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 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

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[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.

Agreement on Agriculture, the United States was entitled to a reasonable period to comply with the latter.[140]

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

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[140] *Id.*

[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

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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] The agreement also provides that Brazil may request an Article 21.5 compliance panel at any time after the July 15 meeting.

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.

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[146] (...continued)
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 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).

As part of the congressional budget reconciliation process, the Senate Agriculture Committee, on October 19, 2005, approved legislation repealing the Step 2 program, effective August 1, 2006; a repeal provision was also approved by the House Agriculture Committee on October 28, 2005.[153] Repeal of the Step 2 program, effective August 1, 2006, was ultimately enacted in § 1103 of P.L. 109-171, the Deficit Reduction Act of 2005, signed by the President on February 8, 2006. [154]

Brazil requested a compliance panel in August 2006, claiming WTO violations stemming from the U.S. failure to repeal the Step 2 program as of the implementation period (i.e., September 21, 2005), the continued existence of the marketing loan and counter-cyclical payments programs, and continued WTO-related defects in the export credit guarantee programs at issue in the case.[155] The panel was established September 28, 2006, and expects to issue its report in July 2007.[156]

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[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] For further information on U.S. actions taken in response to the WTO decision, see CRS Report RS22187, *U.S. Agricultural Policy Response to WTO Cotton Decision*, by Randy Schnepf.

[155] Request for the Establishment of a Panel, Recourse to Article 21.5 of the DSU by Brazil, *United States — Subsidies on Upland Cotton*, WT/DS267/30 (Aug. 21, 2006).

In its panel request, Brazil states that entry into effect of the Step 2 program after the compliance deadline resulted in the lack of a U.S. compliance measure in the interim and cites the failure of the United States to take any measures involving the U.S. marketing loan and counter-cyclical payments programs under the Farm Security and Rural Investment Act of 2002. Brazil claims that as a result the United States has not removed the adverse effects of or withdrawn the subsides as required by the WTO decision. The continued existence of the programs, Brazil alleges, has caused two adverse effects — significant price suppression in the world market for upland cotton and an increase in the U.S. share in the world market for upland cotton in marketing year 2005 — each of which constitute "serious prejudice" for purposes of Article 6.3 of the SCM Agreement. Brazil further argues that even with the repeal of the Step 2 program the adverse effects resulting from the existence of the other two programs continue.

Regarding the export credit guarantee (ECG) programs, Brazil claims that the United States has not fully withdrawn the prohibited subsidies related to these programs as called for by the WTO decision and as a result maintains prohibited export subsidies in violation of the Agreement on Agriculture and the SCM Agreement. Brazil argues the GSM102 and Supplier Credit Guarantee programs fulfil the definition of an export subsidy for purposes of the SCM Agreement, and moreover fail to impose premium rates sufficient to cover the long-term operating costs of the programs for purposes of the Illustrative List of Export Subsides contained in the SCM Agreement. Brazil also argues that the ECGs under the programs have been applied to circumvent U.S. export subsidy commitments for purposes of Article 10 of the Agreement on Agriculture, citing concerns that ECGs have been provided after July 1, 2005, the deadline for removing the prohibited export subsidies, to support the export of upland cotton and other agricultural products in excess of U.S. reduction commitments levels for those products.

[156] Communication from the Chairman of the Panel, Recourse to Article 21.5 of the DSU by Brazil, *United States — Subsidies on Upland Cotton*, WT/DS267/32 (Jan. 11, 2007).

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).[157] 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.[158] The panel then found that three federal 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);[159] the state laws were those of Louisiana, Massachusetts, South Dakota,

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[157] 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).

[158] 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 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.

[159] 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. §

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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.[160]

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.[161] Though the AB upheld the panel's finding of a violation of GATS market access obligations,[162] it reversed the panel on its finding that the United States could not justify the federal measures under GATS exceptions.[163] 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.[164]

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[159] (...continued)
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.

