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

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April 23, 2012

**Congressional Research Service**
7-....
www.crs.gov
RL32014

**CRS Report for Congress**
*Prepared for Members and Committees of Congress*

# Summary

Although the United States has complied with adverse rulings in many past World Trade Organization (WTO) disputes, there are currently 14 cases in which rulings have not yet been implemented or the United States has acted and the dispute has not been fully resolved. Under WTO dispute settlement rules, a WTO Member will generally be given a reasonable period of time to comply. While the Member is expected to remove the offending measure by the end of this period, compensation and temporary retaliation are available if the Member has not acted or not taken adequate remedial action by this time. Either disputing party may request a compliance panel if there is disagreement over whether a Member has complied in a case.

Nine unresolved cases involve trade remedies, including a long-standing dispute with Japan over a provision of U.S. antidumping (AD) law and another with various WTO Members over the Continued Dumping and Subsidy Offset Act of 2000. The Offset Act was repealed as of October 2005, but remains the target of sanctions by the European Union (EU) and Japan due to continued payments to U.S. firms authorized under the repealer (P.L. 109-171). Six of these cases involve "zeroing," a practice under which the Department of Commerce (DOC), in calculating dumping margins in AD proceedings, disregards non-dumped sales. The practice was challenged by the EU (DS294/DS350), Japan (DS322), and Mexico (DS344), resulting in broad prohibitions on its use. The United States administratively resolved one aspect of DS294 by abandoning zeroing in original AD investigations, but has yet to comply fully either in this case or in DS350, 322, or 344, leading the EU (in DS294) and Japan to request the WTO to authorize sanctions. Under memoranda signed by the United States with each complainant on February 6, 2012, however, U.S.-requested arbitration of the two sanctions proposals has been suspended while the United States makes new dumping determinations in challenged AD proceedings using a methodology finalized in March 2012 that eliminates zeroing in later stages of AD cases. The sanctions arbitrations will be terminated once implementation of the new determinations is complete. A compliance panel report in Mexico's zeroing dispute has not yet been publicly circulated. The United States was expected to comply by March 17, 2012, in Brazil's zeroing challenge (DS382), but it is unclear if recent U.S. action will resolve the dispute. A July 2, 2012, deadline is in place in the dispute with Vietnam (DS404). The United States is expected to comply by April 25, 2012, in China's challenge to U.S. countervailing duties imposed on Chinese goods (DS379).

Panel and Appellate Body reports were adopted in the EU's successful challenge of U.S. *aircraft subsidies* on March 23, 2012 (DS353) ("Boeing" case), and the United States is expected to comply by September 23, 2012. In Brazil's dispute over U.S. *cotton subsidies* (DS267), Congress repealed a WTO-inconsistent cotton program in 2006 (P.L. 109-171), but other programs were also successfully challenged and the United States was found not to have fully complied. The United States later made statutory and administrative changes to the export credit guarantee program faulted in the case. While the WTO has authorized Brazil to retaliate, the United States and Brazil signed an agreement in June 2010 aimed at permanently resolving the dispute. It includes Brazil's pledge not to impose sanctions during the life of the agreement and foresees possible legislative resolution of the dispute in the 2012 farm bill. The United States and Antigua have been consulting on outstanding issues in Antigua's challenge of U.S. *online gambling restrictions* (DS285); compensation agreements between the United States and various WTO Members in exchange for U.S. withdrawal of its WTO gambling commitments, an action taken to resolve the case, will not enter into effect until issues with Antigua are settled. Also unsettled are long-pending disputes with the European Union (EU) over a *music copyright* law (DS160) and a statutory *trademark* provision affecting property confiscated by Cuba (DS176).

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This report provides a summary of the status of U.S. compliance efforts in pending World Trade Organization (WTO) disputes that have resulted in adverse rulings against the United States. The report focuses on cases in which panel and Appellate Body reports have been adopted by the WTO Dispute Settlement Body, an action sending the disputes into the compliance phase of the WTO dispute process. Although the United States has complied with adverse rulings in many past WTO disputes,[1] there are 14 pending cases in which the United States is facing compliance deadlines in 2012; deadlines have expired but the United States has not yet fully implemented the WTO decisions involved; or the United States has taken action, including the enactment of legislation, but the prevailing parties in the dispute continue to question whether the United States has fully complied and, as in one case, continue to impose WTO-authorized trade sanctions. Compliance in these cases may implicate either legislative or administrative action by the United States, or both.

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 resolution proceedings. The report then lists pending WTO disputes in the compliance phase categorized by subject matter: trade remedies, subsidies, trade in services, and trade-related intellectual property rights. Disputes are listed in chronological order based on the date on which the panel and any Appellate Body in the case were adopted by the WTO Dispute Settlement Body. Each entry contains a discussion of major issues and U.S. compliance history. Long-standing cases also include a section titled "Recent Developments" discussing the latest activity in the dispute.

# 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 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 (e.g., expedited timelines for subsidy disputes in the Agreement on Subsidies and Countervailing Measures), the former will prevail. A list of these agreements and rules is contained in Appendix 2 of the DSU. The Office of the United States Trade Representative (USTR) represents the United States in the WTO and in WTO disputes.

[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 that have been found to be in violation of their WTO obligations. For further information on WTO disputes, see Office of the U.S. Trade Representative, "WTO Dispute Settlement," at http://www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/wto-dispute-settlement; 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/sites/default/files/uploads/reports/2009/asset_upload_file86_15410.pdf; 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, *Dispute Settlement in the World Trade Organization (WTO): An Overview*, by (name redacted).

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 these actions unless all DSB Members object. In effect, these decisions are virtually automatic. Article 23 of the DSU requires a complaining Member to act in accordance with the DSU when it initiates a dispute, including making any internal determination that another Member has violated a WTO obligation consistent with the WTO decision in the case and following DSU procedures to set a deadline by which the defending Member must comply, determining the level of sanctions for non-compliance, and obtaining authorization from the DSB to impose any such sanctions.

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. If the Member proposes a compliance period and it is not approved by the DSB, the disputing parties may negotiate a deadline themselves. If this fails, the length of the period will be arbitrated. A WTO Member found to have violated WTO obligations is expected to comply by withdrawing the offending measure by the end of the established compliance period, 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 defending Member has not implemented the WTO rulings and recommendations by the end of the established compliance period, it may request the other Member to negotiate a compensation agreement or it may ask the DSB for authorization to suspend WTO concessions, usually to impose higher tariffs on selected imports from the defending country. The Member may choose the latter option without first requesting compensation. In some cases, the prevailing party may agree to extend the original compliance deadline instead of immediately seeking a remedy.

If a prevailing Member does choose to suspend concessions, it is expected to do so 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, referred to as "cross-retaliation." A prevailing Member may seek to cross-retaliate if, for example, in a dispute involving trade in goods, the Member does not import a sufficient amount of goods from the defending Member to remedy the trade injury involved or the Member believes that placing tariff surcharges on goods imported from the defending Member would be unreasonably costly for the prevailing Member's economy.

Under the DSU, the DSB is to authorize the retaliation request under the reverse consensus rule within 30 days after the compliance period expires. If the defending Member objects to the request, however, the proposed retaliation will be arbitrated and the 30-day deadline for approving the retaliation request effectively extended. The objection may relate to the level of nullification or impairment of benefits involved or whether DSU cross-retaliation rules have been followed. The arbitration, which may be carried out by the original panel if members are available, or by an arbitrator appointed by the WTO Director General, is ordinarily to be completed within 60 days after the compliance period expires. The DSB then meets to authorize the retaliation request, subject to any modification by the arbitrator.

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 is expected to issue its report within 90 days; the report may then be appealed. In practice, compliance panels may require a considerably longer period of time to complete their work where a complicated case is involved. For example, in the European Union's challenge to the U.S. use of "zeroing" in antidumping proceedings (DS294), the EU made its compliance panel request in September 2007, panelists were appointed in November 2007, and the panel report was not publicly circulated until December 2008.

Because the DSU fails to incorporate Article 21.5 proceedings into the 30-day period for approving countermeasures and the time frame for any subsequent arbitration, a procedural problem, referred to as "sequencing," has resulted. Disputing Members have often filled the gap by entering into ad hoc bilateral procedural agreements setting out timelines for any requested compliance-related proceedings and reserving Members' rights in the unfolding of these proceedings.[3] Such agreements have been entered into in many of the cases discussed below.

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. As evident from some of the cases discussed in this report, WTO Members may manage disputes in a variety of ways at the compliance phase, short of imposing sanctions.

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

[4] The DSU does not expressly set out a procedure for obtaining the removal of countermeasures, though Members may obtain a ruling on whether continued imposition is warranted either through a compliance panel or a new dispute settlement proceeding. The issue of removing such measures arose in connection with the continued levying of increased tariffs on imports from the European Union (EC) by the United States and Canada in response to the EC's failure to comply with WTO decisions faulting European Union import restrictions on beef produced with growth hormones. The EC initiated WTO dispute settlement proceedings against the United States and Canada in 2004. The Appellate Body, reversing the panel on various points, recommended that the disputing parties request an Article 21.5 compliance panel proceeding in order to resolve their differences as to whether the EC is in compliance in the underlying beef hormone cases (DS26/DS48) and whether the U.S. and Canadian countermeasures thus have a legal basis. Appellate Body Report, *United States—Continued Suspension of Obligations in the EC-Hormones Dispute*, WT/DS320/AB/R (October 16, 2008); Appellate Body Report, *Canada—Continued Suspension of Obligations in the EC-Hormones Dispute*, WT/DS321/AB/R (October 16, 2008). The EC requested consultations under Article 21.5 in December 2008, but the proceeding involving the United States has since been suspended as part of a bilateral agreement intended to resolve the beef hormone dispute. Press Release, Office of the USTR, USTR Announces Agreement with European Union in Beef Hormones Dispute (updated June 22, 2009), at http://www.ustr.gov/about-us/press-office/press-releases/2009/may/ustr-announces-agreement-european-union-beef-hormones-; European Commission, Memorandum on Beef Hormones dispute signed with the United States (May 14, 2009), at http://ec.europa.eu/trade/issues/respectrules/dispute/memo140509_en.htm.

# 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: 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. Section 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 Section 102(a)(2), 19 U.S.C. Section 3512(a)(2), that nothing in the statute "shall be construed ... to amend or modify any law of the United States ... or ... to limit any authority conferred under any law of the United States ... unless specifically provided for in this act."

As explained in Statement of Administrative Action (SAA) accompanying the Uruguay Round agreements when they were submitted to Congress in 1994, "[i]f there is a conflict between U.S. law and any of the Uruguay Round agreements, section 102(a) of the implementing bill makes clear that U.S. law will take precedence."[7] Moreover, Section 102 is further intended to clarify that all changes to U.S. law "known to be necessary or appropriate" to implement the WTO

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[5] For background discussions regarding the effect of treaties and international agreements in domestic law, see CRS Report RL32528, *International Law and Agreements: Their Effect Upon U.S. Law*, by (name redacted); 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), P.L. 103-465, §123(d)-(f), 19 U.S.C. §3533(d)-(f).

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

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 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 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]

[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] 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. (Bloomberg BNA) 945 (2004). In the challenge by Antigua and Barbuda to both federal and state laws affecting the cross-border supply of gambling and betting services (DS285), 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 387-436 for further discussion of this case.

[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), (continued...)

According to legislative history, the provision "makes clear that the Uruguay Round agreements do not automatically preempt State laws that do not conform to their provisions, even if a WTO dispute settlement panel or the Appellate Body were to determine that a particular State measure was inconsistent with one or more of the Uruguay Round agreements."[14] The statute also contains certain restrictions in any such legal action brought by the United States, including that the report of the WTO dispute settlement panel or the Appellate Body may not be considered binding or otherwise accorded deference.[15] Any such suit by the United States is expected to be a rarity.[16]

## Preclusion of Private Remedies

Private remedies are prohibited under Section 102(c)(1) of the URAA, 19 U.S.C. Section 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 Section 102(c)(2) of the URAA, 19 U.S.C. Section 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—
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> (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.

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(...continued)

19 U.S.C. §3512(b)(3). The term is intended to encompass "any provision of a state constitution, regulation, practice or other state measure." Uruguay Round SAA, *supra* note 7, at 674.

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

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

[16] Uruguay Round SAA, *supra* note 7, at 674; H.Rept. 103-826(I), at 26; S.Rept. 103-412, at 15. The SAA states, inter alia, that the Attorney General "will be particularly careful in considering recourse to this authority where the state measure involved is aimed at the protection of human, animal, or plant health or of the environment or the state measure is a state tax of a type that has been held to be consistent with the requirements of the U.S. Constitution. In such a case, the Attorney General would entertain use of this statutory authority only if consultations between the President and the Governor of the State concerned failed to yield an appropriate alternative." Uruguay Round SAA, *supra* note 7, at 674.

The House Ways and Means Committee report on the URAA discusses the rationale and implications of Section 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 Section 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]

## 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: Regulatory Action Generally

Section 123(g) of the URAA, 19 U.S.C. Section 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 United States Trade Representative and relevant agencies meet congressional consultation and private sector advice requirements, the proposal has been published in the *Federal Register* with a request for public comment, and the final rule or other modification has been published in the *Federal Register*.[19] Section 123(g) does not apply to any regulation or practice of the U.S. International Trade Commission.

The statute requires the USTR to consult with "the appropriate congressional committees" regarding the proposed contents of the final rule or other modification. These committees include the House Ways and Means Committee, the Senate Finance Committee, and any other

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

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

[19] 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 *Federal Register* 33703 (1996). The U.S. Court of Appeals for the District of Columbia Circuit upheld the final rule 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).

congressional committees that have jurisdiction over matter at hand.[20] In addition, 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: Agency Determinations in Trade Remedy Proceedings

Section 129 of the URAA, 19 U.S.C. Section 3538, sets forth authorities and procedures under which the Department of Commerce (DOC) and the U.S. International Trade Commission (ITC) may issue new subsidy, dumping and injury determinations, referred to as Section 129 Determinations, in implementation of adverse WTO decisions involving U.S. safeguards, antidumping, and countervailing duty proceedings. Section 129 does not authorize the Commerce Department or the ITC to issue new determinations on their own motion, but instead grants the 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, 19 U.S.C. Sections 1671-1677n, the Commerce Department determines the existence and level of dumping or subsidization, as the case may be, and the ITC determines whether the dumped or subsidized imports cause material injury, or a threat of material injury, to a domestic industry. Under U.S. safeguards law, set forth in Title II of the Trade Act of 1974, 19 U.S.C. Sections 2251-2254, the ITC conducts investigations to determine if 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 (e.g., a tariff surcharge or import quota) 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

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[20] URAA, §121(3), 19 U.S.C. §3531(3).

[21] Two 110th Congress bills would have placed restrictions on the use of Section 123 authorities. S. 364 (Rockefeller) would have amended Section 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 have rescinded certain Section 123 regulatory modifications that had already taken effect. S. 1919 (Baucus) would have established a WTO Dispute Settlement Review Commission to evaluate WTO decisions under statutory criteria and prohibited a domestic regulatory modification under Section 123 from taking effect unless and until Congress received the Commission's report on the WTO decision involved. No action was taken on either of these bills. See also *infra* note 133.

[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 maybe in the position of simultaneously defending determinations in which the agency reached different conclusions. In such situations, the Administration expects that courts and binational panels will be sensitive to the fact that under the applicable standard of review, as set forth in statute and case law, multiple permissible interpretations of the law and the facts may be legally permissible in any particular case, and the issuance of a different determination under

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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 implement an adverse report, and to estimate the period of time that may be needed to implementing the WTO decision.[25]

If a majority of the ITC 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 120-day limit is intended to allow the USTR to propose a reasonable period of time for implementation to the WTO Dispute Settlement Body once the DSB adopts a WTO panel and any Appellate Body report in a case.[28]

In the event the ITC issues a new negative injury or threat of injury determination, the imports subject to antidumping or countervailing duty order at issue, or a least a portion of them, would no longer be considered to have caused a harmful effect, even though they may in fact be dumped or subsidized. The Tariff Act requires that the imposition of antidumping or countervailing duties on dumped or subsidized imports be supported by an affirmative injury determination and thus, absent such a determination, the antidumping or countervailing duty order would need to be revoked in whole or in part. Section 129(a)(6) authorizes the USTR to direct the Commerce

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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).

[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.*

Department to take this action.[29] The USTR must consult with the House Ways and Means and Senate Finance Committees before the ITC's new determination is implemented.[30]

Where a safeguard proceeding is involved, Section 129 authorizes the President, after receiving a new ITC determination, to reduce, modify, or terminate the safeguard notwithstanding other statutory requirements governing changes in existing safeguard measures.[31] The President must consult with the House Ways and Means Committee and Senate Finance Committee before acting under this authority. The USTR is required to publish a notice of the implementation of any ITC determination in the *Federal Register*.[32]

### Department of Commerce

Section 129 also sets out a procedure for new Department of Commerce determinations in antidumping and countervailing duty proceedings, though without the requirement for an initial agency advisory report regarding the scope of the agency's statutory discretion. Instead, promptly after the issuance of a WTO panel or Appellate Body report finding that a DOC determination in an antidumping or countervailing duty proceeds is inconsistent with U.S. obligations under the WTO Antidumping Agreement or the Agreement on Subsidies and Countervailing Measures, the USTR is to consult with the Commerce Department and the House Ways and Means and Senate Finance Committees, and may request the department, in writing, to issue a determination in connection with the underlying antidumping or countervailing duty proceeding that would render its action "not inconsistent with" the panel or appellate findings.[33] The Commerce Department must issue its Section 129 Determination within 180 days of the request.[34] A new determination may, for example, reduce the dumping margin or net subsidy and thus result in a reduction of existing duties. After consulting with DOC and the above-named congressional committees, USTR may direct DOC to implement its determination in whole or in part.[35]

### Prospective Implementation of Section 129 Determinations

Section 129(c)(1) of the URAA provides that Section 129 Determinations, whether issued by the ITC or the Commerce Department, apply prospectively, that is, the full or partial revocation of the antidumping or countervailing duty order or the implementation of the DOC determination, as the case may be, applies to unliquidated entries of the subject merchandise that are entered, or

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

[30] URAA, §129(a)(5),(6), 19 U.S.C. §3538(a)(5),(6).

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

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

[33] 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.

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

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

withdrawn from warehouse for consumption, *on or after* the date on which the USTR directs the Commerce Department to revoke the order or implement the determination.[36] Unliquidated entries are those for which the U.S. Customs and Border Protection (CBP) has not ascertained a final rate and amount of duty.[37] Notices of the implementation of Section 129 Determinations must be published in the *Federal Register*.

The Uruguay Round SAA explains the operation of Section 129(c)(1) as follows:

> Consistent with the principle that GATT panel recommendations apply only prospectively, subsection 129(c)(1) provides that where determinations by the ITC or Commerce are implemented under subsections (a) or (b), such determinations have prospective effect only. That is, they apply to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which the Trade Representative directs implementation. Thus, relief available under subsection 129(c)(1) is distinguishable from relief available in an action brought before a court or a NAFTA binational panel, where, depending on the circumstances of the case, retroactive relief may be available. Under 129(c)(1), if implementation of a WTO report should result in the revocation of an antidumping or countervailing duty order, entries made prior to the date of Trade Representative's direction would remain subject to potential duty liability.[38]

Canada unsuccessfully challenged Section 129(c)(1) in a WTO dispute settlement proceeding in 2001 on the ground that the provision violated the WTO Dispute Settlement Understanding and various WTO antidumping and countervailing duty obligations. Under the retrospective U.S. antidumping and countervailing duty system, DOC ordinarily makes a final assessment of the duties owed on dumped or subsidized goods in an administrative review conducted after the goods are imported. The review covers goods that enter the United States during a specified prior 12-month period. Until this final duty assessment is made for particular goods, importers must deposit estimated duties with CBP on entry.[39] Canada argued that, where a DOC or ITC determination in an antidumping or countervailing duty proceeding is found to violate a WTO obligation, Section 129(c)(1) effectively prohibits the United States from fully complying with the WTO decision by preventing it from refunding estimated duties deposited with CBP before the date that the Section 129 Determination is implemented. In other words, because the duty deposits supported by the challenged determination would no longer have a WTO-consistent basis, Canada argued that they must be returned.[40]

In response to Canada's claim, the United States maintained that Section 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. The United States further argued that the statute does not mandate any particular treatment of these prior unliquidated entries and that the United States has other legal options for dealing with them, including

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[36] URAA, §129(c)(1), 19 U.S.C. §3538(c)(1). This provision has been held to be unambiguous in its prospective effect. E.g., Corus Staal BV, v. United States, 593 F.Supp.2d 1373, 1382-83 (Ct. Int'l Trade 2008).

[37] 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.

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

[39] 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.

[40] Request for the Establishment of a Panel by Canada, *United States—Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/4 (July 13, 2001).

establishing a new dumping or subsidy margin by using a WTO-consistent methodology in an administrative review of the entries or, in the event the duty order or orders were revoked as a result of the WTO proceeding, revising the duty rate in response to a domestic court decision involving the earlier entries.[41]

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.[42] Canada did not appeal, and the panel report was adopted by the DSB in August 2002.

## Judicial Responses

Although private rights of action based on Uruguay Round agreements are precluded under Section 102(c) of the Uruguay Round Agreements Act, WTO panel findings have at times been brought to the attention of federal courts, most often in challenges to agency determinations in antidumping and countervailing duty proceedings initiated under judicial review provisions contained in Section 516A of the Tariff Act of 1930, 19 U.S.C. Section 1516a. Section 129 determinations issued by the ITC and the Commerce Department to comply with WTO decisions are also reviewable under this statute. These cases are heard in the U.S. Court of International Trade (USCIT), which has exclusive jurisdiction over civil actions brought under Section 516A.[43] The USCIT's decisions may be appealed to the U.S. Court of Appeals for the Federal Circuit, whose decisions are reviewable by the U.S. Supreme Court.

Federal courts must hold a final agency determination in an antidumping or countervailing duty proceeding or a Section 129 Determination unlawful if it is found to be "unsupported by substantial evidence on the record, or otherwise not in accordance with law."[44] To determine whether an agency legal interpretation applied in an agency determination is in accordance with law, the court employs the two-step analysis set out by the U.S. Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984).[45] First, the court, using tools of statutory construction, determines whether Congress has clearly spoken to the issue at hand. Second, if the underlying statute is silent or ambiguous, the court decides whether the agency's construction of the statute is permissible and will defer to an agency's interpretation of a statute provided it is reasonable. It has also been argued that, in considering whether an agency construction is reasonable for purposes of the second prong of the *Chevron* test, the court should apply the canon of construction articulated by the Supreme Court in 1804 in *Murray v. Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 118 (1804). This canon holds that where a statute does not

[41] Second Written Submission of the United States, *United States—Section 129(c)(1) of the Uruguay Round Agreements Act* (WT/DS221), paras. 17-20 (March 8, 2002), at http://www.ustr.gov/webfm_send/688.

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

[43] 28 U.S.C. §1581(c)(enacted in Customs Courts Act of 1980, P.L. 96-417, §201).

[44] Tariff Act of 1930, §516A(b)(1)(B)(i), 19 U.S.C. §1516a(b)(1)(B)(i).

[45] See United States v. Eurodif S.A., 129 S.Ct. 878, 886-87 (2009); United States v. Mead Corp., 533 U.S. 218, 226-27 (2001). See also Wheatland Tube Co. v. United States, 495 F.3d 1355 (Fed. Cir. 2007); Pesquera Mares Australes Ltda. v. United States, 266 F.3d 1372, 1379-82 (Fed. Cir. 2001); Koyo Seiko Co. v. United States, 36 F.3d 1565, 1570 (Fed. Cir. 1994), Corus Staal BV v. United States, 593 F.Supp.2d 1373, 1381-82 (Ct. Int'l Trade 2008); Windmill Int'l PTE v. United States, 193 F.Supp.2d 1303, 1305-306 (Ct. Int'l Trade 2002); Cultivos Miramonte S.A. v. United States, 980 F.Supp. 1268, 1271-72 (Ct. Int'l Trade 1997).

require a specific interpretation, that is, it permits more than one interpretation, it should be interpreted consistently with U.S. international obligations.[46] In the current context, the international obligation would be that contained in a WTO agreement, either by itself or as interpreted in one or more WTO decisions.[47] Plaintiffs thus argue, on the basis of the *Charming Betsy* canon, that an agency interpretation that violates a WTO obligation is unreasonable under *Chevron* step two.

Because the underlying cause of action in domestic legal challenges to the agency actions described above is based in the Tariff Act and not on a provision of a WTO agreement, courts have not viewed Section 102(c) of the URAA as preventing them from hearing a WTO-based argument in these challenges.[48] When faced with such arguments, courts may deem WTO decisions to be "persuasive"[49] or a source of useful reasoning, "if sound" to inform a court's decision,[50] but state that WTO decisions are not binding on the United States, U.S. agencies, or the judiciary.[51] Most recently, courts have made clear that, given the statutory scheme established in the URAA for regulatory implementation of adverse WTO decisions, questions as to whether the United States should comply with an adverse WTO decision, and what the extent of U.S. compliance should be, are matters falling within the province of the executive branch.[52] As a result, in ruling on whether an agency's interpretation of a statute is reasonable, courts have

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[46] See, e.g, Corus Staal BV v. U.S. Dep't of Commerce, 259 F.Supp.2d 1253, 1262 (Ct. Int'l Trade 2003) and generally Jane A. Restani & Ira Bloom, *Interpreting International Trade Statutes: Is The Charming Betsy Sinking?* 24 FORDHAM INT'L L. J. 1533 (2001). The *Charming Betsy* canon stems from the following Supreme Court language: "It has also been observed, that an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains, and consequently, can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

[47] See, e.g, Corus Staal BV v. Dept. 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, 1343-44 (Fed. Cir. 2004); Corus Staal BV v. United States, 593 F.Supp.2d 1373, 1383-84 (Ct. Int'l Trade 2008).

[48] 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).

[49] Koyo Seiko Co. v. United States, 442 F.Supp.2d 1360, 1363 (Ct. Intl Trade 2006), *citing*, inter alia, NSK Ltd. v. United States, 358 F.Supp.2d 1276, 1288 (Ct. Int'l Trade 2005). Note also that in *Cummings Inc. v. United States*, the Court of Appeals for the Federal Circuit held that a classification opinion of the World Customs Organization "is not binding and is entitled, at most, to 'respectful consideration'" by a U.S. court. 454 F.3d 1361, 1366 (Fed. Cir. 2006).

[50] Hyundai Electronics Co. v. United States, 53 F.Supp.2d 1334, 1343 (Ct. Int'l Trade 1999); see also, e.g., Allegheny Ludlum Corp. v. United States, 367 F.3d 1339, 1348 (Fed. Cir. 2004).

[51] Corus Staal BV v. Dept. of Commerce, 395 F.3d 1343, 1348-49 (Fed. Cir. 2005), *cert denied*, 126 S.Ct. 1023 (2006). See also Corus Staal BV v. United States, 502 F.3d 1370, 1375 (Fed. Cir. 2007), and Koyo Seiko Co. v. United States, 442 F.Supp.2d 1360, 1363 (Ct. Int'l Trade 2006). For discussions of federal cases addressing the domestic effect of WTO decisions, see, e.g., Robin Miller, *Effect of World Trade Organization (WTO) Decisions Upon United States*, 17 A.L.R.FED.2D 1 (2007) and 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).

[52] Koyo Seiko Co. v. United States, 551 F.3d 1286, 1291 (Fed. Cir. 2008)("The determination whether, when, and how to comply with the WTO's decision on 'zeroing', involves delicate and subtle political judgments that are within the authority of the Executive and not the Judicial Branch."); Corus Staal BV v. Dept. of Commerce, 395 F.3d 1343, 1347 (Fed. Cir. 2005), *cert denied*, 126 S.Ct. 1023 (2006); SKF USA v. United States, 611 F.Supp.2d 1351, 1359-60 (Ct. Intl Trade 2009); Corus Staal BV v. United States, 593 F.Supp.2d 1373, 1383-85 (Ct. Int'l Trade 2008). See also Koyo Seiko Co. v. United States, 442 F.Supp. 1360, 1363 (Ct. Int'l Trade 2006). In this case, the court refused to permit the plaintiff to amend its complaint to challenge the Commerce Department's "zeroing" methodology on the ground that the WTO had since adopted an Appellate Body decision faulting the U.S. practice, stating that such an amendment would be futile "given that it is not controlling precedent and is immaterial to the court's examination of the administrative decisions issued by the Department."

rejected *Charming Betsy* arguments and declined to base their decision making on a WTO decision adverse to the United States where the executive branch has not taken the necessary domestic action to comply.[53]

# Pending WTO Disputes: An Overview

## A Thumbnail Sketch of Pending Cases

There are currently 14 pending WTO cases in which the United States is the defending (or in the language of the WTO Dispute Settlement Understanding, "responding") party. As noted earlier, this report treats a WTO case as pending if the United States has not fully implemented adopted WTO panel and Appellate Body reports or the United States has taken action, including the enactment of legislation, but the prevailing parties in the dispute continue to question whether the United States has fully complied. In one such case, complaining Members are continuing to impose WTO-authorized trade sanctions. Of the 14 cases, nine involve U.S. trade remedies, with the remainder involving subsidies, trade in services, or trade-related intellectual property rights.

Six of the nine pending trade remedy cases focus on the U.S. practice of "zeroing" in antidumping proceedings, discussed in greater detail below. The remaining three are a long-standing dispute with Japan over a portion of U.S. antidumping law governing the calculation of dumping rates for producers and exporters who are not individually investigated by the Commerce Department in an antidumping proceeding; a dispute involving the Continued Dumping and Subsidy Offset Act, a statute that required the distribution of collected antidumping and countervailing duties to petitioners and interested parties in the underlying trade remedy proceedings; and the application of U.S. antidumping and countervailing duty law to products of China.

The United States took administrative action to resolve its antidumping dispute with Japan, but has yet to amend a statutory provision at issue in the case. While Congress repealed the CDSOA as of October 1, 2005, and Congress placed additional restrictions on available funds in 2010, the 2005 repeal legislation mandates the distribution to U.S. firms of duties collected on goods entered through September 30, 2007. The European Union and Japan, two complainants who have objected to the post-repeal disbursements, are continuing to retaliate with tariff surcharges on U.S. goods, albeit in decreasing amounts. The United States and China have agreed to a deadline of April 25, 2012, in their countervailing duty dispute.[54]

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[53] E.g., Corus Staal BV v. Dept. of Commerce, 395 F.3d 1343, 1349 (Fed. Cir. 2005), *cert denied*, 126 S.Ct. 1023 (2006) and SNR Roulements v. United States, 341 F.Supp.2d 1334, 1343-44 (Ct. Int'l Trade 2004). See also Mary Jane Alves, *Reflections on the Current State of Play: Have U.S. Courts Finally Decided to Stop Using International Agreements and Reports of International Trade Panels in Adjudicating International Trade Cases?* 17 TUL. J. INT'L & COMP. L. 299 (2009). Jeffry L. Dunoff, *Less Than Zero: The Effects of Giving Domestic Effect to WTO Law*, 6 LOY. U. CHI. INT'L L. REV. 279 (2008); and John D. Greenwald, *After Corus Staal—Is There Any Role, and Should There Be—for WTO Jurisprudence in the Review of U.S. Trade Measures by U.S. Courts?* 39 GEO. J. INT'L L. 199 (2007).

[54] In another recent case brought by China against the United States, a panel report adverse to the United States was issued in September 2010, but because the challenged measure had expired before the panel concluded its work, the United States was not required to take any action. The panel in the case, *United States—Certain Measures Affecting Imports of Poultry from China*, found that a U.S. appropriations restriction set to expire on September 30, 2009, which prohibited the use of appropriated funds "to establish or implement a rule allowing poultry products to be imported into the United States from the People's Republic of China," violated U.S. obligations under the WTO Agreement on (continued...)

As the result of a compliance panel proceeding, the United States was found not to have fully complied in Brazil's challenge to U.S. cotton subsidies and continues to face the possibility of retaliation by Brazil against U.S. goods and possibly U.S. services or intellectual property interests. While Congress repealed or made statutory changes to U.S. export credit guarantee programs that were found by the WTO to be prohibited subsidies and the executive branch made administrative changes to one of these programs under revised statutory authority, Congress also reauthorized payments under two domestic support programs that Brazil successfully challenged as actionable subsidies. Payments under these programs were found to cause serious prejudice to Brazil in the form of significant price suppression in the world upland cotton market. Brazil is currently authorized to impose sanctions to remedy both prohibited and actionable subsidy measures at issue in the case. The United States and Brazil have temporarily resolved their dispute, however, forestalling any application of sanctions by Brazil.

Antigua's challenge to federal laws governing the remote supply of gambling services, while only partially successful, left certain issues unresolved and resulted in the United States withdrawing its market access commitments for gambling services under the General Agreement on Trade in Services (GATS). Antigua sought authorized retaliation in the WTO dispute as well as compensation under the GATS for the negative effects of the U.S. withdrawal of GATS commitments. Outstanding issues still remain subject to discussion by the two parties.

Two long-standing disputes involve intellectual property rights, each of these brought by the European Union (EU).[55] The first involves Section 110(5)(B) of the Copyright Act, a statute affecting music licensing; the second, Section 211 of the Omnibus Appropriations Act of 1998, a statute addressing trademarks that involve property confiscated by Cuba. The United States made a payment of $3 million to the EU in partial resolution of the music licensing case, but has not yet fully complied. While bills have been introduced in past and current Congresses aimed at resolving the trademark dispute, none has been enacted.

## A Major Focus: Use of "Zeroing" in Antidumping Proceedings

Twenty-one WTO complaints against the United States have challenged the use of "zeroing," a practice used by the Department of Commerce (DOC) in antidumping proceedings to calculate dumping margins, that is, the amount by which the home market or "normal" value of a good exceeds its export price. Under this practice, DOC, in calculating dumping margins for an imported product, disregards non-dumped sales and thus, complainants argue, inflates the dumping margin or establishes a dumping margin where one might not otherwise exist. Of the 21 cases, six are currently in the compliance phase. Two of these cases were brought by the

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Sanitary and Phytosanitary Measures, the GATT most-favored nation article, and the GATT prohibition on quantitative restrictions. Panel Report, *United States—Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R (September 29, 2010). The challenged provision was Section 727 of the Omnibus Appropriations Act, 2009, P.L. 111-8, Div. A, 123 Stat. 557. There was no appeal in the case and the panel report was adopted on October 25, 2010.

