

CRS Report for Congress

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

Updated January 7, 2008

Jeanne J. Grimm
Legislative Attorney
American Law Division



Prepared for Members and
Committees of Congress

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

Summary

Although the United States has complied with adverse rulings in many past World Trade Organization (WTO) disputes, there are currently eight cases in which rulings have not yet been implemented or the United States has taken action and the dispute has not been fully 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 remove 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) regarding a music copyright statute and a trademark provision affecting property confiscated by Cuba. H.R. 217, H.R. 624, H.R. 2819, S. 1673, and S. 1806 would repeal the trademark statute; H.R. 1306 and S. 749 would amend the law. Also unresolved is a dispute with Japan over an antidumping (AD) law provision. While the WTO-inconsistent Continued Dumping and Subsidy Offset Act was repealed in 2006 (P.L. 109-171), complainants EC, Canada, Japan, and Mexico, who had retaliated in the case, have expressed concerns over continued payments during a statutory transition period; the EC and Japan are maintaining sanctions. P.L. 109-171 also repealed a WTO-inconsistent cotton program at issue in Brazil's dispute over U.S. cotton subsidies. Other U.S. programs were also faulted and in December 2007 a compliance panel requested by Brazil ruled against the United States. In May 2007, WTO Members adopted a compliance panel report finding that the United States had not complied in Antigua's challenge of U.S. cross-border gambling restrictions. As a result of the case, the United States has modified its schedule under the General Agreement on Trade in Services to indicate that it had not made commitments on gambling services. Antigua, Australia, Canada, Costa Rica, EC, India, Japan, and Macao requested consultations with the United States regarding compensation for the U.S. action; to date the United States has settled with Canada, the EC, Japan, and reportedly Australia. A WTO arbitrator in the underlying WTO case ruled in December 2007 that Antigua may request authorization to suspend a maximum \$21 million annually in obligations owed the United States under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

Two cases involve administrative action under existing authorities. At issue is the practice of zeroing, under which non-dumped sales are disregarded in the calculation of dumping margins, the practice having been challenged by the EC and Japan. In response to the EC zeroing decision, the Commerce Department discontinued use of zeroing in original AD investigations when applying its most commonly used price comparison methodology and recalculated dumping margins in specific AD investigations cited by the EC. A compliance panel has been established at the request of the EC. The United States was expected to comply by December 24, 2007, in Japan's zeroing challenge, which concerns uses of zeroing beyond those involved in the EC case; the United States took no specific action by this date, however. Pending antidumping disputes with Argentina, Mexico, and Ecuador appear to have been settled. This report will be updated.

Contents

WTO Dispute Settlement Procedures	1
Uruguay Round Agreements Act (URAA): Statutory Requirements	
for Implementing WTO Decisions	4
Section 102 of the URAA: Domestic Legal Effect of WTO Decisions	4
Federal Law	4
State Law	5
Preclusion of Private Remedies	7
Domestic Implementation of WTO Decisions Involving	
Administrative Action	8
Section 123 of the URAA: WTO Cases Involving	
Regulatory Action	8
Section 129 of the URAA: WTO Cases Involving	
Trade Remedy Proceedings	9
Implementation of WTO Rulings in Pending Cases	15
Pending Cases Involving Legislative Action	17
Section 110(5)(B) of the Copyright Act (Music Copyrights)	
(DS160)	17
Section 211 of the Omnibus Appropriations Act of 1998	
(Trademark Exclusion Involving Property	
Confiscated by Cuba) (DS176)	19
Antidumping Measures on Hot-Rolled Steel Products	
from Japan (DS184)	20
Continued Dumping and Subsidy Offset Act	
(DS 217/DS234)	25
Subsidies on Upland Cotton (DS267)	30
Measures Affecting Cross-Border Supply of Gambling	
and Betting Services (DS285)	37
Pending Cases Involving Administrative Action	46
Laws, Regulations and Methodology for Calculating	
Dumping Margins (“Zeroing”) (DS294)	46
Measures Relating to Zeroing and Sunset Reviews	
(DS322)	53

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

This report provides a summary of the status of U.S. compliance efforts in pending World Trade Organization (WTO) disputes that have resulted in adverse rulings against the United States.¹ Although the United States has complied with adverse rulings in many past WTO disputes, 11 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 has not been definitively resolved. In some cases, original or subsequently extended compliance deadlines have expired; in others, the original deadline will lapse in 2007 or has not yet been determined. 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

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 cases in which the United States has implemented adverse reports to the satisfaction of the complaining party and the dispute has been fully settled, nor does it discuss the compliance history of other WTO Members. For further information on WTO disputes, see Office of the U.S. Trade Representative, "WTO Dispute Settlement," at [http://www.ustr.gov/Trade_Agreements/Monitoring_Enforcement/Section_Index.html] (includes briefs filed by the United States in individual WTO dispute settlement proceedings); 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>] (search 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 further information on WTO dispute settlement procedures, see "Dispute settlement," at [http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm], and CRS Report RS20088, (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. Generally, a Member should seek to suspend concessions in the same sector in which the WTO violation was found, but if the Member finds that this is not “practicable or effective,” it may seek to suspend concessions in other sectors in the same agreement. If, however, the Member finds that this alternative would also be impracticable or ineffective and that “the circumstances are serious enough,” it may seek to suspend obligations under another WTO agreement or, in other words, “cross-retaliate.”

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

² (...continued)

Dispute Settlement in the World Trade Organization: An Overview, by Jeanne Grimmett.

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 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

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 issue of removing such measures has arisen with respect to the continued levying of increased tariffs on EC products by the United States and Canada, the increases having been originally imposed 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 (DS26/DS48). The EC filed a complaint in the WTO in November 2004 in which it argued that the higher tariffs should be removed on the ground that the EU had taken adequate compliance measures in the beef hormone dispute by adopting a new Directive on the matter in 2003. The panel established at the EC's request in 2005 reportedly issued a preliminary report with mixed results at the end of July 2007. *Interim WTO Ruling Faults EU Hormone Ban, U.S., Canada Sanctions*, Inside U.S. Trade, August 17, 2007, at 3; *WTO Ruling Said to Aid U.S., Canada in Beef-Hormone Disputes with Europe*, 24 Int'l Trade Rep. (BNA) 1112 (August 2, 2007). 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 (January 14, 2005).

the cases below, Members may manage disputes in a variety of ways at the compliance phase, short of imposing sanctions.

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

The legal effect of Uruguay Round agreements and WTO dispute settlement results in the United States is comprehensively dealt with in the Uruguay Round Agreements Act (URAA), P.L. 103-465, which addresses the relationship of WTO agreements to federal and state law and prohibits private remedies based on alleged violations of WTO agreements.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

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 John Garcia; 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).

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 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

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.

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 152-89 for further discussion of this case.

(continued...)

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 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

¹¹ (...continued)

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.

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
(continued...)

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

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

to occupy the field with respect to any cause of action or defense under or in connection with any of the Uruguay Round Agreements, including by precluding any person other than the United States from bringing any action against any State or political subdivision thereof or raising any defense to the application of State law under or in connection with any of the Uruguay Round Agreements —

(A) on the basis of a judgment obtained by the United States in an action brought under any such agreement; or

(B) on any other basis.

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

¹⁶ (...continued)

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.

¹⁷ H.Rept. 103-826(I), at 26.

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

U.S. WTO obligations in challenges to agency actions implicating WTO agreements.¹⁹

Domestic 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

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 August 30, 2001). As stated in *Timken*, which reviewed a challenge to a final Department of Commerce dumping determination: “[Foreign producer] Koyo ... is not bringing this action under any WTO agreement; rather, Koyo is arguing that the Department’s application and interpretation of U.S. law violates its international obligations pursuant to a WTO agreement. Koyo is certainly ‘free to argue that Congress would never have intended to violate an agreement it generally intended to implement, without expressly saying so.’” 240 F.Supp. at 1238, quoting *Gov’t of Uzbekistan, supra*, at *3.

For discussions of the relationship of WTO decisions and U.S. administrative and judicial actions, see Patrick C. Reed, *Relationship of WTO Obligations to U.S. International Trade Law: Internationalist Vision Meets Domestic Reality*, 38 *Geo. J. Int’l L.* 209 (2006); John J. Barceló, *The Paradox of Excluding WTO Direct and Indirect Effect in U.S. Law*, 21 *Tul. Eur. & Civ. L. F.* 147 (2006); James Thuo Gathii, *Foreign Precedents in the Federal Judiciary: The Case of the World Trade Organization’s DSB Decisions*, 34 *Ga. J. Int’l Comp. L.* 1 (2005); 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 Huisian, *When a New Sheriff Comes to Town: The Impending Showdown Between the U.S. Trade Courts and the World Trade Organization*, 17 *St. John’s J. Legal Comment.* 457 (2003); Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 *Va. J. Int’l L.* 675, 731-46 (2003); Julie Dunne, *Delverde and the WTO’s British Steel Decision Foreshadow More Conflict Where the WTO Subsidies Agreement, Privatization, and United States Countervailing Duty Law Intersect*, 17 *Am. U. Int’l L.* 79 (2001); Michael F. Williams, *Charming Betsy, Chevron, 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 and 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). Note also Brief for the Federal Respondents in Opposition, *Corus Staal BV and Corus Steel USA, Inc. v. Dep’t of Commerce*, No. 05-364 (U.S. petition for cert. filed September 15, 2005), *cert. denied*, 546 *U.S.* 1089 (2006).

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 of the committee with the proposed action during the 60-day period. Any such vote is not binding on the agency or department involved.²¹

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

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).

²¹ Two 110th Congress bills would place restrictions on the use of § 123 authorities. S. 364 (Rockefeller) would amend § 123 to provide that any regulatory modification or final rule proposed under the section could only enter into force if approved by joint resolution enacted into public law. The bill would also rescind certain § 123 regulatory modifications that have already taken effect. S. 1919 (Baucus) would establish a WTO Dispute Settlement Review Commission to evaluate WTO decisions under statutory criteria and prohibit a domestic regulatory modification under § 123 from taking effect unless and until Congress receives the Commission’s report on the WTO decision involved. To date, no action has been taken on either of these bills.

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 Section 129 determinations in antidumping and countervailing duty cases are reviewable in the U.S. Court of International Trade and by binational panels established under Chapter 19 of the North American Free Trade Agreement (NAFTA).²² 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.

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.²³

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.²⁴ 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

²² 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 may be 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.

²³ URAA, § 129(a)(1), 19 U.S.C. § 3538(a)(1).