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

[161] 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].

[162] 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.* ¶¶ 238, 251.

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

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

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.[165] 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.[166]

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.[167] 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.[168] 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.[169] 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.[170]

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[165] 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).

[166] *Id.* ¶¶ 338-372, 373(v),(vi).

[167] 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.

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

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

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

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."[171] The AB concluded that the panel did not err in making this finding.

The Appellate Body report and the panel report, as modified by the AB, were adopted April 20, 2005.[172] 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.[173]

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.[174] 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 legislation."[175] The United States sought a 15-month compliance period, stressing that such legislative action would be "technically complex."[176] In an award

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[171] Id. ¶ 364 (emphasis in original).

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

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

[174] 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).

[175] 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].

[176] The United States argued as follows regarding the nature of the foreseen legislative action:

> ... 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.
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> ... 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

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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.[177]

Legislative action was not taken before the deadline; instead, the United States reported to the DSB that it had complied in the case based on the position of the Department of Justice (DOJ) regarding remote gambling on horse racing, articulated as follows in April 5 DOJ testimony before a House committee:

> The Department of Justice views the existing criminal statutes as prohibiting the interstate transmission of bets or wagers, including wagers on horse races. The Department is currently undertaking a civil investigation relating to a potential violation of law regarding this activity. We have previously stated that we do not believe that the Interstate Horse Racing Act, 15 U.S.C. §§ 3001-3007, amended the existing criminal statutes.[178]

Antigua disagreed that the United States was in compliance, and in May 2006, the parties entered into a procedural agreement regarding the possible seeking by Antigua of a compliance panel and countermeasures in the case.[179] Antigua requested

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[176] (...continued)
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.

Id. at 5-7.

[177] 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)

[178] Status Report by the United States, Addendum, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/15/Add.1 (Apr. 11, 2006). See Statement of Testimony of Bruce G. Ohr, Chief, Organized Crime and Racketeering Section, Criminal Division, U.S. Department of Justice, Before the Committee of the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, U.S. House of Representatives, Concerning H.R. 4777. the "Internet Gambling Prohibition Act," Presented on April 5, 2006, at 2, at [http://judiciary.house.gov/media/pdfs/ohr040506.pdf].

[179] Agreement between Antigua and Barbuda and the United States Regarding Procedures under Articles 21 and 22 of the DSU, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/16 (May 26, 2006). Note also (continued...)

a compliance panel in July 2006, claiming that the United States had failed to bring the Wire Act, the Travel Act and the Illegal Gaming Business Act into conformity with U.S. GATS obligations and that then-pending legislation — H.R. 4777 and H.R. 4411 — was "expressly contrary " to the WTO ruling in that each bill "would further institutionalise the discriminatory effect" of the three cited statutes. It also questioned whether the DOJ statement was a "measure" or a "measure taken to comply" for purposes of the DSU, noting that the position had been maintained by the United States during the course of the dispute and was later rejected by the panel and Appellate Body. It further argued that regardless of the nature of the DOJ statement for purposes of the DSU, the United States remained out of compliance with the GATS because of, *inter alia*, the existence of reasonable technical alternatives to prohibitions on remote gambling and betting services and governmental enforcement problems regarding domestic and cross-border service providers.[180] The compliance panel was established July 19, 2006, and expects to issue a report in March 2007.[181]

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[179] (...continued)
Dispute Settlement Body, *Minutes of Meeting*, April 21, 2006, at 8-10, WT/DSB/M/210 (May 30, 2006)

[180] Request for the Establishment of a Panel, Recourse to Article 21.5 of the DSU by Antigua and Barbuda, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/18 (July 7, 2006). Antigua also made separate arguments regarding the inconsistency of the then-pending bills with U.S. GATS obligations, faulting in particular their exclusions for transactions made in accordance with the Interstate Horseracing Act (IHA), intrastate transactions, and remote gambling conducted by Native American tribes in accordance with existing federal laws applicable to Native American gaming.