[55] As of December 1, 2009, "European Union" replaced "European Communities" as the official name of this WTO Member. The terms European Communities and EC still appear in older WTO materials, including panel and Appellate Body reports, bilateral procedural agreements in particular disputes, and communications to the WTO Dispute Settlement Body. Except for references to any such older WTO documents, this report uses the name "European Union" or the acronym "EU" in the text of the report regardless of the time period being discussed. For further information, see *European Union or Communities?*, at http://www.wto.org/english/thewto_e/countries_e/european_union_or_communities_popup.htm.

European Union (DS294 and DS350), with one each brought by Japan (DS322), Mexico (DS344), Brazil (DS382), and Vietnam (DS404). The decisions in these cases have resulted in a broad WTO prohibition on the use of zeroing in U.S. antidumping proceedings, a multi-phased process consisting of original investigations, annual administrative reviews, five-year "sunset" reviews, and, in some cases, "changed circumstances" and "new shipper" reviews.

In response to the first EU challenge (DS294), the Commerce Department in early 2007 discontinued the use of zeroing in the price comparison employed most frequently in original antidumping investigations and recalculated dumping margins in the investigations cited by the EU, issuing new determinations under Section 129 of the Uruguay Round Agreements Act (URAA). The United States has yet to fully comply with the WTO decisions in this case, the cases initiated by Japan (DS322) and Mexico (DS344), and the second EU challenge (DS350), to the extent that the WTO decisions involve the use of zeroing in other phases of U.S. antidumping proceedings.

Both the EU (in DS294) and Japan requested authorization from the WTO to impose trade sanctions against the United States for non-compliance with the WTO decisions involved; the United States objected to the proposals and, thus, under WTO dispute settlement rules, the requests were automatically sent to arbitration. In 2010, the EU and Japan agreed to suspend the arbitrations on the understanding that the United States would address outstanding issues by early September 2011. In response, the Department of Commerce issued a Federal Register notice in December 2010 in which it proposed as a general rule to calculate dumping margins and duty assessment rates with an offset for non-dumped sales, that is, without zeroing, in administrative, expedited administrative, and new shipper reviews and, by implication, to eliminate zeroing in sunset reviews as well.

The dates for resuming the sanctions arbitrations were extended several times, ultimately to February 6, 2012, for both the EC and Japan. Under separate memoranda signed by the United States with the EU and Japan on that date, the suspensions will continue while the United States finalizes the December 2010 zeroing proposal and issues Section 129 determinations using the new methodology in eight AD proceedings challenged by the EU, one proceeding challenged by Japan, and possibly a second proceeding challenged by Japan if U.S. courts do not uphold the revocation of the antidumping order at issue. The sanctions arbitrations are to be terminated once the Section 129 proceedings are completed, that is, on the date the USTR directs DOC to implement the new determinations. DOC is expected to issue the Section 129 determinations within four months of February 6, 2012, and the USTR is expected to direct DOC to implement these determinations within seven days after they are issued. Implementation will be on a prospective basis; that is, the new cash deposit rates resulting from the recalculated dumping margins will apply to unliquidated entries (i.e., entries for which final duties have not been assessed) that enter on or after the date that the determinations are implemented.

In September 2010, Mexico requested a compliance panel in DS344, alleging the failure of the United States to comply with the WTO decision as it involves antidumping administrative reviews in general and reviews of the original antidumping order challenged in the case. The panel has not yet publicly circulated its report. The United States was expected to comply by March 17, 2012, in Brazil's zeroing challenge (DS382), but it is unclear if recent actions taken by the United States will resolve the dispute. A deadline of July 2, 2012, is set in the dispute with Vietnam (DS404).

New complaints involving zeroing were filed in 2011 by Korea (DS420), China (DS422), and the EU (DS424), and by Vietnam in February 2012 (DS429).[56] A panel was established in Korea's challenge on February 22, 2012, following the entry into a bilateral procedural agreement by Korea and the United States; among other things, the agreement aims at expediting the panel proceeding and excludes from the panel's consideration U.S. compliance efforts in other WTO zeroing cases that may address issues also raised in Korea's panel request.[57] A panel was established in China's challenge in October 2011 after the United States and China entered into a bilateral procedural agreement under which the parties agreed to expedite the panel process, China pledged to provide the necessary evidence and arguments to support its allegations, and the United States agreed not to contest China's claim that the measures identified in the agreed-upon panel request are inconsistent with the relevant section of the WTO Antidumping Agreement, an approach the United States has taken in recent cases in which the use of zeroing in initial investigations was challenged.[58] The panel was appointed on December 21, 2011.[59] The complaint by the EU remains in consultations,[60] as does the complaint by Vietnam, which involves a variety of antidumping issues.[61]

Finally, 11 other WTO complaints have cited the U.S. use of zeroing; some of these disputes were resolved through the panel process, while others remain in consultations or have been otherwise settled.[62] To date, more than 25 WTO panel and Appellate Body reports have been rendered on this issue.

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[56] Request for Consultations by the Republic of Korea, *United States—Anti-Dumping Measures on Corrosion-Resistant Carbon Steel Flat Products from Korea*, WT/DS420/1 (February 3, 2011); Request for Consultations by China, *United States—Anti-Dumping Measures on Certain Frozen Warmwater Shrimp from China*, WT/DS422/1 (March 2, 2011)(caption since revised); Request for Consultations by the European Union, *United States—Anti-Dumping Measures on Imports of Stainless Steel Sheet and Strip in Coils from Italy*, WT/DS424/1 (April 6, 2011); Request for Consultations by Viet Nam, *United States—Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS429/1 (February 27, 2012).

[57] WTO News Item, Panel set up in steel case, reports adopted on raw materials, footwear and plastic (February 22, 2012), at http://www.wto.org/english/news_e/news12_e/dsb_14feb12_e.htm; Agreement on Procedures between Korea and the United States, *United States—Anti-Dumping Measures on Corrosion-Resistant Carbon Steel Flat Products from Korea*, WT/DS420/6 (February 15, 2012).

[58] Request for the Establishment of a Panel by China, *United States—Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades from China*, WT/DS422/3 (October 14, 2011); Agreement on Procedures between China and the United States, *United States—Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades from China*, WT/DS422/4 (October 14, 2011). Regarding past U.S. practice not to contest certain zeroing complaints, see *infra* notes 62-63 and accompanying text.

[59] Note by the Secretariat, Constitution of the Panel Established at the Request of China, *United States—Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades from China*, WT/DS422/5 (January 6, 2012).

[60] The antidumping order in the EU's challenge has since been revoked, 76 *Federal Register* 49450 (August 10, 2011), an action that the EU has stated "could ... resolve" the dispute. Press release, European Commission, Directorate-General for Trade, EU welcomes US decision to lift duties on stainless steel sheet and strip (August 10, 2011), at http://trade.ec.europa.eu/doclib/press/index.cfm?id=731.

[61] See the USTR's notice and request for comments regarding this case, at WTO Dispute Settlement Proceeding Regarding United Stares; Anti-Dumping Measures on Certain Shrimp from Viet Nam, 77 *Federal Register* 19745 (April 2, 2012).

[62] The 11 cases, in reverse chronological order by DS number, are as follows:

*United States—Use of Zeroing in Anti-Dumping Measures Involving Products from Korea,* WT/DS 402 (adverse panel report adopted February 24, 2011; dispute resolved with implementation in October and November 2011 of three Section 129 Determinations in which dumping margins were recalculated without use of zeroing; as a result two challenged AD orders were revoked in full and one in part);

*United States—Antidumping Measures on Polyethylene Retail Carrier Bags from Thailand*, WT/DS383 (adverse panel (continued...)

The conduct of antidumping investigations and the imposition of antidumping duties are subject to obligations in the WTO Agreement on Antidumping and Article VI of the General Agreement on Tariffs and Trade 1994 (GATT 1994), which permits the imposition of an antidumping duty on an imported product "not greater in amount than the margin of dumping in respect of such product." While neither of these agreements expressly address the use of zeroing in antidumping investigations or in the various reviews and duty assessments carried out in antidumping proceedings, WTO panels and the Appellate Body have found that the use of zeroing in original investigations, as applied in two types of price comparisons, is inconsistent with obligations in Article 2.4.2 of the WTO Antidumping Agreement, a provision requiring WTO Members to determine dumping margins by comparing normal and export values of "all comparable export transactions."[63] In addition, WTO panels and the Appellate Body have concluded that the use of zeroing in administrative and new shipper reviews violates GATT and Antidumping Agreement prohibitions on imposing antidumping duties that exceed the dumping margin for the goods under investigation. Further, reliance on zeroing-based dumping margins in mandatory five-year sunset

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report adopted February 18, 2010; dispute resolved with July 2010 implementation of Section 129 Determination in which dumping margins were recalculated without use of zeroing; AD order partially revoked as a result);

*United States—Measures Related to Shrimp from Thailand*, WT/DS343 (adverse panel and AB reports adopted August 1, 2008; dispute resolved with January 2009 implementation of Section 129 Determination in which dumping margins were recalculated without use of zeroing);

*United States—Anti-dumping Measure on Shrimp from Ecuador*, WT/DS335 (adverse panel report adopted February 20, 2007; dispute resolved with August 2007 revocation of the AD order at issue);

*United States—Anti-dumping Determinations Regarding Stainless Steel from Mexico*, WT/DS325 (consultations only; see WT/DS344, discussed in text, for further action);

*United States—Provisional Anti-Dumping Measures on Shrimp from Thailand*, WT/DS324 (consultations only; see WT/DS343, *supra*, for further action);

*United States—Anti-dumping Measures on Cement from Mexico*, WT/DS281 (panel established but work suspended; dispute settled with 2006 bilateral Trade in Cement Agreement);

*United States—Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264 (adverse panel and AB reports in original dispute adopted August 31, 2004; adverse AB report and reversed panel report in compliance panel proceeding adopted September 1, 2006; dispute settled with 2006 bilateral Softwood Lumber Agreement);

*United States—Provisional Anti-Dumping Measures on Import of Certain Softwood Lumber from Canada*, WT/DS247 (consultations only; dispute settled with 2006 bilateral Softwood Lumber Agreement);

*United States—Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244 (Appellate Body reversed panel finding that United States did not violate WTO Antidumping Agreement in relying on zeroing-based dumping margin in challenged sunset review, but found that it had insufficient factual basis to complete analysis of Japan's claim; reports adopted January 9, 2004);

*United States—Anti-dumping Duties on Silicon Metal from Brazil*, WT/DS239 (consultations only).

[63] Article 2.4.2 states, in pertinent part, as follows: "Subject 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 a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis."

The first WTO decision in which the U.S. practice of zeroing was ruled to be inconsistent with this provision of the WTO Antidumping Agreement was *United States—Final Dumping Determination on Softwood Lumber from Canada (Softwood Lumber)*, WT/DS264, a case involving the application of zeroing in an average-to-average price comparison in an original antidumping investigation. As summarized in a January 2010 panel report, the WTO Appellate Body found in *Softwood Lumber* "that the terms 'margins of dumping' and 'all comparable export transactions' in Article 2.4.2 must be interpreted in an 'integrated manner', such that where 'an investigating authority has chosen to undertake multiple comparisons [of product sales], the investigating authority necessarily has to take into account the results of all those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2'." Panel Report, *United States—Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand*, para. 7.20, WT/DS383/R (January 22, 2010).

reviews of antidumping duty orders has been found to violate Article 11.3 of the WTO Antidumping Agreement on the ground that such reliance taints the fundamental determination made in sunset reviews, namely, whether revocation of the antidumping order is likely to lead to the recurrence or continuation of dumping and injury.

As a result of these cases, the use of zeroing has been found to be broadly prohibited in the calculation of dumping margins in U.S. antidumping proceedings, both as a general practice and as applied in particular proceedings. Moreover, findings in related compliance panel proceedings that a WTO decision faulting the use of zeroing in an original antidumping investigation continues to apply with respect to subsequent annual administrative reviews are particularly important for the U.S. "retrospective" antidumping duty system of which administrative reviews are a key component. It has also been found in these cases that, where goods have entered the United States before the end of the compliance period established in a WTO dispute but final duties have not been collected, zeroing-based duties may not be applied to such goods once the compliance period has ended. In addition, the Appellate Body has found that an additional claim may be made in an initial WTO complaint against zeroing, namely, the "continued use" of the practice in subsequent domestic proceedings relating to a particular antidumping duty order.

As mentioned earlier, the United States has responded to these decisions by prospectively eliminating the use of zeroing in original investigations under a regulatory modification issued by the Commerce Department under Section 123(g) of the Uruguay Round Agreements Act and finalizing its December 2010 regulatory modification on the use of zeroing in subsequent phases of antidumping proceedings. Where the use of zeroing in an individual original antidumping investigation has been challenged, the United States has resolved the case by the issuance of a Section 129 Determination in which the dumping margin in question has been recalculated without the use of zeroing.[64] The United States has not contested recent complaints of this type before the panel.

It is not clear that prospective modification of U.S. zeroing practice—that is, its application to new proceedings only—and the issuance of case-by-case recalculations under Section 129 will be sufficient to satisfy the concerns of all WTO complainants.[65] The EU, however, appears to have dropped any demands that it had for the refund of zeroing-based duties paid after the expiration of the compliance periods in its zeroing cases, given that the memorandum that the EU signed with the United States in February 2012 aimed at resolving its zeroing disputes with the United States

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[64] An example is *United States—Antidumping Measures on Polyethylene Retail Carrier Bags from Thailand* (WT/DS383). On January 22, 2010, the WTO dispute panel issued a report finding that the United States was in violation of its obligations under the WTO Antidumping Agreement. Panel Report, *United States—Antidumping Measures on Polyethylene Retail Carrier Bags from Thailand*, WT/DS383/R (January 22, 2010). The United States did not contest Thailand's claim in the case. See *id.* para. 3.3. The panel report was adopted on February 18, 2010, and the two parties agreed to a compliance deadline of August 18, 2010. Agreement on Procedures between Thailand and the United States, *United States—Antidumping Measures on Polyethylene Retail Carrier Bags from Thailand*, WT/DS383/4 (January 12, 2010); Agreement under Article 21.3(b) of the DSU, *United States—Antidumping Measures on Polyethylene Retail Carrier Bags from Thailand*, WT/DS383/6 (April 6, 2010). The Section 129 Determination was issued on June 29, 2010, and implemented effective July 28, 2010. Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order on Polyethylene Retail Carrier Bags from Thailand, 75 *Federal Register* 48940 (August 12, 2010). Thailand expressed appreciation for the "timely" U.S. determination at the August 31, 2010, meeting of the WTO Dispute Settlement Body. Dispute Settlement Body, Minutes of Meeting, August 31, 2010, at 11-12, WT/DSB/M/286 (October 22, 2010).

[65] See, e.g., *Brazil Mulling Whether to Move Forward with Zeroing Case Against U.S.*, INSIDE U.S. TRADE, March 30, 2012, at 19; *U.S. Still Examining Whether It Will Adjust Past Reviews in Zeroing Cases*, INSIDE U.S. TRADE, January 7, 2011, at 3.

provides that the new WTO-compliant dumping margins to be calculated by the United States will be applied only to future entries of merchandise.[66]

The United States has been critical of the Appellate Body's broad prohibition on the use of zeroing at meetings of the WTO Dispute Settlement Body and in related documents circulated to Members. In addition, the United States submitted proposals in June 2007 to the WTO Negotiating Group of Rules, which has been negotiating revisions to antidumping and subsidy rules in the Doha Round, asking that negotiators evaluate the reasoning of the WTO panels that have examined the issue of zeroing and stating 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."[67] The United States also proposed revised language for the Antidumping Agreement to this effect.[68] While the draft negotiating text issued by the Chairman of the Doha Negotiating Group in November 2007 contained proposed language reflecting U.S. concerns,[69] the draft text issued in December 2008 does not contain such language and instead notes that, with regard to zeroing, "[d]elegations remain profoundly divided on this issue," with positions ranging from "insistence on a total prohibition of zeroing irrespective of the comparison methodology used and in respect of all proceedings to a demand that zeroing be specifically authorized in all contexts."[70] Notwithstanding these uncertainties, including the continued inability of WTO Members to complete the Doha Round, the United States stated at a February 2012 meeting of the WTO Dispute Settlement Body that "it will continue to press in ongoing WTO negotiations for affirmation that 'zeroing' is consistent with WTO rules."[71]

### *Domestic Legal Basis for Zeroing*

Although the Tariff Act of 1930, at Section 735(A), 19 U.S.C. Section 1677(35), defines the terms "dumping margin" and "weighted average dumping margin," it does not expressly address the practice of zeroing. Using the *Chevron* standard of judicial review, U.S. courts have held that the statute does not unambiguously require zeroing, but that the Commerce Department's interpretation of the statute as allowing the practice is a permissible one.[72] Courts have also

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[66] See, e.g., Dispute Settlement Body, Minutes of Meeting, January 25, 2011, at 9, WT/DSB/M/291 (March 8, 2011); Dispute Settlement Body, Minutes of Meeting, February 24, 2011, at 8-9, WT/DSB/M/293 (May 2, 2011).

[67] Communication from the United States, *Offsets for Non-Dumped Comparisons*, TN/RL/W/208 (June 5, 2007).

[68] Proposal from the United States, *Proposal on Offsets for Non-Dumped Comparisons*, TN/RL/GEN/147 (June 27, 2007).

[69] WTO, Negotiating Group on Rules, Draft Consolidated Chair Texts of the AD and SCM Agreements, at 6, 20, TN/RL/W/213 (November 30, 2007).

[70] WTO, Negotiating Group on Rules, New Draft Consolidated Chair Texts of the AD and SCM Agreements, at 6, TN/RL/W/236 (December 19, 2008). See also *16 Members Propose Complete Ban of All 'Zeroing' in WTO Rules Talks*, 25 Int'l Trade Rep. (Bloomberg BNA) 149 (January 31, 2008); *China, Other WTO Members Add Support to Proposal on Elimination of Zeroing*, 25 Int'l Trade Rep. (Bloomberg BNA) 185 (February 7, 2008). See also *U.S. Continues Fight to Preserve Zeroing in Doha Despite New Proposal*, INSIDE U.S. TRADE, January 7, 2011, at 8; Office of the U.S. Trade Representative, 2011 TRADE POLICY AGENDA AND 2010 ANNUAL REPORT, at 10 (March 2011), at http://www.ustr.gov/webfm_send/2597; *Commerce Signals Link Between Doha Talks and Zeroing Compliance*, INSIDE U.S. TRADE, March 11, 2011, at 17.

[71] Statement by the United States at the February 22, 2012, DSB Meeting, para. E., at http://geneva.usmission.gov/2012/02/23/statement-by-the-united-states-at-the-february-22-2012-dsb-meeting/.

[72] SKF USA Inc. v. United States, 491 F. Supp. 1354, 1364-66 (Ct. Int'l Trade 2007), *aff'd*, 537 F.3d 1373 (Fed. Cir. 2008); 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.

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refused to implement adverse WTO decisions on zeroing, leaving determinations as to "whether, when, and how" to comply with such rulings to the executive branch.[73]

Further, the U.S. Court of International Trade (USCIT) ruled in July 2009 that the Commerce Department's determination under Section 123 of the Uruguay Round Agreements Act to *eliminate* the use of zeroing in average-to-average comparisons in original antidumping investigations and to offset sales made at less than fair value with fair value sales, an action taken in response to the WTO decision in DS294, was based on a reasonable interpretation of U.S. antidumping law for purposes of *Chevron* and was thus in accordance with law.[74] As discussed earlier, Section 123 sets out statutory requirements for U.S. regulatory modifications taken to implement WTO decisions. Thus, in its *Chevron* analysis, the court also considered that the department was undertaking this interpretation in the context of statutory authorities and requirements with an international dimension, stating that the "deference accorded to Commerce's interpretation [under *Chevron*] is at its highest when that agency acts under the authority of a Congressional mandate to harmonize U.S. practices with international obligations, particularly when it allows the Executive Branch to speak on behalf of the U.S. to the international community on matters of trade and commerce."[75] The court further held that, because the Section 123 action was in accordance with law, the department's use of this new approach in a Section 129 Determination taken to comply with the WTO decision was "not unlawful."[76] In October 2010, the U.S. Court of Appeals for the Federal Circuit (CAFC), in a decision focused on the Section 129 claim, found that the department's Section 129 Determination "reflects Commerce's reasonable interpretation of an ambiguous statute" and affirmed the USCIT decision.[77]

In March 2011, however, the CAFC ruled in *Dongbu Steel Co. v. United States* that DOC's use of zeroing in administrative reviews while abandoning it in initial investigations was an arbitrary interpretation of the statute for purposes of *Chevron* step two, vacating and remanding the contrary USCIT judgment and remanding to DOC for further proceedings to enable DOC to explain its reasoning.[78] The court found, in part, that the government's decision to implement an adverse WTO decision "standing alone does not provide sufficient justification for the inconsistent statutory interpretations."[79] The court stated in summary:

> our prior case law does not address the situation at hand where Commerce has decided to interpret 19 U.S.C. §1677(35) differently based on the nature of the antidumping proceeding at issue. Applying *Chevron* step two to this ambiguous statute, we conclude that the agency has not provided a reasonable explanation for why the statute supports such inconsistent interpretations.... We accordingly vacate the decision of the Court of International Trade and remand for further proceedings to give Commerce the opportunity to explain its reasoning. It may be that Commerce cannot justify using opposite interpretations of 19 U.S.C. §1677(35)

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United States, 543 U.S. 976 (2004).

[73] Koyo Seiko Co. v. United States, 551 F.3d 1286, 1290-91 (Fed. Cir. 2008).

[74] U.S. Steel Corp. v. United States, 637 F.Supp.2d 1199, 1209-16 (Ct. Int'l Trade 2009).

[75] *Id*. at 1212.

[76] *Id*. at 1216.

[77] United States Steel Corp. v. United States, 621 F.3d 1351, 1360-63 (Fed. Cir. 2010).

[78] Dongbu Steel Co. v. United States, 635 F.3d 1363, 1369-73 (Fed. Cir. 2011).

[79] *Id*. at 1372.

> in investigations and in administrative reviews. Under such circumstances, Commerce is of course free to choose a single consistent interpretation of the statutory language.[80]

In a subsequent case, *JTEKT Corp. v. United States*, DOC explained to the CAFC that the reason for continuing to use zeroing in administrative reviews was that investigations and administrative reviews are "different proceedings with different purposes," with the dumping margin calculation in the former used to determine if an antidumping order will be imposed and the dumping margin calculation in the latter used to determine the amount of the duty assessment on entries subject to the order.[81] In response, the court ruled in June 2011 that DOC had "failed to address the relevant question—why is it a reasonable interpretation of the statute to zero in administrative reviews, but not in investigations?"—and again vacated and remanded.[82]

The U.S. Court of International Trade remanded the case to the Commerce Department on December 15, 2011, ordering the department to issue a redetermination in which it reconsiders its decision in the administrative review at issue; to modify its decision or explain how the language of 19 U.S.C. §1677(35) may be construed differently as to the use of zeroing whether an original investigation or an administrative review is involved; and, if the department modifies its decision and decides not to apply zeroing or to make some other change, to redetermine the dumping margin for the exporter involved.[83] The court stated that to be adequate under the CAFC standard articulated in *Dongbu* and *JTEKT*, discussed above, "any such explanation must identify a '*basis in the statute* for reading 19 U.S.C. §1677(35) differently in administrative reviews than in investigations' … and must explain why the differences between antidumping investigations and antidumping administrative reviews, 'make it *reasonable* to continue zeroing in one phase, but not the other.'"[84]

In *Union Steel v. United States*, a February 2012 decision of the USCIT, the court accepted the department's more expansive explanation and upheld the continued use of zeroing in administrative reviews.[85] The department provided three reasons for its different approaches: (1) zeroing has been was the department's "preferred method" and has been consistently upheld by the courts; (2) the difference in procedures was the result of the department's decision to comply with WTO decisions; and (3) there exist inherent differences in the nature and purpose of investigations and reviews.[86] Regarding the third rationale, the department contrasted the fact that investigations focus on "overall pricing behavior of an exporter in order to establish an antidumping duty order" while reviews are used to set final rates to be used to assess antidumping duties.[87] The court stated that, in reviews, "it is reasonable for the agency to look for more accuracy, which it achieves in some measure through monthly averaging, and also for the agency to look for the full measure of duties resulting therefrom, which it better achieves through

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[80] *Id*. at 1373.

[81] JTEKT Corp. v. United States, 642 F.3d 1378, 1384-85 (Fed. Cir. 2011).

[82] *Id*. at 1384-85.

[83] JTEKT Corp. v. United States, No. 08-00324, slip. op at 7-8 (Ct. Int'l Trade December 15, 2011), at http://www.cit.uscourts.gov/slip_op/Slip_op11/11-158.pdf.

[84] *Id*., slip op. at 6 (emphasis added by the court).

[85] Union Steel and Dongbu Steel Co., Ltd v. United States, No. 11-00083 (Ct. Int'l Trade February 27, 2012), at http://www.cit.uscourts.gov/SlipOpinions/Slip_op12/12-24.pdf.

[86] *Id.,* slip op. at 18-22.

[87] *Id*. at 20-21.

zeroing."[88] The court thus concluded that's "when it comes to reviews, which are intended to more accurately reflect commercial reality, Commerce is permitted to unmask dumping behavior in a way that is not necessary at the investigation stage."[89] Considering these reasons in the context of a statute that is silent on the matter of zeroing, the court held that Commerce did not abuse its discretion in changing only its investigation methodology and acted reasonably in applying the antidumping statute to conform to the different purposes of the two.[90]

# Pending Disputes: Trade Remedies

## Antidumping Measures on Hot-Rolled Steel Products from Japan (DS184)

In November 1999, Japan challenged determinations made by the Department of Commerce (DOC) and the U.S. International Trade Commission (ITC) in an antidumping investigation of hot-rolled steel products from Japan initiated in 1998. Under Section 703 of the Tariff Act of 1930, 19 U.S.C. Section 1673, antidumping duties will be imposed if DOC determines that dumping exists, that is, that a product is sold, or likely to be sold, in the United States at less than its fair value, and ITC determines that the dumped imports cause, or threaten to cause, material injury to a domestic industry. At issue in the WTO case were the manner in which DOC calculated the dumping margins in these cases, that is, the amount by which the fair market or "normal" value of the product under investigation exceeded the export price, and elements of the affirmative material injury determination made by the ITC.

DOC calculates dumping margins for individual exporters, as well as an "all others" rate for firms that are not investigated individually. Under Section 735(c)(5)(A) of the Tariff Act of 1930, 19 U.S.C. Section 1673d(c)(5)(A), the "all others" rate is to be based on rates determined for individually investigated producers, excluding any zero and de minimis margins (i.e., margins of less than 2%) and any margins determined "entirely" under "facts available." The department uses "facts available" whenever necessary information is not on the public record or any person involved in the investigation withholds requested information, fails to provide information in a timely manner, significantly impedes an investigation, or provides information that cannot be properly verified.[91] When the department decides to use "facts available," it needs to determine what is the most appropriate information on which to base the dumping margin and whether a party has failed to cooperate in such a manner that an adverse inference against it is warranted.[92]

Also at issue was the test used by the United States to determine if sales were "in the ordinary course of trade" and therefore included in the calculation of normal value. The Antidumping Agreement requires that sales not made "in the ordinary course of trade" are to be excluded from this calculation, but the agreement neither defines this concept nor establishes a general test for determining whether sales fall within this category. In the case at hand, the "arm's length" pricing

[88] *Id.* at 21.

[89] *Id.* at 22.

[90] *Id.* at 22.

[91] Tariff Act of 1930, §776(a), 19 U.S.C. §1677e(a).

[92] Tariff Act of 1930, §776(b), 19 U.S.C. §1677e(b).

test used by the United States to determine whether sales made by exporters and producers to affiliated customers were "in the ordinary course of trade" was argued to unfairly exclude certain low-priced sales and therefore to increase normal value and consequently inflate the dumping margin for the goods under investigation.

In 2001, the WTO 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 requires, in effect, that any dumping margins based *in part* on "facts available" be used in calculating the "all others" rate; (2) the Commerce Department improperly applied "facts available" in calculating dumping margins for producers who were individually investigated; and (3) the department improperly determined the normal value of the goods under investigation due to the manner in which it determined whether sales were "in the ordinary course of trade." [93] While the panel had focused on the "arm's length" test, the Appellate Body looked at the combined operation of two tests used by the department in determining whether goods were "in the ordinary course of trade"—the "arm's length" test and the related and even more limited "aberrationally high" test—finding a "lack of even-handedness" that disadvantaged exporters. [94] As stated by the Appellate Body, the "combined application of these two tests operated systematically to raise normal value, through the automatic exclusion of marginally low-priced sales, coupled with the automatic inclusion of all high-priced sales, except those proved, upon request, to be aberrationally high priced."[95] The Appellate Body reversed the panel on a related point, finding that the United States was not in violation of its WTO obligations regarding the calculation of normal value when it replaced home market sales to affiliates that were excluded under the "arm's length" test with downstream home market sales by the affiliates to independent purchasers.[96]

The Appellate Body also ruled against the United States with respect to the ITC's injury determination, reversing two panel findings favorable to the United States. First, in contrast to the panel, the AB found that ITC had not applied a provision of the antidumping statute addressing "captive production" consistently with the Antidumping Agreement. "Captive production" refers to the situation in which a domestic producer does not sell the domestic counterpart of the product under investigation to unrelated parties (the "merchant market") but instead processes it into a higher-value good downstream. Second, the AB determined that the ITC had not found a causal link between the dumped imports and material injury to the domestic industry involved. The AB also found, however, that there was an insufficient factual record to allow completion of the required causation analysis.[97]

The original compliance period in the case, which had been determined by arbitration, expired November 23, 2002. It was later extended until December 31, 2003, or the end of the 108th Congress, first session, whichever was earlier, in order to facilitate full compliance.[98]

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[93] 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].

[94] Hot-Rolled Steel AB Report, *supra* note 93, paras. 150-153.

[95] *Id*. para. 154.

[96] *Id.* paras.159-180.

[97] *Id.* paras. 235-236.

[98] 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).

### *Administrative Compliance*

Addressing the normal value finding, the Commerce Department modified its "arm's length" test by establishing a price band covering a range of prices both below and above those charged by producers or exporters to non-affiliated companies and treating sales to affiliates within the band as being "in the ordinary course of trade" for purposes of determining normal value.[99] It 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.[100] The department announced a new dumping determination in the AD proceeding at issue in December 2002, 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.[101] The recalculations resulted in reduced dumping margins for the three companies as well for all other exporters. Although ITC findings were also faulted in the case, no action was taken by the ITC in response to the WTO decision.[102]

### *Legislative Compliance*

The WTO panel, as affirmed on appeal, also concluded that Section 735(c)(5)(A) of the Tariff Act of 1930 is inconsistent with Article 9.4 of the WTO Antidumping Agreement because it requires DOC to consider dumping margins based *in part* on facts available in determining the all-others rate, whereas Article 9.4 was found to require the *exclusion* of dumping margins based either in whole *or* in part on such facts.[103] Absent legislative compliance by the United States, the December 2003 deadline referred to earlier was extended twice, most recently to July 31, 2005.[104] The deadline lapsed without U.S. action. In an understanding between the disputing parties reached earlier in July 2005, Japan stated that it would not request authorization to retaliate at the time but might choose to do so in the future.[105]

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[99] Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade, 67 *Federal Register* 69186 (November 15, 2002). See also Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade, 67 *Federal Register* 53339 (August 15, 2002)(request for public comment).

[100] *Id.*

[101] 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 *Federal Register* 71936 (December 3, 2002).

[102] 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. (Bloomberg 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.

[103] Emphasis added. See Hot-Rolled Steel Panel Report, *supra* note 93, paras. 7.83-7.90, 8.1(b); Hot-Rolled Steel AB Report, *supra* note 93, paras. 111-130.

[104] See Dispute Settlement Body, Minutes of Meeting, August 31, 2004, at 6-7, WT/DSB/M/175 (September 24, 2004).

[105] 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 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 of WTO Dispute Settlement Understanding has expired, but reserved the right to have any retaliation request referred to arbitration.

### Recent Developments

No legislation has been introduced to amend Section 735(c)(5) of the Tariff Act since the 109th Congress. H.R. 2473 (Shaw), 109th Congress, 1st Sess., would have amended Section 735(c)(5) to remove the word "entirely" each time it appears in the provision, thus enabling the Department of Commerce to exclude dumping margins based in whole or in part on facts available in determining the "all others" rate, as called for by the WTO decision. Although the text of H.R. 2473 was listed for possible inclusion in 109th Congress miscellaneous tariff legislation,[106] 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,[107] as the United States continues to state its support for legislative amendments that would achieve full compliance in the case.[108] 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.[109] No revisions or clarifications of Article 9.4, however, were included in the draft texts of proposed revisions to the Antidumping Agreement circulated by the Chair of the Negotiating Group in November 2007 and December 2008.[110]

## Continued Dumping and Subsidy Offset Act (DS217/DS234)

The Continued Dumping and Subsidy Offset Act (CDSOA) of 2000, also known as the Byrd Amendment, required that duties collected under an existing antidumping or countervailing duty order be distributed annually to petitioners and interested parties in the underlying antidumping or countervailing duty proceeding.[111] Payments were available for "qualifying expenditures" in specified categories (e.g., manufacturing facilities or equipment) incurred by the petitioners and interested parties after the applicable antidumping or countervailing duty order was issued. To be eligible, petitioners and interested parties, referred to in the statute as "affected domestic producers," must also have remained in operation. Although the statute was held WTO-inconsistent in January 2003 and repealed, effective October 2005, by P.L. 109-171, it remains

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[106] 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.

[107] E.g., Dispute Settlement Body, Minutes of Meeting, October 25, 2011, at 5-6, WT/DSB/M/305 (December 22, 2011).