²⁴ URAA, § 129(a)(2), 19 U.S.C. § 3538(a)(2).

implement an adverse report, and to estimate how long of a period for implementing the WTO decision may be needed.²⁵

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.²⁶ The new determination must be issued within 120 days of the USTR’s request.²⁷ 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.²⁸

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.²⁹ The USTR must consult with the House Ways and Means and Senate Finance Committees before the ITC’s new determination is implemented.³⁰

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.³¹ Notices of the implementation of Section 129 determinations must be published in the *Federal Register*.³²

The Uruguay Round SAA explains the operation of § 129(c)(1), which sets an implementation date both for ITC and DOC determinations, as follows:

²⁵ Uruguay Round SAA, *supra* note 7, at 1023.

²⁶ URAA, § 129(a)(3),(4), 19 U.S.C. § 3538(a)(3),(4).

²⁷ 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.

²⁸ *Id.*

²⁹ URAA, § 129(a)(6), 19 U.S.C. § 3538(a)(6).

³⁰ URAA, § 129(a)(3),(5), 19 U.S.C. § 3538(a)(3),(5).

³¹ 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.cbp.gov/nafta/cgov/pdf/iius.pdf>].

³² URAA, § 129(c)(2), 19 U.S.C. § 3538(c)(2).

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.³³

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.³⁴ The President is required to consult with the House Ways and Means Committee and Senate Finance Committee before acting under this authority.³⁵ The USTR must publish a notice of the implementation of any ITC determination in the *Federal Register*.³⁶

Department of Commerce. A procedure for USTR and agency interaction, including congressional consultation requirements, is also set forth with respect to DOC determinations in antidumping and countervailing duty proceedings, though without the requirement for an initial agency advisory report regarding the extent of its statutory discretion. Instead, promptly after the issuance of a WTO panel or appellate report finding that a DOC action in an antidumping or countervailing duty proceeds is inconsistent with U.S. obligations under the WTO Antidumping Agreement or the SCM Agreement, the USTR is to consult with DOC and the House Ways and Means and Senate Finance Committees, and may request DOC in writing to issue a determination in connection with the underlying proceeding that would

³³ Uruguay Round SAA, *supra* note 7, at 1026. See also H.Rept. 103-826(I), at 39; S.Rept. 103-412, at 27.

³⁴ URAA, § 129(a)(7), 19 U.S.C. § 2254(b)(3).

³⁵ *Id.*

³⁶ URAA, § 129(c)(2)(B), 19 U.S.C. § 3538(c)(2)(B).

render its action “not inconsistent with” the panel or appellate findings.³⁷ DOC must issue a determination within 180 days of the request.³⁸

After consulting with DOC and the above-named congressional committees, USTR may direct DOC to implement its determination in whole or in part.³⁹ 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.⁴⁰

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 entries⁴¹ or, in the

³⁷ 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.

³⁸ URAA, § 129(b)(2), 19 U.S.C. § 3538(b)(2).

³⁹ URAA, § 129(b)(3),(4), 19 U.S.C. § 3538(b)(3),(4).

⁴⁰ URAA, § 129(c)(1), 19 U.S.C. § 3538(c)(1).

⁴¹ An administrative review is a mechanism used by the Department of Commerce to administer the U.S. “retrospective” system of duty assessment. Under a retrospective system, final liability for antidumping and countervailing duties is determined after goods are imported. Ordinarily, the amount of duties owed by an importer is determined in an
(continued...)

event the duty order or orders were revoked as a result of the WTO proceeding, revising the duty rate in response to a domestic court decision involving the earlier entries.⁴²

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.⁴³ 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 (Tembec I)* 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.⁴⁴ In *Tembec, Inc. v. United States (Tembec II)*, a decision on remedies issued October 13, 2006, the day following the effective date of the agreement between the United States and Canada settling their dispute over softwood lumber trade, the USCIT ruled that all unliquidated softwood entries were to be

⁴¹ (...continued)

administrative review, which is an annual review of imports for a specified 12-month period to determine the existence and amount of dumping or subsidization, as the case may be, involving the subject merchandise for this period. Trade Act of 1974, § 751(a), 19 U.S.C. § 1675(a), 19 C.F.R. § 351.212(a), 351.213. The rate determined in the administrative review is also the rate at which estimated duties on imports entered during the succeeding year are assessed and will apply until any subsequent administrative review produces a new rate.

⁴² Second Written Submission of the United States, *United States — Section 129(c)(1) of the Uruguay Round Agreements Act*, paras. 17-20, WT/DS221 (March 8, 2002), available at [http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file327_6455.pdf].

⁴³ Panel Report, *United States — Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R (July 15, 2002).

⁴⁴ *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].

liquidated in accordance with the final negative decision of the NAFTA injury panel and thus without the imposition of the duties.⁴⁵ The USCIT later vacated its judgment (but not its decision) in *Tembec II* on the ground that the U.S.-Canada agreement, which ultimately resulted in liquidation of all softwood lumber entries without regard to antidumping or countervailing duties, provided the plaintiffs with the relief they sought.⁴⁶

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. At issue are challenges to the following:

- § 110(5)(B) 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

⁴⁵ *Tembec, Inc. v. United States*, 461 F.Supp.2d 1355 (Ct. Int'l Trade 2006), available at [http://www.cit.uscourts.gov/slip_op/Slip_op06/06-152.pdf].

⁴⁶ *Tembec, Inc. v. United States*, No. 05-00028, 2007 WL 609736 (Ct. Int'l Trade February 28, 2007), available at [http://www.cit.uscourts.gov/slip_op/Slip_op07/07-28.pdf]. On October 12, 2006, the Department of Commerce retroactively revoked the antidumping and countervailing duty orders at issue, ordering that all entries made on or after May 22, 2002, be liquidated without regard to antidumping duties except for certain entries for which liquidation was then enjoined. Also on October 12, 2006, Canada 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 vacate its October 13 decision. The injunction cited in the revocation order was later modified and, on October 31, 2006, Customs instructed that the all entries be liquidated without regard to antidumping duties. Because an injunction relating to some of the covered imports existed on the day of the October 13 USCIT decision, the court decided that there was a live case or controversy as of that date and thus refused to withdraw its decision, as the U.S. Government had requested. For further information on this case, the previously discussed WTO proceeding involving § 129, and NAFTA and other WTO proceedings involving the U.S. softwood duty orders, see CRS Report RL33752, *Softwood Lumber Imports from Canada: Issues and Events*, by Ross W. Gorte and Jeanne J. Grimmett.

the distribution of duties on goods entered through September 30, 2007;

- statutes providing subsidies to U.S. cotton 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.

Two pending cases involve regulatory action in antidumping proceedings under existing statutory authorities, each involving DOC's use of "zeroing" (i.e., the exclusion of non-dumped sales) in determining dumping margins in antidumping investigations and reviews of existing antidumping orders.

Two cases involving an antidumping order on oil country tubular goods, appear to have been settled in 2007 with the revocation of the challenged measure.⁴⁷ In the first case, *United States — Sunset Review of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina (WT/DS268)*, the United States and Argentina jointly requested in June 2007 that the arbitral panel examining Argentina request to impose \$44 million in annual retaliation suspend its work. In the second, *United States — Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico (WT/DS282)*, Mexico in July 2007 asked that the compliance panel that it had requested the previous April suspend its activity. While the parties do not appear to have formally notified the WTO of a settlement in either dispute, no further action appears to have been taken with respect to either of the suspended proceedings.

A third case, *Anti-Dumping Measure on Shrimp from Ecuador (DS335)*, also appears to have been settled in 2007 with revocation of the underlying antidumping order. This case involved the use of zeroing in the original antidumping investigation, Ecuador claiming that similar application of zeroing had already been found to be inconsistent with the Antidumping Agreement in two earlier WTO dispute proceedings. The United States and Ecuador entered into a procedural agreement in which, inter alia, the United States agreed to comply within six months of the adoption of the expected adverse panel report, i.e. by August 20, 2007.⁴⁸ The Department initiated a Section 129 proceeding in which dumping rates were calculated without the use of zeroing, resulting in new rates that were either zero or *de minimis*; the antidumping order was consequently revoked, effective August 15, 2007.⁴⁹

⁴⁷ Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico; Revocation of Antidumping Duty Orders Pursuant to Second Five-Year (Sunset Review), 72 Fed. Reg. 34442 (June 22, 2007).

⁴⁸ Agreement on Procedures between Ecuador and the United States, *United States — Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/8 (October 25, 2006).

⁴⁹ Implementation of the Findings of the WTO Panel in United States Antidumping Measure (continued...)

Japan has raised questions during the past year regarding U.S. implementation of an adverse WTO decision rendered in 2000 involving the Antidumping Act of 1916, formerly 15 U.S.C. § 72, which provided a private cause of action and criminal penalties for dumping.⁵⁰ The United States responded to the WTO ruling by prospectively repealing the act in late 2004 (P.L. 108-429, § 2006) and considered that by virtue of this action it had complied in the case; Japan stated at the time that it preferred retroactive repeal, given that suits were pending against several Japanese companies, and that it was reserving its rights under the DSU.⁵¹ Although Japan did not raise the issue for some time thereafter, it has since questioned whether the United States has fully complied, citing litigation against a Japanese firm that was pending at the time of the repeal and subsequently resulted in a substantial monetary judgment against the company.⁵²

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.⁵³ Challenged by the EC in 1999, this so-called “small business” exemption was found to be an improper rights limitation in violation of Article 13 of the Agreement on Trade-Related Intellectual Property Rights (TRIPS).

In the absence of U.S. legislative action by the end of the initial compliance period (July 27, 2001), complainant EC agreed to extend the period to the end of 2001, and to consider U.S. compensation for the EC music industry based on an amount of trade injury determined by arbitration under Article 25 of the DSU, a free-

⁴⁹ (...continued)

on Shrimp from Ecuador, 72 Fed. Reg. 48257 (August 23, 2007).

⁵⁰ *United States — Anti-dumping Act of 1916* (DS136 (EC) and DS162 (Japan)).

⁵¹ E.g., Dispute Settlement Body, *Minutes of Meeting*, December 17, 2004, at 14, WT/DSB/M/180 (February 1, 2005). Regarding pending litigation, see also *Yamaha, Honda, Suzuki Among Japanese Firms Sued Under 1916 Act*, Inside U.S. Trade, December 10, 2004, at 1; *Federal Jury Awards U.S. Firm Damages under 1916 Dumping Act*, 20 Int'l Trade Rep. (BNA) 2072 (2003). See also Japan, Ministry of Economy, Trade and Industry, *2007 Report on Compliance by Major Trading Partners with Trade Agreements — WTO, FTA/EPA, and BIT; Executive Summary* 4, 6 (2007), at [<http://www.meti.go.jp/english/report/index.html>].