In October 2006, the President signed into law the SAFE Port Act, which contains an Internet gambling title that generally following the House-reported language of H.R. 4411. Unlawful Internet Gambling Enforcement Act (UIGEA), P.L. 109-437, Title VII. The statute prohibits gambling business from accepting checks, credit cards, electronic transfers and similar forms of payment in connection with illegal Internet gambling, while exempting intrastate and intratribal Internet gambling operations that include age and location verification requirements imposed as a matter of law. The legislation also leaves unresolved questions as to the extent to which the Interstate Horseracing Act restrains the reach of other federal statutes. For further information, see CRS Report RS22418, *Internet Gambling: Two Approaches in the 109th Congress*, by Charles Doyle; CRS Report 97-619 A, *Internet Gambling: Overview of Federal Criminal Law*, by Charles Doyle; CRS Report RS21984, *Internet Gambling: An Abridged Overview of Federal Criminal Law*, by Charles Doyle.

The United States has argued in the compliance proceeding case that the UIGEA is not within the terms of reference of the compliance panel and, noting that the new statute "prohibits certain financial transactions associated with activities already deemed illegal under existing state or federal laws," that the legislation "is not instructive as to whether the United States has made its showing that the IHA does not exempt domestic suppliers of betting on horse racing from the prohibition in U.S. criminal laws." Second Written Submission of the United Stated before the World Trade Organization, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, *Recourse to Article 21.5 of the DSU by Antigua and Barbuda*, Nov. 13, 2006, at 13-16, at [http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTODispute_Settlement_Listings/asset_upload_file354_5581.pdf].

[181] Communication from the Chairman of the Panel, Recourse to Article 21.5 of the DSU by
(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 involving steel or stainless steel products to determine whether a countervailable subsidy existed subsequent to the privatization of a firm. The 12 cases cited by the EC included 6 original CVD investigations, 2 administrative reviews of the CVD orders, and 4 sunset reviews (i.e., statutorily mandated five-year reviews) of the orders. 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.[182] 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

[181] (...continued)
Antigua and Barbuda, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/20 (Dec. 21, 2006).

[182] 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.[183] 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.

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[183] 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.[184] 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.[185] 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.[186]

Following a U.S. appeal, the Appellate Body (AB) 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.[187] The AB stated that it agreed with both the United States and the EC that § 771(5)(F) does not dictate any particular methodology and thus "as such, does not prevent the USDOC from determining whether a 'benefit' continues to exist, as required by the SCM Agreement."[188]

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

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[184] Panel Report, *United States — Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/R (July 31, 2002).

[185] *Id* . ¶¶ 7.60-7.89.

[186] *Id.* ¶¶ 7.129-7.158

[187] 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).

[188] *Id.* at ¶ 159.

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.[189] 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."[190] 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.[191]

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.[192] 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, which concerned sunset reviews of CVD orders on goods from France, Germany, Spain, and the United Kingdom, resulted in no changes to the existing orders. The United States did not apply its revised privatization methodology with respect to orders because, as it later explained to the DSB, the Department had determined that application of the new methodology "would not change its original conclusions that continued subsidization was likely."[193] As a result of its actions regarding the 12 orders, the United States considered that it had fully complied in the case.[194]

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[189] 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).

[190] *Id.* at 13899.

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

[192] 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.

[193] 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.