[108] Status Report by the United States, Addendum, *United States—Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/15/Add.112 (March 13, 2012).

[109] *U.S. Seeks to Reverse WTO Ruling on 'Facts Available' Dumping Rates*, 21 Int'l Trade Rep. (Bloomberg 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. 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).

[110] See WTO, Negotiating Group on Rules, New Draft Consolidated Chair Texts of the AD and SCM Agreements, at 20, TN/RL/W/236 (December 19, 2008) and WTO, Negotiating Group on Rules, Draft Consolidated Chair Texts of the AD and SCM Agreements, at 21, TN/RL/W/213 (November 30, 2007).

[111] P.L. 106-387, 114 Stat. 1549A-72, codified at 19 U.S.C. §1675c (2000). Regulations are set out at 19 C.F.R. §§159.61-64. For a 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 (name redacted) and (name redacted). 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).

the target of authorized sanctions by complainants European Union and Japan due to continued payments to U.S. firms under the CDSOA program.

### *Original WTO Complaints*

Eleven WTO members challenged CDSOA shortly after its enactment in October 2000 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 Antidumping Agreement or the SCM Agreement.[112] Two complaints were filed: DS217, filed jointly by Australia, Brazil, Chile, the European Union (EU), India, Indonesia, Japan, Korea and Thailand; and DS234, filed jointly by Canada and Mexico.

Considering both complaints at the same time, 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 other arguments made by the complainants, including Mexico's claim that the act constituted a subsidy in and of itself.[113] The Appellate Body upheld the panel's finding that the statute created a "specific action against" dumping and subsidization not allowed under WTO agreements, but reversed the panel on its conclusion regarding industry support requirements.[114] The reports were adopted January 27, 2003, and the compliance period was subsequently determined by arbitration to expire December 27, 2003.[115]

### *Complainants' Retaliation Requests and Subsequent Arbitration*

Because the United States did not comply by the December 2003 deadline, eight complaining Members—Brazil, Chile, EU, India, Japan, Korea, Canada, and Mexico—asked the WTO in January 2004 for authorization to impose retaliatory measures.[116] The United States objected to the requests, sending them to arbitration.[117] The remaining three complainants—Australia, Indonesia, and Thailand—agreed to give the United States until December 27, 2004, to comply.[118]

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[112] 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).

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

[114] 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).

[115] 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.* para. 50.

[116] 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).

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

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

In awards issued August 31, 2004, the Arbitrator 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.[119] The Arbitrator stated that the disbursements "operate, in economic terms, as subsidies that may generate import substitution production"[120] 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.[121]

The eight complainants received formal authorization from the DSB to impose retaliatory measures in late 2004.[122] The EU and Canada began to impose countermeasures in the form of higher tariffs and surcharges on selected U.S. products, respectively, as of May 2005.[123] Mexico began to impose $20.9 million in retaliatory tariffs effective August 18, 2005.[124] In addition, Japan imposed additional tariffs of 15% on 15 categories of U.S. goods as of September 2005.[125]

## *U.S. Judicial and Legislative Action*

In April 2006, the U.S. Court of International Trade ruled that the CDSOA did not apply to imports from Canada or Mexico,[126] and on September 28, 2006, U.S. Customs and Border

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[119] 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).

[120] *Id.* para. 3.41.

[121] *Id.* paras. 3.72, 3.80-3.151, 4.7.

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

[123] 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. (Bloomberg BNA) 796 (2005).

[124] *Mexico Announces $20.9 Million in Byrd Retaliation Against U.S. Exports*, INSIDE U.S. TRADE, August 19, 2005, at 1.

[125] 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. (Bloomberg 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.*

[126] Canadian Lumber Trade Alliance v. United States, 425 F.Supp.2d 1321 (Ct. Int'l Trade 2006), 441 F.Supp.2d 1259 (Ct. Int'l Trade 2006), *aff'd in part, vacated in part, and remanded*, 517 F.3d 1319 (Fed. Cir. 2008), *cert. denied* 129 S.Ct. 344 (2008). 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, Section 408, 19 U.S.C. Section 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.

Canadians had been concerned that antidumping and countervailing duties collected on softwood lumber imports, (continued...)

Protection (CBP) announced that it was withholding FY2006 and subsequent years' distributions on imports from the two countries pending the outcome of any appeal.[127] Canada allowed its retaliatory tariffs to terminate as of April 30, 2006.[128] Mexico, after a month's lapse, imposed increased tariffs on U.S. dairy products from September 18 through October 31, 2006.[129] These tariffs surcharges have not been reimposed.

A provision repealing the CDSOA as of October 1, 2005, 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.[130] While collection of antidumping and countervailing duties for purposes of CDSOA disbursal has thus ceased, duties will continue to be available for disbursement until all relevant customs entries before September 1, 2007, are liquidated, that is, the final assessment of duties on these entries is made.[131]

Following the 2006 enactment, the United States informed the WTO Dispute Settlement Body (DSB) that it had taken the actions necessary to implement the WTO rulings.[132] Although complaining Members expressed support for the repeal, Members also stated their concerns that the requirement that duties be distributed through 2007 and possibly after this date would prevent the United States from complying fully with its WTO obligations in the case.[133] While WTO Members have regularly called on the United States to cease payments under the CDSOA program,[134] no Member has formally challenged the compatibility of the 2006 statute with U.S. WTO obligations.

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which had at the time of the suit totaled over $4 billion and whose underlying duty orders had been heavily litigated by Canada, might eventually be distributed to U.S. lumber producers. For further information on the U.S.-Canada softwood lumber dispute, which was settled in 2006, see CRS Report RL33752, *Softwood Lumber Imports from Canada: Issues and Events*, by (name redacted) and (name redacted).

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

128 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.

129 *U.S. Dairy Industry Expects Hit from Short-term Mexican Byrd Retaliation*, INSIDE U.S. TRADE, October 6, 2006; Dispute Settlement Body, Minutes of Meeting, September 28, 2006, at 9, WT/DSB/M/220 (November 2, 2006).

130 Deficit Reduction Act of 2005, P.L. 109-171, §7601. 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."

131 In addition, Congress had been routinely including provisions in annual appropriations legislation directing the Commerce Department and the Office of the USTR to conduct negotiations in the WTO "to recognize the right of members to distribute monies collected from antidumping and countervailing duties." E.g., Consolidated Appropriations Act, 2010, P.L. 111-117, Div. B, Tit. I, Tit. 4, 123 Stat. 3113-14, 3148. This provision is not included Commerce Department and USTR appropriation for FY2012. See Consolidated and Further Continuing Appropriations Act, 2012, P.L. 112-55, Div. B, Tit. I, Tit. IV, Tit. V.

Although the USTR submitted a proposal of this type to the pertinent Doha Round negotiating group in 2004, a provision addressing this issue has not been included in the draft negotiating texts. 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); see WTO, Negotiating Group on Rules, New Draft Consolidated Chair Texts of the AD and SCM Agreements, at 20, TN/RL/W/236 (December 19, 2008); WTO, Negotiating Group on Rules, Draft Consolidated Chair Texts of the AD and SCM Agreements, at 21, TN/RL/W/213 (November 30, 2007).

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

133 *Id.*

134 See, e.g., Dispute Settlement Body, Minutes of Meeting, April 21, 2011, at 10-11, WT/DSB/M/295 (June 30, 2011).

### Recent Developments

A December 2010 enactment, as amended, restricted the funds available for continued payments under the CDSOA program. Section 822 of the Claims Resolution Act of 2010, P.L. 111-291, a provision included in the public law as a funding offset, provides that no payments may be distributed under the CDSOA with respect to entries of any goods that, on the date of enactment, that is, December 8, 2010, are (1) not liquidated and (2) not in litigation and not under an order of liquidation from the Commerce Department.[135]

The EU and Japan are continuing to impose retaliatory tariffs on U.S. products due to the continued CDSOA disbursements, albeit at diminishing levels due to the generally decreasing amount of duties available for distribution to U.S. firms. As of May 1, 2011, the EU removed 30 U.S. products from its retaliation list and suspended tariff concessions on only three products—sweet corn, glass frames, and crane lorries—for a total value of trade that does not exceed $9.96 million.[136] Japan has reduced its retaliation as well, lowering tariffs on U.S. ball bearings and tapered roller bearings to 1.7% beginning September 1, 2011.[137]

In June 2011 CBP announced that approximately $25.1 million was preliminarily available for FY2011 disbursements, with approximately $18.2 million under review pursuant to amended Section 822, discussed above.[138]

## Laws, Regulations, and Methodology for Calculating Dumping Margins ("Zeroing") (DS294)

In June 2003, the European Union (EU) 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 antidumping investigations and subsequent administrative, new shipper, changed circumstances, and sunset reviews was inconsistent "as such" with provisions of the WTO Agreement on Antidumping and Article VI of the GATT 1994. That is, complainants argued that the existence of the practice violated these agreements regardless of any specific application.[139] The EU also alleged that the United States had acted inconsistently with its WTO

[135] The statute had originally stated that the covered entries must be (1) not liquidated and (2) not in litigation *or* not under an order of liquidation from the Department of Commerce. Section 504 of P.L. 111-312, the Tax Relief, Unemployment Insurance Authorization, and Job Creation Act of 2010, changed the word "or" to "and" and made the amendment effective as if included in the earlier enactment.

[136] Communication from the European Communities, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/59 (April 12, 2011). This amount is a considerable reduction from the previous year, when the EU raised its annual amount of retaliation from $16.31 million to $96.38 million in trade, based in large part on the disbursement in 2009 of antidumping duties collected on low-enriched uranium from the EU. Communication from the European Communities, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/57 (April 27, 2010); European Commission, *General Overview of Active WTO Disputes Involving the EU as Complainant or Defendant*, at 25 ([July 15, 2011]), at http://trade.ec.europa.eu/doclib/docs/2007/may/tradoc_134652.pdf.

[137] Communication from Japan, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/60 (August 30, 2011); *Japan to Extend, Reduce Retaliatory Tariffs on U.S. Exports in Byrd Fight*, INSIDE U.S. TRADE, August 12, 2011, at 12.

[138] U.S. Customs and Border Protection, FY2011 Preliminary CDSOA Amounts Available as of 4/30/11, at http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/add_cvd/cont_dump/fy_2011_amount.ctt/fy_2011_amount.pdf.

[139] Request for the Establishment of a Panel by the European Communities, *United States—Laws, Regulations and*
(continued...)

obligations in applying zeroing in 31 specific cases, including 15 original investigations and 16 administrative reviews.[140] The EU further claimed that insofar as dumping margins in original investigations should be calculated without the use of zeroing and some exporters may thus have de miminis dumping margins, these imports should be excluded from the volume of dumped imports that the ITC takes into account in determining whether such imports are causing material injury to domestic industry. The EU argued that WTO obligations require the United States to make this determination based only on the volume of imports remaining after this exclusion. A panel was established in March 2004.

### Panel and Appellate Body Reports

In a report issued October 31, 2005, the WTO panel found that zeroing, as applied in the weighted-average-to-weighted average price comparisons made in the 15 original investigations cited in the EU's complaint, was inconsistent with Article 2.4.2 of the Antidumping Agreement. This article provides, in pertinent part, that "[s]ubject to the provisions governing fair comparison in [Article 2] 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."[141] The panel based its conclusion on Appellate Body rulings in earlier cases that "when a margin of dumping is calculated on the basis of multiple averaging by model type, the margin of dumping for the products in question must reflect the results of *all such comparisons*, including weighted average export prices that are above the normal value for individual models."[142] The Appellate Body had earlier concluded that the term "dumping" in WTO agreements is defined "in relation to a product as a whole" and that, as a result, dumping can thus be found to exist "only for the product under investigation as a whole" and not solely "for a type, model, or category of that product."[143] Thus, in considering the U.S. multiple averaging technique in light of WTO obligations, the Appellate Body concluded that the

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*Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/7 (February 6, 2004) and WT/DS294/7/Rev.1 (February 19, 2004). The EC's use of zeroing in establishing the existence of dumping margins in antidumping investigations, as applied in a case involving goods from India, had been successfully challenged by India in 2001. See panel and Appellate Body reports in *European Communities—Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India*, WT/DS141.

[140] 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). : The WTO Appellate Body has described "as such" claims as follows: "By definition, an 'as such' claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct—not only in a particular instance that has occurred, but in future situation as well—will necessarily be inconsistent with that Member's WTO obligations. In essence, complaining parties brining 'as such' challenges seek to prevent Members *ex ante* from engaging in certain conduct. The implications of such challenges are obviously more far-reaching than 'as applied' claims." 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).

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

[142] *Id.* paras. 7.27-7.32 (emphasis added).

[143] Appellate Body Report, *United States—Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, para. 93 (August 11, 2004).

only was that a dumping margin could be properly established for the product as a whole would be to aggregate "*all* of the 'results' of the multiple comparisons for *all* product types."[144]

The panel also found that zeroing, as it relates to original investigations, was a "well established and well-defined norm" that could be challenged "as such" in a WTO dispute even though it was 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" was inconsistent with Article 2.4.2.[145]

The panel rejected the EU's claims regarding the application of zeroing in the 16 administrative reviews cited by the EU, 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 would have struck down the use of the practice in proceedings other than original investigations, however. The panel did not address EU claims involving the need for a new injury determination based on excluded imports, viewing this as a dependent claim and finding that any conclusion would not provide the United States with additional guidance as to how to remedy the primary violation.

The panel report was appealed by the United States and the EU. While the United States appealed the panel's finding that zeroing was a challengeable norm, it did not appeal the panel's conclusion that the use of zeroing in weighted-average-to-weighted-average price comparisons in the cited original investigations violated the Antidumping Agreement.[146]

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.[147]

The AB also expanded the range of proceedings in which zeroing was prohibited, finding, contrary to the panel, that the United States could not use zeroing in making weighted-average-to-transaction comparisons to assess duties and set cash deposit rates in the 16 administrative reviews challenged by the EU. The AB found 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 the imposition of antidumping duties that exceeded the exporters' or producers' dumping margins.[148] 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

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[144] *Id.* para. 98 (emphasis added).

[145] U.S. Zeroing Panel Report (EC I), *supra* note 141, paras. 7.91-7.106. The panel rejected the EC's claims that various provisions of the Tariff Act of 1930, which define terms "dumping margin" and "weighted average dumping margin," establish the basic authority for imposing antidumping duties, and authorize the price comparison methodologies discussed above, were inconsistent with WTO obligations, finding that these provisions did not address the issue of zeroing. *Id.* paras. 7.50-7.69. The cited provisions were Tariff Act of 1930, §§771(35)(A),(B), 731, 777A(d), 19 U.S.C. §§1677(35)(A),(B), 1673, 1677f-1(d).

[146] Notification of an Other Appeal by the United States, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/13 (February 1, 2006).

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

[148] *Id.* para. 133.

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." The Appellate Body did not determine whether the use of zeroing in these reviews was "as such" inconsistent with WTO obligations, however, due to insufficient facts in the panel record to complete this analysis.

The AB report, which also addressed other issues, and the modified panel report were adopted on May 9, 2006.[149] While the United States vigorously disputed the Appellate Body decision,[150] it stated at a subsequent DSB meeting that it intended to comply.[151] The disputing parties later agreed on an implementation deadline of April 9, 2007.[152]

### *U.S. Actions in Response*

Shortly before the AB report was issued, 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.[153] The department noted that the United States had not appealed the panel's finding that the zeroing could not be used in making such comparisons in the specific antidumping investigations challenged by the EU.

On December 26, 2006, the department, following the requirements in Section 123 of the Uruguay Round Agreements Act (URAA), published a *Federal Register* notice stating that it was modifying its antidumping practice as announced earlier, noting that the modification would be used in implementing the findings of the WTO panel pursuant to Section 129 of the URAA with regard to the specific antidumping investigations challenged by the EU in the dispute and, moreover, that it would apply the modification in all current and future antidumping investigations as of the effective date, which at the time was planned for January 16, 2007.[154] 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."[155]

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

[150] 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).

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

[152] 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).

[153] Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 71 *Federal Register* 11189 (March 6, 2006).

[154] Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 *Federal Register* 77722 (December 27, 2006).

[155] Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Duty Investigation; Change in Effective Date of Final Modification, 72 *Federal Register* 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 *Federal Register* 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 (continued...)

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 original antidumping investigations cited by the EU, three of the cited AD orders having been revoked.[156] 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 findings of no dumping.[157] DOC also 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. Recalculations were done without the use of zeroing as provided in the modification originally announced in December 2006.[158] Regarding the administrative reviews at issue in the dispute, the United States stated that since they had been superseded by new administrative reviews, it did not need to take any further action to bring these reviews into compliance with the WTO decision.[159] The USTR instructed DOC to implement the new determinations on April 23, 2007.[160]

While the United States considered itself in compliance,[161] the EU questioned the prospective nature of the new determinations, that is, that they did not cover duties on goods entered before the date the Section 129 Determinations were implemented; claimed that 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

(...continued)

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 Section 123 regarding the modification available at *Inside U.S. Trade*, December 15, 2006, at 19-21.

In addition, H.R. 496 (Rangel), introduced January 14, 2009, would have provided that the 2007 regulatory modification would expire March 1, 2009, and the prior departmental practice would thenceforth apply, unless and until the department issued a revised methodology pursuant to procedures laid out in the bill. Note also S. 364 (Rockefeller), 110th Congress, 1st Sess. (2007), discussed at *supra* note 21.

156 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."

157 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.

158 *Id.*

159 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 April 2007 Zeroing Status Report].

160 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 *Federal Register* 25261 (May 4, 2007).

161 April 2007 Zeroing Status Report, *supra* note 159.

margins in the 16 challenged administrative reviews, claiming that to its knowledge the United States had not taken any action to bring these reviews into compliance with the WTO decision.[162]

On May 4, 2007, the United States and the EU 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 was found not to have complied in the case.[163] The EU requested consultations with the United States under Article 21.5 in July 2007.[164]

In September 2007, DOC issued a new determination in the outstanding antidumping case involving steel products from Italy, finding that the alleged clerical errors were not raised in the WTO dispute and thus were outside the scope of the Section 129 proceeding.[165]

### Compliance Proceedings

The EU requested a compliance panel in September 2007, claiming that the United States had failed to take compliance actions in some cases and that measures that it had taken in others were inconsistent with WTO obligations.[166] In its panel request, the EU cited specific administrative reviews and sunset reviews undertaken by the United States in the 15 original investigations and 16 administrative reviews that were successfully challenged in the original proceeding. The EU also claimed that United States violated its WTO obligations in those cases where it had recalculated dumping margins in original investigations without the use of zeroing, found that some exporters were not dumping or had *de miminis* margins, and maintained the antidumping order without determining whether the remaining amount of dumped goods were causing material injury to domestic industry.

The compliance proceeding was complex not only because of the number of U.S. antidumping determinations that the EU claimed were WTO-inconsistent, but also because of the interaction of the retrospective U.S. duty system with what has generally been considered to be the prospective nature of remedies in a WTO dispute. As described by the WTO Appellate Body, the WTO dispute settlement system is one under which "compliance has to be accomplished at the latest from the end of the reasonable period of time [i.e. the compliance period] with prospective effect."[167] At the same time, due to the U.S. retrospective system, there were goods that had

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

163 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).

164 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).

165 The final antidumping margins were 2.11% 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%. 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 *Federal Register* 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.

166 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).

167 Report of the Appellate Body, *United States—Laws, Regulations and Methodology for Calculating Dumping* (continued...)

entered the United States before the date on which the compliance period ended but for which final duty assessments would not be made until after this date, or for which final assessments were made before this date, but the duties were not collected until after the period expired. While the United States and the EU agreed that the WTO Dispute Settlement Understanding provides only for prospective remedies, the parties disagreed on what this entailed for the United States with regard to these earlier-entered goods.[168]

Questions also arose as to whether dumping determinations made in a phase of the proceeding that occurred after the one at issue in the original WTO dispute were considered measures taken to comply or whether they were properly before the panel for other reasons. Some of the challenged determinations, which had been rendered in original investigations, were the subject of later administrative or sunset reviews. In addition, the challenged administrative reviews had been superseded by determinations made in subsequent administrative reviews. Further, the United States had taken new action in some of the challenged proceedings before the panel and Appellate Body reports were issued.

The United States argued that administrative reviews of challenged dumping determinations made in original investigations were not measures taken to comply with the WTO decision and thus outside the panel's terms of reference.[169] In its view, the compliance panel could only review whether the original determination now complied with the WTO decision and could not examine whether the United States had employed zeroing in the subsequent review. The United States made the same argument with regard to administrative reviews that occurred after those that were challenged in the dispute and protested the inclusion of sunset reviews of challenged determinations as well.[170] As noted above, the United States maintained that since the challenged administrative reviews had been superseded by later reviews, the United States was not required to take any action to ensure that the challenged determinations were in compliance. The EU argued that under this approach, the EU would need to initiate a new dispute settlement proceeding for each subsequent administrative review with which it disagreed, thus allowing the United States to avoid permanent compliance with a WTO decision as it related to a specific investigation or review that was successfully challenged.[171] In addition, the United States had undertaken sunset reviews of some of the challenged original determinations and administrative reviews prior to the adoption of the panel and Appellate Body reports by the Dispute Settlement Body, actions that the EU claimed could not be considered measures taken to comply with the WTO rulings and recommendations in these reports.

(...continued)

*Margins ("Zeroing"); Recourse to Article 21.5 of the DSU by the European Communities*, para. 305, WT/DS294/AB/RW (May 14, 2009)[hereinafter U.S. Zeroing Article 21.5 AB Report (EC I)].

[168] Report of the Panel, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"); Recourse to Article 21.5 of the DSU by the European Communities*, paras. 8.165-8.169, WT/DS294/RW (December 17, 2008)[hereinafter U.S. Zeroing Article 21.5 Panel Report (EC I].

[169] *Id.* para. 8.33.

[170] *Id*. paras. 8.33-8.34, 8.36.

[171] *Id.* paras. 8.40, 8.42.

### *Compliance Proceedings: Panel and Appellate Body Reports*

In December 2008, the panel issued a mixed report regarding U.S. compliance,[172] which the EU appealed. In a report issued May 20, 2009, the Appellate Body found that the United States remained out of compliance with its WTO obligations in a variety of respects.[173]

Regarding whether actions taken by the United States before the panel and Appellate Body reports were adopted were within the panel's terms of reference, the Appellate Body, reversing the panel, found that measures taken before this date were potentially reviewable as compliance measures. The Appellate Body found that the relevant inquiry was not whether the measures were intentionally taken to comply, but instead whether they each had a "sufficiently close nexus, in terms of *nature, effects,* and *timing*," with the WTO decision and with the declared measures that were in fact taken to comply.[174] The AB found that of the five sunset reviews that met this test determinations in four of these, having relied on dumping margins calculated with the use of zeroing, were inconsistent with WTO obligations; no findings were made on the fifth.[175]

Regarding whether subsequent administrative and sunset reviews of challenged measures were amenable to review, it was determined in the compliance proceeding that administrative reviews involving the calculation of a dumping margin based on zeroing and subsequent sunset reviews in which DOC relies on dumping margins calculated with the use of zeroing, could potentially fall within the scope of the compliance proceeding, This conclusion was based on two grounds: (1) the "close nexus that exists in terms of their nature" between the subsequent reviews and measures at issue in the original dispute and (2) the fact that "the subsequent reviews potentially affect or undermine the steps otherwise taken—or the steps that should have been taken—by the United States to comply with the recommendations and rulings of the DSB, notably in the form of Section 129 determinations."[176] The panel had noted that the use of zeroing in an administrative review of an original determination could potentially negate the results of a Section 129 determination in which the dumping margin was calculated without its use, thus undoing an action taken to comply with the WTO decision.[177]

Further, regarding the scope of U.S. obligations involving imports entering the United States before the end of the compliance period, the Appellate Body agreed with the panel that the calculation of dumping margins in administrative reviews, or "definitive duty determinations," that occurred after the end of the compliance period, but that involved imports entered before this date, could not be made with the use of zeroing.[178] Contrary to the panel, however, the Appellate Body determined that duties could not be *collected* after the end of compliance period consistently with WTO obligations if they are based on dumping margins calculated with the use of zeroing during administrative reviews that occur before the end of the compliance period. The panel had found entries could be liquidated on the basis of a zeroing-based dumping determination without violating WTO obligations even though actions taken by the United States after the compliance deadline would ordinarily be expected to comply with the WTO decision.

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[172] U.S. Zeroing Article 21.5 Panel Report (EC I), *supra* note 168.

[173] U.S. Zeroing Article 21.5 AB Report (EC I), *supra* note 167.

[174] *Id*, para. 226 (emphasis in original).

[175] *Id.* paras. 233-35, 392-97.

[176] U.S. Zeroing Article 21.5 Panel Report (EC I), *supra* note 168, paras. 8.165-8.169.

[177] *Id.* para. 8.108.

[178] U.S. Zeroing Article 21.5 AB Report (EC I), *supra* note 167, para. 311.

The Appellate Body found that any measures that "derives *mechanically*" from the assessment of duties, as is the case with the collection (or liquidation) of antidumping duties, would not be WTO-compliant to the extent they are based on zeroing and are applied after the compliance deadline expires.[179]

Before drawing these conclusions, the AB had generally noted that, with respect to the original determinations and administrative reviews in which the use of zeroing was challenged "as applied," the assessment of a final duty for previously imported goods in an administrative review also affects the cash deposit rate for certain future imports, a situation that has implications for the administrative reviews not directly at issue in the case. Thus, in light of the prospective nature of WTO remedies, "compliance is not confined by the limited duration of the original measures at issue, especially when a subsequent measure replaces or supersedes the measure at issue in the original proceeding."[180]

The panel and AB made various findings regarding the inconsistency of particular determinations challenged by the EU with the obligation to eliminate zeroing. Further, the panel, in an issue not reviewed by the AB, determined that, with regard to four original determinations for which Section 129 determinations were issued, the United States violated the Antidumping Agreement by not revisiting its ITC material injury determinations due to revised import volumes. In some cases, the recalculated dumping margins had led to findings of no dumping or *de minimis* margins for particular exporters and thus the panel found that, in these four cases, the United States was obligated to reconsider whether dumped imports were causing material injury to domestic industry using import volumes that excluded these non-dumped and *de minimis* imports.[181]

The adverse Appellate Body report and the modified compliance panel report were adopted on June 11, 2009. With the compliance panel proceeding completed, the EU has stated that the United States is required to comply "without delay" by recalculating dumping margins without the use of zeroing in the numerous dumping determinations faulted in the case and then collecting duties at the recalculated rates.[182] At the same time, the United States has raised concerns about what it views as the expanded scope of U.S. obligations in the case.[183]

### *EU's Retaliation Request and Subsequent Arbitration*

On February 2, 2010, the EU requested authorization from the WTO Dispute Settlement Body to suspend WTO tariff concessions owed the United States for non-compliance in the case.[184] The EU proposed either a "a prohibitive tariff (such as, for example, 100%) on a specified annual value of trade from the United States to the European Union; or of an equivalent *ad valorem* tariff on an equivalent annual value of trade."[185] In the first scenario, the prohibitive tariff would be applied to an annual value of trade from the United States to the EU of $311 million; in the

[179] *Id.* (emphasis in original).

[180] *Id.* para. 304.

[181] U.S. Zeroing Article 21.5 Panel Report (EC I), *supra* note 168, para. 8.118.

[182] WTO News Item, WTO adopts compliance rulings in the US "zeroing" case brought by the EC (June 11, 2009), at http://www.wto.org/english/news_e/news09_e/dsb_11jun09_e.htm.

[183] *Id*.

[184] *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"); Recourse to Article 22.2 of the DSU by the European Union*, WT/DS294/35 (February 2, 2010).

[185] *Id.* at 3.

second scenario, an *ad valorem* tariff of 13.18% would be applied to an annual value of trade of $477 million.[186] The United States objected to the EU's request, automatically sending it to arbitration.[187]

At the request of the parties, the arbitration was suspended as of September 8, 2010, upon the understanding that the United States would take action "in the foreseeable future" to comply fully with its obligations in the case.[188] The suspension could last up to one year, but might also be terminated by either party before then. The Arbitrator stated that if a request for resumption of the arbitration had not been received by September 7, 2011, the Arbitrator's report would be circulated on September 15, 2011. The United States and the European Union subsequently asked for further suspensions, with these dates now extended to June 28, 2012, and July 12, 2012, under a February 2012 bilateral agreement, discussed below, aimed at ultimately resolving the dispute.[189]

### Commerce Department's Proposed Zeroing Rule (December 2010)

To respond to outstanding WTO dispute settlement issues, the Commerce Department issued a proposed rule on December 28, 2010, to eliminate the use of zeroing in administrative reviews, new shipper reviews, and expedited administrative reviews.[190] While the department had been making price comparisons in administrative, new shipper, and expedited administrative reviews using transaction-specific export prices and average normal values without offsets for export prices that exceeded normal value, it would now use *average-to-average* comparisons and provide offsets for non-dumped sales "in a manner that parallels the WTO-consistent methodology" that DOC has been using since 2007 in original antidumping investigations.[191] As stated by the department, unless the department determined that a different price comparison was "more appropriate," the department proposed "to compare monthly weighted average export prices with monthly weighted average normal values and to grant an offset for such comparisons that show export price exceeds normal value" in calculating both the weighted average margin of dumping and the duty assessment rate."[192] Antidumping duties will not be assessed if the weighted average margin is zero or *de minimis*.[193] Further, if the use of *transaction-to-transaction* price comparisons in any prior original investigations "could be considered as establishing a practice of the Department" with respect to use of zeroing when calculating the weighted average

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[186] *Id.*

[187] *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"); Recourse to Article 22.6 of the DSU by the United States*, WT/DS294/36 (February 16, 2010); Dispute Settlement Body, Minutes of Meeting, February 18, 2010, at 17, WT/DSB/M/279 (March 31, 2010).

[188] Communication from the Arbitrator, Recourse to Article 22.6 of the DSU by the United States, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"),* WT/DS294/39 (September 8, 2010); Dispute Settlement Body, Minutes of Meeting, September 21, 2010, at 8, WT/DSB/M/287 (November 5, 2010).

[189] Communication from the Arbitrator, Recourse to Article 22.6 of the DSU by the United States, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"),* WT/DS294/44 (February 10, 2012).

[190] Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings, 75 *Federal Register* 81533 (December 28, 2010).

[191] *Id.* at 81534.

[192] *Id.* (emphasis added).

[193] *Id.*

margin of dumping, an issue arising in Japan's challenge in DS322 (see discussion later in this report), the department proposes "to withdraw any such practice."[194]

Regarding the WTO-inconsistency of U.S. practice in five-year sunset reviews, the Commerce Department has stated the following:

> the Department notes that the underlying issue is the methodology for calculating weighted average dumping margins in investigations and reviews, which is addressed by the modifications the Department has made with respect to investigations and is proposing herein to make with respect to reviews. Moreover, the Department recognizes that while section 752(c) of the [Tariff] Act [of 1930] provides that the Department shall consider the weighted average dumping margins determined in the investigation and subsequent reviews, among other factors, the Act does not require that Department to rely on the weighted average dumping margins, or any particular weighted average dumping margin, as the basis for its determinations in five-year (sunset) reviews where such reliance would render the determination inconsistent with the United States international obligations.[195]

The comment period on the proposal closed on February 18, 2011. At 2011 meetings of the WTO Dispute Settlement Body, the EU and Japan responded positively to the U.S. proposal to eliminate the use of zeroing as a general practice in reviews, but indicated that they will not consider the United States to be in full compliance with its WTO obligations unless the United States ceases the collection of zeroing-based duties under existing antidumping orders and, as argued by the EU, refunds zeroing-based duties collected after the termination of the compliance period in the cases brought by the EU.[196]

## Recent Developments

On February 6, 2012, the United States and the EU signed a Memorandum providing a "roadmap" for conclusively resolving both DS294 and the EU's subsequent zeroing dispute, DS350.[197] Under the plan, the United States: (1) by February 13, 2012, was to have completed its internal regulatory procedures under Section 123 of the Uruguay Round Agreements Act and issued a final version of the modification of antidumping practices regarding the use of zeroing in later phases of antidumping proceedings proposed by the Commerce Department in December 2010; (2), by February 18, 2012, was to have begun Section 129 proceedings for eight antidumping proceedings enumerated in the Memorandum using the revised methodology with the aim of revising the current cash deposit rates, which were established as a result of past zeroing-based administrative reviews; and (3) by June 6, 2012, is to issue final dumping determinations in the eight cited proceedings. The Section 129 proceedings are to be completed within seven days after the Department of Commerce issues its final determinations; the

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[194] *Id.*

[195] *Id.*

[196] WTO News Item, DSB defers panel on Dominican safeguard measures, US announces zeroing proposal (January 25, 2011), at http://www.wto.org/english/news_e/news11_e/dsb_25jan11_e.htm; *EU, Japan Question U.S. Claims Of Compliance With WTO Zeroing Rulings*, 28 Int'l Trade Rep. (Bloomberg BNA) 138 (January 27, 2011); WTO News Item, WTO adopts panel report on US/Korea zeroing (February 24, 2011), at http://www.wto.org/english/news_e/news11_e/dsb_24feb11_e.htm; *EU Losing Patience With U.S. On Zeroing, Demands Duty Refunds at DSB*, INSIDE U.S. TRADE, February 25, 2011, at 10; see also *supra* note 64.