⁵² Dispute Settlement Body, *Minutes of Meeting*, January 23, 2007, at 12-13, WT/DSB/M/225 (March 8, 2007)[hereinafter *DSB Minutes* (January 23, 2007)]; Dispute Settlement Body, *Minutes of Meeting*, July 19, 2006, at 12-15, WT/DSB/M/217 (September 12, 2006).

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

standing arbitration provision. A November 9, 2001, arbitral award determined that some \$1.1 million in EC trade benefits are affected annually.

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

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

Recent Developments. Shortly before the three-year U.S.-EC agreement expired, the EC complained to the DSB that the United States had taken only minimal steps to secure the passage of legislation that would bring the United States into full compliance in the case.⁵⁶ The EC regularly raises the issue of U.S. noncompliance at DSB meetings,⁵⁷ with the United States continuing to report to the

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

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

⁵⁶ Dispute Settlement Body, *Minutes of Meeting*, November 24 and 26, 2004, at 7, WT/DSB/M/178 (January 17, 2005). The continued existence of the provision is also routinely cited in annual European Union reports on foreign trade barriers. See, e.g., European Commission, *United States Barriers to Trade and Investment; Report for 2006*, at 14-15 (February 2007), at [http://trade.ec.europa.eu/doclib/docs/2007/february/tradoc_133290.pdf]. Note also European Commission, Directorate-General for Trade, *General Overview of Active WTO Dispute Settlement Cases Involving the EC as Complainant or Defendant*, 26 October 2007, at 17, at [http://trade.ec.europa.eu/doclib/docs/2007/may/tradoc_134652.pdf].

⁵⁷ E.g., Dispute Settlement Body, *Minutes of Meeting*, July 24, 2007, at 6, WT/DSB/M/234 (July 24, 2007) [hereinafter *DSB Minutes* (July 24, 2007)], as corrected, (continued...)

DSB that it is working with Congress on the matter.⁵⁸ While the EC has noted that it has reserved the right to reactivate the arbitration on its retaliation request at any time,⁵⁹ the disputing parties have also appeared to indicate interest in possible discussions on a mutually satisfactory resolution of the matter.⁶⁰

Section 211 of the Omnibus Appropriations Act of 1998 (Trademark Exclusion Involving Property Confiscated by Cuba) (DS176). This case involves a statute (P.L. 105-277, 112 Stat. 2681-88), which prohibits the registration or enforcement in the United States, without the consent of the original owner or successors, of a trademark that is the same or substantially the same as one used in connection with a business or assets confiscated by the Cuban government. Challenged by the EC in 1999, the law was ultimately found to violate national treatment and most-favored-nation obligations in the TRIPS Agreement in that it limited the prohibition on registration and enforcement of rights to rights asserted by Cuba and Cuban nationals or their successors-in-interest. Panel and Appellate Body reports in the case were adopted January 2, 2002.⁶¹

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, 2005.⁶² The United States did not comply by this date. Instead of agreeing to an extension of the deadline or, alternatively, requesting authorization to retaliate, the EC entered into an agreement with the United States regarding rights and procedures involving any future EC retaliation request.⁶³ 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.

⁵⁷ (...continued)

WT/DSB/M/234/Corr.1 (August 22, 2007).

⁵⁸ E.g., *DSB Minutes* (July 24, 2007), at 5; see also Status Report by the United States, Addendum, *United States — Section 110(5) of the US Copyright Act*, WT/DS160/24/Add.36 (December 7, 2007).

⁵⁹ E.g., Dispute Settlement Body, *Minutes of Meeting*, September 28, 2006, at 5-6, WT/DSB/M/220 (November 2, 2006)[hereinafter *DSB Minutes* (September 28, 2006)].

⁶⁰ See, e.g., Dispute Settlement Body, *Minutes of Meeting*, June 20, 2007, at 6, WT/DSB/M/234 (July 23, 2007), as corrected, WT/DSB/M/234/Corr.1 (August 22, 2007).

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

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

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

Recent Developments. As the EC, Cuba, and other WTO Members continue to raise the issue of U.S. noncompliance at DSB meetings,⁶⁴ the United States has been reporting to the DSB that legislative proposals that would implement the WTO ruling have been introduced in the House and Senate and that it is working with the Congress on legislative vehicles to resolve this matter.⁶⁵

Various 110th Congress bills would either repeal or amend § 211. H.R. 217 (Serrano) and H.R. 624 (Rangel) would repeal § 211, as well as remove the current trade embargo on Cuba. H.R. 2819 (Rangel) and S. 1673 (Baucus) would repeal the statute along with removing certain other restrictions on trade with Cuba. S. 1806 (Leahy) would repeal the statute and require the Secretary of the Treasury to issue regulations as are necessary to carry out the repeal within 30 days after enactment. H.R. 1306 (Wexler) and S. 749 (Nelson) would amend § 211 to apply to all persons claiming rights in trademarks confiscated by Cuba, whatever their nationality.

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

⁶⁴ E.g., *DSB Minutes* (July 24, 2007), *supra* note 57, at 2-4. As with DS160, discussed earlier, the continued existence of § 211 is routinely cited in annual European Union reports on foreign trade barriers. See European Commission, *United States Barriers to Trade and Investment; Report for 2006*, at 15 (February 2007), at [http://trade.ec.europa.eu/doclib/docs/2007/february/tradoc_133290.pdf]. Note also European Commission, Directorate-General for Trade, *General Overview of Active WTO Dispute Settlement Cases Involving the EC as Complainant or Defendant, 26 October 2007*, at 17-18, at [http://trade.ec.europa.eu/doclib/docs/2007/may/tradoc_134652.pdf].

⁶⁵ See, e.g., Status Report by the United States, Addendum, *United States — Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/11/Add.61 (December 7, 2007).

Bills to repeal or amend the provision were also introduced in the 109th Congress. Like the recently introduced S. 749 and H.R. 1306, S. 691 (Domenici) and H.R. 1689 (Feeney) would have amended § 211 to remove the prohibition on claims by Cuba, Cuban nationals, and their successors-in-interest. See 151 Cong. Rec. S3153 (daily ed. April 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.

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.⁶⁶ 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.⁶⁷

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.⁶⁸

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."⁶⁹ 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

⁶⁶ Panel Report, *United States — Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R (February 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].

⁶⁷ Hot-Rolled Steel AB Report, *supra* note 66, at paras. 235-236.

⁶⁸ 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 (December 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, November 15, 2002, at 3; *U.S. Gets Extra Year to Comply with WTO Hot-rolled Steel Decision*, Inside U.S. Trade, December 6, 2002, at 13. No action has been taken by the ITC in response to the WTO decision.

⁶⁹ Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade, 67 *Fed. Reg.* 69186 (November 15, 2002)[hereinafter Modification of Antidumping Methodology]. See also Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade, 67 *Fed. Reg.* 53339 (August 15, 2002)(request for public comment).

exporting country.”⁷⁰ 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% 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....”⁷¹

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.’”⁷² 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, 2002.⁷³

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.⁷⁴ 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

⁷⁰ Hot-Rolled Steel Panel Report, *supra* note 66, at paras. 7.91-7.120, Hot-Rolled Steel AB Report, *supra* note 66, at paras.131-173.

⁷¹ Modification of Antidumping Methodology, *supra* note 69, 67 *Fed. Reg.* at 69186. The Department noted that its modification was the same as that proposed in August 2002, “with the exception of comparing prices of ‘similar’ products where an identical comparison product was not sold to unaffiliated parties....” *Id.* at 69187.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ 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 (December 3, 2002).

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.”⁷⁵ Section 735(c)(5)(A) of the Tariff Act of 1930, 19 U.S.C. § 1673d(c)(5)(A) states that, for purposes of preliminary and final dumping determinations, the estimated dumping rate for producers not investigated individually “shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined *entirely* under section 776.”⁷⁶ Section 776 of the Tariff Act governs the use of facts available by the DOC and ITC in making dumping, subsidy, and injury determinations.⁷⁷ 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.⁷⁸

⁷⁵ 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.

⁷⁶ Emphasis added.

⁷⁷ 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).

⁷⁸ Emphasis added. See *Hot-Rolled Steel Panel Report*, *supra* note 66, at paras. 7.83-7.90, 8.1(b); *Hot-Rolled Steel AB Report*, *supra* note 66, at paras. 111-130.

Absent legislative compliance by the United States, the December 2003 deadline referred to earlier was extended twice, most recently to July 31, 2005.⁷⁹ 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.⁸⁰

Recent Developments. 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 inclusion in 109th Congress miscellaneous tariff legislation,⁸¹ the bill was not made part of the tariff legislation nor was it acted upon as stand-alone legislation.

Japan continues to seek legislative action on the issue,⁸² as the United States continues to state its support for legislative amendments that would achieve full compliance in the case.⁸³ The United States has also submitted a proposal to the Doha Round Negotiating Group on Rules that Article 9.4 of the Antidumping Agreement be clarified to allow the invalidated practice.⁸⁴ No revisions or

⁷⁹ See Dispute Settlement Body, *Minutes of Meeting*, August 31, 2004, at 6-7, WT/DSB/M/175 (Sept 24, 2004).

⁸⁰ 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.

⁸¹ 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>].

⁸² E.g., *DSB Minutes* (July 24, 2007), *supra* note 57, at 5.

⁸³ *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.61 (December 7, 2007).

⁸⁴ *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 (September 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

(continued...)

clarifications of Article 9.4, however, were included in the draft text of proposed revisions to the Antidumping Agreement issued by the Chair of the Negotiating Group in late November 2007.⁸⁵

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.⁸⁶ The EC and ten other WTO members challenged the October 2000 statute shortly after enactment as violative of the WTO Antidumping Agreement, the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement), and other WTO obligations. The complainants based their argument in part on the prohibitions in Article 18.1 of the Antidumping Agreement and Article 32.1 of the SCM Agreement against Members' taking any "specific action against" dumping and subsidization, respectively, except for action taken in accordance with the GATT 1994 as interpreted by the respective Agreement.⁸⁷

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.⁸⁸ 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

⁸⁴ (...continued)

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.*

⁸⁵ See Negotiating Group on Rules, Draft Consolidated Chair Text of the AD and SCM Agreements, at 21, TN/RL/W/213 (November 30, 2007)[hereinafter Draft Rules Text].

⁸⁶ 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. Grimmer 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* (September 2005)(GAO-05-979).

⁸⁷ 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*, paras. 103-138, WT/DS136/AB/R, WT/DS162/AB/R (August 28, 2000)(adopted September 26, 2000). See also text at *supra* notes 50-52.