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

Recent developments. In September 2004, a compliance panel was established at the request of the EC, which disputed the results of the sunset reviews involving products from the France, the United Kingdom, and Spain.[195]

Sunset reviews are provided for in Article 21.3 of the SCM Agreement, which requires that any definitive countervailing duty be terminated five years after imposition (or after an earlier sunset review) unless domestic authorities determine in a review initiated before that date, either on their own motion or upon industry request, that termination of the duty "would be likely to lead to continuation or recurrence" of subsidization and injury. U.S. law requires DOC to revoke a CVD order as the result of a sunset review unless (1) DOC determines that a countervailable subsidy would be likely to continue to recur and (2) the International Trade Commission determines revocation would be likely to lead to termination or recurrence of material injury within a reasonably foreseeable period of time.[196]

In a report publicly circulated August 17, 2005, the compliance panel upheld the Section 129 determination involving French imports, but faulted the two others, finding that the Commerce Department had failed to apply its new privatization methodology in the sunset review and thus 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 subsidization of the state-owned firm.[197] 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.

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[195] See 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.

[196] Tariff Act of 1930, § 751(d)(2), 752(a)(1), 19 U.S.C. § 1675(d)(2), 1675a(a)(1).

[197] 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).

The United States did not appeal, and the panel report was adopted on September 27, 2005. The United States reported to the DSB in January 2006 that the USTR on November 29, 2005, had requested the Commerce Department to issue in an expeditious manner revised determinations with respect to the two outstanding sunset reviews and that the Department had initiated such proceedings shortly thereafter.[198] In addition, new sunset reviews of both orders had been announced November 1, 2005.[199]

The Commerce Department, on October 4, 2006, announced that it had determined that revocation of the UK order would not be likely to lead to continuation or recurrence of a countervailable subsidy and that it was revoking the order effective December 15, 2006.[200] Although DOC made an affirmative determination in the sunset review involving steel products from Spain,[201] the ITC announced December 14, 2006, that all six Commissioners had made negative determinations in the case and that thus the CVD order would also be revoked.[202]

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.[203] The determinations

[198] Dispute Settlement Body, *Minutes of Meeting*, Jan. 20, 2006, at 19, WT/DSB/M/203 (Feb. 24, 2006).

[199] Initiation of Five-year ("Sunset") Reviews, 70 Fed. Reg. 65884 (Nov. 1, 2005).

[200] Cut-to-Length Carbon Steel Plate from the United Kingdom: Final Results of Full Sunset Review, 71 Fed. Red. 58587 (Oct. 4, 2006). The full text of the underlying DOC Issues and Decision Memorandum is available at [http://ia.ita.doc.gov/frn/summary/uk/E6-16393-1.pdf].

[201] Cut-to-Length Carbon Steel Plate from Spain: Final Results of Expedited Five-Year ("Sunset") Review of the Countervailing Duty Order, 71 Fed. Reg. 32523 (June 6, 2006). The full text of the underlying DOC Issues and Decision Memorandum is available at [http://ia.ita.doc.gov/frn/summary/spain/E6-8757-1.pdf]. Following the issuance of the compliance panel report, the Commerce Department conducted a second Section 129 review regarding the CVD order and, as explained in the Issues and Decision Memorandum, took these findings into account in its sunset review. DOC applied its new privatization methodology in the second Section 129 review as directed by the panel and determined that the privatization of the subject producer, Aceralia, did not extinguish the non-recurring, allocable subsidies provided to it before its privatization. DOC also determined that it had been provided substantial evidence that some programs that were originally found countervailable were had been terminated. At the same time, it found that countervailable programs continued to exist and that thus revocations would likely lead to continuation or recurrence of a countervailable subsidy.

[202] U.S. Int'l Trade Comm'm, News Release 06-119, Dec. 14, 2006, at [http://www.usitc.gov/ext_relations/news_release/2006/er1214dd1.htm].

[203] 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).

resulted in the continued imposition of antidumping duties in the amount of 1.36%.[204] The rate applied to one individually investigated company (Siderca SAIC) as well as to all other exporters (all others rate).