[197] Joint Communication from the European Union and the United States, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), United States—Continued Existence and Application of Zeroing Methodology,* WT/DS294/43, WT/DS350/20 (February 8, 2012).

proceedings will be considered to be completed on the day that the USTR directs the Commerce Department to implement "each and every [listed] section 129 determination … that would result in a change in the current cash deposit rate."[198]

If the Section 129 deadlines are met, the EU and the United States will continue the suspension of the arbitration of the EU's retaliation request in DS294 until the arbitrator notifies the WTO that it is not necessary to render an award. Additionally, within 15 days after the United States completes the above-mentioned Section 129 proceedings, the EU is to withdraw its retaliation request, and the United States and the EU, by joint letter to the arbitrator, are to note that the EU has taken this action, inform the arbitrator that the United States accordingly no longer objects to the request, and request that the arbitrator notify the DSB that it is not necessary to issue an award in the proceeding. The arbitrator has notified the WTO that, if the EU does not submit a request in writing to the arbitrator by June 28, 2012, to terminate the arbitration, the suspension will automatically terminate, the arbitrator will resume work on June 29, 2012, and the arbitral decision will be circulated on July 12, 2012.[199]

In furtherance of the U.S.-EU Memorandum, the Commerce Department Final Rule and Final Modification for Reviews (FMR), reflecting the department's December 2010 proposal, was approved on February 7, 2012, and published in the *Federal Register* of February 14, 2012.[200] The Final Rule and FMR, under which the department will terminate the use of zeroing in calculating dumping margins and the antidumping duty rates in administrative reviews, new shipper reviews, expedited administrative reviews, and sunset reviews, are effective April 16, 2012, with the modification applicable to preliminary dumping determinations in administrative reviews issued after that date. While the EU had sought revisions in antidumping determinations using zeroing issued after the compliance periods had ended, and possible refunds of antidumping duties imposed, the Memorandum is prospective in nature, as indicated above.

The department noted again, however, that, as is the case with original investigations, it will determine on a case-by-case basis whether it is appropriate to use a price comparison methodology in administrative, new shipper, and expedited administrative reviews other than the average-to-average method.[201] Regarding five-year sunset reviews, the department stated that it would modify its practice so that it would no longer rely on weighted-average dumping margins that were calculated using the methodology that the Appellate Body found to be inconsistent in

[198] *Id*. Annex, para 2.

[199] Communication from the Arbitrator, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"),* WT/DS294/44 (February 10, 2012).

[200] Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 *Federal Register* 8101 (February 14, 2012)[hereinafter Final Rule].

[201] *Id*. at 8102. This exception has led some to speculate as to whether the department will use the "alternative methodology" exception as a basis for examining targeted dumping in a review, thus providing an avenue for the possible use of zeroing. See generally *Rule Leaves Door Open to Possible Future Use of Zeroing*, INSIDE U.S. TRADE, February 17, 2012, at 10-1, and Final Rule, *supra* note 200, at 8106-107. Targeted dumping occurs where there is a pattern of export prices for comparable merchandise that differ significantly among purchasers, regions, or periods of time. See 19 U.S.C. §1677f-1(d)(1(B). Currently the department uses average-to-transactions price comparisons in such investigations, as the use of average-to-average or transaction-to-transaction methodologies may mask this type of dumping. The WTO decisions did not address the use of zeroing in average-to-transaction price comparisons. While the department had proposed a rule for targeted dumping investigations in 2008, 73 *Federal Register* 26371 (May 9, 2008), it later withdrew the proposal, 73 *Federal Register* 74930 (December 10, 2008), and now examines whether targeted dumping exists on a case-by-case basis.

the two cases brought by the EU and the case brought by Japan, but that "only in the most extraordinary circumstances will the department rely on margins other than those calculated and published in prior determinations," as provided in current regulations.[202]

## Measures Relating to Zeroing and Sunset Reviews (DS322)

In November 2004, Japan instituted a broad challenge of the use of zeroing by the United States, claiming in its subsequent panel request that the use of this practice in original antidumping investigations, administrative reviews (referred to in the case as "periodic reviews"), new shipper reviews, sunset reviews, and changed circumstances reviews was in violation of obligations in the WTO Antidumping Agreement. Japan also challenged zeroing as applied in 15 specific antidumping proceedings, including one original investigation, 12 administrative reviews, and two sunset reviews. The cited cases involved imports of steel plate and steel flat products, as well as roller, ball, spherical plain, and antifriction bearings. In addition, Japan challenged subsequent material injury determinations made by the U.S. International Trade Commission based on dumping margins determined through zeroing and made further claims regarding sunset reviews and changed circumstances reviews in which determinations were based on dumping margins obtained in this way.

### *Panel and Appellate Body Reports*

In a report circulated September 20, 2006, the WTO 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.[203] As in DS294, discussed above, zeroing was found to be a norm that could be challenged "as such" in a WTO dispute settlement proceeding.

At the same time, the panel rejected Japan's claims that the use of zeroing in transaction-to-transaction comparisons and weighted-average-to-transaction comparisons in original investigations, its use administrative reviews and new shipper reviews, its application in the 11 cited administrative reviews was violative of the Antidumping Agreement. The panel also found that Japan had failed to make a prima facie case that the use of zeroing in changed circumstances reviews and sunset reviews violated WTO obligations. The panel also rejected Japan's claims that

[202] *Id.* at 8103. The department further stated as follows:

> The Department does not anticipate that it will need to recalculate the dumping margins in the vast majority of future sunset determination to avoid WTO inconsistency, apart from the "most extraordinary circumstances" provided for in its regulations. Instead, the Department will limit its reliance to margins determined or applied during the five-year sunset period that were not determined in a manner found to be WTO-inconsistent in these disputes. Future dumping margins in reviews will be determined in accordance with this *Final Modification for Reviews*. The Department may also rely on past dumping margins that were not affected by the WTO-inconsistent methodology, such as dumping margins recalculated pursuant to section 129 proceedings, dumping margins determined based on the use of adverse facts available, and dumping margins where no offset were denied because all comparison results were positive.

*Id*.

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

the ITC had improperly relied 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 findings that zeroing could be challenged "as such," but went further in finding that U.S. measures did in fact constitute "as such" violations of the WTO antidumping obligations.[204] The Appellate Body found that, in maintaining zeroing procedures in transaction-to-transaction comparisons in original investigations, the United States was in violation of Articles 2.4 of the Antidumping Agreement, which requires 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 acted 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" 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 was 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 Appellate Body upheld Japan's "as applied" claims, finding that the United States had 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 zeroing-based dumping margins in two cited sunset reviews, the United States had acted inconsistently with Article 11.3 of the Antidumping Agreement. Article 11.3 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." The Appellate Body had found in an earlier dispute that WTO Members are not required to rely on dumping margins in making this determination, but that, if Members choose to do so, they must calculate the margin in conformity with the requirements of Article 2.4 of the Agreement.[205] If not, the "likelihood" determination would not serve as a proper foundation for maintaining the duty under Article 11.3 The Appellate Body found in the instant case that the United States, in making its sunset determinations, had relied on zeroing-based margins calculated in earlier administrative reviews. Since the Appellate Body had also found that the use of zeroing in such reviews is inconsistent "as such" with

[204] Appellate Body Report, *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (January 9, 2007)[hereinafter U.S. Zeroing AB Report (Japan)].

[205] *Id.* para. 183, *citing Appellate Body Report, United States—Sunset Review of Corrosion-Resistant Carbon Steel Products from Japan*, para. 127, WT/DS244/AB/R (December 15, 2003).

Articles 2.4 and 9.3 of the Antidumping Agreement, it concluded that reliance on these margins in the sunset reviews thus violated Article 11.3.[206]

The Appellate Body report and the panel report, as modified, were adopted by the DSB at its January 23, 2007, meeting.[207] 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.[208] It later circulated a critical analysis of the Appellate Body decision to WTO Members.[209] While Japan had originally requested the compliance period be arbitrated,[210] the parties later agreed on a compliance period ending December 24, 2007.[211]

### Actions by the United States and Japan in Response

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 comparisons in original investigations and stated only that is was "continually to consult internally on steps to be taken with respect to the other DSB recommendations and rulings."[212] While the Department of Commerce had initiated a proceeding under Section 129 of Uruguay Round Agreements in November 2007 regarding the challenged original investigation, a proceeding involving certain steel plate products, and publicly released final results on December 27, 2007,[213] it took no final action to comply by the December 24 deadline.[214]

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[206] U.S. Zeroing AB Report (Japan), *supra* note 204, paras. 184-185.

[207] Dispute Settlement Body, Minutes of Meeting, January 23, 2007, at 15-22, WT/DSB/M/225 (March 8, 2007).

[208] Dispute Settlement Body, Minutes of Meeting, February 20, 2007, at 7, WT/DSB/M/226 (March 26, 2007); see also Dispute Settlement Body, Minutes of Meeting, January 23, 2007, at 15-17, WT/DSB/M/225 (March 8, 2007), and *Administration, Congress Explore Zeroing Compliance Options*, INSIDE U.S. TRADE, February 9, 2007, at 1.

[209] 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).

[210] 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).

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

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

[213] Japan Certain Cut-to-Length Carbon-Quality Steel Plate Products, Final Results Under Section 129: Uruguay Round Agreements Act, December 27, 2007, at http://ia.ita.doc.gov/ia-news-2007.html; Issues and Decision Memorandum for the Final Results (undated), at http://ia.ita.doc.gov/download/section129/Japan-CTL-Plate-129-Final-20071227.pdf. The subsequent *Federal Register* notice announcing these results states that the department issued them on December 21, 2007. See Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act Regarding the Antidumping Duty Order on Certain Cut-to-Length Carbon—Quality Steel Plate Products from Japan, 73 *Federal Register* 29109 (May 20, 2008)[hereinafter Notice of Japan Steel Section 129 Determination].

[214] See generally *U.S. Fails to Comply with WTO Challenge on Zeroing by Deadline*, INSIDE U.S. TRADE, January 4, 2008, at 1.

In January 2008, Japan requested authorization to retaliate by imposing additional import duties on selected products in an initial annual amount of $181.2 million.[215] While the subsequent U.S. objection sent Japan's request to arbitration,[216] the disputing parties entered into a procedural agreement in March 2008 under which Japan was permitted to request a compliance panel without first seeking consultations and, if it made such a request, its retaliation request would be suspended.[217] Under the procedural agreement, either party may request that the arbitration resume in the event that the compliance proceeding results in a finding that U.S. compliance measures are inadequate or non-existent or "there is no disagreement" between Japan and the United States that "a measure taken to comply does not exist" with respect to certain U.S. actions that were successfully challenged in the original dispute.

The United States maintained in a status report to the Dispute Settlement Body and in a DSB meeting held on January 21, 2008, that it was in compliance in the case because it was no longer making average-to-average price comparisons in original investigations without offsets, it had issued a revised dumping determination using this methodology in the one challenged original investigation, and it did not need to take action with respect to the challenged administrative reviews because they had been superseded by subsequent reviews.[218]

### Compliance Panel Proceedings

As provided for in the U.S.-Japan procedural agreement, Japan requested a compliance panel on April 7, 2008, stating that the United States was in violation of its WTO obligations by not having fully complied with respect to the one original investigation at issue; by continuing to use zeroing in transaction-to-transaction comparisons in original investigations, administrative reviews, and new shipper reviews; by applying zeroing in five of the administrative reviews originally challenged by Japan and as well as in three "closely connected" administrative reviews that the United States argued had superseded earlier reviews; and by relying on zeroing in one of the originally challenged sunset reviews and a subsequent sunset review of the same antidumping duty order.[219] The compliance panel was established on April 18, 2008. On June 6, 2008, the United States and Japan asked the arbitration panel that was reviewing Japan's January 2008 retaliation request to suspend its work.[220]

In the interim, DOC, on May 20, 2008, announced the results of the Section 129 proceeding involving the challenged original investigation, stating in the *Federal Register* that it had

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[215] Recourse to Article 22.2 of the DSU by Japan, *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/24 (January 11, 2008); Recourse to Article 22.2 of the DSU by Japan, *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/23 (January 11, 2008).

[216] Request by the United States for Arbitration under Article 22.6 of the DSU, *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/25 (January 21, 2008).

[217] Understanding between the United States and Japan Regarding Procedures under Articles 21 and 22 of the DSU, Recourse to Article 22.2 of the DSU by Japan, *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/26 (March 12, 2008).

[218] Status Report by the United States, Addendum, *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/22/Add.2 (January 11, 2008); Dispute Settlement Body, Minutes of Meeting, January 21, 2008, at 6, WT/SB/M/245 (March 14, 2008).

[219] Request for the Establishment of a Panel, Recourse to Article 21.5 of the DSU by Japan, *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/27 (April 8, 2008).

[220] Communication from the Arbitrator, Recourse by the United States to Article 22.6 of the DSU, *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/30 (June 10, 2008).

recalculated the affected dumping margins, arriving at slightly reduced rates, which, at the direction of the U.S. Trade Representative, went into effect on April 8, 2008.[221]

The compliance panel issued its report on April 20, 2009, finding that the United States had not complied with its WTO antidumping obligations in the administrative reviews cited by Japan and in maintaining zeroing in transaction-to-transaction comparisons in original investigations and in any price comparison used in administrative and new shipper reviews.[222] While the United States had argued that it did not have compliance obligations with respect to five of the reviews because the covered goods had entered the United States before the end of the compliance period, the panel found that the United States was required to bring the importer-specific assessment rates determined in these reviews into compliance with its WTO obligations by the end of the compliance period.[223] The panel also addressed a situation that had not been ruled upon in DS294—that is, one in which duties are assessed before the end of the compliance period, but liquidation instructions are delayed because of injunctions issued under domestic judicial proceedings challenging the assessment—and found that the fact that the delay was due to litigation was of no consequence to compliance with the WTO obligations in the case.[224]

The panel further determined that the United States had violated GATT Article II prohibitions on imposing tariff surcharges on goods subject to negotiated tariff rates (so-called "bound items") by issuing WTO-inconsistent liquidation instructions in four challenged administrative reviews involving ball bearing products after the compliance period expired.[225] These reviews were among the five with delayed liquidations because of pending litigation. While the panel had agreed with the United States that the Article II claims were derivative of Japan's claims under the Antidumping Agreement, it nonetheless found it appropriate to rule on them because "they raise an important point of contention between the parties regarding the right of the United States to continue liquidating entries after the expiry of the RPT [reasonable period of time] on the basis of liquidation measures issued pursuant to administrative reviews that have already been found to be WTO-inconsistent."[226]

The panel additionally concluded that the United States was out of compliance with its WTO obligations by not withdrawing or modifying the likelihood of dumping determination in the challenged 1999 sunset review in which the United States had relied on zeroing-based dumping margins.[227]

The United States appealed the adverse compliance panel report in May 2009. In a report issued August 18, 2009, the Appellate Body upheld the compliance panel on all issues appealed, including against U.S. claims regarding the judicial delay of liquidation and violations of GATT Article II.[228] The Appellate Body emphasized that all antidumping duties collected after the end

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[221] Notice of Japan Steel Section 129 Determination, *supra* note 213.

[222] Panel Report, *United States—Measures Relating to Zeroing and Sunset Reviews; Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/RW (April 24, 2009)[hereinafter U.S. Zeroing Article 21.5 Panel Report (Japan)].

[223] *Id*. para. 7.149.

[224] *Id.* para. 7.153.

[225] *Id.* paras. 7.198-7.208. GATT Article II permits the imposition of antidumping duties on bound items but the duties must be applied consistently with GATT VI. See GATT 1994, art. II:2(b).

[226] U.S. Zeroing Article 21.5 Panel Report (Japan), *supra* note 222, paras. 7.202, 7.203.

[227] *Id*. paras. 7.223-7.229.

[228] Appellate Body Report, *United States—Measures Relating to Zeroing and Sunset Reviews; Recourse to Article 21.5* (continued...)

of the compliance period needed to be calculated without the use of zeroing. Among other things, it upheld the panel's dismissal of the U.S. argument that judicial delay of liquidation permits the collection of zeroing-based antidumping duties after the compliance period expires, stating, inter alia, that it was "not persuaded that the initiation by private parties of domestic judicial proceedings is relevant for determining the scope of the United States compliance obligations in this case."[229]

The Appellate Body and compliance panel reports issued in the Article 21.5 proceeding were adopted by the WTO Dispute Settlement Body on August 31, 2009. At the meeting, the United States referred Members to its earlier public statements regarding its intent to comply in all the WTO zeroing disputes and stated that it was "working actively to implement these recommendations and rulings, including those made in other disputes for which the reasonable period of time … is still ongoing."[230] The United States added, however, that in its view the appeal of the compliance panel report in this case "was not about zeroing but rather concerns what a Member with a retrospective antidumping system must do to come into compliance with the DSB's recommendations and rulings with respect to individual administrative reviews" and that the dispute in addition "raised important procedural issues as to the scope of dispute settlement proceedings." Noting the prospective nature of WTO remedies, the United States cited the systemic implications of applying obligations under a WTO decision to governmental actions involving goods that enter the defending Member's customs territory before the end of the compliance period, an approach that, in its view, could be taken toward all border measures imposed on imports, including ordinary tariffs. It also took issue with Appellate Body's finding that the obligation not to use zeroing applied to duty liquidations that take place after the expiration of the compliance period where the liquidation is delayed due to litigation, as well as the Appellate Body's affirmance that a particular administrative review could be reviewed by a compliance panel even though the proceeding was not in existence at the time that Japan made its panel request.

### Arbitration of Japan's Sanctions Request

In April 2010, Japan requested that arbitration of the sanctions proposal it had made in January 2008 be resumed.[231] The arbitration, which was requested by the United States, had been suspended since June 2008 following Japan's request for a compliance panel. Under the U.S.-Japan procedural agreement in the case, Japan had reserved the option to resume the arbitration once the compliance panel process was completed, assuming, as here, that Japan prevailed before the panel and Appellate Body. On December 10, 2010, the United States and Japan asked the arbitrator to suspend its work once again on the ground that the parties were entering into informal discussions on the implementation of the WTO decisions in the case.[232] The suspension could be terminated at any time at the request of either party; further, the arbitrator would

(...continued)

*of the DSU by Japan*, WT/DS322/AB/RW (August 18, 2009).

229 *Id*. paras. 170-187, 188.

230 U.S. Diplomatic Mission to the United Nations in Geneva, Statements by the United States at the August 31, 2009, WTO—DSB, at para. 5, at http://geneva.usmission.gov/news/2009/08/31/ds/.

231 Communication from Japan, *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/37 (May 5, 2010).

232 Communication from the Arbitrator, Recourse to Article 22.6 of the DSU by the United States *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/38 (December 15, 2010).

automatically resume its work on September 8, 2011, unless Japan submitted a written communication to the contrary by September 7, 2011. At the request of the disputing parties, the latter date has been extended four times, most recently to January 31, 2012.[233]

### *Commerce Department's Proposed Zeroing Rule (December 2010)*

To address outstanding issues in the case, the Commerce Department, on December 28, 2010, issued a proposed rule to eliminate the use of zeroing in administrative reviews, new shipper reviews, and expedited administrative reviews and to withdraw the use of zeroing in transaction-to-transaction price comparisons in original investigations to the extent that this activity may be considered a WTO-inconsistent "practice." The proposal also implies that zeroing-based dumping margins will no longer be used in sunset reviews. For further discussion, see the entry for "Commerce Department's Proposed Zeroing Rule (December 2010)," under DS294.

## Recent Developments

On February 6, 2012, the United States and Japan signed a Memorandum of Understanding (MOU) setting out a series of steps to be taken by the parties for conclusively resolving the dispute.[234] Similar to the EU-U.S. Memorandum discussed above, the United States: (1) by February 13, 2012, was to have completed its internal regulatory procedures under Section 123 of the Uruguay Round Agreements Act and issued a final version of the Commerce Department's December 2010 regulatory modification terminating the use of zeroing; (2) by February 18, 2012, was to have begun Section 129 proceedings for the antidumping order on Japanese stainless steel products cited in the memorandum using the revised methodology with the aim of revising the current cash deposit rate, which was established as a result of past zeroing-based administrative reviews; and (3) by June 6, 2012, is to issue a final dumping determination in the cited proceeding. The section 129 proceeding on Japanese steel is to be completed within seven days after the Department of Commerce issues its final determinations. If there is a change in the cash deposit rate, the proceeding will be considered completed on the date the USTR directs the Commerce Department to implement the final determination; if there is no change, the proceeding will be completed when the section 129 determination is issued.[235] The United States has also agreed to recalculate the dumping margin in a an antidumping order on antifriction bearings from Japan within a specified time frame if an existing revocation of the order is not upheld by U.S courts.

If the Section 129 deadlines are met, Japan and the United States will continue the suspension of the arbitration of Japan's retaliation request until the arbitrator notifies the WTO that it is not necessary to render an award. Additionally, no later than six months after the MOU was signed,

[233] Communication from the Arbitrator, Recourse to Article 22.6 of the DSU by the United States, *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/42 (January 17, 2012); Communication from the Arbitrator, Recourse to Article 22.6 of the DSU by the United States, *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/41 (December 2, 2011); Communication from the Arbitrator, Recourse to Article 22.6 of the DSU by the United States, *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/40 (November 8, 2011); Communication from the Arbitrator, Recourse to Article 22.6 of the DSU by the United States *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/39 (September 13, 2011).

[234] Joint Communication from the United States and Japan, *United States—Measures Relating to Zeroing and Sunset Reviews,* WT/DS322/44 (February 8, 2012).

[235] *Id*. Annex II, para. 3.

Japan is to withdraw its retaliation request and the United States and Japan, by joint letter to the arbitrator, are to note that the Japan has taken this action, inform the arbitrator that the United States accordingly no longer objects to the request, and request that the arbitrator notify the DSB that it is not necessary to issue an award in the proceeding. The arbitrator has notified the WTO that, if Japan does not submit a request in writing to the arbitrator by August 20, 2012, to terminate the arbitration, the suspension will automatically terminate and the arbitrator will resume work on the following day. [236]

In furtherance of the MOU, the Commerce Department Final Rule and Final Modification for Reviews (FMR), reflecting the department's December 2010 proposal, was approved on February 7, 2012, and published in the *Federal Register* of February 14, 2012.[237] For further discussion of the Final Rule, see "Recent Developments" under DS294.

## Final Anti-Dumping Measures on Stainless Steel from Mexico (DS344)

Mexico challenged (1) the use of model zeroing by the United States in original antidumping investigations, both as such and as applied in an original investigation of Mexican stainless steel sheet and strips in coils and (2) the use of simple zeroing in annual administrative reviews, both as such and as applied in five administrative reviews in the antidumping proceeding involved.[238] A panel report issued December 20, 2007, concluded that model zeroing, as used in original investigations, was inconsistent with Article 2.4.2 of the Antidumping Agreement, both as such and as applied in the cited antidumping investigation.[239] The panel ruled in favor of the United States, however, in finding that the use of simple zeroing, either as such or as applied in the cited administrative reviews, was not inconsistent with the GATT Article VI or the Antidumping Agreement.

In an appeal by Mexico, the Appellate Body issued a report on April 30, 2008, in which it reversed the panel's findings on the use of simple zeroing, finding, as it had in earlier disputes, that the use of this practice in administrative reviews, both as such and as applied in cited antidumping cases, was inconsistent with Article VI:2 of the GATT and Article 9.3 of the Antidumping Agreement.[240] The Appellate Body also criticized the panel for not adhering to earlier Appellate Body rulings on this issue, stating that, although it was "well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties," this principle "does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that

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[236] Communication from the Arbitrator, *United States—Measures Relating to Zeroing and Sunset Reviews,* WT/DS322/45 (February 9, 2012).

[237] Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 *Federal Register* 8101 (February 14, 2012)[hereinafter Final Rule].

[238] Request for the Establishment of a Panel by Mexico, *United States—Final Anti-dumping Measures on Stainless Steel from Mexico*, WT/DS344/3 (October 16, 2006).

[239] Panel Report, *United States—Final Anti-dumping Measures on Stainless Steel from Mexico*, WT/DS344/R (December 20, 2007).

[240] Appellate Body Report, *United States—Final Anti-dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (April 30, 2008).

have been adopted by the DSB."[241] Examining the use made of panel and Appellate Body reports in subsequent disputes and by WTO Members in enacting laws and issuing regulations, and the role played by the Appellate Body in the WTO dispute settlement system vis à vis panels, the Appellate Body concluded that the "Panel's failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU."[242]

The Appellate Body report and modified panel report were adopted at the May 20, 2008, meeting of the Dispute Settlement Body. During the meeting, the United States stated its support for the panel's conclusions regarding simple zeroing and questioned the approach taken by the Appellate Body in reversing the panel.[243] It did not, however, discuss compliance in the case. The United States later circulated a document in which it questioned in a more detailed fashion the reasoning and approach of the Appellate Body regarding the use of zeroing in the transaction-specific calculations employed in administrative reviews.[244]

Because the parties could not agree on the length of the compliance period, the issue was arbitrated at Mexico's request. In an October 31, 2008, decision, the Arbitrator set a deadline of April 30, 2009.[245]

The Commerce Department issued a determination under Section 129 of the Uruguay Round Agreements Act on March 31, 2009, in which it recalculated the dumping margin in the original investigation without the use of zeroing, and later published a notice in the *Federal Register* that the USTR had instructed the department to implement this determination effective April 23, 2009.[246] The recalculation resulted in a reduction of the dumping margin from 30.85% to 30.69% for one individually investigated exporter and the same reduction in the "all others" rate.

With respect to the administrative reviews that were challenged "as applied," the United States has reportedly informed the WTO Dispute Settlement Body at its May 20, 2009, meeting "that 'any prospective effect of those reviews has been eliminated and all entries of merchandise under the five reviews have been liquidated for customs purposes.'"[247] With regard to other rulings and recommendations in the dispute, however, the United States "informed the DSB that it 'has also

[241] *Id.* para. 158.

[242] *Id.* paras. 160-61.

[243] Dispute Settlement Body, Minutes of Meeting, May 20, 2008, at 9-11, WT/DSB/M/250 (July 1, 2008).

[244] Communication from the United States, *United States—Final Anti-dumping Measures on Stainless Steel from Mexico*, WT/DS344/11 (June 11, 2008).

[245] Award of the Arbitrator, *United States—Final Anti-dumping Measures on Stainless Steel from Mexico*, Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DS344/15 (October 31, 2008).

[246] Implementation of the Findings of the WTO Dispute Settlement Panel and Appellate Body in United States—Final Anti-Dumping Measures on Stainless Steel from Mexico: Notice of Determination under Section 129 of the Uruguay Round Agreements Act, 74 *Federal Register* 19527 (April 29, 2009).

[247] Request for Consultations, Recourse to Article 21.5 of the DSU by Mexico, *United States—Final Anti-dumping Measures on Stainless Steel from Mexico*, at 3, WT/DS344/18 (August 24, 2009)[hereinafter Mexico Article 21.5 Consultation Request]. Recalculation of dumping margins in the challenged administrative reviews was not part of the Section 129 proceeding for the original antidumping investigation at issue in the case. See Department of Commerce, Issues and Decision Memorandum for the Final Results of Proceedings Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Stainless Steel from Mexico, [March 31, 2009], at http://ia.ita.doc.gov/download/section129/mexico-ssss-coil-129-final-memo-04-03-09.pdf

been conferring with Mexico about the steps that the United States has taken to comply with the recommendations and rulings of the DSB.'"[248] On May 19, 2009, the United States and Mexico entered into a sequencing agreement involving the possible request by Mexico of a compliance panel and, if it is later determined that the United States has not taken a measure to comply or its compliance measures are inconsistent with WTO obligations, a request for authorization to suspend concessions owed the United States.[249]

### Recent Developments

On August 19, 2009, Mexico requested consultations with the United States under Article 21.5 of the DSU regarding U.S. compliance in the case.[250] Mexico maintains that the United States has not complied with the WTO decision because it (1) "has not taken any steps" to eliminate the use of simple zeroing in periodic, that is, administrative, reviews; (2) continues to maintain and use simple zeroing in the five administrative reviews originally challenged in the case; and (3) continues to "impose, assess and/or collect anti-dumping duties in excess of the proper margin of dumping, and evidences its intention to continue to do so, through … five subsequent periodic reviews [of the original antidumping duty order on stainless steel and sheet in coils from Mexico] ... , any amendments thereto, any measures closely related thereto, any future subsequent periodic reviews, and the United States Government instructions and notices."

The U.S.-Mexico procedural agreement gave the parties 15 days to consult on Mexico's request, after which Mexico could request a compliance panel. Mexico requested a compliance panel on September 7, 2010,[251] and DSB referred the matter to the original panel later that month.[252] Because one of the members of the original was unavailable, a replacement panelist was named on May 13, 2011.[253] The compliance panel was expected to issue its final report to the disputing parties by March 2012.[254]

## Continued Existence and Application of Zeroing Methodology (DS350)

Although the European Union (EU) had successfully challenged the U.S. use of zeroing in DS294, it was concerned that the United States had not yet broadly discontinued use of the practice. In October 2006, the EU challenged the continued use and application of zeroing in 18 specific antidumping cases, citing the continued application of antidumping duties at a level in excess of the margins that would result from correct application of the Antidumping

[248] Mexico Article 21.5 Consultation Request, *supra* note 247, at 3.

[249] Understanding between Mexico and the United States Regarding Procedures under Articles 21 and 22 of the DSU, *United States—Final Anti-dumping Measures on Stainless Steel from Mexico*, WT/DS344/17 (May 20, 2009).

[250] Mexico Article 21.5 Consultation Request, *supra* note 247.

[251] Request for the Establishment of a Panel, Recourse to Article 21.5 of the DSU by Mexico, *United States—Final Anti-dumping Measures on Stainless Steel from Mexico*, WT/DS344/20 (September 8, 2010).

[252] Dispute Settlement Body, Minutes of Meeting, September 21, 2010, at 10-11, WT/DSB/M/287 (November 5, 2010).

[253] Note by the Secretariat, Constitution of the Panel, Recourse to Article 21.5 of the DSU by Mexico, *United States—Final Anti-dumping Measures on Stainless Steel from Mexico*, WT/DS344/21 (May 18, 2011).

[254] Communication from the Chairman of the Panel, Recourse to Article 21.5 of the DSU by Mexico, *United States—Final Anti-dumping Measures on Stainless Steel from Mexico*, WT/DS344/22 (November 10, 2011).

Agreement.[255] Ten of the 18 cases had been at issue in the EU's earlier challenge, DS294. The EU also challenged the use of zeroing in administrative and sunset reviews in 13 cases, a sunset review in one case, and original investigations in four others, a total of 52 agency determinations.

Along with challenging the use of zeroing both "as such" and "as applied" in the cited antidumping determinations, the EU also claimed that a duty based on zeroing, while not falling within either of these two categories, was a "measure" subject to WTO dispute settlement.[256] The EU considered this new argument to be "key" to the proceeding since, in its view, its effect "would be that of bringing the future use of United States zeroing in each case within the scope of the panel findings."[257] The EU later abandoned its "as such" claim after Japan successfully obtained a ruling on this point in DS322.[258]

In its October 1, 2008, report, the WTO panel found that the United States acted inconsistently with its obligations in the Antidumping Agreement by (1) using model zeroing in the four cited original investigations; (2) applying simple zeroing in 29 of the cited administrative reviews cited; and (3) relying on dumping margins obtained through model zeroing in the eight sunset reviews at issue.[259] The panel found, however, that claims involving the continued application of antidumping duties in the18 antidumping cases were not within the panel's terms of reference. One panelist, while agreeing with these conclusions, disagreed with the legal reasoning used by the panel in considering the EU's claims on simple zeroing in periodic reviews and, in part, on model zeroing in original investigations. The report was appealed by both the EU and the United States.

In a report issued on February 4, 2009, the Appellate Body ruled that "the continued use of zeroing in successive proceedings in which duties resulting from the 18 anti-dumping duty orders are maintained, constitute 'measures' that can be challenged in WTO dispute settlement."[260] The Appellate Body determined that it had a sufficient factual record to make findings on this basis in four of the 18 cases cited by the EU and found that, with respect to these four cases, the application and continued application of antidumping duties was (1) inconsistent with Article 9.3 of the Antidumping Agreement and Article VI:2 of the GATT 1994 to the extent that the duties were calculated with zeroing in administrative reviews, and (2) inconsistent with Article 11.3, to the extent that reliance was placed on a zeroing-based margin in sunset reviews.[261]

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[255] 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).

[256] This issue implicates Article 6.2 of the WTO Dispute Settlement Understanding, which states that a Member's written request for the establishment of a panel must, inter alia, "identify the *specific measures* at issue" in the dispute (emphasis added).

[257] European Commission, *United States Barriers to Trade and Investment Report for 2008*, at 60 (July 2009), at http://trade.ec.europa.eu/doclib/docs/2009/july/tradoc_144160.pdf.

[258] *Id.*

[259] Panel Report, *United States—Continued Existence and Application of Zeroing Methodology*, WT/DS350/R (October 1, 2008).

[260] Appellate Body Report, *United States—Continued Existence and Application of Zeroing Methodology*, para. 185, WT/DS350/17 (June 4, 2009)[hereinafter U.S. Zeroing AB Report (EC II)]. The "continued use" argument was later made by Brazil its consultations and panel requests in *United States—Anti-dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil.* Request for Consultations by Brazil, WT/DS382/1/Add.1 (May 27, 2009), at 2; Request for the Establishment of a Panel by Brazil, WT/DS382/4 (August 21, 2009), at 3. For further discussion of this case, see text at *infra* notes 279-287.

[261] U.S. Zeroing AB Report (EC II), *supra* note 260, paras. 186-99.

The Appellate Body also upheld the panel's findings that zeroing was improperly applied in 29 of the challenged administrative reviews and, contrary to the panel, was able to find that the United States had acted inconsistently with its WTO obligations in five additional administrative reviews originally cited by the EU.[262] In addition, the Appellate Body upheld the panel's finding that the United States had acted inconsistently with Article 11.3 of the Antidumping Agreement in eight sunset reviews.[263]

The Appellate Body Report and the modified panel report were adopted at the February 19, 2009, meeting of the Dispute Settlement Body. As it had with respect to past appellate reports on zeroing, the United States expressed concerns with the Appellate Body's approach to a variety of issues in the case.[264] At the March 20, 2009, meeting of the Dispute Settlement Body, the United States stated that it intended to comply in the dispute, "would be considering carefully how to do so," and would need a reasonable period of time for this undertaking.[265] In June 2009 the United States and the EU agreed on a compliance period ending December 19, 2009.[266]

## Recent Developments

With the compliance deadline of December 19, 2009, before it, the United States stated in its December 10, 2009, WTO status report that the USTR had sent a written request to the Secretary of Commerce to issue a Section 129 determination that would render four final antidumping determinations at issue in the case not inconsistent with the recommendations and rulings of the WTO Dispute Settlement Body.[267] The United States also stated that it would "continue to consult with interested parties in order to address the other findings" contained in the adopted panel and Appellate Body reports. At the December 21, 2009, meeting of the WTO Dispute Settlement Body, the United States added that it was "sure that Members appreciate the difficulties that are raised for the United States by the Appellate Body findings on zeroing in this disputes and others," reiterating the action that it had taken and the ongoing discussions on unresolved issues.[268] At the same meeting, the EU reportedly "expressed its disappointment that the reasonable period of time for implementation had expired and the US had yet to bring itself into compliance."[269]

With other issues in the case remaining unaddressed, the United States and the EU entered into a procedural agreement in the case in January 2010 providing for a possible compliance panel

[262] *Id.* paras. 242-357. One Appellate Body member, in a concurrence to the AB's findings that zeroing was not permitted in administrative reviews, called for an end to litigation on the issue. Despite "arguments of substance made on both sides," the member stated that Appellate Body had "spoken definitively" on the issue of zeroing, the AB decisions had been adopted, and that it was now "more important for the system of dispute resolution to have a definitive outcome than to pick over the entrails of battles past." *Id.* para. 312.