⁸⁸ Panel Report, *United States — Continued Dumping and Subsidy Offset Act*, WT/DS217/R, WT/DS234/R (September 16, 2002).

regarding industry support requirements.⁸⁹ The reports were adopted January 27, 2003, and the compliance period was subsequently determined by arbitration to expire December 27, 2003.⁹⁰

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.⁹¹ The United States objected to the requests, sending them to arbitration.⁹² The remaining three complainants — Australia, Indonesia, and Thailand — agreed to give the United States until December 27, 2004, to comply.⁹³

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.⁹⁴ The Arbitrator stated that the disbursements “operate, in economic terms, as subsidies that may generate import substitution production”⁹⁵ 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.⁹⁶ 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.

⁸⁹ Appellate Body Report, *United States — Continued Dumping and Subsidy Offset Act*, paras. 224-299, WT/DS217/AB/R, WT/DS234/AB/R (January 16, 2003).

⁹⁰ 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 was for the United States to decide on the manner of implementation, which might be through repeal or modification of the law. *Id.* at para. 50.

⁹¹ 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).

⁹² See Dispute Settlement Body, *Minutes of Meeting*, January 26, 2004, WT/DSB/M/164 (March 12, 2004).

⁹³ See WTO documents WT/DS217/17 (Thailand); WT/DS217/18 (Australia); and WT/DS217/19 (Indonesia).

⁹⁴ 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)*, paras. 5.1-5.2, WT/DS217/ARB/EEC (August 31, 2004).

⁹⁵ *Id.* at para. 3.41.

⁹⁶ *Id.* at paras. 3.72, 3.80-3.151, 4.7.

The eight complainants received formal authorization from the DSB to impose retaliatory measures in late 2004.⁹⁷ 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, 2005.⁹⁸ Mexico began to impose \$20.9 million in retaliatory tariffs effective August 18, 2005.⁹⁹ In addition, Japan imposed additional tariffs of 15% on 15 categories of U.S. goods as of September 1, 2005.¹⁰⁰

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).¹⁰¹ While the United States informed the WTO that

⁹⁷ 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 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).

⁹⁸ 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).

⁹⁹ *Mexico Announces \$20.9 Million in Byrd Retaliation Against U.S. Exports*, Inside U.S. Trade, August 19, 2005, at 1.

¹⁰⁰ Communication from Japan, *United States — Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/48 (August 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) 1344 (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*.

¹⁰¹ 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 International Trade Administration of the Department of Commerce and USTR to conduct negotiations in the WTO “to recognize the right of members to distribute monies collected from antidumping and countervailing duties” in the Science, State, Justice, Commerce and Related Agencies Appropriations Act, 2006, P.L. 109-108, 119 Stat. 2306-07, marking the third time that such a requirement appeared in statute. The appropriation was extended for FY2007 with the same provisos. See Revised Continuing Appropriations Resolution, 2007, P.L. 110-5.

The President’s signing statement on P.L. 109-108 appeared to indicate that the Executive Branch would treat the provision, inasmuch as it affected the Commerce (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.¹⁰²

In April 2006, the U.S. Court of International Trade ruled that the CDSOA did not apply to imports from Canada or Mexico,¹⁰³ and on September 28, 2006, Customs

¹⁰¹ (...continued)

Department, as “advisory” on the ground that it interfered with the President’s foreign affairs authority. The statement provides in pertinent part:

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

In 2004, 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, which is negotiating on antidumping and countervailing duty issues. Communication from the United States, *Three Issues Identified for Discussion by the Negotiating Group on Rules*, at 2, TN/RL/W/153 (April 26, 2004). A provision of this type was not included in the draft negotiating text released by the Chairman of the Negotiating Group at the end of November 2007. See Negotiating Group on Rules, *Draft Consolidated Chair Texts of the AD and SCM Agreements*, TN/RL/W/213 (November 30, 2007).

¹⁰² Dispute Settlement Body, *Minutes of Meeting*, February 17, 2006, at 5-10, WT/DSB/M/205 (March 31, 2006).

¹⁰³ *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 (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
(continued...)

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.¹⁰⁴ Canada allowed its retaliatory tariffs to terminate as of April 30, 2006.¹⁰⁵ Mexico, after a month's lapse, imposed increased tariffs on U.S. dairy products from September 18 through October 31, 2006.¹⁰⁶ These tariffs have not been reimposed.

The EC and Japan are continuing to impose retaliatory tariffs, which, according to the earlier WTO arbitration, may not exceed 72 percent of the antidumping and countervailing duties on EC and Japanese products, respectively, disbursed for the most recent year for which data is available. On May 1, 2007, the EC increased its level of retaliation from the \$36.91 million applied since May 1, 2006, to \$81.19 million. The EC made its existing 15% import surcharge applicable to 32 additional products, including different types of paper products, plastic furniture, textile products, pens, footwear, and mobile homes.¹⁰⁷ Japan also imposed a 15% tariff surcharge on selected products, which it has extended for one year, ending August 31, 2008; its current level of retaliation is \$48.18 million, a decrease from the \$55.93 million imposed during the previous year.¹⁰⁸ Japan's surcharge applies to conveyor belts, steel products, fork-lift trucks, printing machines, tool holders, ball and roller bearings, and navigational instruments.

Although collection of antidumping and countervailing duties for purposes of CDSOA disbursement ceased as of October 1, 2007, duties will continue to be available for disbursement until all entries before this date are liquidated, i.e. the final assessment of duties on these entries is made. WTO Members regularly state at DSB meetings that, by including a transition period in the statutory repeal, the United

¹⁰³ (...continued)

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.

¹⁰⁴ Notice of Withholding of Certain Distributions on Continued Dumping and Subsidy Offset to Affected Producers, 71 *Fed. Reg.* 57000 (September 28, 2006).

¹⁰⁵ 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>].

¹⁰⁶ *U.S. Dairy Industry Expects Hit from Short-term Mexican Byrd Retaliation*, Inside U.S. Trade, October 6, 2006; *DSB Minutes* (September 28, 2006), *supra* note 59, at 9.

¹⁰⁷ European Commission, *EU Publishes revised smart sanctions to counter US Byrd Amendment* (April 17, 2007), at [http://ec.europa.eu/trade/issues/respectrules/dispute/pr170407_en.htm]. See also European Commission, *Products that will be subject to a 15% additional import duty as from May 2007* (April 17, 2007), at [http://trade.ec.europa.eu/doclib/docs/2007/april/tradoc_134483.pdf].

¹⁰⁸ Communication from Japan, *United States — Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/52 (August 27, 2007); *Japan Notifies WTO of \$48 Million in Duties That Remain on U.S. Imports in Byrd Dispute*, 24 Int'l Trade Rep. (BNA) 1247 (September 6, 2007).

States has not fully complied with its WTO obligations in the case.¹⁰⁹ No Member has formally challenged the compatibility of the 2006 statute with U.S. obligations, however.

In addition, Congress for the past several years has directed the Commerce Department and the USTR to conduct negotiations in the WTO “to recognize the right of members to distribute monies collected from antidumping and countervailing duties.”¹¹⁰ While the USTR submitted a proposal of this type to the Doha Round Negotiating Group on Rules, a provision addressing this issue was not included in the draft negotiating text released by the Chairman of the Negotiating Group in late November 2007.¹¹¹

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,¹¹² adding in its subsequent panel request in February 2003 a claim based on subsidy obligations in GATT Article XVI.¹¹³

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

¹⁰⁹ See, e.g., *DSB Minutes*, July 24, 2007, *supra* note 57, at 6-8.

¹¹⁰ The mandate appears in the Science, State, Justice, Commerce and Related Agencies Appropriations Act, 2006, P.L. 109-108, 119 Stat. 2306-07, marking the third time that such a requirement appeared in statute. The appropriation was extended for FY2007 with the same provisos. See Revised Continuing Appropriations Resolution, 2007, P.L. 110-5.

The President’s signing statement on P.L. 109-108 appeared to indicate that the Executive Branch would treat the provision, inasmuch as it affected the Commerce Department, as “advisory” on the ground that it interfered with the President’s foreign affairs authority. The statement provides in pertinent part:

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

¹¹¹ See Communication from the United States, *Three Issues Identified for Discussion by the Negotiating Group on Rules*, at 2, TN/RL/W/153 (April 26, 2004), and Draft Rules Text, *supra* note 85.

¹¹² Request for Consultations by Brazil, *United States — Subsidies on Upland Cotton*, WT/DS267/1 (October 3, 2002).

¹¹³ Request for the Establishment of a Panel by Brazil, *United States — Subsidies on Upland Cotton*, WT/DS267/7 (February 7, 2003).

commitments are listed in a Schedule that is attached to the Agreement.¹¹⁴ 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 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.¹¹⁵ 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").¹¹⁶ 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).¹¹⁷ 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 provided 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 1994 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

¹¹⁴ Agreement on Agriculture, Art. 3.1.

¹¹⁵ Agreement on Agriculture, Art. 3.3.

¹¹⁶ *Id.*

¹¹⁷ Agreement on Subsidies and Countervailing Measures (SCM Agreement), at [http://www.wto.org/english/docs_e/legal_e/legal_e.htm].

as actionable subsidies that caused serious prejudice to the interests of Brazil.¹¹⁸ 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.¹¹⁹ The three programs are the Commodity Credit Corporation (CCC) Export Credit Guarantee Program (GSM 102), providing export credit guarantees for up to three 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.¹²⁰ The panel went on to find that these programs are prohibited export subsidies under Article 3.1(a) of the SCM Agreement.¹²¹

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.¹²² 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.¹²³ 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.¹²⁴

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 the 1992 marketing year” and thus were not covered by a provision of the Peace Clause that could be invoked only

¹¹⁸ Panel Report, *United States — Subsidies on Upland Cotton*, WT/DS267/R (September 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, *Brazil's WTO Case Against the U.S. Cotton Program*, by Randy Schnepf. See also Eliza Patterson, *The WTO Decision on U.S. Cotton Subsidies*, ASIL Insight (March 2005), at [<http://www.asil.org/insights/2005/03/insights050323.html>].

¹¹⁹ Cotton Panel Report, *supra* note 118, at paras. 7.787-7.948, 8.1(d)(i).

¹²⁰ *Id.* at paras. 7.943-7.944, 8.1(d)(i).

¹²¹ *Id.* at paras. 7.946-7.948, 8.1(d)(i).

¹²² *Id.* at paras. 7.692-7.749, 8.1(e)(i).

¹²³ *Id.* at paras. 7.751-7.761, 8.1(e)(ii)-(iii).

¹²⁴ *Id.* at paras. 7.1030-7.1098, 8.1(f).

if such support was not being provided.¹²⁵ 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.¹²⁶ 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,¹²⁷ a finding that allowed Brazil to challenge flexibility contract payments (FCP) and market loss assistance payments, the legislative basis of which had expired in 2002. Brazil was unable, however, to show serious prejudice from the FCP program.