The WTO Antidumping Agreement, at Article 11.3, and, as noted earlier, the Agreement on Subsidies and Countervailing Measures, at Article 21.3, require that antidumping or countervailing duties, as the case may be, 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 duties "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,"[205] 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,"[206] 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."[207] 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.[208] As described by the Department, the policies set out in the SPB are "intended to complement the applicable statutory and regulatory provision by providing guidance on methodological or analytical issues not explicitly addressed by the statute and regulations."[209]

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.[210] Section 751(c)(4)(B) provides that in a review in

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[204] 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).

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

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

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

[208] 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).

[209] *Id.* at 18871.

[210] Tariff Act of 1930, § 751(c)(4)(A), 19 U.S.C. § 1675(c)(4)(A)(2000). The parties who (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),[211] 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.[212] 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."[213]

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.[214] 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."[215]

Argentina argued that the application of expedited review procedures in the sunset review at issue was inconsistent with the Agreement because one individually

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[210] (...continued)
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 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).

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

[212] See 19 C.F.R. §§ 351.218(d)(3).

[213] 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.

[214] 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).

[215] Id.

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 Agreement; and that the Department failed to "determine" whether or not future dumping was likely as required under Article 11.3.[216] 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.[217]

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.[218]

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.[219] 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.[220] 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,[221] 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.[222] 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

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[216] Id. at 3.

[217] Id. at 3.

[218] Id. at 3-4.

[219] 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).

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

[221] *Id.* ¶ 7.136.

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

determinations.[223] In addition, the panel upheld the U.S. legal standards for finding a likelihood of the continuation or recurrence of injury and ITC's affirmative likelihood of injury determination in the case.[224]

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.[225]

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.[226] 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.[227] The reports were adopted on December 17, 2004.

The compliance deadline in the case, determined by arbitration, expired on December 17, 2005.[228] In a submission to the Arbitrator, the United States stated that, in order to comply, it needed to amend its regulation regarding waivers and to

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

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

[225] 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.

[226] 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.

[227] 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.

[228] 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).

make a new determination of the likelihood of continuation or recurrence of dumping in the sunset review at issue.[229]

In August 2005, DOC issued preliminary regulations amending 19 C.F.R. § 351.218(d)(2), regarding waivers by responding parties;[230] final regulations were issued on October 28, 2005.[231] 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 and thus maintained the duties at 1.36%.[232]

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."[233] 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."[234]

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."[235] 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.[236] 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."[237] 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

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[229] Id. at 2.

[230] 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).

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

[232] See U.S. Statements to the DSB, *infra* note 242; 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].

[233] 70 Fed. Reg. at 62062.

[234] *Id.*

[235] 19 C.F.R. § 351.218(d)(2)(ii), *as amended*, 70 Fed. Reg. at 62064.

[236] 70 Fed. Reg. at 62062.

[237] *Id.*

the Department's sunset regulations would be based on assumptions about likelihood of continuation or recurrence of a countervailable subsidy."[238]

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."[239] 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.[240]

Recent developments. 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 by issuing amended regulations and a redetermination in the sunset review at issue. As noted above, DOC had issued a Section 129 determination in which it concluded that revocation of the antidumping duty order was likely lead to continuation or recurrence of dumping and as a result the order imposing antidumping duties of 1.36% was continued.[241] Argentina stated at the same DSB meeting that it did not view the United States as having complied[242] and in January 2006, the disputing parties entered into a procedural agreement addressing Argentina's possible request for a compliance panel and any subsequent appeal.[243] 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

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[238] *Id.*

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

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

[241] 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].