[263] *Id.* paras. 369-83.

[264] Dispute Settlement Body, Minutes of Meeting, February 19, 2009, at 18-21, WT/DSB/M/265 (April 29, 2009).

[265] Dispute Settlement Body, Minutes of Meeting, March 20, 2009, at 14, WT/DSB/M/266 (May 19, 2009).

[266] Agreement under Article 21.23(b) of the DSU, *United States—Continued Existence and Application of Zeroing Methodology*, WT/DS350/17 (February 4, 2009).

[267] Status Report by the United States, *United States—Continued Existence and Application of Zeroing Methodology*, WT/DS350/18 (December 11, 2009).

[268] U.S. Diplomatic Mission to the United Nations in Geneva, Statements by the United States at the December 21, 2009, DSB Meeting, at para. H, at http://geneva.usmission.gov/2009/12/21/1221dsb/.

[269] WTO News Item, DSB establishes panel to examine China's export restrictions of raw materials (December 21, 2009), at http://www.wto.org/english/news_e/news09_e/dsb_21dec09_e.htm.

request by the EU.[270] To address outstanding issues in this and other related cases, the Commerce Department, on December 28, 2010, issued a proposed rule to eliminate the use of zeroing in administrative reviews, new shipper reviews, and expedited administrative reviews. For further discussion of the proposed rule, as well as the February 2012 U.S.-EU memorandum aimed at conclusively resolving this dispute and the final version of December 2010 rule issued in furtherance of this memorandum, see entries for "Commerce Department's Proposed Zeroing Rule (December 2010)" and "Recent Developments" under DS294.

## Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (DS379)

China requested consultations with the United States in September 2008 regarding U.S. law and practice in four antidumping and countervailing duty investigations involving Chinese products.[271] China made both "as applied" and "as such" claims; that is, it argued that both the application of U.S. antidumping and CVD law in particular investigations and the law in itself violated WTO obligations.[272] While panel and Appellate Body reports in the case were adopted in March 2011 and the parties originally settled on a February 2012 compliance deadline, U.S. compliance in the dispute was complicated by the December 2011 ruling of the U.S. Court of Appeals for the Federal Circuit in *GPX Int'l Tire Corp. v. United States* that the Commerce Department did not have statutory authority to impose CVDs on goods from NME countries. Legislation to provide the department with express authority to do so, effective November 20, 2006, was signed into law on March 13, 2012 (P.L. 112-99). Litigation in the *GPX* case is still pending.

### *U.S. Trade Remedy Law and NME Countries*

The United States treats China as a nonmarket economy (NME) country for purposes of antidumping investigations,[273] thus triggering a provision of U.S. antidumping law permitting Department of Commerce (DOC) to use a "surrogate country" methodology to determine the fair market or "normal" value of products imported from NME countries. Under the statute, if DOC finds that available information does not permit it to determine normal value under the rules that are ordinarily applicable in U.S. antidumping investigations, DOC must make this determination "on the basis of the value of the factors of production" used in producing the product, adding certain other costs and expenses and base its valuation of these factors on the best available information regarding the valuation of such factors in a market economy country or countries that DOC considers to be appropriate.[274]

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[270] Understanding between the European Union and the United States Regarding Procedures under Articles 21 and 22 of the DSU, *United States—Continued Existence and Application of Zeroing Methodology*, WT/DS350/19 (January 6, 2010).

[271] Request for Consultations by China, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/1 (September 22, 2008).

[272] Because they focus on the WTO-consistency of a statutory or regulatory norm itself, "as such" claims have broader implications than "as applied" claims. See *supra* note 140 for further discussion.

[273] The term "nonmarket economy country" is defined in the Section 771(18) of the Tariff Act of 1930, 19 U.S.C. Section 1677(18). The Department of Commerce is authorized to revoke any determination that a foreign country is a nonmarket economy country for purposes of the act. Tariff Act of 1930, §771(18)(C), 19 U.S.C. §1677(18)(C).

[274] Tariff Act of 1930, as amended, §773(c)(1), 19 U.S.C. §1677b(c)(1).

If DOC finds that available information is inadequate for these purposes, it is to determine normal value on the basis of the price at which merchandise that is (1) comparable to that under investigation, and (2) that is produced in one or more market economy countries that are at a level of economic development comparable to that of the NME country involved, is sold in other countries, including the United States.[275] Assuming that a Chinese product is subsidized and that this subsidization results in a lower domestic sale price, the NME methodology generally produces a higher fair market value than would result if the actual sale price in China were used. Since a dumping margin is determined by measuring the export price against the normal value of the good, a higher normal value may result in a higher dumping margin or, in some cases, might produce a dumping margin that would not otherwise exist.[276]

The United States only recently began to impose CVDs on the goods of NME countries, having long refrained from doing so due to the high level of subsidization in such countries and the resulting difficulty of isolating the economic value of subsidies provided with respect to specific products.[277] The Commerce Department's 1984 determination to this effect was upheld by the U.S. Court of Appeals for the Federal Circuit in its 1986 decision in *Georgetown Steel Corp. v. United States*.[278] The Commerce Department changed its policy in 2006 in accepting the CVD petition in *Coated Free Sheet Paper from the People's Republic of China* and in issuing affirmative preliminary and final subsidy determinations in the resulting CVD investigation.[279] Although the U.S. International Trade Commission issued a negative final material injury determination in the *Coated Free Sheet Paper* investigation, thus ending the proceeding, the Department of Commerce issued CVD orders in subsequent CVD investigations involving Chinese products, with more than 20 CVD orders on Chinese goods in effect as of October 2011.[280]

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[275] Tariff Act of 1930, as amended, §773(c)(2), 19 U.S.C. §1677b(c)(2). For further discussion, see U.S. Dep't of Commerce, Import Admin., 2009 Antidumping Manual, Chapter 10, "Non-Market Economies," at http://ia.ita.doc.gov/admanual/2009/Chapter%2010%20NME.pdf.

[276] Note also the description of the implications of the NME methodology provided by the WTO panel in the case at hand:

> … conceptually, the dumping margin calculated under an NME methodology—i.e., the difference between the constructed normal value and the export price—reflects not only price discrimination by the investigated producer between the domestic and export markets ("dumping"), but also, in addition, the economic distortions that affect the producer's costs of production. Specific domestic subsidies granted to the producer of the good in question, in respect of that good—i.e., the same subsidies which are countervailed in the context of a countervailing duty investigation—are one of these economic distortions "captured" in the NME dumping margin calculation. Expressed differently, the dumping margin calculated under an NME methodology generally is higher than would be the case otherwise because it results from a comparison of the export price to market-determined, and hence *unsubsidized*, costs of production, rather than to the producer's actual, subsidized (or distorted) costs of production.

Panel Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, para. 14.69, WT/DS379/R (October 22, 2010)(emphasis in original)(footnote omitted).

[277] See generally CRS Report RL33976, *U.S. Trade Remedy Laws and Nonmarket Economies: A Legal Overview*, by (name redacted).

[278] Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986). DOC made its 1984 determination in the context of CVD investigations involving goods from Poland and Czechoslovakia.

[279] Coated Free Sheet Paper from the People's Republic of China: Amended Preliminary Affirmative Countervailing Duty Determination, 72 *Federal Register* 17484 (April 9, 2007); Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 72 *Federal Register* 60645 (October 25, 2007).

[280] Antidumping and Countervailing Duty Orders in Place as of October 11, 2011, by Date of Order, at http://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/active/index.htm (click on "AD/CVD Orders").

Further, because domestic industries often file both antidumping and countervailing duty petitions with regard to the same NME merchandise, the United States may ultimately impose both antidumping and countervailing duties on imports of the same product. As discussed above, the use of NME surrogate country methodology in an antidumping investigation generally produces an unsubsidized (and likely higher) price for normal value, the subsidy later being captured in the margin of dumping. In such situations, subsidization is thus offset not only by the CVD but also by the dumping margin, potentially resulting in a double remedy. In calculating a dumping margin, the Commerce Department is required under Section 772(c)(1)(C) of the Tariff Act, 19 U.S.C. §1677a(c)(1)(C), to make an upward adjustment of the export price to account for any countervailing duty imposed on the same merchandise to offset an *export* subsidy, thus reducing the margin. There is, however, no such requirement or authority where a CVD is imposed to offset a *domestic* subsidy, that is, a subsidy that is not contingent on export but that may nonetheless benefit exported goods, thus creating a double remedy or "double counting" where domestic subsidization is involved. This result has been argued to violate both the SCM Agreement and domestic trade remedy law.

### *U.S. WTO Obligations and NME Countries*

U.S. international obligations regarding the imposition of CVDs on NME goods are primarily centered in the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). Briefly, in order for a subsidy to exist under the SCM Agreement, a preliminary requirement for remediation under WTO rules, there must be "a financial contribution by a government or any public body" within the territory of a WTO Member, or any form of income or price support, that confers a benefit. A financial contribution may take the form of (1) a direct or potential direct transfer of funds such as a loan or loan guarantee, (2) the foregoing of revenue "otherwise due," (3) government provision of goods of services other than general infrastructure or government purchase of goods, or (4) government payments to a funding mechanism, or entrustment or direction of a private body to carry out one of the functions described above. As provided in GATT Article VI and the SCM Agreement, subsidized imports must also be found to cause or threaten to cause material injury to a domestic industry for a countervailing duty to be imposed.

Unless a subsidy is prohibited under the SCM Agreement (as are export subsidies and subsidies contingent on the use of domestic over imported products), a subsidy may only be remedied in a direct WTO challenge or a CVD investigation if it is specific to an enterprise or industry or group, either in law (*de jure*) or in fact (*de facto).* A subsidy that is limited to certain enterprises in a designated geographic region within the jurisdiction of the subsidizing WTO Member is deemed specific in the Agreement. What qualifies as a "public body" and how to quantify the benefit of a financial contribution such as a loan or the provision of goods and services are important issues in CVD investigations involving Chinese products.

Article 14 of the SCM Agreement contains guidelines for WTO Members to follow in calculating the benefit from four types of governmental financial contributions—the provision of equity capital; loans; loan guarantees; and the provision or goods or services or the purchase of goods by a government—each providing for the use of market-based benchmarks. In addition, Article 15(c) of China's WTO Accession Protocol provides that Article 14 provisions will apply in benefit calculations in countervailing duty investigations involving Chinese goods, but that "if there are special difficulties in that application, the importing WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks."[281] Because a market-based benchmark may not be available in China, the United States has thus used benchmarks based on rates or prices from one or more foreign market economy countries to make its benefit determinations in these investigations.[282]

### China's Complaint

These and other related issues arose in China's 2008 request for consultations and its subsequent panel request in December of that year.[283] In its "as applied" claims, China cited inconsistencies with the GATT articles, the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement), the WTO Antidumping Agreement, and Article 15 of China's WTO Accession Protocol in four antidumping and four CVD investigations involving Chinese goods. Among other claims, China alleged the following:

> (1) that in connection with U.S. findings that the alleged provision of goods for less than adequate remuneration fulfilled the definition of a subsidy under the SCM Agreement, DOC erroneously determined that certain state-owned enterprises (SOEs) were public bodies for purposes of the definition, that DOC failed to find that the alleged benefits that trading companies had received from SOE-provided goods were passed on to the producers of the merchandise that was the subject of the CVD investigations, and, in an argument analogous to that used in challenges to the use of "zeroing" in antidumping cases, that DOC improperly included in subsidy benefit calculations only those transactions that produced a positive benefit, while excluding transactions that yielded no benefit;
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> (2) that the United States had failed to demonstrate that the alleged provision of land and land use rights for less than adequate remuneration was specific to an industry or group of industries;
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> (3) that in connection with finding that the government had provided loans on preferential terms, that the United States had erroneously determined that certain state-owned commercial banks were public bodies, and also failed to find specificity;
>
> (4) that in each case where the United States chose a benchmark outside of China in order to determine the existence and amount of any subsidy benefit, an action permitted under Article 15 of China's Accession Protocol, the United States had improperly rejected the prevailing terms and conditions in China as the basis for making its determinations;
>
> (5) that in using its non-market economy (NME) methodology for determining dumping and imposing antidumping duties simultaneously with a determination of subsidization and the imposition of CVDs on the same product, the United States levied CVDs in excess of the subsidy found to exist in violation of the SCM Agreement, that is, an impermissible "double

[281] WTO, Accession of the People's Republic of China; Decision of 10 November 2001, Part I, para. 15(b), WT/L/432 (November 23, 2001). Section 15 also provides for the possible use of surrogate country prices or costs to determine normal value in antidumping investigations involving Chinese goods. *Id*. para. 15(a).

[282] See, e.g., Coated Free Sheet Paper from the People's Republic of China: Amended Preliminary Affirmative Countervailing Duty Determination, 72 *Federal Register* at 17487-89.

[283] Request for the Establishment of a Panel by China, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/2 (December 12, 2008).

remedy"; that the levied antidumping and countervailing duties were in excess of the "appropriate" amounts, as called for in Article 9.2 of the AD Agreement and Article 19.3 of the SCM Agreement; that the United States failed to make a "fair comparison" between export price and normal value in its antidumping determination as required under the WTO Antidumping Agreement; that the United States imposed antidumping duties in excess of the amount of dumping found to exist; and that the United States failed to grant China the most-favored-nation (MFN) treatment required under Article I of the GATT by not according it "the same unconditional entitlement to the avoidance of a double remedy for the same unfair trade practice that it accords to imports of like products from the territories of other WTO Members."

(6) that in conducting the antidumping and countervailing duty investigations in question, the United States made various procedural errors involving notification and transparency and used improperly made adverse inferences from available information without having requested information from interested parties regarding the factual issue involved.

China also argued that U.S. law is inconsistent "as such" with U.S. obligations under the WTO Antidumping and SCM Agreements because it does not provide the Department of Commerce with authority to avoid imposing an impermissible "double remedy" on goods from China when it uses surrogate country values for determining costs of production of goods made in a country designated a NME. Because imports from WTO Members with market economies are not subject to this treatment, China also considered this situation to be a violation of the GATT Article I, the GATT most-favored-nation article.

### *Panel Report*

In a report publicly circulated on October 22, 2010,[284] the WTO panel rejected most of China's claims, as follows:

- Regarding the WTO-consistency of DOC's determinations in cited investigations that there was a *financial contribution* for purposes of the SCM Agreement's definition of a subsidy, the panel found that China had not established that the United States violated the SCM Agreement in determining that state-owned enterprises and state-owned enterprises (SOEs) and state-owned commercial banks (SOCBs) were "public bodies," agreeing with the United States that the term "public body" means "any entity that is controlled by the government."[285] The panel also rejected China's claim that the United States had violated the Agreement in determining that certain trading companies were "entrusted" or "directed" by the government to provide goods and services to producers of the investigated products.
- Regarding DOC's determinations of *specificity*, the panel rejected China's claims that DOC had improperly determined that lending by SOCBs to the off-the-road (OTR) tire industry was *de jure* specific, but also found that the United States had not acted consistently with the SCM Agreement in determining that the

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[284] Panel Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R (October 22, 2010).

[285] *Id.* para. 8.79.

government provision of land-use rights in one investigation was regionally specific.

- Regarding U.S. *benefit* determinations, which, at China's later request, were reviewed only in light of Article 14 of the SCM Agreement and not the price comparison provisions in China's Accession Protocol, the panel found that China had not established that DOC violated the SCM Agreement by failing to conduct a "pass through" analysis in the OTR investigation to determine whether any subsidy benefits received by trading companies selling rubber inputs were passed on to OTR tire producers who purchased those inputs; by failing to "offset" positive with "negative" benefit amounts in the same investigation; and by rejecting Chinese prices and interest rates as benchmarks with respect to various government loans and government-provided inputs and land use rights in the OTR and other investigations. At the same time, the panel determined that DOC had acted inconsistently with the SCM Agreement in the OTR investigation (1) by not ensuring that the methodology used to determine the benefit to tire producers from purchases of SOE-manufactured inputs from trading companies did not result in a benefit that exceeded that conferred by the government's provision of the inputs, and (2) by using average annual interest rates as benchmarks for one company's U.S. dollar-denominated loans from SOCBs.
- Regarding China's *double remedy* claims, the panel rejected China's "as such" challenge, and reviewing its "as applied" claim, found that, while the panel did not doubt that in general the simultaneous imposition of an antidumping order based on NME methodology and a CVD order on the same merchandise likely result in the same subsidization being offset twice, China did not establish that double remedies were inconsistent with the SCM Agreement, Article VI:3 of the GATT, which prohibits the imposition of CVDs in excess of the amount of subsidization, or the GATT MFN article.
- Regarding alleged *procedural violations*, the panel found that China had not established that the United States violated the SCM Agreement by not granting China and various Chinese producers extra time to respond to certain questionnaires in the CVD investigations, but that the United States did violate an obligation under the SCM Agreement in using "facts available," that is, facts not provided by China or its companies, in determining the amount of SOE-provided hot-rolled steel that investigated producers purchased from trading companies.

### Appellate Body Report

In an appeal by China, the WTO Appellate Body (AB), on March 11, 2011, reversed the panel on two especially significant issues: the interpretation of the term "public body" and the permissibility of "double remedies."[286] The AB reversed the panel's finding that the term "public body" means an entity controlled by the government and thus its consequent finding that the United States had not violated the SCM Agreement in finding that certain SOEs and SOCBs qualified as such. The AB also completed the analysis on this point and concluded that DOC's determinations in the four CVD investigations that SOE input suppliers were public bodies were

[286] Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (March 11, 2011).

inconsistent with the Agreement, on the ground that a public body "must be an entity that possesses, exercises or is vested with governmental authority" and not merely an entity that is owned or controlled by the government.[287] The AB also concluded, however, that China had not established that DOC's determination that the SOCBs in the OTR investigation constituted public bodies was improper.

The AB upheld panel findings on specificity appealed by China. The AB also upheld two of the appealed findings approving DOC's use of foreign benchmarks in determining the subsidy benefit. The AB reversed the panel's rejection of China's claim that the foreign benchmark actually used by DOC to calculate the benefit from RMB-denominated SOCB loans in three investigations was inconsistent with Article 14(b) of the SCM Agreement, a provision governing the calculation of loan benefits, but, at the same time, found that it could not complete the analysis of China's claim under this article. The AB's reversal was based on its finding that the panel had not made an "objective assessment" of the issue, as required under Article 11 of the WTO Dispute Settlement.

In reversing the panel on the issue of "double remedies," the AB found that offsetting the same subsidization twice by the simultaneous imposition of antidumping duties based on NME methodology and countervailing duties is inconsistent with Article 19.3 of the SCM Agreement, which requires that, when a CVD is imposed on a product, it be levied "in the appropriate amount in each case." The AB also reversed related panel findings and found that, in the four sets of challenged antidumping and CVD investigations, because the United States had imposed duties concurrently without having assessed whether "double remedies" arose, the United States acted inconsistently with Article 19.3. As result, the AB also found that the United States was also in violation of two other provisions of the SCM Agreement: Article 10, which requires WTO Members, inter alia, to ensure that the imposition of CVDs is consistent with Article VI of the GATT, and Article 32.1, which prohibits WTO Members from imposing a "specific action" against the subsidy of another Member except in accordance with the GATT, as interpreted by the SCM Agreement.

## Implementation of WTO Reports

The Appellate Body report and modified panel report were adopted by the WTO Dispute Settlement Body at its March 25, 2011, meeting. At the meeting, the United States and other WTO Members expressed considerable concern over the AB's approach to the term "public body,"[288] the United States noting that the AB's interpretation appeared to have "collapsed the terms 'government' and 'public body,' such that there was no purpose for the term 'public body' to have been included by Member in the SCM Agreement at all."[289] As recounted in the DSB minutes, the United States elaborated on the difficulties that it believed would result from this test in attempts by WTO Members to address trade distortions caused by state-owned enterprises:

> In moving away from an objective "control" standard, as adopted by this Panel and previous panels, the Appellate Body adopted an undefined "governmental authority" standard. The

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[287] *Id.* para. 317.

[288] Dispute Settlement Body, Minutes of Meeting, March 25, 2011, at 18-19 (United States), 21 (Mexico), 22-23 (Turkey), 23-24 (European Union), 25 (Canada), 25-26 (Australia), 26-29 (Japan), 29-30 (Argentina), WT/DSB/M/294 (June 9, 2011).

[289] *Id.* at 19.

> test created by the Appellate Body Report appeared to require an additional analysis into what constitutes "governmental authority" within the domestic legal system of the exporting Member. There was, in addition, no elaboration in the Report as to how to determine whether the entity in question possessed or exercised such authority. In a CVD case, such an analysis could place a considerable additional burden on the responding companies and governments to provide appropriate data, as well as on administering authorities to collect and analyze all of the appropriate data. It may be difficult in many instances to identify concrete evidence establishing that state-owned enterprises (SOEs) were vested with or exercising "governmental authority", despite the fact that they were owned by the government. Yet at the same time, governments could and did use SOEs as key instruments through which to manage national economic activity. In such cases, the pricing policies of SOEs in NMEs could be very trade distorting, primarily the provision of inputs and financing at below market rates. Consequently, the Appellate Body Report could make it much more difficult to address trade distorting subsidies provided through SOEs.[290]

The United States and other Members also expressed concerns over the legal reasoning and implications of the AB's finding on double remedies. As described in the DSB minutes, the United States noted that no provision of the Antidumping Agreement or the SCM Agreement restricted a WTO Member's ability to apply antidumping duties based on NME methodology and countervailing duties concurrently.[291] It further maintained that Article 19.3 of the Agreement, on whose language the AB based its conclusion, was not concerned with the definition and calculation of CVDs and "still less" with the concurrent application of antidumping and countervailing duties, but rather with the imposition and collection of CVDs, with the phrase "appropriate amounts" referring "simply to the fact that the CVD on particular imports may vary, even though a CVD should be imposed in a non-discriminatory manner."[292]

The United States further stated that the report gave Members "no certainty in determining what would constitute an 'appropriate' amount of a CVD in a given situation" and that it "appeared to impose the entire burden of proving that there was no 'double remedy' on the importing Member."[293] The United States added that the Appellate Body "appeared to impose significant administrative burdens on Members' trade remedy administrators in the situation of concurrent application of CVDs and NMEs," since ["[i]f required, measuring the effect of a subsidy on the export price of a good and other components of the dumping margin may involve highly complex economic and econometric analysis," a measurement that may entail "significant" difficulties.[294] In the U.S. view, this situation "raised serious questions about whether Members would be able to address trade-distorting subsidies by NME Members."[295]

The United States stated at the following DSB meeting that it intended to comply with the WTO decision and that it would need a reasonable period of time in which to do so.[296] In July 2011, the United States and China agreed on a compliance deadline of February 25, 2012.[297]

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290 *Id.*

291 *Id.* at 19.

292 *Id.* at 20.

293 *Id.*

294 *Id.* at 21.

295 *Id.*

296 Dispute Settlement Body, Minutes of Meeting, April 21, 2011, at 9, WT/DSB/M/295 (June 30, 2011).

297 Agreement under Article 21.3(b) of the DSU, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/11 (July 8, 2011).

## Related U.S. Litigation: *GPX Int'l Tire Corp. v. United States*

As the WTO case was proceeding, the U.S. Court of International Trade (USCIT), in a case involving the antidumping and CVD orders on over-the-road tires at issue in the WTO case, ruled in August 2010 in *GPX Int'l Tire Corp. v. United States*, that the application of CVDs on these imports concurrently with antidumping duties calculated under the NME methodology without making adjustments to avoid double counting was unreasonable and inconsistent with U.S. law.[298] In an earlier ruling involving the same CVD order, the USCIT stated that "[if] there is a substantial potential for double counting, and it is too difficult for Commerce to determine whether, and to what degree double counting is occurring, Commerce should refrain from imposing CVDs on NME goods until it is prepared to address this problem through improved methodologies or new statutory tools."[299] The court instructed Commerce that it "has a choice," explaining as follows:

> ... The unfair trade statutes ... give Commerce the discretion not to impose CVDs as long as it is using the NME AD methodology. Thus, Commerce reasonably can do all of its remedying though [sic] the NME statute, as it likely accounts for any competitive advantages the exporter received that are measurable. If Commerce now seeks to impose CVD remedies on the products of NME countries as well, Commerce must apply methodologies, including methodologies that will make it unlikely that double counting will occur.[300]

DOC considered in the remand that it had three options—not to apply the CVDs, to apply the market economy antidumping methodology to either the company involved or the PRC, or to offset the CVD against the duty deposit rate for the NME ADs—and chose the third option.[301] In its August 2010 ruling, the USCIT held the offset to be "unreasonable" since it would always result in the unaltered NME AD margin and thus render concurrent AD and CVD investigations unnecessary.[302] The court also found that, "[p]erhaps even more importantly," this practice was inconsistent with Section 772(c)-(d) of the Tariff Act of 1930, 19 U.S.C. 1677a(c)-(d), which lists the specific offsets in dumping margin calculations that are "permissible" and held that the offset "does not comply with the statute."[303] The court further stated that it found DOC's tripartite list to be "exhaustive" and as such "a tacit admission that, at this time, it is too difficult for Commerce to determine, using improved methodologies and in the absence of new statutory tools, whether and to what degree double counting is occurring."[304] The court remanded again, ordering DOC not to apply CVD law to the goods of the exporter that had challenged the duties on this basis as well as to the goods of a second company even though it had not raised the issue in the litigation.[305]

The U.S. government and domestic industry defendants appealed the *GPX* decision to the U.S. Court of Appeals for the Federal Circuit (CAFC). On December 19, 2011, a three-judge panel of

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[298] GPX Int'l Tire Corp. v. United States, 715 F.Supp.2d 1337 (Ct. Int'l Trade 2010)[hereinafter *GPX II*]. The use of double remedies by DOC on goods from China has also been challenged in a second case, *Guang Ya Aluminum Industries Co., Ltd.. v. United States*, No. 11-00197 (Ct. Int'l Trade filed June 20, 2011).

[299] GPX Int'l Tire Corp. v. United States, 645 F.Supp.2d 1231, 1243 (Ct. Int'l Trade 2009).

[300] *Id.*

[301] *GPX II*, 715 F.Supp.2d at 1344.

[302] *Id.* at 1345-46.

[303] *Id.* at 1345.

[304] *Id.* at 1346.

[305] *Id.* at 1346-47.

the CAFC affirmed the lower court ruling, but on the ground that Congress had legislatively ratified the 1984 DOC interpretation that CVD law did not apply to NMEs and the CAFC's upholding of that interpretation in its 1986 decision in *Georgetown Steel Corp. v. United States*,[306] and that, as a result, the Commerce Department was no longer permitted to interpret the statute as providing authority to impose CVDs on NME products.[307] The ruling thus prohibited DOC from imposing CVDs on the imports in question even if it were able to reasonably resolve the double counting issue or if there were no concurrent antidumping order on the merchandise under investigation. As the court instructed, the department needed to seek legislative authority to apply CVDs to NME countries it if believed that the law should be changed.[308]

In mid-January 2012, Secretary of Commerce Bryson and USTR Kirk wrote to the Senate Finance Committee and the House Ways and Means Committee that the Administration was continuing to review "all options" in the litigation, "including a request for a rehearing by the full appellate court," but that it also wished to pursue legislation amending the CVD statute.[309] The letter stated that without legislation "should the decision of the court become final, Commerce would be required to revoke all CVD orders and terminate all CVD proceedings involving non-market economy countries, including 24 existing CVD orders on imports from China and Vietnam, as well as five pending investigations and two recently filed petitions." According to the letter, the Administration was seeking legislation "clarifying that the CVD law can be applied to subsidized goods from non-market economies, that CVD proceedings Commerce has already initiated on products from non-market economies are to continue, and that CVD determinations Commerce has made with respect to such products are to remain in effect."

Legislation to remedy the *GPX* ruling (H.R. 4105) was introduced on February 29, 2012. The bill was quickly passed by the House and Senate and was signed into law on March 13, 2012. The new statute, P.L. 112-99, generally authorizes the application of CVDs to NME products, makes this authority effective as of November 20, 2006, and prospectively amends antidumping law to address double counting issues.

While the legislation was pending, the Administration filed a petition with the CAFC for a rehearing *en banc* in the *GPX* case.[310] The day after the new legislation was signed, the CAFC requested the *GPX* litigants to submit arguments on the effect of P.L. 112-99 on further proceedings in the case. The United States has asked that the appellate decision be vacated, arguing that it is not final and has been superseded by the new law, and that the case be remanded to the U.S. Court of International Trade for further proceedings in light of the new statute.[311]

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[306] Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986).

[307] GPX Int'l Tire Corp. v. United States, 666 F.3d 732 (Fed. Cir. 2011)[hereinafter *GPX III*], at http://www.cafc.uscourts.gov/images/storeis/opinions-orders/11-1107.pdf.

[308] *Id*. at 745.

[309] See Letter to Hon. Max Baucus, Chairman, Senate Committee on Finance, from John Bryson, Secretary of Commerce, and Ron Kirk, U.S. Trade Representative, at http://insidetrade.com/iwpfile.html?file= jan2012%2Fwto2012_0129.pdf; *USTR Kirk, Bryson Tell Key Lawmakers Overriding GPX Ruling of 'Utmost Urgency,'* Daily Report for Executives (Bloomberg BNA), January 25, 2012; *Kirk, Bryson Urge Congress to Fix GPX Decision in Parallel to Judicial Review*, INSIDE U.S. TRADE, January 20, 2012, at 1; *Congress urged to ease China tariff rules*, FIN.TIMES, January 19, 2012, at http://www.ft.com.

[310] The CAFC set a one-time March 5, 2012, deadline for the United States to file a petition for rehearing; the United States had asked the court for a 60-day extension of the original February 2, 2012, deadline.

[311] Defendant-Appellant United States' Letter Brief in Response to Court Order, GPX Int'l Tire Corp. v. United States, No. 2011-1107, -1108, -1109 (Fed. Cir. March 23, 2012).

Importers are primarily arguing that the effective date for the new CVD authority is unconstitutionally retroactive and that the court should affirm its earlier decision.[312]

## Recent Developments

Notwithstanding the December 2011 appellate court ruling that U.S. CVD law did not cover goods from NME countries, the United States proceeded with compliance in China's WTO dispute. In January 2012, the United States and China agreed to extend the compliance deadline in the case to April 25, 2012.[313] In its January 2012 status report to the DSB, the United States stated that the United States Trade Representative (USTR) had "made a written request to the Secretary of Commerce to issue determinations under section 129(b) of the Uruguay Round Agreements Act that would render US Department of Commerce ('Commerce') determinations in four original antidumping investigations and four original countervailing duty determinations of products from China—circular welded pipe, light-walled rectangular pipe, certain new pneumatic off-the-road tires, and laminated woven sacks—not inconsistent with the recommendations and rulings of the DSB."[314] The United States continued:

> Commerce has been actively working on this matter and has issued questionnaires to Chinese respondents and to the Government of China, seeking additional information related to the issues on which the DSB adopted recommendations and rulings. Respondents have requested and Commerce has granted additional time for the submission of responses to the questionnaires. Commerce is analyzing responses provided to date and awaiting further responses from Chinese respondents and the Government of China.[315]

The Commerce Department is statutorily required to issue a Section 129 determination within 180 days after receiving a written request from the United States Trade Representative (USTR).[316] After the determination is issued and the USTR consults with the department and congressional committees, the USTR may direct the department to implement the determination in whole or in part.

As noted earlier, P.L. 112-99, signed into law on March 13, 2012, authorizes the department to impose CVDs on goods of NME countries, effective November 20, 2006, and thus covers the CVD proceedings at issue in China's WTO case. The United States made note of the new law in its April 2012 status report to the WTO Dispute Settlement Body, mentioning the potential role of the statute in resolving the impermissible "double counting" that had been found by the Appellate Body:

> The new legislation makes clear that where countervailing duties are applied to the exports from a nonmarket economy country at the same time that anti-dumping duties, calculated

[312] Response of Plaintiffs-Appellees GPX International Tire and Hebei Starbright to Court's Request for Letter-Brief on New Legislation, GPX Int'l Tire Corp. v. United States, No. 2011-1107, -1108, -1109 (Fed. Cir. March 23, 2012); Plaintiff-Appellee Tianjin United Tire & Rubber Int'l Co., Ltd's Response to Court's Request for Letter-Brief, GPX Int'l Tire Corp. v. United States, No. 2011-1107, -1108, -1109 (Fed. Cir. March 23, 2012).

[313] Modification of the Agreement under Article 21.3(b) of the DSU, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/13 (January 19, 2012).

[314] Status Report by the United States, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/12 (January 10, 2012).

[315] *Id.*

[316] Uruguay Round Agreements Act, P.L. 103-465, §129(b)(2), 19 U.S.C. §3538(b)(2)

> using a "surrogate value" methodology, are applied to the exports, and evidence is presented that this has resulted in an increase in the dumping margin, Commerce may reduce the antidumping duty to avoid what has referred to as a "double remedy." Commerce is currently working to implement this new law and including as part of US efforts to implement the recommendations and rulings of the DSB in connection with this dispute.[317]

The United States also noted that in early April 2012 it had issued to interested parties preliminary determinations in two of the Section 129 proceedings being carried out in the case (off-the-road tires and laminated woven sacks) and had requested comments on these determinations.[318]

## Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil (DS382)

In November 2008 and May 2009, Brazil requested consultations with the United States over the use of zeroing in antidumping proceedings involving Brazilian orange juice.[319] The Department of Commerce first issued an antidumping duty order on imports of orange juice from Brazil on March 9, 2006. Brazil's consultation request, as expanded, cited the use of zeroing in the original 2003-2004 antidumping investigation, the resulting antidumping order, the continued use of zeroing in successive antidumping proceedings involving the order, specific administrative reviews related to the order, and any ongoing and future administrative reviews involving the covered imports. Brazil also contested any assessment and case deposit requirements resulting from the order and action taken by U.S. Customs and Border Protection (CBP) to collect definitive antidumping duties at zeroing-based rates. In addition, it challenged U.S. statutes, regulations, and practices, including the use of zeroing in administrative reviews, both as such and as applied in the administrative reviews cited in its request.