The panel recommended that the prohibited subsidies be removed “without delay” and specified that this be done at the latest within six months of the date of adoption of the panel report or July 1, 2005, whichever was earlier.¹²⁸ 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.¹²⁹ The United States appealed, and the Appellate Body, in a March 5, 2005, report, largely upheld the panel.¹³⁰ The reports were adopted at the DSB meeting of March 21, 2005.¹³¹

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.¹³²

¹²⁵ *Id.* at paras. 7.415-7.608, 8.1(c).

¹²⁶ *Id.* at paras. 7.1109-7.1416, 8.1(g)(i).

¹²⁷ *Id.* at paras. 7.528-7.530.

¹²⁸ *Id.* at para. 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.”

¹²⁹ *Id.* at para. 8.3(d).

¹³⁰ Appellate Body Report, *United States — Subsidies on Upland Cotton*, WT/DS267/AB/R (March 3, 2005).

¹³¹ Dispute Settlement Body, *Minutes of Meeting*, March 21, 2005, at 7-13, WT/DSB/M/186 (April 14, 2005).

¹³² 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
(continued...)

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.¹³³ Brazil complained that the U.S. statement was not sufficiently detailed and made reference to the panel's recommended compliance date.¹³⁴ The EC noted that because the subsidies at issue were found to infringe both the SCM Agreement and the Agreement on Agriculture, the United States was entitled to a reasonable period to comply with the latter.¹³⁵

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.¹³⁶ 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.¹³⁷ 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.”¹³⁸

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

¹³² (...continued)

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.”

¹³³ Dispute Settlement Body, *Minutes of Meeting*, April 20, 2005, at 7, WT/DSB/M/188 (May 18, 2005)[hereinafter *DSB Minutes* (April 20, 2005)].

¹³⁴ *Id.* at 8.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

commodities and for rice, for the most recent concluded fiscal year.¹³⁹ Brazil estimated the annual total for both to be \$3 billion.¹⁴⁰

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.¹⁴¹ Pursuant to the agreement, the United States requested arbitration of Brazil's retaliation proposal; the DSB referred the matter to arbitration at the July 15 meeting of the DSB;¹⁴² and the two countries, on August 17, 2005, requested that the arbitration be suspended.¹⁴³ 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

¹³⁹ 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).

¹⁴⁰ 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.

¹⁴¹ Understanding between Brazil and the United States Regarding Procedures under Articles 21 and 22 of the DSU and Article 4 of the SCM Agreement, *United States — Subsidies on Upland Cotton*, WT/DS267/22 (July 8, 2005). It was agreed, among other things, that Brazil would make its retaliation request at the July 15 DSB meeting; the United States would object to the retaliation request (thus sending it to arbitration); the two would request shortly thereafter that the arbitration be suspended; Brazil would be entitled to request an Article 21.5 compliance panel, which either party could appeal; were the United States found to be 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 withdraw its retaliation request, an action that would terminate the arbitration.

¹⁴² Dispute Settlement Body, *Minutes of Meeting*, July 15, 2005, WT/DSB/M/193 (July 28, 2005).

¹⁴³ 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 (August 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 (January 20, 2006); *Brazil Threatens to Renew WTO Arbitration Proceeding on Cotton*, Inside U.S. Trade, January 20, 2006, at 1.

adverse effects.¹⁴⁴ The United States objected to the proposal on October 17,¹⁴⁵ and the matter was referred to arbitration at the DSB meeting held the following day.¹⁴⁶ 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.”¹⁴⁷ 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.¹⁴⁸

Recent Developments. The Step 2 program faulted by the Appellate Body was repealed effective August 1, 2006.¹⁴⁹ Brazil requested a compliance panel later that month, 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.¹⁵⁰ The panel publicly issued a final ruling adverse to the United States

¹⁴⁴ 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 (October 7, 2005).

¹⁴⁵ 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 (October 18, 2005).

¹⁴⁶ 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 (December 7, 2005).

¹⁴⁷ 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 (December 7, 2005).

¹⁴⁸ See *Senate Agriculture Narrowly Approves \$3 Billion in Cuts to Agriculture Spending*, Daily Rep. for Executives (BNA) No. 202, at A-23 (October 20, 2005); *House Agriculture Committee Approves \$3.7 Billion in Cuts for Reconciliation Plan*, Daily Rep. for Executives (BNA) No. 209, at A-12 (October 31, 2005).

¹⁴⁹ See § 1103 of P.L. 109-171, the Deficit Reduction Act of 2005, signed by the President on February 8, 2006. For further information on U.S. actions taken in response to the WTO decision, see CRS Report RS22187, *Brazil's WTO Case Against the Cotton Program: A Brief Overview*, by Randy Schnepf.

¹⁵⁰ 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 (August 21, 2006).

In its panel request, Brazil states that entry into effect of the repeal 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 compliance 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 subsidies 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 —

(continued...)

on December 18, 2007.¹⁵¹ Either party may appeal the final panel report on issues of law and legal interpretation within 60 days after this date.

Measures Affecting Cross-Border Supply of Gambling and Betting Services (DS285). 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).¹⁵² 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

¹⁵⁰ (...continued)

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 Subsidies 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.

¹⁵¹ Report of the Panel, Recourse to Article 21.5 of the DSU by Brazil, *United States — Subsidies on Upland Cotton*, WT/DS267/RW (December 18, 2007).

¹⁵² Request for Consultations by Antigua and Barbuda, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/1 (March 27, 2003).

market access commitments in the area.¹⁵³ 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);¹⁵⁴ the state laws were those of Louisiana, Massachusetts, South Dakota, and Utah. The panel found that by preventing one, several, or all means of delivering gambling and betting services, the statutes constituted impermissible market access 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.¹⁵⁵

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.¹⁵⁶ Though the AB upheld the

¹⁵³ Panel Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (November 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, including supply from the territory of one Member into the territory of any other Member, which is the mode of supply at issue in this case. 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.

¹⁵⁴ The Wire Act, P.L. 87-216, § 2, as amended, 18 U.S.C. § 1084, prohibits the transmission of wagering information. The Travel Act, P.L. 87-228, § 1(a), as amended, 18 U.S.C. § 1952, prohibits interstate and foreign travel or transportation in aid of certain unlawful activities, including business enterprises involving gambling in violation of U.S. or state law. The Interstate Gambling Business Act, P.L. 91-452, § 803(a), as amended, 18 U.S.C. § 1955, prohibits illegal gambling businesses, as defined in the statute.

¹⁵⁵ See Gambling Panel Report, *supra* note 153, at para. 6.578.

¹⁵⁶ Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply* (continued...)

panel’s finding of a violation of GATS market access obligations,¹⁵⁷ it reversed the panel on its finding that the United States could not justify the federal measures under GATS exceptions.¹⁵⁸ 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.¹⁵⁹

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.¹⁶⁰ 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.¹⁶¹

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.¹⁶² First, Antigua cited § 5 of the act, which it characterized as expressly allowing an interstate off-track wager to be accepted by

¹⁵⁶ (...continued)

of *Gambling and Betting Services*, paras. 158-213, 373(B), WT/DS285/AB/R (April 7, 2005)[hereinafter *Gambling AB Report*].

¹⁵⁷ *Id.* at paras. 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.* at paras. 238, 251.

¹⁵⁸ *Id.* at paras. 300-327, 335-336, 373(D)(iii)(b),(iv)(a).

¹⁵⁹ *Id.* at paras. 133-155, 373(A)(iii),(C)(iii).

¹⁶⁰ 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.* at paras. 337, 373(D)(iv)(b).

¹⁶¹ *Id.* at paras. 338-372, 373(v),(vi).

¹⁶² Interstate Horseracing Act of 1978 (IHA), P.L. 95-515, 15 U.S.C §§ 3001-3006. See *Gambling AB Report*, *supra* note 156, at para. 361.

an off-track betting system, where consent is obtained from certain organizations.¹⁶³ 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.¹⁶⁴ 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.¹⁶⁵

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.”¹⁶⁶ 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, 2005.¹⁶⁷ 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.¹⁶⁸

After the disputing parties had failed to agree on a reasonable period of time for compliance, Antigua requested that the compliance period be arbitrated.¹⁶⁹ 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 “U.S. authorities intend to seek further clarification through legislation.”¹⁷⁰

¹⁶³ 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.”

¹⁶⁴ IHA, § 3(3), 15 U.S.C § 3002(3).

¹⁶⁵ Gambling AB Report, *supra* note 156, at para. 361 (footnotes omitted)(emphasis in original).

¹⁶⁶ *Id.* at para. 364 (emphasis in original).

¹⁶⁷ DSB Minutes (April 20, 2005), *supra* note 133, at 15.

¹⁶⁸ Dispute Settlement Body, *Minutes of Meeting*, May 19, 2005, at 9, WT/DSB/M/189 (June 17, 2005).

¹⁶⁹ 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).

¹⁷⁰ 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*, (continued...)

The United States sought a 15-month compliance period, stressing that such legislative action would be “technically complex.”¹⁷¹ In an award made public August 19, 2005, the Arbitrator determined that the compliance period would last 11 months and two weeks from the date of adoption of the panel and AB reports, thus expiring April 3, 2006.¹⁷²

Legislative action was not taken before the deadline; instead, the United States stated in a status report to the DSB that it had complied in the case based on the

¹⁷⁰ (...continued)

WT/DS285, July 12, 2005, at 4, at [http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_Trade_Policy_Agenda/asset_upload_file639_10625.pdf?ht=].

¹⁷¹ The United States argued as follows regarding the complexity 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.

... There will be ample room for reasonable and principled disagreements among legislators as to precisely how to achieve such a clarification in the context of Internet gambling....

... A legislative clarification will be further complicated by the fact that, starting in the 105th Congress (1997-98), and continuing in each subsequent Congress through the 108th Congress (2003-04), U.S. federal lawmakers have considered a wide range of proposals to address Internet gambling. Members of Congress are actively considering introduction of Internet gambling bills in the current 109th Congress (2005-2006), 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.

¹⁷² 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 (August 19, 2005).

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.¹⁷³

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.¹⁷⁴

Antigua requested 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 same position had been maintained by the United States during the course of the dispute and was subsequently rejected by the panel and Appellate Body. Antigua 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

¹⁷³ 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 (April 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>].

¹⁷⁴ 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)[hereinafter Antigua — United States Procedural Agreement]. Note also Dispute Settlement Body, *Minutes of Meeting*, April 21, 2006, at 8-10, WT/DSB/M/210 (May 30, 2006).

and cross-border service providers.¹⁷⁵ The compliance panel was established July 19, 2006.