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

[243] 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).

with the United States in late January 2006[244] and on March 17, 2006, the DSB established a compliance panel at Argentina's request.[245]

In its panel request, Argentina challenged the factual basis of the Section 129 determination, identified alleged procedural defects in the underlying proceeding, claimed that the DOC's failure to "implement" the Section 129 determination under § 129(b)(4) denied Argentinian respondents the opportunity to challenge the determination in U.S. courts, claimed that the United States failure to repeal or amend §§ 751(c)((4)(A)(and (B) of the Tariff Act of 1930 rendered the United States out of compliance in the case, and faulted new 19 C.F.R. § 351.218(d)(2) for not taking into account the "statutory consequences for parties who 'elect not to participate in a review' ... but who also do not file a Statement of Waiver," (i.e., that in such case the United States would automatically find that removing the order would likely lead to continued or recurring dumping).[246]

In a November 30, 2006, report, the compliance panel found that the United States had not acted inconsistently with the Antidumping Agreement in developing a new factual basis for its Section 129 Determination or in certain other procedural aspects of the sunset review. It also determined, however, that U.S. statutory and regulatory waiver provisions remained inconsistent with the Antidumping Agreement, that DOC acted inconsistently with the Agreement in that its determination that dumping was likely to continue or recur lacked a sufficient factual basis with regard to its analysis of likely past dumping and volume, and that other U.S. procedural actions did not meet the requirements of the Agreement.[247] The United States has appealed the panel ruling.[248]

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.[249]

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[244] 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).

[245] WTO News, Dispute Settlement Body, Mar. 17, 2006, at [http://www.wto.org/english/news_e/news06_e/dsb_17mar06_e.htm].

[246] Request for the Establishment of a Panel, 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/DS268/16 (Mar. 7, 2006).

[247] Report of the Panel, 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/RW (Nov. 30, 2006).

[248] Notification of an Appeal by the United States, 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/DS268/19 (Jan. 16, 2007).

[249] 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).

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.[250] 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.[251] 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.[252] The panel and AB reports were adopted on November 28, 2005.[253]

Because 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.[254]

DOC initiated the second sunset review of the AD order on June 1, 2006,[255] and on June 9, issued a issued a Section 129 determination in which it determined that there was likelihood of continuation or recurrence of dumping had the AD order on OCTG from Mexico been revoked in 2000, that is, at the end of the original sunset review period and thus affirmed its basis for continuing the order.[256] The parties entered into a procedural agreement regarding the WTO dispute in July 2006[257] and the following month Mexico requested consultations regarding U.S. compliance

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

[251] 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.

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

[253] 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).

[254] 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).

[255] Initiation of Five-Year ("Sunset") Reviews, 71 Fed. Reg. 31153 (June 1, 2006).

[256] Section 129 Determination: Final Results of Sunset Review , Oil Country Tubular Goods from Mexico, at [http://ia.ita.doc.gov/download/section129/mexico-octg-129-final-decision-memo.pdf].

[257] Understanding between Mexico and the United States Regarding Procedures under Articles 21 and 22 of the DSU, *United States — Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/12 (July 14, 2006).

under Article 21.5 of the DSU.[258] On December 26, 2006, DOC issued a affirmative preliminary determination in the pending sunset review.[259]

Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")(DS294). In June 2003, the EC requested consultations with the United States over its use of "zeroing" in antidumping investigations and administrative reviews, arguing the practice violated the Agreement on Antidumping and the GATT and citing 15 original investigations and 16 administrative reviews in which it was used.[260] A panel was established at the EC's request in March 2004.[261]

Zeroing is a practice used by the Commerce Department in the calculation of dumping margins under which, in comparing export prices to normal value, it assigns a zero value to non-dumped sales. The Department is authorized under U.S. law to make three types of price comparisons in determining a dumping margin, each of which is recognized in Article 2.4.2 of the Antidumping Agreement: (1) weighted average of normal values to weighted average of export prices (W-W); (2) normal values of individual transactions to export prices of individual transactions (T-T); and (3) under certain defined circumstances, weighted average of normal values to export prices of individual transactions (W-T).[262] The United States ordinarily uses W-W comparisons as was the case in the antidumping proceedings cited in the EC's complaint. The practice of zeroing is said to inflate dumping margins by not allowing dumped sales to be weighted against non-dumped sales, while others argue that the practice combats masked dumping and that actual dumping may be remedied notwithstanding that exporters may not sell all products at dumped prices in a particular national market. Federal laws do not expressly address the use of the practice and U.S. courts have ruled that DOC's interpretation of current antidumping statute to allow but not require the practice is a reasonable one.[263]

The WTO panel, in a report issued October 31, 2005, found that the methodology, as applied in the specific original investigations cited in the EC's complaint, is inconsistent with Article 2.4.2 of the Antidumping Agreement, which

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[258] Request for Consultations, Recourse to Article 21.5 of the DSU by Mexico, *United States — Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/13 (Aug. 24, 2006).