A panel was established at Brazil's request in September 2009. In a report publicly circulated on March 25, 2011, the panel found that Brazil had established that the United States acted inconsistently with Article 2.4 of the Antidumping Agreement in using zeroing to determine the weighted-average margins of dumping—amounts used to set cash deposit rates—and to determine importer-specific assessment rates for two firms in the first and second administrative reviews under the order.[320] The United States chose not to appeal[321] and the panel report was adopted by the WTO Dispute Settlement Body on June 17, 2011. At the meeting, the United States made note of its December 2010 proposal to change its existing practice for calculating

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317 Status Report by the United States, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/12/Add.3 (April 13, 2012).

318 *Id.*

319 Request for Consultations by Brazil, *United States—Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil*, WT/DS382/1 (December 1, 2008); Request for Consultations by Brazil, Addendum, *United States—Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil*, WT/DS382/1/Add.1 (May 27, 2009).

320 Panel Report, *United States—Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil*, WT/DS382/R (March 25, 2011).

321 The United States and Brazil had asked the DSB to extend the 60-day appeal period to June 17, 2011, in order to alleviate the heavy workload of the Appellate Body; the DSB agreed to the request at its April 21, 2011 meeting. Joint Request by Brazil and the United States for a Decision by the DSB, *United States—Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil*, WT/DS382/7 (April 11, 2011); Dispute Settlement Body, Minutes of Meeting, April 21, 2011, at 14-16, WT/DSB/M/295 (June 30, 2011).

dumping margins and assessment rates in administrative reviews.[322] The United States and Brazil later agreed on a compliance deadline of March 17, 2012.[323]

At the February 22, 2012, meeting of the WTO Dispute Settlement Body, the United States indicated that its final modification regarding the use of zeroing in administrative reviews, as published in the February 14, 2012 issue of the *Federal Register,* would address the issues raised in the case.[324] The United States has since reported to the WTO that, as the result of a five-year sunset review, the antidumping order at issue in the case is to be revoked, effective March 9, 2011.[325] It is unclear whether Brazil is satisfied with these responses and will thus seek additional relief.[326] On April 3, 2012, Brazil and the United States entered into a procedural agreement providing for a possible compliance panel and sanctions request by Brazil and a joint effort to expedite any such proceedings.[327]

## Anti-Dumping Measures on Certain Shrimp from Vietnam (DS404)

Vietnam instituted dispute settlement proceedings against the United States in 2010 regarding the final dumping determination in a U.S. antidumping investigation of frozen and canned warmwater shrimp from that country, challenging, inter alia, the U.S. use of zeroing in calculating the dumping margins involved; a limitation that the Commerce Department placed on the number of exporters entitled to individual reviews (i.e., exporters eligible to receive company-specific dumping rates as opposed to what is generally a higher "all others" rate and, later, to seek

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322 Statements by the United States at the June 17, 2011, DSB Meeting, Item 7.A, at http://geneva.usmission.gov/2011/06/17/us-statements-june-17-2011-dsb/. See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 *Federal Register* 8101 (February 14, 2012), and text at *supra* notes 190-95.

323 Agreement under Article 21.3(b) of the DSU, *United States—Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil*, WT/DS382/9 (June 21, 2011).

324 Statement by the United States at the February 22, 2012, DSB Meeting, at http://geneva.usmission.gov/2012/02/23/statement-by-the-united-states-at-the-february-22-2012-dsb-meeting/[hereinafter U.S. Statement].

325 Status Report by the United States, *United States—Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil*, WT/DS382/10/Add.4 (April 13, 2012).

A requirement of the WTO Antidumping Agreement, sunset reviews of antidumping orders must be conducted every five years to determine whether there are sufficient grounds for keeping them in place. Under U.S. law, the Department of Commerce must revoke an antidumping order unless (1) the department makes a determination that dumping would be likely to continue or recur and (2) the U.S. International Trade Commission (USITC) determines that material injury would be likely to continue to or recur within a reasonably foreseeable time, were the order to be revoked. 19 U.S.C. §§1675(c), 1675a.

The Department of Commerce determined in May 2011 that revocation of the order would likely lead to the continuation or recurrence of dumping, Certain Orange Juice from Brazil: Final Results of the Expedited Sunset Review of the Antidumping Duty Order, 76 *Federal Register* 30655 (May 26, 2011). On March 14, 2012, however, the USITC made a negative injury determination, an action requiring revocation of the order. Certain Orange Juice from Brazil: Final Results of the Expedited Sunset Review of the Antidumping Duty Order, 76 *Federal Register* 30655 (May 26, 2011). Any DOC determination to revoke the antidumping order on orange juice from Brazil would apply to unliquidated entries of the merchandise—that is, entries for which final duties have not been assessed—that are entered, or withdrawn from warehouse, for consumption on or after the date determined by the department. 19 U.S.C. §1675(c)(3).

326 U.S. Statement, *supra* note 324; *Brazil Mulling Whether to Move Forward with Zeroing Case Against U.S.*, INSIDE U.S. TRADE, March 30, 2012, at 19.

327 Understanding between Brazil and the United States Regarding Procedures under Articles 21 and 22 of the DSU, *United States—Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil*, WT/DS382/11 (April 10, 2012).

revocation of the antidumping order on an individual basis); and the application of a country-wide dumping rate that was substantially higher than the "all-others" rate to imports of shrimp from companies that were unable to rebut a presumption used by DOC in antidumping proceedings that companies in nonmarket economy countries such as Vietnam operate under the control of the government and, thus, as units of one, government-controlled, country-wide entity.[328] Vietnam also challenged the use of zeroing and the continued application of the "all others" rate and the Vietnam-wide entity rates in subsequent administrative reviews of the order.

A panel was established at Vietnam's request in May 2010, and a panel was appointed in July 2010. The panel report, publicly circulated July 11, 2011, generally found against the United States on the zeroing issues and on the application of the higher country-wide dumping rate instead of the "all others" rate to companies that had not rebutted the presumption of government control, but upheld the United States with respect to its limitation on firms eligible for individual reviews.[329] The panel report was adopted on September 2, 2011. The United States and Vietnam have agreed on a compliance deadline of July 2, 2012.[330]

# Pending Disputes: Subsidies

## Subsidies on Upland Cotton (DS267)

In September 2002, Brazil requested consultations with the United States regarding U.S. statutes and programs that Brazil claimed provided prohibited and actionable subsidies to U.S. producers, users, and exporters of upland cotton.[331] Brazil alleged violations of the WTO Agreement on Agriculture, the Agreement on Subsidies and Countervailing Measures (SCM Agreement), and national treatment obligations in the GATT. It requested a panel in February 2003, adding a claim based on subsidy obligations in GATT Article XVI.[332] The panel was established in March 2003; panelists were appointed in May of that year.

WTO Members have made commitments in the WTO Agreement on Agriculture to reduce, and in some cases eliminate, domestic support in favor of agricultural producers and export subsidies on agricultural products. The commitments made by each Member to limit domestic support and export subsidization are contained in the Member's Schedule, which is attached to and considered an integral part of the Agreement.[333] "Scheduled products" are those products for which a WTO

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[328] Request for the Establishment of a Panel by Viet Nam, *United States—Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS404/5 (April 9, 2010).

[329] Panel Report *United States—Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS404/R (July 11, 2011). For a summary of the panel's key findings, see "United States—Anti-dumping Measures on Certain Shrimp from Viet Nam," at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds404_e.htm.

[330] Agreement under Article 21.3(b) of the DSU, *United States—Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS404/10 (November 2, 2011).

[331] Request for Consultations by Brazil, *United States—Subsidies on Upland Cotton*, WT/DS267/1 (October 3, 2002). For further information on this dispute, see CRS Report RL32571, *Brazil's WTO Case Against the U.S. Cotton Program*, by (name redacted) [hereinafter CRS Report RL32571].

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

[333] Agreement on Agriculture, art. 3.1, at http://www.wto.org/english/docs_e/legal_e/14-ag.pdf.

Member has made domestic support and export subsidy reduction commitments. The United States did not schedule any export subsidy reduction commitments regarding upland cotton.

The types of export subsidies for which reduction commitments are made are listed in Article 9.1 of the Agreement. Members may not provide any export subsidy listed in Article 9.1 to an "unscheduled product" or to a "scheduled" product in excess of the Member's scheduled reduction commitments. If the Member does so it is in violation of Articles 3.3 and 8 of the Agreement. In addition, Article 10.1 prohibits Members from applying any subsidy that is not listed in Article 9.1 "in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments."

Alleged violations of the Agriculture Agreement may be challenged under WTO dispute settlement procedures. Agricultural subsidies may also be challenged under the SCM Agreement, which defines the term "subsidy," prohibits export subsidies and subsidies contingent on the use of domestic over imported products "except as provided in the Agreement on Agriculture," and makes any subsidy fitting the Agreement definition "actionable" if the subsidy is specific to an industry and causes "adverse effects" to the interests of another WTO Member.[334] Among these adverse effects is what the SCM Agreement refers to as "serious prejudice," which is defined in Article 6.3 of the Agreement as including, among other effects, "a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market." The SCM Agreement contains timelines for dispute settlement proceedings that are shorter than those in the WTO Dispute Settlement Understanding and in general contemplates expedited compliance with adverse WTO decisions in disputes arising under the Agreement.

Resort to WTO dispute settlement had been temporarily limited by Article 13 of the Agriculture Agreement—the now-expired "Peace Clause"—which provided that certain domestic support measures and export subsidies that conformed fully with enumerated requirements in the Agriculture Agreement were "exempt from actions" under specified subsidy-related provisions in the GATT 1994 and the SCM Agreement through the end of the "implementation period," that is, the end of the nine-year period following the date the Agriculture Agreement entered into force (January 1, 1995), or December 31, 2003. The United States unsuccessfully argued in the case that certain of its agricultural programs were covered by this provision.

### *Panel and Appellate Body Reports*

In a report issued September 8, 2004, the WTO panel found that the United States was maintaining export subsidy programs and providing payments under domestic support programs in violation of the Agriculture Agreement and the SCM Agreement.[335]

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[334] Agreement on Subsidies and Countervailing Measures (SCM Agreement) arts. 1, 3, 5, at http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

[335] Panel Report, *United States—Subsidies on Upland Cotton*, WT/DS267/R (September 8, 2004)[hereinafter U.S. Cotton Panel Report]. For further information on the agricultural programs at issue and the bases for panel and Appellate Body findings in the case, see CRS Report RL32571, *supra* note 331298. 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.

First, the panel found that three U.S. export credit guarantee programs in effect at the time constituted export subsidies for purposes of WTO obligations because the programs were provided at premium rates that were "inadequate to cover the long-term operating costs and losses" of the programs.[336] The panel looked to the Illustrative List of Export Subsidies set out in Annex I of the SCM Agreement, which includes export credit guarantee programs fitting this description in item (j) of the List.[337] The cited programs were (1) the Commodity Credit Corporation (CCC) Export Credit Guarantee Program (GSM-102), providing export credit guarantees for up to three years; (2) the CCC Intermediate Export Credit Guarantee Program (GSM-103), providing export credit guarantees for up to 10 years; and (3) the Supplier Credit Guarantee Program (SCGP), allowing export guarantees for 180 days and in some cases up to 360 days.

The panel found that the premiums charged for the U.S. programs would not insure adequate financial coverage for several reasons: (1) the existence of a statutory 1% fee cap in connection with GSM-102 and SCGP transactions; (2) the fact that premiums were not risk-based either as to country risk or the creditworthiness of the borrower in individual transactions; and (3) even though the premiums charged offset the programs' long-term costs and losses "to some degree," coverage was "effectively ensure[d]" by the U.S. government's subsidy estimates and re-estimates "and ultimately the availability of United States government funds to cover any costs to government."[338] The panel further found that, to the extent that these programs applied to exports of upland cotton and other unscheduled agricultural commodities supported under the programs, and to exports of rice (a scheduled commodity), the export subsidies were being applied in a manner that circumvented U.S. export subsidy commitments in the Agriculture Agreement in violation of Article 10 of the Agreement. As these programs did not conform fully to export subsidy obligations in the Agreement, they were found not to be covered by the Peace Clause and thus subject to challenge. The panel went on to find that these programs were prohibited export subsidies under Article 3.1(a) of the SCM Agreement.

Second, the panel faulted the "Step 2" program, authorized in Section 1207(a) of the Farm Security and Rural Investment Act of 2002, P.L. 107-171 ("2002 farm bill"), 7 U.S.C. Section 7937(a), as it applied both to exporters and domestic users of upland cotton. To the extent that the program provided for payments to *exporters* for their purchase of higher priced upland cotton, it was found to constitute an export subsidy that was not scheduled by the United States in the Agreement on Agriculture and was therefore inconsistent with U.S. obligations under the Agreement. As such, this part of the Step 2 program was found not to be covered by the Peace Clause and thus also subject to challenge. The panel then found that the program constituted a prohibited export subsidy under the Article 3.1(a) of the SCM Agreement. In addition, the panel found that the Step 2 program, insofar as it provided for payments to domestic *users* of upland cotton, qualified as a subsidy contingent on the use of domestic over imported products and was thus prohibited under Article 3.1(b) of the SCM Agreement.

Third, the panel found that payments under various U.S. domestic support programs, including counter-cyclical payments (CCP), market loss assistance payments (MLA), marketing loan program payments, and Step 2 payments for U.S. cotton producers, were measures that granted

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[336] U.S. Cotton Panel Report, *supra* note 33504, at paras. 7.866-7.867.

[337] *Id.* paras. 7.796-7.803.

[338] *Id.* paras. 7.860-7.866.

sufficient amounts of support to upland cotton to exempt them from the Peace Clause.[339] The panel then found that the payments under the four cited programs—which it characterized as "mandatory price-contingent subsidies"—caused serious prejudice to Brazil's interests in the form of significant price suppression in the world upland cotton market for purposes of Articles 5(c) and Article 6.3(c) of the SCM Agreement.

At the time, CCP payments, market loan program payments, and Step 2 payments were authorized in the 2002 farm bill, while the authority for the MLA payments had expired. Among other findings, however, the panel determined 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 Agriculture Agreement implementation period (i.e., between 1995 and the end of 2003) and continued to have an adverse effect on the complaining Member. This finding allowed Brazil to challenge MLA payments and flexibility contract payments (FCP), the legislative basis of which had lapsed 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.[340] 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, that is, upon adoption of the panel report.[341]

The panel's finding of serious prejudice for the actionable subsidies also implicated a deadline in Article 7.9 of the SCM Agreement affecting requests for authorization to impose retaliatory measures. Provided there is no agreement between the disputing parties on compensation, Article 7.9 accords a prevailing Member the right to make such a request 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.[342]

The United States and Brazil appealed the panel report, and the Appellate Body, in a March 5, 2005, report largely upheld the panel.[343] The reports were adopted on March 21, 2005.[344] This action effectively established a July 1, 2005, deadline for removal of the prohibited subsidies and an Article 7.9 deadline of September 21, 2005, with respect to the actionable subsidies.

The United States told the WTO 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

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339 *Id.* paras. 7.415-7.608. See Agreement on Agriculture, art. 13(b)(ii).

340 U.S. Cotton Panel Report, *supra* note 33504, 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."

341 *Id.* para. 8.3(d).

342 Article 7.9 further provides that the DSB "shall grant authorization to the complaining Member to take countermeasures, commensurate with the degree and nature of the adverse affects determined to exist," subject to the reverse consensus rule.

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

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

begun to consider its options for doing so.[345] Brazil complained that the U.S. statement was not sufficiently detailed and made reference to the panel's recommended time periods for compliance.[346] The European Union 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 of time" to comply with Agriculture Agreement, that is, a compliance period determined on an *ad hoc* basis, as ordinarily available under the WTO Dispute Settlement Understanding.

### Responses of the United States and Brazil

In response to the WTO finding that fees charged by the Commodity Credit Corporation (CCC) guarantee programs must be risk-based, the United States Department of Agriculture (USDA) announced on June 30, 2005, that, as of July 1, 2005, CCC would use a risk-based fee structure for both the GSM-102 and SCGP program.[347] USDA also announced that CCC would no longer accept applications for payment guarantees under the GSM-103 program.

Because prohibited export subsidies had not been removed by July 1, 2005, Brazil requested that the DSB meet on July 15, 2005, to consider its request for authorization to impose countermeasures against the United States. Brazil sought 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.[348] Brazil proposed sanctions in an amount corresponding to (1) the Step 2 payments made in the most recent concluded marketing year and (2) the total of exporter applications received under the GSM-102, GSM-103, and SGCP programs, for all unscheduled commodities and for rice, for the most recent concluded fiscal year, estimating the annual total for both to be $3 billion.[349]

On July 5, 2005, 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, remove the 1% cap on origination fees under the GSM-102 program, and terminate the GSM-103 program.[350] 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. Eliminating the one-percent fee cap would make the Export Credit

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

[346] *Id.* at 8.

[347] News Release, USDA, USDA Announces Changes to Export Credit Guarantee Programs to Comply with WTO Findings (June 30, 2005).

[348] 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).

[349] 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.

[350] News Release, USDA, USDA Proposes Legislative Changes to Cotton and Export Credit Programs to Comply with WTO Findings (July 5, 2005).

> Guarantee Program more risk-based. Terminating the GSM-103 program would reinforce the recent U.S. decision to stop using longer-term export credit guarantees.[351]

On the same day, Brazil and the United States notified the DSB that they had entered into a procedural agreement covering the implementation phase of the dispute.[352] The agreement also recognized both the changes to the CCC programs announced June 30, 2005, and the legislative proposal sent to Congress to repeal the Step 2 program. As provided in the agreement, the United States requested arbitration of Brazil's retaliation proposal; the DSB referred the matter to arbitration at its July 15, 2005, meeting;[353] and the two countries, on August 17, 2005, requested that the arbitration be suspended.[354] The agreement also provided that Brazil could request an Article 21.5 compliance panel at any time after the July 15, 2005, meeting.

In addition, because the United States had not complied with its WTO obligations regarding the actionable subsidies by September 21, 2005, Brazil shortly thereafter proposed to suspend tariff concessions as well as obligations under the TRIPS Agreement and the GATS in the annual amount of $1.037 billion.[355] The United States objected to the proposal, and the matter was referred to arbitration.[356] On November 21, 2005, the parties requested that the arbitration be suspended, "noting that the United States reaffirmed" at the November 18, 2005, DSB meeting "its commitment to implement the recommendations and rulings of the DSB in this dispute, 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."[357]

Congress subsequently repealed the Step 2 program, effective August 1, 2006.[358]

### *Compliance Panel Proceeding*

On August 21, 2006, Brazil requested an Article 21.5 compliance panel, claiming WTO violations stemming from the U.S. failure to repeal the Step 2 program as of end of the six-month period set out in Article 7.9 of the SCM Agreement (i.e., by September 21, 2005), the continued payments under the marketing loan and counter-cyclical programs authorized in the 2002 farm bill, and continued WTO-related defects in the export credit guarantee programs at issue in the case.

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[351] *Id.*

[352] 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).

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

[354] 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).

[355] 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).

[356] 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); 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).

[357] 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).

[358] See Section 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 RL32571, *supra* note 331.

In December 2007, the compliance issued a report adverse to the United States with respect to both the marketing loan and CCP payments and the GSM-102 program.[359]

First, the panel found that payments under the marketing loan and counter-cyclical programs authorized in the 2002 farm bill resulted in significant price suppression, which constituted present serious prejudice to the interests of Brazil in violation of Articles 5(c) and 6.3(c) of the SCM Agreement. The panel thus found that the United States was in violation of its obligation under Article 7.8 of the SCM Agreement to take "appropriate steps to remove the adverse effects of … or withdraw the subsidy."

Second, regarding GSM-102 export credit guarantees provided after July 1, 2005 (the deadline set by the original panel), the panel found that Brazil had established that the revised GSM-102 program constituted an export subsidy on the ground that the program continued to be provided against premiums that were inadequate to cover its long-term operating costs and losses and that the program thus qualified as such under item (j) of the Illustrative List.[360] The panel further found that United States was in violation of its obligations in the Agreement on Agriculture in applying export subsidies in a manner that circumvented its export subsidy commitments regarding various unscheduled products (e.g., cotton, oilseeds, protein meals) as well as three scheduled products (rice, poultry meat, and rice).[361] By providing export subsidies both to unscheduled products and to scheduled products in excess of its reduction commitments, the United States was also found to be granting prohibited subsidies in violation of the SCM Agreement.[362]

The panel based its conclusion that the GSM-102 program constituted an export subsidy on the following factors:

> (a) The US Government continues to project that new GSM 102 export credit guarantees issued under the new fee schedule will be provided at a net cost to the Government.
>
> (b) GSM 102 fees are well below the OECD MPR's [minimum premium rates], which we consider to provide an informed appraisal of the level of fees necessary to cover the long-term, operating costs and losses of an export credit guarantee programme;
>
> (c) Elements of the structure, design and operation of the GSM 102 programme indicate that the programme is not designed to cover the long term operating costs and losses of that programme.[363]

The compliance panel's conclusion in (c) resulted from the following considerations: "the CCC's access to funds from the US Treasury, which facilitates the functioning of the programme"; "the fact that GSM 102 fees do not vary with foreign obligor risk"; and "the fact that the one percent fee cap has not been repealed and in our view prevents the adoption of risk-based fees (notably

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

[360] The compliance panel rejected Brazil's argument that the United States had failed to comply with the panel's recommendations, as adopted by the WTO Dispute Settlement Body, to withdraw the export subsidy with respect to payments issued before July 1, 2005. *Id*. paras. 14.19-14.39.

[361] *Id.* paras. 14.139-14.150.

[362] *Id.* paras. 14.151-14.157.

[363] *Id.* para. 14.133.

due to the insufficient 'scaling' of GSM 102 fees [as risk increases])."[364] The panel ultimately found that the United States had failed to bring its measures into conformity with the Agreement on Agriculture and to "withdraw the subsidy without delay" as recommended by the WTO Dispute Settlement Body pursuant to Article 4.7 of the SCM Agreement.

Both the United States and Brazil appealed. In a report issued June 2, 2008, the Appellate Body largely upheld the compliance panel, though taking issues with an aspect of the panel's methodology regarding the existence of export subsidization.[365] The Appellate Body reversed the panel's intermediate conclusion that the GSM-102 program would be run at a net cost to the government on the ground that the panel had not accorded sufficient weight to data provided by the United States concerning re-estimates of initial subsidy estimates for the three challenged programs for 1992-2006.[366] The United States had argued that the re-estimates demonstrated that the programs "were in fact not provided at a net loss to the US Government even before the United States took any measures to comply with the DSB recommendations" in the case.[367] At the same time, the Appellate Body upheld the panel's ultimate conclusion that the revised program fell within the scope of item (j) and thus constituted an export subsidy, determining that the panel's findings on the structure, design, and operation of the revised GSM 102 program provided "a sufficient evidentiary basis for the conclusion that it is more likely than not that … [it] operates at a loss."[368]

The WTO Dispute Settlement Body adopted the reports on June 25, 2008.

### *2008 Farm Bill Amendments*

On June 18, 2008, a week before the compliance panel and appellate reports were adopted, President George W. Bush signed the Food, Conservation, and Energy Act of 2008, P.L. 110-246 ("2008 farm bill"), a statute containing several provisions relevant to the pending dispute. Section 3101 of the act made statutory changes affecting U.S. export credit guarantee programs, changes that the bill Managers believed "satisfy U.S. commitments to comply with the Brazil cotton case with regard to the export credit programs."[369] The act repealed the GSM-103 intermediate export credit guarantee program and the Supplier Credit Guarantee Program (SCGP)[370] and eliminated the 1% cap on origination fees under the GSM-102 program, a requirement contained in 7 U.S.C. Section 5622(b).[371] While leaving the GSM-102 program intact, Congress placed new

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[364] *Id*. para. 14.131.

[365] Appellate Body Report, *United States—Subsidies on Upland Cotton*, *Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW (June 2, 2008)[hereinafter U.S. Cotton Article 21.5 AB Report].

[366] *Id*. paras. 279-295.

[367] See U.S. Cotton Article 21.5 Panel Report, *supra* note 359, para. 14.78.

[368] U.S. Cotton Article 21.5 AB Report, *supra* note 36534, paras. 321-322. The Appellate Body upheld the panel's comparison of OECD MPRs with GSM-102 fees as an element of the panel's analysis because, in the Appellate Body's view, the comparison was used only as evidence of the magnitude of the difference between the two and thus possibly indicative of the inadequacy of the GSM-102 fees to the program's long-term costs and losses, and was not relied upon to make a definitive determination as to whether the criterion of item (j) of the Illustrative List was met. *Id.* paras. 302-307.

[369] *Id.*

[370] Food, Conservation, and Energy Act of 2008 (FCE Act), P.L. 110-246, §3101(a)(1)(B), (2), *repealing* Agricultural Trade Act of 1978, §202(a)(2),(3), (b), 7 U.S.C. §5622(a)(2),(3), (b).

[371] FCE Act, §3101(b), *amending* Agricultural Trade Act of 1978, §211(b), 7 U.S.C. §5641(b).

requirements on the Secretary of Agriculture in administering the program, including "work[ing] with industry to ensure, to the maximum extent practicable, that risk-based fees associated with the guarantees cover, but do not exceed, the operating costs of and losses over the long term."[372] The phrase "long term" is defined in the statute as "a period of 10 or more years."[373] In addition, Congress directed the Commodity Credit Corporation to make available for GSM-102 programs each year through FY2012 a maximum $5.5 billion, or "the amount of guarantees that can be supported by $40 billion in budget authority (plus any budget authority for prior years)—whichever amount is less."[374]

In addition, Congress reauthorized counter-cyclical payments and marketing assistance loans for cotton and other commodities for the 2008-2012 crop years.[375] As discussed earlier, these two programs, as authorized in the 2002 farm bill, were successfully challenged by Brazil as actionable subsidies in the pending WTO case and are the basis of one of Brazil's retaliation requests.

### *Brazil's Retaliation Request and Subsequent Arbitration*

In August 2008, following the DSB's adoption of the compliance panel and Appellate Body reports finding the United States not to be in full compliance in the case, Brazil requested that the arbitrations on its retaliation proposals be resumed. Brazil lowered its retaliation requests in March 2009 to approximately $2.5 billion consisting of three components: (1) a one-time countermeasure of $350 million based on payments made under the repealed Step 2 program during the 13-month period between the compliance deadline of July 1, 2005, set by the original panel, and August 1, 2006, the date that the statutory repeal entered into force; (2) an annual countermeasure of approximately $1.2 billion for prohibited subsidies resulting from the GSM-102 export credit guarantee program; and (3) an annual countermeasure of approximately $1 billion based on actionable subsidies resulting from marketing loan and countercyclical payments.[376]

In an arbitral proceeding involving prohibited subsidies, the Arbitrator determines whether the proposed countermeasures are "appropriate," that is, not "disproportionate in light of the fact that the subsidies … are prohibited."[377] Where actionable subsidies are involved, the Arbitrator

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[372] FCE Act, §3101(a)(4), *adding* Agricultural Trade Act of 1978, §202(k)(2), 7 U.S.C. §5622(k)(2).

[373] FCE Act, §3101(a)(4), *adding* Agricultural Trade Act of 1978, §202(k)(1), 7 U.S.C. §5622(k)(1).

[374] H.Rept. 110-627 at 758. See FCE Act, §3101(b), *amending* Agricultural Trade Act of 1978, §211(b), 7 U.S.C. §5641(b). As stated in the conference report, it was expected that USDA would be able to make available "approximately $4 billion annually in export credit guarantees on $40 million in budget authority." H.Rept. 110-627 at 728. Regarding the export credit guarantee authorization, see generally CRS Report R41072, *International Food Aid Programs: Background and Issues*, by (name redacted), at 8.

[375] FCE Act, §§1104, 1201-1204. See generally CRS Report RL34594, *Farm Commodity Programs in the 2008 Farm Bill*, by (name redacted).

[376] See *United States—Subsidies on Upland Cotton, Arbitration under Article 22.6 of the DSU and Article 7.10 of the SCM Agreement*, Oral Statement of the United States, March 2, 2009, paras. 5, 60, at http://www.ustr.gov/webfm_send/585; *United States—Subsidies on Upland Cotton, Arbitration under Article 22.6 of the DSU and Article 7.10 of the SCM Agreement*, Oral Statement of the United States, March 3, 2009, para. 6, at http://www.ustr.gov/webfm_send/587.

[377] SCM Agreement, art. 4.11 and n.10.

determines whether the proposed countermeasures are "commensurate with the degree and nature of the adverse effects determined to exist."[378]

On August 31, 2009, the Arbitrator issued two reports—the first addressing retaliation for prohibited subsidies, the second for actionable subsidies.[379] The Arbitrator rejected Brazil's request for a one-time payment based on the Step 2 program; lowered the other amounts proposed by Brazil to a total $297.4 million annually for both prohibited and actionable subsidies (based on the FY2006 figures); and set out conditions under which Brazil could suspend WTO obligations involving U.S. services and intellectual property, or "cross-retaliate." Among other findings, the Arbitrator rejected U.S. arguments that, with the expiration of the statutory authority for the marketing loan and countercyclical payments at issue in the underlying WTO proceedings, Brazil could not pursue countermeasures for serious prejudice resulting from payments under these programs. The Arbitrator's decisions are final and not subject to appeal.

### Retaliation for Prohibited Subsidies

In examining Brazil's request for countermeasures for the prohibited subsidies, the Arbitrator first concluded that there was no legal basis for Brazil's request for a one-time payment based on past disbursements under the Step 2 program. The Arbitrator found that countermeasures are an exceptional temporary remedy aimed at inducing compliance and that the United States had in fact complied with respect to this program.[380]

Second, the Arbitrator determined that Brazil could suspend concessions amounting to $147.4 million annually for the continued operation of the GSM-102 export credit guarantee program, based on GSM-102 transactions in FY2006. As summarized by the Arbitrator, Brazil determined the trade-distorting impact of the program and thus the level of "appropriate" countermeasures for the prohibited subsidy by determining "the interest rate discounts secured by creditworthy and uncreditworthy foreign obligors backed by GSM-102 guarantees and estimating the additional export sales obtained by US exporters as a result of these discounts."[381] Brazil referred to these two factors as the "interest rate subsidy" and "additionality." The Arbitrator modified Brazil's calculations, however, "in order to more accurately calculate the trade-distorting impact of the GSM-102 programme on Brazil" and, taking into account other determinations it had made, reduced Brazil's original proposal to the figure stated above.[382]

The Arbitrator found that $147.4 million figure was variable, however, and could change annually depending on the total of amount of GSM-102 transactions in the most recently concluded fiscal year. The Arbitrator set out a formula that Brazil would need to use to determine the amount of permissible sanctions for a given year due to these payments, noting that "the United States does not dispute that it would be permissible for the level of appropriate countermeasures to be

[378] SCM Agreement, art. 7.10.

[379] Decision by the Arbitrator, *United States—Subsidies on Upland Cotton, Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the* SCM Agreement, WT/DS267/ARB/1 (August 31, 2009)[hereinafter U.S. Cotton Arbitrator's Decision I]; Decision by the Arbitrator, *United States—Subsidies on Upland Cotton, Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 7.10 of the* SCM Agreement, WT/DS267/ARB/2 (August 31, 2009)[hereinafter U.S. Cotton Arbitrator's Decision II].

[380] U.S. Cotton Arbitrator's Decision I, *supra* note 379, paras. 3.5-3.64.

[381] *Id.* para. 4.203.

[382] *Id.* para. 4.278. See *id.* paras. 4.203-4.278 for a full discussion of this portion of the decision.

determined through a formula, provided that this formula was sufficiently well defined so as to make it applicable in a transparent and predictable manner."[383]

Third, the Arbitrator determined that Brazil could cross-retaliate in order to remedy the prohibited subsidy resulting from the GSM-102 payments, but set conditions on Brazil's use of this remedy. The Arbitrator stated that "Brazil has at its disposal a sufficient range of imports of goods, including consumer goods, from the United States so as to enable it to suspend concessions in the area of trade in goods alone, without causing itself such economic harm so as to render such suspension 'not practicable or effective,'" the standard set out in the Dispute Settlement Understanding, taking into account the cumulated $294.7 million in countermeasures the Arbitrator had determined Brazil could impose for both prohibited and actionable subsidies in this case.[384] Based on Brazil's imports of consumer goods for 2007, the Arbitrator identified at least $409.7 million of such goods that could be the subject of countermeasures.[385] For certain consumer goods (food, medical products, and arms), the Arbitrator adopted a benchmark of 20%, finding that a U.S. import share of the good of less than this amount "constitutes a reasonable threshold by which to estimate the extent to which Brazil may be able to find alternative sources of supply" for the product.[386] This annual goods "threshold" is to be updated, however, under a formula set out by the Arbitrator, to take into account any change in Brazil's total imports of U.S. consumer goods *for the same year* for which the annual countermeasures are determined.[387]

Under the decision, if the total level of countermeasures for prohibited and actionable subsidies that Brazil is entitled to for a given year exceeds the updated goods threshold for that year, Brazil may cross-retaliate, that is, suspend WTO obligations involving U.S. services, intellectual property rights, or both, in excess of the goods threshold to the full amount of permissible sanctions for the year. If permissible sanctions do not exceed the goods threshold, however, Brazil may only suspend concessions on trade in goods.

[383] *Id.* para. 4.279.