Recent Developments. On March 30, 2007, the compliance panel issued a report adverse to the United States, finding that the United States had not taken any measures to comply in the case and thus left the statutory ambiguity cited by the panel unresolved.¹⁷⁶ The panel noted that legislation was not the only means of compliance in the proceeding and that “other forms of administrative action, or judicial action, [could be used] to bring the measures into conformity.”¹⁷⁷ The United States did not appeal the report, which was adopted by the DSB on May 22, 2007. Earlier in the month, the Office of the USTR announced that the United States intended to invoke Article XXI of the GATS “in order to clarify its commitment involving ‘recreational services,’” in order to bring the United States into compliance in the dispute and to resolve the dispute permanently.¹⁷⁸ With Antigua’s subsequent

¹⁷⁵ 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. 109-347, Title VIII. 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 RS22749, *Unlawful Internet Gambling Enforcement Act and Regulations Proposed for Its Implementation*, by Charles Doyle; CRS Report RS21984, *Internet Gambling: An Abridged Overview of Federal Criminal Law*, by Charles Doyle.

¹⁷⁶ Panel Report, 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/RW (March 30, 2007)[hereinafter Gambling Compliance Report]. Among other things, the panel concluded that enactment of the UIGEA, see *supra* note 175, did not resolve any of the issues involved in the dispute, citing the statute’s express exclusion of activities allowed under the Interstate Horseracing Act and its “sense of Congress” statement that UIGEA “is not intended to resolve any existing disagreements over how to interpret the relationship between the IHA and other Federal statutes.” Gambling Compliance Report, *supra*, at paras. 6.130-6.135.

¹⁷⁷ *Id.* at para. 6.90

¹⁷⁸ Press Release, Office of the U.S. Trade Representative, Statement of Deputy United States Trade Representative John K. Veroneau Regarding U.S. Actions under GATS Article XXI (May 4, 2007), at [http://www.ustr.gov/Document_Library/Press_Releases/2007/May/Statement_of_Deputy_United_States_Trade_Representative_John_K_Veroneau_Regarding_US_Actions_under_GATS_Article_XXI.html] (hereinafter USTR Press Release, May (continued...))

pursuit of retaliation in the underlying WTO dispute, the United States is currently engaged in two WTO proceedings, one involving negotiations with various WTO Members regarding modification of its GATS Schedule under Article XXI and the other involving arbitration of Antigua's request to impose countermeasures.

GATS Article XXI Negotiations. Article XXI allows a WTO Member to modify or withdraw any commitment in its GATS Schedule and also permits a WTO Member whose GATS benefits may be affected by the proposed modification or withdrawal to negotiate a compensation agreement with the Member making the change.¹⁷⁹ Any such agreement “should maintain a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of Specific Commitments prior to such negotiations.” In its May announcement, USTR stated that in negotiating the GATS, the United States “did not make it clear” that its international commitments to open its market to recreational services did not extend to gambling and that since “no WTO Member either bargained for or reasonably could have expected the United States to undertake a commitment on gambling, there would be very little, if any basis for ... [compensation] claims.”¹⁸⁰

Antigua, Australia, Canada, Costa Rica, EC, India, Japan, and Macao requested consultations with the United States regarding Article XXI compensation.¹⁸¹ As provided in GATS procedural rules, negotiations on compensation were originally envisioned to have been completed within three months, i.e. toward the end of September 2007, but were later extended twice by mutual agreement, most recently to December 14, 2007.¹⁸² On December 17, the United States and the EC announced

¹⁷⁸ (...continued)

4, 2007); Press Release, U.S. Mission to the United Nations in Geneva, Statements by the United States at the WTO Dispute Settlement Body Meeting, Geneva, May 22, 2007, at [<http://www.us-mission.ch/Press2007/0522DSB.html>].

¹⁷⁹ Compensatory adjustments under Article XXI are to be made on an MFN basis. Further, in the absence of an agreement between the parties before “the period provided for negotiations,” the affected Member may refer the issue to arbitration. Any Member wishing to enforce its right to compensation must participate in the arbitration. The modifying Member may not change modify or withdraw its GATS commitment until it has provided compensation in accordance with the arbitral findings. If the modifying Member implements its change without complying with these findings, any affected Member participating in the arbitration “may modify or withdraw substantially equivalent benefits in conformity with the those findings.” Any such change by the affected Member may be implemented so as to apply only to the modifying Member notwithstanding the general MFN obligation in GATS Article II.

¹⁸⁰ USTR Press Release, May 4, 2007, *supra* note 178.

¹⁸¹ *Australia, Canada, Costa Rica, Macao Request Talks with U.S. in Gambling Dispute; EU, Antigua Request Compensation from the U.S. in WTO Gambling Case*, Inside U.S. Trade, June 22, 2007, at 9.

¹⁸² *U.S. Extends Gambling Negotiations on Compensation with Claimants*, Inside U.S. Trade, October 26, 2007, at 9 [hereinafter *U.S. Extends Negotiations*]. See WTO Council on Trade in Services, *Procedures for the Implementation of Article XXI of the General* (continued...)

that they had reached a bilateral compensation agreement providing EC service suppliers with improved market access in the U.S. postal and courier, research and development, warehouse, and technical testing services sectors.¹⁸³ The United States also announced that it had reached agreement with Canada and Japan as well.¹⁸⁴ It has also been reported that Australia has settled outstanding issues with the United States and is no longer participating in the negotiations.¹⁸⁵

Under GATS rules, the remaining claimants may now may request arbitration and have 45 days after the end of the last negotiating period to do so. A panel would be expected to issue its report within three months after it is appointed.¹⁸⁶ Under GATS rules, the United States would not be permitted to modify its Services Schedule until it had made compensatory adjustments in conformity with the arbitration. If the United States were to implement its change without so complying, any affected Member participating in the arbitration would be able to modify or withdraw substantially equivalent benefits in conformity with the arbitral findings. GATS rules would allow any such change by the affected Member to be implemented so as to apply only to the United States notwithstanding the general MFN obligation in GATS Article II. If arbitration were not requested, however, the United States would be free to implement the modification as originally proposed.

Antigua's Retaliation Request. In the WTO dispute itself, Antigua has requested authorization from the DSB to impose \$ 3.4 billion in countermeasures against the United States for non-compliance, primarily by suspending obligations owed the United States under the Agreement on Trade-Related Intellectual Property Rights.¹⁸⁷

¹⁸² (...continued)

Agreement on Trade in Services (GATS)(Modification of Schedules), para. 4, S/L/80 (October 29, 1999)[hereinafter *GATS Article XXI Procedures*].

¹⁸³ *Statement by USTR Spokeswoman Gretchen Hamel on Gambling*, December 17, 2007, at [http://www.ustr.gov/Document_Library/Press_Releases/2007/December/Statement_by_USTR_Spokeswoman_Gretchen_Hamel_on_Gambling_printer.html] [hereinafter USTR Gambling Statement]; *EU and US Agree on Compensation in WTO for Loss of Trade Opportunities in US Gambling Sector*, News Release No. 128/17, December 17, 2007, at [<http://www.eurunion.org/News/press/2007/20070128.htm>].

¹⁸⁴ USTR Statement on Gambling, *supra* note 183.

¹⁸⁵ *U.S. Extends Negotiations*, *supra* note 182; *U.S. Japan Reach WTO Settlement on Compensation for Gambling Claim*, Daily Report for Executives (BNA), September 28, 2007, at A-29; *U.S. Compensation Package for WTO Members Unlikely to Satisfy Antigua*, Inside U.S. Trade, at August 24, 2007, at 1.

¹⁸⁶ Regarding GATS procedural rules on arbitration, see *GATS Article XXI Procedures*, *supra* note 182, at paras. 7-19.

¹⁸⁷ Recourse by Antigua and Barbuda to Article 22.2 of the DSU, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/22 (June 22, 2007). Along with obligations under the Agreement on Trade Related Intellectual Property Rights, Antigua has also proposed possible suspension of GATS concessions involving telecommunications services. Antigua argues in its request that imposing tariff surcharges on U.S. products (the most commonly used form of retaliation) or placing added restrictions on U.S. services would have a “disproportionate adverse impact” on Antigua (continued...)

The United States objected to the request, challenging both the level of suspension of concessions and Antigua's compliance with DSU principles and procedures governing a WTO Member's consideration of which concessions to suspend.¹⁸⁸ Because of the U.S. objection, Antigua's proposal was sent to arbitration. In a ruling issued December 21, 2007, the Arbitrator determined that Antigua may request authorization from the DSB to suspend concessions under the TRIPS agreement at a level not to exceed \$21 million annually.¹⁸⁹ The amount was based on the Arbitrator's assumption that the United States would have complied with the ruling by opening its market to Antiguan providers of remote gambling on horseracing.

Pending Cases Involving Administrative Action

Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") (DS294). In June 2003, the EC requested consultations with the United States over the use of zeroing by the Commerce Department in determining dumping margins, arguing that the practice as it relates to original investigations and subsequent (i.e., administrative, new shipper, changed circumstances, and sunset) reviews was "as such" inconsistent with provisions of the Agreement on Antidumping and the GATT 1994 and that the United States had acted inconsistently with its WTO obligations in applying zeroing in 31 specific cases,

¹⁸⁷ (...continued)

because any such fees or restrictions would make the goods and services "materially more expensive" to Antiguan citizens and would have little or no impact on the United States. Antigua also argues that retaliating solely under the GATS would prevent it from recovering the full amount of trade damage caused by the U.S. measures.

¹⁸⁸ Request by the United States for Arbitration under Article 22.6 of the DSU, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/23 (July 24, 2007). The United States has challenged the economic data used by Antigua and its measurement of losses against the hypothetical legalization of all remote gambling in the United States instead of the legalization of remote gambling on horseracing. The United States argues that by its calculations Antigua's trade injury should amount to \$500,000 per year and, in any event, no more than \$3.3 million per year. Written Submission of the United States, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services — Arbitration Pursuant to Article 22.6 of the DSU*, WT/DS285 (September 19, 2007), available at [http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file602_5581.pdf].