[259] Oil Country Tubular Goods from Mexico; Preliminary Results of the Sunset Review of Antidumping Duty Order, 71 Fed. Reg. 77372 (Dec. 26, 2006).

[260] Request for Consultations by the European Communities, *United States — Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/1 (June 19, 2003) and WT/DS294/1/Add.1 (Sept. 15, 2003).

[261] Request for the Establishment of a Panel by the European Communities, *United States — Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/7 (Feb. 6, 2004) and WT/DS294/7/Rev.1 (Feb. 19, 2004).

[262] Tariff Act of 1930, § 777A(d), 19 U.S.C. § 1677f-1(d). The three modes of price comparison are recognized in Article 2.4.2 of the Antidumping Agreement.

[263] Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347 (Fed. Cir. 2005), *cert denied*, 126 S.Ct. 1023 (2006); Timken Co. v. United States, 354 F.3d 1334, 1341-42 (Fed. Cir.), *cert denied sub nom.*, Koyo Seiko Co. v. United States, 543 U.S. 976 (2004).

makes the comparison methodologies recognized in the Article subject to the "fair comparison" requirements of Article 2.4.[264] The panel also found that the methodology, as it relates to individual investigations, is a norm that could be challenged in a WTO dispute even though it is not in written form, and that the practice as a whole was WTO-inconsistent

The panel rejected the EC's claims regarding §§ 771(35)(A) and (B), 731, and 777(A)(d) of the Tariff Act of 1930, concluding that they did not address the issue of zeroing. These sections, respectively, define the terms "dumping margin" and "weighted average dumping margin," establish the basic authority for imposing antidumping duties, and authorize the three price comparison methodologies discussed above.

The panel also upheld the United States on its use of zeroing in the administrative reviews cited by the EC as well as in the use of zeroing as such in administrative reviews, new shipper reviews, changed circumstances reviews, and sunset reviews. One dissenting panelist, however, would have struck down the use of the practice in proceedings other than original investigations. The report was appealed by the United States and the EC.

On April 18, 2006, the Appellate Body found, although on different grounds from the panel, that the zeroing methodology could be challenged "as such" as it relates to original investigations and upheld the panel's finding that the practice was inconsistent with Article 2.4.2 of the Antidumping Agreement.[265] The AB reversed the panel, however, on its finding that the practice did not violate WTO obligations when applied in the administrative reviews cited by the EC. The AB found instead that the use of zeroing in these reviews violated Article 9.3 of the Antidumping Agreement and Article VI:2 of the GATT, since the practice resulted in antidumping duties that exceeded the exporters' or producers' dumping margins.

Article 9.3 provides that the "amount of the anti-dumping duty" imposed by a WTO Member "shall not exceed the margin of dumping as established under Article 2" of the Agreement. Article VI:2 of the GATT provides that a WTO Member may impose an antidumping duty on a dumped product "no greater in amount than the margin of dumping in respect of such product." Regarding use of the practice in the cited instances, the Appellate Body stated that

> ... in the administrative reviews at issue, the USDOC assessed the anti-dumping duties according to a methodology in which, for each individual importer, comparisons were carried out between the export price of each individual transaction made by the importer and a contemporaneous average normal value. The results of these multiple comparisons were then aggregated to calculate the anti-dumping duties owed by each individual importer. If, for a given individual transaction, the export price exceeded the contemporaneous average normal value, the USDOC, at the aggregation stage, disregarded the result of this

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

[265] Appellate Body Report, *United States — Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R (Apr. 18, 2006).