[384] *Id.* paras. 5.198, 5.200; see *id.* paras. 5.61-5.201 for full discussion of this issue. Along with determining whether or not retaliating solely in trade in goods would be "practicable or effective," the Arbitrator also needed to determine whether Brazil met the second requirement for cross-retaliation, that is, whether it had adequately shown that the "circumstances are serious enough" to warrant suspension of concessions under another agreement. Brazil maintained that this was the case because of the continued maintenance and expansion of U.S. subsidy programs, their long term distortion of world markets, and the disproportionately costly effects on the Brazilian economy and the welfare of the Brazilian population if countermeasures were confined to trade in goods. *Id.* para. 5.216. The Arbitrator found that Brazil's determination was "reasonable in light of the circumstances of the case." *Id.* paras. 5.217-5.218. While the Arbitrator was not persuaded that the "very granting" of the subsidies by the United States was sufficient to create the required "serious enough" circumstances, the Arbitrator agreed with Brazil that "the specific design and structure of the subsidies at issue, as they have been maintained over a significant period of time, is such as to have created an artificial and persisting competitive advantage for US producers over all other operators, and that this has a significant trade-distorting impact, not just on the US domestic market, but on the world market in these products." *Id.* para. 5.219. Adding to this the amplified trade-distorting impact of the increased payments under GSM-102 program during the current credit crisis, a situation also cited by Brazil, the Arbitrator found that these factors in combination supported the required determination. *Id.* para. 5.220. In addition, the Arbitrator agreed that the disproportionate adverse impact of suspending concessions or other obligations on a Member's economy was also a relevant consideration. The Arbitrator found that the fact that countermeasures involving trade in goods would no longer be "practicable or effective" for Brazil if a specified monetary threshold is reached would in this case "also directly contribute to the circumstances being 'serious enough' to justify recourse to suspension under another agreement." *Id.* para. 5.221.

[385] *Id.* para. 5.201.

[386] *Id.* para. 5.181.

[387] *Id*. paras. 5.201, 5.230-5.236.

### Retaliation for Actionable Subsidies

The United States preliminarily argued in the arbitration involving actionable subsidies that, with the expiration of the 2002 farm bill, payments would no longer be made under the marketing loan and countercyclical payments programs at issue in Brazil's WTO challenge and that, because the challenged measures were removed, there was no longer a legal basis for Brazil to impose countermeasures with regard to these payments. Brazil argued that because these programs were reauthorized in the 2008 farm bill in a manner that did not materially change them as they applied to cotton, the problematic payments would continue under the same conditions and criteria as the payments subject to the earlier WTO proceedings. Until the United States achieved what the WTO Appellate Body deemed "substantial compliance," Brazil claimed that it had the right to pursue countermeasures for continuing present serious prejudice. The United States responded that Brazil's conclusions about payments that might be made under the 2008 farm bill and their price effect were speculative.

In assessing whether the United States had complied, the Arbitrator quoted from the Appellate Body report referred to by Brazil, in which the Appellate Body had stated that for purposes of determining whether a WTO Member has complied in a case, "substantive compliance is required, rather than formal removal of the inconsistent measure."[388] Informed by this principle, the Arbitrator compared the 2002 and 2008 farm bills and concluded that the replacement of the 2002 provisions with new measures that are "essentially the same" as those found to be WTO-inconsistent was not a basis for finding that the United States had complied, if the United States had not shown that "the inconsistencies that were the object of the [prior WTO] proceedings have been remedied."[389] Seemingly alluding to possible activity under the reauthorized CCP and marketing loan provisions, the Arbitrator noted that "any uncertainty about what might happen in the future" could not dissuade the Arbitrator from "assessing the adverse effects determined to exist in relation to a measure which did exist and which, on the facts, continues to exist."[390] The Arbitrator thus stated that "although the legal basis for the granting of ML and CCPs has been modified, such payments continue to be offered and may continue to be made under a new legal basis."[391] The Arbitrator concluded that, to the extent that it was entitled to review whether compliance has been achieved in a case (a task it earlier admitted was not normally the task of arbitrators), it would not have adequate grounds to conclude that the United States had complied.[392] Further noting that the findings in the underlying WTO proceedings related to the payments under the 2002 farm bill and not to the farm bill as such, the Arbitrator concluded that the United States had failed to establish that Brazil no longer had a legal basis to seek countermeasures for payments under these two programs.[393]

The Arbitrator ultimately determined that Brazil could impose countermeasures for the actionable subsidies in an amount not to exceed $147.3 million annually.[394] The Arbitrator arrived at this figure by first determining that the world cotton price would have been 9.38 % higher but for the

[388] U.S. Cotton Arbitrator's Decision II, *supra* note 379, para. 3.19, *quoting* Appellate Body Report, *United States-Continued Suspension of Obligations in the EC—Hormones Dispute*, para. 308, WT/DS320/AB/R (October 16, 2008).

[389] *Id*. paras. 3.25-3.28.

[390] *Id.* para. 3.28.

[391] *Id.* para. 3.29.

[392] *Id.* paras. 3.30.

[393] *Id.* paras. 3.31-3.32.

[394] U.S. Cotton Arbitrator's Decision II, *supra* note 379, paras. 4.193-4.195.

U.S. programs, with adverse effects for the rest of the world of $2.905 billion in marketing year (MY) 2005. The Arbitrator further found that this overall amount needed to be apportioned to Brazil, basing this apportionment on Brazil's 5.1% share of worldwide cotton production for the same marketing year, or $147.3 million.

The Arbitrator also found that Brazil may cross-retaliate with regard to the actionable subsidies only if the total amount of permissible countermeasures for a given year (i.e., $284.7 million, as adjusted) exceeds the monetary import threshold (i.e., $409.7 million, as adjusted).[395] Since annual countermeasures for the actionable subsidies is fixed at $147.3 million, the use of cross-retaliation will depend on annual increases in countermeasures due to increased U.S. payments under the prohibited subsidy, that is, the GSM-102 export credit guarantee program.

### Brazil's Preparation of Retaliatory Measure/Bilateral Negotiations to Resolve the Dispute

After the WTO arbitral panel issued its August 2009 reports setting out the permissible scope of Brazil's requested retaliation for both prohibited and actionable U.S. subsidies, Brazil asked the United States to provide it with information on transactions under the GSM-102 export credit guarantee program for FY2008 and FY2009 and the most recent data on U.S. export prices of products for which the United States had made export subsidy reduction commitments ("scheduled" products), namely, pig meat, poultry meat, and rice, for 2008 and 2009.[396] Brazil's request was based on language in the Arbitrator's report on prohibited subsidies directing the United States to provide such data to Brazil to enable it to calculate its annual countermeasures under the formula set out in the report.[397]

In early November 2009, Brazil published a preliminary list of over 200 U.S. products, primarily consumer and agricultural goods, that could potentially be subject to increased tariffs.[398] On November 19, 2009, the WTO Dispute Settlement Body approved Brazil's request to impose countermeasures against the United States consistent with the August 2009 Arbitrator's decisions.[399] The United States stated at the DSB meeting that it intended to comply and hoped that a resolution of the dispute could be reached, obviating any need for Brazil to impose tariff increases and other authorized measures.[400] WTO dispute settlement rules do not require that Brazil impose countermeasures once it is authorized to do so or that it impose these measures by a given date.

As Brazil prepared for and pursued its retaliation request during the fall of 2009, the USDA tightened requirements for the GSM-102 program for FY2010. On September 21, 2009, the Commodity Credit Corporation (CCC) and the Foreign Agricultural Service (FAS) solicited

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[395] *Id.* paras. 5.230-5.233.

[396] Communication from Brazil, *United States—Subsidies on Upland Cotton*, WT/DS267/40 (September 30, 2009).

[397] The formula is set out in Annex 4 of U.S. Cotton Arbitrator's Decision I, *supra* note 379.

[398] *Brazil to Seek WTO Okay for Cotton Sanctions, Issues List of Possible U.S. Imports Targeted*, 26 Int'l Trade Rep. (Bloomberg BNA) 1552 (November 12, 2009).

[399] WTO News Item, DSB authorizes Brazil countermeasures in "cotton" case, established "COOL" and poultry panels (November 19, 2009), at http://www.wto.org/english/news_e/news09_e/dsb_19nov09_e.htmPhttp://www.wto.org/english/news_e/news09_e/dsb_19nov09_e.htm.

[400] Statements by the United States at the DSB Meeting, Item 7, November 19, 2009, at http://geneva.usmission.gov/2009/11/19/1119dsb.

comments from stakeholders on revisions to the GSM-102 fee rate schedule.[401] The revisions were being proposed to implement requirements in the 2008 farm bill to develop a risk-based fee structure for the program. In November 2009, CCC posted higher program fees than those proposed earlier.[402] In addition, CCC announced that maximum credit terms for FY2010 would be based on the risk category of the obligor country associated with the CCC payment guarantees, with shorter repayment terms or "tenor" as country risk category increased.[403]

On December 21, 2009, Brazil reported to the WTO Dispute Settlement Body that, based on U.S.-supplied fiscal and calendar year data for 2008, it was entitled to annual retaliation of $829.3 million, with $561 million covering trade in goods and $268.3 million covering other sectors and agreements.[404] At the same time, Brazil delayed announcing a final list of sanctioned products as the two countries engaged in negotiations on at least a temporary resolution of the dispute.[405] On March 12, 2010, however, Brazil notified the WTO that, beginning on April 7, it intended to impose up to $829.3 million in retaliation against the United States, $591 million of which would consist of tariff increases on various agricultural products, cosmetics, cotton textiles, appliances, motor vehicles, and other items.[406] The remainder would involve the suspension of unspecified concessions under the Agreement on Trade Related Intellectual Property Rights (TRIPS) or the General Agreement on Trade in Services (GATS), or both.

## Recent Developments

On April 6, 2010, the United States and Brazil announced a preliminary agreement in the cotton dispute that temporarily forestalled the imposition of WTO-authorized sanctions by Brazil against the United States. The United States agreed (1) to establish a fund with Brazil to provide technical assistance and capacity building to Brazilian cotton farmers and to contribute approximately $147.3 million to the fund per year on a *pro rata* basis; (2) to make some "near term" modifications of the GSM-102 program and engage in bilateral discussions on the further operation of the program; and (3) to address various food safety issues involving Brazilian exports to the United States.[407] Regarding food safety, the United States agreed that it would

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[401] Solicitation of Input from Stakeholders on Revised Fees for the Export Credit Guarantee (GSM-102) Program, 74 *Federal Register* 48014 (September 21, 2009).

[402] USDA, Foreign Agricultural Service, GSM-102 Guarantee Fee Rate Schedule, updated on November 17, 2009, at http://www.fas.usda.gov/excredits/gsm102fees.html (visited December 2009).

[403] News Release, USDA, Foreign Agricultural Service, Notice to GSM-102 Program Participants, at http://www.fas.usda.gov/scriptsw/PressRelease/pressrel_dout.asp?PrNum=0280-09; USDA, Foreign Agricultural Service, Country Risk Ratings (for the GSM-102 Program), updated on December 7, 2009, at http://www.fas.usda.gov/excredits/countryrisk.html.

[404] WTO News Item, DSB establishes panel to examine China's export restrictions of raw materials (December 21, 2009), at http://www.wto.org/english/news_e/news09_e/dsb_21dec09_e.htm; *Brazil Says Entitled to Impose $829 Million in Annual Sanctions on U.S. in Cotton Case*, 26 Int'l Trade Rep. (Bloomberg BNA) 1776 (December 24, 2009).

[405] E.g., *U.S., Brazil to Discuss U.S. Proposal in Cotton Dispute Next Week*, INSIDE U.S. TRADE, March 5, 2010, at 5.

[406] Brazil stated that, based on the arbitrator's formula, it was entitled to impose countermeasures in the annual amount of $892.3 million, a figure reflecting the fixed level of $147.3 million and an additional $682 million based on data for FY2008 and calendar year 2008 for the GSM-102 program. The amounts designated for the suspension of concessions on imported goods and the suspension of obligations under the Agreement on TRIPS and/or the GATS were based on a threshold of $56l million in imports from the United States during the same period. Because the total amount of retaliation for the year exceeded the threshold for trade in goods with the United States, Brazil intended to fill the gap with sanctions under WTO agreements pertaining to services and intellectual property rights. Communication from Brazil, *United States—Subsidies on Upland Cotton*, WT/DS267/43 (March 12, 2010).

[407] Press Release, Office of the United States Trade Representative, U.S., Brazil Agree Upon Path Toward Negotiated (continued...)

publish a proposed rule by April 16, 2010, declaring that the Brazilian state of Santa Catarina is free of various diseases, complete an ongoing risk analysis for the area, and "identify appropriate risk mitigation measures to determine whether fresh beef can be imported from Brazil while preventing the introduction of foot-and-mouth disease in the United States."[408] In return, Brazil postponed its retaliatory measures until April 22, but also agreed that if sufficient progress were made under the preliminary agreement by April 21, it was willing to suspend its measures for an additional 60 days.[409]

On the same day the agreement was announced, the USDA stated that, effective April 9, it was canceling all unused balances of the GSM-102 export credit program announcements issued for FY2010 and that, if any unused allocations remained under these announcements, it would issue new announcements making the allocations available under new guarantee fee rates.[410] On April 16, the USDA issued a proposed rule adding Santa Catarina to a list of regions considered free of foot-and-mouth disease (FMD), rinderpest, swine vesicular disease, classical swine fever, and African Swine fever, an action that USDA stated "would relieve certain restrictions on the importation into the United States of live swine, swine semen, pork meat, pork products, live ruminants, ruminant semen, ruminant meat, and ruminant products" from that region "while continuing to protect against the introduction of these diseases into the United States."[411] On April 20, the parties signed a memorandum of understanding providing for the above-described fund for Brazilian cotton farmers.[412] According to USTR, the fund "is scheduled to continue until the next Farm Bill or a mutually agreed solution to the Cotton dispute is reached" and may be terminated by the United States if Brazil imposes retaliatory measures.[413] On the same day, USDA activated a fee increase for most transaction categories in the GSM-102 program.[414]

On June 25, 2010, the United States and Brazil signed a framework agreement aimed at permanently settling the cotton dispute, including a pledge by Brazil not to impose authorized countermeasures during the life of the agreement and an understanding that the dispute may be legislatively resolved in the 2012 farm bill. The agreement provides for (1) bilateral discussions on U.S. domestic cotton support; (2) semi-annual reviews of the GSM-102 program to determine

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Solution of Cotton Dispute (April 6, 2010), at http://www.ustr.gov/about-us/press-office/press-releases/2010/april/us-brazil-agree-upon-path-toward-negotiated-solution.

408 *Id.*

409 *Brazil-U.S. Cotton Deal Sets Out Two Deadlines for Further U.S. Action*, INSIDE U.S. TRADE, April 9, 2010, at 1.

410 News Release, U.S. Department of Agriculture, USDA Amends GSM-102 Credit Guarantees for Fiscal Year 2010 (April 6, 2010), at http://www.fas.usda.gov/scriptsw/PressRelease/pressrel_dout.asp?Entry=valid&PrNum=0074-10.

411 Changes in Disease Status of the Brazilian State of Santa Catarina with Regard to Certain Ruminant and Swine Diseases, 75 *Federal Register* 19915 (April 16, 2010).

412 Press Release, Office of the USTR, U.S., Brazil Agree on Memorandum of Understanding As Part of Path Forward Toward Resolution of Cotton Dispute, at http://www.ustr.gov/about-us/press-office/press-releases/2010/april/us-brazil-agree-memorandum-understanding-part-path-f. Payments into the fund are being made by the Commodity Credit Corporation (CCC), the Administration reportedly having determined that export promotion language in the CCC Charter Act permits the use of CCC funds for this purpose. *U.S. Brazil Sign Cotton Fund MOU, But Key Issues Remain Unresolved*, INSIDE U.S. TRADE, April 23, 2010, at 1[hereinafter *Cotton MOU Signed*]; *USDA Determined CCC Charter Act Allows Funding of Brazil Cotton Deal*, INSIDE U.S. TRADE, April 16, 2010, at 16. Questions reportedly remained, however, as to whether the act permitted use of CCC-provided funds for research purposes by Brazilian farmers. *Cotton MOU Signed*, *supra*, at 22.

413 *Id.*

414 News Release, U.S. Department of Agriculture, Notice to GSM-102 Program Participants (April 19, 2010), at http://www.fas.usda.gov/scriptsw/PressRelease/pressrel_dout.asp?Entry=valid&PrNum=0083-10.

whether program usage exceeds $1.3 billion for the relevant six-month period and thus whether USDA must implement an agreed-upon increase in program fees; (3) bilateral consultations at least four times a year on issues relevant to the dispute; (4) Brazil's agreement not to impose countermeasures as long as the agreement is not terminated; and (5) upon the enactment of a successor to the 2008 farm bill, consultations to determine whether the statute provides a mutually agreed resolution to the dispute.[415] The United States and Brazil notified the WTO of their agreement on August 27, 2010.

The United States reportedly began making payments into the cotton fund for Brazilian farmers in June 2010.[416] Further, the United States and Brazil reportedly determined during the October 2010 GSM-102 review, the first semi-annual review under the framework agreement, that actual usage of the GSM-102 program from April through September 2010 approached, but did not exceed, the $1.3 billion threshold and thus an automatic increase in fees for the program was not triggered.[417] The USDA issued a final rule regarding the disease-free status of the state of Santa Catarina on November 16, 2010.[418]

The USDA, which must release $5.5 billion in GSM-102 allocations each year, announced its first set of FY2011 allocations at the end of October 2010.[419] In addition, USDA announced new GSM-102 guarantee fees, effective February 17, 2011, aimed in part at encouraging the use of loans of shorter length (or "tenor"), a less desirable alternative for exporters.[420] A joint U.S.-Brazil review of the GSM-102 program, tasked with examining actual usage of the program for the six-month period from October 2010 through March 2011, took place in April 2011. Following the review, USDA increased GSM-102 fees based on the amount of program usage during the six-month review period, as called for in the framework agreement.[421] In the six-month joint review held in October 2011, usage of the GSM-102 program was again found to exceed agreed-upon levels, with USDA once more raising its program fees as a result.[422]

On June 16, 2011, the House passed H.R. 2112, appropriations legislation for the Department of Agriculture, with a provision that would have prohibited the USDA from using appropriated funds for FY2012 to provide payments to the Brazil Cotton Institute for the fund established in

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415 Framework for a Mutually Agreed Solution to the *Cotton* Dispute in the World Trade Organization (WT/DS267), *in* Joint Communication from Brazil and the United States, *United States—Subsidies on Upland Cotton*, WT/DS267/45 (August 31, 2010), at 2-5.

416 *U.S. Begins Cotton Payments, Brazilian Institute to Decide on Uses*, INSIDE U.S. TRADE, August 27, 2010, at 12.

417 *U.S. Brazil Find GSM Usage Below Fee-Increase Trigger of $1.3 Billion*, INSIDE U.S. TRADE, October 29, 2010, at 8; *Brazil Satisfied with U.S. Implementation of Cotton Subsidies Framework Agreement*, 27 Int'l Trade Rep. (Bloomberg BNA) 1693 (November 4, 2010).

418 Changes in Disease Status of the Brazilian State of Santa Catarina With Regard to Certain Ruminant and Swine Diseases, 75 *Federal Register* 69851 (November 16, 2010); News Release, USDA, USDA Changes Disease Status of the Brazilian State of Santa Catarina with Regard to Certain Ruminant and Swine Diseases, at http://www.aphis.usda.gov/newsroom/content/2010/11/brazil_swine.shtml.

419 See list of announcements at http://www.fas.usda.gov/2010/whatsnewoct2010.asp.

420 GSM-102 Guarantee Fee Rate Schedule, effective February 17, 2011, at http://www.fas.usda.gov/excredits/gsm102fees.html (visited March 8, 2011); see also *USDA Adjusts GSM 102 Fees to Help Comply with U.S.-Brazil Cotton Deal*, INSIDE U.S. TRADE, March 4, 2011, at 13.

421 *USDA Hikes Up GSM Fees After Usage Exceeds Framework Threshold*, INSIDE U.S. TRADE, April 29, 2011, at 17.

422 *GSM Usage Again Exceeds Trigger Set Out in Cotton Framework Deal*, INSIDE U.S. TRADE, October 21, 2011, at 21; GSM-102 Guarantee Fee Rate Schedule, effective October 24, 2011, at http://www.fas.usda.gov/excredits/gsm102fees.html.

the framework agreement.[423] Such a prohibition did not appear in the Senate-passed version of the bill and was not included in the final public law.[424]

In January 2012, the Brazilian Ambassador to the World Trade Organization wrote to the chairmen and ranking members of the House and Senate agriculture committees that various cotton-related proposals suggested for inclusion in the 2012 farm bill "would result in subsidy programs that are more trade-distortive than the programs currently in place," noting further that modifications to the GSM-102 program, which Brazil views as essential to U.S. compliance in the case, had not been the subject of any legislative proposals to date.[425] As of the date of this report, the passage of a new 2012 farm bill, and thus the possible enactment of provisions to resolve the U.S.-Brazil cotton dispute, is uncertain. Further, the April 2012 bilateral operational review of the USDA's GSM-102 loan guarantee program reportedly found that U.S. exporters' usage of the program for the previous six months exceeded a $1.5 billion benchmark established in the 2010 bilateral framework agreement, requiring the USDA to increase its premiums for the program by at least 15%.[426]

## Measures Affecting Trade in Large Civil Aircraft (Second Complaint) ("Boeing" Case) (DS353)

The United States and the European Union (EU) challenged each other in the WTO in October 2004 regarding alleged government subsidies provided by each to their major airline manufacturers in what is referred to as the "Boeing/Airbus" dispute. Although a panel began hearing the case in the original EU proceeding (DS317), the panel did not issue a report. In June 2005, however, shortly before the first panel was established, the EU submitted a second complaint, which is the basis of the current dispute proceeding against the United States (DS353).[427] WTO dispute panels and the WTO Appellate Body (AB) ultimately found that the EU provided injurious subsidies to Airbus and that the United States provided prohibited export subsidies and injurious export and domestic subsidies to the Boeing Corporation in violation of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). While each dispute is currently in the compliance phase, the EU challenge to U.S. aircraft subsidies focused on in this report is at an earlier point in the implementation process. Panel and Appellate Body reports in the U.S. challenge were adopted by the WTO Dispute Settlement Body (DSB) on June 1, 2011, with those in the EU challenge adopted on March 23, 2012.[428]

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[423] Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2012, H.R. 2112, 112th Congress, §751, as passed the House. The House-passed provision states: "None of the funds made available by this Act may be used to provide payments (or to pay the salaries and expenses of personnel to provide payments) to the Brazil Cotton Institute."

[424] See Consolidated and Further Continuing Appropriations Act, 2012, P.L. 112-55, Div. A, Tit. VII.

[425] See, e.g., Letter from Roberto Azevêdo, Permanent Representative of Brazil to the World Trade Organization and other Economic Organizations in Geneva, to Hon. Collin Peterson, Ranking Member, House Committee on Agriculture, January 2012, as posted on http://www.brazilcouncil.org/sites/default/files/LetterfromARAtoRep.PetersonJanuary2012.pdf.

[426] See *GSM Usage Again Exceeds Benchmark Set Out in Brazil Cotton Deal*, INSIDE U.S. TRADE, April 20, 2012, at 22.

[427] The United States filed a second complaint on EC aircraft subsidies in January 2006 (DS347), but later asked the panel to suspend its work. Absent further communication from the United States, the panel's authority lapsed in October 2007. See *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint),* at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds347_e.htm.

[428] For discussions of the panel and Appellate Body findings in the U.S. challenge to EU aircraft subsidies, see (continued...)

### U.S. WTO Case Against the European Union ("Airbus" Case) (DS316)

In the pending proceeding involving EU aircraft subsidies ("Airbus" case), the EU informed the DSB on December 1, 2011, that it had complied with its WTO obligations, meeting the six-month compliance deadline for subsidy disputes set out in Article 7.9 of the SCM Agreement. [429] The United States disagreed and on December 9, 2011, requested authorization from the DSB to retaliate against the EU in an estimated annual amount of $7 billion to $10 billion.[430] The United States also initiated consultations with the EU regarding a compliance panel under Article 21.5 of the WTO Dispute Settlement Understanding (DSU) on the same day. The EU objected to the U.S. retaliation request on December 22, 2011, sending it to arbitration. The United States and the EU entered into a procedural agreement on January 12, 2012, permitting the compliance proceeding and the arbitration (if needed) to proceed sequentially.[431] Under the agreement, the arbitration has been suspended and the parties will expedite any compliance panel proceeding. At the request of the United States, the DSB established a compliance panel on April 13, 2012.[432] If the EU is found to be out of compliance in the case, the U.S. or the EU may request that the arbitration of the U.S. sanctions request be resumed.

A main issue of concern to the United States in its compliance challenge in the Airbus case is the provision of "launch aid" by EU for two Airbus models, the A380 and the A350. The United States is arguing that the EU has not yet removed the largest launch aid subsidies for the A380, which, while not found to be prohibited subsidies in the original proceeding, were nonetheless found to cause serious prejudice to U.S. interests.[433] The United States has also expressed concerns over new launch aid for the Airbus A350, aid that is not covered by the WTO decision in DS316 but that the U.S. maintains exacerbates the subsidy problems addressed in the case.[434] The United States had unsuccessfully argued that all launch aid is part of a unified EU program, a finding that may have made it easier for the United States to challenge any new EU assistance of this type. [435]

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*European Communities—Measures Affecting Trade in Large Civil Aircra*ft, at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds316_e.htm, and Simon Lester, *The WTO* EC—Aircraft *Panel and Appellate Body Reports on Subsidies,* ASIL Insights, July 14, 2011, at http://www.asil.org/insights110714.cfm.

[429] Communication from the European Union, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/17 (December 5, 2011).

[430] Recourse to Article 7.9 of the SCM Agreement and Article 22.2 of the DSU by the United States, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/18 (December 12 2011).

[431] Understanding between the European Union and the United States Regarding Procedures under Articles 21 and 22 of the DSU, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/21 (January 17, 2012).

[432] For details on the concerns of the United States regarding EU compliance, see Request for the Establishment of a Panel, Recourse to Article 21.5 of the DSU by the United States, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/23 (April 3, 2012).

[433] WTO News Item, Dispute panel to examine EU compliance in Airbus case (April 13, 2012), at http://www.wto.org/english/news_e/news12_e/dsb_16apr12_e.htm.

[434] *Id.*; U.S. Statements at the April 13, 2012 Meeting of the WTO Dispute Settlement Body, at http://geneva.usmission.gov/2012/04/13/wto-dsb/.

[435] See Appellate Body Report, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft,* paras. 778-796, WT/DS316/AB/R (May 18, 2011).

### *EU Panel Request*

The SCM Agreement, at Article 1.1 defines the term "subsidy" as a financial contribution by a government or any public body within a WTO Member's territory that confers a benefit. A financial contribution may take the form of a direct transfer of funds, such as a grant, loan, or equity infusion; the foregoing of revenue that is "otherwise due," such as a tax credit; or government provision of goods or services or the purchase of goods. Article 3 of the Agreement prohibits subsidies contingent on export performance and subsidies contingent on the use of domestic over imported products. Subsidies that are not prohibited, but that fall within the Agreement's definition of a subsidy are deemed "actionable" under Article 5 of the Agreement; that is, they may be challenged by a WTO Member if they are alleged to cause one or more types of "adverse effects" to the Member's interests: (1) material injury to a domestic industry; (2) impairment of a tariff concession; or (3) "serious prejudice." To successfully challenge a subsidy, the complaining Member must also show that the subsidy is "specific" in law or in fact to an industry or group of industries under principles set out in Article 2 of the SCM Agreement. Prohibited subsidies are considered to be specific *per se*, however, and thus complainants do not need to make this showing when challenging subsidies of this type. What constitutes "serious prejudice" is set out in Article 6.3 of the Agreement, which lists such adverse economic effects as significant price suppression, displacement of exports, and significant lost sales.[436]

In its panel request, the EU cited subsidies granted to the Boeing Corporation by the states of Washington, Kansas, and Illinois, identifying a variety of "tax breaks, bond financing, fee waivers, lease arrangements, corporate headquarters relocation assistance, research funding, and infrastructure measures and other benefits."[437] The EU also alleged various subsidies on the federal level, claiming that, through a variety of cited programs, the National Aeronautics and Space Administration (NASA), the Department of Defense (DOD), the National Institute of Standards and Technology (NIST), the Department of Labor, and various statutory tax incentives transferred to the U.S. large civil aircraft (LCA) industry economic resources on terms more favorable than available on the market or at arm's length.[438]

The EU claimed two types of violations: (1) that the U.S. Foreign Sales Corporation (FSC) program, as modified in subsequent enactments, and a tax reduction under Washington State law constituted export subsidies prohibited under Article 3 of the SCM Agreement, and (2) that all of the subsides alleged by the EU were actionable under Article V of the SCM Agreement as they were specific and caused adverse effects to the interests of the EU, specifically, "serious prejudice" as contemplated by Articles 5(c) and 6.3 of the SCM Agreement. The EU also alleged violations of agreed levels of industry support contained in the bilateral 1992 U.S.-EU Agreement on Trade in Large Civil Aircraft (LCA Agreement), an agreement from which the United States withdrew the same day that it filed its WTO complaint against EU aircraft subsidies (October 6, 2004). The EU estimated that the alleged U.S. subsidies amounted to $14.1 billion between 1989

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[436] For background on the WTO Agreement on Subsidies and Countervailing Measures, see CRS Report R4130CRS Report R41306, *Trade Law: An Introduction to Selected International Agreements and U.S. Laws*.

[437] Request for the Establishment of a Panel by the European Communities, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, at 2, WT/DS317/5 (January 23, 2006), WT/DS353/2/Corr.1, WT/DS317/Add.1/Corr.1 (December 8, 2006).

[438] *Id*. at 5-12.

and 2006, more than half of which ($10.4 billion) was attributable to alleged research and development (R&D) subsidies provide by NASA.[439]

The EU argued that the United States maintained an export subsidy on the federal level in providing tax benefits to U.S. companies under the U.S. Foreign Sales Corporation (FSC) program, 26 U.S.C. §§921-927, as well as through subsequent statutes enacted to repeal and replace it, namely the FSC Repeal and Extraterritorial Income Exclusion Act of 2000 (ETI Act) and the American Jobs Creation Act of 2004, which repealed the 2000 statute. The FSC program had been found to constitute an export subsidy in violation of the SCM Agreement in an earlier dispute brought by the EU (DS108). Transition and grandfathering clauses in the 2000 and 2004 acts, which permitted Boeing to continue to receive FSC benefits under existing contracts, were a particular source of contention in the Boeing case. In 2005, Congress repealed the objectionable provision in the 2004 statute in response to adverse panel and AB reports in compliance proceedings in DS108.[440]

Among the forms of serious prejudice alleged by the EU in its Article V claims were:

- price undercutting by subsidized U.S. aircraft of competing EU products in world, EU, U.S., and third country markets where the U.S. and EU producers compete;
- significant depression and suppression of the prices of competing EU LCA products in these markets;
- significant lost sales of competing EC LCA products in these markets; and
- the displacement and impeding of exports of competing EU LCA products in the U.S. and third country markets.

A panel was established on February 17, 2006. Because of the complexity of the case, the panel did not issue a final report to the disputing parties until January 31, 2011.[441] The panel report was made public on March 31, 2011.

## Panel Report

The WTO panel issued a mixed ruling in the case, finding that the United States had provided prohibited subsidies and specific subsidies causing adverse effects, while rejecting a number of EU claims and declining to rule on whether the specific subsidies caused serious prejudice in the form of a *threat* of significant price suppression or whether the United States had violated the bilateral LCA Agreement. [442] Regarding the EU's prohibited subsidy claims, the panel concluded

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[439] See WTO Secretariat, *United States—Measures Affecting Trade in Large Civil Aircraft—Second Complaint*, under Panel and Appellate Body Proceedings, Summary of Key Findings, para. 2, at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds353_e.htm [hereinafter WTO Secretariat Summary (DS353)].

[440] For further discussion of the FSC/ETI program, see generally CRS Report RS20746, *Export Tax Benefits and the WTO: The Extraterritorial Income Exclusion and Foreign Sales Corporations*, by David L. Brumbaugh; CRS Report RL31660, *A History of the Extraterritorial Income (ETI) and Foreign Sales Corporation (FSC) Export Tax-Benefit Controversy*, by David L. Brumbaugh.

[441] *WTO Panel Issues Final Ruling Siding in Part with EU Claims of U.S. Subsidies for Boeing*, 28 Int't Trade Rep. (Bloomberg BNA) 184 (February 3, 2011); *Final WTO Panel Affirms Boeing Received Illegal NASA, DOD Subsidies*, INSIDE U.S .TRADE, February 4, 2011, at 1.

[442] Panel Report, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R (continued...)

that the FSC/ETI measures that were in force at the time that the panel was established (provisions that have since been repealed) constituted prohibited export subsidies under Article III of the SCM Agreement, but that the EU had not shown that challenged Washington State tax measures qualified as such. The panel also found that of the 31 subsidies alleged to be specific by the EU, only 15 qualified as such; moreover, the panel estimated that, in total, they provided at least $5.3 billion in subsidies to Boeing's LCA division between 1989 and 2006, less than half the amount originally claimed by the EU.[443]

The panel grouped the specific subsidies into three categories: (1) aeronautics R&D subsidies provided by NASA and DOD; (2) tax subsidies; and (3) other subsidies, including property and sales tax relief provided to Boeing under Industrial Revenue Bonds (IRBs) issued by the city of Wichita, KS; various tax credits and exemptions and employment assistance provided by the state of Washington; relocation reimbursement, tax credits, and tax abatement by the state of Illinois; and assistance related to Boeing's move to new headquarters in Chicago. The panel found, however, that only some of these specific subsidies caused serious prejudice to EU interests. In particular, the panel found that:

- NASA and DOD R&D aeronautics subsidies affected Boeing's development of technologies for the Boeing 787 Dreamliner, causing adverse effects in the 200-300 seat wide-body product market, specifically significant price suppression of the Airbus A330 and Original A350; significant lost sales of the A330 and original A350; and the threat and threat of displacement and impedance of EC exports of the A330 and Original A350 from third-country markets;
- the FSC/ETI subsidies and the Washington State business and occupation (B&O) tax rate reduction affected Boeing's pricing of the 737NG, causing adverse effects in the 100-200 seat single-aisle LCA product market, specifically significant price suppression of the Airbus A320, significant lost sales of the A320, and displacement and impedance of EC exports of the A320 from third country markets;
- the FSC/ETI subsidies and B&O tax subsidies provided by the state of Washington and the City of Everett, WA, affected Boeing's pricing of the Boeing 777, causing adverse effects in the 300-400 seat wide-body LCA product market, specifically significant price suppression of the Airbus A340, significant lost sales of the A340, and displacement and impedance of EC exports from third country markets.[444]

The panel refrained from making a recommendation as to compliance with its rulings on the FSC/ETI measures, noting (1) that "the FSC/ETI measures in force at the time of the Panel's establishment have been substantially changed during the course of the present proceedings and indeed it appears that the measure is no longer in force with respect to Boeing" and (2) that the rulings in the FSC dispute (DS108) were still "operative" and thus the United States would be subject to those rulings to the extent that it had not already withdrawn the FSC/ETI subsidies to

(...continued)

(March 31, 2011)[hereinafter U.S. Aircraft Panel Report].