¹⁸⁹ Decision by the Arbitrator, Recourse to Arbitration by the United States for Arbitration under Article 22.6 of the DSU, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/ARB (December 21, 2007).

including 15 original investigations and 16 administrative reviews.¹⁹⁰ A panel was established at the EC's request in March 2004.¹⁹¹

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 (i.e., sales at prices that are equal to or greater than normal value). The Department is authorized under U.S. law to make three types of price comparisons in determining a dumping margin in an original antidumping investigation, 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 for comparable merchandise; (2) normal values of individual transactions to export prices of individual transactions for comparable merchandise; and (3) under certain defined circumstances, aimed at identifying so-called "targeted dumping," weighted average of normal values to export prices of individual transactions for comparable merchandise.¹⁹² The DOC ordinarily uses weighted-average-to-weighted-average comparisons in original investigations,¹⁹³ as was the case in the original investigations cited in the EC's complaint. In annual administrative reviews, where DOC assesses the actual antidumping duties to be imposed on entries of the merchandise involved,¹⁹⁴ the Department calculates the duty owed by an importer by comparing the price of each individual export transaction with a monthly weighted-average normal value.¹⁹⁵ The practice of zeroing is said to inflate dumping margins by not allowing dumped sales to be weighed against non-dumped sales, whereas others argue that the practice combats masked dumping and that actual dumping may

¹⁹⁰ 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 (September 15, 2003). An "as such" claim challenges the existence of a measure of another Member, as opposed to its application in a particular case. Such claims "assert[] that a Member's conduct — not only in a particular instance that has occurred, but in future situations as well — will necessarily be inconsistent with that Member's WTO obligations." Appellate Body Report, *United States — Sunset Review of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, para. 172, WT/DS268/AB/R (November 29, 2004).

¹⁹¹ 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 (February 6, 2004) and WT/DS294/7/Rev.1 (February 19, 2004).

¹⁹² Tariff Act of 1930, § 777A(d), 19 U.S.C. § 1677f-1(d). Targeted dumping comparison methodology is rarely used but may be employed where the other comparison methodologies "cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods." Uruguay Round SAA, *supra* note 7, at 843; see also Targeted Dumping in Antidumping Investigations; Request for Comments, 72 *Fed. Reg.* 60651 (October 25, 2007). Targeting dumping would occur when an exporter sold a product at a dumped price in certain areas or to certain customers, while masking these sales with non-dumped exports elsewhere.

¹⁹³ Dept. of Commerce, *Import Administration Antidumping Manual*, ch. 6, at 7 (1997 ed.), at [<http://ia.ita.doc.gov/admanual>][hereinafter DOC AD Manual].

¹⁹⁴ Regarding administrative reviews generally, see *supra* note 41.

¹⁹⁵ DOC AD Manual, *supra* note 193, ch. 18, at 24; see Tariff Act of 1930, § 777A(d)(2), 19 U.S.C. § 1677f-1(d)(2), and Uruguay Round SAA, *supra* note 7, at 843.

be remedied notwithstanding that exporters may not sell all products at dumped prices in a particular national market. Neither the WTO Antidumping Agreement nor federal laws expressly address the use of zeroing in antidumping investigations and reviews; U.S. courts have ruled, however, that DOC's interpretation of U.S. antidumping law to allow, but not require, the practice is a reasonable one.¹⁹⁶

The WTO panel, in a report issued October 31, 2005, found that zeroing, as applied in the weighted-average-to-weighted average price comparisons made in the specific original investigations cited in the EC's complaint, is inconsistent with Article 2.4.2 of the Antidumping Agreement, which provides in part that "[s]ubject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of weighted-average normal value of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis."¹⁹⁷ The panel based its conclusion on earlier Appellate Body rulings, including a ruling against the United States regarding its use of zeroing in calculating dumping margins on softwood lumber from Canada (DS264), that "when a margin of dumping is calculated on the basis of multiple averaging by model type, the margin of dumping for the product in question must reflect the results of all such comparisons, including weighted average export prices that are above the normal value for individual models."¹⁹⁸ The panel also found that zeroing, as it relates to

¹⁹⁶ *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).

¹⁹⁷ Panel Report, *United States — Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R (October 31, 2005)[hereinafter Zeroing Panel Report (EC)].

¹⁹⁸ *Id.*, at para. 7.31. The application of zeroing by the Department of Commerce in weighted-average-to-weighted-average comparisons, referred to by the EC in the case as "model zeroing," was described by the panel as follows:

... The investigating authority, as well as determining the overall product scope of the proceeding ... will in applying the weighted average-to-weighted average comparison method, identify those sales of sub-products in the United States considered "comparable", and will include such sales in an "averaging group." An averaging group consists of merchandise that is identical or virtually identical in all physical characteristics.... The weighted-average-to-weighted-average comparison between normal value and export price is made within each averaging group. The amount by which normal value exceeds export price is considered by the United States to be a "dumping margin" or dumped amount — referred to by the United States as the Potentially Uncollectible Dumping Duties, or PUDD. If export price exceeds normal value (the margin is negative), the "dumping margin" or dumped amount or PUDD for that averaging group is considered to be zero. The margin of dumping for the overall product is calculated by combining the averaging group results. The total of the dumped amounts or PUDDs (excluding the negative amounts or treating them as zero) is expressed as a percentage of the total export prices (including all averaging groups)....

(continued...)

original investigations, is a norm that could be challenged in a WTO dispute even though it is not in written form, and that, with respect to its use in weighted-average-to-weighted-average price comparisons in original investigations, the norm as such is inconsistent with Article 2.4.2.

The panel rejected the EC's claims regarding §§ 771(35)(A) and (B), 731, and 777A(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 price comparison methodologies discussed above.

The panel also upheld the United States on its use of zeroing in the specific administrative reviews cited by the EC as well as on 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 is inconsistent with Article 2.4.2 of the Antidumping Agreement.¹⁹⁹

The AB reversed the panel, however, in finding that the United States was in compliance with its WTO obligations in using zeroing in the administrative reviews cited by the EC. The AB found instead that the application of zeroing in these reviews violated Article 9.3 of the Antidumping Agreement and Article VI:2 of the GATT 1994 since the practice resulted in antidumping duties that exceeded the exporters' or producers' dumping margins. Article 9.3, which sets out obligations regarding the assessment of antidumping duties, 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 1994 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 administrative reviews, the Appellate Body stated that

¹⁹⁸ (...continued)

Id. at para. 2.3 (citations omitted)(emphasis in original). The Commerce Department defines the term PUDD as the amount of dumping duties that would have been collected from the U.S. sales under investigation had an AD order been in effect before the investigation began; for further discussion, see DOC AD Manual, *supra* note 193, ch. 6, at 9-10.

¹⁹⁹ Appellate Body Report, *United States — Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R (April 18, 2006).

... 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 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 1994.²⁰⁰

The AB report, which also addressed other issues, and the modified panel report were adopted on May 9, 2006.²⁰¹ While the United States vigorously disputed the Appellate Body decision,²⁰² it stated at a subsequent DSB meeting that it intended to comply.²⁰³ The disputing parties later agreed on an implementation deadline of April 9, 2007.²⁰⁴

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 weighted-average-to-weighted-average comparisons in antidumping investigations and was seeking comments on alternative approaches that might be appropriate in future investigations.²⁰⁵ 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 such comparisons was inconsistent with Article 2.4.2 of the Antidumping Agreement.

²⁰⁰ *Id.* at para. 133.

²⁰¹ Dispute Settlement Body, *Minutes of Meeting*, May 9, 2006, at 7-13, WT/DSB/M/211 (June 12, 2006).

²⁰² Along with criticizing the Appellate Body report at DSB meetings, the United States took the uncommon step of circulating detailed critiques of the decision to WTO Members. See 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).

²⁰³ Dispute Settlement Body, *Minutes of Meeting*, May 30, 2006, at [1], WT/DSB/M/213 (June 21, 2006).

²⁰⁴ 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).

²⁰⁵ Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 71 *Fed. Reg.* 11189 (March 6, 2006).

Recent Developments. 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, noting 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, 2007.²⁰⁶ The Department later extended the date to January 23, 2007, and then to 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.”²⁰⁷

The Department also announced on February 22, 2007, that it was initiating Section 129 proceedings in which it would implement the WTO ruling with respect to 12 of the 15 antidumping investigations cited by the EC, three of the cited AD orders having been revoked.²⁰⁸ On April 9, 2007, the Department of Commerce issued new Section 129 determinations in 11 of the proceedings using average-to-average comparisons in which offsets were provided, two of which resulted in

²⁰⁶ Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Duty Investigation; Final Modification, 71 *Fed. Reg.* 77722 (December 27, 2006).

²⁰⁷ 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 (January 16, 2007); Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Duty Investigation; Change in Effective Date of Final Modification, 72 *Fed. Reg.* 3783 (January 26, 2007).

Representative Rangel, Chairman of the House Ways and Means Committee, and Senator Baucus, Chairman of the Senate Finance Committee, had written 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, 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>]. The House Ways and Means Committee went on to solicit comments on the DOC action. See Advisory from the Committee on Ways and Means, FC-7 (January 31, 2007), at [<http://waysandmeans.house.gov>].

In mid-December 2006, 11 Senators signed a letter to the same Administration recipients in which they took issue with the Appellate Body decision in DS294, favorably referred to several earlier GATT and WTO panels that had ruled differently, and expressed their disagreement with any modification of the U.S. practice. Text of December 2006 letter and of USTR memo to Congress under § 123 regarding the modification available at *Inside U.S. Trade*, December 15, 2006, at 19-21.

²⁰⁸ See Department of Commerce *Federal Register* notice and fact sheet at [<http://ia.ita.doc.gov/ia-highlights-and-news.html>]. The Department stated in its *Federal Register* notice that since a Section 129 determination is implemented prospectively, the date on which the USTR directs the Commerce Department to implement the determination “will necessarily be after the effective date of the revocation” of the AD orders in the three referenced cases and that “[a]s a result, the Department is not conducting section 129 proceedings with respect to the three investigations.”

findings of no dumping; the DOC postponed its determination in the 12th investigation, a proceeding involving stainless steel products from Italy, as it was investigating a possible clerical error in the original investigation alleged by the respondent.²⁰⁹ Recalculations were done without the use of zeroing as provided in the modification originally announced in December 2006.²¹⁰ Regarding the administrative reviews at issue in the dispute, the United States has stated that since they have been superseded by new administrative reviews, it does not need to take any further action to bring these reviews into compliance with the WTO decision.²¹¹ The USTR instructed DOC to implement the new determinations on April 23, 2007.²¹²

While the United States considered itself in compliance,²¹³ the EC questioned the prospective nature of the new determinations (that is, that they do not cover duties on goods entered before the date the Section 129 determinations were implemented), claimed that the DOC had “massively increased the ‘all others’ rate (applicable to exporters who do not have an individual duty rate, notably new exporters),” and stated that the United States was obligated to review the dumping margins in the 16 challenged administrative reviews, arguing that to its knowledge the United States has not taken any action to bring these reviews into compliance with the WTO decision.²¹⁴

On May 4, 2007, the United States and the EC entered into a procedural agreement regarding possible Article 21.5 compliance panel proceedings and the sequencing of a possible retaliation request in the event the United States is found not to have complied in the case.²¹⁵ The EC requested consultations with the United States under Article 21.5 in July 2007.²¹⁶ DOC issued a new determination in the

²⁰⁹ Department of Commerce, Issues and Decision Memorandum for the Final Results of the Section 129 Determination (April 9, 2007), at [<http://ia.ita.doc.gov/download/zeroing/zeroing-sec-129-final-decision-memo-20070410.pdf>].