> individual comparison. Because results of this type were systematically disregarded, the methodology applied by the USDOC in the administrative reviews at issue resulted in amounts of assessed anti-dumping duties that exceeded the foreign producers' or exporters' margins of dumping with which the anti-dumping duties had to be compared under Article 9.3 of the Antidumping Agreement and Article VI:2 of the GATT 1994. Accordingly, the zeroing methodology, as applied by the USDOC in the administrative reviews at issue, is inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.[266]

The AB report, which also contained other findings, and the modified panel report were adopted on May 9, 2006. While the United States vigorously disputed the reports,[267] it stated at a subsequent DSB meeting that it intended to comply.[268] The disputing parties later agreed on an implementation deadline of April 9, 2007.[269]

Shortly before the AB report was issued, the DOC had announced in the *Federal Register* that in response to the WTO panel report it would abandon the use of zeroing in W-W comparisons in antidumping investigations and was seeking comments on alternative approaches that might be appropriate in future investigations.[270] The Department noted that it had not appealed the panel's finding that, with respect to the specific antidumping investigations challenged by the EC, the use of zeroing in W-W comparisons was inconsistent with Article 2.4.2 of the Antidumping Agreement.

On December 26, 2006, the Department, pursuant to § 123 of the URAA, published a *Federal Register* notice stating that it was modifying its methodology as announced earlier, stating that the modification would be used in implementing the findings of the WTO panel pursuant to § 129 of the URAA with regard to the specific antidumping investigations challenged by the EC in the dispute and, moreover, that it would apply the modification in all current and future antidumping investigation as of the effective date, which at the time was planned for January 16, 2007.[271] The Department later extended the date to January 23, 2007, and more recently to

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[266] Id. ¶ 133.

[267] Communication from the United States, *United States — Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/16 (May 17, 2006); Communication from the United States, *United States — Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/18 (June 19, 2006).

[268] Dispute Settlement Body, *Minutes of Meeting*, May 30, 2006, at [1], WT/DSB/M/213 (June 21, 2006).

[269] Agreement under Article 21.3(b) of the DSU, *United States — Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/19 (August 1, 2006).

[270] Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 71 Fed. Reg. 11189 (Mar. 6, 2006).

[271] Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Duty Investigation; Final Modification, 71 Fed. Reg. 77722 (Dec. 27, 2006).

February 22, 2007, noting each time that it was acting "[a]fter further consultations with Congress and in order to afford adequate time for review."[272]

[272] Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Duty Investigation; Change in Effective Date of Final Modification, 72 Fed. Reg. 1704 (Jan. 16, 2007); Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Duty Investigation; Change in Effective Date of Final Modification (proposed Federal Register notice, Jan. 22, 2007), at [http://ia.ita.doc.gov/download/zeroing/zeroing-prepub-2nd-ext-fr.pdf].

Representative Rangel, Chairman of the House Ways and Means Committee, and Senator Baucus, Chairman of the Senate Finance Committee, wrote to the Secretary of Commerce and the USTR on January 19, 2007, requesting that DOC postpone its decision whether to modify the practice to March 31, 2007, to give Committee members additional time to consider the issue. The letter stated that the 60-day consultation period, which in this case ended in mid-January, was insufficient given the limited actual time for consultation in the interim, the complexity of the matter, and the controversial nature of the ruling. Text of letter available at [http://finance.senate.gov/ press/Bpress/2007press/prb012207.pdf]. In mid-December 2006, eleven Senators had signed a letter to the same Administration recipients in which they took issue with these and other WTO decisions on zeroing and expressed their disagreement with any modification of the U.S. practice. Text of December 2006 letter and of U.S.T.R. memo to Congress under § 123 regarding the modification available at Inside U.S. Trade, December 15, 2006, at 19-21.