[443] *Id.* paras. 7.1429-7.1433.

[444] *Id.* paras. 7.1590-7.1855; see also Table 2 in the Appellate Body report issued in this case, *infra* note 447, at page 368.

Boeing.[445] With regard to the adverse effects, however, the panel recommended, consistent with the prescription in Article 7.8 of the SCM Agreement, that once the panel and any Appellate Body reports were adopted, the United States "take appropriate steps to remove the adverse effects or … withdraw the subsidy."[446] Both the United States and the EU appealed the ruling.

### *Appellate Body Report*

The Appellate Body, in a report publicly circulated on March 12, 2012, again issued a mixed ruling, confirming the existence of NASA and DOD aeronautics subsidies and the specificity of the subsidies provided by the Washington State B&O tax rate reduction and the Wichita IRBs, but, unlike the panel, finding that all DOD programs cited by the EU constituted subsidies and that the Wichita IRBs caused adverse effects. The AB, however, limited some of the adverse effects caused by the specific subsidies that the panel had found.[447] Addressing a systemic issue, the AB found that the information-gathering procedure for serious prejudice cases provided for in Annex V of the SCM Agreement, a mechanism for obtaining "information from the government of the subsidizing Member as necessary to establish the existence and amount of subsidization, the value of total sales of the subsidized firms, as well as information necessary to analyse the adverse effects caused by the subsidized products," is initiated automatically when a disputing party requests the procedure and a panel is established and does not require the consensus of the WTO Dispute Settlement Body.

Among the findings made by the AB regarding the existence and effects of subsidization are the following:

- ***Financial contribution/benefit (eight NASA R&D programs):*** the AB invalidated the panel's finding that government "purchases of services" are excluded from the definition of a financial contribution in Article 1.1(a)(1) of the SCM Agreement, an argument made by the United States, and instead found that the payment and access to facilities, equipment, and employees provided to Boeing under NASA procurement contracts constituted direct transfers of funds and the provision of goods or services and thus financial contributions under the definition; it also upheld for different reasons the panel's finding that these actions conferred a benefit on Boeing, rejected the U.S. claim that the panel erred in estimating the amount of the subsidy provided, and upheld the panel's findings that the estimated value of the NASA procurement-related subsidies totaled $2.6 billion;
- ***Financial contribution/benefit (23 DOD Research, Development, Testing and Evaluation (RDT&E) programs):*** the AB found that payments and access to facilities provided to Boeing under all 23 DOD (instead of just the two programs

[445] *Id.* paras. 8.6-8.7

[446] *Id.* paras. 8.8-8.9.

[447] Appellate Body Report, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint),* WT/DS353/AB/R (March 12, 2012). Addressing a systemic issue, the AB also found that the information-gathering procedure for serious prejudice cases provided for in Annex V of the SCM Agreement, a mechanism for obtaining "information from the government of the subsidizing Member as necessary to establish the existence and amount of subsidization, the value of total sales of the subsidized firms, as well as information necessary to analyse the adverse effects caused by the subsidized products," is initiated automatically when a disputing party requests the procedure and a panel is established and does not require the consensus of the WTO Dispute Settlement Body.

cited by the panel) also constituted direct transfers of funds and the provision of goods or services and thus financial contributions under Article 1.1; it also upheld for different reasons the panel's finding that DOD programs conferred a benefit on Boeing;

- ***Financial contribution (Washington State B&O tax rate reduction):*** the AB upheld the panel's finding that the state's reduction of the tax rate applicable to commercial aircraft and component manufacturers constituted the foregoing of revenue otherwise due and thus a financial contribution under Article 1.1;
- ***Specificity (allocation of patent rights under NASA/DOD contracts):*** the AB found that, with respect to the allocation of patent rights under contracts and agreements between NASA and DOD and Boeing, and on the assumption that each allocation is a subsidy in and of itself, the subsidy is not explicitly limited to certain enterprise, that is, is not specific in law; while the AB also found that the panel erred in not examining whether such allocation was specific "in fact" as argued by the EU, and thus could not uphold the panel's finding that these measures were not specific, the AB declined to find *de facto* specificity;
- ***Specificity (Washington State B&O tax rate reduction and Wichita IRBs):*** the AB upheld the panel's findings that the Washington State tax rate reduction is a subsidy that is specific in law and that the Wichita IRBs are subsidies that are specific in fact;
- ***Adverse effects (technology effects of aeronautics R&D subsidies):*** the AB modified and upheld that panel's overall conclusion that the aeronautics R&D subsidies caused serious prejudice with respect to the 200-300 seat LCA market, inter alia, finding that the panel was correct in finding that these subsidies "contributed in a genuine and substantial way to Boeing's development of technologies for the 787" in 2004; upholding the panel's finding that the effect of these subsidies is significant lost sales with respect to the 200-300 seat LCA market; reversing the panel's finding that, insofar as it relates to Kenya, Iceland, and Ethiopia, that the effect of the subsidies is a *threat* of displacement and impedance of EC exports in third country markets with respect to the 200-300 seat LCA market; and upholding the panel's finding that the effect of these subsidies is significant price suppression with respect to the 200-300 seat LCA market;
- ***Adverse effects (price effects of FSC/ETI subsidies and the B&O tax rate reductions):*** the AB reversed the panel's findings that these subsidies caused serious prejudice to EU interests with respect to the 100-200 seat and 300-400 seat LCA markets, and went on to complete the analysis, finding that the subsidies caused serious prejudice in the 100-200 seat LCA market, particularly that in two sales campaigns the subsidies affected Boeing's prices for the 737NG, causing significant lost sales for the EU product;
- ***Adverse effects (collective assessment of the subsidies and their effects):*** the AB found that the panel erred in not considering whether the price effects of the Washington State B&O tax rate reductions "complement and supplement" the technology effects of the R&D subsidies so as to cause significant lost sales and significant prices suppression and a threat of displacement and impedance in the 200-300 seat LCA market; reversed the panel's finding that the EU had not shown that the remaining subsidies had affected Boeing's prices so as to give rise

> to serious prejudice in the 100-200 seat and 300-400 seat LCA markets; and, in completing the analysis, found that the effects of the Wichita IRBs complemented and supplemented" the price effects of the FSC/ETI subsidies and the Washington State B&O tax rate reduction, thus causing serious prejudice in the form of significant lost sales in the 100-200 seat LCA market.[448]

The Appellate Body acknowledged that "after more than five years of panel proceedings and eleven months of appellate review, a number of issues remain unresolved in the dispute," but that, where there were sufficient facts available to it on an issue, it had tried to complete the analysis "with a view to fostering the prompt settlement of this dispute." [449] The Appellate Body made note of the panel's finding regarding the continuing obligation of the United States to comply with the rulings in the FSC case and recommended that, in accordance with Article 7.8 of the SCM Agreement, the United States "take appropriate steps to remove the adverse effects found to have been caused by its use of subsidies, or to withdraw those subsidies."[450]

## *Implementation of WTO Decision*

As was the case with respect to the EU in the Airbus proceeding, Article 7.9 of the SCM Agreement gives the United States six months from the date that the panel and Appellate Body reports were adopted (here, up to September 23, 2012) to remove the subsidies or their adverse effects. Absent an agreement on compensation, the EU may then seek authorization from the WTO Dispute Settlement Body to impose sanctions against the United States, "commensurate with the degree and nature of the adverse effects determined to exist."[451] Any such request will be considered under the reverse consensus rule and therefore approved unless the DSB decides without objection to reject the request. The United States informed WTO Members at the April 13, 2012, meeting of the Dispute Settlement Body that it intends to comply with the WTO decision within Article 7.9 time frame. [452] To address future contingencies, the United States and the EU have reportedly entered into a procedural agreement that would coordinate any sanctions proceedings with a possible compliance panel.[453]

Given the panel and AB findings, compliance will focus on NASA and DOD subsidies, the income tax breaks provided by the State of Washington and the City of Everett, and the property tax breaks provided through Wichita's Industrial Revenue Bonds (IRBs). While the United States has repealed the problematic FSC/ETI tax provisions and Boeing has publicly stated that it did not receive benefits under the program after 2006, the EU continues to express concerns that benefits may be provided to Boeing under the program.[454]

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[448] *Id.* para. 1350.

[449] *Id.* para. 1351.

[450] *Id.* para. 1352.

[451] Agreement on Subsidies and Countervailing Measures, art. 7.9.

[452] WTO News Item, Dispute panel to examine EU compliance in Airbus case (April 13, 2012), at http://www.wto.org/english/news_e/news12_e/dsb_16apr12_e.htm; U.S. Statements at the April 13, 2012 Meeting of the WTO Dispute Settlement Body, at http://geneva.usmission.gov/2012/04/13/wto-dsb/.

[453] *WTO Forms Airbus Compliance Panel; U.S. Pledges to Comply in Boeing* Case, INSIDE U.S. TRADE, April 20, 2012, at 15.

[454] *White Paper Lays Out Broad U.S. Compliance Obligations in Boeing Case*, INSIDE U.S. TRADE, March 30, 2012, at 26. While findings were made that Boeing received FSC/ETI benefits for the period 1989-2006, the EU had also sought a panel finding that Boeing would continue to receive FSC/ETI subsidies after the end of this period. The United States (continued...)

# Pending Disputes: Trade in Services

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

Antigua and Barbuda (Antigua) requested consultations with the United States in March 2003 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).[455]

As part of their GATS obligations, WTO Members make specific commitments involving particular service sectors, subject to any terms, limitations, or conditions Members may add. Commitments are made with respect to four means or "modes" by which services may be supplied, 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. Each Member's sectoral commitments are set out in a Schedule of Specific Commitments, which is attached to the GATS and considered an integral part of the agreement. GATS market access and national treatment apply only with respect to scheduled commitments. These obligations are set out in GATS Articles XVI and XVII, respectively. All GATS obligations are subject to various general exceptions set out in Article XIV.

Among other market access obligations, Article XVI(a) of the GATS prohibits a WTO Member, in sectors where it has scheduled a specific commitment, 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." In addition, 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."

### *Panel and Appellate Body Reports*

Although 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

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submitted to the panel a 2009 statement from a Boeing official that Boeing did not receive any such benefits after December 31, 2006, and the panel ultimately found it unnecessary to conclude whether Boeing would receive any such benefits in the post-2006 period. U.S. Aircraft Panel Report, *supra* note 442, paras. 7.1418-7.1429.

[455] 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).

States, had made market access commitments in the area.[456] 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);[457] 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, such 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.[458]

In an appeal by both parties to the dispute, 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.[459] Though the AB upheld the panel's finding of a violation of GATS market access obligations,[460] it reversed the panel on its finding that the United States could not justify the federal measures under GATS exceptions. 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.

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

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

[457] The Wire Act, P.L. 87-216, Section 2, 18 U.S.C. Section 1084, prohibits the transmission of wagering information. The Travel Act, P.L. 87-228, Section 1(a), 18 U.S.C. Section 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, Section 803(a), 18 U.S.C. Section 1955, prohibits illegal gambling businesses, as defined in the statute.

[458] See U.S. Gambling Panel Report, *supra* note 456, para. 6.578.

[459] Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (April 7, 2005)[hereinafter U.S. Gambling AB Report].

[460] The AB stated that "limitations amounting to a zero quota are quantitative limitations and fall within the scope of Article XVI:2(a)." *Id.* para. 238. The AB further found that prohibitions on the supply of a service with regard to which a market access commitment has been taken "amount to a 'zero quota' on service operations or output with respect to such services. As such, they fall within the scope of Article XVI:2(c)." *Id.* para. 251.

within the scope of this exception.[461] 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.[462]

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.[463] First, Antigua cited Section 5 of the act, which it characterized as expressly allowing an interstate off-track wager to be accepted by an off-track betting system, where consent is obtained from certain organizations.[464] 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.[465] 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."[466]

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."[467] 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.

## *Responses of the United States and Antigua*

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

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[461] 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), the GATS exception for measures necessary to enforce GATS-consistent laws and regulations. *Id.* paras. 337, 373(D)(iv)(b).

[462] *Id.* paras. 338-372, 373(v),(vi).

[463] Interstate Horseracing Act of 1978 (IHA), P.L. 95-515, 15 U.S.C §§3001-3006. See U.S. Gambling AB Report, s*upra* note 459, para. 361.

[464] Section 4 of the IHA, 15 U.S.C. Section 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. Section 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."

[465] IHA, §3(3), 15 U.S.C §3002(3).

[466] Gambling AB Report, *supra* note 459, para. 361 (footnotes omitted)(emphasis in original).

[467] *Id.* para. 364 (emphasis in original).

reasonable period to comply.[468] After the disputing parties had failed to agree on a reasonable period of time for compliance, Antigua requested that the compliance period be arbitrated.[469] 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."[470]

The United States sought a 15-month compliance period, stressing that such legislative action would be "technically complex."[471] 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.[472]

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 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

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

[469] 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).

[470] Submission of the United States, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (WT/DS285): Arbitration under Article 21.3(c) of the DSU, at 4 (July 12, 2005), at http://www.ustr.gov/webfm_send/768.

[471] 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.

[472] 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).

> 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.[473]

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.[474]

### *Compliance Proceedings*

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 and cross-border service providers.[475] The compliance panel was established July 19, 2006.

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

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[473] 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). *Internet Gambling Prohibition Act of 2006: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Congress 14 (2006)(statement of Bruce G. Ohr, Chief, Organized Crime and Racketeering Section, Criminal Division, U.S. Department of Justice), at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_house_hearings&docid=f:26913.pdf.

[474] Agreement between Antigua and Barbuda and the United States Regarding Procedures under Articles 21 and 22 of the DSU, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/16 (May 26, 2006). Note also Dispute Settlement Body, Minutes of Meeting, April 21, 2006, at 8-10, WT/DSB/M/210 (May 30, 2006).

[475] 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 businesses 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 (UIGEA) and Its Implementing Regulations*, by (name redacted) and (name redacted) [hereinafter CRS Report RS22749]; CRS Report RS21984, *Internet Gambling: An Abridged Overview of Federal Criminal Law*, by (name redacted). See also CRS Report R41614, *Remote Gaming and the Gambling Industry*, by (name redacted).

ambiguity cited by the panel unresolved.[476] 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."[477] The United States did not appeal the report, which was adopted by the DSB on May 22, 2007.

In early May 2007, 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.[478] The modification would explicitly exclude gambling and betting services from this broader services category. With Antigua's subsequent pursuit of retaliation in the underlying WTO dispute, the United States became engaged in two WTO proceedings, one involving negotiations with various WTO Members under Article XXI on compensation for changes in the U.S. GATS schedule, and the other involving arbitration of Antigua's request to impose countermeasures against the United States for non-compliance with the WTO decision.

### *Negotiations on Compensation under GATS Article XXI*

Article XXI allows a WTO Member to modify or withdraw any commitment in its GATS Schedule, but any WTO Member whose GATS benefits may be affected by the proposed change has a right to negotiate a compensation agreement with the Member making the change. In negotiating an agreement, Members must try to maintain "a general level of mutually advantageous commitments" that are as favorable to trade as was the case with the Schedule in its original form. In its May 2007 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."[479]

Antigua, Australia, Canada, Costa Rica, European Union (EU), India, Japan, and Macao requested consultations with the United States by June 22, 2007, the deadline for WTO Members to notify the United States that their interests may be affected by the U.S. Schedule modification.[480] The following month USTR filed a notice in the *Federal Register* asking for

[476] 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*, *Recourse to Article 21.5 of the DSU by Antigua and Barbuda,* WT/DS285/RW (March 30, 2007)[hereinafter U.S. Gambling Article 21.5 Panel Report]. Among other things, the panel concluded that enactment of the UIGEA, see *supra* note 475, 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." U.S. Gambling Article 21.5 Panel Report, *supra*, paras. 6.130-6.135.

[477] *Id.* para. 6.90.

[478] 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)[hereinafter USTR Press Release, May 4, 2007], at http://www.ustr.gov/about-us/press-office/press-releases/archives/2007/may/statement-deputy-united-states-trade-represen; Press Release, U.S. Diplomatic 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.

[479] USTR Press Release, May 4, 2007, *supra* note 478.

[480] See Request for Public Comment on the Negotiations for Compensatory Adjustments to U.S. Schedule of Services Commitments Under WTO General Agreement on Trade in Services (GATS) in Response to Notice of the United (continued...)

public comment on the requested compensation negotiations.[481] As provided in GATS procedural rules, negotiations were expected to conclude within three months, that is, toward the end of September 2007, but the parties agreed on two extensions with a final deadline of January 14, 2008.[482] On December 17, 2007, the United States and the EU announced that they had reached a bilateral compensation agreement providing EU service suppliers with improved market access in the U.S. postal and courier, research and development, warehouse and storage, and technical testing services sectors.[483] The United States also announced that it had reached agreement with Canada and Japan as well.[484] Australia had reportedly settled outstanding issues with the United States several months earlier and had withdrawn from the negotiations.[485]

Since the United States had not agreed on compensation with Antigua, Costa Rica, India, or Macao by the end of the negotiating period, these Members had a right to request that compensation be arbitrated, provided that they made their request within 45 days after deadline, that is, by January 28, 2008. If none of these Members requested arbitration, the United States would then be free to implement its Schedule modification, as originally proposed. Antigua and Costa Rica each filed timely arbitration requests.[486] India and Macao reportedly did not choose this option and thus effectively abandoned their claims.[487] In February 2008, Costa Rica reached agreement with the United States on compensation and as a result withdrew its request to arbitrate.[488] Antigua was thus the only remaining Member pursuing arbitration under Article XXI.

Under GATS rules, any arbitral panel established under Article XXI would be expected to issue its report within three months after the panel is appointed.[489] Once a report is issued, the United States would not be able to modify its GATS Schedule until it made compensatory adjustments in conformity with the arbitration. If the United States modified its Schedule without complying with the arbitral decision, Antigua could modify or withdraw substantially equivalent benefits in conformity with the arbitral findings. GATS rules would allow Antigua to apply any such change

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States of Intent to Modify Its Schedule Under Article XXI of the GATS, 72 *Federal Register* 38846 (July 16, 2007)[hereinafter USTR Request for Public Comment]; WTO Council on Trade in Services, Procedures for the Implementation of Article XXI of the General Agreement on Trade in Services (GATS)(Modification of Schedules), para. 3, S/L/80 (October 29, 1999)[hereinafter GATS Article XXI Procedures].

481 USTR Request for Public Comment, *supra* note 480.

482 *U.S. Extends Gambling Negotiations on Compensation with Claimants*, INSIDE U.S. TRADE, October 26, 2007, at 9 [hereinafter *U.S. Extends Negotiations*]. See GATS Article XXI Procedures, *supra* note 478, para. 4.

483 Office of the U.S. Trade Representative, Statement by USTR Spokeswoman Gretchen Hamel on Gambling (December 17, 2007)[hereinafter USTR Statement on Gambling Case (December 17, 2007)]; European Union, News Release No. 128/17, EU and US Agree on Compensation in WTO for Loss of Trade Opportunities in US Gambling Sector (December 17, 2007), at http://www.eurunion.org/News/press/2007/20070128.htm.

484 USTR Statement on Gambling Case (December 17, 2007), *supra* note 483.

485 *U.S. Extends Negotiations*, note 482; *U.S. Japan Reach WTO Settlement on Compensation for Gambling Claim*, Daily Report for Executives (Bloomberg 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.

486 *Antigua, Costa Rica Request Arbitration on Compensation in U.S. Gambling Dispute*, 25 Int'l Trade Rep. (Bloomberg BNA) 166 (January 31, 2008).

487 *Id*.; *Costa Rica Drops Gambling Arbitration Claim in WTO Against U.S. After Compensation Deal*, 25 Int'l Trade Rep. (Bloomberg BNA) 355 (March 6, 2008)[hereinafter *Costa Rica Drops Claim*].

488 *Costa Rica Drops Claim*, *supra* note 487.

489 See GATS Article XXI Procedures, *supra* note 480, paras. 7-19.

only to the United States, notwithstanding the general most-favored-nation obligation in GATS Article II.

### 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.[490] 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.[491] 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.[492] 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.

## Recent Developments

Although Antigua requested arbitration in January 2008 under GATS Article XXI on compensation owed by the United States because of the U.S. withdrawal of gambling commitments in its GATS Schedule, there have not been reports that panelists have been appointed to hear this claim. Moreover, Antigua has not yet requested the WTO Dispute Settlement Body to authorize its retaliation request as modified by the December 2007 Arbitrator's report in the original WTO dispute settlement proceeding. In a July 2009 government press release, the Minister of Finance of Antigua is quoted as stating that "'[w]hile we may in the future consider exercising the right to impose sanctions, as of this moment, I am instead looking forward to meeting with the United States government in the near future and focusing on a mutually beneficial resolution of the issues raised by the remote gambling case.'"[493] The USTR's

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[490] 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 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.

[491] 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 challenged both 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 argued 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), at http://www.ustr.gov/webfm_send/769.

[492] 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).

[493] Antiguan Government Statement on Unauthorized Representations by Zookz.com Regarding its Entertainment (continued...)

annual report for 2010 also indicates that the parties have been consulting with a view to achieving "a mutually agreeable resolution" to the dispute.[494]

A June 10, 2009, European Commission staff report on an investigation under the European Union (EU) Trade Barriers Regulation, initiated as a result of a complaint submitted by the London-based Remote Gambling Association, indicates persistent EU concerns over U.S. Internet gambling regulation and its consistency with U.S. GATS obligations.[495] Regarding possible future action, a fact sheet accompanying the report states as follows: "The report concludes that WTO action would be justified. However, this is not an automatic consequence. The report does not include any recommendation for action and also suggests that the issue should be addressed with the US Administration, with a view to finding an amicable solution."[496] During their July 2009 meeting in Washington, USTR Kirk and EU Trade Ambassador Ashton discussed the EU report "and its implications for the WTO rights and obligations of the parties concerned."[497]

In November 2008, the Treasury Department and the Board of Governors of the Federal Reserve System issued a final rule implementing the provisions of the 2006 Unlawful Internet Gambling Enforcement Act (UIGEA), P.L. 109-347, Title VIII.[498] The statute prohibits gambling businesses 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 rule became effective on January 19, 2009, with the original compliance date of December 1, 2009, extended to June 1, 2010.

Various bills were introduced in the 111th Congress to permit Internet gambling under a federal licensing program. Two 112th Congress bills—H.R. 1174 (Campbell) and H.R. 2366 (Barton)—would do the same.[499] H.R. 2230 (McDermott), introduced June 16, 2011, would establish a tax on "Internet gambling licensees." H.R. 2702 (Gibson), introduced July 29, 2011, would amend the federal criminal code to provide that provisions of federal law that establish criminal penalties for any activity involved in placing, receiving or otherwise transmitting a bet or wager will not apply to any bet or wager that is permissible under the Interstate Horseracing Act of 1978.

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Download Web Site, at http://www.antiguawto.com/pr_zookz_antiguan_gov_jul09.pdf.

[494] Office of the U.S. Trade Representative, 2011 TRADE POLICY AGENDA AND 2010 ANNUAL REPORT 80 (March 2011), at http://www.ustr.gov/webfm_send/2597.

[495] European Commission, Report to the Trade Barriers Regulation Committee (Commission Staff Working Paper), Examination Procedure Concerning an Obstacle to Trade, Within the Meaning of Council Regulation (EC) No 3286/94, Consisting of Measures Adopted by the United States of America Affecting Trade in Remote Gambling Services at http://trade.ec.europa.eu/doclib/docs/2009/june/tradoc_143405.pdf.

[496] European Commission, Fact Sheet: Trade Barriers Regulation report on US Internet gambling laws (June 10, 2009), at http://trade.ec.europa.eu/doclib/docs/2009/june/tradoc_143429.pdf.

[497] Press Release, Office of the U.S. Trade Representative, U.S. and EU discuss ways forward on bilateral trade issues (last updated July 14, 2009). See also European Commission, *General Overview of Active WTO Disputes Involving the EU as Complainant or Defendant*, at 45-46 ([July 15, 2011]), at http://trade.ec.europa.eu/doclib/docs/2007/may/tradoc_134652.pdf.

[498] Prohibition on Funding of Unlawful Internet Gambling, 73 *Federal Register* 69382 (November 18, 2008), codified at 12 C.F.R. 233 and 31 C.F.R. Part 132; Prohibition on Funding of Unlawful Internet Gambling, 74 *Federal Register* 62687 (December 1, 2009)(extension of compliance date).

[499] For further information on the UIGEA and proposed legislation, see CRS Report RS22749, *supra* note 475.

In addition, on December 23, 2011, the Office of Legal Counsel (OLC) of the Department of Justice made public a September 2011 opinion in which it provided an avenue for states to permit certain types of online betting. OLC concluded in its opinion that "interstate transmissions of wire communications that do not relate to a 'sporting event or contest,' 19 U.S.C. § 1084(a), fall outside the reach of the Wire Act of 1961," and that, because state-run lotteries proposed by New York and Illinois did not involve wagering on sporting events or contests, they were not prohibited by the act.[500] Further, because OLC found that the Wire Act did not apply in this situation, it found it unnecessary "to consider how to reconcile the Wire Act with the UIGEA."[501]

# Pending Disputes: Trade-Related Intellectual Property Rights

## Section 110(5)(B) of the Copyright Act (Music Copyrights) (DS160)

This case, sometimes referred to as the "Irish music" 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.[502] Challenged by the European Union (EU) 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 EU agreed to extend the period to the end of 2001, and to consider U.S. compensation for the EU music industry based on an amount of trade injury determined by arbitration under Article 25 of the DSU, a free-standing arbitration provision. A November 9, 2001, arbitral award determined that some $1.1 million in EU trade benefits are affected annually.

Notwithstanding the arbitration, the EU, in January 2002, requested authorization from the DSB to impose countermeasures against the United States on the ground that the United States had not fully complied with its obligations in the case by the extended deadline. The EU proposed suspending concessions under the TRIPS Agreement so it could levy "a special fee from US nationals in connection with border measures concerning copyright goods."[503] The United States

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[500] Dep't of Justice, Office of Legal Counsel, Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act, at [1]-2, September 21, 2011, at http://www.justice.gov/olc/2011/state-lotteries-opinion.pdf [hereinafter OLC Opinion]. See generally *Web Gambling Given a Boost in U.S. Ruling*, N.Y.TIMES, December 25, 2011, at 1.

[501] OLC Opinion, *supra* note 500, at 13.

[502] For further discussion of this provision, see CRS Report RS21107, *Copyright Law's "Small Business Exception": Public Performance Exemptions for Certain Establishments*, by (name redacted).

[503] Recourse by the European Communities to Article 22.2 of the DSU, *United States—Section 110(5) of the US Copyright Act*, WT/DS160/19 (January 11, 2002). The fee would be applied to those U.S. right holders "that apply for action by the EU customs authorities to block pirated copyright goods." European Commission, *General Overview of Active WTO Disputes Involving the EU as Complainant or Defendant*, at 28([July 15, 2011]), at http://trade.ec.europa.eu/doclib/docs/2007/may/tradoc_134652.pdf.

asked for arbitration of the proposal, but the disputing parties later asked that the arbitration be suspended, with the understanding that it could be reactivated by either party after March 1, 2002.[504]

In April 2003, Congress appropriated $3.3 million for a "one-time only, lump-sum payment" to the EU to cover a three-year period of nullification and impairment of benefits in the dispute (P.L. 108-11).[505] The parties notified the WTO in June 2003 that the payment, which will be made into a fund for EU performers, constitutes a temporary settlement of the dispute.[506] They also agreed that the EU 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

In November 2004, shortly before the three-year U.S.-EU agreement expired, the EU 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.[507] The EU has regularly raised the issue of U.S. noncompliance at DSB meetings, with the United States continuing to report to the DSB that it will work with Congress on the matter.[508] During a July 2009 meeting on bilateral trade relations held in Washington, DC, USTR Kirk and European Union Trade Commissioner Ashton "exchanged ideas on potential steps to address" this dispute, and "directed … [their] staffs to explore new options on this dispute in the coming weeks."[509] No agreement on resolving the dispute has yet been announced. As it has since the 2009 meeting with the EU, the United States reported to the DSB in February 2011 that, as well as working closely with Congress, it "will continue to confer with the European Union in order to reach a mutually satisfactory resolution of this matter."[510]

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[504] Communication from the Arbitrator, Recourse by the European Communities to Article 22.2 of the DSU, *United States—Section 110(5) of the US Copyright Act*, WT/DS160/22 (March 1, 2002).

[505] 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.*

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

[507] Dispute Settlement Body, Minutes of Meeting, November 14 and 26, 2004, at 7, WT/DSB/M/178 (January 17, 2005).

[508] E.g., Dispute Settlement Body, Minutes of Meeting, October 25, 2010, at 6, WT/DSB/M/288 (December 15, 2010).

[509] Press Release, Office of the U.S. Trade Representative, U.S. and EU discuss ways forward on bilateral trade issues (last updated July 14, 2009), at http://www.ustr.gov/about-us/press-office/press-releases/2009/july/eu-and-us-discuss-ways-forward-bilateral-trade-issues.

[510] Status Report by the United States, Addendum, *United States—Section 110(5) of the US Copyright Act*, WT/DS160/24/Add.74 (February 11, 2011).

## Section 211 of the Omnibus Appropriations Act of 1998 (Trademark Exclusion Involving Property Confiscated by Cuba) (DS176)

This dispute, at the time referred to as the "Havana Club" 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 European Union (EU) 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.[511]

The original compliance period, as agreed upon by the United States and the EU, expired December 31, 2002; it was extended four times, also by agreement, most recently to June 30, 2005.[512] 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 EU entered into an agreement with the United States regarding rights and procedures involving any future EU retaliation request.[513] The EU agreed not to request authorization from the DSB to suspend concessions for the time being, but pledged to notify and consult with the United States before making any such request in the future. For its part, the United States agreed not to block any retaliation request by the EU 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 retained the right to object to a proposed retaliation request and to refer the matter to arbitration.

### Recent Developments

The EU, Cuba, and other WTO Members continue to raise the issue of U.S. noncompliance at DSB meetings,[514] while the United States has reported to the DSB that legislative proposals that would implement the WTO ruling have been introduced in the House and Senate and that it will work with Congress on legislative vehicles to resolve this matter.[515] A hearing on possible changes to U.S. law in light of the WTO decision was held by the House Judiciary Committee on March 3, 2010.[516] In the 112th Congress, H.R. 255 (Serrano) and H.R. 1887 (Rangel) would repeal

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511 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 (name redacted).

512 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).

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

514 E.g., Dispute Settlement Body, Minutes of Meeting, May 24, 2011, at 2-5, WT/DSB/M/296 (July 4, 2011).

515 See, e.g., Status Report by the United Status, Addendum, *United States—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/11/Add.104 (July 8, 2011); Statements by the United States at the June 17, 2011, DSB Meeting, Item 1.A, at http://geneva.usmission.gov/2011/06/17/us-statements-june-17-2011-dsb/.

516 Domestic and International Trademark Implications of Havana Club and Section 211 of the Omnibus Appropriations Act of 1999: Hearing Before the H. Comm. on the Judiciary, 111th Congress (2010), at http://judiciary.house.gov/hearings/printers/111th/111-69_55221.PDF.

Various 111th Congress bills would have either repealed or amended Section 211. H.R. 1103 (Wexler) and S. 1234 (Lieberman) would have amended Section 211 to apply to all persons claiming rights in trademarks confiscated by (continued...)

Section 211, remove the current trade embargo on Cuba, and make other statutory changes involving U.S.-Cuba relations. H.R. 1888 (Rangel) would repeal Section 211 and make various statutory changes to facilitate the export to Cuba of U.S. agricultural and medical products. S. 603 (Bill Nelson) and H.R. 1166 (Issa) would amend Section 211 to apply to all persons claiming rights in trademarks confiscated by Cuba, whatever their nationality.

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(...continued)

Cuba, whatever their nationality. H.R. 1530 (Rangel) and H.R. 2272 (Rush) would have repealed Section 211, removed the current trade embargo on Cuba, and made other statutory changes involving U.S.-Cuba commercial relations. H.R. 1531 (Rangel) and S. 1089 (Baucus) would have repealed Section 211, required related regulatory changes, and removed statutory restrictions on U.S.-Cuba trade in agricultural and medical goods.

Bills to repeal or amend the provision were also introduced in the 110th and earlier Congresses: 110th Congress bills included H.R. 217 (Serrano) and H.R. 624 (Rangel), which would have repealed Section 211, as well as removed the current trade embargo on Cuba; H.R. 2819 (Rangel) and S. 1673 (Baucus), which would have repealed the statute along with removing certain other restrictions on trade with Cuba; S. 1806 (Leahy), which would have repealed the statute and required the Secretary of the Treasury to issue regulations as were necessary to carry out the repeal within 30 days after enactment; and H.R. 1306 (Wexler) and S. 749 (Bill Nelson), which would have amended Section 211 to apply to all persons claiming rights in trademarks confiscated by Cuba, whatever their nationality. In addition, 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/hearings/hearing.cfm?id=1261, for witness lists, testimony, and Members' statements.