²¹⁰ See Implementation of the Findings of the WTO Panel in *US-Zeroing (EC)*: Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders, 72 *Fed. Reg.* 25261 (May 4, 2007)[hereinafter May 2007 Implementation Notice].

²¹¹ Status Report by the United States, Addendum, *United States — Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)*, at 2, WT/DS294/20/Add.2 (April 13, 2007)[hereinafter Zeroing Status Report].

²¹² See May 2007 Implementation Notice, *supra* note 210.

²¹³ Zeroing Status Report, *supra* note 211.

²¹⁴ European Commission, *EU response to US action on WTO zeroing judgement* (April 12, 2007), at [http://ec.europa.eu/trade/issues/respectrules/anti_dumping/pr120407_en.htm].

²¹⁵ Understanding between the United States and the European Communities Regarding Procedures under Articles 21 and 22 of the DSU, *United States — Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)*, WT/DS294/21 (May 9, 2007).

²¹⁶ Request for Consultations, Recourse to Article 21.5 of the DSU by the European Communities, *United States — Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)*, WT/DS294/22 (July 12, 2007).

(continued...)

outstanding antidumping case, finding that the alleged clerical errors were not raised in the WTO dispute and thus were outside the scope of the Section 129 proceeding; the final antidumping margins were 2.11 percent for the individually investigated producer and 2.11 for all other exporters and producers, the same as the preliminary margins, each a reduction from an original margin of 11.23 percent.²¹⁷ A compliance panel was established at the EC's request in September 2007.²¹⁸ The WTO Director-General appointed panelists on November 30, 2007; reportedly a replacement is being sought for a panelist who has become unable to serve.²¹⁹ As discussed at the end of the following section, the use of zeroing in certain circumstances has been addressed in a Doha Round draft negotiating text released at the end of November 2007.

Measures Relating to Zeroing and Sunset Reviews (DS322).

Following a consultation request in November 2004, Japan requested that a panel be established to examine whether, in original antidumping investigations, administrative reviews (referred to in the case as “periodic reviews”), new shipper reviews, sunset reviews, and changed circumstances reviews, the application of zeroing in comparing normal value and export price in order to determine the overall dumping margin for the product as a whole as such violated various obligations under the WTO Antidumping Agreement.²²⁰ Japan also challenged as inconsistent with the Agreement subsequent USITC injury determinations based on dumping margins determined in this manner and made additional Agreement claims regarding sunset reviews and changed circumstances reviews in which determinations were

²¹⁶ (...continued)

In addition, the EC has initiated a new dispute proceeding with the United States in which it is challenging the use of zeroing in 18 antidumping proceedings, including 37 administrative reviews, 11 sunset reviews, and four original investigations, involving steel products, pasta, and chemicals imported from EC member countries (DS350). A panel was established in the case on June 4, 2007; a panel report is expected in September 2008. See Request for the Establishment of a Panel by the European Communities, *United States — Continued Existence and Application of Zeroing Methodology*, WT/DS350/6 (May 11, 2007); Communication from the Chairman of the Panel, *United States — Continued Existence and Application of Zeroing Methodology*, WT/DS350/10 (December 20, 2007).

²¹⁷ Implementation of the Findings of the WTO Panel in US-Zeroing (EC); Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Duty Order on Stainless Steel Sheet and Strip from in Coils from Italy, 72 *Fed. Reg.* 54640 (September 29, 2007); Department of Commerce, Issues and Decision Memorandum for the Final Results of the Section 129 Determination (August 20, 2007), at [<http://ia.ita.doc.gov/download/section129/Italy-SSSS-in-Coils-129-Final-Decision-Memo-08-20-07.pdf>].

²¹⁸ Request for the Establishment of a Panel, Recourse to Article 21.5 of the DSU by the European Communities, *United States — Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)*, WT/DS294/25 (September 14, 2007).

²¹⁹ Note from the Secretariat, Constitution of the Panel Established at the Request of the European Communities, Recourse to Article 21.5 of the DSU by the European Communities, *United States — Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)*, WT/DS294/26 (December 4, 2007); *Two Zeroing Rulings Delayed Due to Changes in Lineup of Panelists*, 24 *Int'l Trade Rep.* (BNA) 1728 (December 6, 2007).

²²⁰ Request for the Establishment of a Panel, *United States — Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/8 (February 7, 2005).

based on earlier determined dumping margins obtained through zeroing. Japan also challenged zeroing as applied in 15 specific antidumping proceedings, including one original investigation, 12 administrative reviews, and two sunset reviews. The panel was established February 28, 2005.

In a report circulated September 20, 2006, the panel concluded that zeroing, when used by DOC in weighted-average-to-weighted-average comparisons in original antidumping investigations and consequently, the use of zeroing in the one original investigation cited by Japan, were inconsistent with Article 2.4.2 of the Antidumping Agreement.²²¹ As in DS294, discussed above, zeroing was found to be a norm that could be challenged in a WTO dispute settlement proceeding.

The panel rejected Japan's claims that the use of use zeroing in transaction- to-transaction comparisons and in weighted-average-to-transaction comparisons was inconsistent with WTO obligations. It also rejected claims that the use of zeroing in administrative reviews and new shipper reviews, and the application of zeroing in the 11 administrative reviews cited by Japan was violative of WTO obligations. In addition, the panel found that Japan had failed to make a prima facie case that the United States was in violation of its WTO obligations by using zeroing procedures in changed circumstances reviews and sunset reviews. The panel also determined that the United States did not act inconsistently with Antidumping Agreement provisions in relying on dumping margins calculated in previous proceedings in the two sunset reviews cited by Japan. Both Japan and the United States appealed the decision.

In a ruling issued January 9, 2007, the Appellate Body upheld the panel's finding that zeroing was a norm that could be challenged as such but reversed the panel in a number of significant respects.²²²

Contrary to the panel, the Appellate Body found that, in maintaining zeroing procedures in transaction-to-transaction comparisons in original investigations, the United States is in violation of Articles 2.4 of the Antidumping Agreement, which requires overall that a "fair comparison ... be made between the export price and the normal value," and Article 2.4.2 of the Agreement, which as noted earlier, provides that "[s]ubject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of weighted-average normal value of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis."

The Appellate Body further found that by maintaining zeroing procedures in administrative reviews, the United States acts inconsistently with Article 2.4 of the Antidumping Agreement, Article 9.3 of the Agreement, which provides that amount of the antidumping duty actually assessed "shall not exceed the margin of dumping"

²²¹ Panel Report, *United States — Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R (September 20, 2006).

²²² Appellate Body Report, *United States — Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (January 9, 2007).

as determined under Article 2 of the Agreement, and Article VI:2 of the GATT 1994, which 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.”

The Appellate Body also found that, by using zeroing in new shipper reviews, the United States is out of compliance with Articles 2.4 and 9.5 of the Antidumping Agreement, the latter setting out requirements for such reviews.

In addition, the United States was found to have acted inconsistently with Articles 2.4 and 9.3 of the Antidumping Agreement and Article VI:2 of the GATT 1994 by applying zeroing in the 11 administrative reviews cited by Japan.

The Appellate Body also determined that, in relying on dumping margins previously determined with the use of zeroing in the two cited sunset reviews, the United States had acted inconsistently with Article 11.3, which requires that duties be terminated after five years unless authorities determine in a review “that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.”

Recent Developments. The Appellate Body report and the panel report, as modified, were adopted by the DSB at its January 23, 2007, meeting.²²³ The United States, while once again disputing the Appellate Body’s reasoning, told the DSB on February 20, 2007, that it intended to comply with its WTO obligations in the case and that it needed a reasonable period of time to do so.²²⁴ It later circulated a critical analysis of the Appellate Body decision to WTO Members.²²⁵ While Japan had originally requested the compliance period be arbitrated,²²⁶ the parties have since agreed upon a compliance period ending December 24, 2007.²²⁷ In its December 7, 2007 WTO status report on the case, the United States made reference to the modification adopted by the Commerce Department in February 2007 under which zeroing would no longer be used in weighted average-to-weighted average

²²³ *DSB Minutes* (January 23, 2007), *supra* note 52, at 15-22.

²²⁴ Dispute Settlement Body, *Minutes of Meeting*, February 20, 2007, at 7, WT/DSB/M/226 (March 26, 2007); see also *DSB Minutes* (January 23, 2007), *supra* note 52, at 15-17, and *Administration, Congress Explore Zeroing Compliance Options*, Inside U.S. Trade, February 9, 2007, at 1.

²²⁵ Communication from the United States, *United States — Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/16 (February 26, 2007). On June 1, 2007, the United States submitted a proposal to the WTO Negotiating Committee on Rules asking that negotiators evaluate the reasoning of the WTO panels that have examined the issue of zeroing and stating its view that “the proper resolution of this issue requires clear text providing that margins of dumping may be determined without offsets for non-dumped transactions, consistent with the long-held concept of dumping.” Communication from the United States, *Offsets for Non-Dumped Comparisons*, TN/RL/W/208 (June 5, 2007).

²²⁶ Request by Japan for Arbitration under Article 21.3(c) of the DSU, *United States — Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/17 (March 30, 2007).

²²⁷ Agreement under Article 21.3(b) of the DSU, *United States — Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/20 (May 8, 2007).

comparisons in original investigations and stated only that it was “continually to consult internally on steps to be taken with respect to the other DSB recommendations and rulings.”²²⁸ The United States took no specific action, however, by the compliance deadline.²²⁹

The use of zeroing has been addressed in the draft negotiating text issued by the Chairman of the Doha Negotiating Group on November 30, 2007.²³⁰ According to the text, a WTO Member would not be allowed to use zeroing in weighted average-to-weighted average comparisons in original antidumping investigations (the practice abandoned by the Commerce Department in February 2007), but could employ the zeroing at the investigation stage when making transaction-to-transaction comparisons and when comparing export prices of individual transactions to weighted-average normal values, a method of comparison used when targeted dumping is alleged.²³¹ The text would also permit a WTO Member to use zeroing in administrative and sunset reviews using any of the three types of price comparisons.²³²

²²⁸ Status Report by the United States, *United States — Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/Add.1 (December 7, 2007).

²²⁹ See generally *U.S. Fails to Comply with WTO Challenge on Zeroing by Deadline*, Inside U.S. Trade, January 4, 2008, at 1.

²³⁰ Draft Rules Text, *supra* note 85.

²³¹ *Id.* at 6, proposing new paras. 2.4.3(i)-(ii) to the WTO Antidumping Agreement.

²³² Draft Rules Text, *supra* note 85, at 6, proposing new para. 2.4.3(iii) to the Antidumping Agreement.